DISCOUNTS AND BUYOUTS IN MINORITY INVESTOR LLC VALUATION DISPUTES INVOLVING OPPRESSION OR DIVORCE

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This paper highlights the need for guidance on how to value a minority LLC interest in a court-ordered buyout resulting from the exercise of LLC dissenters' rights, an oppression suit, or an action seeking an equitable distribution of property in a divorce. The Model Business Corporation Act prohibits both the "minority discount" reflecting the minority's lack of voting control and the "marketability discount" adjusting for the limited illiquid market of a private firm. The American Law Institute in the Principles of Corporate Governance and the Uniform Partnership Act recommend disregarding the minority discount and the marketability discount as a general rule, but recognize limited exceptions for the marketability discount. This paper advances arguments in favor of prohibiting both discounts in the valuation of an LLC. A contextual judicial approach to valuation is recommended as are amendments to the Revised Uniform Limited Liability Company Act and state LLC statutes in order to authorize an election in lieu of a judicial dissolution to foster fair and speedy resolutions of member conflicts.

I. INTRODUCTION

The question of whether there has been unfairly prejudicial or oppressive conduct on the part of a majority LLC member is just the first issue that courts must address in resolving a dispute among warring LLC members.[1] Frequently, a court-ordered buyout will be the most appropriate

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1. *See generally* F. HODGE O'NEAL & ROBERT THOMPSON, F. HODGE O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS (2d ed. 2010)

remedy. Very quickly the conflict can shift from *whether* the minority should be bought out to *what* amount the minority should be paid.[2] What guidelines should be established for determining the buyout price in the absence of a controlling LLC agreement? Should the buyout price be adjusted downward to reflect the facts that a minority interest lacks voting control and that the company is private rather than public with a limited number of buyers?[3]

Assume, for example, that a 75% majority owner squeezes out the 25% minority member after the minority has a conflict with the majority owner's son. Stripped of his role in management, and facing a dramatic reduction in salary and distributions, the minority owner institutes a suit alleging that the majority has engaged in oppressive conduct. Assuming

(providing an overview of legal issues affecting minority investors in private companies). *See also* JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS (2d ed. 2003) (offering a review of legal issues concerning public and private corporations); ROBERT A. RAGAZZO & DOUGLAS K. MOLL, CLOSELY HELD BUSINESS ORGANIZATIONS: CASES, MATERIALS & PROBLEMS (West Publishing 2006) (providing a detailed analysis of the vulnerability of minority owners in private firms and squeeze-out problems).

2. A number of corporate statutes facilitate buyouts by containing an election to purchase the corporation's stock in which case the petition for dissolution of the corporation will be dismissed. *See, e.g.*, MODEL BUS. CORP. ACT § 14.34 (2006) (describing election to purchase in lieu of dissolution); *infra* Appendix E (providing a multi-state chart of corporate, partnership, and LLC statutes that provide guidelines for the judicial dissolution). States that offer express statutory buyout guidelines for corporations include Alaska, Arizona, California, Connecticut, Hawaii, Idaho, Illinois, Iowa, Maine, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Utah, West Virginia, and Wyoming. A much smaller number of states provide such guidelines in their LLC statutes. LLC statutes with buyout guidelines include California, Illinois, Minnesota, North Dakota, and Utah. Virtually all states have some language in their partnership statutes authorizing buyouts. *See* Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 53 (1987) (presenting an empirical study of thirty-seven suits for a judicial dissolution and finding that a majority culminated in a court-ordered buyout).

3. The minority discount provides a downward adjustment in value to reflect the fact that the owner of a minority interest in the LLC lacks majority control to influence the firm's affairs. A discount in marketability offers a downward adjustment to reflect the fact that there is not a ready market on which to sell the interests in an LLC. *See* SHANNON P. PRATT, ROBERT F. REILLY, & ROBERT P. SCHWEIHS, VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES 298-365 (3rd ed. 1996) (discussing minority interest discounts, control premiums, and other discounts including the lack of marketability discount). *See also* Bernier v. Bernier, 873 N.E. 2d 216, 222-224 (Mass. 2007) (considering discrepancies in value due to discounts and distinguishing fair value from fair market value); Marsh v. Billington Farms, LLC, C.A. No. PB 04-3123, 2007 R.I. Super. LEXIS 105, at *12-13 (R.I. Super. Ct. Aug. 2, 2007) (concluding without discussing that the pro rata valuation approach should be taken to a buyout of an LLC interest as the result of oppressive conduct); Douglas Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L. REV. 293, 297 (2004) (discussing the valuation issues in the context of disputes between shareholders of closely-held companies).

that the court decides not to liquidate the business, but to order the majority to buy out the minority interest, how should the court determine the buyout price absent a contractual arrangement? Should the buyout price be based upon a strict 25% of value of the LLC? Alternatively should the price be less than 25% of the company to reflect the minority's lack of voting control? Arguably a "willing" buyer would pay a "willing" seller less than this full 25% and would want the price to reflect a "minority discount." Should the buyout price be reduced to reflect the lack of a ready market for such private companies? Does it make a difference if this is not a "willing" sale?[4] Should fault matter? Does the context matter? Should a different result occur if the valuation is being done in connection with a divorce? What if minority oppression is not involved but instead, the minority opportunistically uses a relatively insignificant reorganizational change as a pretext for triggering statutory dissenters' rights? Should the interests of third parties in the continuing financial viability of the LLC be factored into the buyout terms? What if the payment terms would strip the business of its working capital? What are the social and/or economic policy interests at stake?

As LLC filings soar, courts and arbitrators will have to make these difficult decisions with increasing frequency.[5] The LLC valuation questions will emerge as questions of first impression as courts struggle to interpret statutory and judicial corporate and/or partnership precedents for guidance. The trouble is that most LLC statutes fail to provide guidance on valuation approaches, and there are subtle conflicts in the messages sent from the corporate and partnership arenas. While the Model Business Corporation Act broadly prohibits both the "minority discount" and the "marketability discount" in the definition of "fair value" governing the purchase in lieu of a judicial dissolution,[6] the Principles of Corporate Governance[7] and the Uniform Partnership Act[8] acknowledge the possibility

4. *See* Weinberger v. UOP, 457 A.2d 701, 713 (Del. 1983) (indicating that the dissenting shareholder is entitled to be paid "that which has been taken from him, viz, his proportionate interest in a going concern.").

5. *See* Michael K. Molitor, *Eat Your Vegetables (or at Least Understand Why You Should): Can Better Warning and Education of Prospective Minority Owners Reduce Oppression in Closely-Held Businesses?* 14 FORDHAM J. CORP. & FIN. L. 491, 496-97 (2009) (suggesting special steps to educate owners of small LLCs and to compile statistical data on the contractual choices made by LLC owners).

6. *See* MODEL BUS. CORP. ACT § 14.34 (2006) (authorizing a buyout in lieu of a judicial dissolution); MODEL BUS. CORP. ACT § 13.01(4) at 13-3 (1998) (providing guidelines for determining fair value defined as "the value of the corporation's shares . . . using customary and current valuation concepts . . . without discounting for lack of marketability or minority status"). *See also* Brown v. Arp. & Hammond Hardware Co., 141 P.3d 673, 684-685 (Wyo. 2006) (offering a superb history of the valuation guidelines contained in the Model Business Corporation Act).

7. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE:

of exceptions for the marketability discount in extraordinary circumstances. The Revised Uniform Limited Liability Company Act (RULLCA) has a judicial dissolution provision, but one that does not contain guidelines on buyouts in lieu of dissolutions.[9] Should RULLCA be amended to include such guidance, and if so, how should the minority and marketability discount issues be addressed? Recent literature has focused upon the appropriate methodology for determining the value of a corporation as a whole, but not on the next question of whether minority and marketability discounts should apply once the underlying value of the entity is determined, particularly where the entity is an LLC.[10]

Following introductory comments in Part I and II, Part III considers the LLC statutory buy-out provisions. Part IV discusses the corporate and partnership case law dealing with the minority discount, the corporate and partnership precedents regarding the marketability discount, and the emerging LLC case law addressing both types of discounts. Arguing for a contextual approach, Part V explores the policy interests at stake in LLC oppression and dissenters' rights cases, many of which are shared by corporations and other business entities. Consistent with both the Revised Uniform Partnership Act and the Principles of Corporate Governance, this paper supports a general rule prohibiting the minority and marketability discounts in LLC oppression and dissenters' rights cases and in connection with divorce. Part VI recommends that the Revised Uniform Limited Liability Company Act be amended to provide a purchase in lieu of a

STANDARD FOR DETERMINING FAIR VALUE § 7.22 (2010) (defining that fair value should be calculated as the eligible holder's proportionate interest in the corporation without any discount for lack of marketability, "absent extraordinary circumstances").

8. *See* UNIF. P'SHIP ACT § 7.01(b), cmt. no. 3 (1997) (discussing that while "[t]he notion of a minority discount in determining the buyout price is negated by valuing the business as a going concern . . . [o]ther discounts, such as for a lack of marketability . . . may be appropriate . . . .").

9. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 701 (2006) (providing for a judicial dissolution or other remedies in the event of illegal, fraudulent or oppressive conduct, but not containing an express provision for a buyout in lieu of a dissolution with guidance on how the buyout price should be determined).

10. *See* Steven G. (Buzz) Durio, *Discounts in Business Valuations After* Cannon v. Bertrand, 57 LA. BAR J. 24, 27-28 (2009) (observing that where a partner withdraws from a partnership and the partnership continues and the remaining partners have an equal say or where an LLC member withdraws and the remaining LLC continues, a convincing argument can be made that the minority discount should not apply); Lawrence A. Hamermesh & Michael L. Wachter, *Rationalizing Appraisal Standards in Compulsory Buyouts*, 50 B.C. L. REV. 1021, 1022 (2009) (endorsing Delaware's determination of a corporation's "fair value" as going concern value under the corporate appraisal statute but not addressing the debate regarding the minority and marketability discounts arising in buyouts of small private partnerships or LLCs); Douglas K. Moll, *Shareholder Oppression in Texas Close Corporations: Majority Rule (Still) Isn't What It Used to Be*, 9 HOUS. BUS. & TAX L.J. 33, 60 (2008) (discussing valuation issues for small private firms).

judicial dissolution with a general prohibition on minority and marketability discounts.

II. THE DISCOUNTS, THE PRO RATA APPROACH, AND THE VARIABLE NATURE OF LLC INTERESTS

To properly value an LLC interest in a judicial buy-out, it is essential to understand the nature of the discounts, the unique features of the LLC, the competing valuation approaches, and the relevant LLC, corporate, and partnership statutory environments. Part A below explores the different discounts. Also, it discusses the corporate-style pro rata approach to valuation. Part B discusses the hybrid features of the LLC and the unique contractual nature of the LLC interest.

A. "Fair Market Value," "Fair Value," and Discounts

Courts have largely defined "fair market value" as the price that a willing buyer would pay a willing seller in the relevant marketplace with neither being under a compulsion to enter into the sale.[11] In the context of a purchase of stock, for instance, the "fair market value" would be the owner's proportionate interest in the corporation multiplied by the value of the corporation, plus or minus any premiums or discounts that would be reflected in the market.[12] Thus, the "fair market value" of the interest owned by a 25% stockholder of a company worth $1,000,000 would be $250,000 plus or minus any relevant premiums or discounts that take into account special aspects of the seller's particular shares. In contrast, "fair value" does not consider market-related factors that could affect value in the particular hands of a specific owner. Instead, "fair value" considers only "the proportionate interest in a going concern."[13] Thus, one need

11. *See* First W. Bank Wall v. Olsen, 2001 SD 16, 621 N.W. 2d 611 (explaining that, with respect to a valuation dispute in the context of the exercise of dissenters' rights, "[i]nitially, it bears repeating that we are bound by what the legislature has written" (citing State Subsequent Injury Fund v. Federated Mut. Ins., Inc., 2000 SD 11, 605 N.W.2d 166, 169)). "If the legislature intended dissenting shareholders to receive the fair market value of their shares, it would have so stated. The reason the legislature did not use the term fair market value is obvious. Fair market value has often been defined as the price a willing buyer would pay a willing seller, both under no obligation to act." *First W. Bank Wall*, 621 N.W. 2d at 617 (citing Zochert v. Nat'l Farmers Union Prop. & Cas., 1998 SD 34, 576 N.W.2d 531, 534). *See also* Rev. Rul. 59-60 1959-1 C.B. 237 (discussing the IRS' definition of "fair market value" as the price that a willing buyer will pay a willing seller, neither being under a compulsion to sell, and both having a reasonable knowledge of relevant facts).

12. Moll, *supra* note 3, at 296-97.

13. *Id*. *See also* Brown v. Allied Corrugated Box Co., Inc., 91 Cal. App. 3d 477, 486 (Cal. Dist. Ct. App. 1979) (refusing to devalue the corporation for a minority discount);

establish only the value of the company and the ownership percentage—$1,000,000 times 25% without considering any special market adjustments that might come into play in the hands of the stockholder.

There are many different types of discounts recognized by valuation experts. There is a discount for voting versus nonvoting minority shares.[14] Discounts are recognized for the loss of a key person, known as the "Key Person" discount.[15] Discounts have been recognized for fractional interests in real estate. One study for instance covered the sales of 54 undivided interests in real estate and revealed a median discount of 30 percent.[16] The most common discounts that arise in the context of controversies involving closely-held business disputes include the minority discount and the lack of marketability discount.

1. The Minority Discount

The minority discount takes into account the fact that the minority interest holder lacks majority control.[17] In valuing privately-held

Pueblo Bancorporation v. Lindoe, 63 P.3d 353, 362 (Colo. 2003) (discussing that the fact that the legislature has required dissenters be paid both "value" and "fair value," but never "fair market value"); Cavalier Oil Corp., 564 A.2d 1137, 1144-45 (Del. 1989) (refusing to recognize the minority and marketability discounts in an action under Delaware's appraisal statute); Security State Bank v. Ziegeldorf, 554 N.W. 2d 884, 889-90 (Iowa 1996) (eschewing minority and marketability discounts); Arnaud v. Stockgrowers State Bank of Ashland Kansas, 992 P. 2d 216, 220-21 (Kan. 1999) (disregarding the marketability and minority discount); Fisher v. Fisher, 568 N.W. 2d 728, 731-32 (N.D. 1997) (refusing to apply minority discount in a divorce setting); Charland v. Country View Golf Club, Inc., 588 A. 2d 609, 613 (R.I. 1991) (disallowing the minority and marketability discounts in a dissolution); *First W. Bank Wall*, 621 N.W. 2d at 617-18 (involving a valuation dispute in the context of the exercise of dissenters' rights); Hogle v. Zinetics Medi. Inc., 63 P. 3d 80, 84 (Utah 2002) (discounts are inherently unfair to a minority shareholder who is not a willing seller); HMO-W Inc. v. SSM Health Care Sys., 611 N.W. 2d 250, 255 (Wis. 2000) (disallowing minority discount in an appraisal). *But see* Blake v. Blake, 486 N.Y.S. 2d 341, 349-50 (N.Y. App. Div. 1985) (concluding that "fair value" encompasses a discount for the private nature of the company—the "marketability discount," but not a "minority discount" reflecting the owner's lack of control in a company). *See also* Munshower v. Kolbenheyer, 732 So. 2d 385, 386-387 (Fla. 3d Dist. Ct. App. 1999) (following New York's approach to defining "fair value" to disregard the minority discount but to consider a marketability discount).

14. *See* SHANNON P. PRATT, ROBERT F. REILLY & ROBERT P. SCHWEIHS, VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES, 323-24 (5th ed. 2008) [hereinafter PRATT ET AL. 5th ed.].

15. *Id*.

16. *Id*. at 322-23.

17. *See* Rebecca C. Cavendish & Christopher W. Kammerer, *Determining the Fair Value of Minority Ownership Interests in Closely Held Corporations: Are Discounts for Lack of Control and Lack of Marketability Applicable?* 82 FLA. B.J. 10, 11-12 (2008), *available at* http://www.floridabar.org/divcom/jn/jnjournal01.nsf/0/e6c13ab725ca5ed6852573db006eaab

businesses, there may be considerable differences in the value of ownership interests that offer different degrees of control in the business.[18] A number of elements impact the investor's nature and degree of control and may ultimately affect the value of the investor's interest. These elements of control include the capacity to:

1. Appoint management.
2. Determine management compensation and perquisites.
3. Set policy and change the course of business.
4. Acquire or liquidate assets.
5. Select people with whom to do business and award contracts.
6. Make acquisitions.
7. Liquidate, dissolve, sell out, or recapitalize the company.
8. Sell or acquire treasury shares.
9. Register the company's stock for a public offering.
10. Declare and pay dividends.
11. Change the articles of incorporation.
12. Block any of the above actions.[19]

Given the nature and scope of majority control, it is readily apparent that the owner of a controlling interest in an enterprise enjoys some very valuable rights that the minority owner does not possess.[20] However, there is not a great deal of documentation regarding the existence and degree of minority discounts. The rarity and possible difficulty of selling a minority interest on its own was documented in one study by a bank trust officer who administered trusts and estates that owned some or all of the interests in closely held businesses.[21] The officer conducted two major studies of minority discounts.[22] The first was comprised of data on 30 actual sales of minority interests. The officer's data revealed that the average sale was 36% below book value and only 20% of the sales were made at discounts less than 20%. More than half of the sales were made at discounts ranging from 22% and 48%.[23] Approximately 23 ½ percent of the sales were made at discounts from 54.4% to 78%.[24] The second study also found substantial discounts. It should be noted, however, that the discounts were from book value (rather than enterprise value), but discounts from enterprise value

6?opendocument (discussing the challenges of valuing a business interest where majority control is lacking and reviewing Florida's unusual statutory approach of prohibiting discounts for closely held corporations that have 10 shareholders or less).

18. PRATT ET AL. 5th ed., *supra* note 14, at 323-24.
19. *Id*.
20. *Id*.
21. *Id*. at 321.
22. *Id*.
23. *Id*.
24. *Id*.

would have produced even greater discounts.[25] Clearly, one or two studies are far from definitive. What evidence does exist, however, leads one to believe that the minority discount is a very real market phenomenon.

2. The Marketability Discount

The marketability discount takes into account the fact that there is not a ready market for a privately-held company.[26] As a result, the owners of a private company that seek to sell the firm will face a number of costs not encountered by the public firm.[27] One valuation expert has described these costs as follows:

The controlling owner of a closely held company who wishes to liquidate a controlling equity interest generally faces the following transactional considerations:

1. Uncertain time horizon to complete offering or sale.
2. Cost to prepare for and execute offering or sale.
3. Risk as to eventual price.
4. Form of transaction proceeds.
5. Inability to hypothecate.[28]

Given these transactional considerations, the value of a private company may be less than that of its publicly-traded counterpart since the illiquidity carries with it additional risks.[29] However, as discussed below, the impact of the lack of marketability will be felt only if the company is sold. Although a majority of courts now reject both the minority and marketability discounts, some courts in Florida[30] and New York,[31] have

25. *Id*. at 322.

26. *Id*. at 350-51.

27. *See* Mukesh Bajaj et al., *Firm Value and Marketability Discounts,* 27 J. CORP. L. 89, 92-93 (2001) (discussing restrictions from selling an asset which causes the investor to forego the ability to sell at a maximum price).

28. PRATT ET AL. 5th ed., *supra* note 14, at 350-51.

29. *Id*.

30. Munshower v. Kolbenheyer, 732 So. 2d 385 (Fla. Dist. Ct. App. 1999) (upholding the marketability discount but providing little analysis, and not containing a discussion of the minority discount). It should be noted that this decision was reached prior to Florida's statutory changes prohibiting the minority and marketability discounts in corporations with ten or fewer shareholders. *See* FLA. STAT. § 607.1430 (2010) (expressly disregarding minority and marketability discounts for corporations with ten or fewer shareholders but remaining silent with regard to larger corporations). *See also* FLA. STAT. § 608.4351(5) (2010) (expressly disregarding minority or marketability discounts for LLCs with ten or fewer members).

