

# MANUFACTURING MYSTERY: A RESPONSE TO PROFESSORS CARNEY AND SHEPHERD'S "THE MYSTERY OF DELAWARE LAW'S CONTINUING SUCCESS"

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*In this Article, Chandler and Rickey respond to Professors Carney and Shepherd's The Mystery of Delaware Law's Continuing Success. While Carney and Shepherd argue that the indeterminacy and instability of Delaware corporate law compares unfavorably with the Model Business Corporation Act, Chandler and Rickey show that the comparison made by Carney and Shepherd is an unfair one. Instead of comparing Delaware law with the Model Act as it is practiced in other jurisdictions, Carney and Shepherd compare Delaware law with the bare text of the Model Act.*

*Chandler and Rickey examine the data provided by Carney and Shepherd and conclude that Delaware's success is not such a mystery. First, they compare appeal and reversal rates of other jurisdictions with those of Delaware. Their findings do not support Carney and Shepherd's conclusion that Delaware's reversal rate is "relatively" high. Next, they consider several of Carney and Shepherd's qualitative claims of the Model Act's doctrinal superiority and demonstrate that the Model Act becomes much less certain when applied in real-world cases. Finally, they address Carney and Shepherd's assertion that Delaware law leads to unnecessary cost and delay in litigation and show that this conclusion is based upon unreliable and incomplete data.*

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*Based on their analysis, Chandler and Rickey are able to explore several weaknesses in Carney and Shepherd's conclusions. Although Chandler and Rickey do not claim that Delaware law is superior to that of other states, this Article provides a sound basis for understanding Delaware law's continuing success.*

In their recent article, Professors Carney and Shepherd struggle to weave together the strands of an economic mystery. As a first act, they introduce their villain, the state of Delaware,<sup>1</sup> which has seemingly purloined a disproportionate share of the charters of America's major corporations.<sup>2</sup> Having once captured them, the blackguard then subjects these corporations to several indignities: an indeterminate, outmoded, and prolix legal system; a rapacious corporate bar extracting monopoly rents; high chartering fees; and, of course, a self-aggrandizing judiciary.<sup>3</sup> In the third act, the professors introduce their protagonist, the Model Business Corporation Act (MBCA), a legislative regime that seeks to banish common-law rulemaking and rescue corporations, domestic and foreign, from the yoke of Delaware oppression.<sup>4</sup> The "mystery" arises from the fact that the MBCA has not managed to rescue the enterprises in their moment of distress.<sup>5</sup> Finally, the professors tease that the answer to all these questions, and more, shall be answered in a sequel.<sup>6</sup>

We suggest that no sequel is necessary and that this script is in desperate need of a rewrite. Carney and Shepherd have cherry-picked data to provide a superficially plausible characterization of corporate law in Delaware as a maelstrom of shifting standards whipped up by judicial fiat. This characterization is then purportedly strengthened by reference to studies that suggest that Delaware would be better served were judges to pour oil upon the waters and provide more concrete guidelines<sup>7</sup>—or less "guidance"—to those who choose to navigate its allegedly confusing seas. Yet, even conceding every premise put forth in the article and ignoring every reason a corporation might make the rational economic decision to incorporate under Delaware law, Carney and Shepherd fail to adequately support their thesis that suggests Delaware's success is a mystery.

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1. William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 3.

2. Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 212 (2006) ("About half of the largest corporations are incorporated in Delaware, the majority of firms going public for the first time are incorporated in Delaware, and the overwhelming majority of firms that change their domicile mid-stream reincorporate in Delaware.").

3. Carney & Shepherd, *supra* note 1, at 11–17.

4. *Id.* at 49–60.

5. *See id.* at 63–74.

6. *See id.* at 74–75.

7. *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1954 (1998) (suggesting that indeterminacy in Delaware law is socially suboptimal and limits the ability of other states to compete).

Instead, they skip an important step in their analysis. Reduced to its simplest terms, Carney and Shepherd's comparison of Delaware law with the MBCA proceeds as follows: (1) identify an area of corporate law; (2) trace the evolution of this area of law through several decisions in the Delaware Court of Chancery and Supreme Court; (3) note how complex and difficult those cases render the area of law; (4) compare this complex case law to the supposedly simple, statutory language of the MBCA; and (5) conclude the MBCA is superior.<sup>8</sup> Carney and Shepherd, however, conspicuously fail to identify a jurisdiction that actually functions as a haven of certainty for businesses seeking to incorporate or reincorporate. Their apples-to-oranges approach attempts to compare a fully implemented legal regime with a set of statutory provisions isolated from real disputes, ignoring the dynamic nature of corporate law as it is actually practiced.

In defining their "mystery," Carney and Shepherd muse about the "indeterminacy" or "relative indeterminacy" of Delaware law.<sup>9</sup> The definition of neither expression is readily apparent. We understand indeterminacy to mean a state of vagueness—a situation where clear answers cannot be divined *ex ante*. "Relative indeterminacy," then, must mean this nebulous state in a side-by-side comparison with something else. For the purpose of evaluating the relative determinacy of Delaware law,<sup>10</sup> that "something else" ought logically be the law of another state. Our chief criticism of Carney and Shepherd's work is that they level a charge of relative indeterminacy against Delaware law—the textual statute and judicial interpretations thereof—by comparing it with the MBCA—the textual statute alone.

It is by avoiding direct comparisons between Delaware and states that have adopted the MBCA that Carney and Shepherd conjure their picture of relative indeterminacy. Businesspersons cannot, after all, choose to incorporate under the MBCA itself. Instead, they must choose one of the jurisdictions that has selected the MBCA as the starting point for its corporate law.<sup>11</sup> Some of these jurisdictions have specialized

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8. See, e.g., Carney & Shepherd, *supra* note 1, at 47 (comparing the Delaware and MBCA approaches to special litigation committees). When Carney and Shepherd actually engage in a direct statute-to-statute comparison, they misleadingly cite a 1006-word subsection to support the proposition that the Delaware General Corporation Law is unreadable. See *id.* at 50–51 n.271 (citing DEL. CODE ANN. tit. 8, § 251(g) (Supp. 2007)).

9. *Id.* at 11–48.

10. We understand (and use in this article) the phrase "Delaware law" to include both the Delaware General Corporation Law and the body of judicial decisions that interpret and apply the statute. The function of the judiciary, of course, is to interpret the law as drafted by the legislature. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."). A statute alone is incomplete; "law" is composed of both the text and the interpretation and applications of that text.

11. It is not clear how many jurisdictions have adopted the MBCA. The introduction to the official text asserts that thirty states have adopted all or substantially all of the provisions of the MBCA

courts to handle complex business litigation, while others do not.<sup>12</sup> Some include a time-consuming stage of intermediate appellate review.<sup>13</sup> Some allow jury trials, and others allow punitive damages.<sup>14</sup> Each jurisdiction has adopted its own set of laws and procedures, and we do not suggest here that any particular combination of these is optimal. We instead propose that when Delaware jurisprudence is compared to law as it is actually practiced in these jurisdictions, the results do not sustain Carney and Shepherd's thesis of the relative indeterminacy of Delaware law.

Delaware law is far from perfect or entirely determinate. No law applied by human judges to the myriad actions brought by skilled and well-financed business organizations could ever hope to be wholly certain. The evolution of doctrine in a common law system can be analogized to the process by which a gem-cutter fashions a finished jewel from a raw stone. Each set of litigants presents to the court a controversy, and the court clarifies that aspect of the doctrine (to the best of its ability) when it decides the case. Once the decision is written, new parties look at the refined doctrine. New litigants alter their behavior, turning the stone slightly and presenting the court with a new surface upon which a decision must be struck. Over time, the doctrine becomes clearer. To compare the end result of this process with the text of a statute, however, is to mistake the facet for the stone. Despite Delaware's success in the competition for corporate charters,<sup>15</sup> any legal system is subject to improvement. Our argument is simply that Carney and Shepherd have

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(and three other states still have the 1969 version). MODEL BUS. CORP. ACT introductory cmt. (2008). Thus, it appears that at least thirty-three states have adopted all or substantially all of some version of the MBCA, though other commentators seemingly disagree. Compare Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 110 n.2 (2006) ("Twenty-nine states have adopted the MBCA. Four jurisdictions have statutes [sic] based on an earlier version of the Act."), with Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 738 (2001) ("Twenty-four states have adopted all or substantially all of the current Model Act . . ."). Carney and Shepherd suggest there has been "widespread adoption," Carney & Shepherd, *supra* note 1, at 5, but offer no statistical or evidentiary support for this conclusion. The difficulty is compounded by the fact that some states have adopted the Act in whole and some in part, some states have taken key language from certain provisions of the Act but omit other portions, some states have done all of the above, and others have done all of these combinations but with older versions of the Act.

12. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 711 tbl.4 (2002) (summarizing features of state business courts).

13. See *id.* (demonstrating that all business courts outside of Delaware are divisions of the trial court, which may lead to lengthy review by higher courts).

14. *Id.*; see, e.g., *Ahan v. Grammas*, No. CAL 02-09937, 2004 WL 2724111, at \*21-24 (Md. Cir. Ct. Nov. 19, 2004) (reviewing, on motion for judgment notwithstanding the verdict, a jury's award of damages and discussing punitive damages).

15. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 214-15 (1991) (suggesting Delaware is winning a "race to the top" because shareholders benefit from Delaware incorporation); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (noting a "race for the bottom, with Delaware in the lead"); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 842 (1995) ("[T]here is a broad consensus that state competition to produce corporate law is a race to (or at least toward) the top . . .").

failed to demonstrate the inferiority of Delaware law, or the superiority of actual alternatives, with evidence sufficient to convert Delaware's success into a "mystery."

To support our argument, we place the data provided by Carney and Shepherd into a comparative context. First, we examine what little quantitative data is provided regarding the "relatively high reversal rate"<sup>16</sup> of the Court of Chancery and show that it is far from atypical for a specialized business court. Indeed, although the available data is limited, what comparisons can be made favor Delaware.<sup>17</sup> Next, we examine some of the claims of doctrinal superiority put forward by Carney and Shepherd,<sup>18</sup> and demonstrate that much of the certainty they claim exists under the MBCA disappears when the MBCA is actually applied by courts.<sup>19</sup> Finally, we address the argument that "relatively" indeterminate Delaware law leads to unnecessary cost and delay in litigation,<sup>20</sup> and show that this thesis rests upon unreliable and incomplete data.<sup>21</sup>

Carney and Shepherd excuse their work by describing it as "qualitative, and thus suffer[ing] from the weakness of not being falsifiable."<sup>22</sup> In most cases, however, their data is not even suggestive of their thesis, much less persuasive. Every argument must have support sufficient to justify its conclusions, and yet Carney and Shepherd omit even the most basic comparative data in order to construct their mystery. Nowhere is this omission more glaring than in their attempt to show that Delaware law is relatively indeterminate.

Before discussing this indeterminacy, however, it is important to understand the "success" that Carney and Shepherd find so improbable. If a metric of performance is attraction of large public corporations, Delaware has been hugely successful. As of April 2008, over 63% of Fortune 500 companies were incorporated in Delaware, and the state had captured about 75% of all U.S. initial public offerings since January 2003, despite being one of the nation's smallest and least populous states.<sup>23</sup> Delaware has every incentive to maintain its advantage in this area; the franchise taxes and chartering fees procured from this dominance constitute a significant portion of the state's general fund revenue and allow the General Assembly to avoid imposing other taxes.<sup>24</sup>

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16. Carney & Shepherd, *supra* note 1, at 15.

