ARTICLES

AN INTRODUCTION AND PRACTITIONER'S GUIDE TO THE LOUISIANA BUSINESS CORPORATION ACT

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This article introduces Louisiana's new Business Corporation Act. It describes the Act's foundations in the Model Business Corporation Act and argues that Louisiana's connection to this model statute will provide benefits to the understanding and maintenance of its corporate law. It then produces a detailed practitioner's guide to the new statute, describing many of the specific changes to corporate practice that the new law will require.

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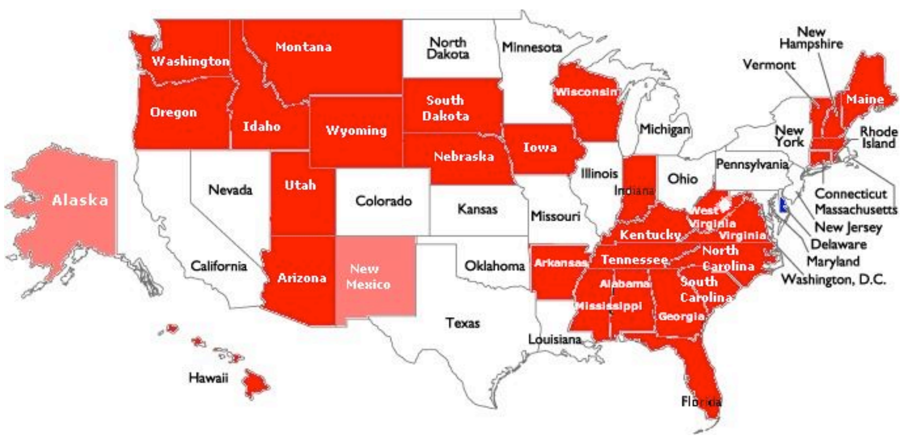
I. INTRODUCTION

The Corporate Laws Committee of the American Bar Association produced the original Model Business Corporation Act (MBCA) in 1950.[1] That committee continues to update the statute, and many states have adopted all or a significant part of the Act as their own state's corporate law. As of now, thirty states and the District of Columbia base their corporate law on the MBCA. As shown on this map,[2] these states vary widely in geography, population, and other demographic measures:



On May 30, 2014, Governor Jindal signed H.B. 319, providing for a wholesale revision of Louisiana's corporate laws and replacing its 1968 vintage statute with an MBCA-inspired version (this new statute will be referred to as the Louisiana Business Corporation Act, or "LBCA,"[3] in contrast to the current statute, commonly referred to as the Louisiana Business Corporation Law, or "LBCL").[4] When the Act becomes effective

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1. As many of the drafters were members of the Chicago bar, they relied heavily on the Illinois Business Corporation Act in their drafting. *See* Whitney Campbell, *The Model Business Corporation Act*, 11 BUS. LAW. 98, 100 (1956); Ray Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAW. 1, 1 (1950).

2. MBCA states are shaded a darker color. Stephen Bainbridge, *A Map of Model Business Corporation Act States*, PROFRESSORBAINBRIDGE.COM (Nov. 4, 2013), http://www.professorbainbridge.com/professorbainbridgecom/2013/11/a-map-of-model-business-corporation-act-states.html.

3 Louisiana Business Corporation Act, No. 328 (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

4. Louisiana Business Corporation Law, LA. REV. STAT. ANN. §§ 12:1–12:178 (2010 & Supp. 2014).

on January 1, 2015, Louisiana will become the thirty-first state to base its corporate law on the MBCA.

While the structure and level of detail in this new statute will be entirely new to Louisiana corporate law, the substance of the statute will be largely familiar. So, why would the Louisiana legislature go through the trouble of completely overhauling a statute to leave the substance largely intact? This Article addresses that question by explaining the potential benefits of the new LBCA. It also provides a practical guide for corporate attorneys familiar with Louisiana's current law to identify the few important substantive differences between the statutes and to recognize specific areas of detail where the new LBCA will necessitate changes to regular corporate practice. Part II describes the benefits of adopting model statutes generally and then addresses three specific areas where this statute makes significant substantive changes to current law. Part III then provides a detailed practitioner's guide to the new statute. It walks a lawyer familiar with the current requirements of Louisiana law through various stages of corporate practice, pointing out distinctions between the requirements of the old and new statutes.

II. THE ADOPTION OF THE MODEL BUSINESS CORPORATION ACT IN LOUISIANA

With the adoption of the LBCA, Louisiana will benefit in tangible ways. Among the benefits will be an established mechanism for monitoring developments in the corporate world and considering revisions to the Act to reflect the latest assessment of these developments. Also, when seeking to interpret unfamiliar or little-used provisions, courts will have two useful aids that they do not currently possess. First, the ABA publishes commentary on each of its sections that describes the intent of the drafters, and often provides useful explanations and examples of statutory provisions at work.[5] Also, where the LBCA differs from the Model Act, the Louisiana drafters furnished their own commentary explaining the diversion from the MBCA and its purpose.[6] Second, Louisiana courts may, if they choose, look to

5. *See, e.g.*, 1 MODEL BUS. CORP. ACT ANN. § 1.40 & official cmts., at 1-89 to 1-106 (2013) (providing definitions used throughout the statute and then describing significant choices made by the drafters in the commentary).

6. *See, e.g.*, Louisiana Business Corporation Act, No. 328, § 1-140 & cmts. (a)–(j) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-140),

the jurisprudence of other Model Act states in interpreting novel provisions. While other states' case law is obviously not binding on Louisiana, courts will have the option, if they so choose, to see how similar issues have been resolved in other jurisdictions when deciding a matter of first impression in Louisiana.

A. THE BENEFIT OF ADOPTING MODEL STATUTES

This section elaborates on the benefits provided by aligning Louisiana's corporate law with the MBCA. First, it provides a mechanism for the regular review and updating of the statute to comply with modern corporate practice. Second, it gives Louisiana courts and practitioners the option to look to other jurisdictions and authorities when seeking to interpret an unclear provision of law.

1. REGULAR REVIEW AND UPDATING

The Corporate Laws Committee of the American Bar Association contains twenty-four members from around the country, meets in person at least four times every year, and currently has around ten sub-committee "task forces" working on various issues of corporate law.[7] Its primary function is the care and maintenance of the MBCA. The committee constantly monitors corporate developments from around the country and considers the need for updates to the MBCA.[8]

For example, activist shareholders have recently become more willing to challenge director decision-making.[9] This increased activism has led to a higher number of contested

available at http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 (providing Louisiana's definitional section and ten instances where the Louisiana definitions diverge from the MBCA in the commentary).

7. The Committee has twenty-four regular members, each serving six-year terms (plus a chair and secretary), approximately twenty senior advisors, liaisons and special advisors, hosts three standalone in-person meetings a year plus an in-person meeting at the Business Law Section Spring Meeting, and contains approximately ten working task forces addressing various corporate law issues and amendments to the Model Business Corporation Act. *See Corporate Laws Committee*, AMERICAN BAR ASSOCIATION, http://apps.americanbar.org/dch/committee.cfm?com=CL270000 (last updated Sept. 2, 2014).