31. *See In re* Murphy, 903 N.Y.S.2d 434, 437-38 (N.Y. App. Div. 2010) (applying a 15% marketability discount in a corporate purchase in lieu of a dissolution); Blake v. Blake Agency, 486 N.Y.S.2d 341, 349 (N.Y. App. Div. 1985) (allowing a discount for lack of marketability where the marketability discount was applied to the goodwill of the company);

rejected the minority discount but permit the discount for the lack of marketability. For example, some decisions in New York have rejected the minority discount but have applied the marketability discount.[32] These New York decisions have reasoned that the marketability discount is appropriate to accurately reflect the lesser value of shares that cannot be freely traded like the shares of public companies.[33] As one court recently

In re Jamaica Acquisition, Inc., 901 N.Y.S.2d 907, at *17-18 (N.Y. Sup. Ct. 2009) (applying a marketability discount); Peter A. Mahler, Ruling on Valuation Discounts for Marketability, *Built-In Gains Tax Ends Rift Among New York Appellate Courts*, N.Y. BUSINESS DIVORCE (June 7, 2010), http://www.nybusinessdivorce.com/2010/06/articles/valuation-discounts/ruling-on-valuation-discounts-for-marketability-builtin-gains-tax-ends-rift-among-new-york-appellate-courts/ (discussing Matter of Murphy and observing that the Nassau County Commercial Division opinion had applied a 15% marketability discount to the value of the enterprise as a whole thereby rejecting precedents that had previously applied the marketability discount only to the goodwill of the company). *See also* Mohlas Realty, LLC v. Koutelos, No. 5799/08, slip op. (N.Y. Sup. Ct. Apr. 7, 2009) (involving an answer asserting a 30% lack of marketability discount); *In re* Murphy, No. 002640/2006, slip op. at 23-28 (N.Y. Sup. Ct. May 19, 2008) (indicating that the court is powerless to reject case law that has considered a lack of marketability discount). In *Hall v. King*, 675 N.Y.S.2d 810, 814-16 (N.Y. Sup. Ct. 1998), a N.Y. Supreme Court applied the marketability discount to the enterprise as a whole and not just to its goodwill. The decision in *Hall* indicates that although there are some cases that have applied the marketability discount just to goodwill the better approach is to apply the marketability discount to the company as a whole, thus disagreeing with prior applications of the discount to goodwill only in *Whalen v. Whalen's Moving & Storage Co.*, 612 N.Y.S.2d 165, 166 (N.Y. Sup. Ct. 1996) and in *Matter of Cinque v. Largo Enterprises*, 212 A.D.2d 608, 610 (N.Y. Sup. Ct. 1995). More recently, the Supreme Court of New York, Nassau County, observed that "upon a fair ready of *Whalen* and *Cinique*, the court is left without a reason for the rulings vis-à-vis goodwill v. other assets of an enterprise" and upheld the application of the marketability discount to the entire enterprise. *In re Jamaica Acquisition Inc.*, 901 N.Y.S.2d at *16-18.

32. *See* Raskin v. Karl, 514 N.Y.S.2d 120 (N.Y. App. Div. 1987) (applying the marketability discount in the context of a corporation dissolution case).

33. Blake v. Blake Agency, 107 A.D.2d 139, 149 (N.Y. App. Div. 1985) (applying a marketability discount). *But see* Charland v. Country View Golf Club, 588 A.2d 609, 612-13 (R.I. 1991) (refusing to apply minority discount or lack of marketability discount in an oppression suit). In New Jersey, courts have sometimes rejected both the minority and marketability discount. *See* Wheaton v. Smith, 734 A.2d 738, 750-51 (N.J. 1999) (observing that in appraisal actions the marketability discount should generally not apply and finding no extraordinary circumstances that would justify the discount where the dissenting shareholders had exercised their appraisal rights because they lacked confidence in new management). *See also* Balsamides v. Protameen Chems. Inc., 734 A.2d 721 (N.J. 1999) (recognizing the lack of marketability discount in extraordinary circumstances where there was a feud between two owners of a corporation and considerations of equity justified the marketability discount). Though decided the same day as *Wheaton*, because of the unusual facts, the court ordered one fifty-percent owner to buy out the other owner, who had engaged in oppressive conduct. Subsequently, a N.J. appellate court refused to find extraordinary circumstances justifying a marketability discount in connection with a divorce in the valuation of the husband's minority ownership of a family florist where there was no evidence of a possible sale of the business, presumably making market considerations

noted "It is important to distinguish the minority discount and another commonly discussed discount, the marketability discount, which adjusts for a lack of liquidity."[34] While denying a minority discount, an Oregon appellate court reasoned that the marketability discount properly captured the close corporation's volatility and illiquidity.[35] In addition, some Florida court decisions have acknowledged that a discount for marketability may be appropriate in some cases.[36]

3. The Key Man Discount

The Key Man Discount is a discount that adjusts the value of the business downward for the loss of human capital.[37] For example, in the case of a firm whose goodwill is associated with one individual, the value

relevant. Brown v. Brown, 792 A.2d 463, 477-78 (N.J. Super. Ct. App. Div. 2002).

34. Brown v. Arp & Hammond Hardware, 141 P.3d 673, 679 (Wyo. 2006) (reversing the lower court's application of a minority discount).

35. *See* Columbia Mgmt. Co. v. Wyss, 765 P.2d 207, 213-14 (Or. Ct. App. 1988) (stating that a fair price for dissenting shareholder stock requires a market value assessment). *But see* Chiles v. Robertson, 767 P.2d 903, 926-27 (Or. Ct. App. 1989) (refusing to apply a minority and marketability discount where there was misconduct by the defendant).

36. *See* Cox Enterprises v. News-Journal Corporation, 469 F. Supp. 2d 1094, 1108-09 (M.D. Fla. 2006) (indicating that a discount for a lack of marketability is a qualifying component of computing "fair value."); Hall v. King, 675 N.Y.S.2d 810, 814 (N.Y. Sup. Ct. 1998) (indicating that, under the present facts, there was insufficient support for the application of a discount). *See also* Erp v. Erp, 976 So. 2d 1234, 1239-40 (Fla. Dist. Ct. App. 2008) (holding that the court has discretion to apply a marketability discount in an equitable distribution of marital assets in connection with a dissolution of marriage). The Florida law regarding discounts has been in a state of flux, however, since the Florida corporate appraisal statute dealing with dissenters' rights and the LLC provision dealing with dissenters' rights were changed expressly to define "fair value" to disregard the minority and marketability in corporations or LLCs with ten or fewer shareholders or LLC members. *See* FLA. STAT. ANN. § 607.1301, 1302 (2010) (expressly disregarding minority and marketability discounts for corporations with ten or fewer shareholders but remaining silent with regard to larger corporations in connection with corporate shareholders' appraisal rights); FLA. STAT. ANN. § 608.4351, 4352 (2010) (expressly disregarding minority and marketability discounts for LLCs with ten or fewer members but remaining silent with regard to larger LLCs in connection with LLC members' appraisal rights). Interestingly, Florida's corporate judicial dissolution statute offers a buyout in lieu of a judicial dissolution using the term "fair value," but it does not contain special provisions for small corporations or any other guidance on the term "fair value." FLA. STAT. ANN. § 607.1436 (2010). Florida's LLC dissolution provision does not offer a buyout in lieu of dissolution and thus offers no guidelines on valuation methodology that might apply in the specific context of a judicially ordered buyout. FLA. STAT. ANN. § 608.449 (2010). *See* Cavendish & Kammerer, *supra* note 17.

37. The seminal revenue ruling on business valuation addresses the key man discount. *See* Rev. Rul. 59-60, 1959-1 C.B. 237 (indicating that the loss of a key person can have a depressing effect upon the value of a business).

of the business might go down significantly if the individual leaves the business. The Key Man Discount may be appropriate in a minority buyout if the person seeking the buyout is also taking with her or him some customers or clients.[38]

4. The Pro Rata versus the Discount Approach

Under a pro rata approach, the buy-out price is based on the LLC member's applicable ownership interest in the LLC. Thus, in the simplest case, if an LLC member owning 75% of the LLC is ordered to buy out the interests of the 25% member, the purchase price will be based upon 25% of the value of the LLC in total. No reduction would be made to reflect the fact that the 25% owner lacks control of the enterprise. Thus, if the LLC is valued as a whole at $1,000,000, the buy-out price paid to the minority LLC member would be $250,000. In contrast, an approach that recognizes a minority discount would reduce the $250,000 by an amount that would reflect the fact that a 25% owner lacks control of the LLC. The pro rata approach assumes that all interests in the LLC are equal. Thus, it does not take into account any contractual differences that may make some LLC interests more or less valuable than others.

B. The Unique Features of the LLC

The LLC offers unprecedented flexibility combined with favorable flow-through taxation. The flexibility that has made the LLC so popular has opened the door to richly varied LLC contractual relationships. LLC members may have an interest in profits that differs from their interest in the capital of the entity. Unlike S Corporation shareholders, each LLC member may have a unique constellation of ownership interests. S Corporation shareholders are required to have only a single class of stock

38. *See* Bernier v. Bernier, 873 N.E.2d 216, 231-33 (Mass. 2007) (denying a key man discount under the present facts, but recognizing that a key man discount may be appropriate where [a] an individual's continuing services are critical to the financial success of the company, and [b] where the services would be lost). *See also* Hodas v. Spectrum Tech., Inc., Civil Action No. 11,265, 1992 Del. Ch. LEXIS 252, *13-15 (Del. Ch. Dec. 7, 1992) (disallowing a marketability discount but allowing a key man discount where a shareholder had personal contacts and a unique combination of skills and education). *But see* Brown v. Allied Corrugated Box Co., Inc., 91 Cal. App. 3d 477, 488-89 (Cal. Dist. Ct. App. 1979) (indicating that the goodwill that a *controlling* shareholder builds for the corporation should stay with the corporation and that a devaluation because the controlling shareholder could depart should not be considered). *See generally* William P. Dukes, *Business Valuation Basics for Attorneys*, 1 J. BUS. VALUATION & ECON. LOSS ANALYSIS (2006), *available at* http://www.bepress.com/jbvela/vol1/iss1/art7/ (discussing important business valuation issues for attorneys including premiums, discounts, required return, and capitalization rates).

in order to qualify for favorable flow-through taxation.[39] However, LLC members are taxed as partnerships and, under the partnership tax rules, LLC members may have widely divergent compensation arrangements and varying interests in profits.[40] Additionally, not all those with financial rights in the LLC will be actual members of the LLC with members' rights. For example, one who has acquired an interest in an LLC by inheritance may be considered a transferee and not a member.[41] The significance is that a transferee normally does not have voting or other rights enjoyed by LLC members; instead, the transferee merely has financial rights in the LLC.[42]

Once the valuation expert, using one of several acceptable approaches to valuing the entity, determines the value of the LLC as a whole, the expert will then consider special adjustments such as contractual features or other factors that might impact the value of the ownership rights being transferred. The question of whether a minority and/or marketability discount should be applied will arise where the member owns less than a controlling interest in a privately-owned LLC. In answering these questions, it is important to analyze each discount individually and to carefully consider the statutory and factual context in which the valuation question arises.

III. THE LLC STATUTORY ENVIRONMENT

A. The LLC Statutes

The LLC statutes vary somewhat in their approaches to the judicial dissolution remedy, but virtually all states have some statutory reference to judicial dissolutions.[43] Approximately twenty-five states provide for a judicial dissolution in the event of deadlock, oppressive behavior, or other stated misconduct.[44] Approximately forty-four states, including some that also have remedies for oppressive conduct, provide for judicial dissolution

39. I.R.C. § 1361 (2006).

40. *See* I.R.C. § 704(c) (2006) (providing for various allocations of losses subject to the restriction that the allocations have a substantial economic effect).

41. *See* CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW § 8.06[2][a][i] (2010), *available at* Westlaw Limited Liab. Co. ¶ 8.06 (explaining that transferees typically have no right to participate in management of an LLC).

42. *Id*.

43. *See infra* Appendices B, C, and E. *But see* WYO. STAT. ANN. § 17-25-108 (2010) (providing for an election for closely-held LLCs under which dissolution occurs only when [a] the period fixed for the duration of the company expires, [b] by unanimous written agreement of members, or [c] upon the occurrence of an event specified in the operating agreement; thus offering no statutory authorization for judicial dissolution).

44. *See infra* Appendix B.

on the grounds that it is not reasonably practicable to carry on business.[45]

Unlike many corporate statutes providing for judicial dissolution in the event of deadlock, oppressive conduct, or other misconduct, most LLC statutes do not provide for a purchase in lieu of a judicial dissolution. Most of the LLC statutes authorize judicial dissolution for illegal, fraudulent, or oppressive conduct, but they are silent with regard to the specific remedy of a buy-out or its valuation methodology.[46] Approximately forty-one LLC statutes contain no express guidelines as to valuation in the event a judicial dissolution is avoided by a court-ordered buy-out.[47]

The Revised Uniform Limited Liability Company Act authorizes judicial dissolution for illegal, fraudulent, or oppressive conduct, but fails to offer provisions for a buy-out in lieu of a dissolution or any related valuation guidelines.[48] In contrast, approximately twenty-two corporate statutes provide for a purchase in lieu of a judicial dissolution pursuant to the Model Business Corporation Act, most of which use the term "fair value" rather than "fair market value" in designating how the buy-out should proceed.[49]

The Delaware LLC statute authorizes judicial dissolution on the grounds that it is not reasonably practicable to carry on business.[50] A few states do have LLC statutes that authorize a buy-out in lieu of dissolution. For instance, California and Utah authorize a buy-out in lieu of dissolution and specify that the valuation should be with reference to "fair market value."[51] Under the California statute, if the parties cannot agree on the fair market value, the court is required to appoint three appraisers who will determine the valuation. The California and Utah statutes make no

45. *See infra* Appendix C.

46. *See infra* Appendices B and C.

47. *See infra* Appendix E.

48. REVISED UNIF. LTD. LIAB. CO. ACT § 701, *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.htm. As of Aug. 2010, this has been enacted by Iowa, Nebraska, and Wyoming.

49. *See infra* Appendix E. *See also infra* Appendix D (containing the Model Business Corporation's judicial dissolution provisions, which provide for a buy-out in lieu of a judicial dissolution triggered in part by oppressive conduct).

50. DEL. CODE ANN. tit. 6, § 18-802 (2005). *See* Polak v. Kobayashi, No. Civ.A. 05-330 JJF, 2005 WL 2008306 (D. Del. Aug. 22, 2005) (concluding that there was no reasonably practicable way for the business to carry on where two attorneys had invested in real estate and one had refused to communicate with the other and transfer title to real estate from his own account to that of the LLC). *See also* In re Arrow Investment Advisors, LLC, C.A. No. 4091-VCS, 2009 WL 1101682 (Del. Ch. Apr. 23, 2009) (refusing to grant dissolution and expressing concern that the petitioner was planning to side-step fiduciary duty claims and an arbitration agreement); In re Seneca Investments LLC, 970 A.2d 259, 263 (Del. Ch. 2008) (involving suit for dissolution where one of three directors was removed).

51. CAL. CORP. CODE § 17351(b)(1)–(b) (3) (West 2006). *See infra* Appendix E.

references to valuation methodologies specified in the articles of organization. Also, the Utah statute does not offer any direction in terms of the appointment of appraisers, but rather it authorizes the court to consider whatever factors it deems appropriate.[52]

The Illinois LLC statute contains a buy-out provision in lieu of dissolution and specifies that the valuation is to be based on "fair value."[53] In determining "fair value," the statute does not specify whether discounts are to be considered, but it does require the court to consider relevant evidence of going concern value, including agreements between the parties that specify a formula, for valuing the interests. Pennsylvania provides for a distribution based upon "fair value" when a member disassociates from the LLC; it also has a judicial dissolution provision that is tied to the "not reasonably practicable standard."[54] Under Pennsylvania's LLC dissolution provision, dissolution is triggered when it is no longer reasonably practicable to carry on the business.[55] However, specific guidance on valuation in connection with judicial dissolution is not provided.

In addition, Minnesota and North Dakota provide for dissolution of the LLC in lieu of a purchase.[56] Minnesota's and North Dakota's buy-out provisions are at "fair value" and direct the court to use the value indicated in the articles of organization unless the agreement is unreasonable under the circumstances.[57]

In Tennessee, when the existence and the business of the LLC continue but a member's interest has been terminated for certain specified reasons (including when it is no longer practicable to do business with the member) the member is entitled to receive the fair value of the terminated membership interest.[58] If the parties cannot agree upon fair value, the court is authorized to determine fair value.[59] The statute directs the court to enforce governing terms in LLC documents that address fair value if the value is to be determined by the LLC operating agreement.[60] In addition, the statute authorizes the imposition of attorney's fees, appraiser's fees, or

52. UTAH CODE ANN. § 48-2c-1214(4) (LexisNexis 2007).

53. *See infra* Appendix E. *See also* 805 ILL. COMP. STAT. ANN. 180/35-60, 180/35-65 (West 2004).

54. *See* PA. CONS. STAT. ANN. § 8933 (LexisNexis 2007) (addressing distributions upon dissociation); PA. CONS. STAT. ANN. § 8972 (LexisNexis 2010) (providing for dissolution when it is no longer practicable to carry on business).

55. *Id*.

56. *See id*. at app. E.

57. *See* MINN. STAT. ANN. § 322B.833 (West 2010). *See also* N.D. CENT. CODE § 10-32-119 (2008).

58. *See* TENN. CODE ANN. § 48-249-505(c) (2010); TENN. CODE ANN. § 48-249-506 (2010); TENN. CODE ANN. § 48-249-617 (2008).

59. *See* TENN. CODE ANN. § 48-249-506 (2010).

60. *See id*.

other expenses of an expert if the party has not acted in good faith and has not engaged in fair dealing.[61]

A minority of LLC statutes provide for dissenters' rights.[62] For example, Florida's LLC statute provides for an appraisal in the event of certain mergers or conversions subject to modification, restriction, or elimination by contract.[63] The Florida LLC appraisal rights direct that the minority and marketability discounts should be disregarded for LLCs with ten or fewer members.[64] No statutory guidance for buy-outs in connection with appraisal rights is provided for the valuation of Florida LLCs with more than ten members.[65]

As can be seen from the above summary and from Appendix E, most LLC statutes do not contain clear statutory definitions and guidelines as to the valuation of an LLC interest. As for the case law, although LLC valuation case law is beginning to emerge, the majority of guidance must be gleaned from judicial precedents in the corporate and partnership arenas.

IV. THE DISCOUNTS AND THE CASE LAW

Given the recent arrival of LLCs on the business entity landscape, it is not surprising that most of the established case law on minority and marketability discounts stems from the partnership and corporate settings. In analyzing this authority, it is important to carefully consider the specific statutory and factual contexts of the cases. Also, although some courts talk about these discounts interchangeably, they are very different in nature.

A. The Minority Discount and the Corporate and Partnership Contexts

Much of the judicial guidance on the minority and marketability discounts has been decided in connection with dissenters' statutes. At present, virtually all states have corporate dissenters' rights statutes, also

61. *See* TENN. CODE ANN. § 48-249-506(3)(B)(v) (2010).

62. *See* CAL. CORP. CODE § 17604 (Deering 2010) (providing for dissenters' rights with fair market value payment); FLA. STAT. ANN. § 608.4352 (LexisNexis 2010) (providing for appraisal rights subject to limitations); GA. CODE ANN. § 14-11-603(a) (2010); MINN. STAT. § 322B.386 (LexisNexis 2007) (using the term fair value); N.D. CENT. CODE § 10-32-54 (2010) (using the term fair value); OHIO REV. CODE ANN. § 1705.40-41 (LexisNexis 2010) (using term fair cash value); WASH. REV. CODE § 25.15.430 (2010).