17. See discussion *infra* Part I.B.

18. Carney & Shepherd, *supra* note 1, at 55–60.

19. See discussion *infra* Part II.B–C.

20. Carney & Shepherd, *supra* note 1, at 11–17.

21. See discussion *infra* Part III.

22. Carney & Shepherd, *supra* note 1, at 11.

23. E-mail from Richard J. Geisenberg, Assistant Sec'y of State, State of Del., to author (Oct. 10, 2007) (on file with authors) (reporting statistics from the Delaware Division of Corporations).

24. Delaware Corporate and Commercial Litigation Blog, Why Delaware Courts Are America's Most Important to Business, <http://www.delawarelitigation.com/2007/09/articles/commentary/why-delaware-courts-are-americas-most-important-to-businesses> (Sept. 2, 2007) (highlighting data from the August 22, 2007, issue of the *Delaware Law Weekly* that 21.6% of Delaware's general fund revenue

On the other hand, nonpublic companies are much less likely to incorporate in Delaware. As of 2000, only about 6% of nonpublic companies made their home there.<sup>25</sup> This number might still be large in comparison to Delaware's share of the nation's population,<sup>26</sup> but it is not as grossly disproportionate as Delaware's success in attracting large public companies. It is difficult to see how this contributes to any mystery.

This understanding of the nature of Delaware's success undercuts Carney and Shepherd's thesis that Delaware is an "outlier" that has lagged behind in important statutory "innovations."<sup>27</sup> Even states that are arguably indifferent to competition for public incorporations still need a code that will serve its nonpublic corporations. These states will adopt innovations appropriate to their needs, but they may not consider the needs of large, public firms.

Though we limit our analysis to the race for public incorporations, we broaden the scope of that inquiry to consider the intense, dynamic nature of corporate law as practiced in this area. Such practice is not the domain of the inexperienced. Few listed corporations make major decisions without the advice of professional and specialized legal counsel. Transactions undertaken by corporate actors are pursued by those with thorough knowledge of the Delaware legal regime, or at least parties with access to such advice.<sup>28</sup> When these transactions are challenged in the Court of Chancery, plaintiffs' attorneys are familiar with (and, in some cases, seek to change) existing Delaware law. Defendants arrive at the courthouse with their own expert litigators.

Where litigation arises from a conflict between parties well versed not only in positive law but also in its inevitable gray areas, it is useful to remember the famous admonition to look at the law from the perspective of the "bad man," or, at the very least, the self-interested man.<sup>29</sup> Fiduci-

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stems from franchise tax and related fees). On the other hand, it is worth noting that Delaware's small size may make it a more avid competitor for corporate franchise fees. Such funds would comprise a much lower proportion of the budget of a larger state. See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 39 (1993). See generally Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

25. Marcel Kahan & Ehun Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1227 (2001).

26. The 2000 census reported Delaware's population as 783,600 people, which represents just under 0.3% of the total U.S. population in 2000. See U.S. Census Bureau, Delaware QuickFacts, <http://quickfacts.census.gov/qfd/states/10000.html> (last visited Nov. 13, 2008).

27. See Carney & Shepherd, *supra* note 1, at 48–49; see also Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1772–86 (2006) (commenting on the "conservatism" of Delaware's approach to amending statutory law); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1601 (2005) (noting the "minor or technical" nature of amendments to Delaware statutory law in contrast to the broader enforcement role of the judiciary).

28. See, e.g., DEL. SUP. CT. R. 52 (setting strict requirements for applicants to the Delaware bar).

29. O.W. Holmes, Justice, Supreme Court of Massachusetts, *The Path of the Law* (Jan. 8, 1897), in 10 HARV. L. REV. 457, 459 (1897). Justice Holmes may have anticipated Carney and Shepherd by almost one hundred years when he admonished students at Harvard Law School that "[w]hen we study law we are not studying a mystery but a well known profession." *Id.* at 457.

ary duties, which are themselves a reflection of the fundamental agency problem created when shareholders choose to be represented by directors whose interests may not be identical to those of their principals, lie at the heart of corporate jurisprudence. Any successful body of law must therefore face the problem of the “bad director”—the faithless fiduciary intent on enriching himself at the expense of his shareholders.

Indeterminacy is the friend of the bad director, who may affirmatively seek unclear areas in the law in the attempt to escape liability (or the threat of it) on the path to unjust enrichment. Yet the party that most often opposes the bad director is often *also* a fiduciary, either in the form of a derivative plaintiff or a class-action lawyer. These parties bring their own agency problems: derivative plaintiffs may expect returns from litigation not shared with general shareholders,<sup>30</sup> and attorneys seek fees siphoned from settlements or judgments.<sup>31</sup> This conflict derives not from any given set of corporate law, but from the nature of agency that lies at the heart of the corporation itself.<sup>32</sup> Carney and Shepherd correctly argue that bad directors and ambitious plaintiffs’ lawyers have affirmatively sought out areas of indeterminacy in Delaware law.<sup>33</sup> What they ignore, however, is that these parties have every incentive to seek indeterminacy in the MBCA. As we shall see, they have done so with considerable success.

#### I. QUANTITATIVE INDETERMINACY: DOES DELAWARE HAVE A RELATIVELY HIGH REVERSAL RATE?

Carney and Shepherd’s case for the relative indeterminacy of corporate law rests upon three related contentions. The first, and weakest, might be called an aesthetic objection: law in Delaware is more prolix, and less subject to easy classification, than law under the MBCA.<sup>34</sup> In support of this, Carney and Shepherd first point to a comment from a prominent defense lawyer that Delaware counsel often cannot tell how many distinct fiduciary duties are faced by a director.<sup>35</sup> Although not directly related to the indeterminacy argument, the authors later complain

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30. The recent battle for control of Caremark between CVS and Express Scripts offers an illustration. See *La. Mun. Police Employees’ Ret. Sys. v. Crawford*, 918 A.2d 1172, 1177–85 (Del. Ch. 2007). There, plaintiff Express Scripts was both a shareholder of Caremark and a competing bidder for control of the company.

31. Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1777–80 (2004).

32. Of course, there is one bright-line rule that would eliminate all indeterminacy in this area. A state could adopt a law declaring that no suit may be brought for breach of fiduciary duty, relegating the relationship to the realm of moral law discussed by Holmes. Holmes, *supra* note 29, at 459–64. After shareholders had run screaming from such a lawless jurisdiction, however, all other states would still be left with laws of various degrees of indeterminacy.

33. Carney & Shepherd, *supra* note 1, at 46–47.

34. *Id.* at 4–48.

35. *Id.* at 14 (quoting Paul T. Schnell, *From the Editor—M&A at Year-End*, M&A LAW. (Glasser LegalWorks, New York, N.Y.), Jan. 2005, at 1, 3–4).

that the length of title 8, section 251(g) of the Delaware Code “is not visually broken down into clauses that make comprehension relatively manageable.”<sup>36</sup>

Neither of these criticisms strikes us as particularly weighty or even relevant to the success of Delaware law in the competition for public incorporations. The question of the precise number of fiduciary duties recognized in Delaware, although the subject of considerable academic dispute,<sup>37</sup> was recently settled by the Delaware Supreme Court’s decision in *Stone v. Ritter*.<sup>38</sup> There is little evidence that corporate directors, as a practical matter, previously were flummoxed by questions of appropriate directorial behavior.<sup>39</sup> As for the text of the Delaware General Corporation Law, it may not be entirely “reader-friendly,” but it is unlikely that the text is impossible to comprehend, particularly for large corporations with extensive in-house legal departments and access to highly trained outside counsel. The use of bullet points over paragraphs is a stylistic preference, not a matter of positive law.<sup>40</sup>

Carney and Shepherd make two additional claims that merit more thorough consideration. First, they point to a “relatively high” reversal rate for the Court of Chancery as a sign of legal indeterminacy.<sup>41</sup> Second, they concentrate on areas of Delaware legal doctrine that, they contend, would be handled in a more determinate manner under the MBCA.<sup>42</sup>

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36. *Id.* at 51.

37. See Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight* 5–25 (UCLA Sch. of Law, Law & Econ. Research Paper Series, Paper No. 07-09, 2007), available at <http://ssrn.com/abstract=1006097> (summarizing the history of the “duty” of good faith).

38. 911 A.2d 362, 370 (Del. 2006).

39. Indeed, when one observes the context of the quotation relied upon by Carney and Shepherd, it becomes clear that the defense lawyer is concerned more with a perception of heightened scrutiny faced by directors than with any precise taxonomy of duties:

Governance developments are affecting M&A in another way. By the end of 2004, directors of public companies found themselves in a more precarious position than perhaps ever before, facing unprecedented scrutiny of their conduct and heightened potential liability. The law governing the responsibilities of directors has become so muddled that, incredibly, one can’t get a consistent answer to the most basic corporate law question of how many fiduciary duties directors have—if you ask Delaware lawyers, the answer can range anywhere from two to five!

The last year saw a piling on of Congress, the SEC, the Delaware courts, state regulators, institutional and activist shareholders (like CalPERS and state pension funds), the media and public opinion over the subject of greater director accountability. Directors have been taken to task for oversight failures, excessive executive pay and conflicts of interest compromising their independence. In an unrelenting series of cases, the Delaware courts have expanded significantly the law relating to director independence and the duties of good faith, oversight and loyalty. Schnell, *supra* note 35, at 3–4 (citations omitted). When the practitioner discusses specific areas of risk to directors, such as claims for excessive compensation or questions of whether “change of control” payments due to directors in a merger constitute a conflict of interest, it is instructive that he does not mention the distinction between loyalty, good faith, or care, and indeed suggests that taxonomy was mostly irrelevant, in that the court focused on “duties” of loyalty, oversight, and good faith to make an “end-run” around limitations on liability for breach of the duty of care. *Id.*

40. It is hardly unusual for corporate documents to be long and less than reader-friendly. Prospectuses, merger agreements, and bond indentures (to name but a few) can be extremely lengthy and complex corporate instruments that are difficult to understand, even if they have numbered paragraphs.

41. Carney & Shepherd, *supra* note 1, at 15.

42. *Id.* at 33.

We suggest that in both areas, actual comparative data—almost entirely unexplored by Carney and Shepherd—is either inconclusive or slightly favors Delaware.

Little scholarship, particularly empirical research, exists on the comparative indeterminacy of Delaware law. Rather, existing academic work has largely concentrated on advantages that Delaware interest groups (particularly the corporate law bar) may enjoy because Delaware law is suboptimally determinate in some theoretical sense.<sup>43</sup> Indeed, much of the literature cited by Carney and Shepherd either says nothing regarding relative indeterminacy or actually suggests that the wealth of existing precedent makes Delaware law *more* determinate than that of other states.<sup>44</sup>

The few authors who have concluded that Delaware corporate law is indeterminate in comparison with any of the other forty-nine relevant jurisdictions have not done so based upon any particularly robust methodology.<sup>45</sup> A jurisdiction with a complex body of law can seem less “determinate” than one in which there are few decisions, if only because most law in the latter jurisdiction is unwritten. Without a comprehensive empirical study, it is impossible to establish that Delaware law is relatively indeterminate in comparison with other jurisdictions.

Carney and Shepherd do not attempt such a complex empirical study, and we do not purport to perform a complete analysis (even a merely “qualitative” one) in response. Instead, we offer an admittedly brief summary of data from alternate jurisdictions and focus on the evidence already put forward by Carney and Shepherd to support their view that Delaware law is relatively indeterminate. We show that Carney and Shepherd’s argument is incomplete and unpersuasive.