8. *Id.*

9. Corporate Laws Committee, ABA Section of Business Law, *Changes in the Model Business Corporation Act -- Proposed Amendments to Section 8.02 Relating to Qualifications for Directors and Nominees for Directors*, 68 BUS. LAW. 781, 781 (2013).

director elections.[10] In monitoring this development, the ABA committee noticed that incumbent boards were able to use statutory mechanisms to thwart the will of shareholders, even if those shareholders were in the majority. In response, the committee proposed two recent changes to the Model Act: it adopted revisions in 2012 that facilitated majority voting[11] and, in 2013, adopted revisions that clarified ambiguities about the qualifications for directors and nominees.[12] The majority voting amendments remove any ambiguity about the legitimacy of shareholder proposals to require that directors receive a majority of votes cast, rather than the mere plurality needed under the default rule. The new director qualification provision requires that any limitation placed on the ability of a candidate to serve as a director be in good faith and reasonable. This revision counters the practice at certain corporations to impede shareholder nominations by placing arbitrary criteria on directors not met by the insurgent candidates.

This review and revision process is consistent and ongoing. As recently as May of 2014, for example, the committee proposed additional refinements relating to the advancement of expenses to officers or directors who might be ultimately entitled to indemnification.[13] As Louisiana decides how and whether to amend the LBCA in the future, it will be able to turn to the work of the ABA committee for potential topics and drafting

10. Corporate Laws Committee, *supra* note 9, at 781.

11. Majority voting is an alternative to the default rule in every state for director elections, which is to require plurality voting. Under the plurality voting system, the company first determines the number of open director seats and then looks to the top vote-getters to fill that number. For example, if a corporation has five open seats, the top five vote-getters will be elected to the board, regardless of their overall tally. So, if only five candidates run, all five will get elected under the plurality system as long as each receives at least one vote. Many corporations have recently revised their director election procedures to require any candidate to receive at least a majority of votes cast to be elected to the board. This type of system is a majority voting system.

12. Corporate Laws Committee, *supra* note 9, at 783 ("The purpose of section 8.02(a) is to permit qualifications that may benefit the corporation by enhancing the board's ability to perform its role effectively. However, this needs to be balanced against the risk that qualifications could be misused for entrenchment purposes by incumbents or for other improper purposes. To address these concerns, this section requires that qualifications must be reasonable as applied to the corporation and must be lawful.").

13. Corporate Laws Committee, ABA Business Law Section, *Changes in the Model Business Corporation Act -- Proposed Advance of Expenses Amendments to Sections 8.53 and 8.54*, 69 BUS. LAW. 733, 733 (2014).

alternatives.

Another benefit of the continuous review and revision process is that the MBCA drafters strive to keep the requirements of the statute consistent with those governing other business entities.[14] Therefore, jurisdictions that use model-based statutes for entities other than corporations (including limited liability companies, limited partnerships, and other forms of business organization) will experience consistent procedures and drafting conventions, as well as consistent treatment of entities across jurisdictional boundaries.[15] Currently, Louisiana does not base any of its other statutes on model acts. However, it may gain additional advantage in the future if it decides to do so, and its corporate law will be compatible with the various entity laws of other states regardless of its action in this area.

2. PERSUASIVE PRECEDENT FROM OTHER JURISDICTIONS

Another benefit of adopting a statute based on the MBCA is the nonbinding interpretive guidance available to Louisiana courts. This guidance comes from two primary sources. First, the MBCA itself provides commentary to its sections, allowing an attorney or judge to learn the reasoning behind the particular use of statutory language.[16] Second, because much of the statute will be identical to that adopted in other jurisdictions, a court may choose to look to the courts of other states for evidence of how a provision has been interpreted elsewhere. This ability to see how others have resolved similar issues should benefit a Louisiana court in determining the best course of action.

For example, since its adoption in 1968, Louisiana's current indemnification statute, although thoroughly revised in 1986,[17] has only been interpreted by the courts in four reported decisions.[18] In contrast, the Model Act has extensive commentary

14. William H. Clark, Jr., *The Relationship of the Model Business Corporation Act to Other Entity Laws*, 74 LAW & CONTEMP. PROBS. 57, 63 (2011) (providing an example of how the MBCA has been amended to facilitate cross-entity mergers).

15. *See id.* at 68-74 (discussing the potential for the Model Entity Transactions Act, the Business Organizations Act, and the Harmonization of Entity Laws).

16. *See, e.g.*, 1 MODEL BUS. CORP. ACT ANN. § 1.40 official cmts., at 1-96 to 1-106 (2013).

17. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:83 (2010).

18. Theriot v. Bourg, 96-0466 (La. App. 1 Cir. 2/14/97); 691 So. 2d 213; White v. St. Elizabeth B.C. Bd. of Dirs., 43,329 (La. App. 2 Cir. 6/4/08); 986 So. 2d 202; Hirsch v. Cahn Elec. Co., 29,327 (La. App. 2 Cir. 5/9/97); 694 So. 2d 636; Green v. Champion

on its indemnification provisions.[19] Also, in Florida alone, one of thirty Model Act jurisdictions, there are thirty reported decisions relating to indemnification.[20] These resources will now be available to Louisiana courts after the LBCA becomes effective on January 1, 2015.

Also, the usefulness of commentary and nonbinding case law is not limited to situations where there are no reported Louisiana decisions. Delaware corporate law is the most exhaustive and cited individual state corporation statute, and it has long maintained a healthy sense of rivalry with the MBCA. Nevertheless, a former Delaware Supreme Court justice noted the usefulness of consulting the MBCA when fashioning Delaware jurisprudence. Former Chief Justice Veasey stated:

> I found it useful during my twelve-year term in writing opinions for the Delaware Supreme Court to consider some provisions of the MBCA when those provisions had no statutory analog in the DGCL. One such area is the useful process of dividing the analysis of director conduct into standards of conduct and standards of liability. . . .
>
> . . . [S]tandards of conduct are distinct from standards of review (also referred to as standards of liability). On the one hand, standards of conduct include some conduct that is required of directors and some aspirations for what is expected of directors in carrying out best practices. Standards of review, on the other hand, govern whether directors will be held liable (or a transaction set aside) as a result of their particular action or inaction. Failure to adhere to the standard of conduct reflected in the aspirational goal of best practices may not result in liability, as the Delaware Supreme Court has made clear.[21]

This reflection on MBCA principles and drafting helped shape Delaware's jurisprudence, even in an area as central to corporate law as fiduciary duties. If even the jurisdiction with the most developed and sophisticated corporate law jurisprudence

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Ins. Co., 601 So. 2d 14 (La. Ct. App. 1992).

19. 2 MODEL BUS. CORP. ACT ANN. §§ 8.50-8.56, at 8-384 to 8-477 (2013).

20. Westlaw search (on file with author).

21. E. Norman Veasey, *On Corporate Codification: A Historical Peek at the Model Business Corporation Act and the American Law Institute Principles through the Delaware Lens*, 74 LAW & CONTEMP. PROBS. 95, 98 (2011).

can benefit from reference to the MBCA, surely Louisiana can as well.

B. MAJOR CHANGES TO THE LAW

While much of the substance of Louisiana corporate law will remain the same after the adoption of the LBCA, there are a few areas that will undergo significant substantive revision. The most striking of these changes are the new buyout remedy for oppressed shareholders, the treatment of fiduciary duties in the statute, and the new opportunity for closely-held corporations to alter, limit, or even do away with traditional board governance by means of a unanimous shareholders' agreement.