63. *See* FLA. STAT. ANN. § 608.4352 (LexisNexis 2010); FLA. STAT. ANN. § 608.4352(4) (LexisNexis 2010).

64. FLA. STAT. ANN. § 608.4351 (LexisNexis 2010).

65. Interestingly, the Florida LLC provision addressing judicial dissolutions contains no express guidelines for valuations in a court-ordered buy-out in lieu of a judicial dissolution. *See* FLA. STAT. ANN. § 608.449 (LexisNexis 2010). In contrast, the Florida corporate judicial dissolution provisions provide for a "fair value" buy-out in lieu of a judicial dissolution. FLA. STAT. ANN. §§ 607.1430, 1434, 1436 (LexisNexis 2010).

known as the appraisal remedy.[66] Dissenters' rights give the minority interest holder in a company the right to disapprove the proposed fundamental change in the corporation such as where a major acquisition results in a reorganization of the company that may be accompanied by a change in management.[67] The shareholders who dissent from the transaction are entitled to receive the "fair value" of their shares.[68] Shareholders of private corporations as well as public companies may utilize dissenters' rights and as indicated previously, a small number of LLC statutes have enacted dissenters' rights.[69] There can be some overlap in situations giving rise to dissenters' rights and those justifying petitions for a judicial dissolution—an attempted squeeze-out of a minority owner may give rise to either action.[70] However, the petition for judicial dissolution typically occurs in the privately-owned corporation and may encompass deadlocks among shareholders.[71] Dissenters' rights may be triggered by any number of disagreements with fundamental changes in the enterprise and can occur in the context of public or private companies.[72]

The seminal case on minority discounts in the context of dissenters' rights is *Cavalier Oil Corp. v. Harnett*[73] in which the Delaware Supreme Court rejected the application of a minority discount in connection with Delaware's appraisal remedy.[74] The Delaware appraisal statute does not expressly eschew the minority discount, but the Delaware Supreme Court

66. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORP. GOVERNANCE at Pt. VII, ch. 4, 291-92, 296 (2007) (indicating that an ABA survey found that all jurisdictions have a statute specifying events giving rise to appraisal rights). These statutes typically offer cash equal to the "fair value" of the minority's shares when there has been a major event has occurred such as a merger, consolidation, mandatory sale of substantially all assets, etc. The statutes emerged at about the time when American corporate law dropped the requirement that unanimous shareholder approval was needed for mergers and other fundamental changes.

67. *See id*. at 7.21 cmt. c (elaborating upon five different triggering events including: 1) business combinations; 2) squeeze-out transactions; 3) sale of substantial assets; 4) charter amendments; and 5) events designated in corporate charter documents other than bylaws).

68. *See* DEL. CODE ANN. tit. 8, § 262(h) (2010) (providing for the determination of "fair value" for purposes of an appraisal proceeding). *See also id*. at app. E (listing of statutes authorizing judicial dissolution and/or buyouts).

69. *See*; CAL. CORP. CODE ANN. § 17604 (Deering 2007) (providing for dissenters' rights with fair market value payment); GA. CODE ANN. § 14-11-603(a) (2007); MINN. STAT. § 322B.386 (West 2007) (using the term fair value); N.D. CENT. CODE § 10-32-54 (2008) (using the term fair value); OHIO REV. CODE ANN. § 1705.40 & 1705.41 (LexisNexis 2008) (using term fair cash value); WASH. REV. CODE § 25.15.430 (2010).

70. SANDRA K. MILLER, LIMITED LIABILITY COMPANIES, § 7:1 (2009) (providing an overview of unfairly prejudicial or oppressive conduct).

71. *Id.*

72. *See generally* F. HODGE O'NEAL & ROBERT THOMPSON, O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, (2d ed. 2010) (providing an overview of legal issues affecting minority investors in private companies).

73. 564 A.2d 1137 (Del. 1989).

74. *Id*. at 1142.

exposed the problems posed by the minority discount and began a national trend away from minority discounts in the corporate contexts.[75]

In *Cavalier Oil*, the plaintiff, a minority shareholder, sought the "fair value" of his stock pursuant to Delaware's appraisal statute. As explained by the court, the appraisal statute requires the shareholder who dissents from a cash-out merger to receive the "fair value" or intrinsic value of his or her shares.[76] The task of the court, in the words of Justice Walsh, is to "value what has been taken from the shareholder: 'viz his proportionate interest in a going concern.'"[77] The court concluded that the application of a minority discount was contrary to the requirement that the company be regarded as a going concern.[78] Further, the court emphasized that the appraisal process is not designed to reconstruct a pro forma sale.[79] Thus, the compensation to the dissenting investor is compensation for the deprivation of an investment that the shareholder would have been willing to maintain had the merger not occurred.[80]

The court articulated several major policy reasons for rejecting the minority discount. First, it emphasized that discounting injects an undesirable degree of speculation into the valuation process.[81] Second, it argued that discounting ends up penalizing the minority investor for his or her lack of control.[82] Third, the court pointed out that the minority discount unfairly enriches the majority shareholders who may get a windfall by cashing out the dissenting shareholder.[83]

Subsequent to *Cavalier Oil*, a majority of courts rejected the minority discount in the context of dissenters' cases.[84] The deterrence function of

75. *See* DEL. CODE tit. 8, § 262 (2010).
76. *Cavalier Oil Corp*., 564 A.2d at 1137.
77. *Id*. at 1144-45.
78. *Id*. 1145-46.
79. *Id*.
80. *Id*.
81. *Id*. at 1145.
82. *Id*.
83. *Id*.
84. Foy v. Klapmeier, 992 F.2d 774, 781 (8th Cir. 1993); Pro Finish USA, Ltd v. Johnson, 63 P.3d 288, 294 (Ariz. Ct. App. 2003); Brown v. Allied Corrugated Box. Co. Inc., 91 Cal. App.3d 477, 486-87 (Cal. Dist. Ct. App. 1979); Security State Bank v. Ziegeldorf, 554 N.W.2d 884, 889-90 (Iowa 1996); Arnaud v. Stockgrowers State Bank, 992 P.2d 216, 220 (Kan. 1999); Hansen v. 75 Ranch Co. 957 P.2d 32, 42 (Mont. 1998); Rigel Corp. v. Cutchall, 511 N.W.2d 519, 526 (Neb. 1989); Lawson Mardon Inc. v. Smith, 734 A.2d 738, 748 (N.J. 1999); Friedman v. Beway Realty Corp., 661 N.E.2d 972, 975 (N.Y. 1995); Woolf v. Universal Fid. Life Ins. Co., 849 P.2d 1093, 1095 (Okla. Civ. App. 1992); Charland v. Country View Golf Club Inc., 588 A.2d 609, 613 (R.I. 1991); Stone v. People's Trust & Sav. Bank, 363 F. Supp. 2d 1036, 1039 (S.D. Ind. 2005); Robblee v. Robblee, 841 P.2d 1289, 1295 (Wash. Ct. App. 1992); Columbia Mgmt. Co. v. Wyss, 765 P.2d 207, 214; HMO-W Inc. v. SSM Health Care Sys., 611 N.W.2d 250, 255 (Wis. 2000); Brown v. Arp, 141 P.3d 673, 683 (Wyo. 2006).

dissenters' statutes has been cited as a compelling reason to deny the minority discount in the dissenters context.[85] In *Pueblo Bancorporation v. Lindoe, Inc.*,[86] the Colorado Supreme Court rejected both the minority and marketability discount in connection with the interpretation of a pre-1999 formulation of the Model Business Corporation Act that did not yet expressly prohibit such discounts.[87] Subsequently in 1999, the Model Business Corporation Act was amended to expressly eschew the minority and marketability discounts for purposes of the definition of "fair value."[88] The ALI Principles of Corporate Governance similarly reject the minority discount, but leave open the application of the marketability discount in extraordinary circumstances as discussed below.[89]

The argument against minority discounts originating in dissenters' rights cases has been extended to the broader context of close corporation oppression cases. In *Elder v. Elder*,[90] for instance, two brothers owned a closely held company in which the plaintiff owned 40% and his brother owned the remaining 60% of the corporation. The defendant had taken away the plaintiff's salary and check-writing privileges and terminated his role as vice president. The appellate court noted that the lower court had embraced precedents emphasizing that:

> A minority discount frustrates the equitable purpose of protecting a minority shareholder from a squeeze-out . . . remedying shareholder oppression has the same objective of protecting a minority shareholder. The exclusion of Richard [the minority shareholder] created the same situation faced by a dissenter shareholder in a closely held corporation: "The shareholder not only lacks control over corporate decision making, but also upon the application of a minority discount receives less than proportional value for loss of that control." Equity is served by allowing the "squeezed" shareholder his or her proportionate interest of the corporation as a going concern.[91]

The trend away from the minority discount may also be seen in the partnership arena. Section 701 of the Revised Uniform Partnership Act

85. *Brown v. Arp*, 141 P.3d at 687.

86. 63 P.3d 353 (Colo. 2003).

87. *Id*. at 368-69.

88. *See* 3 MODEL BUS. CORP. ACT § 14.34 (1998) (authorizing a buy-out in lieu of a judicial dissolution); *Id*. at §§ 13.01(4), 13-3 (1998) (providing guidelines for determining fair value defined as ". . . the value of the corporation's shares . . . using customary and current valuation concepts . . . without discounting for lack of marketability or minority status").

89. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORP. GOVERNANCE § 7.22 (2007).

90. Elder v. Elder, No. 2006AP2937, 2007 Wisc. App. LEXIS 1130 (Wis. App. Dec. 27, 2007).

91. *Id.* at *12-14 (internal citations omitted).

provides that a disassociated partner has the right to obtain a "buyout" of his interest at the greater of the liquidation value or the amount distributable to the dissociating partner if the entire business had been sold as a going concern without the dissociating partner.[92] In addition, interest is payable from the date of the dissociation. The comments to RUPA indicate that the buyout price envisioned in RUPA is formulated to reject the minority discount but may encompass the application of a marketability discount or other relevant discounts.[93] The comments indicate that other discounts may be fair and appropriate to reflect the private nature of the firm or to factor in a discount for the loss of a key partner.[94]

92. *See* REVISED UNIF. P'SHIP ACT § 701 (1997), *available at* http://www.law.upenn.edu/bll/archives/ulc/uparta/1997act_final.htm.

> (a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).
>
> (b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under Section 807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

93. *Id*. § 701 cmt. 3 (emphasis added) provides:

> The terms "fair market value" or "fair value" were not used because they are often considered terms of art having a special meaning depending on the context, such as in tax or corporate law. "Buyout price" is a new term. It is intended that the term be developed as an independent concept appropriate to the partnership buyout situation, while drawing on valuation principles developed elsewhere.
>
> Under subsection (b), the buyout price is the amount that would have been distributable to the dissociating partner under Section 807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of liquidation value or going concern value without the departing partner. Liquidation value is not intended to mean distress sale value. Under general principles of valuation, the hypothetical selling price in either case should be the price that a willing and informed buyer would pay a willing and informed seller, with neither being under any compulsion to deal. *The notion of a minority discount in determining the buyout price is negated by valuing the business as a going concern*. *Other discounts, such as for a lack of marketability or the loss of a key partner, may be appropriate, however*.

94. *See* Warnick v. Warnick, 133 P.3d 997, 1004 (2006) (failing to discuss the marketability discount, but holding that, pursuant to Wyoming's partnership statute that included willing buyer/willing seller language, there should be no reduction for hypothetical costs of selling the business where the business is continued after the buyout of the dissociating partner). *See generally* Donald J. Weidner and John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 11 (1993) (indicating that the buy-out to the dissociating partner should be based on the higher of the liquidation

The similarity between cases involving dissenting shareholders and cases involving withdrawing partners was observed by the Maryland Circuit Court, which concluded that both the minority and marketability discounts should be disregarded in the case of the withdrawing partner as the dissenting shareholder.[95] In *Larkin v. Ratta*,[96] the court noted:

> The logic of the authorities that reject both minority and marketability discounts in the dissenting shareholder context is equally applicable to a valuation analysis under § 10-604. This is not a marketplace transaction involving a third party purchaser. Instead it is a statutory redemption intended to make the withdrawing partners whole by allowing them to "cash out" their interests.[97]

In summary, there is growing support for disregarding the minority discount in dissenters' rights cases, in close corporation oppression cases,[98] and under statutory formulations contained in the Model Business Corporation Act.[99] As more fully discussed below, while the American Law Institute's Principles of Corporate Governance and the Revised Uniform Partnership Act reject the *minority* discount, they take a slightly more permissive stance vis-à-vis the *marketability* discount.[100]

B. The Marketability Discount in the Corporate and Partnership Setting

As discussed in Part II above, the marketability discount is designed to adjust the value of the enterprise to take into account the fact that it is a private entity without a ready market and it may take time to sell the enterprise. This delay, or illiquidity, presents unknown risks concerning possible changes in technology, competition, or markets. The discount adjusts for the lack of liquidity because there are presumably a limited number of buyers for a privately-held enterprise.[101]

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value or the going concern value, and that the dissociating partner should not be paid for his human capital that goes with him).

95. Larkin v. Della Ratta, No. C-2002-80490.BC, 2005 Md. Cir. Ct. LEXIS 18, at *33 (Md. Cir. Ct. March 24, 2005).

96. *Id*.

97. *Id*.

98. *See* Baur v. Baur Farms, Inc., No. 9-9-31/09-0480, 2010 Iowa App. LEXIS 117, at *20-21 (Iowa Ct. App. Feb. 10, 2010) (observing that the legislature has prohibited the marketability and minority discounts).

99. *See* MODEL BUS. CORP. ACT § 14.34 (authorizing a buy-out in lieu of a judicial dissolution); § 13.01(4) at 13-3 (1998) (providing guidelines for determining fair value defined as "the value of the corporation's shares . . . using customary and current valuation concepts . . . without discounting for lack of marketability or minority status . . . .").

100. *See infra* Part II.B.

101. *See* Larkin v. Della Ratta, No. C-2002-80480.BC, 2005 Md. Cir. Ct. LEXIS 18, *29-30 (Md. Cir. Ct. March 24, 2005) ("A marketability discount adjusts for the lack of

Many of the arguments that have been levied against the minority discount in the context of dissenting shareholder cases can be advanced against the marketability discount as well.[102] Like the minority discount, the marketability discount adjusts to market conditions, whereas the goal of both dissenters' rights statutes and oppression remedies is to compensate the investor for the loss of the investment opportunity. From a policy standpoint, the application of a marketability discount similarly introduces uncertainty in the valuation process and runs the risk of rewarding the majority misconduct.[103]

Even in the absence of express statutory condemnation, *Cavalier Oil* set the stage for rejecting the idea of discounting generally by emphasizing that the point of an appraisal was not to simulate a pro forma sale.[104] Then, in 1999, the Model Business Corporation Act was amended to expressly prohibit *both* minority and marketability discounts in its definition of "fair value" governing buy-outs pursuant to dissenters' statutes and buy-outs in lieu of judicial dissolution triggered by illegal, oppressive or fraudulent majority conduct.[105]

The American Law Institute takes a slightly more permissive approach to the marketability discount than to the minority discount.[106] While prohibiting the minority discount under its definition of fair value for buy-outs in appraisal actions, the ALI leaves the door slightly ajar with regard to the marketability discount.[107] In defining fair value, the ALI provides that "the fair value of shares under § 7.21 (Corporate Transactions Giving Rise to Appraisal Rights) should be the value of the eligible holder's [§ 1.17] proportionate interest in the corporation, without any discount for

liquidity based on the notion that there are limited potential buyers for shares in a small organization.").

102. *See* East Park Ltd. P'ship v. Larkin, 893 A.2d 1219, 1231-33 (Md. Ct. Spec. App. 2006) (discussing the arguments against the marketability discount); Drury Indus., Inc. v. Drury Props., Inc., No. 03-00852A, 2005 WL 5072229, nn.10-12 (Nev. Dist. Ct. March 23, 2005) (involving a cash-out merger).

103. *East Park*, 893 A.2d at 1232.

104. Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145-46 (Del. 1989). The Delaware corporate statute contains no definition of "fair value" and no express direction regarding the minority or marketability discounts. *See* DEL. CODE ANN. tit. 8, § 262 (2010) (showing the lack of statutory condemnation of discounting under relevant Delaware appraisal law).

105. *See* MODEL BUS. CORP. ACT § 14.34 (authorizing a buy-out in lieu of a judicial dissolution); § 13.01(4) at 13-3 (1998) (providing guidelines for determining fair value defined as "the value of the corporation's shares . . . using customary and current valuation concepts . . . without discounting for lack of marketability or minority status . . . ."). *See also* Brown v. Arp and Hammond Hardware Co., 141 P.3d 673, 684 (Wyo. 2006) (discussing thoroughly the Model Business Corporation Act's provisions pertaining to discounts in a dissenters' rights buy-out case).

106. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 7.22, at 314-15.

107. *See id*.

minority status or, absent extraordinary circumstances, lack of marketability."[108] The ALI does not itself provide a statutory provision for judicial buy-outs in the event of oppressive conduct. Nevertheless, the ALI does contain some commentary on oppressive conduct suits and suggests that courts might properly look to the ALI's guidelines for determining fair value under dissenters' provisions in implementing buy-outs occurring in the context of oppressive conduct statutes.[109]

The Revised Uniform Partnership Act also leaves the door slightly ajar with respect to discounts other than the minority discount, providing that other discounts "such as for a lack of marketability or the loss of a key partner, may be appropriate . . . ."[110] As noted previously, the Revised Uniform Limited Liability Company Act authorizes a judicial dissolution, but is silent with regard to the possibility of a court-ordered purchase in lieu of a dissolution and thus, contains no guidance on valuation matters.[111]

Thus, while there seems to be a strong consensus against the minority discount among the Model Business Corporation Code, the ALI, and the RUPA, there are subtle differences regarding the marketability discount, with the Model Business Corporation Code rejecting the marketability discount outright, and the ALI and the RUPA generally rejecting the marketability discount, but possibly countenancing rare exceptions (albeit *extraordinary* exceptions, in the case of the ALI).[112]

C. Emerging LLC Case Law

There is comparatively little LLC case law that addresses the valuation of LLC interests in connection with oppressive conduct. In

108. *See id*. (providing that:

> The fair value of shares under 7.21 (Corporate Transactions Giving Rise to Appraisal Rights) should be the value of the eligible holder's [1.17] proportionate interest in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability. Subject to Subsections (b) and (c), fair value should be determined using the customary valuation concepts and techniques generally employed in the relevant securities and financial markets for similar businesses in the context of the transaction giving rise to appraisal.

).

109. *Id*. § 7.21 cmt. h, at 312.

110. REVISED UNIF. P'SHIP ACT § 701 cmt. 3 (1997), *available at* http://www.law.upenn.edu/bll/archives/ulc/uparta/1997act_final.htm.

111. *Id*.

112. In 2003, the court indicated that of the jurisdictions with "fair value" statutes, courts in fifteen states had held that a marketability discount should not be applied, and only six states had concluded that fair value may include marketability discounts (Florida, Illinois, Kentucky, Virginia interpreting Maryland law, New York, and Oregon). Pueblo Bancorporation v. Lindoe Inc., 63 P.3d 353, 366-68 (Colo. 2003).