#### A. *The “High” Reversal Rate of the Court of Chancery*

First, we consider the suggestion that the Supreme Court of Delaware reverses decisions of the Court of Chancery with surprising fre-

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43. See, e.g., Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 91 (1990) (stating that “the bar earns fees by interpreting and advising on questions of Delaware law” and, therefore, benefits from any indeterminacy).

44. See, e.g., *id.* at 112–13 (“The wealth of Delaware precedent enables corporate counsel to construe the corporate statute, structure transactions, and predict probable outcomes should issues become the subject of litigation.”); Kamar, *supra* note 7, at 1914 (“To be sure, the large conglomerate of precedents in Delaware may well lend a higher degree of predictability to the law than that achieved by other states with fewer precedents. . . . While the existence of a large stock of precedents makes Delaware law more predictable and hence *more conducive to business planning than the laws of other states*, the law is *less predictable than it could be.*”) (emphasis added) (citations omitted).

45. For instance, Jill E. Fisch declares that Delaware’s legal standards are less determinate than those of other states but mentions only two examples: (1) the ability of Delaware courts to allow derivative litigation to go forward even in the face of a contrary decision by an independent special litigation committee, and (2) the intermediate standard of review articulated in *Unocal* that applies in certain takeover contexts. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1076–77 (2000).

quency.<sup>46</sup> There is considerable reason to doubt the accuracy of the reversal rate suggested by Carney and Shepherd's article, as it relies upon former Chief Justice Veasey's "guesstimate" that about one-quarter of chancery appeals are overturned.<sup>47</sup> This estimate, made as part of a speech, was not based upon a particularly rigorous examination of the cases.<sup>48</sup> Although the actual rate of reversal is, to be sure, considerably less, even this inflated rate does not demonstrate relative indeterminacy.

Carney and Shepherd examined the rulings of the Delaware Supreme Court in 2002 in cases appealed from the Court of Chancery, excluded appeals rejected from interlocutory orders, counted any decision affirmed only in part as a reversal, and arrived at a total of ten affirmances and nine reversals.<sup>49</sup> The Court of Chancery disposed of 3,525 cases in 2002 (902 cases excluding those involving wills, trusts, guardianships, and other general equitable matters), of which fifty-five were appealed, and fifty-eight appeals were addressed by the Delaware Supreme Court.<sup>50</sup> Thus, the Court of Chancery's appeal rate was 1.56%, its reversal rate of those appealed was 16.4%, and the overall reversal rate (cases reversed as a percentage of all cases disposed in chancery) for 2002 was approximately 0.26%.<sup>51</sup> When one considers the relatively large volume

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46. Carney & Shepherd, *supra* note 1, at 15. We consider reversals by the Delaware Supreme Court simply because that is the metric used by Carney and Shepherd. We question, however, why Carney and Shepherd neglect to consider legislative reversals—i.e., evidence of the Delaware legislature overruling chancery and supreme court decisions. Had Carney and Shepherd done so, they would have discovered that over the last forty years there were only two legislative reversals of Chancery decisions and three amendments that were inconsistent with the court's interpretation of statutory language. Professors Kahan and Rock have compared this remarkable record with the United States Supreme Court and the federal courts of appeals, which have been "reversed" by Congress or the SEC on insider trading decisions at least five times in the last twenty years. See Kahan & Rock, *supra* note 27, at 1596–97.

47. Carney & Shepherd, *supra* note 1, at 15.

48. See E. Norman Veasey & Michael P. Dooley, *The Role of Corporate Litigation in the Twenty-First Century*, 25 DEL. J. CORP. L. 131, 135 (2000). A comparison of the rough estimates cited in this speech to the actual numbers provided by Carney and Shepherd illustrates that former Chief Justice Veasey's estimates should not be considered canonical. Compare *id.* ("The Court of Chancery appeals to the Supreme Court are very few. Of those business law cases in the Court of Chancery . . . about ninety-five percent stay in the Court of Chancery. That is to say, they are not appealed. . . . Of the five percent of the Chancery business cases that are appealed, seventy-five percent are affirmed.") (emphasis added), with Carney & Shepherd, *supra* note 1, at 15–16 n.87 (assuming that 902 Chancery cases not involving trusts, guardianships, and other matters are corporate cases and noting nineteen appeals taken from corporate cases with nine reversals and ten affirmances). Carney and Shepherd's own figures suggest a much lower appeals rate (approximately 2.1%) and a much higher reversal rate (about 47.4%) than suggested by former Chief Justice Veasey.

49. Carney & Shepherd, *supra* note 1, at 15–16 & n.87. It is worth noting that of the nine cases cited by the authors as "reversed (at least in part)," one of these cases (*Tyson Foods, Inc. v. Actos Corp.*, 809 A.2d 575 (Del. 2002)) is improperly characterized as "reversed." Thus, the numbers should instead read: eleven (not ten) affirmances and eight (not nine) reversals.

50. OFFICE OF THE COURTS, 2002 STATISTICAL REPORT OF THE DELAWARE JUDICIARY 19, 24, 27, available at <http://courts.delaware.gov/aoc/Annual%20Reports/FY02/?2002Final.pdf>.

51. *Id.* (using nine as the number of appeals that were reversed). Because the cases terminated in the Supreme Court are not necessarily the same cases as those terminated in the Court of Chancery in the same year, the data may not be entirely comparable. Nevertheless, we adopt the methodology employed by Carney and Shepherd.

of cases heard by the Court of Chancery, the overall reversal rate was actually extremely low.

The relevance of these numbers to the question of legal determinacy is at best unclear. Carney and Shepherd make little effort to explain why a jurisdiction with a lower rate of supreme court reversal is necessarily more determinate. A highly indeterminate body of law will be reflected in settlements, rates of appeal, and rates of reversal. All else being equal, it is reasonable to expect that a more determinate system will produce a higher percentage of settlements: so long as parties are able to predict the law accurately, they will resort to the courts only when they have factual disputes. Similarly, a determinate legal system may tend to lower the number of appeals taken from trial court decisions: appellate courts generally show great deference to trial court findings of fact, so a jurisdiction with more determinate legal rules will see fewer appeals altogether. On the other hand, there is less reason to believe that a relatively determinate legal regime will have a low reversal rate on appeal. If the law is such that only close, disputable cases are advanced on appeal, the higher court may reverse more often than in a jurisdiction where the law is less certain, particularly if parties are adapting their behaviors to take advantage of the gray areas of a legal system.

A thorough attempt to measure the relative indeterminacy of corporate law through comparisons of reversal rates would necessarily involve a comparison of rates of settlement, appeal, and reversal in different jurisdictions, as well as an understanding of why the litigants behaved as they did. We do not attempt to undertake such an analysis here. Nor can we provide definite answers as to the relative weight that should be assigned to each factor in a thorough comparative analysis. For the moment, however, we suggest that the measure most relevant to the question of indeterminacy among the three we have mentioned is the percentage of trial court decisions that are appealed. We hypothesize that in an indeterminate system, even if the trial court's determination of fact is afforded great deference, many cases still are likely to be appealed simply because outcome determinative issues will be considered *de novo* by a different court. As a result, the losing party will have considerable incentive to take another roll of the dice.

#### *B. Reversal Rates in Other Jurisdictions*

With this in mind, we searched for data of at least comparable quality to that gathered by Carney and Shepherd to compare appeal and reversal rates of other jurisdictions with those of Delaware. We sought to obtain appeal and reversal rates of business courts in other jurisdictions, particularly those that use the MBCA, to preserve as much as possible a like-to-like comparison. Where there are relevant differences, we highlight them. The results tentatively support the thesis that Delaware law is not comparatively indeterminate.

### 1. *The Federal Courts*

Carney and Shepherd limited their specific comparison of appeal and reversal rates to the federal courts,<sup>52</sup> which is a somewhat strained comparison. In any given civil case, federal courts may be applying federal law, Delaware law, or the civil law of some other jurisdiction, including one that employs the MBCA. Civil actions in federal court will include contract claims, mass tort claims, and other cases that would be handled in Delaware by the Superior Court.<sup>53</sup> On the other hand, federal courts are more likely to handle disputes with large, publicly traded organizations than state courts outside of Delaware.<sup>54</sup> In that sense, their caseload is closer to Delaware. We do not attempt to resolve the issue here, but merely point out that the utility of the comparison may not be very high, and may lead to faulty conclusions.

Our review of the data leads us to a slightly more positive view of the federal courts. Carney and Shepherd considered the 259,537 civil cases terminated by district courts in 2002.<sup>55</sup> They compared this with the 56,586 appeals terminated in all courts of appeal and the 2,424 cases reversed, and arrived at an overall reversal rate of 0.93%, which is about three times that of Delaware.<sup>56</sup> Although flattering, this is slightly misleading, as they compared the number of *civil* cases filed to the number of *all* cases (including criminal cases) appealed. If one considers only federal civil appeals (excluding bankruptcy cases and administrative appeals), only 17,659 cases were appealed in 2002, and of those 1,141 were reversed.<sup>57</sup> This results in an appeals rate of 6.8%, a reversal rate of 6.46%, and an overall reversal rate of 0.44%.

### 2. *North Carolina*

Next, we examine reversal rates from a specialized business court in an MBCA jurisdiction. In 1996, the state of North Carolina appointed Ben F. Tennille as the first Special Superior Court Judge for complex business cases as part of an effort specifically designed to attract busi-

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52. Carney and Shepherd included this comparison in an earlier draft of their article, but it has subsequently been omitted.

53. The Court of Chancery's jurisdiction is limited under Delaware law to equitable causes where no sufficient remedy is available elsewhere, unless jurisdiction is granted specifically by statute. See DEL. CONST. art. IV, § 10; DEL. CODE ANN. tit. 10, §§ 341–342 (1999).

54. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 391 (1992) (reporting that 62% of defendants removing cases to federal courts were corporations).

55. Carney and Shepherd's comparison from their earlier draft used data from ADMIN. OFFICE OF THE U.S. COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 97 tbl.B-5, 123 tbl.C, available at <http://www.uscourts.gov/judbus2002/contents.html> (reporting data for the fiscal year ending September 30, 2002).

56. *Id.*

57. *Id.*

nesses to North Carolina.<sup>58</sup> Far from declaring Delaware jurisprudence to be indeterminate, the North Carolina Business Court (NCBC) was instituted as part of a plan to make a “court system as responsive and predictable as the Delaware Chancery Court in dealing with complex corporate issues.”<sup>59</sup> Judge Tennille was reappointed in 2000, and the court has expanded to include three judges.<sup>60</sup> Carney and Shepherd include North Carolina in their list of states that have adopted all three of their selected MBCA innovations.<sup>61</sup>

The NCBC kindly responded to an inquiry for a statistical breakdown of their cases since 1996, and we used this as a basis of our analysis.<sup>62</sup> The small size of the NCBC (at least until 2006) makes direct comparison difficult. Between 2000 and 2005, for instance, only 126 cases were closed by the NCBC.<sup>63</sup> In some years, no cases were reversed, while in other years the North Carolina Supreme Court did not even address a NCBC case.<sup>64</sup> To provide a meaningful comparison, we have aggregated the years 2001 to 2005.<sup>65</sup> During this period, the NCBC closed 107 cases, of which seven were appealed and two reversed.<sup>66</sup> This yields an appeal rate of 6.54%, a reversal rate of 28.6%, and an overall reversal rate of 1.87%, which is four times greater than that of Delaware.<sup>67</sup>

### 3. *Maryland Special Business and Technology Case Management Program*

On January 1, 2003, the Maryland Special Business and Technology Case Management Program was established under Maryland Rule 16.205.<sup>68</sup> Under the program, litigants can seek to have their cases designated as special or complex business or technology matters that are then referred to one of three judges specially trained to handle such litiga-

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58. CHIEF JUSTICE’S COMM’N ON THE FUTURE OF THE N.C. BUS. COURT, FINAL REPORT AND RECOMMENDATION (2004), <http://www.ncbusinesscourt.net/ref/Final%20Commission%20Report.htm>.