1. THE OPPRESSION REMEDY

Currently, Louisiana does not contain special statutory protections for minority shareholders claiming oppression, nor does its case law recognize a heightened duty to shareholders of close corporations.[22] The new LBCA departs from the old LBCL in providing this explicit statutory protection,[23] and it departs from the MBCA in the manner in which it provides the protection.[24]

It accomplishes this goal by first granting an oppressed shareholder the right to withdraw from the corporation, similar to the rights of partners in partnerships or members in limited liability companies.[25] If a shareholder withdraws, that action is treated as an offer to sell his shares back to the corporation at fair value.[26] If the corporation and shareholder cannot agree on fair value, they may institute a proceeding for a court to determine it.[27] This buyout remedy is the exclusive recourse for an oppressed shareholder; he may not sue for money damages

22. *See, e.g.*, Gruenberg v. Goldmine Plantation, Inc., 360 So. 2d. 884, 887 (La. Ct. App. 1978).

23. Louisiana Business Corporation Act, No. 328, §§ 1-1435 to -1438 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-1435 to -1438), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

24. *See id.* § 1-1435 cmt. (a).

25. *Id.* § 1-1435(A) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(A)).

26. Louisiana Business Corporation Act, No. 328, § 1-1435(D) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(D)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

27. *Id.* § 1-1436 (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436).

and remain a shareholder of the corporation.[28]

As professor Douglas Moll points out in his article, *Shareholder Oppression and the New Louisiana Business Corporation Act*, this change brings Louisiana in line with the vast majority of U.S. jurisdictions.[29] However, the specifics of Louisiana's new oppression provisions in the LBCA are unique. Louisiana makes individualized choices, both when defining the basis for determining whether oppression exists[30] and for a shareholder's remedy once oppression is found.[31]

In determining whether oppression exists, Louisiana looks to the majority's conduct as a whole and determines whether it is "incompatible with a genuine effort . . . to deal fairly and in good faith" with the shareholder claiming oppression.[32] It also takes into account the conduct of the shareholder, recognizing that potential misconduct by a minority shareholder may be relevant in assessing the culpability of the majority.[33]

If a court finds oppression, the LBCA provides a unique remedy. It reverses the Model Act's statutory remedy of dissolution and instead requires the company to buy out the oppressed shareholder.[34] The rationale behind the Louisiana provision is to align the statutory language more closely with the conduct of the parties in oppression cases.[35] In jurisdictions with a dissolution remedy, most corporations where oppression is found do not actually dissolve, but rather the shareholders, under pressure from the pending dissolution, negotiate a buyout.[36]

28. Louisiana Business Corporation Act, No. 328, § 1-1435(L) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(L)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

29. Douglas K. Moll, *Shareholder Oppression and the New Louisiana Business Corporation Act*, 60 LOY. L. REV. 461, 477-85 (2014).

30. *See id.*

31. *See id.* at 491-508.

32. Louisiana Business Corporation Act, No. 328, § 1-1435(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

33. *Id.* § 1-1435(B)(1) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(B)(1)).

34. *Id.* § 1-1435(A) & cmt. (a) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(A)); *see also* Moll, *supra* note 29, at 491-508.

35. *See* Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (b) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

36. *See* Moll, *supra* note 29, at 491-508.

Louisiana makes this common practice explicit. Further, it makes clear that this remedy is the exclusive recourse for the aggrieved shareholder.[37] This limitation recognizes the reality of close corporations, where frayed shareholder relationships are often better served by allowing an exit than for suing for damages and keeping the antagonistic shareholders together.[38]

2. TREATMENT OF FIDUCIARY DUTIES

Another major shift in the LBCA is how it treats fiduciary duties. This shift is structural, and is accomplished in three primary ways: explicitly separating out standards of conduct from standards of liability,[39] limiting monetary recovery to a category of breach referred to as director conflicting interest transactions,[40] reversing the presumption against exculpation to one in favor of exculpation,[41] and revising the procedure for bringing shareholder derivative suits.[42] This section will describe each piece of this structural shift in detail.

a. Defining Standards of Conduct and Liability

Notwithstanding all of the structural changes in the new statute, the basics of Louisiana fiduciary duty law will remain the same. Directors owe duties of care and loyalty to the corporation and its shareholders, and their decisions will be given deference under the traditional business judgment rule.[43] However, the analysis used to reach these conclusions will be somewhat different. First, the standards of conduct—what is expected from directors—will be in a separate statute from the standards of

37. Louisiana Business Corporation Act, No. 328, § 1-1435(L) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(L)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

38. *See id.* § 1-1435 cmt. (l).

39. *Id.* §§ 1-830 to -831 (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-830 to -831).

40. *Id.* § 1-860(1) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-860(1)).

41. *See id.* § 1-832 (to be codified as amended at LA. REV. STAT. ANN. § 12:1-832).

42. Louisiana Business Corporation Act, No. 328, § 1-742 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-742), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

43. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:91 (2010); Louisiana Business Corporation Act, No. 328, §§ 1-830 to -831 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-830 to -831), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

liability, which provide the degree to which they must fall short of those standards for legal sanction to attach.[44] This distinction exists in current Louisiana law, but not in this manner.[45] Further, the LBCA introduces a new concept, a "director's conflicting interest transaction."[46] A director's conflicting interest transaction is defined as any of the following:

> (a) A transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation, to which, at the relevant time, the director is a party.
>
> (b) A transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation, respecting which, at the relevant time, the director had knowledge and a material financial interest known to the director.
>
> (c) A transaction effected or proposed to be effected by the corporation, or by an entity controlled by the corporation, respecting which, at the relevant time, the director knew that a related person was a party or had a material financial interest.[47]

The LBCA then goes on to limit a shareholder's ability to bring an action against the corporation or its directors unless it fits this definition or suffers from similar, statutorily-prescribed defects.[48] Again, while this preserves a similar result of providing for liability for duty of loyalty breaches, it does so in a way that is very different from the LBCL.[49]

b. The Presumption of Exculpation of Directors

Another area where the LBCA changes fiduciary law relates to the ability of shareholders to exculpate directors from monetary damage for certain fiduciary breaches. Louisiana's

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44. Louisiana Business Corporation Act, No. 328, §§ 1-830 to -831 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-830 to -831), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

45. Richard P. Wolfe, *The Fiduciary Duty of Directors and Officers Under the Louisiana Business Corporation Act of 2014*, 60 LOY. L. REV. 523, 544-45 (2014).

46. Louisiana Business Corporation Act, No. 328, § 1-860(1) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-860(1)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

47. *Id.*

48. *Id.* § 1-861 (to be codified as amended at LA. REV. STAT. ANN. § 12:1-861).

49. Wolfe, *supra* note 45, at 560-72.

current provision is modeled after Delaware's § 102(b)(7), and it allows a corporation to amend its articles to provide for the elimination or limitation of personal liability of directors for fiduciary breaches, with the exception of breaches of the duty of loyalty, unlawful dividends, actions not taken in good faith, and acts where the director receives an improper personal benefit.[50] Most corporations in Louisiana, as elsewhere, take advantage of this permissive provision and exculpate their directors to the fullest extent allowed by law.[51]

The new LBCA reverses the traditional presumption. It is no longer an "opt-in" provision requiring a corporation to take action for its directors to receive the protection of the statute. Now, it is an "opt-out" provision, where directors will be exculpated unless the shareholders choose to maintain this liability in the corporation's articles.[52] The rationale for this switch is that, if most well-advised corporations are selecting the opt-in option, those without the benefit of counsel should not be punished for being unaware of the benefits of the added protection for directors.[53] As a compromise, and to ensure that new corporations desire to provide this added protection to their board members, an additional required provision has been added to all new articles of incorporation making the decision of whether to opt in or out explicit.[54]

c. Derivative Litigation

Another area where the LBCA revises Louisiana's fiduciary law deals with the mechanism that allows for recourse for fiduciary breaches, the derivative suit. Louisiana has abandoned its traditional approach to the initiation of these suits and adopted the universal demand requirement favored by the MBCA.[55] That is, as a formal matter, all shareholders will need

50. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:24(C)(4) (2010).