Marsh v. Billington Farms, LLC,[113] the Rhode Island Superior Court summarily concluded, based upon a Rhode Island corporate oppression case, that the minority and marketability discount should not apply.[114] Also, the court failed to explore whether there were precedents from Rhode Island partnership cases that might be relevant. Interestingly, the court applied its corporate statute's dissolution provisions applicable even though the case under consideration involved an LLC. Clearly, the corporate oppression statute was the inappropriate provision. Rhode Island's LLC dissolution provision allows for judicial dissolution when it is no longer reasonably practicable to carry on the business.[115] Apparently, the parties had disputed this point but had entered into a consent order agreeing to apply the corporate provision anyway. In any event, the decision provides virtually no policy analysis regarding LLC valuation matters. Nevertheless, Marsh shows a judicial willingness to apply without question corporate precedents regarding the minority and marketability discounts to the LLC.[116]

In *Denike v. Cupo*,[117] a case involving a dispute between co-owners of an LLC, a New Jersey Superior court upheld a valuation of an LLC interest without regard to a marketability or minority discount, even though the New Jersey LLC statute provides that upon resignation of a member, the member is entitled to receive the "fair value of his limited liability company interest . . . less all applicable valuation discounts, unless the operating agreement provides for another distribution formula."[118] The appellate court observed that there is not an inflexible test for determining fair value, and refused to conclude that the valuation expert's opinion was contrary to accepted valuation methodology. The opinion emphasized that the decision was not inconsistent with accepted valuation principles since accepted principles recognized that the minority and marketability discounts should not apply where an actual sale of an entire business appears unlikely.[119] The court largely ignored the statute's reference to discounts in the wording of the LLC statute. Had the court addressed this specific statutory language it might have concluded that no valuation discounts were applicable under the facts, especially given the nature of the business at issue.

113. 2007 R.I. Super. LEXIS 105 (R.I. Super. Ct. Aug. 2, 2007).

114. *Id*. at *12-13 (citing Charland v. Country View Golf Club, 588 A.2d 609, 613 (R.I. 1991)).

115. R.I. GEN. LAWS § 7-16-40 (2010).

116. Marsh v. Billington Farms, LLC, C.A. No. PB 04-3123, 2007 R.I. Super. LEXIS 105 (R.I. Super. Ct. Aug. 2, 2007).

117. Denike v. Cupo, 926 A.2d 869, 887 (N.J. Super. Ct. App. Div. 2010).

118. *See* N.J. STAT. ANN. § 42:2B-39 (West 2010); *Denike*, 926 A.2d at 884-85.

119. 926 A.2d at 884-85.

Another recent LLC valuation controversy arose in the context of a divorce. In *In re Thornhill*,[120] the Colorado Supreme Court was asked to determine the appropriateness of applying a marketability discount to determine the value of NGR Services, LLC, an LLC that was an oil and gas service company.[121] The magistrate refused to extend the holding of *Pueblo Bancorporation v. Liondoe, Inc.,* which prohibited a marketability discount in a dissenters' rights case to a divorce proceeding. The trial court enforced a separation agreement that had used a 33% marketability discount in valuing an LLC interest. The Appellate Court reversed, finding that the separation agreement was unconscionable, and also went on to reject the wife's argument that a *per se* rule disregarding the marketability discount should be applied in the divorce context.[122] Although the Colorado Supreme Court determined that the *Pueblo* decision had interpreted the statutory language "fair value" in the specific context of a dissenters' statute, the present case arose under a different statute and did not use the term "fair value."[123] Pueblo had reasoned that the legislature would have used the term "fair market value" if it so intended, and that the term "fair value" value did not encompass the marketability discount.[124] The minority discount was not at issue in the divorce case.[125]

In *In re Thornhill,* the Colorado Supreme Court observed that while there was a national trend against the marketability discount in dissenters' cases, there was no similar national consensus prohibiting the marketability discount in a divorce setting.[126] In fact, the Court observed that most courts had left the question of the marketability discount to the court's discretion when valuing the interest of a company in a divorce proceeding.[127] The Court emphasized that in the context of divorce, a non-member spouse is not a victim of shareholder oppression, and stressed that the goal in the valuation is to reach an equitable division of marital property.[128] Although *In re Thornhill* will obviously impact future divorce valuation cases, it leaves open the question of valuation of LLCs in other contexts not involving divorce. Presumably, in the face of *Pueblo*, it will be difficult to support the application of either a minority or marketability discount in the context of a squeeze-out of a Colorado LLC member.

Thus, at present, outside of the divorce context, the few LLC cases

120. 232 P.3d 782 (Colo. App. 2010).
121. *Id*. at 784-85.
122. *Id*. at 786.
123. *Id*.
124. Pueblo Bancorporation v. Lindoe, Inc., 63 P. 3d 353, 361 (Colo. 2003).
125. *In re Thornhill*, 232 P.3d at 782.
126. *Id*. at 786.
127. *Id*.
128. *Id*.

that have addressed valuation questions have not applied minority or marketability discounts. The decision in *Denike* is somewhat helpful in its attempt to explain why the marketability discount was not applicable under the facts.[129] According to the court, there would be no actual transfer of the company and a sale of the company appears unlikely.[130] It appears that the court felt that because there was no real market for the LLC, adjustment of the LLC's value to reflect market conditions would be inappropriate. As more fully discussed below, the improbability that a company will ever be sold presents a sound rationale for eschewing the marketability discount. However, the court's analysis of the marketability discount issue in *Denike* is somewhat incomplete. The court fails to mention that the New Jersey Supreme Court has recognized that extraordinary circumstances may sometimes justify the marketability discount.[131] Perhaps the court deemed that such circumstances could only arise where the LLC has the possibility of a credible market. However, the decision would have been more helpful had it fully analyzed New Jersey corporate precedents.

Given the paucity of direct guidance in the LLC setting, courts should look to the relevant jurisdiction's corporate and partnership precedents to determine whether a minority and/or marketability discount should be applied. As more fully discussed below, the question of whether discounts should apply is context-specific. Different policy considerations may be presented depending upon whether the valuation question arises in the setting of oppressive conduct, the exercise of dissenters' rights, a divorce settlement, or a tax controversy. An appreciation of the policy issues raised in specific settings, and a keen sensitivity to the facts presented in the controversy, are indispensable.

As discussed below, in the context of oppressive conduct, there are strong policy reasons favoring a *per se* prohibition of the minority discount. In addition, there are compelling arguments supporting a general rule prohibiting the marketability discount. In tax contexts and/or in divorce settings, different policy and statutory terms may come into play. Some courts have argued that in the divorce context, a different and more flexible approach to valuation may be appropriate.[132] However, a number of the

129. Denike v. Cupo, 926 A.2d 869, 884-885 (N.J. App. 2010).

130. *Id*. at 382-383.

131. *Id*. The decision cites *Balsamides v. Protameen Chems. Inc.*, 734 A.2d 721 (N.J. 1999), but does not explain why *Balsamides* presented extraordinary circumstances justifying a marketability discount. The case, however, should be distinguished from the facts presented in *Balsamide* where the court held that it would be inequitable to require one fifty-percent owner to buy out another where the purchasing shareholder was apparently the victim of the other fifty-percent owner's difficult conduct. *Id.*

132. *See* Sweet v. Sweet, No. 2007-A-0003 and 2008-A-0003, 2009 Ohio App. LEXIS 1607 at *32, *45 (Ohio App. Apr. 27, 2009) (observing broad discretion to adopt a method for valuation in a divorce case and upholding discretion to employ marketability discounts).

arguments against the discounts appear relevant in both the oppression and divorce settings.

V. A CONTEXTUAL APPROACH TO THE LLC DISCOUNT DILEMMA

An appreciation of the policy issues raised in each LLC valuation setting will be important to the development of a well-supported approach to the minority discount and the marketability discount in the LLC. It is important for courts to be cognizant of the context of the valuation case and whether it arises in the setting of an oppression suit, an ordinary withdrawal from the LLC, a divorce, or under other circumstances.

The context of the law is of growing importance in connection with contract interpretation as well as in other areas of jurisprudence, both within and outside of the United States.[133] In writing about the benefits of a contextual approach to law, Professor Larry DiMatteo recently discussed "[t]he rule that Llewellyn targets for criticism is what he calls the rule-of-thumb or paper rule."[134] Professor DiMatteo describes this as a rule that is cut off from its underlying reasons.[135] Under a contextual approach, the outcome of a legal result will be highly dependent upon the specific facts and circumstances, as well as the special interests, that are presented in a particular setting.[136] In the case of the minority and/or a marketability discount, each specific setting, whether oppression or otherwise, raises its own policy considerations.

A. Policy Concerns Raised by the Minority Discount in the Oppression Setting and Beyond

As can be gleaned from the above corporate and partnership contexts, there are compelling reasons to eschew the minority discount in LLC cases involving minority oppression. These reasons apply with equal force in the setting of an LLC. On balance, in minority LLC oppression cases, a *per se* rule makes sense. First, the purpose of a judicial buy-out of an LLC

133. *See generally* Shalin M. Sugunasiri, *Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability*, 22 DALHOUSIE L. J. 126 (1999) (discussing contextualism in the Supreme Court of Canada).

134. *See* Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation,* 109 PENN ST. L. REV. 397, 477-78 (2004) (observing broad discretion to adopt a method for valuation in a divorce case and upholding discretion to employ marketability discounts).

135. *Id*.

136. *See id*. *See generally* Larry A. DiMatteo & Blake D. Morant, *Contract in Context and Contract As Context*, 45 WAKE FOREST L. REV. 549 (2010); Sandra K. Miller, *Legal Realism, the LLC, and a Balanced Approach to the Implied Covenant of Good Faith and Fair Dealing*, 45 WAKE FOREST L. REV. 729 (2010).

interest is not to closely simulate a market sale, but rather, to fashion a sensible remedy to compensate for a lost investment. A judicially ordered buy-out occasioned by oppressive conduct is not voluntary in any sense of the word.[137] As a forced sale that is the product of majority coercion, the judicial buy-out fails to involve a willing seller and willing buyer, the hallmark of which is a sale at "fair market value."[138] Further, from the standpoint of a majority LLC purchaser, a judicial buy-out by the majority of a minority LLC interest may not be the acquisition of a minority interest at all if the buyer already owns a majority of the LLC.[139] As previously discussed in the corporate oppression case law, it could be argued that the application of a minority discount runs the risk of rewarding oppressive conduct by possibly permitting a buy-out of the minority's LLC interest at a bargain price.[140] Application of the minority discount arguably penalizes the minority, unfairly enriches the majority, and undermines the deterrence function of oppression statutes.[141] Further, the assumption of a hypothetical sale of the minority interest may be an entirely inappropriate premise where the minority interest has no value to others besides to the minority, where there is no market for the LLC, or where sales to outsiders would never be contemplated.[142] Finally, the minority discount may introduce a troubling degree of uncertainty into the valuation process.[143]

Are there any policy arguments in support of a minority LLC discount? If one considers the perspective of the minority, the interest being sold is truly a minority interest even if it is being purchased by a majority owner. In fact, the reason why the minority may have petitioned

137. *See* Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 20 J. CORP. L. 371, 372 (2003) (emphasizing that the oppression remedy under Oregon law does not attempt to simulate a sale between a willing seller and a willing buyer).

138. *See* Treas. Reg. 20.2031-1(b) (2009) (indicating that fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under compulsion to buy or sell and both having reasonable knowledge of the relevant facts).

139. *See generally* Moll, *supra* note 3, at 324.

140. *See* Harry Haynesworth IV, *Valuation of Business Interests*, 33 MERCER L. REV. 457, 489 (1982) (observing that in cases involving squeeze-outs, discounts may undermine the purposes of dissenters or oppression statutes).

141. *See* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137 (Del. 1989) (emphasizing speculative characteristics of the minority discount, the penalizing impact upon the minority, and the potential enrichment of the majority). *See also* Elder v. Elder, No. 2006AP2937, 2007 Wisc. App. LEXIS 1130 (Wis. App. 2007); Brown v. Arp and Hammond Hardware Co., 141 P.3d 673 (Wyo. 2006) (emphasizing deterrence function of dissenters' statutes and rejecting the minority discount).

142. *Id*. *See also* Denike v. Cupo, 926 A.2d 869, 884-85 (N.J. App. 2010).

143. Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989) (stating that a minority discount may introduce a troubling degree of uncertainty into the valuation process).

the buy-out is likely to be because the controlling LLC member exercised majority powers to the minority's detriment. Some may contend that a judicial buy-out at an undiscounted price gives the minority an incentive to threaten dissolution and could present a roadmap for opportunistic minority conduct.[144] Finally, one might argue that under a number of LLC statutes, LLC judicial buy-outs are not triggered by "oppressive conduct," but rather occur when it is "no longer reasonably practicable" to carry on the business of the LLC. The "no longer reasonably practicable" standard arguably does not present the protective minority purpose that is present where the applicable statute directs the judicial action when "oppression" has taken place.

Notwithstanding these counter arguments, on balance, a *per se* prohibition upon the minority discount still makes sense under both LLC statutes triggering the judicial action based upon "oppression" as well as under LLC statutory provisions utilizing the "not reasonably practicable to do business" formulation. The arguments against the minority discount are more compelling than those in favor of it in the presence of "oppression." The need to deter rather than facilitate exploitive majority conduct has been a cornerstone of the argument against the minority discount in corporate dissenters' and corporate squeeze-out settings. Thus, in the setting of LLC buy-outs occasioned by assertions of majority oppression, the deterrence rationale largely supports a general rule prohibiting the minority discount.

The Revised Uniform Partnership Act rejects the minority discount across the board with respect to partnership dissociations, including withdrawals—not just dissociations occasioned by misconduct.[145] Some

144. *See* Hunt v. Data Management Resources, Inc., 985 P.2d 730, 732 (Kan. App. 1999) (involving a minority shareholder who sold the S Corporation stock to a corporation in an effort to disqualify the corporation from S Corporation status and thus coerce a buy-out at a given price).

145. *See* UNIF. P'SHIP ACT § 801(5)(ii) (1997). *See also* the REVISED UNIF. P'SHIP ACT § 701, *available at* http://www.law.upenn.edu/bll/archives/ulc/uparta/1997act_final.htm.

> (a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under Section 801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).
>
> (b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under Section 807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

Comment 3 provides:

> The terms "fair market value" or "fair value" were not used because they are often considered terms of art having a special meaning depending on the

may argue that the applicable LLC statute would have included similar language had the drafters of the LLC statute intended to similarly prohibit the minority discount. However, others may argue that the absence of similar language is not dispositive and that given the similarity between partnerships and LLCs, statutory language designed to disregard minority discounts in partnership valuations lends weight to the argument against the minority discount in the LLC context.

Another compelling argument supporting the disregard of the minority discount in the LLC is that, from the standpoint of the LLC, there is no acquisition of a minority interest when the minority withdraws from the LLC; rather, the LLC continues under ownership of the remaining members.[146] Finally, a particularly persuasive argument is that the minority discount creates substantial uncertainty in the setting of the LLC. This is especially evident when keeping in mind that the overall goal of LLC business entity governance is to allow business planners to achieve certainty and predictability in business affairs. However, this uncertainty argument may be countered somewhat by emphasizing that an LLC member who could have achieved certainty via express contractual buy-out and valuation provisions but chose not to should not be allowed thereafter to complain about uncertain judicial valuation laws. Nevertheless, regardless of whether an LLC member contractually self-protected, the goals of certainty and predictability in business entity governance are important considerations in selecting alternative business entities such as

> context, such as in tax or corporate law. "Buyout price" is a new term. It is intended that the term be developed as an independent concept appropriate to the partnership buyout situation, while drawing on valuation principles developed elsewhere.
>
> Under subsection (b), the buyout price is the amount that would have been distributable to the dissociating partner under Section 807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of liquidation value or going concern value without the departing partner. Liquidation value is not intended to mean distress sale value. Under general principles of valuation, the hypothetical selling price in either case should be the price that a willing and informed buyer would pay a willing and informed seller, with neither being under any compulsion to deal. The notion of a minority discount in determining the buyout price is negated by valuing the business as a going concern. Other discounts, such as for a lack of marketability or the loss of a key partner, may be appropriate, however.

146. It is noteworthy that the Revised Uniform Partnership Act uses the "no longer reasonably practicable" standard for partnership dissolutions. *See* Cannon v. Bertrand, 2 So. 3d 393, 396-97 (La. 2009) (refusing to apply the marketability or minority discount where one of three partners withdrew from a Louisiana LLP and indicating that such discounts must be used sparingly and only when the facts support their use; also indicating that, under the facts, the remaining two partners were not subject to a lack of control as would be the case if the withdrawing partner's interest were sold to a third party since each of the remaining two partners had an equal say in the control of the partnership).

LLCs. Therefore, LLC jurisprudence should be developed in a way that maximizes certainty and predictability as much as possible. To the extent that the minority discount contributes to uncertainty, it constitutes a provision that runs counter to important overall policy goals underlying LLC jurisprudence.

Valuations in connection with divorce present slightly different policy concerns, but many of the objections to the minority discount in oppression cases apply with equal force in the context of divorce. Indeed, there are important differences between the divorce and minority squeeze-out settings. In the minority squeeze-out context, the buy-out may be coerced, and thus fair market value adjustments—such as discounts that arise between a willing buyer and a willing seller—are arguably irrelevant. Although there is not always a definitive judicial finding of oppressive conduct or fault, there typically is an overriding policy interest in protecting the minority investor. Thus, it is important that the valuation process not be used in a manner that facilitates the expulsion of the minority.

In the context of divorce, the overall goal of the proceeding for an equitable distribution of property is not to protect one party or the other, but rather to fairly and equitably apportion marital property and to recognize each party's contribution to an economic partnership.[147] There is an overriding concern that the parties honestly disclose the assets that are owned. However, there is not the same concern that discounts might operate as incentives for squeeze-out behavior. Also, in a divorce there may be no actual transfer of the business interest. In a typical minority squeeze-out one can argue that the minority discount essentially vanishes because, from the perspective of the majority, the majority isn't buying a minority interest. However, in a divorce, one party may not be buying out a business interest at all. Thus, the argument that the minority discount vanishes does not apply. The statutory context of the divorce is distinct. Also, the relevant divorce statute may not necessarily use the terms "fair value" or "fair market value" in authorizing how to reach valuation judgments; thus, there may not be a direct statutory connection between valuations occurring in divorce and precedents involving corporate dissenters' rights and/or corporate oppression cases.[148] As one court

147. *See* Benjamin M. Ellis, *Protecting the Right to Marital Property: Ensuring a Full Equitable Distribution Award With Fraudulent Conveyance Law*, 30 CARDOZO L. REV. 1709, 1720-21 (2009) (observing that the goal of equitable distribution of property is to recognize and compensate each spouse for his or her contribution to the economic partnership).

148. *See* 23 PA. CONS. STAT. ANN. § 3502 (2010) (providing court authority to make an equitable division of marital property and setting forth factors to consider such as length of marriage, prior marriages, age, health, education, etc.; not containing guidelines for

recently noted:

> There admittedly is a significant debate about when marketability discounts are appropriate in any proceeding requiring the valuation of a closely held corporation. . . . It seems that the debate is sometimes led astray by the application of broad generalizations that do not differentiate between the types of proceedings within which valuations are required, nor acknowledge that the appropriate analysis for the valuation of a business may change depending upon the specific legal and factual context presented.[149]

Although these comments were made with regard to the marketability discount, they are equally applicable to the minority discount.

In spite of the differences between the squeeze-out and divorce settings, there are still some significant objections to the minority discount that apply with equal force in both the oppression and divorce contexts. The minority discount injects unwarranted uncertainty and a lack of predictability in both oppression and divorce LLC cases. Also, regardless of whether the valuation occurs in a squeeze-out or a divorce, an adjustment for the minority discount still makes little sense when the business itself does not have a market and is unlikely ever to be sold. Thus, although a number of arguments against the minority discount have little application to the divorce context, there are still some important reasons that support a prohibition of the minority discount in some divorce settings.

B. Policy Issues Surrounding the Marketability Discount in the Oppression Context and Beyond

Although the Colorado Supreme Court refused to extend the holding of *Pueblo Bancorporation*, prohibiting the marketability discount to a divorce proceeding, some of the policy reasons supporting the disregard of the marketability discount appear to make sense in both divorce and oppression contexts.[150] Because of the significance of these problems, even

valuation of property). *See generally* Buckl v. Buckl, 542 A.2d 65, 70-71 (Pa. Super. Ct. 1988) (indicating that a partnership interest is part of the marital property and should be valued in accordance with the partnership agreement and the relevant Uniform Partnership provisions).