59. *Id.*

60. N.C. ADMIN. OFFICE OF THE COURTS, FISCAL YEAR 2005–06 ANNUAL REPORT: THE NORTH CAROLINA JUDICIAL BRANCH 11 (2006), available at [http://www.nccourts.org/Citizens/Publications/Documents/annualreport\\_2005-06.pdf](http://www.nccourts.org/Citizens/Publications/Documents/annualreport_2005-06.pdf); see also Ertel Berry, *More Judges Needed to Keep Pace with Increased Caseload*, N.C. LAW. WKLY., Jan. 17, 2005, at 1.

61. Carney & Shepherd, *supra* note 1, at 53–55 tbl.2. North Carolina follows the MBCA. See *Crowder Constr. Co. v. Kiser*, 517 S.E.2d 178, 189–90 (1999) (describing legislative instruction to incorporate comments to 1984 Revised MBCA into North Carolina law).

62. N.C. Bus. Court, Disposition of NCBC Cases (May 27, 2008) (on file with University of Illinois Law Review).

63. *Id.* at 2.

64. *Id.* at 1.

65. In 2000, the NCBC experienced an 80% reversal rate using the Carney and Shepherd methodology, a significant statistical outlier. *Id.* at 1–2. We have set aside that year, despite the fact that inclusion would be highly flattering to Delaware.

66. *Id.*

67. See *supra* text accompanying note 51 (calculating Delaware’s overall reversal rate as 0.26%).

68. See Business and Technology Case Management Program, Introduction, <http://www.baltocts.sailorsite.net/civil/BTCMP/introduction.htm> (last visited Nov. 16, 2008).

tion.<sup>69</sup> The judges who take part in the case management system do not constitute a separate court, but their decisions are segregated in such a way that numerical analysis is possible.<sup>70</sup>

Like North Carolina, the Maryland case management system is relatively new, providing a very small sample from which to work. Judge Steven I. Platt (Ret.), the Chairman of the Implementation Committee for the case management system, kindly provided us with an analysis of Maryland Business & Technology Case Management Program opinions. As of October 2007, there were fifty-six such opinions since the inception of the program. Of the nine that had been appealed, one had been reversed, five had been affirmed, and three appeals were still pending.<sup>71</sup> This yields an appeal rate of 16.1%, a reversal rate of 11.1%, and an overall reversal rate of 1.79%.

4. *Conclusion: Statistical Analysis Does Not Support Carney and Shepherd's Thesis that Delaware's Reversal Rate Is "Relatively" High*

The summary of our findings in Table 1 does little to support a theory of relative indeterminacy. Subject to all the caveats in our preceding discussion, a party who receives a judgment in the Delaware Court of Chancery is less likely to see that judgment reversed than her counterpart in Maryland or North Carolina. Even the federal courts are marginally less "certain" than Delaware. The three state courts all have relatively high reversal rates and relatively low appeal rates, although Delaware leads the state courts in all categories. This is true despite the fact that parties in complex business cases are rarely unable to find the funds to prosecute trials to appeal. The difference between these courts and the relatively low reversal rate of the federal courts may lie in the nature of specialized business practice as opposed to the more general nature of the federal court docket.

Of course, this data is purely suggestive and is not meant to show that Delaware law is necessarily more determinate than MBCA jurisprudence. Because data on reversal rates in state courts is difficult to obtain, the sample size is fairly small, and any conclusions are necessarily tentative. Moreover, if our hypothesis about the difference between the general civil nature of cases in federal courts and the specialized state courts is correct, then the fact that Delaware lies between the two extremes in

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69. *Id.*

70. See Business and Technology Case Management Program, Opinions, <http://www.baltocts.sailorsite.net/civil/BTCMP/opinions.htm> (last visited Nov. 16, 2008).

71. E-mail from Judge Steven I. Platt (Ret.) to author (Oct. 2, 2007) (on file with the authors).

TABLE 1  
COMPARATIVE REVERSAL RATES IN STATE AND FEDERAL COURTS

	Delaware (Court of Chancery)	Federal Courts	North Carolina	Maryland
Cases terminated in trial court	3,525	259,537	107	56
Appeals	55	17,659	7	9
Reversals	9	1,141	2	1
Appeal rate	1.6%	6.8%	6.5%	16.1%
Reversal rate (as % of appeals)	16.4%	6.46%	28.6%	11.1%
Reversal rate (as % of terminations)	0.26%	0.44%	1.87%	1.79%

both cases may not be surprising. The Court of Chancery's jurisdiction, although heavy with corporate disputes, is defined only by the boundaries of equity, and includes general cases that would not be heard in the specialized courts in North Carolina or Maryland. In that sense, the Court of Chancery's work is broad, although not as broad as that of a federal court. Similarly, supporters of other corporate law innovations, such as the new corporations act recently implemented in North Dakota,<sup>72</sup> might object to our decision to compare the Court of Chancery only to specialized business courts that have a narrow scope. Critics of Delaware, and specialized business courts in general, might argue that specialized judges are more likely to engage in nuanced judicial decision making and, thus, may be more prone to appeal or reversal than jurisdictions without them. Such arguments cannot be ruled out.

Yet if we cannot definitively say, based on this data, that Delaware law is more determinate than that of Maryland or North Carolina, the same data provides no support at all for Carney and Shepherd's conclusion that Delaware law is relatively indeterminate. Nor do the numbers lead to the conclusion that a jurisdiction can make the gray areas of its law magically disappear through the simple application of the MBCA.

72. Posting of Larry Ribstein to The Harvard Law School Corporate Governance Blog, <http://blogs.law.harvard.edu/corpgov/2007/04/23/the-north-dakota-experiment/> (Apr. 23, 2007, 23:48 CST).

## II. QUALITATIVE INDETERMINACY: DO CORPORATE DECISION-MAKERS REALLY HAVE ACCESS TO MORE GUIDANCE OUTSIDE OF DELAWARE?

*Mystery's* qualitative analysis of Delaware jurisprudence is equally lacking. Carney and Shepherd limit themselves almost entirely to pointing out “warts” in Delaware law and asserting that corporations would not suffer from such uncertainty under the MBCA.<sup>73</sup> Noticeably absent is any response to the question that immediately presents itself when balancing the merits of the MBCA versus Delaware law: if the MBCA is vastly superior, then why have other large states of incorporation declined to adopt its innovations?<sup>74</sup> In addition, though we agree that a comprehensive fifty-state comparison would be beyond the scope of any article,<sup>75</sup> we also believe that at least a brief examination of potential areas of uncertainty in the MBCA case law is warranted before one writes off Delaware's success as inexplicably mysterious.

### A. *The Difficulty of Qualitatively Evaluating Relative Indeterminacy*

A true “apples-to-apples” comparison of Delaware law to that of other states presents a daunting task. Comparison presents a technical difficulty because there is no solid and consistent body of “MBCA law” to which Delaware law may be compared.<sup>76</sup> No other state has developed a body of decisional law comparable to Delaware,<sup>77</sup> and many states will confront questions of corporate law as matters of first impression. Indeed, merely attempting to discover the “MBCA position” on an issue can be difficult.<sup>78</sup> If a practitioner wishes to find all cases interpreting section 12.02 of the MBCA, for instance, she cannot simply search Lexis

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73. See, e.g., Carney & Shepherd, *supra* note 1, at 46–57.

74. For example, New York, Pennsylvania, California, and Texas all—as states with a large number of incorporations—have an interest in adopting efficient innovations. None of these states has, however, adopted any of the more “innovative” provisions of the MBCA. See, e.g., *infra* note 81 (listing states that have adopted the section 12.02 safe harbor provision).

75. See Carney & Shepherd, *supra* note 1, at 33 (“We cannot produce a comprehensive, fifty-state comparison on all of the difficulties with Delaware law that we have described.”).

76. The MBCA has undergone a series of revisions, but states do not necessarily adopt the newest version of the MBCA immediately or even at all. See, e.g., *supra* note 11 (noting that three states still have adopted only the 1969 version of the MBCA).

77. Dooley & Goldman, *supra* note 11, at 753–54 (explaining the necessity for the bright-line safe harbor in section 12.02 of the MBCA because “[t]he bench and bar in other states are unlikely to have at their disposal such a well-developed body of common law decisions interpreting what constitutes a ‘sale of all or substantially all the assets’ of a corporation”).

78. This difficulty is further exacerbated by the piecemeal fashion of legislative adoption of the MBCA. Even the corporate statute in an “MBCA” jurisdiction may not be identical to the MBCA itself; states may adopt most, but not all, of the MBCA and, in a rare case, a state may seemingly adopt both the MBCA and Delaware law for the same provision. Compare MINN. STAT. ANN. § 302A.661(2)(b) (West Supp. 2008) (adopting the “safe harbor” and “significant continuing business activity” language of section 12.02(a) of the MBCA), with *id.* § 302A.661(2)(a) (retaining the “all or substantially all” and “usual and regular course of . . . business” language).

or Westlaw for citations to that section of the Act.<sup>79</sup> Courts will occasionally note that their corporate law statutes reflect the MBCA, but they do not always do so, making the search for precedent considerably more difficult.<sup>80</sup>

More importantly, a lack of case law may provide the illusion of certainty to a body of law that has not undergone trial by fire. For example, there is little, if any, case law interpreting the safe harbor provision of section 12.02(a) of the MBCA.<sup>81</sup> Carney and Shepherd seem to assume

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79. A number of factors immediately complicate what initially may seem to be a straightforward research undertaking. First, not all states that have adopted the language of the MBCA have also adopted its numbering, rendering a numerically driven search based on the sections of the MBCA less than fruitful. *See, e.g., id.* § 302A.661(2)(b) (adopting the “safe harbor” language of section 12.02(a) of the MBCA). Second, even if the numbering system aligns so that, for example, section 12.02 of a state corporate code addresses shareholder approval for the sale of assets, the language of section 12.02 of a state’s corporate statute may not be that of section 12.02 of the MBCA because the state may have declined to adopt that particular section of the MBCA and instead chosen to retain the Delaware test under an “MBCA-numbering” scheme. *See, e.g.,* FLA. STAT. ANN. § 607.1202(1) (West Supp. 2007) (codification of the “all or substantially all” sale of assets test); N.J. STAT. ANN. § 14A:10-11 (West Supp. 2003) (same); MODEL BUS. CORP. ACT § 12.02 cmt. 1 (2008) (“The ‘all or substantially all’ test has also been used in most corporate statutes.”). The series of revisions that the MBCA has undergone present an additional obstacle. Most importantly for the purposes of this Article, results from a search for provisions from the most recently revised MBCA, even if restricted by timeframe to post-revision, cannot be relied on without further consideration. For example, a search restricted to cases after 1999, when the safe harbor made its first appearance in the MBCA, produces results that include case law from a state that has adopted the safe harbor provision, but whose court did not apply it. *Firstcom, Inc. v. Qwest Corp.*, No. 04-995ADM/JJG, 2006 WL 2666301, at \*5 (D. Minn. Sept. 18, 2006) (applying an “all or substantially all” analysis to determine whether a sale of assets required shareholder approval under section 302A.661(2), even where section 302A.661(2)(b) appears to define, by way of the safe harbor, when a sale of assets is a sale of “all or substantially all” of a corporation’s assets). This underscores the relative scarcity of decisions engaging in independent interpretation of the MBCA.