51. *See* Louisiana Business Corporation Act, No. 328, § 1-832 cmt. (a) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

52. Louisiana Business Corporation Act, No. 328, § 1-832 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-832), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

53. *Id.* § 1-832 cmt. (a).

54. *Id.* § 1-202(A)(5) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-202(A)(5)); *see also id.* § 1-832 cmt. (a).

55. *Id.* § 1-742 (to be codified as amended at LA. REV. STAT. ANN. § 12:1-742).

to make demand on the directors to bring suit on behalf of the company before they may proceed.

However, all are not convinced that universal demand improves on other methods, like that found in Delaware, that excuse demand based on its futility. At least one commentator argues that "the MBCA's refinements achieve a false, or at least dubious, clarity . . . [and that] [t]he same issues litigated in demand futility cases (for example, director disinterestedness and independence) must still be litigated, based on pleadings alone, when the corporation moves to dismiss the derivative proceeding."[56]

3. THE UNANIMOUS GOVERNANCE AGREEMENT

A final major innovation of the LBCA is the introduction of a governance device known as a "unanimous governance agreement."[57] This device is available to shareholders, except those of public corporations, and provides a striking degree of flexibility in the organization of that firm's governance.[58] In addition to a general grant of authority, the statute makes clear that these governance agreements can do the following:

> (1) Eliminate[] the board of directors or restrict[] the discretion or powers of the board of directors.
>
> (2) Govern[] the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in R.S. 12:1-640 [the unlawful distribution statute].
>
> (3) Establish[] who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal.
>
> (4) Govern[], in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies.

56. Jeffrey M. Gorris et al., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 LAW & CONTEMP. PROBS. 107, 118 (2011).

57. Louisiana Business Corporation Act, No. 328, § 1-732 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-732), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

58. *Id.*

> (5) Establish[] the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among any of them.
>
> (6) Transfer[] to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders.
>
> (7) Require[] dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency.
>
> (8) Otherwise change[], in a manner not contrary to public policy, the result that would be reached under other provisions of this Chapter.[59]

The powers delegated to shareholders in a unanimous governance agreement is strikingly broad and allows shareholders to revise or reject even the most basic premises of corporate law—attributes like the existence of a board of directors or the equal treatment of all shares of the same class. This broad authority is only exercisable by unanimous consent, and it gives shareholders of private companies the flexibility to arrange their affairs in a manner they see fit, allowing for attributes and arrangements more traditionally seen in partnerships and limited liability companies to be used in the corporate setting.

In adopting the LBCA, Louisiana has made significant substantive changes to the rights of minority shareholders by adopting a novel oppression remedy, to the process of holding directors liable for breaches of fiduciary duties, and to the flexibility provided to shareholders of privately-held corporations.

III. A PRACTITIONER'S GUIDE TO THE NEW LOUISIANA BUSINESS CORPORATION ACT

While the introduction of the new oppression remedy, the treatment of fiduciary duties, and the creation of the unanimous governance agreement are the most striking substantive changes

59. Louisiana Business Corporation Act, No. 328, § 1-732(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-732(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

brought on by the LBCA, they are far from the only ones. There are many smaller substantive revisions in this new statute, most of which are stylistic changes that will not fundamentally alter the state's corporate law but will require practitioners to change their established practice. This section, while not purporting to be comprehensive, attempts to identify for seasoned practitioners the aspects of the LBCA that will most commonly occur and require different treatment than under the LBCL. This Part will proceed thematically, addressing issues with the incorporation process; shares and shareholders; officers, directors, and governance; mergers and other fundamental transactions; dissolution and termination; and filings, reports, and dealing with the Secretary of State.

A. INCORPORATION

The LBCA's changes start at the beginning of a corporation's life, with the filing of articles of incorporation. Practitioners forming new Louisiana corporations should be aware that the LBCA does away with the concept of par value, contains a new mandatory provision on director exculpation, and makes changes to the current affidavit of acceptance of the corporate registered agent.

1. ELIMINATION OF PAR VALUE

The most noticeable change at the incorporation stage is that shares are no longer designated as having a par value.[60] This concept of legal capital long ago ceased to provide a meaningful relationship to the true value of shares and served as little more than a trap to the unwary when calculating dividends or certain tax obligations.[61] At the incorporation stage, this deletion means that a corporation's reference to the number of authorized shares of each class should no longer contain a reference to the par value of the shares, or that they are issued without par value, as was

60. Legal dictionaries have defined par value as "the value of a security at the time of issuance." *See What is Par Value?*, THELAWDICTIONARY.ORG, http://thelawdictionary.org/par-value/ (last visited Nov. 6, 2014). While that may have been true at one time, there is no modern requirement for a mandatory listing of par value in a corporation's articles of incorporation to reflect the intrinsic economic value of the underlying shares.

61. James J. Hanks, Jr., *Legal Capital and the Model Business Corporation Act: An Essay for Bayless Manning*, 74 LAW & CONTEMP. PROBS. 211, 213-14 (2011).

required under the LBCL.[62] This elimination also has consequences in other aspects of corporate practice, such as declaring dividends, and will be addressed again in Section (B)(1)(a) of this Part.[63]

2. MANDATORY CHOICE OF EXCULPATION

As mentioned above, the LBCA reverses the presumption regarding director exculpation.[64] This reversal has consequences for existing corporations and for newly incorporated entities. For those newly incorporated, there are additional items that must be included in the articles. The LBCA's new opt-out exculpation statute requires a corporation to state "[w]hether the corporation accepts, rejects, or limits, with a statement of the limitations, the protection against liability of directors and officers that is provided by R.S. 12:1-832 [the opt out exculpation statute]."[65]

For entities already incorporated on January 1, 2015, there is a more significant consequence that requires any corporation's attention. If a corporation's articles are silent about exculpation, the status of their director protections will be significantly altered. On December 31, 2014, the directors of a corporation silent on the exculpation issue will remain personally liable for all fiduciary breaches. On January 1, 2015, those same directors will be exculpated to the fullest extent of the law. Those corporations wishing to avoid that situation will need to amend their articles rejecting the new default rule.

3. CHANGE TO AFFIDAVIT OF ACCEPTANCE

Under the LBCL, corporations need to file an affidavit along with their articles, signed by the corporation's registered agent, and agreeing to act in that capacity. The new LBCA will keep the substantive requirement, but the document's name will be changed to a "written consent to appointment," in which consent must still be signed by the initial registered agent and

62. Louisiana Business Corporation Law, LA. REV. STAT. ANN. §§ 12:24(B)(5)-12:24(B)(6)(a) (2010).

63. *See infra* Part III(B).

64. *See supra* Part II(B)(2)(b).