149. Erp v. Erp, 976 So. 2d 1234, 1239-40 (Fla. Dist. Ct. App. 2008).

150. *See In re* Thornhill, 232 P.3d 782 (Colo. 2010) (holding that trial court may, in its discretion, apply marketability discounts when valuing ownership interests in closely-held corporations because the Pueblo considerations are not applicable here); Pueblo Bancorporation v. Lindoe Inc., 63 P.3d 353, 364-65 (Colo. 2003) ("The purpose of the dissenters' rights statute would best be fulfilled through an interpretation of 'fair value' which ensures minority shareholders are compensated for what they have lost, that is, their proportionate ownership interest in a going concern. A marketability discount is

if a court refuses to adopt a general prohibition of discounts in divorce proceedings, nevertheless, there may be reasons to disregard the marketability discount in individual cases involving an equitable distribution of property.

There may be a number of problems with the marketability discount both within and outside of the oppression setting. Whether the buy-out occurs because it is "no longer practicable" to do business or because a member simply dissociates from the LLC, the marketability discount arguably injects uncertainty into the law.[151] As indicated above, investors may have selected the LLC form precisely to gain some control and certainty over legal and business responsibilities.[152] In addition, the marketability discount presents some other problems which may be relevant not just in the event of oppression, but also in ordinary withdrawals, and even in other settings such as in divorce. These other problems include the double-counting problem observed by at least one court,[153] the undervaluation risk—also called the under-compensation risk,[154] and what I shall call the market irrelevancy issue. These problems tend to support a rule that would disallow the marketability discount.

The double-counting issue arguably arises if the LLC is valued in a manner that already reflects private market data. As one court noted:

> There is a recognized risk of double-counting by an expert, that is, duplicative reductions in the value of the minority interest in a closely-held business, as a result of increasing the capitalization rate (and decreasing the valuation multiple) to account for limited marketability, and then in addition applying a "marketability discount" to the value derived from capitalizing income.[155]

Courts do not always pick up on the problem of double counting the reduction necessary to reflect the private nature of the LLC.[156] For

inconsistent with this interpretation . . . .").

151. *Pueblo Bancorporation*, 63 P.3d at 364-65.

152. *See* Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1610 (2004) ("[I]n an atmosphere of escalating jury awards, practitioners advocated control over the legal liability of their clients with respect to both co-investors and third parties.").

153. *See* Brown v. Brown, 792 A.2d 463, 475-76 (N.J. Super. Ct. App. Div. 2002) (observing that an adjustment for the private nature of the firm already had been made in the valuation of the underlying business).

154. *See* Moll, *supra* note 3, at 293 (arguing that the buyout remedy should provide an oppressed minority investor with his pro rata share of the company's overall value with no reductions for the lack of control or liquidity associated with the minority's share).

155. *Brown*, 792 A.2d at 475.

156. *See* Balsamides v. Protameen Chems. Inc., 734 A.2d 721 (N.J. 1999) (holding that the trial court acted within its discretion in the court-ordered buyout when it valued the oppressing shareholder's shares using the "excess earnings" method). *But see Brown*, 792

example, in *Balsamides v. Protameen Chems. Inc.*,[157] the New Jersey Supreme Court applied a marketability discount in a buy-out case occasioned by oppressive conduct.[158] According to one commentator, the valuation expert had already relied upon an IRS Revenue Procedure which utilizes an approach specific to the valuation of private business interests.[159] The additional application of a marketability discount arguably double counted the valuation adjustment due to the private nature of the business.[160]

Some may refute the double-counting rationale for rejecting the marketability discount by pointing to the fact that the marketability discount is an adjustment for unknown and/or unknowable risks that do not necessarily get factored into the underlying valuation of a private company. In valuing the underlying business, some valuation experts may adjust assets and/or capitalization rates to reflect a variety of risk factors specific to the particular business—i.e. poor facilities, aging management, new competition, lags in technological advancement, nepotism. However, these risk factors are not necessarily associated with the unknowable risks of being locked into an investment without a ready market. Advocates of the marketability discount may take the position that the marketability discount is not typically considered in valuing the underlying business and is a necessary additional downward adjustment to reflect the risks of ownership associated with an illiquid investment.[161] But one must remember that in a buy-out occasioned by a squeeze-out the court is not necessarily trying to simulate market conditions, but rather is attempting to provide damages for the involuntary deprivation of an investment. Further, in a divorce context, the goal is not necessarily the simulation of market conditions in a hypothetical sale, but rather is to arrive at an equitable distribution of

A.2d at 475-76 (adhering to a prohibition on marketability discounts absent extraordinary circumstances in divorce cases as well as other types of cases; also indicating that a marketability discount would double count the risk associated with the private nature of the company.).

157. *Balsamides*, 734 A.2d at 721. *See* Charles F. Vuotto & Scott A. Maier, *The Continuing Debate About Brown: What Constitutes "Extraordinary Circumstances"?* (2003), http://tvelaw.com/newjerseydivorcearticles/debate.htm (examining when "extraordinary circumstances" arise such that valuation discounts are warranted).

158. *Balsamides*, 734 A.2d at 737-38.

159. Vuotto & Maier, *supra* note 157.

160. *Id*.

161. *See* R. GLENN HUBBARD, MONEY, THE FINANCIAL SYSTEM, AND THE ECONOMY 137 (Denise Clinton ed. 2008) ("Lenders value liquidity . . . an instrument traded in a less liquid market will have a lower price and a greater required return than an instrument traded in a more liquid market."). *See also* LLOYD B. THOMAS, MONEY, BANKING, AND FINANCIAL MARKETS 129 (Jack Calhoun ed., Thomson 2006) (according to the liquidity premium theory, because long-term bonds entail greater market risk—long term yields will pay more).

property.

Even if the double counting argument is disregarded, there are still other strong reasons to reject the marketability discount in many oppression cases. Particularly where there has been a squeeze-out of an active minority investor, a buy-out of the minority's interest may not fully compensate the minority for the economic rights he or she has lost.[162] Prof. Moll has pointed out this undervaluation risk in his seminal article on valuation discounts in the corporate oppression setting.[163] Prof. Moll quite correctly points out that, in a close corporation, the active minority has an expectation of future employment, a role in management, and an interest in a share of the value of the company.[164] Prof. Moll argues that the minority's employment and management interests are not typically compensated in the buyout price which makes the minority and/or marketability discounts even more inappropriate and unjust in oppression cases.[165]

The undervaluation or "under-compensation" problem to which Prof. Moll refers obviously would not occur if the minority is a passive LLC member but could arise if the member actively participates in the management of the company. The active LLC member may indeed have reasonable expectations of continued employment and an active role in management as well as of a share in the future growth of the LLC.[166] Unless the plaintiff has sued both for the buy-out price as well as for money damages for the loss of future employment, the plaintiff may already be losing out on an important segment of his expectation interest. Of course, LLC ownership does not present a guarantee of future earnings. However, a decline in compensation following the departure from an LLC could present a substantial loss for which a buy-out price does not fully compensate. A further reduction for a marketability discount may increase his or her loss.

While the double-counting problem may not exist in all cases, the under-compensation issue can be a significant problem for the active minority plaintiff.[167] In addition, what I term "the market irrelevancy issue" may arise because the reference to a market is either irrelevant or inappropriate, given the facts and circumstances surrounding the LLC in

162. *See* Moll, *supra* note 3, at 297.

163. *Id*.

164. *Id*.

165. *Id*. at 349.

166. *See* Michael K. Molitor, *Eat Your Vegetables (Or at Least Understand Why You Should): Can Better Warning and Education of Prospective Minority Owners Reduce Oppression in Closely Held Businesses?*, 14 FORDHAM J. CORP. & FIN. L. 491, 514 (2009) (discussing common strategies of oppression).

167. *See id*.

dispute. For example, some private businesses are never intended for sale and hold value only to the existing owners.[168] To make a downward adjustment to reflect an irrelevant market makes no sense. This point was recently raised in the case *Brown v. Brown*,[169] where the New Jersey Superior Court denied a marketability discount to a business with no evidence that the business would be sold outside the family in the foreseeable future.[170]

In summary, like the minority discount, the marketability discount runs the risk of rewarding oppressive conduct in buy-outs occasioned by oppression. Also, even in contexts not involving oppression, the marketability discount may, depending upon the facts, create or exacerbate potential problems, including those of uncertainty, double-counting, risk of undervaluation, and market irrelevancy. Given the significance of these potential problems, it makes good sense to rule out the marketability discount in LLC oppression cases in all but the most extraordinary circumstances.

The Colorado Supreme Court, in the context of a divorce case, took the position that a case-by-case approach to the marketability discount may be most appropriate.[171] Nevertheless, the double-counting problem, under-compensation risk, and market irrelevancy issue may still arise in the setting of an equitable distribution. Whether in the context of a divorce or a minority squeeze-out, it is important that the marketability discount not be counted twice—first when valuing the underlying business, and again when making an adjustment to reflect the lack of marketability. The under-compensation risk may be present in both divorce and squeeze-out settings as well. A spouse may derive great value from a private business that is not properly accounted for, by looking narrowly at the estimated price for which the business interest could be sold. A spouse may be employed by the company and also may derive a broad range of fringe benefits from the business. Children, too, could be employed by the family company. The true value of a business interest to a spouse may already be grossly undervalued. Applying a marketability discount could exacerbate this undervaluation problem. Finally, as indicated previously, the market value

168. *See generally* Harry Haynesworth IV, *Valuation of Business Interests*, 33 MERCER L. REV. 457, 459 (1982) (explaining the basic principles of enterprise valuation).

169. Brown v. Brown, 792 A.2d 463, 478 (N.J. Super. Ct. App. Div. 2002) (questioning whether a marketability discount should be allowed in a divorce action and concluding that extraordinary circumstances did not exist to justify the application of a marketability discount).

170. *See id*.

171. *But see* Brown v. Brown, 792 A.2d 463, 477 (N.J. Super. Ct. App. Div. 2002) (arguing that since no actual transfer of stock would take place in the equitable distribution action and no sale of the business appeared likely in the foreseeable future, the marketability discount was even less appropriate than in a statutory appraisal or deadlock context).

of a business may be irrelevant where it is unlikely that the business would or could ever be sold. This market irrelevancy issue arises regardless of whether the valuation question occurs in an oppression case or in a divorce proceeding.[172] Thus, there may be significant reasons to prohibit a marketability discount in certain specific divorce cases, if not in all divorce proceedings.

C. Should Extraordinary Circumstances or Equitable Adjustments Ever Be Allowed in the LLC Oppression or Divorce Case?

As indicated above in the context of an LLC oppression case or a dissenters' rights case, a strong general rule prohibiting both discounts is fitting for efforts to avoid a valuation approach that indirectly facilitates minority squeeze-outs. The divorce context lacks this singularly protective focus of the law. As we have seen, however, a number of the same arguments against the minority and marketability discounts appear to be relevant in both the oppression and divorce settings. Are there ever circumstances which would justify the imposition of a minority or marketability discount or any other discounts in a divorce or oppression proceeding? As alluded to earlier, the Model Business Corporation Act prohibits all minority and marketability discounts in the definition of "fair value" that governs a buy-out in lieu of a judicial dissolution triggered by an oppression suit.[173] In contrast, the ALI and RUPA both disregard the minority discount and the marketability discount, but recognize that there might be exceptions for the marketability discount or other discounts in extraordinary circumstances.[174] Yet another albeit minority approach is to disregard the minority discount, but to freely allow the marketability discount.[175]

The pervasive weight of authority is clearly to disregard the minority discount in oppression, dissenters, and even ordinary dissociation case contexts. Furthermore, given the ALI and RUPA's approach to the marketability discount, it makes sense to retain a general prohibition on the marketability discount in such settings.[176] The double-counting problem,

172. Penelope Eileen Bryan, *An Interdisciplinary Examination of Coercion, Exploitation, and the Law: I. Coercive and Exploitive Bargaining: The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U.L. REV. 931, 932 (1997) (discussing the problem of the concealment and/or undervaluation of assets in connection with divorce).

173. *See* MODEL BUS. CORP. ACT § 13.01(4)(iii)(1998) (containing guidelines for the determination of fair value without discounting for minority status or lack of marketability).

174. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 7.22, at 296 (2010); REVISED UNIF. P'SHIP. ACT § 7.01(b), cmt. 3 (1997).

175. *See supra* Part II (referring to the minority approach to the marketability discount taken by New York, and seen in some case law in Florida).

176. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 7.22 (2010);

the under-compensation risk, and the market irrelevancy issue provide compelling policy reasons to prohibit the marketability discount in the usual LLC buy-out or dissenters case, and possibly in some, if not all divorce proceedings.

In spite of widespread criticism of discounts, some commentators have argued that in rare cases, the marketability discount may be appropriate to reflect factors such as age, infirmity, or other circumstances unique to the LLC owners in question that must be taken into account to avoid a gross overstatement of the LLC's value.[177] Thus, there may be characteristics of the LLC's management, unique features of the LLC's assets, contractual rights, cash position, or even subsequent extraordinary and unforeseeable events that, if not taken into account, could result in a significant and unfair overvaluation of the LLC. Such adjustments appear to be extremely important, but they should not be made twice—first in the underlying valuation of the company and a second time when a marketability discount is then applied once the valuation of the business is otherwise determined.[178]

Moreover, there may be unusual cases where a withdrawing LLC member may take goodwill and/or other intellectual property with him. In such instances, the buy-out price paid to the withdrawing LLC member might be grossly unfair and overstated without considering the value of the intellectual and/or intangible value withdrawn by the dissociating LLC member himself.[179] The Comments to the Revised Uniform Partnership Act appear to recognize the possibility of discounts other than the minority discount and mention the key man discount.[180] Indeed, such discounts may be a critical way to arrive at an appropriate value in certain instances. Finally, it seems reasonable that courts should have some discretion regarding payments or payment terms within reason, to arrive at a fair resolution, particularly where an equitable proceeding is involved.

REVISED UNIF. P'SHIP. ACT § 701 (1997).

177. *See* Vuotto & Maier, *supra* note 157 (exploring what facts should constitute extraordinary circumstances to give rise to the application of discounts in business valuations).

178. However, one would expect that if the underlying valuation of the company is properly done, such unique features already would be taken into account in the underlying valuation of the company, making it unnecessary to again reflect the factors in the form of a marketability discount.

179. Some courts, however, have taken the position that consideration of goodwill in the valuation process is inappropriate because the goodwill belongs to the enterprise and is not an asset belonging to the individual participant. *See* Brown v. Corrugated Box, Inc., 91 Cal. App. 3d 477, 488 (Cal. Ct. App. 1979) (holding that the loss of goodwill that would occur if a controlling shareholder were to leave should not be considered in valuing a company upon disassociation by minority shareholders).

180. REVISED UNIF. P'SHIP. ACT § 701, cmt3 (1997). http://www.law.upenn.edu/bll/archives/ulc/uparta/1997act_final.htm.

As indicated in Part IV.B, the ALI provides that in the corporate arena, the marketability discount should be disallowed in the appraisal remedy except in extraordinary cases.[181] If without the marketability discount there would be an unfair wealth transfer from the remaining shareholders to the departing LLC member, it has been argued that the marketability discount should apply.[182] According to the ALI Comments, this exception is limited to cases where a dissenting shareholder has held out to exploit the transaction giving rise to the appraisal, so as to divert value to his or her self at the expense of other shareholders.[183] The ALI Comment posits that a minority shareholder who exploits a relatively minor certificate change can trigger an appraisal. The appraisal's fair value will likely be higher than the company's fair market value, due to the company's financially troubled, illiquid condition.[184]

Although the ALI Comment is somewhat obtuse, it appears to address a situation involving bad faith or manipulation on the part of a minority. Perhaps a similar type of manipulation could occur in connection with an LLC. Some LLC statutes contain dissenter's rights.[185] Perhaps a manipulative minority LLC member could seek an appraisal to obtain a higher buy-out price where the fair market value would be lower because, for example, the LLC is operating under severe cash constraints. One could posit a situation in which a minority LLC member attempts to exploit an oppression remedy in bad faith in an effort to get cashed out quickly prior to an upcoming sale that is likely to occur at a depressed price due to possible managerial problems or other impediments that are not likely to be reflected in an underlying formal valuation of the LLC. In such cases involving bad faith manipulation, one approach might be to allow a discount because of the extraordinary circumstances. The problem, however, with creating this exception is the difficulty in defining extraordinary circumstances and the potential for re-introducing the very uncertainty that a general prohibition on discounts is intended to avoid.

An alternative approach might be to handle instances of bad faith/misconduct through the imposition of punitive damages and/or to

181. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 7.22 (2010).

182. Advanced Commc'n Design v. Follett, 615 N.W. 2d 285, 292 (Minn. 2000).

183. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 7.22, at cmt e (2010).

184. *See id*.

185. *See* CAL. CORP. CODE § 17604 (Deering 2010) (providing for dissenters' rights with fair market value payment); FLA. STAT. ANN. § 608.4352 (LexisNexis 2010) (providing for appraisal rights subject to limitations); GA. CODE ANN. § 14-11-603(a) (2010) (providing that the court may decree dissolution of a limited liability company); MINN. STAT. § 322B.386 (2007) (using the term fair value); N.D. CENT. CODE § 10-32-54 (2010) (using the term fair value); OHIO REV. CODE ANN. § 1705.40, 1705.41 (LexisNexis 2010) (using the term fair cash value); WASH. REV. CODE § 25.15.430 (2010) (using the term fair value).

permit the award of court costs and attorney's fees. Counterclaims for tortious conduct might also be justified in certain extreme cases. Addressing misconduct through punitive damage awards, the award of court costs, and/or through counterclaims may be more honest and transparent than using a discount factor as a "catch-all" adjustment to punish one of the parties.[186] For example, in *Balsamides v. Protameen Chems. Inc.*,[187] two fifty-percent owners of a corporation began feuding when they brought their sons into their business.[188] The feud degenerated into physical violence.[189] The case was an unusual one because Balsamides was not a minority owner, yet was considered an oppressed shareholder under New Jersey's applicable oppression statute. In an unusual twist, the court ordered Balsamides, the oppressed party, to purchase the shares of Perle, the other fifty-percent owner.[190] The New Jersey Supreme Court affirmed the use of a marketability discount which had the effect of lowering the price at which plaintiff was to purchase the defendant's stock. The court in effect decided that it should take into account fairness and equity and on that basis, it was equitable to give Balsamides a minority discount in the price he should pay Perle.[191]

The *Balsamides* decision has been criticized for being inappropriately punitive, and such criticism appears to be well-deserved.[192] The marketability discount should not be used as a punitive measure in an indirect manner which in effect imposes hidden punitive damages. The Minnesota Supreme Court has similarly struggled to define extraordinary circumstances justifying a marketability discount in the context of oppression. In *Advanced Communication Design v. Follett*,[193] the Minnesota Supreme Court concluded that the marketability discount should apply to the corporation's buy-out of the minority shareholder. The marketability discount was necessary to prevent an unfair transfer of wealth to the minority shareholder.[194] Without the marketability discount, the

186. *See* Mullenberg v. Bikon Corp., 669 A. 2d 1382, 1390 (N.J. 1996) (ordering the minority to buy-out the majority). *See also* Moll, *supra* note 3, at 297 (discussing the considerable disagreement regarding the appropriateness of a discount).

187. Balsamides v. Protameen Chems. Inc., 734 A.2d 721 (N.J. 1999)

188. *Id*. at 721-22.

189. *Id*. at 723-24.

190. *Id*. at 723. *See also id*. at 725-726 (discussing defendant's refusal to provide technical information to customers, his refusal to stock inventory that plaintiff's customers ordered, his sale of carbopol to his son in violation of a distribution agreement with a major customer, and defendant's son's disparaging treatment of plaintiff intending to embarrass plaintiff and harm his relationships with customers).