80. *See, e.g.,* BCI Telecom Holding, Inc. v. Jones Intercable, Inc., 3 F. Supp. 2d 1165, 1170–71 (D. Colo. 1998) (applying section § 7-108-501 of the Colorado Revised Statutes), which is based on chapter 8 of the MBCA, without ever mentioning or citing the MBCA). Although this might otherwise be considered a minor criticism, it is certainly a comparable annoyance to the wordiness of Delaware General Corporation Law, section 251(g) of which Carney and Shepherd complain. *See* Carney & Shepherd, *supra* note 1, at 50–51 n.271.

81. Though unable to find any cases interpreting the “safe harbor” provision of the MBCA, this is perhaps unsurprising because it appears that only eight states have adopted the safe harbor provision of section 12.02 of the MBCA. *See* IDAHO CODE ANN. § 30-1-1202 (1999); IOWA CODE ANN. § 490.1202 (West Supp. 2008); ME. REV. STAT. ANN. tit. 13-C, § 1202 (2005); MICH. COMP. LAWS ANN. § 450.1753 (West 2002); MINN. STAT. ANN. § 302A.661(2)(b); MISS. CODE ANN. § 79-4-12.02 (2001); S.D. CODIFIED LAWS § 47-1A-1202 (2007); W. VA. CODE ANN. § 31D-12-1202 (LexisNexis Supp. 2008). Despite Carney and Shepherd’s protestations to the contrary, *see* Carney & Shepherd, *supra* note 1, at 57 & n.304, at least with respect to the safe harbor provision, more than just a “few” states have copied Delaware’s law. In fact, all but eight state corporate statutes utilize an “all or substantially all” standard. *See* ALA. CODE § 10-2B-12.02 (LexisNexis 1999); ALASKA STAT. § 10.06.568 (2006); ARIZ. REV. STAT. ANN. § 10-1202 (2004); ARK. CODE ANN. § 4-27-1202 (2001); CAL. CORP. CODE § 1001 (West Supp. 2008); COLO. REV. STAT. ANN. § 7-112-102 (West 2006); CONN. GEN. STAT. ANN. § 33-831 (West 2005); DEL. CODE ANN. tit. 8, § 271 (Supp. 2008); D.C. CODE ANN. § 29-101.75 (LexisNexis 2001); FLA. STAT. ANN. § 607.1202; GA. CODE ANN. § 14-2-1202 (Supp. 2008); HAW. REV. STAT. ANN. § 414-332 (LexisNexis 2008); 805 ILL. COMP. STAT. 5/11-60 (2006); IND. CODE ANN. § 23-1-41-2 (LexisNexis 1999); KAN. STAT. ANN. § 17-6801 (2007); KY. REV. STAT. ANN. § 271B.12-020 (LexisNexis 2003); LA. REV. STAT. ANN. § 12:247 (1994); MD. CODE ANN., CORPS. & ASS’NS §§ 1-101, 3-104; (LexisNexis 2007) (section 1-101 defining “transfer of assets” as “all or substantially all”); MASS. ANN. LAWS ch. 156D, § 12.02 (LexisNexis 2005); MO. ANN. STAT. § 351.400 (West 2001); MONT. CODE

that this reflects the statute's finely written certainty,<sup>82</sup> but it may also reflect the fact that this particular provision has yet to meet a hard case,<sup>83</sup> or even be applied at all.<sup>84</sup>

Given the technical and theoretical difficulties inherent in a fair comparison of Delaware law with the various states in which the MBCA has been implemented, we are sympathetic with the decision of Carney and Shepherd to avoid the exercise. We do not attempt to do the opposite and prove that Delaware law, as actually practiced, is inherently superior to any possible implementation of the MBCA. Rather, we present two less striking theses. First, we suggest that courts in other jurisdictions often look to Delaware when the guidance available to them under the MBCA runs out. Second, in order to give a more complete perspective on relative indeterminacy, we identify a few areas (unmentioned by Carney and Shepherd) in which courts have disagreed upon the meaning of the MBCA.

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ANN. § 35-1-823 (2007); NEB. REV. STAT. § 21-20.136 (1997); NEV. REV. STAT. ANN. § 78.565 (LexisNexis Supp. 2007); N.H. REV. STAT. ANN. § 293-A:12.02 (LexisNexis 1999); N.J. STAT. ANN. § 14A:10-11; N.M. STAT. § 53-15-2 (LexisNexis 2001); N.Y. BUS. CORP. LAW § 909 (McKinney 2003); N.C. GEN. STAT. § 55-12-02 (2007); N.D. CENT. CODE § 10-19.1-104 (Supp. 2007); OHIO REV. CODE ANN. § 1701.76 (LexisNexis Supp. 2008); OKLA. STAT. ANN. tit. 18, § 1092 (West Supp. 2008); OR. REV. STAT. § 60.534 (2007); 15 PA. CONS. STAT. ANN. § 1932 (West Supp. 2008); R.I. GEN. LAWS § 7-1.2-1102 (Supp. 2007); S.C. CODE ANN. § 33-12-102 (2006); TENN. CODE ANN. § 48-22-102 (2002); TEX. BUS. ORGS. CODE ANN. § 21.455 (Vernon 2008); UTAH CODE ANN. § 16-10a-1202 (2005); VT. STAT. ANN. tit. 11A, § 12.02 (Supp. 2008); VA. CODE ANN. § 13.1-900 (Supp. 2008); WASH. REV. CODE ANN. § 23B.12.020 (West Supp. 2008); WIS. STAT. ANN. § 180.1202 (West 2002); WYO. STAT. ANN. § 17-16-1202 (2007).

82. Carney & Shepherd, *supra* note 1, at 33.

83. Of the eight states that currently include the safe harbor as part of their corporate statute, courts in only two of these states have had the occasion to address the safe harbor provision at all. A search conducted for the relevant statutory provisions in those eight states, including both federal and state cases (to account for, as Carney and Shepherd seemingly fail to do, the possibility of state-based claims in federal court) yielded six cases from only two of the eight states, in which either the court merely noted the existence of the statute in passing or the statute at issue in the case utilized the "all or substantially all" standard. See *Firstcom, Inc.*, 2006 WL 2666301, at \*4; *In re Great Nw. Dev. Co.*, 28 B.R. 141, 143 (Bankr. E.D. Mich. 1983); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 885 (Mich. 1976); *Christner v. Anderson, Nietzke & Co.*, 401 N.W.2d 641, 646 (Mich. Ct. App. 1986); *Wessin v. Archives Corp.*, 581 N.W.2d 380, 389 (Minn. Ct. App. 1998); *Warthan v. Midwest Consol. Ins. Agencies, Inc.*, 450 N.W.2d 145, 149 (Minn. Ct. App. 1990). Notably, all but one of the six cases pre-date the 1999 revision of the MBCA, in which section 12.02 was amended to include the "safe harbor" provision (which, of course, is not necessarily the year in which any of the six states adopted the provision). This suggests that there is no case law interpreting the safe harbor provision from any state in which the safe harbor provision has actually been adopted. Though Carney and Shepherd presumably would contend that this is a definitive testament to the clarity and determinacy of the provision, it is at least equally as likely that this lack of judicial interpretation of the safe harbor provision is a function of the statute's novelty or an absence of financial incentive. For example, none of the top fifty 2007 Fortune global 500 corporations are incorporated in Michigan and only two are incorporated in Minnesota. *Global 500 Full List for 2007*, FORTUNE, July 23, 2007, available at [http://money.cnn.com/magazines/fortune/global500/2007/full\\_list/index.html](http://money.cnn.com/magazines/fortune/global500/2007/full_list/index.html); see also Kahan & Kamar, *supra* note 25, at 1240-41.

84. See, e.g., *Firstcom, Inc.*, 2006 WL 2666301, at \*5 (discussing "all or substantially all" without reference to the safe harbor provision in section 302A.661(2)(b)).

*B. The Influence of Delaware Law on the Interpretation of the MBCA*

Although academics speak of a “race” or “competition” between states for corporate charters,<sup>85</sup> from a judicial perspective the relationship between state laws is often more collaborative than competitive.<sup>86</sup> Delaware courts cite to the MBCA as a source of persuasive authority.<sup>87</sup> Similarly, the official comments to the MBCA frequently reference Delaware cases as examples or sources of further explanation.<sup>88</sup> Thus, it is far from clear that, simply by selecting a different state of incorporation, a firm may opt-out of the “disarray” that Carney and Shepherd claim plagues Delaware corporate law.

For instance, Carney and Shepherd criticize the Delaware courts for departing from a strict “market value” approach in appraisal actions, suggesting that Delaware courts ignore the efficient capital market hypothesis.<sup>89</sup> “Results that depart so dramatically from economic reality,” they say, “[should] encourage litigants to play a lottery by increasing the number of cases involving valuation issues.”<sup>90</sup> They criticize the Delaware Supreme Court for chastising the board of directors, which failed to conduct any independent inquiry whatsoever into the value of their firm, in *Smith v. Van Gorkom*<sup>91</sup> because, apparently, the 46% premium over market price should have been sufficient for the plaintiff shareholders.<sup>92</sup> Carney and Shepherd then complain that the Delaware Supreme Court in *Rapid American Corp. v. Harris*<sup>93</sup> awarded shareholders consideration significantly higher than the pre-merger market price.<sup>94</sup> Yet this very criticism that Carney and Shepherd level against Delaware courts—that the courts are willing to depart from strict market value—can be made

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85. See Carney & Shepherd, *supra* note 1, at 9–10.

86. See Kahan & Rock, *supra* note 27, at 1584.

87. See, e.g., *Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 794 n.68 (Del. Ch. 2004) (citing MODEL BUS. CORP. ACT § 2.02 cmt. 3.i (1997)); *Conway v. Astoria Fin. Corp.*, 837 A.2d 30, 36 (Del. Ch. 2003) (citing MODEL BUS. CORP. ACT § 4A (1967)); see also *Berger v. Intelident Solutions, Inc.*, 911 A.2d 1164, 1169–71 (Del. Ch. 2006) (applying Florida law, which is based on the MBCA, and predicting that Florida courts would follow the Delaware approach to dissidents’ rights).

88. See, e.g., MODEL BUS. CORP. ACT § 7.44 cmt. 1 (2008) (citing Delaware case law to explain the concept of independence).

89. Carney & Shepherd, *supra* note 1, at 26–28.

90. *Id.* at 27–28. These are favorite themes for Professor Carney, who, along with a different coauthor, has previously written at length about his distaste for valuation in Delaware. Compare William J. Carney & Mark Heimendinger, *Appraising the Nonexistent: The Delaware Courts’ Struggle with Control Premiums*, 152 U. PA. L. REV. 845, 846–47 (2003), with Carney & Shepherd, *supra* note 1, at 26–28. We can only hope that through repetition, the “bizarre result [of *Harris v. Rapid American Corp.* that] has received relatively little attention” will garner the notice he believes it obviously deserves. Carney & Heimendinger, *supra*, at 847. As we demonstrate, however, a strong form of the efficient capital market hypothesis has not been universally accepted in MBCA jurisdictions, so firms remain at risk of “bizarre” valuations in jurisdictions beyond Delaware.