65. Louisiana Business Corporation Act, No. 328, § 1-202(A)(5) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-202(A)(5)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

acknowledged or executed by authentic act.[66]

B. SHARES AND SHAREHOLDERS

Another area where the LBCA distinguishes itself from prior law is in its treatment of shares and shareholders. There are no major divergences from the LBCL here, only minor technical changes. The most significant difference is a carryover from the discussion in Part III(A) relating to par value. Because par value is a foreign concept to the LBCA, it needs a new mechanism for determining the legitimacy and lawfulness of distributions. In addition to this new statutory framework, the LBCA makes minor revisions to the forgiveness of liability for unlawful distributions, preemptive rights, removal of the concept of treasury shares, call of shareholders meetings, the rule against circular voting, and the formal requirements of share certificates.

1. LIABILITY FOR UNLAWFUL DISTRIBUTIONS

The LBCA introduces a new framework for determining whether dividends may be lawfully paid. Also, a minor clarification emphasizes that claims not timely filed are completely perempted.[67]

a. Standard for Declaring Dividends

Section 640 describes the procedure for declaring shareholder distributions.[68] It states:

> No distribution may be made if, after giving it effect, either of the following conditions would exist:
>
> (1) The corporation would not be able to pay its debts as they

66. Louisiana Business Corporation Act, No. 328, §§ 1-120(H)(2), -202(A)(5) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-120(H)(2), -202(A)(5)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

67. Peremption here is distinguished from prescription. A peremptive period completely extinguishes a right once it has run. A prescriptive period does not extinguish the right itself but only forecloses the ability of a plaintiff to recover once the period has ended. A prescriptive period may be tolled but a peremptive period may not. For the new clarification of the peremptive period, see Louisiana Business Corporation Act, No. 328, § 1-622(D) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-622(D)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

68. Louisiana Business Corporation Act, No. 328, § 1-640 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-640), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

> become due in the usual course of business.
>
> (2) The corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.[69]

This replaces the test using legal capital under the LBCL, which required an accounting calculation of surplus based on stated capital and retained earnings.[70] The LBCA replacement is a functional test, and both functions must be satisfied. A corporation must have assets exceeding liabilities and be able to pay its debts as they come due. Failing either of these requirements prohibits a corporation from making distributions to its shareholders.

b. Peremptive period

Louisiana retains its equitable rule allowing creditors to bring a claim against shareholders who received an unlawful dividend.[71] This ability to collect from shareholders is in addition to the traditional rule in most jurisdictions that allows creditors to collect from the directors who declared the unlawful dividend. The innovation of the LBCA clarifies that any claim against shareholders personally for unlawful distributions must be made within two years.[72] Unlike the LBCL, the new LBCA expressly states that any claim not brought within two years of the date that either the distribution was measured by the board or that it violated a restriction in the corporation's articles will be completely perempted.

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69. Louisiana Business Corporation Act, No. 328, § 1-640(C) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-640(C)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

70. Louisiana Business Corporation Law, LA. REV. STAT. ANN. §§ 12:63(A)-(B) (2010).

71. Louisiana Business Corporation Act, No. 328, § 1-622 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-622), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

72. *Id.* § 1-622(D) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-622(D)).

2. PREEMPTIVE RIGHTS

The LBCA also has its own procedures for dealing with preemptive rights of shareholders. Preemptive rights provide current shareholders with the ability to purchase a pro rata share of new issuances to maintain their proportionate interest in the corporation. The longstanding rule in Louisiana, retained by the LBCA, is that pre-1968 incorporated businesses presume that shareholders do have preemptive rights, whereas any corporations incorporated since 1969 do not make this presumption unless the articles expressly grant that right.[73]

The new LBCA states that if a corporation's articles contain the phrase "shareholders shall have preemptive rights[,]" that statement means:

> The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors to provide a fair and reasonable opportunity to exercise the right, to acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them. Shareholders have a fair and reasonable opportunity to exercise the right to acquire shares if they are given at least forty-five days to purchase the shares after notice to them of that right, but shorter periods of time may be fair and reasonable under the circumstances in which the shares are being issued.[74]

The forty-five day presumption of reasonableness is a new addition in the LBCA.

3. NO TREASURY SHARES

Under the current LBCL, a corporation must state in its articles the maximum number of shares that it is authorized to issue in each class.[75] If a share is issued and repurchased by the corporation, that share is designated as a "treasury share" under the LBCL and would be once again available for issuance by the

73. Louisiana Business Corporation Act, No. 328, § 1-630(A) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-630(A)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

74. *Id.* § 1-630(B)(1) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-630(B)(1)).

75. Louisiana Business Corporation Law, LA. REV. STAT. ANN. §§ 12:24(B)(4)-(B)(6)(a) (2010).

board without being "double counted" against the maximum number in the articles.

The LBCA does away with the concept of treasury shares. Section 631 makes the concept unnecessary by statutorily characterizing shares that have been acquired by the corporation itself as once again authorized but unissued shares.[76] This innovation once again puts a realistic interpretation above legal formalism and does away with unnecessary and substantively meaningless accounting required under the old law.

4. CALL OF SHAREHOLDERS' MEETING

Under the LBCL, corporations must hold an annual shareholder's meeting every year.[77] As an enforcement mechanism, the statute empowered any shareholder to call an annual meeting if the corporation itself had failed to do so for a period exceeding eighteen months.[78]

The new LBCA retains the spirit of this rule, while slightly altering the enforcement mechanism. Section 701 keeps the annual meeting requirement and keeps the enforcement trigger at eighteen months.[79] However, instead of empowering any shareholder to personally call a meeting, the statute empowers any shareholder to demand that the corporate secretary call the meeting.[80] At first blush, this sounds like a less effective mechanism for shareholders, imposing a corporate secretary in between them and a power they once held unilaterally. However, the intention is that this mechanism will be more effective. Shareholders rarely have the information needed to contact all other shareholders or the distribution mechanisms available to reach them easily and reliably, unlike corporate secretaries, who do have this information and ability. Therefore, by giving shareholders the power to make this demand of the secretary, it places responsibility on the party with the greatest ability to

76. Louisiana Business Corporation Act, No. 328, § 1-631(A) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-631(A)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

77. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:73(A) (2010).

78. *Id.*

79. Louisiana Business Corporation Act, No. 328, § 1-701 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-701), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

80. *Id.* § 1-701(D) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-701(D)).

carry out the task. Additionally, it understands that there is a well-recognized legal mechanism, the mandamus action, available to compel the corporate officer to act.[81]

5. RULE AGAINST CIRCULAR VOTING

Because of the general corporate law rule that all shares of the same class must be treated the same, an unusual situation can arise if a subsidiary corporation acquires shares in its parent. If that subsidiary is allowed to vote in elections just as any other shareholder would, it could allow managers to capture the corporate governance process by issuing shares to wholly owned subsidiaries, whose votes it would then control. In this manner, managers of a corporation could take action without regard to the wishes of the outside shareholders, if it were brazen enough to issue enough shares to its subsidiaries.