191. Vuotto and Maier, *supra* note 157.

192. Moll, *supra* note 3, at 297.

193. *See* Advanced Comm'n Design v. Follett, 615 N.W.2d 285, 289 (Minn. 2000) (discussing the appropriateness of a marketability discount).

194. *Id*. at 285.

valuation would have been more than five times the total net worth of the corporation and seven times its average annual net income.[195] According to the Minnesota Supreme Court, several factors should be considered in the determination of whether extraordinary circumstances warrant the marketability discount. Such factors include whether the buying or selling shareholder has acted in a manner that is unfairly oppressive or has reduced the value of the company, whether the oppressed shareholder has additional remedies, and whether any condition of the buy-out, including price, would be unfair to the remaining shareholders because it would be unduly burdensome to the company.[196]

It is commendable that the court did not accept an obviously misguided value for the business in question in *Advanced Communication Design*. However, guidelines on the issue of valuation should not turn on whether the controlling shareholder engaged in unfairly prejudicial conduct. The nature and scope of the alleged oppressive conduct is relevant to the question of whether the minority should be entitled to the remedy of a judicial dissolution or buy-out, but should not have a bearing on the valuation question.

Perhaps in substance, the court in *Advanced Communication Design* is not really applying a discount as such, but rather is making its own equitable adjustments based upon the facts and circumstances presented and the parties' misconduct in the case. Such judicial adjustments could inject an unfortunate degree of uncertainty and lack of predictability in the valuation process that is particularly inappropriate for LLCs. As indicated above, a more direct and honest approach to misconduct may be to seek court costs, attorney's fees, and/or an award of punitive damages as an offset to the purchase price, or to encourage a counterclaim for damages where there has been tortious conduct or a breach of contract.

In summary, it is appropriate for the valuation of a privately-held business to take into account special features that are unique to the business, whether having to do with the age or quality of management, unique contractual rights, or facts and circumstances dealing with goodwill. If a minority investor is taking goodwill with him, the valuation of the business should be adjusted accordingly. However, these sorts of adjustments should not be made twice—first in the determination of the underlying value of the business and then again by applying a discount. Also, in an equitable proceeding, some judicial discretion in the interests of fairness and equity may be appropriate regarding payment terms, etc. However, a broad exception to the prohibition on the marketability discount for "extraordinary circumstances" is not recommended because it

195. *Id*. at 293-94.
196. *Id*.

would reintroduce uncertainty in the LLC valuation process. It is true that the objectives of fairness and equity should not be overlooked in connection with valuations arising in oppression cases or divorce—"leaving fairness out of the law is a little like asking Mrs. Lincoln if she otherwise liked the show."[197] However, if there has been bad faith, a breach of contract, or tortious conduct, it should be dealt with straightforwardly, and an award of compensatory and/or punitive damages should be sought.

D. Judicial Guidance Specific to the LLC

Many courts are likely to confront the minority discount dilemma as a question of first impression when involving an LLC investor. In deciding how to value the LLC investor's LLC interest, courts should first consider the provisions contained in the LLC operating agreement given the contractual mandate and contractual orientation of most LLC legislation.[198] Many statutes expressly reflect a policy of giving maximum effect to the terms of the LLC operating agreement.[199] Absent fraud or bad faith or other unforeseen special circumstances, courts should make every effort to enforce the buy-out valuation terms contained in the LLC operating agreement.[200] Absent guidance from an LLC operating agreement, the

197. C.A.E. Goodhart, *Economics, and the Law: Too Much One-Way Traffic?* 60 MOD. L. REV. 1, 12 (1997). *See also* Miller, *supra* note 152, at 1650 (citing Goodhart).

198. *See* Elf Atochem Am., Inc. v. Jaffari, 727 A.2d 286 (Del. 1999) (emphasizing the contractual policy underlying the Delaware LLC statute and the intent to give the parties the discretion to contractually define their relationship). *See also* Am. Aglian Envtl. Techs. v. Envtl. Mgmt. Corp., 412 F. 3d 956, 962 (8th Cir. 2005) (holding that provisions in an operating agreement are designed to achieve finality); Bootheel Ethanol Inv., LLC v. Semo Ethanol Coop., No. 1:08CV59SNLJ, 2009 U.S. Dist. LEXIS 11380, at *7-9 (E.D. Mo. Feb. 17, 2009) (emphasizing the role of the contract).

199. COLO. REV. STAT. § 7-80-108(4) (2010); DEL. CODE ANN. tit. 6, § 18-1101(b) (2010); KAN. STAT. ANN. § 17-76, 134(b) (2010); MISS. CODE ANN. § 79-1201(2) (2010); N.H. REV. STAT. ANN. § 304-C:78(II) (2010); N.J. STAT. ANN. § 42:2B-66(a) (West 2010); OKLA. STAT. ANN. tit. 18, § 2058(D) (West 2010); 15 PA. CONS. STAT. ANN. § 8913 (West 2010) (comment on paragraph 8); UTAH CODE ANN. § 48-2c-1901 (LexisNexis 2010); WASH. REV. CODE ANN. § 25.15.800(2) (LexisNexis 2010).

200. Some state legislation expressly refers to the parties' relevant contractual provisions. *See* N.D. CENT. CODE § 10-32-119 (2)(a) (2008) ("If the articles of organization, a member-control agreement, or another agreement state a price for the redemption or buyout of membership interests, the court shall order the sale for the price and on the terms set forth, unless the court determines that the price or terms are unreasonable under all the circumstances of the case."). *See also* 805 ILL. COMP. STAT. ANN. § 180/35-65 (LexisNexis 2008) (indicating that the court should "determine the fair value of the interest, considering among other relevant evidence the going concern value of the company, any agreement among some or all of the members fixing the price or specifying a formula for determining value of distributional interests for any other purpose, the recommendations of any appraiser appointed by the court, and any legal constraints on

court should next consider whether the applicable LLC statute contains valuation provisions that become operative in the absence of an operating agreement. In interpreting buy-out language contained in the LLC statute, prior interpretations under both the jurisdiction's corporate and/or partnership statutes may be helpful.

As indicated earlier, except for California and Utah which expressly state that the buyout of the LLC interest should be at fair market value, most LLC statutes are silent as to how the dissociating member's interest should be valued.[201] Under these circumstances, courts should look to the state's corporate oppression and dissenters' rights precedents as well as the state's partnership dissociation provisions. It may be helpful to factor in the policy reasons described above in support of a general prohibition of the minority and marketability discounts in the oppression context and possibly, in the divorce setting as well.[202]

the company's ability to purchase the interest"); MINN. STAT. ANN. § 322B.833 Sub. 2 (West 2010) (discussing the court's ability to, upon motion by a limited liability company or a member, order a sale of membership interests).

201. *See infra* Appendix E.

202. *See supra* Part VI; Swope v. Siegel-Robert, Inc., 243 F.3d 486, 493 (8th Cir. 2001) (finding that the lower court did not err in declining to apply a marketability discount); Arnaud v. Stockgrowers State Bank of Ashland Kansas, 992 P.2d 216 (Kan. 1999) (indicating that fair value should be used and minority and marketability discounts not applied in a case involving a reverse stock split that was deliberately designed to squeeze out the minority shareholders because application of the discounts would have penalized the minority and unfairly enriched the majority); Joseph W. Anthony & Karlyn V. Boraas, *Betrayed, Belittled . . . But Triumphant: Claims of Shareholders in Closely Held Corporations*, 22 WM. MITCHELL L. REV. 1173, 1186 (1996) (discussing that there is no ready market for closely held corporations); Marilyn B. Cane & Peter Ferola, *An Appraisal of "Fair Value" in the Revised Corporate Appraisal Statute Section 1.01, Model Business Corporation Act*, 30 NOVA L. REV. 333, 347 (2006) (arguing that the 1998 Revised Model Corporation Act (RMBCA) indicates that discounts are inappropriate in appraisal transactions as a whole in MODEL BUS. CORP. ACT § 13.01(4) & cmt. 2); John C. Coates, *"Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251, 1255 (1999) (discussing the importance and unpredictability of the minority discount); Harry J. Haynsworth, *Valuation of Business Interests*, 33 MERCER L. REV. 457, 459 (1982) (showing that in an oppression setting there is no willing seller and buyer); William S. Monnin-Browder, *Are Discounts Appropriate?: Valuing Shares in Close Corporations for the Purpose of Remedying Breach of Fiduciary Duty Under Massachusetts Law*, 40 SUFFOLK U. L. REV. 723, 734 (2007) (discussing several rationales offered by courts in rejecting application of discounts); Barry M. Wertheimer, *The Shareholders Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 636-37 (1998) (discussing the unreliability of market price due to fluctuations and susceptibility to manipulation by insiders or majority shareholders).

VI. LEGISLATIVE RECOMMENDATIONS: THE PURCHASE IN LIEU OF DISSOLUTION

To facilitate the efficient resolution of LLC member disputes, it is suggested that LLC judicial dissolution provisions be amended to include a buyout option in lieu of a judicial dissolution of the entity. This amendment would harmonize LLC provisions with many corporate oppression statutes.[203] Such a provision should be incorporated into the Uniform Limited Liability Company Statute.[204] In addition, states should consider harmonizing the valuation language among their partnership, corporate, and LLC statutes. The National Conference of Commissioners on Uniform State Laws has recently begun a project to harmonize business entity legislation.[205] A review of LLC and corporate judicial dissolution provisions reveals that most LLC statutes do not contain provisions for a buyout in lieu of a judicial dissolution and many are silent with regard to how a valuation would proceed if a buyout were to occur.[206]

In many of the states in which the LLC statute is silent regarding valuation, there are corporate statutes that do address valuation in corporate dissolution provisions and/or corporate dissenters' rights provisions. It would be helpful to courts if legislatures rationalized these differences. A number of states such as Alaska, Arizona, Connecticut, Hawaii, Iowa, Maine, Montana, New Hampshire, New Jersey, New York, and West Virginia have an express LLC judicial dissolution that does not authorize a buyout in lieu of a judicial dissolution. These states, however, do have corporate mechanisms that offer a buyout at "fair value" in lieu of a judicial dissolution.[207]

Minnesota and North Dakota are in the minority by having consistent LLC and corporate provisions that offer a buyout at fair value in lieu of judicial dissolution. Such symmetry is usually lacking. The Utah LLC statute uses "fair market value" in its LLC statute governing the purchase

203. *See infra* Appendix D. Harry Haynsworth IV, Chair of the Harmonization Committee of the National Conference of Commissioners on Uniform State Laws, has long recommended this type of buyout in lieu of dissolution provisions. *See* NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, HARMONIZED BUSINESS ORGANIZATIONS ACT (2011), *available at* http://www.law.upenn.edu/bll/archives/ulc/hobe/2011jan_huba.pdf (proposing a harmonized single code of entity laws).

204. Although the Uniform Limited Liability Company Statute includes a judicial dissolution provision triggering a right to a judicial dissolution in the event of unfairly prejudicial or oppressive conduct, it does not include an express mechanism authorizing a buyout in lieu of a judicial dissolution.

205. NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, HARMONIZED BUSINESS ORGANIZATIONS ACT, *available at* http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=336.

206. *See infra* Appendix E.

207. *Id*.

of an LLC interest in lieu of a dissolution, but uses "fair value" in comparable corporate provisions and in its corporate appraisal statute.[208] As in Florida, different statutory language governing judicial dissolutions may appear in corporate and LLC statutes and still other statutory valuation formulations may appear in the state's corporate statutory appraisal provisions. I suggest that legislators compare buyout provisions in a state's corporate appraisal provisions, corporate dissolution provisions, and in partnership statutes.

In addition, the judicial dissolution provisions of the Revised Model Business Corporation Statute and the Revised Uniform Limited Liability Company Act should be revisited. As already mentioned, the Revised Model Business Corporation Act provides for a buyout at fair value in lieu of a dissolution, whereas the Revised Uniform Limited Liability Act does not.[209] Purchase in lieu of dissolution is a highly desirable provision because it holds the promise of reducing complex and protracted litigation leading up to the buyout. Given the policy analyses offered above, I suggest that the Revised Model Business Corporation Act and the Revised Uniform Limited Liability Company Act should be harmonized to prohibit the minority and marketability discounts generally, subject to an exception for the marketability discount in extraordinary instances—an approach that would be largely consistent with the ALI and the UPA.

All members of the legal community, whether legislators, lawyers, or courts, should be mindful that creditors and the public at large have vested interests in the financial vitality of privately-owned businesses and the timely and successful resolution of internal disputes. The latest financial crisis highlights the interrelatedness of business enterprises and the degree to which the health of one business can affect that of another. Swift and viable buyout arrangements are in the best interest of all stakeholders in the economy. Some legislation has attempted to encourage flexible buyout terms by authorizing courts to provide for installment sales where it is in the interest of equity to do so.[210] Further, it may be helpful to incorporate language that awards reasonable attorneys fees and the fees of appraisers or other experts where one of the parties has acted arbitrarily or not in good faith. The statutory authorization of punitive damages may be another tool

208. *Compare* UTAH CODE ANN. § 48-2C-1214 (LexisNexis 2010) (applying "fair market value" in elections to purchase in lieu of dissolution of an LLC) *with* UTAH CODE ANN. § 16-10a-1434 (LexisNexis 2010) (applying "fair value" in comparable provision).

209. *See* REVISED UNIF. LTD. LIAB. CO. ACT § 701(a)(5), *available at* http://www.law.upenn.edu/bll/archives/ulc/ullca/2006act_final.htm (providing for dissolution upon application by a member).

210. *See* N.D. CENT. CODE ANN. § 10-32-119(2) (2010) (providing for the court to use equitable discretion in determining an installment payment schedule where parties have failed to agree).

to deter obstructionist or deceptive conduct that unnecessarily prolongs and complicates disputes arising in the divorce or oppression contexts.[211]

VII. CONCLUSION

Against the backdrop of soaring LLC filings, judicial and legislative guidelines are needed to determine the value of an LLC interest in controversies involving LLC dissenters' rights, LLC oppression cases, and in suits for an equitable distribution of property. There is a split of authority in valuation guidelines under the Model Business Corporation Act on one hand, and under the American Principles of Corporate Governance and the Uniform Partnership Act on the other. This article argues that the minority discount should be disregarded in LLC oppression and dissenters' rights cases because such buyouts are coercive, there is a need to deter oppressive majority conduct, and the minority discount injects uncertainty into the valuation process. The goal of such buyouts is not to closely simulate a market sale, but rather, to provide a sensible remedy for the deprivation of an investment that the LLC owner would have otherwise continued to own. The need to deter oppressive conduct by a prohibition of the minority discount is lacking in the divorce context, but the uncertainty problem is present in divorce as well as in oppression contexts. Similarly, the marketability discount should be disregarded as a general rule in oppression cases and in divorce contexts to prevent double-counting the impact of a restricted market, to avoid under-compensating the active minority or the spouse of a minority owner, and to preclude market-related adjustments for family firms to which outside markets are largely irrelevant. Although adjustments to value appear appropriate in recognition of the unique characteristics of management and to reflect the specific facts and circumstances surrounding goodwill, such adjustments should not be made twice—first when valuing the underlying business and then again through a discount. Judicial discretion to achieve reasonable and equitable payment terms may be appropriate in an equitable proceeding; however, a broadly-conceived exception for a marketability discount based on "extraordinary circumstances" is not recommended.

211. *See* TENN. CODE ANN. § 61-1-701 (2010) (providing for the award of reasonable attorney's fees and the fees and other expenses of appraiser or other experts in the amount the court finds equitable against the party who has acted arbitrarily, vexatiously, or not in good faith). *See also* VA. CODE ANN. § 50-73 (2010) (providing for award of reasonable attorney's fees and other expenses for circumstances matching the statutory language of Tennessee); WASH. REV. CODE § 25.05.250 (2010) (providing for the award of reasonable attorney's fees and other expenses for circumstances matching the statutory language of Tennessee); W. VA. CODE § 47B-7-1 (LexisNexis 2009) (providing for award of reasonable attorney's fees and other expenses for circumstances matching the statutory language of Tennessee).

Counterclaims for tortious conduct, the award of punitive damages, and a demand for court costs or attorney's fees may be an important way of deterring bad faith and/or opportunistic conduct on either side of a divorce or oppression action. The award of punitive damages or a well-fashioned counterclaim for tortious conduct may provide a more appropriate and transparent means of addressing misconduct than a hazy application of a "catch-all" marketability discount. Specific statutory recommendations should be considered to rationalize differences among partnership, corporate, and LLC statutes and to deter bad faith and obstructive or deceptive conduct.

APPENDIX A

LLC Statutes Nationwide

STATE	**STATUTORY PROVISIONS**
Alabama	ALA. CODE §§ 10-12-1 to -61 (LexisNexis 1999 & Supp. 2004)
Alaska	ALASKA STAT. §§ 10.50.010–.995 (2004)
Arizona	ARIZ. REV. STAT. §§ 29-601 to -857 (LexisNexis 1998 & Supp. 2007)
Arkansas	ARK. CODE ANN. §§ 4-32-101 to -1401 (2001 & Supp. 2005)
California	CAL. CORP. CODE §§ 17000–17656 (Deering 2006 & Supp. 2008)
Colorado	COLO. REV. STAT. ANN. §§ 7-80-101 to -1101 (West 2007)
Connecticut	CONN. GEN. STAT. ANN. §§ 34-100 to -242 (West 2005 & Supp. 2006)
Delaware	DEL. CODE ANN. tit. 6, §§ 18-101 to -1109 (2005 & Supp. 2006)
District of Columbia	D.C. CODE ANN. §§ 29-1001 to -1075 (LexisNexis 2001 & Supp. 2007)
Florida	FLA. STAT. ANN. §§ 608.401–.705 (West 2007 & Supp. 2008)
Georgia	GA. CODE ANN. §§ 14-11-100 to -1109 (2003 & Supp. 2005)
Hawaii	HAW. REV. STAT. §§ 428-101 to -1302 (2004 & Supp. 2007)
Idaho	IDAHO CODE ANN. §§30-6-101 to -1104 (LexisNexis 2010) effective after 7/1/10, subject to transition rules; *formerly* IDAHO CODE ANN. §§ 53-601 to -672 (2000 & Supp. 2005)
Illinois	805 ILL. COMP. STAT. ANN. 180/1-1 to /60-1 (West 2004 & Supp. 2007)
Indiana	IND. CODE ANN. §§ 23-18-1-1 to -13-1 (LexisNexis 1999 & Supp. 2005)
Iowa	IOWA CODE ANN. §§489.101-.1304 (LexisNexis 2010) adopting the Revised Uniform Limited Liability Company Act; formerly IOWA CODE ANN. §§ 490A.100–.1601 (West 1999 & Supp. 2007)(2)
Kansas	KAN. STAT. ANN. §§ 17-7662 to -76,142 (Supp. 2006)
Kentucky	KY. REV. STAT. ANN. §§ 275.001–.540 (West 2006 & Supp. 2007)
Louisiana	LA. REV. STAT. ANN. §§ 12:1301–:1369 (1994 & Supp. 2008)
Maine	ME. REV. STAT. ANN. tit. 31, §§ 601–762 (1996 & Supp. 2007)