91. 488 A.2d 858 (Del. 1985).

92. Carney & Shepherd, *supra* note 1, at 26.

93. 603 A.2d 796 (Del. 1992).

94. Carney & Shepherd, *supra* note 1, at 27.

against the courts of almost every MBCA jurisdiction.<sup>95</sup> Indeed, Carney and Shepherd implicitly concede as much. Although their article is otherwise interspersed with remarks about the superiority of the MBCA, they conspicuously omit the MBCA's treatment of "fair value."<sup>96</sup>

Judges, economists, and academics generally agree that arriving at a valuation of a company is complex and difficult. Judges routinely note that the terms "value" and "fair value" are ambiguous.<sup>97</sup> Economists called as expert witnesses in appraisal actions arrive at widely varied conclusions.<sup>98</sup> Academics have hardly come to a consensus on which methods of valuation are superior.<sup>99</sup> Against a background of seemingly universal agreement as to the difficulty associated with valuation, Carney and Shepherd's assertion that the Delaware courts "misunderstand" finance<sup>100</sup> is surprising. If the Delaware courts are lost, where should we look for guidance?

Apparently not to the MBCA or to most states that have followed Delaware's approach. Consider the Supreme Court of Colorado's decision in *Pueblo Bancorporation v. Lindoe, Inc.*,<sup>101</sup> which was decided in 2003. At the time, Colorado based its corporate law on the 1984 version of the MBCA.<sup>102</sup> In a squeeze-out merger, the plaintiff asked for its proportional share of the value of the enterprise, and a defendant insisted that the plaintiff's shares be subject to a marketability and minority discount.<sup>103</sup> Of course, the application of a minority discount to a dissenter's shares that was at issue in *Pueblo Bancorporation*<sup>104</sup> is merely the flip-side of the application of a control premium to the value of shares at issue in *Rapid American*.<sup>105</sup> both allow the court to depart from the value that would be paid in an open market transaction to give dissenting shareholders their fair share of the value of the firm. The Colorado Supreme Court, in a divided opinion, determined that the interpretation of "fair value" was a question of law and that the trial court did not have the discretion to apply a minority discount that would reflect the "fair

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95. See, e.g., *Stanton v. Republic Bank of S. Chi.*, 581 N.E.2d 678, 682 (Ill. 1991); *Santee Oil Co. v. Cox*, 217 S.E.2d 789, 791 (S.C. 1975).

96. Carney & Shepherd, *supra* note 1, at 26–28.

97. See, e.g., *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 359 (Colo. 2003) ("We conclude that the meaning of 'fair value' is ambiguous. It is a term that does not have a commonly accepted meaning in ordinary usage, much less in the business community."); *Matthew G. Norton Co. v. Smyth*, 51 P.3d 159, 163 (Wash. Ct. App. 2002) ("The term 'value' is inherently ambiguous.").

98. Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 471 (1990).

99. Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 310 (2004) ("[T]here is significant disagreement about what fair value means.").

100. Carney & Shepherd, *supra* note 1, at 26.

101. 63 P.3d 353.

102. *Id.* at 365.

103. *Id.* at 357 n.2.

104. *Id.* at 353.

105. 603 A.2d 796 (Del. 1992).

market value” of the shares.<sup>106</sup> In other words, in Colorado, under the MBCA, plaintiffs are now encouraged to play the very lottery to which Carney and Shepherd so strenuously object.

More interesting than the result, however, are the sources of authority relied upon by the majority in the *Pueblo Bancorporation* case. The disagreement between the majority and the dissent in the Colorado case highlights areas of indeterminacy inherent in the MBCA approach,<sup>107</sup> a matter to which we will return in the next section. For now, however, two aspects of the majority opinion are worth noting. First, the Colorado Supreme Court cited extensively, and favorably, to Delaware law, particularly *Cavalier Oil Corp. v. Harnett*.<sup>108</sup> Such reliance is not atypical.<sup>109</sup> Courts in MBCA jurisdictions often follow Delaware in choosing a valuation methodology,<sup>110</sup> and, as does Delaware, the majority of states reject the market approach advocated by Carney and Shepherd.<sup>111</sup> Second, the court noted that the 1999 amendments to the MBCA (not yet adopted in Colorado) specifically reject a marketability discount and that the majority of American courts had followed Delaware’s lead in this regard.<sup>112</sup>

Thus, though one might agree or disagree with how Carney and Shepherd<sup>113</sup> or Justice White (who was, in any event, writing in dissent) might approach the question of whether “fair value” is equivalent to “fair market value,” the matter appears utterly irrelevant to the relative indeterminacy of Delaware law. If the majority of MBCA jurisdictions, and the latest amendments to the MBCA itself, have followed Delaware’s lead, this is not a point of differentiation for firms choosing where to incorporate.

Not only do courts refer to Delaware corporate law to clarify gaps in the MBCA, but on occasion they refer to Delaware law in preference

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106. *Pueblo Bancorporation*, 63 P.3d at 361.

107. *Compare id.* at 369, *with id.* at 372 (Kourlis, J., dissenting).

108. 564 A.2d 1137 (Del. 1989).

109. *See, e.g.*, *Szaloczi v. John R. Behrmann Revocable Trust*, 90 P.3d 835, 841 (Colo. 2004) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), among others); *Pueblo Bancorporation*, 63 P.3d at 365 (citing *Cavalier Oil*, 564 A.2d 1137).

110. *See, e.g.*, *Ex parte Baron Servs., Inc.*, 874 So. 2d 545, 550 (Ala. 2003) (citing *Cavalier Oil*, 564 A.2d 1137, among others); *Pueblo Bancorporation*, 63 P.3d at 365 (same); *Nw. Inv., Corp. v. Wallace*, 741 N.W.2d 782, 787–92 (Iowa 2007) (same); *Bingham Consolidation Co. v. Groesbeck*, 105 P.3d 365, 370–71 (Utah Ct. App. 2004) (citing *Paskill Corp. v. Alcoma Corp.*, 747 A.2d 549, 556 (Del. 2000)); *Matthew G. Norton Co. v. Smyth*, 51 P.3d 159, 163–65 (Wash. Ct. App. 2002) (citing *Weinberger*, 457 A.2d 701, among others).

111. *Baron*, 874 So. 2d at 550 (“We cannot conclude that the Legislature intended by fair value to mean fair market value.”); *Pueblo Bancorporation*, 63 P.3d at 361 (“We are convinced that ‘fair value’ does not mean ‘fair market value.’”); *Bingham*, 105 P.3d at 370–71 (permitting consideration of market prices, but not exclusive reliance thereon); *Smyth*, 51 P.3d at 166 (“But our Legislature did not adopt ‘fair market value’ as the standard in granting dissenters’ rights to shareholders for the ‘fair value’ of their shares.”).

112. *Pueblo Bancorporation*, 63 P.3d at 366.

113. Or even the “scholastics of medieval times.” *See Carney & Shepherd, supra* note 1, at 26–27 n.146 (questioning whether Delaware judges are as equipped as scholastics to make a valuation of a commodity’s worth).

to decisions by MBCA courts. In *Georgia-Pacific Corp. v. Great Northern Nekoosa Corp.*, a federal district court confronted the question of whether a “flip-in” poison pill was a violation of the Maine Business Corporation Act.<sup>114</sup> Although the Maine Act is based upon the MBCA,<sup>115</sup> the district court noted that Maine had recently followed Delaware precedent in the interpretation of its own law,<sup>116</sup> and proceeded to use Delaware precedent to resolve this issue.<sup>117</sup> In doing so, it specifically rejected alternate authority from MBCA jurisdictions, deciding that Delaware case law more clearly represented the will of the Maine legislature.<sup>118</sup>

One might argue that the *Georgia-Pacific* court chose to employ the wrong precedent and that MBCA courts should instead prefer the reasoning of other MBCA jurisdictions. Nevertheless, *Georgia-Pacific* makes clear that corporations may not rely on this rule of interpretation, highlighting how the relationship between the law of Delaware and other states is symbiotic and complex.<sup>119</sup> A corporation that agrees that Delaware law is relatively indeterminate may nevertheless be unable to escape it by incorporating elsewhere, because the courts of that state may look to Delaware when the text of a particular provision of the MBCA is indeterminate.

### C. A False Sense of Determinacy in the MBCA

One can read all of *The Mystery of Delaware Law's Continuing Success* and never suffer the impression that courts have disagreed on the application of the MBCA. Not surprisingly, this gossamer certainty disappears with a few forays into Westlaw or LexisNexis. Just as Delaware courts are called upon to interpret the Delaware General Corporation Law, other courts find themselves interpreting the provisions of the MBCA. If indeed the MBCA is “visually broken down into clauses that make comprehension relatively manageable,”<sup>120</sup> its organization does not always make interpretation of the law certain, or even clear.<sup>121</sup> Even a few examples demonstrate that Carney and Shepherd's one-sided com-

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114. 728 F. Supp. 807, 807 (D. Me. 1990).

115. ME. REV. STAT. ANN. tit. 13-C, § 601 (2005). The Supreme Court of Maine has frequently noted that its statutory law is based upon the MBCA. See *Ne. Harbor Golf Club, Inc. v. Harris*, 661 A.2d 1146, 1152 (Me. 1995) (noting that Maine adopted the MBCA in 1971); *Richards Realty Co. v. Inhabitants of Castle Hill*, 458 A.2d 753, 754 (Me. 1983) (citing at least one provision of Maine law based upon the MBCA).

116. See *Georgia-Pacific*, 728 F. Supp. at 809–10 (citing *In re McLoon Oil Co.*, 565 A.2d 997 (Me. 1989)).

117. *Id.* at 810.

118. *Id.* at 810–11 (rejecting application of precedent from MBCA jurisdictions New Jersey, Georgia, and Wisconsin).

119. See *id.*

120. Carney & Shepherd, *supra* note 1, at 51.

121. See, e.g., *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 362–63 (Colo. 2003).

parison dramatically overstates the relative determinacy that they ascribe to the MBCA.

1. *If a State Does Not Adopt an Amendment to the MBCA, What Is the Law?*

Courts in Delaware are charged with applying the law put forward by the General Assembly. Although the silence of the Assembly has occasionally presented an interpretive challenge,<sup>122</sup> only one source of legislative authority need be consulted by the Delaware courts. In any MBCA jurisdiction, however, both courts and corporate planners must wrestle with an additional question: when the MBCA is modified, what do these modifications portend in the face of legislative silence?

The question has persistently bedeviled courts that seek to create a consistent jurisprudence. We have already alluded to one example of this problem in the discussion of *Pueblo Bancorporation*.<sup>123</sup> The majority relied in part on the 1999 revisions to the MBCA to conclude that a trial court could not apply a minority or marketability discount to the “fair value” of a dissenter’s shares, and overruled earlier trial court opinions that had, with the blessing of the Colorado Court of Appeals, applied such discounts.<sup>124</sup> After noting that the 1999 revisions to the MBCA eliminated any ambiguity by forbidding the use of marketability or minority discounts, the court remarked that Colorado had been a “Model Act” state since the inception of the MBCA in 1958.<sup>125</sup> The majority rejected the defendant’s argument that the Colorado legislature, not having implemented the 1999 revisions, did not mean for them to apply:

Holding Company argues that because the General Assembly has not adopted the 1999 MBCA amendments we should infer that it has rejected them. We are not persuaded. It has been less than four years since the MBCA was amended, too short a period of time to infer intent from legislative inaction. Because the legislature has consistently relied on the MBCA when fashioning the corporate laws of this state we find the views of the MBCA on this issue to be persuasive.<sup>126</sup>

Yet three justices drew the entirely opposite conclusion. In a vigorous dissent, they argued that, absent an affirmative decision by the legis-

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122. See, e.g., *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 924–25 (Del. Ch. 1999) (noting that the legislative silence on the issue of multiple indemnitors under section 145 of the Delaware General Corporation Law “makes it impossible to choose the more obligated indemnitor of two contractually obligated indemnitors,” and that the two “as voluntary, contractual indemnitors . . . were equally responsible for” the plaintiff’s expenses), *aff’d*, 748 A.2d 407 (Del. 2000).