The LBCA addresses this situation forthrightly in § 721.[82] It makes an exception to the one-share-one-vote rule and excludes from voting shares "owned, directly or indirectly, by a subsidiary."[83] Subsidiary is then defined for this purpose as "a domestic or foreign corporation, limited liability company, partnership, or other juridical person that is subject to at least majority control by the issuer of the shares, but does not include the issuer itself."[84] The LBCA then defines "majority control," providing even more specific guidance to interested parties on conduct allowed under the Act.[85]

6. SHARE CERTIFICATES

Although among the least substantive of the changes in the LBCA, the requirements relating to the necessity for and content of share certificates may be among the most used on a daily basis. Like its predecessor, the LBCA requires corporations to provide

81. *See* Louisiana Business Corporation Act, No. 328, § 1-701 cmt. (c) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. Mandamus refers to a judicial writ commanding a person to perform a statutory duty.

82. *Id.* § 1-721 (to be codified as amended at LA. REV. STAT. ANN. § 12:1-721).

83. *Id.* § 1-721(B) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-721(B)).

84. *Id.* § 1-721(E)(1) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-721(E)(1)).

85. *Id.* § 1-721(E)(2) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-721(E)(2)).

share certificates to it shareholders.[86] However, it does slightly broaden the exception to the general rule of certification. Whereas the old LBCL only allowed corporations whose shares were listed on the Direct Registration System of the Depository Trust and Clearing Corporation, the new statute adds the language "or of a similar book-entry system," which allows for future development in the field without need to amend the statute.[87]

More significantly, the new LBCA does not require the same officers to sign the certificate as was previously mandated.[88] Under the old LBCL, a corporation's president and secretary needed to sign share certificates. However, the LBCA does not require a corporation to elect a president, only a secretary.[89] Therefore, the LBCA only requires the signature of two authorized officers, not the president and secretary.[90] Other than the signatures, the minimum requirements remain the same:

> (1) The name of the issuing corporation and that it is organized under the law of this state.
>
> (2) The name of the person to whom issued.
>
> (3) The number and class of shares and the designation of the series, if any, the certificate represents.[91]

C. OFFICERS, DIRECTORS, AND GOVERNANCE

In addition to the unanimous governance agreements,[92] the LBCA makes a number of changes to the requirements relating to officers, directors, and corporate governance that practitioners should be aware of. These changes include which officers are required to be appointed, the ability to have a staggered or

86. Louisiana Business Corporation Act, No. 328, § 1-625(A) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-625(A)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

87. *Id.*

88. *See id.* § 1-625(D) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-625(D)).

89. *See infra* Part III(C)(1).

90. Louisiana Business Corporation Act, No. 328, § 1-625(D) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-625(D)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

91. *Id.* § 1-625(B) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-625(B)).

92. *See supra* Part II(B)(3).

classified board, the manner in which director proxies may be exercised, membership on board committees, and the grant of emergency powers.

1. APPOINTMENT OF OFFICERS

The LBCL required every corporation to have a president, secretary, and treasurer.[93] It allowed any two of these offices to be combined in one person, but not all three.

The LBCA does away with any obligation to elect specific officers other than a secretary.[94] The LBCA did not go as far as recommended by the MBCA, which does not require the election of any particular officer at all. However, the MBCA did require the corporation to appoint somebody to "have the authority and responsibility for preparing the minutes of the directors' and shareholders' meetings and for maintaining and authenticating the records of the corporation."[95] Because the MBCA was recommending that some officer be obligated to carry out duties traditionally performed by the corporate secretary, the LBCA simply determined to identify that officer as "secretary" of the corporation.[96]

2. STAGGERED BOARDS

If the articles of incorporation are silent, shareholders elect a corporation's entire board of directors at each annual meeting for a one-year term.[97] Many jurisdictions allow for the classification, or staggering, of director elections. If a corporation elects to have a staggered board, only a portion of the directors will be elected each year, and that portion, or class, of directors will serve a multi-year term. For example, if a corporation choses to divide its nine person board into three classes, then three directors would be elected in year one (serving until year four), another three would be elected in year two (serving until year five), and the

93. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:82(A)(1) (2010).

94. Louisiana Business Corporation Act, No. 328, § 1-840(A) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-840(A)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

95. *See id.* § 1-840(C) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-840(C)).

96. Louisiana Business Corporation Act, No. 328, § 1-840 cmt. (b) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

97. *Id.* § 1-805 (to be codified as amended at LA. REV. STAT. ANN. § 12:1-805).

final three would be elected in year three (serving until year six).

Proponents of staggered boards believe that the practice adds to the continuity of service and allows for enhanced institutional memory. Others are concerned about the possibility of directors entrenching themselves because of the length of time before shareholders are scheduled to vote on whether to remove them from office. State legislatures have accommodated both concerns by allowing staggered boards to exist, but placing limits on the length of director terms and the frequency that they must stand for re-election.

Under the old LBCL, corporations could separate the directors' terms into classes, with the only limitation being that no term could be longer than five years.[98] With the minimum term of one year, this meant that, in effect, directors could be separated into many classes and their terms could last anywhere from one to five years, including fractions thereof.

The LBCA retains the ability for corporations to stagger the terms of directors, creating a classified board but providing much less discretion in how it can be accomplished. Section 806 allows for staggered terms, but it provides that directors may only be split into two or three groups and that the term of each group must expire at the second or third annual meeting after their election, not at any interim period.

3. DIRECTOR PROXIES

While every state allows and even encourages shareholder voting by proxy, Louisiana has the distinction of being the only state in the union where directors may vote by proxy. The LBCA maintains that tradition. Section 812 allows proxy voting at director meetings, but only under certain conditions,[99] and those conditions are slightly different from those found in the LBCL.[100]

First, consistent with the old LBCL provisions, the ability of directors to vote by proxy must be granted in the articles of incorporation,[101] and the proxy must be signed and in writing.[102]

98. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:81(A) (2010).

99. Louisiana Business Corporation Act, No. 328, § 1-812 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-812), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

100. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:81(E) (2010).

101. *Id.*; Louisiana Business Corporation Act, No. 328, § 1-812(A) (May 30, 2014)

However, the new LBCA inserts limitations that were not found in the earlier statute: only fellow directors may serve as proxy for an absent director,[103] and a separate proxy is required for each meeting.[104]

4. MEMBERSHIP ON BOARD COMMITTEES

Much of the work of boards is done through committees. Both the LBCL and the LBCA expressly authorize boards to appoint committees and empower them to carry out particular functions. The LBCA provides further clarification on the work of committees. It describes who may participate in those committees and who the ultimate decision-makers are.[105]

First, § 825 of the LBCA allows directors to appoint individuals who are not members of the board itself to serve on committees.[106] This situation may occur when a board would like certain corporate officers or close outside advisors to participate in the function carried out by that committee. However, the LBCA clarifies that any nonboard member serving on a committee may do so only in an advisory capacity. This clarification serves to underscore the fact that ultimate power lies with the elected directors. Furthermore, the corresponding liability that attaches to members of a board carrying out their fiduciary obligations only accrues to those members themselves.

(to be codified as amended at LA. REV. STAT. ANN. § 12:1-812(A)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

102. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:81(E) (2010); Louisiana Business Corporation Act, No. 328, § 1-812(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-812(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

103. Louisiana Business Corporation Act, No. 328, § 1-812(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-812(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. Under the LBCL, either fellow directors or shareholders could serve as proxy. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:81(E) (2010).

104. Louisiana Business Corporation Act, No. 328, § 1-812(C) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-812(C)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. The LBCL is silent on the length of director proxies. *See* Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:81(E) (2010).

105. Louisiana Business Corporation Act, No. 328, § 1-825 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-825), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

106. *Id.* § 1-825(A) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-825(A)).