Maryland	MD. CODE ANN., CORPS. ASSN'S §§ 4A-101 to 1103 (LexisNexis 1999 & Supp. 2005)
Massachusetts	MASS. GEN. LAWS ANN. ch. 156C, §§ 1–69 (West 2005 & Supp. 2007)
Michigan	MICH. COMP. LAWS ANN. §§ 450.4101-.5200 (West 2002 & Supp. 2007)
Minnesota	MINN. STAT. ANN. §§ 322B.01-.960 (West 2004 & Supp. 2008)
Mississippi	MISS. CODE ANN. §§ 79-29-101 to -127 (LexisNexis 2010) effective from and after Jan. 1, 2010; *see also* MISS. CODE ANN. §§ 79-29-101 to -1204 (West 1999 & Supp. 2007) effective until Jan 1, 2011
Missouri	MO. ANN. STAT. §§ 347.010-.740 (West 2001 & Supp. 2008)
Montana	MONT. CODE ANN. §§ 35-8-101 to -1307 (2005)
Nebraska	NEB. REV. STAT. §§ 21-2601 to -2653 (Reissue 1989 & Cum. Supp. 2006)
Nevada	NEV. REV. STAT. §§ 86.011–.590 (2007)
New Hampshire	N.H. REV. STAT. ANN. §§ 304-C:1-:85, §§ 304-D:1-:20 (LexisNexis 2005)
New Jersey	N.J. STAT. ANN. §§ 42:2B-1 to -70 (West 2004)
New Mexico	N.M. STAT. ANN. §§ 53-19-1 to -74 (LexisNexis 2001 & Supp. 2005)
New York	N.Y.LTD. LIAB. CO. LAW §§ 101 to 1403 (McKinney 2007 & Supp. 2008)
North Carolina	N.C. GEN. STAT. §§ 57C-1-01 to -10-07 (2003)
North Dakota	N.D. CENT. CODE §§ 10-32-01 to -156 (2007)
Ohio	OHIO REV. CODE ANN. §§ 1705.01 – .58 (LexisNexis 2001)
Oklahoma	OKLA. STAT. tit. 18, §§ 2000 to 2060 (West 1999 & Supp. 2007)
Oregon	OR. REV. STAT. §§ 63.001-.990 (2003)
Pennsylvania	15 PA. CONS. STAT. ANN. §§ 8901 to 8998 (West 1995 & Supp. 2007)
Rhode Island	R.I. GEN. LAWS §§ 7-16-1 to -75 (1999 & Supp. 2005)
South Carolina	S.C. CODE ANN. §§ 33-44-101 to -1208 (2006 & Supp. 2007)
South Dakota	S.D. CODIFIED LAWS §§ 47-34A-101 to -1207 (2007)
Tennessee	TENN. CODE ANN. §§ 48-249-101 to -48-249-1133 (LexisNexis 2010)
Texas	TEX. BUS. ORGS. CODE ANN. §§ 101.001–.552 (Vernon 2007)
Utah	UTAH CODE ANN. §§ 48-2C-101 to -1902 (2002 & Supp. 2005)

Vermont	VT. STAT. ANN. tit. 11, §§ 3001 to 3184 (2007)
Virginia	VA. CODE ANN. §§ 13.1-1000 to -1123 (1999 & Supp. 2005)
Washington	WASH. REV. CODE ANN. §§ 25.15.005-.902 (West 2005 & Supp. 2007)
West Virginia	W. VA. CODE ANN. §§ 31B-1-101 to -13-1306 (LexisNexis 2003 & Supp. 2005)
Wisconsin	WIS. STAT. ANN. §§ 183.0102–.1305 (West 2002 & Supp. 2007)
Wyoming	WYO. STAT. ANN. §§ 17-15-101 to -147 (2007); *see also* Wyoming Close Limited Liability Company Supplement 17-25-101 to -111 (LexisNexis 2010)

APPENDIX B

LLC Dissolution in Event of Deadlock, Oppressive Behavior or Other Stated Misconduct

STATE	**STATUTORY PROVISION**
Arizona	ARIZ. REV. STAT. ANN. 29-785 A.2-A4 cmt. A (LexisNexis 2007) Comment a *
California	CAL. CORP. CODE 17351(a)(2), (4), (5) (LexisNexis 2007) Comment b *
Florida	FLA. STAT. ANN. § 608.449(b)(2) (LexisNexis 2007) Comment c
Hawaii	HAW. REV. STAT. § 428-801(E) (LexisNexis 2007) Comment d *
Idaho	IDAHO CODE ANN. § 30-6-701(e)(2009) *
Iowa	IOWA CODE ANN. § 489.701(e)(2009) *
Illinois	805 ILL. COMP. STAT. 180/35-1(4)(E) (LexisNexis 2007) Comment f *
Kansas	KAN. STAT. ANN. §§ 17-76,117 (LexisNexis 2007) Comment g
Maine	ME. REV. STAT. ANN. tit. 31, §702(2007) Comment h
Michigan	MICH. COMP. LAWS ANN. §§ 450.4802 & 450.4803 (West 2007) Comment i
Minnesota	MINN. STAT. ANN. §§ 322B.833 (LexisNexis 2006) Comment j
Mississippi	MISS. CODE ANN. §§ 79-29-802(b) (LexisNexis 2007) Comment k *
Missouri	MO. ANN. STAT. §§ 347.143(1) (LexisNexis 2007) Comment l *
Montana	MONT. CODE ANN. §§ 35-8-902(1)(e) (2005) Comment d *
New Hampshire	N.H. REV. STAT. ANN. §§ 304-C:51 (LexisNexis 2007) Comment m
North Carolina	N.C. GEN. STAT. §§ 57C-6-02 (2008) Comment n
North Dakota	N.D. CENT. CODE §§ 10-32-119 (2007) Comment o
Oregon	OR. REV. STAT. 63.661(1)(2005) Comment p
South Carolina	S.C. CODE ANN. §33-44-801 (LexisNexis 2006) Comment q *
South Dakota	S.D. CODIFIED LAWS §§ 47-34A-801(a)(4)(iv) (LexisNexis 2007) Comment d *
Tennessee *	TENN. CODE ANN. §§ 48-249-616 (LexisNexis 2008) Comment r
Utah	UTAH CODE ANN. §§ 48-2c-1210 (LexisNexis 2007) Comment s *
Vermont	VT. STAT. ANN. tit. 11, §§ 3001 (5)(E) (LexisNexis 2007) Comment d *
West Virginia	W.VA. CODE §§ 31B-1-801(b)(5)(v) (LexisNexis 2007) Comment d *
Wisconsin	WIS. STAT. ANN. §§ 183.0902(4) (LexisNexis 2006) Comment d
Wyoming	WYO. STAT. ANN. §§ 17-29-701 (2007) Comment t *

* Also contains not reasonably practicable language

a. Agreement can alter; deadlock, illegal or fraudulent behavior, waste, misapplication or diversion of assets.
b. Reasonably necessary for protection of rights of complaining members; persistent and pervasive fraud, mismanagement, or abuse of authority. Excludes term "oppressive."
c. Deadlock, misappropriation or waste of assets. Excludes term "oppressive."
d. Illegal, oppressive, fraudulent, or unfairly prejudicial.
e. Deadlock, illegal, oppressive, or fraudulent and irreparable injury suffered or threatened.
f. Illegal, oppressive, or fraudulent conduct.
g. Irreparable harm, deadlock language.
h. Deadlock, illegal or fraudulent conduct, misapplication or waste of assets, abandonment of business.
i. Whenever company is unable to carry on business in conformity with articles or operating agreement. Where Procured articles by fraud, repeatedly and willfully exceed authority, conduct business unlawfully; statute doesn't exclude other statutory or common law grounds for dissolution.
j. Governors or those in control acted fraudulently, illegally, or unfairly prejudicial in capacities as members or governors or as managers or employees of a closely held LLC, an LLC having no more than 35 members as defined per 322B.03.
k. Knowingly countenanced persistent and pervasive fraud, abuse of authority, persistent unfairness toward any member, or misapplication or waste of property.
l. Procured articles through fraud, exceeded legal authority, conducted business in fraudulent or illegal manner, abuse of powers contrary to public policy.
m. Deadlock and irreparable damage or affairs no longer conducted to company's advantage or procured articles through fraud, exceeded legal authority, committed violation that forfeits certificate, conducted business in fraudulent or illegal manner, or abuse of powers contrary to public policy.
n. Deadlock and irreparable injury, or deadlock and business no longer conducted to the advantage of members, liquidation necessary to protect rights of complaining member, assets misapplied or wasted, or articles or LLC agreement entitle complaining members to the dissolution.

o. Deadlock, fraudulent, illegal, or unfairly prejudicial conduct as managers or employees of a closely held LLC, or divided and failure to elect successors, misapplication or waste of assets; closely held LLC defined as a company that does not have more than 35 members per 10-32-02.
p. Obtained articles by fraud, exceed or abuse authority, or not reasonably practicable.
q. Event makes it unlawful to continue, or decree that economic purpose frustrated, another's conduct makes it not reasonably practicable to carry on, it is not otherwise reasonably practicable to carry on, unlawful, oppressive, fraudulent, or unfairly prejudicial conduct.
r. Misconduct is not identified but court is given power to grant equitable relief it considers just and reasonable in the circumstances and/or may direct the dissolved entity be merged into another or a new entity on terms and conditions it deems equitable.
s. Obtained articles by fraud, exceed authority, violate a law that forfeits charter, carry on business in a persistently fraudulent or illegal manner, abuse of powers, fail to amend articles as required, deadlock, and irreparable injury or affairs no longer conducted to advantage of members, or deadlock for at least 6 months; managers or those in control acting illegal, oppressive, or fraudulent; misapplication or waste of assets, creditor provision. Election to purchase in lieu of dissolution at 48-2C-1214.
t. Applies to LLCs that have not elected to be a closely held LLC under Wyoming's Close Limited Liability Company Supplement. LLCs that have elected close LLC status, dissolution occurs only upon the expiration of the period fixed for the duration of the company, the unanimous agreement of all members, or upon the occurrence of events specified in the operating agreement. WYO. STAT. 17-25-108 (2010).

APPENDIX C

Judicial Dissolution Where Not Reasonably Practicable to Carry on Business

STATE	**STATUTORY PROVISION**
Alabama	ALA. CODE ANN. § 10-12-38 (LexisNexis 2007)
Alaska	ALASKA CODE § 10.50.405 (LexisNexis 2007)
Arizona	ARIZ. REV. STAT. ANN. § 29-785 A.1. (LexisNexis 2007)
Arkansas	ARK. CODE ANN. § 4-32-902 (LexisNexis 2007)
California	CAL. CORP. CODE § 17351(a)(1) (LexisNexis 2007)
Colorado	COLO. REV. STAT. ANN. §§ 7-80-810 (LexisNexis 2007)
Connecticut	CONN. GEN. STAT. ANN. § 34-207 (West 2007)
Delaware	DEL. CODE ANN. tit. 6, §§ 18-802 (LexisNexis 2007)
District of Columbia	D.C. CODE ANN. §§ 29-1048 (LexisNexis 2007)
Florida	FLA. STAT. ANN. § 608.441(3) (LexisNexis 2007)
Georgia	GA. CODE ANN. §§ 14-11-603(a) (LexisNexis 2007)
Hawaii	HAW. REV. STAT. tit. 23A §§ 428-801(4)(A),(B), and (C) (LexisNexis 2007) Comment a
Illinois	805 ILL. COMP. STAT. 180/35-1(4)(A)-(C)(LexisNexis 2007) Comment a
Indiana	IND. CODE ANN. §§ 23-18-9-2 (LexisNexis 2007)
Idaho	IDAHO CODE ANN. § 30-6-701(d) (2009)
Iowa	IOWA CODE ANN. §489.701(1)(d)(2) (2009)
Kentucky	KY. REV. STAT. ANN. §§ 275.290 (LexisNexis 2007)
Louisiana	La. Rev. Stat. Ann. §§ 12:1335 (2007)
Maryland	MD. CODE ANN., CORPS. ASS'NS §§ 4A-903 (LexisNexis 2007)
Massachusetts	MASS. ANN. LAWS ch. 156C, §44 (LexisNexis 2007) Comment b
Michigan	MICH. COMP. LAWS ANN. §§ 450.4802 (West 2007)
Mississippi	MISS. CODE ANN. §§ 79-29-802(a) (LexisNexis 2007)
Missouri	MO. ANN. STAT. § 347.143(2) (LexisNexis 2007)
Montana	MONT. CODE ANN. §§ 35-8-902 (1)(c) (2007)
Nebraska	NEB. REV. STAT. ANN. §§ 21-2622(2) (LexisNexis 2007)
Nevada	NEV. REV. STAT. ANN. §§ 86.495 (LexisNexis 2007)
New Jersey	N.J. STAT. ANN. §§ 42:2B-49 (LexisNexis 2007)
New Mexico	N.M. STAT. ANN. §§ 53-19-40 (LexisNexis 2007)
New York	N.Y. LTD. LIAB. CO. LAW §702 (McKinney 2007)
Ohio	OHIO REV. CODE ANN. §§ 1705.47 (LexisNexis 2007)
Oklahoma	OKLA. STAT. tit. 18, §§ 2038 (LexisNexis 2007)
Oregon	OR. REV. STAT. §§ 63.661(2) (2005)

Pennsylvania	15 PA. CONS. STAT. ANN. §§ 8972 (LexisNexis 2006)
Rhode Island	R.I. GEN. LAWS §§ 7-16-40 (2007)
South Carolina	S.C. CODE ANN. §§ 33-44-801(4)(c) (LexisNexis 2006)
South Dakota	S.D. CODIFIED LAWS §§ 47-34A-801(4)(i)-(iii) (LexisNexis 2007)
Tennessee	TENN. CODE ANN § 48-249-617 (LexisNexis 2008)
Texas	TEX. BUS. ORGS. CODE ANN. §§ 11.314(2) (LexisNexis 2007)
Utah	UTAH CODE ANN. §§ 48-2C-1210(2)(e) (LexisNexis 2007)
Vermont	VT. STAT. ANN. tit. 11, §3101(5)(c) (LexisNexis 2007) Comment c
Virginia	VA. CODE ANN. §§ 13.1047 (LexisNexis 2007)
Washington	WASH. REV. CODE. §§ 25.15.275 (LexisNexis 2008) Comment d
West Virginia	W.VA. CODE §§ 31B-8-801(b)(5)(i),(ii), and (iii) (LexisNexis 2007) Comment a
Wisconsin	WIS. STAT. ANN. §§ 183.0902(1) (LexisNexis 2006)
Wyoming	WYO. STAT. §§ 17-29-701 (2010) Comment e

a. Economic purpose unreasonably frustrated, another member makes it not reasonably practical to continue, or it is not otherwise reasonably practical to continue. Note that West Virginia also gives certain rights to transferees.
b. Not reasonably practicable to carry on in conformity with articles of organization or agreement.
c. Economic purpose unreasonably frustrated; not otherwise practicable to carry on.
d. Not reasonably practicable to carry on in conformity with agreement or other circumstances render dissolution equitable.
e. Applies to LLCs that have not elected to be a closely held LLC under Wyoming's Close Limited Liability Company Supplement. For LLCs that have elected close LLC status, dissolution occurs only upon the expiration of the period fixed for the duration of the company, the unanimous agreement of all members, or upon the occurrence of events specified in the operating agreement. WYO. STAT. §§ 17-25-108 (2010).

APPENDIX D

§ 14.34. Election to Purchase in Lieu of Dissolution.

(a) In a proceeding under section 14.30(2) to dissolve a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.

(b) An election to purchase pursuant to this section may be filed with the court at any time within 90 days after the filing of the petition under section 14.30(2) or at such later time as the court in its discretion may allow. If the election to purchase is filed by one or more shareholders, the corporation shall, within 10 days thereafter, give written notice to all shareholders, other than the petitioner. The notice must state the name and number of shares owned by the petitioner and the name and number of shares owned by each electing shareholder and must advise the recipients of their right to join in the election to purchase shares in accordance with this section. Shareholders who wish to participate must file notice of their intention to join in the purchase no later than 30 days after the effective date of the notice to them. All shareholders who have filed an election or notice of their intention to participate in the election to purchase thereby become parties to the proceeding and shall participate in the purchase in proportion to their ownership of shares as of the date the first election was filed, unless they otherwise agree or the court otherwise directs. After an election has been filed by the corporation or one or more shareholders, the proceeding under section 14.30(2) may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of his shares, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit such discontinuance, settlement, sale, or other disposition.

(c) If, within 60 days of the filing of the first election, the parties reach agreement as to the fair value and terms of purchase of the petitioner's shares, the court shall enter an order directing the purchase of petitioner's shares upon the terms and conditions agreed to by the parties.

(d) If the parties are unable to reach an agreement as provided for in subsection (c), the court, upon application of any party, shall stay the section 14.30(2) proceedings and determine the fair value of the petitioner's shares as of the day before the date on which the petition under section 14.30(2) was filed or as of such other date as the court deems appropriate under the circumstances.

(e) Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate, which may include payment of the purchase price in installments, where necessary in the interest of equity, provision for security to assure payment of the purchase price and any additional costs, fees, and expenses as may have been awarded, and, if the shares are to be purchased by shareholders, the allocation of shares among them. In allocating petitioner's shares among holders of different classes of shares, the court should attempt to preserve the existing distribution of voting rights among holders of different classes insofar as practicable and may direct that holders of a specific class or classes shall not participate in the purchase. Interest may be allowed at the rate and from the date determined by the court to be equitable, but if the court finds that the refusal of the petitioning shareholder to accept an offer of payment was arbitrary or otherwise not in good faith, no interest shall be allowed. If the court finds that the petitioning shareholder had probable grounds for relief under paragraphs (ii) or (iv) of section 14.30(2), it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts employed by him.

(f) Upon entry of an order under subsections (c) or (e), the court shall dismiss the petition to dissolve the corporation under section 14.30, and the petitioning shareholder shall no longer have any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded to him by the order of the court which shall be enforceable in the same manner as any other judgment.

(g) The purchase ordered pursuant to subsection (e), shall be made within 10 days after the date the order becomes final unless before that time the corporation files with the court a notice of its intention to adopt articles of dissolution pursuant to sections 14.02 and 14.03, which articles must then be adopted and filed within 50 days thereafter. Upon filing of such articles of dissolution, the corporation shall be dissolved in accordance with the provisions of section 14.05 through 14.07, and the order entered pursuant to subsection (e) shall no longer be of any force or effect, except that the court may award the petitioning shareholder reasonable fees and expenses in accordance with the provisions of the last sentence of subsection (e) and the petitioner may continue to pursue any claims previously asserted on behalf of the corporation.

(h) Any payment by the corporation pursuant to an order under subsections (c) or (e), other than an award of fees and expenses pursuant to subsection (e), is subject to the provisions of section 6.40.

APPENDIX E

LLC, Corporate, and Partnership Statutes Authorizing a Judicial Dissolution

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Alabama LLC	ALA. CODE ANN. § 10-12-38 (LexisNexis 2007)		
Alabama Corporate	ALA. CODE § 10-2B-14.30 (LexisNexis 2007)		
Alabama Partnership			ALA. CODE § 10A-8-7.01 (effective Jan 1, 2011). Departs from RUPA language, providing for a buyout at "fair value."
Alaska LLC	ALASKA CODE § 10.50.405 (LexisNexis 2007)		
Alaska Corporate			ALASKA CODE § 10.06.628 (LexisNexis 2008) and 10.06.630 (LexisNexis 2008)**
Alaska Partnership		ALASKA CODE § 32.06.70 (2010) Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold without dissociating partner.	
Arizona LLC	Ariz. Rev. Stat Ann. § 29-785 A.1-A.4		
Arizona Corporate			ARIZ. REV. STAT. § 10-1430 & §10.1434 (LexisNexis 2008) Authorizes buyout but doesn't specify the value.

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Arizona Partnership			
Arkansas LLC	ARK. CODE ANN. § 4-32-902 (LexisNexis 2007)		
Arkansas Corporate	ARK. CODE ANN. § 4-27-1430 (LexisNexis 2008)		
Arkansas Partnership		ARK. CODE ANN. § 4-46-701 (2009) Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without the dissociating partner.	
California LLC		CAL. CORP. CODE ANN. § 17351 & § 17604 (2010)	
California Corporate			Cal. Corp. Code § 1800 & 2000**
California Partnership		CAL. CORP. CODE § 16701 (Deering 2009) Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Colorado LLC	COLO. REV. STAT. ANN. § 7-80-810 (LexisNexis 2007)		
Colorado Corporate	COLO. REV. STAT. § 7-114-301 (LexisNexis 2007)		
Colorado Partnership		COLO. REV. STAT. § 7-64-701 (2009) Buyout price is the amount equal to the value of the partner's interest.	