123. See discussion *supra* Part II.B.

124. See *Pueblo Bancorporation*, 63 P.3d at 361, *overruling* *M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc.*, 40 P.3d 6 (Colo. Ct. App. 2001), and *WCM Indus., Inc. v. Trs. of the Harold G. Wilson 1985 Revocable Trust*, 948 P.2d 36 (Colo. Ct. App. 1997).

125. *Id.* at 368.

126. *Id.* at 367–68.

lature to adopt a new version of the MBCA, local interpretations of the 1984 version should prevail.<sup>127</sup> Indeed, the dissent noted that the legislature had amended the dissenters' rights statute in 1996, which was before the advent of the 1999 amendments but after Delaware courts had already addressed the issue.<sup>128</sup> Had the legislature wished to adopt new rules, the minority argued, it could have done so in 1996.<sup>129</sup>

*Pueblo Bancorporation* is far from an isolated case. Courts in Maine,<sup>130</sup> Wyoming,<sup>131</sup> and Michigan<sup>132</sup> have come to differing conclusions as to whether later revisions to the MBCA apply in advance of their adoption by a state legislature. Every amendment to the MBCA thus creates a source of uncertainty for corporate planners, at least until a state court has decided whether new "clarifications" in the MBCA reflect the preexisting law of the individual state or constitute a change in the law that must be implemented by a legislature.

## 2. *Fair Market Valuations*

Though splits of authority between jurisdictions would seem to be an indication of legal indeterminacy, Carney and Shepherd fail to address areas in which MBCA courts have disagreed about the interpretation of the Act. We consider first the difficulty that MBCA courts have had in determining the "fair value" of dissenters' shares. Carney and Shepherd are not the first commentators to criticize the Delaware approach,<sup>133</sup> but academics are far from being in general agreement on the issue.<sup>134</sup> There is reason to believe that the efficient market hypothesis is unstable in the situations in which appraisal actions are available.<sup>135</sup>

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127. *Id.* at 369 (Kourlis, J., dissenting).

128. *Id.* at 371.

129. *Id.*

130. *See* Kaplan v. First Hartford Corp., 484 F. Supp. 2d 131, 146 (D. Me. 2007) (declining to apply revisions that would limit shareholder dissolution suits to closely held corporations because they had not been adopted by the legislature).

131. *See* Brown v. Arp & Hammond Hardware Corp., 141 P.3d 673, 684–85 (Wyo. 2006) (rejecting the argument that a minority discount should be applied because the legislature did not adopt the 1999 amendment to the MBCA).

132. *See* Krieger v. Gast, 179 F. Supp. 2d 762, 777–78 (W.D. Mich. 2001) (concluding that commentary on the 1999 revisions to the MBCA was relevant despite lack of adoption by Michigan legislature).

133. Professor Carney, for example, has published this exact argument before. *See* Carney & Heimendinger, *supra* note 90.

134. *See, e.g.,* Brett A. Margolin & Samuel J. Kursh, *The Economics of Delaware Fair Value*, 30 DEL. J. CORP. L. 413, 434 (2005) (finding that the Delaware approach is consistent with the proper economic theory of the corporation); *cf.* John C. Coates IV, "Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions, 147 U. PA. L. REV. 1251, 1350 (1999) (suggesting that the proper approach to valuation should be "more flexible" and "more in keeping with the spirit of *Weinberger v. UOP, Inc.*").

135. Delaware law permits appraisal actions in cash-out mergers, short-form mergers, and cases involving close corporations. DEL. CODE ANN. tit. 8, § 262(b) (2001); *see also* Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119, 128 (2005) (discussing types of mergers where the appraisal remedy is available). Because there is no market for the shares of close corporations, one cannot fairly expect courts to use a market price in

As Professor Booth has previously noted, “it is not entirely clear what position the MBCA takes” with respect to valuation.<sup>136</sup> Of course, there are jurisdictions where Carney and Shepherd’s approach is still ascendant, but as we have already shown, their position is a minority position.<sup>137</sup> Before the 1999 amendments, the Act provided little guidance as to whether courts should apply minority or marketability discounts when valuing the shares of dissenters.<sup>138</sup> That led to a split among MBCA jurisdictions, and although the Act itself has been revised to purportedly clarify this question, the split among courts remains.<sup>139</sup>

Moreover, there remain numerous ambiguities in the MBCA’s definition of “fair value.” First, the statute itself merely states that fair value is the value determined before the effectuation of the merger and by using “customary and current valuation concepts and techniques.”<sup>140</sup> Courts have found this definition wanting,<sup>141</sup> and the official comments provide scant additional guidance.<sup>142</sup> Even if the 1999 revisions resolve issues relating to minority or marketability discounts, courts continue to struggle with the question of whether a control premium may be applied in valuations. Given their disapproval of the Court of Chancery’s decision in *Rapid American Corp. v. Harris*,<sup>143</sup> Carney and Shepherd must find the Iowa Supreme Court’s decision in *Northwest Investment Corp. v. Wallace*<sup>144</sup> particularly galling. Not only did the court find that Iowa allowed consideration of a control premium, but the court then cited the “bizarre” result of *Rapid American* as authority for their decision.<sup>145</sup>

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appraisal actions involving them. While there are indeed market prices available to courts in cash-out and short-form mergers, those prices are subject to manipulation by majority shareholders. An efficient market will price shares of a corporation based on all *publicly* available information about the quality of management and the company. Majority shareholders, of course, control management and have, at the very least, the *nonpublic*, material knowledge that they may desire to cash out the minority. With that nonpublic knowledge, the majority—under the market approach advocated by Carney and Shepherd—may be incentivized to undermanage the corporation in the short term, or otherwise time their offer to coincide with preferable circumstances.

136. Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127, 138 (2000).

137. See *supra* Part II.B.

138. See *Ex parte* Baron Servs., Inc., 874 So. 2d 545, 549 n.5 (Ala. 2003).

139. Whether the split remains because legislatures have not yet adopted the revisions or because the Act is still ambiguous is unclear. Courts, however, continue to wrestle with this issue. See, e.g., *id.* at 549–51 (refusing to apply a discount under a former version of the statute); *Nw. Inv. Corp. v. Wallace*, 741 N.W.2d 782, 787 (Iowa 2007) (refusing to apply a discount under a revised form of the statute); *Advanced Comm’n Design, Inc. v. Follett*, 615 N.W.2d 285, 292 (Minn. 2000) (refusing to establish a bright-line rule forbidding discounts); *Matthew G. Norton Co. v. Smyth*, 51 P.3d 159, 167 (Wash. Ct. App. 2002) (finding discounts may be appropriate in extraordinary circumstances under a former version of the statute).

140. MODEL BUS. CORP. ACT § 13.01(4) (2008).

141. See, e.g., cases cited *supra* note 97.

142. See MODEL BUS. CORP. ACT § 13.01 cmt. 2 (“Modern valuation methods will normally result in a range of values, not a particular single value.”).

143. Carney & Shepherd, *supra* note 1, at 27.

144. 741 N.W.2d at 782.

145. *Id.* at 788.

### 3. *Conflict of Interest Transactions*

The drafters of chapter 8 of the MBCA intended to produce a conflict of interest statute with clearer and more specific terms than the corresponding statute in the Delaware General Corporation Law.<sup>146</sup> Carney and Shepherd praise this effort and criticize corresponding Delaware cases.<sup>147</sup> An analysis of the case law, however, suggests that the MBCA's bright-line rules are not a panacea for the pains of litigation.

Taken in isolation, the language of the MBCA is commendable. For example, chapter 8 offers a definition of a "conflicting interest"<sup>148</sup> and affirmatively excludes anything outside that definition from judicial review.<sup>149</sup> Yet when courts have been invited to interpret chapter 8, they have found numerous terms that remain open ended.<sup>150</sup>

For example, section 8.60 defines "conflicting interest," but fails to define "transaction," which is an integral part of the "conflicting interest" definition.<sup>151</sup> Not surprisingly, litigants have contested the meaning of this word. Decisions addressing this issue thus far have provided a consistent answer<sup>152</sup> that comports with the official comment's definition of "transaction" as "a bilateral (or multilateral) arrangement to which the corporation or an entity controlled by the corporation is a party."<sup>153</sup> Nevertheless, the official comments are not binding on courts,<sup>154</sup> and a majority of states have yet to directly address the question. The statute itself, moreover, contains ambiguities that cannot be resolved solely by consulting the official comments.<sup>155</sup> In one case, a court was compelled to

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146. See James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077, 1081 (2003) (noting that although the drafters attempted to make the MBCA as clear as possible, "statutory language is never free of ambiguity"); Peter E. Kay, Comment, *Director Conflicts of Interest Under the Model Business Corporation Act: A Model for All States?*, 69 WASH. L. REV. 207, 208 (1994) ("The drafters of the Model Business Corporation Act (MBCA) adopted a bright-line statute approach that was intended to overcome some of the uncertainties that existed under prior common and statutory conflict of interest law.").

147. Carney & Shepherd, *supra* note 1, at 47-48.

148. MODEL BUS. CORP. ACT § 8.60(1) (2008).

149. *Id.* § 8.61.

150. See, e.g., *Mueller v. Zimmer*, 124 P.3d 340, 357 (Wyo. 2005) (noting that the term "transaction" was undefined in a statute based on the MBCA).

151. MODEL BUS. CORP. ACT § 8.60(1).

152. See *Glad Tidings Assembly of God v. Neb. Dist. Council of the Assemblies of God, Inc.*, 734 N.W.2d 731, 737-38 (Neb. 2007); *Mueller*, 124 P.3d at 357-58.

153. MODEL BUS. CORP. ACT § 8.60 cmt. 1(A).

154. Cf. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 797 (La. 2005) ("[W]e note that statements contained in the official comments are not part of the statute, and are not binding on this court . . ."); *Rushmore State Bank v. Kurylas, Inc.*, 424 N.W.2d 649, 656 n.9 (S.D. 1988) ("[T]he Official Comments are not statutorily binding on this court.").