5. EMERGENCY POWERS

Unlike its predecessor, the LBCA sets out in elaborate detail the procedures and powers that may be exercised in an emergency situation. It defines emergency as a situation where "a catastrophic event makes it impracticable . . . to attain a quorum of the corporation's directors when and as necessary to carry out the functions of the board of directors."[107]

During an emergency, a corporation's board of directors may modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent. A board may also "[r]elocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so."[108] The statute also waives a number of procedural requirements for the conduct of meetings.[109] Finally, it provides legal protection for those acting in good faith under these emergency powers.[110]

D. MERGERS AND OTHER FUNDAMENTAL TRANSACTIONS

The rules in the LBCA relating to mergers and other fundamental transactions are elaborate and complex. The focus of this practitioner's guide is to highlight the basic procedures involved with fundamental transactions, such as domestications, conversions, mergers, and asset sales, giving particular focus to substantive differences from the old LBCL approach. With that goal in mind, this section first discusses the new procedure used for entity domestications and conversions, then mergers, and finally asset sales.

1. DOMESTICATIONS AND CONVERSIONS

A domestication is a procedure by which a business corporation that has been incorporated in another state becomes a Louisiana corporation. A conversion is a procedure by which either a Louisiana corporation may become another type of entity

107. Louisiana Business Corporation Act, No. 328, § 1-303(D) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-303(D)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

108. *Id.* § 1-303(A)(2) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-303(A)(2)).

109. *Id.* § 1-303(B) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-303(B)).

110. *Id.* § 1-303(C) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-303(C)).

or another type of entity may become a Louisiana corporation. Prior to the existence of domestication and conversion statutes, an entity could only undertake such a transformation by merging with the desired type of entity and having that entity survive the merger. Modern domestication and conversion statutes have simplified that mechanical process.

The LBCA provides clarity and uniformity to the domestication and conversion process. Domestications and conversions all follow the same format and procedures.[111] No matter the option, parties must follow the same four steps: the corporation's board of directors must adopt a plan,[112] the shareholders must approve the plan,[113] articles of domestication or conversion must be filed for plans so adopted and approved,[114] and the charter of the disappearing company must be surrendered.[115]

Once the parties follow that common procedure, the effect of the domestication or conversion is described in the statute, formally vesting all of the assets in the new entity and obligating that entity to all of the converting entity's liabilities.[116] There is also a uniform procedure available for abandonment of a domestication or conversion.[117]

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111. Louisiana Business Corporation Act, No. 328, §§ 1-920 to -925 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-920 to -925), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 (governing domestications); *id.* §§ 1-930 to -935 (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-930 to -935) (governing nonprofit conversions); *id.* §§ 1-940 to -943 (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-940 to -943) (governing foreign nonprofit domestications and conversions); *id.* §§ 1-950 to -956 (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-950 to -956) (governing entity conversions).

112. Louisiana Business Corporation Act, No. 328, §§ 1-921, -931, -952 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-921, -931, -952), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

113. *Id.*

114. *Id.* §§ 1-922, -932, -941, -952 (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-922, -932, -941, -952).

115. Louisiana Business Corporation Act, No. 328, §§ 1-923, -933, -954 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-923, -933, -954), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

116. *Id.* §§ 1-924, -934, -942, -955 (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-924, -934, -942, -955).

117. *Id.* §§ 1-925, -935, -943, -956 (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-925, -935, -943, -956).

2. MERGERS

Similar to domestications and conversions, the LBCA provides a new procedure for effecting corporate mergers, similar to the one in place for domestications and conversions. However, this section will focus on two areas of substantive change in the merger law: the shareholder vote needed to approve the merger and a reduction in the requirement to file merger documents in the public record.

a. Vote Needed for Approval

The LBCL requires that two-thirds of the voting power present at a properly called shareholders meeting must approve a plan of merger.[118] The LBCA changes that requirement to a majority of shares entitled to vote.[119] This standard contains two important changes. First, it lowers the threshold from two-thirds to a simple majority. But, it also changes the relevant votes from those present at the meeting to all shares entitled to vote. In essence, this change counts every share not present at the meeting as a "no" vote. So, the lowering of the threshold from two-thirds to a majority will be offset somewhat by the requirement that the majority be of all shares entitled to vote, not just those attending the meeting.

b. Elimination of Parish Filings

The current rule under the LBCL requires that articles of merger be filed not only with the Secretary of State, but also in (1) all parishes where either party owns real property, and (2) the parish where either party has its registered office. The LBCA slightly revises this requirement. Filings are still required where the corporations own real property, but the LBCA eliminates the duplicative requirement of filing in the parish of either company's registered office.[120]

118. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:112(C)(2) (2010).

119. Louisiana Business Corporation Act, No. 328, § 1-1104(5) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1104(5)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

120. *Id.* § 1-1106 & cmt. (a) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1106).

3. ASSET SALES

The Louisiana law relating to the sale of assets will be substantially different under the LBCA. Under the LBCL, only shareholders can authorize the sale of substantially all of a corporation's assets.[121] The shareholders may do so by a vote of two-thirds of the voting power present at a properly called meeting.[122] The board, even though it possesses the general authority to manage the business and affairs of the corporation, is not authorized to sell substantially all of the corporation's assets. Its authority is limited to abandoning a shareholder-approved sale and then subject to the rights of third parties.[123]

The new LBCA brings the law of asset sales more in line with other sorts of fundamental transactions. First, a board must initiate the sale of substantially all of the assets under the LBCA.[124] A board-approved sale must then be approved by the shareholders. The standard for shareholder approval, similar to the merger context, is the majority of shares entitled to vote.[125]

E. DISSOLUTION AND TERMINATION

There is a major conceptual difference between the way that the current LBCL treats dissolution and how it is treated under the MBCA. Current Louisiana law allows companies to file for dissolution, have a liquidator appointed,[126] and upon liquidation have the corporation declared dissolved and its corporate existence cease.[127] While the MBCA begins the dissolution process similarly, it does not provide for a finite end-point. There is never a time when the existence of a Model Act corporation ceases.

The new LBCA uses the Model Act format, but reintroduces the Louisiana concept of an end date for the separate corporate existence. It does this by introducing the idea of termination into

121. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:121(B) (2010).

122. *Id.*

123. *Id.* § 12:121(C).

124. Louisiana Business Corporation Act, No. 328, § 1-1202(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1202(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

125. *Id.* § 1-1202(E) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1202(E)).

126. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:141 (2010).

127. *Id.* § 12:148.

the Model Act. This Part describes the concept of termination, and then illuminates several differences in the LBCA, including a limit on post-dissolution claims by creditors, the concept of reinstatement after termination, the handling of the corporate name after dissolution, and the continuing requirement of a dissolved company to file reports with the Secretary of State until it is terminated.