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Connecticut LLC	CONN. GEN. STAT. ANN. § 34-207 (West 2007)		
Connecticut Corporate			CONN. GEN. STAT. ANN. § 33-900 (West 2008)**
Connecticut Partnership		Conn. Gen. Stat. Ann. § 34-362(2009) Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without the dissociated partner.	
Delaware LLC	DEL. CODE ANN. tit. 6 § 18-802		
Delaware Corporate	DEL. CODE ANN. tit. 8 § 273 (LexisNexis 2008)		
Delaware Partnership			DEL. CODE ANN. tit. 6 § 15-701 (2010) Buyout at fair value of such partner's economic interest as of the date of dissociation based on the partner's right to share in distributions.
District of Columbia LLC	D.C. CODE ANN. § 29-1048 (LexisNexis 2008)		
District of Columbia Corporate	D.C.CODE ANN. § 29-101.88 (LexisNexis 2008)		
District of Columbia Partnership		D.C. CODE ANN. § 33-107.01 (2010). Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociating partner.	

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Florida LLC	FLA. STAT. ANN. § 608.449(2)(a)-(b) *		
Florida Corporate			Fla. Stat. Ann. §§ 607.1430, 607.1434, and 607.1436(2010) *
Florida Partnership		FLA. STAT. ANN. § 620.8701 (2010) Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Georgia LLC	GA. CODE ANN. § 14-11-603(a) (LexisNexis 2007) *But see* GA. CODE ANN. § 14-11-1108 (2008) Provides Dissenters' Rights at fair value.		
Georgia Corporate	GA. CODE ANN. § 14-2-1430 (LexisNexis 2008)		
Georgia Partnership		GA. CODE ANN. § 14-8-42 (2010) Other Language: "The withdrawn partner or legal representative . . . shall receive . . . an amount equal to the value of his interest."	
Hawaii LLC	HAW. REV. STAT. tit. 23A, §§ 428-801 (LexisNexis 2008)		
Hawaii Corporate			HAW. REV. STAT. tit. 23, §§ 411-414 & 414-415 (LexisNexis 2008) **

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Hawaii Partnership		HAW. REV. STAT. tit. 23, § 425-133 (LexisNexis 2010) Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Idaho LLC	ID CODE ANN. §§ 53-643 (2008)		
Idaho Corporate			ID CODE ANN. §S 30-1-1430 & §30-1-1434 (LexisNexis 2008) **
Idaho Partnership		ID CODE ANN. § 53-3-701 (2010) Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Illinois LLC			805 ILL. COMP. STAT. ANN. §§ 180/35-60 & 180/35-65 (LexisNexis 2008)** Allows for reasonable expenses if arbitrary, vexatious or conduct not in good faith.
Illinois Corporate			805 ILL. COMP. STAT. ANN. §§ 5/12.55 & 5/12.56 (LexisNexis 2008) *****

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Illinois Partnership		Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Indiana LLC	IND. CODE ANN. § 23-18-2 (LexisNexis 2008)		
Indiana Corporate	IND. CODE ANN. § 23-1-47-1 (LexisNexis 2008)		
Indiana Partnership		IND. CODE ANN. § 23-4-1-42 (2010) Unif. P'ship Act Other Language: Upon retirement or death . . . right to the "value of his interest."	
Iowa LLC	IOWA CODE ANN. § 490A.1302 (LexisNexis 2008)		
Iowa Corporate			IOWA CODE ANN. §§ 490.1430 & 490/1434 (2008) **
Iowa Partnership		IOWA CODE ANN. § 486A.701(2010) Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Kansas LLC	KANSAS STAT. ANN. §§ 17-76, 117 (LexisNexis 2008)		
Kansas Corporate	KAN. STAT. ANN. § 17-6808 (LexisNexis 2007) General authority to dissolve but no specific oppression or deadlock triggers.		

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Kansas Partnership		KAN. STAT. ANN. § 56a-701 (2009). Other Language: Follows RUPA §7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Kentucky LLC	KY. REV. STAT. ANN. § 275.290 (LexisNexis 2008)		
Kentucky Corporate	KY. REV. STAT. ANN. § 271B.14-300 (LexisNexis 2008)	KY. REV. STAT. ANN. § 362.355 (2010)	
Kentucky Partnership		Ky. Rev. Stat. Ann. § 362.355 (2010). Other Language: Upon retirement or death . . . right to the "value of his interest."	
Louisiana LLC	LA. REV. STAT. ANN. § 12:1335 (LexisNexis 2008)		
Louisiana Corporate	LA. REV. STAT. ANN. § 12:143 (LexisNexis 2008)		
Maine LLC	ME. REV. STAT. tit. 31, § 702 (LexisNexis 2008)		
Maine Corporate			ME. REV. STAT. tit. 13-C, § 1430 (LexisNexis 2008) and ME. REV. STAT. tit. 13-C §1434 (LexisNexis 2008) ***
Maine Partnership		ME. REV. STAT.tit. 31 §1071 (2009). Other Language: Follows RUPA § 7.01. Buyout at greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Maryland LLC	MD. CODE ANN. § 4A-903 (LexisNexis 2008)		
Maryland Corporate	MD. CODE ANN. § 3-413 (LexisNexis 2008)		
		MD. CODE ANN. § 9A-701 (2010) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Massachusetts LLC	MASS. ANN. LAWS ch. 156C, § 44 (LexisNexis 2008)		
Massachusetts Corporate	MASS. ANN. LAWS ch. 156D, § 14.30 (LexisNexis 2008)		
Massachusetts Partnership		MASS. ANN. LAWSch. 108A § 42 (2010) Other Language: Upon retirement or death "right to the value of his interest."	
Michigan LLC	MICH. COMP. LAWS ANN. § 450.4802 (LexisNexis 2008)		
Michigan Corporate	MICH. COMP. LAWS § 450.1823 (LexisNexis 2008)		
Michigan Partnership		MICH. COMP. LAWS § 449.42 (2010) Other Language: Retiring or deceased partner entitled to the "value of his interest."	

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Minnesota LLC			MINN. STAT. ANN. § 322B.833 (LexisNexis 2008)** *See also* § 322B.386 (2007) Provides Dissenters' Rights at fair value.
Minnesota Corporate			MINN. STAT. ANN. § 302A.751 (LexisNexis 2007)**
Minnesota Partnership		MINN. STAT. ANN. § 323A.0701 (2009) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Mississippi LLC	MISS. CODE ANN. § 79-29-802 (LexisNexis 2008)		
Mississippi Corporate			MISS. CODE ANN. § 79-4-14.34 (LexisNexis 2008)**
Mississippi Partnership		MISS. CODE ANN. § 79-13-701 (2010) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Missouri LLC	MO. ANN. STAT. § 347.143 (LexisNexis 2008)		
Missouri Corporate	MO. ANN. STAT. § 351.494 (LexisNexis 2008)		

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Missouri Partnership		MO. ANN. STAT. § 358.420 (2010) Other Language: Retiring or deceased partner entitled to the value of his interest.	
Montana LLC	MONT. CODE ANN. § 35-8-902 (LexisNexis 2008)		
Montana Corporate			MONT. CODE ANN. §§ 35-1-938 & §35-1-939 (LexisNexis 2008) **
Montana Partnership		MONT. CODE ANN. § 35-10-619 (2009) Formulation Similar to That in Fed. Income Tax Reg. 20.2031-3: Buy out at greater of liquidation value or value based on sale of entire business as going concern with selling price determined on the basis of the amount that would be paid by a willing buyer to a willing seller, neither being under any compulsion to buy or sell, and with knowledge of relevant fact.	
Nebraska LLC	NEB. REV. STAT. ANN. § 21-2622 (LexisNexis 2008)		
Nebraska Corporate	NEB. REV. STAT. ANN. § 21-20,162 (LexisNexis 2008)		
Nebraska Partnership	NEB. REV. STAT. ANN. § 67-434 (LexisNexis 2010)	Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Nevada LLC	NEV. REV. STAT. ANN. § 86.495 (LexisNexis 2008)		

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Nevada Corporate	NEV. REV. STAT. ANN. § 78-605 (LexisNexis 2008) Generalized court authority.		
Nevada Partnership		Nev. Rev. Stat. Ann. § 87.4346 (2009) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
New Hampshire LLC	N.H.REV. STAT. ANN. § 304:C-51 (LexisNexis 2008)		
New Hampshire Corporate			N.H.REV. STAT. ANN. §§ 293-A:14:30 & 14.34 (LexisNexis 2008)**
New Hampshire Partnership		N.H.Rev. Stat. Ann. § 304-A:42 (2010) Other Language: Retiring or deceased partner entitled to the value of his interest.	
New Jersey LLC	N.J.REV. STAT. ANN. § 42:2B-49 (LexisNexis 2008)		
New Jersey Corporate			N.J.REV. STAT. ANN. § 14A:12-7 (LexisNexis 2008)** Allows for marketability discount; Balsamadies v. Protameen Chemicals, Inc., 734 A. 2d 721(N.J. 1999), rev'g 712 A. 2d 673(N.J. Super. App. Div. 1998).

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
New Jersey Partnership			N.J.REV. STAT. ANN. § 42:1A-34 (2010) Buyout at fair value as of the date of withdrawal based on the right to share in distributions from the partnership unless the partnership agreement provides for a different fair value formula.
New Mexico LLC	N.M. STAT. ANN. § 53-19-40 (LexisNexis 2008)		
New Mexico Corporate	N.M. STAT. ANN. § 53-16-16 (LexisNexis 2008)		
New Mexico Partnership		N.M. STAT. ANN. § 54-1A-701 (LexisNexis 2009) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
New York LLC	N.Y.LT. LIAB. CO. LAW § 702 (LexisNexis 2008)		
New York Corporate			N.Y. BUS. CORP. §§ 1104 & 1104A for dissolution & §1118 for buy-out in lieu of dissolution. ** Allows marketability discount; Raskin v. Walter Karl, Inc., 514 N.Y. S 2d 120 (N.Y. App. 1987).

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
New York Partnership		N.Y. PARTNERSHIP 73 (LexisNexis 2010) Other Language: Retiring or deceased partner entitled to the value of his interest. Note: See Vick v. Albert, 849 N.Y.S. 2d 250(App. Div. 2008) (minority and marketability discounts unavailable; buy out of retiring partner doesn't raise same issues as in corporate appraisal statute).	
North Carolina LLC	N.C. GEN. STAT. § 57C-6-02 (LexisNexis 2008)		
North Carolina Corporate	N.C. GEN. STAT. § 55-14-30 (LexisNexis 2008)		
North Carolina Partnership		N.C. GEN. STAT. § 59-72 (LexisNexis 2010) Other Language: Retiring or deceased partner entitled to the value of his interest.	
North Dakota LLC			N.D. CENT. CODE § 10-32-119 (LexisNexis 2008) *See also* N.D. Cent. Code §10-32-54 (LexisNexis 2008) Provides Dissenters' Rights at fair value.
North Dakota Corporate			N.D.Cent. Code § 10-19.1-115 (LexisNexis 2008)

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
North Dakota Partnership		N.D.Cent. Code § 45-19-01 (2010). Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Ohio LLC	OHIO REV. CODE ANN. § 1705.47 (LexisNexis 2008) *But see* OHIO REV. CODE ANN. §1705.41(2008) Provides Dissenters' Rights at fair cash value.		
Ohio Corporate	OHIO REV. CODE ANN. § 1701.91 (LexisNexis 2008)		
Ohio Partnership		OHIO REV. CODE ANN. § 1776.54 (LexisNexis 2010) Other Language: Based on RUPA. Treated as if partnership sold the assets at a price equal to the greater of the liquidation value or value based on the sale of the entire business as a going concern without dissociated partner.	
Oklahoma LLC	OKLA. STAT. tit. 18, ch. 14, § 2038 (LexisNexis 2008)		
Oklahoma Corporate	OKLA. STAT. tit. 18, ch. 22, § 1094 (LexisNexis 2008)		
Oklahoma Partnership		OKLA. STAT. tit. 54, ch. 1, § 1.701 (LexisNexis 2009) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Oregon LLC	OR. REV. STAT. ANN. § 63.661 (2007)		
Oregon Corporate	OR. REV. STAT. ANN. § 60.661 (2007).		
Oregon Partnership			OR. REV. STAT. ANN. § 67.250 (LexisNexis 2009) Departs from RUPA Language: Buyout price is an amount equal to the fair value of the dissociated partner's interest . . . If the partner has a minority interest . . . the buyout price . . . shall not be discounted.
Pennsylvania LLC			PA. CONS. STAT. ANN. §§ 8933 and 8972 (LexisNexis 2007) Judicial dissolution tied to not reasonably practicable standard but provides for distribution at fair value upon dissociation from LLC.
Pennsylvania Corporate	PA. CONS. STAT. ANN. § 1981 (LexisNexis 2007)		
Pennsylvania Partnership		PA. CONS. STAT. ANN. § 8364 (LexisNexis 2009) Other Language: Retiring or deceased partner entitled to the value of his interest.	
Rhode Island LLC	R.I. GEN. LAWS § 7-16-40 (LexisNexis 2008)		
Rhode Island Corporate			R.I. GEN. LAWS §§ 7-1.2-1314 (LexisNexis 2008) & §7-1.2-1315 (LexisNexis 2008)**

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Rhode Island Partnership		R.I. GEN. LAWS § 7-12-53 (LexisNexis 2010) Other Language: Retiring or deceased partner entitled to the value of his interest.	
South Carolina LLC	S. C. CODE ANN. § 33-44-801 (LexisNexis 2008) ****		
South Carolina Corporate	S. C. CODE ANN. § 33-14-300 (LexisNexis 2008)		
South Carolina Partnership		S. C. CODE ANN. § 33-41-1080 (LexisNexis 2009) Other Language: Retiring or deceased partner entitled to the value of his interest.	
South Dakota LLC	S.D. CODIFIED LAWS § 47-34A-801(a)(4)(iv) (LexisNexis 2008)		
South Dakota Corporate			S.D. CODIFIED LAWS § 47-1A-1430 (LexisNexis 2008) & for purchase 47-1A-1434 to 47-1A-1434.7 (LexisNexis 2008) **
South Dakota Partnership		S.D. CODIFIED LAWS § 48-7A-701 (LexisNexis 2009)	
Tennessee LLC			TENN. CODE ANN. § 48-249-617 (LexisNexis 2008) Authorizes judicial dissolution and TENN. CODE ANN. § 48-249-503 and 48-249-506 (LexisNexis 2008) provide guidelines as to purchase (containing valuation provisions at fair value where a member's interest has been terminated).

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Tennessee Corporate	TENN. CODE ANN. § 48-24-301 (LexisNexis 2008)		
Tennessee Partnership		TENN. CODE ANN. § 61-1-701 (LexisNexis 2010) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Texas LLC	TEX. BUS. ORG. CODE ANN. § 11.314 (LexisNexis 2007)		
Texas Corporate			
Texas Partnership			TEX. BUS. ORG. CODE ANN. § 10.354 (LexisNexis 2010) Uses "fair value" in Dissenters' rights provision. Comment indicates no substantive change was intended in Dissenters' rights. *See also* TEX. BUS. CORP. ACT § 5.12 (2009) ** Provides payment to dissenters based on fair value without consideration of control premium, minority discount, or marketability discount.

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Utah LLC		UTAH CODE ANN. §§ 48-2C-1210 & 48-2C-1214 (LexisNexis 2008) Provision to purchase in lieu of dissolution at fair market value.	
Utah Corporate			UTAH CODE ANN. § 16-10a-1430 (LexisNexis 2008) Provision to purchase in lieu of dissolution at fair value at 16-10a-1434 (Lexis Nexis 2008). ** *See also* 16-10a-1330.
Utah Partnership		UTAH CODE ANN. § 48-1-39 (LexisNexis 2010) Other Language: Retiring or deceased partner entitled to the value of his interest.	
Vermont LLC	VT. STAT. ANN. tit. 11, § 3101 (LexisNexis 2007)		
Vermont Corporate	VT. STAT. ANN. tit. 11A § 1430 (LexisNexis 2007)		
Vermont Partnership		Vt. Stat. Ann. tit. 11 § 3261 (LexisNexis 2010) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Virginia LLC	VA. CODE ANN. § 13.1-1047 (LexisNexis 2008)		
Virginia Corporate	VA. CODE ANN. § 13.1-747 (LexisNexis 2008)		

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Virginia Partnership		VA. CODE ANN. § 150-73-112 (LexisNexis 2010) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Washington LLC	WASH. REV. CODE § 25.15.275 (LexisNexis 2008) *But see* § 25.15.430 (LexisNexis 2008) Provides Dissenters' Rights at fair value.		
Washington Corporate	WASH. REV. CODE § 23B.14.300 (LexisNexis 2008)		
Washington Partnership		WASH. REV. CODE § 25.05.425 (LexisNexis 2010) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	*See also* partnership dissenters' provisions requiring payment at "fair value" under §§ 25.05.420 - 25.05.475 (LexisNexis 2010).
West Virginia LLC	W.VA. CODE § 31B-1-801(b)(5)(v) (LexisNexis 2008)		
West Virginia Corporate			W.VA. CODE § 31D-14-1430 (LexisNexis 2008) Provision for purchase in lieu of dissolution at § 31D-14-1434 **

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
West Virginia Partnership		W.VA. CODE § 47B-7-1 (LexisNexis 2009) Other Language: Follows RUPA § 7.01. Buyout greater of the liquidation value or the amount distributable to the dissociating partner had the partnership been sold as a going concern without dissociated partner.	
Wisconsin LLC	WIS. STAT. ANN. § 183.0902 (LexisNexis 2007)		
Wisconsin Corporate	WIS. STAT. ANN. § 180.1430 (LexisNexis 2007)		
Wisconsin Partnership		WIS. STAT. ANN. § 178.37 (LexisNexis 2009) Other Language: Retiring or deceased partner entitled to the value of his interest.	
Wyoming LLC	WYO. STAT. ANN. § 17-29-701 (LexisNexis 2010) Authorizes judicial dissolution but offers no guidance on value. However LLCs electing close LLC status lack express statutory authorization for judicial dissolution. WYO. STAT. ANN. § 17-25-103 (LexisNexis 2010)		
Wyoming Corporate			WYO. STAT. ANN. § 17-16-1430 (LexisNexis 2007) Provision for purchase in lieu of dissolution at §17-16-1434 (LexisNexis 2007). **

STATE	JUDICIAL DISSOLUTION AUTHORIZED BUT SILENT ON BUY-OUT	BUY-OUT AT "FAIR MARKET VALUE" OR CONTAINING OTHER BUY-OUT LANGUAGE	BUY-OUT AT "FAIR VALUE"
Wyoming Partnership		WYO. STAT. ANN. § 17-21-701 (LexisNexis 2010) Supplements RUPA language, providing for a buyout price equal to the greater of the amount that would have been distributable if the assets were sold at the greater of liquidation value or the value based on the sale as a going concern, and indicating that in either case, the sale price of the partnership assets shall be determined on the basis of the amount that would be paid by a willing buyer to a willing seller, neither being under any compulsion to buy or sell, and with knowledge of all relevant facts.	

* *Cf.* Florida's LLC statutory appraisal rights at FLA. STAT. ANN. § 608.4351 (LexisNexis 2008) (disregarding expressly minority or marketability discounts for LLCs with ten or fewer members but providing no statutory guidance on valuation for LLCs with more than ten members). Florida's corporate appraisal rights at FLA. STAT. ANN. §608.1301 similarly require the minority and marketability discounts to be disregarded for corporations with ten or fewer shareholders, but remain silent on valuation for corporations with more than ten shareholders.

** Election to purchase in lieu of dissolution.

*** Gives court discretion to provide remedies and one of the remedies listed includes purchase at fair value.

**** Note that 33-44-701 contains provisions for purchasing a member's interest at fair value.

***** Without reduction for minority discount or absent extraordinary circumstances, without a discount for lack of marketability.