1. INTRODUCTION OF TERMINATIONS

The LBCA creates a new mechanism for terminating the existence of dissolved corporations.[128] Once a liquidator completes the winding up of a corporation's affairs, it files articles of termination.[129] These articles cause the existence of the corporate entity to cease. Unlike prior law, which vested the title to undiscovered assets in the liquidator, the new LBCA provisions leave title to these assets in the terminated company, and provide a procedure for revoking the termination and reinstating the corporate existence.[130]

2. LIMIT ON POST-DISSOLUTION CLAIMS

Under the LBCA, creditors have three years to bring a claim against a dissolved corporation.[131] In a clarification of existing law, it expressly asserts that claims beyond that time are perempted, foreclosing an argument that prescription has been tolled.[132]

3. TERMINATION AND REINSTATEMENT

Because the LBCA diverged from the Model Act and allows corporations to be terminated, it also must provide a remedy if the corporation was terminated prematurely, allowing it to regain its separate existence. The LBCA provides this mechanism through provisions dealing with corporate reinstatement.[133] The

128. Louisiana Business Corporation Act, No. 328, §§ 1-1440 to -1445 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-1440 to -1445), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

129. *Id.* § 1-1440 (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1440).

130. *Id.* pt. 14, subpt. D, intro. cmt. (f).

131. Louisiana Business Corporation Act, No. 328, § 1-1407(B)(3) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1407(B)(3)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

132. *See supra* note 67 and accompanying text.

133. Louisiana Business Corporation Act, No. 328, § 1-1444 (May 30, 2014) (to be

current LBCL reinstatement provision only allows this procedure for corporations that were administratively terminated.[134] The LBCA not only allows reinstatement for administratively terminated corporations, but also for those that were voluntarily terminated, provided that the reinstating party follows certain procedures.[135]

4. THE CORPORATE NAME AFTER DISSOLUTION

The introduction of the different concepts of dissolution and termination may cause some confusion in whether corporate names are available. If the concept of termination were not introduced, then a dissolved corporation would hold the rights to its name indefinitely, even if it had not conducted operations in years, or even decades. By introducing termination, the LBCA provides an opportunity for that corporate name to re-enter the list of possibilities after a certain period.

The LBCA accomplishes this by reserving the name of an existing corporation for three years post termination.[136] No other entity may use that name during the dissolution process or for those three years post-termination. However, once the three-year period lapses, that corporate name is once again available for selection by the public.

5. THE CONTINUING REQUIREMENT TO FILE REPORTS

The new LBCA allows dissolved corporations to be in dissolution for a long period of time, and it introduces the concept of termination to distinguish a dissolved corporation that is still active in some way from one that is not. Because of the potential need to communicate with a corporation, even after it is dissolved, the LBCA introduces a requirement for dissolved corporations to continue to file annual reports.[137]

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codified as amended at LA. REV. STAT. ANN. § 12:1-1444), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

134. *See* Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:163 (2010).

135. Louisiana Business Corporation Act, No. 328, § 1-1444 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1444), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

136. *Id.* § 1-402(C) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-402(C)).

137. *Id.* § 1-1621(E) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1621(E)).

F. CORPORATE RECORDS, FILINGS, AND THE SECRETARY OF STATE

Finally, the LBCA provides some technical revisions that every practitioner should be aware of. It makes a minor change in the provisions for amending articles of incorporation, for requesting good standing certificates from the secretary of state's office, for allowing inspections of corporate books by competitors, and for requiring a filing when corporations do business with the state of Louisiana.

1. AMENDING THE ARTICLES OF INCORPORATION

The old LBCL contained a provision that allowed a corporation with a limited duration to amend its articles extending its corporate life, even after the original duration has lapsed, and gave that amendment retroactive effect. The LBCL limited this provision to corporations that had not yet begun liquidation proceedings.

The LBCA continued that premise, but needed to revise the new statute to reflect the novel dissolution and termination provisions described above. It did so by adding a new section, which states that "[a]n amendment that extends the duration of a corporation may be adopted even after that duration expires unless . . . [a]rticles of termination or a certificate of termination has been filed and the existence of the corporation has not been reinstated."[138]

2. GOOD STANDING CERTIFICATES

Traditional corporate practice would often require corporations to produce certificates of good standing in connection with a variety of transactions as an assurance that the party engaged in the transaction possessed authority to act and that it retained the authority granted to it by it jurisdiction of incorporation. The Louisiana Secretary of State issued these certificates.

The MBCA does not retain the idea of good standing certificates and instead replaces them with certificates of existence. The LBCA modified that provision, and now allows

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138. Louisiana Business Corporation Act, No. 328, § 1-1001(C)(1) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1001(C)(1)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

interested parties to seek a certificate of existence and standing.[139] A new certificate of existence and standing in Louisiana will provide the following information:

> (1) The domestic corporation's corporate name or the foreign corporation's corporate name used in this state.
>
> (2) That either of the following apply:
>
> (a) The domestic corporation is duly incorporated under the law of this state, along with the date of its incorporation and the period of its duration if less than perpetual.
>
> (b) The foreign corporation is authorized to do business in this state.
>
> . . . .
>
> (4) That its most recent annual report . . . has been filed with the secretary of state and that the corporation is in good standing, or that its most recent annual report has not been filed as required by law.
>
> (5) That the corporation is not dissolved or terminated.[140]

3. INSPECTING CORPORATE BOOKS

Both the LBCL and the new LBCA provide for the fundamental right of shareholders to inspect the corporate records. The LBCL provided for a two-tiered system where business competitors needed to own at least 25% of the corporation's shares before being granted the right to inspect books,[141] while other shareholders only needed to own 5% of the shares, and they could aggregate their shares together for the purpose of attaining that 5% threshold.[142]

Section 1602 of the new LBCA disposes of the two-tiered system. Under the new LBCA, any shareholders, regardless of their business interests, are subject to the 5% threshold. The belief that protections against self-interested motives by competitors can be better handled elsewhere in the statute

139. Louisiana Business Corporation Act, No. 328, § 1-128 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-128), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

140. *Id.* §§ 1-128(B)(1)-(5) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-128(B)(1)-(5)).

141. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:103(D) (2010).

142. *Id.*

justified the removal of this distinction. First, the LBCA requires that the request to inspect books be made in good faith and for a proper purpose. Also, corporations may seek court assistance in requiring and maintaining confidentiality of otherwise sensitive records that might be subject to a legitimate shareholder inspection request.[143]

4. CONTRACTING WITH THE STATE

Current Louisiana law contains a provision in its incorporation section that requires a Louisiana business corporation that contracts with the state to file a notice in the Secretary of State's office.[144] This provision has been retained in the LBCA and moved to a section of the statute with more general applicability. Section 1622 of the LBCA requires a corporation that contracts with the state to file a statement that acknowledges the contract.[145] The statement must include the names of certain owners of the corporation, and there are exceptions to those who are required to file.[146]

IV. CONCLUSION

Louisiana has made a significant shift in adopting its new Business Corporation Act. In doing so, it will reap the benefits of the continuous revision process carried out by the ABA's committee on corporate laws, and it will have the MBCA commentary and case law from other jurisdictions as persuasive guidance.

Louisiana shareholders will receive the protection of the LBCA's new oppression remedy and will operate under a new structure of fiduciary duties. Shareholders of private companies will have the added flexibility of electing alternative governance mechanisms through unanimous shareholder agreements. And, corporate practitioners in Louisiana will need to adjust to a number of small changes in everything from the incorporation

143. Louisiana Business Corporation Act, No. 328, § 1-1602(F) & cmt. (b) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1602(F)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

144. Louisiana Business Corporation Law, LA. REV. STAT. ANN. § 12:25(E)(1) (2010).

145. Louisiana Business Corporation Act, No. 328, § 1-1622 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1622), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

146. *Id.*

procedure and the treatment of shareholders, officers, and directors, to the elaborate provisions governing mergers, other fundamental transactions, and dissolution and termination.