155. For an example of a particularly odd oversight by the drafters of the MBCA, see *Mizel v. Connelly*, No. Civ. A. 16638, 1999 WL 550369, at \*4 n.3 (Del. Ch. Aug. 2, 1999), printed in 25 DEL. J. CORP. L. 1025, 1033 n.3 (2000), in which Vice Chancellor Strine notes that grandparents are excluded from the definition of "related person" in section 8.60 of the MBCA. He writes, "Logically, it only makes sense to include grandparents within these definitions if grandchildren are included, and I hesitate to ascribe a one way view of grandparent-grandchild loyalty to the authors of these respected au-

drag out at least six canons of statutory construction to aid in its review of a conflict of interest statute modeled on the MBCA.<sup>156</sup> The MBCA's bright-line rules cannot obviate the need for the exercise of judicial discretion.<sup>157</sup>

Though chapter 8 of the MBCA may indeed create *some* clearly defined safe harbors, it retains the possibility that a conflict of interest transaction may be permitted where it "is established to have been fair to the corporation."<sup>158</sup> To restate a conclusion of Carney and Shepherd, so much for bright-line rules in the MBCA.<sup>159</sup> As expected, courts attempting to apply section 8.61(b)(3) struggle to define fairness. The Supreme Court of Virginia noted that "[n]o inflexible rule can be established by which to test the 'fairness' of a transaction."<sup>160</sup> There, the court concluded that to ascertain fairness it must review the transaction "as a whole" and consider "the nature and circumstances of the business action."<sup>161</sup> More recently, the Colorado Court of Appeals faced the same difficulty.<sup>162</sup> There, the court consulted the MBCA's official comments for guidance and was directed by the comments to consult the "traditional language in the cases."<sup>163</sup> Like the Virginia court, the Colorado court determined that fairness "depends on the facts and circumstances of each particular case" and requires consideration of the "transaction as a whole."<sup>164</sup> Surveying the landscape of corporate law, the court discerned three different approaches to fairness,<sup>165</sup> including the "entire fairness" test articulated by the Delaware Supreme Court in *Kahn v. Lynch Communications Systems, Inc.*<sup>166</sup> Despite Carney and Shepherd's assertion that *Kahn* "opened a Pandora's box for corporate planners,"<sup>167</sup> the Colorado court found itself "unable to discern any functional difference between the majority, Colorado, and Delaware approaches."<sup>168</sup> What Carney and Shepherd insist is a key point of differentiation be-

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thorities (even to the authors of the MBCA, who claim to have set forth an exclusive, 'bright line' definition)." *Id.*

156. See *Camden v. Kaufman*, 613 N.W.2d 335, 339 (Mich. Ct. App. 2000).

157. A proponent of bright-line rules might easily respond that although no rule can eliminate the need for judicial discretion, the scope of such discretion is more limited when a judge is confronted with a clear rule. Yet it is far from clear that a judge interpreting a bright-line rule as a matter of first impression will, in fact, be more constrained than his colleague who must address the same issue while remaining, or at least appearing to remain, within a deep body of business law precedent.

158. MODEL BUS. CORP. ACT § 8.61(b)(3).

159. *Cf.* Carney & Shepherd, *supra* note 1, at 25 ("So much for *stare decisis* in Delaware corporate law.").

160. *Willard ex rel. Moneta Bldg. Supply, Inc. v. Moneta Bldg. Supply, Inc.*, 515 S.E.2d 277, 287 (Va. 1999).

161. *Id.*

162. See *Kim v. Grover C. Coors Trust*, 179 P.3d 86, 91–98 (Colo. App. 2007).

163. *Id.* at 91 (quoting MODEL BUS. CORP. ACT § 8.61 cmt. 2 (1997)).

164. *Id.* at 91–92.

165. *Id.* at 92–93.

166. 638 A.2d 1110, 1115 (Del. 1994).

167. See Carney & Shepherd, *supra* note 1, at 26 (insisting that *Kahn* "opened Pandora's box for corporate planners").

168. *Kim*, 179 P.3d at 93.

tween the two legal regimes became, when actually applied, a distinction without a difference.

#### 4. *The “Safe Harbor” of Section 12.02 of the MBCA*

Carney and Shepherd praise the “safe harbor” provision found in section 12.02 of the MBCA and scorn the Delaware judiciary for converting “a quantitative standard, requiring a shareholder vote for the sale of ‘all or substantially all’ assets, into a qualitative one that cannot be easily specified, because it seems to depend on such factors as whether the sold assets are operating or investment assets and whether the sale was one ‘in the ordinary and usual course of business.’”<sup>169</sup> An even-handed analysis of the evolution of Delaware and MBCA jurisprudence on this issue, however, renders the differences almost irrelevant to the question of the determinacy of Delaware law.

Carney and Shepherd highlight three decisions of the Court of Chancery to suggest that Delaware law relating to the sale of “all or substantially all” corporate assets stands in disarray: *Gimbel v. Signal Co.*,<sup>170</sup> *Katz v. Bregman*,<sup>171</sup> and *Hollinger, Inc. v. Hollinger International, Inc.*<sup>172</sup> As evidence of the alleged confusion, Carney and Shepherd emphasize *Katz*, in which the Court of Chancery applied the “all or substantially all” test to assets comprising only 51% of asset value.<sup>173</sup>

There is no doubt that Delaware courts have “eschewed a definitional approach” to this question.<sup>174</sup> Yet to say that the courts have rejected bright-line rules is not to say that the law has become ever murkier with the passage of time. Recognizing the uncertainty inherent in a qualitative test, Delaware courts have sought to provide guidance through decisions like *Hollinger* and *In re General Motors Class H Shareholders Litigation*.<sup>175</sup> The criticism cited by Carney and Shepherd, a 1982 article authored by prominent practitioners,<sup>176</sup> may well have been a fair criticism of the uncertainty surrounding the “all or substantially all assets” test a quarter of a century ago. The world and Delaware have moved on.<sup>177</sup>

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169. Carney & Shepherd, *supra* note 1, at 33 n.180.

170. 316 A.2d 599 (Del. Ch. 1974).

171. 431 A.2d 1274 (Del. Ch. 1981).

172. 858 A.2d 342 (Del. Ch. 2004).

173. *Katz*, 431 A.2d at 1276.

174. *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 623 (Del. Ch. 1999).

175. *See id.*

176. Leo Herzel et al., *Sales and Acquisitions of Divisions*, 5 CORP. L. REV. 3, 25 (1982).

177. After the *Hollinger* decision, the Delaware General Assembly amended section 271. H.R. 150, 143d Gen. Assem. (Del. 2005), available at <http://www.corp.delaware.gov/hb150.pdf>. This amendment, which confirmed the reasoning of Vice Chancellor Strine, clarified that the assets of a wholly owned subsidiary should be included in the “all or substantially all” calculus. *Id.* (“For purposes of this section only, the property and assets of the corporation include the property and assets of any subsidiary of the corporation.”).

Yet the world has not necessarily moved in the direction advocated by Carney and Shepherd. Several MBCA courts, agreeing with the Court of Chancery's opinion in *Gimbel* and *Katz*, concluded that the "all or substantially all" test protected minority shareholders, not only from sales of a particular quantity of assets, but also from sales that fundamentally altered the nature of the corporate entity.<sup>178</sup> At least two such decisions are relatively recent.<sup>179</sup>

The difference between Delaware and MBCA jurisprudence on assets sales thus appears far more modest than Carney and Shepherd make out. Though the latest revision of the MBCA now includes a quantitative safe harbor provision,<sup>180</sup> we can find only eight states that have adopted it.<sup>181</sup> Other states may adopt this test in the future, either through legislative amendment or through a judicial decision like that in *Pueblo Bancorporation*.<sup>182</sup> For now, however, the distinction between Delaware and a number of MBCA jurisdictions seems too narrow to render Delaware law inferior or less determinate and, thus, provides no reason to wonder at the "mysterious" success that Delaware has enjoyed.

## 5. Conclusion

Once placed in a comparative context, Carney and Shepherd's qualitative claims are no more convincing than their quantitative analysis. No one has ever doubted that Delaware corporate law—like constitutional law, criminal law, or any doctrine that develops as part of common law jurisprudence—has evolved through a series of judicial opinions, and these opinions have yielded the occasional "surprise." It is a far cry from this rather commonplace observation, however, to proclaim that Delaware law is relatively indeterminate, particularly without a thorough examination of the alternative that Carney and Shepherd cheerlead so forcefully.

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178. See, e.g., *State ex rel. Columbus Metal Indus., Inc. v. Aaron Ferer & Sons Co.*, 725 N.W.2d 158, 166 (Neb. 2006) (citing *Gimbel v. Signal*, 316 A.2d 599 (Del. Ch. 1974), among others, for the proposition that a sale of assets has a qualitative dimension); *Sterman v. Hornbeck*, 457 N.W.2d 874, 877 (Wis. Ct. App. 1990) (applying a qualitative test to a sale of assets without citing Delaware law).

179. The trend is not universal. Texas, although primarily following MBCA jurisprudence, has adopted the unique rule under which a corporation may sell all or substantially all of its assets in the usual course of business so long as that corporation continues in *any* business after the sale. See *Rudisill v. Arnold White & Durkee, P.C.*, 148 S.W.3d 556, 574 (Tex. App. 2004).

180. See MODEL BUS. CORP. ACT § 12.02(a) (2008).

181. See IDAHO CODE ANN. § 30-1-1202 (1999); IOWA CODE ANN. § 490.1202 (West Supp. 2008); ME. REV. STAT. ANN. tit. 13-C, § 1202 (2007); MICH. COMP. LAWS ANN. § 450.1753 (West 2002); MINN. STAT. ANN. § 302A.661(2)(b) (West Supp. 2008); MISS. CODE ANN. § 79-4-12.02 (2001); S.D. CODIFIED LAWS § 47-1A-1202 (2007); W. VA. CODE ANN. § 31D-12-1202 (LexisNexis Supp. 2008).

182. *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 359 (Colo. 2003).

### III. AN UNFAIR CRITICISM OF DELAWARE THAT DESERVES BRIEF MENTION

Having undermined the central thesis of *The Mystery of Delaware Law's Continuing Success*, we feel no need to respond to Carney and Shepherd's lengthy discussion of the theoretical benefits of statutory versus common law rulemaking<sup>183</sup> or to address the arguments of the authors against the "apologists" for Delaware's indeterminate "mess" of law.<sup>184</sup> The fact that the law in MBCA jurisdictions is subject to considerable uncertainty and that a firm must accept the decisions of courts in its state of incorporation makes the question of which state possesses the most determinate corporate law less clear. It also becomes less important because even if Delaware law were shown to be slightly (if unquantifiably) less determinate than the law of some other state, the relatively slight comparative disadvantage might be outweighed by other factors, such as the Delaware courts' willingness to quickly schedule expedited review of requests for injunctive relief and a system that eschews the time and expense of jury trials and precludes awards of punitive damages.

We do, however, take exception with Carney and Shepherd's assertion that litigation costs and delay have made Delaware relatively inhospitable to corporations.<sup>185</sup> In a discussion of litigation costs and delays, Carney and Shepherd cite as "terrifying" a figure of 1,280 corporate law cases filed in Delaware over the course of two years, 78% of which involved claims for breach of fiduciary duty.<sup>186</sup> Even worse, the authors suggest that the Delaware courts have become slow to respond to corporate lawsuits, at least where the cases do not involve injunctive relief.<sup>187</sup> Once again, however, no context is provided. One may think that 1,280 corporate law cases is a large or small number, but in order to convert Delaware's success into a mystery, one would at least expect some comparative data demonstrating that the number is high or low in proportion to the number of companies incorporated in Delaware. Carney and Shepherd provide no such comparison, and we have been unable to find any research that focuses upon litigation rates in other states.

Despite this lack of evidence, the authors propose that "[l]itigation costs in Delaware are exacerbated in derivative suits by the inability of boards and their special committees to dispose of litigation not in the interest of the corporation without second-guessing by the Delaware courts."<sup>188</sup> Once again, their conclusion requires context. First, it is not at all clear that the Delaware courts address demand issues with greater leniency than those of other states, despite their authority to exercise "in-

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183. Carney & Shepherd, *supra* note 1, at 65–67.

184. *Id.* at 63–74.

185. *Id.* at 43–48.

186. *See id.* at 45 (citing Thompson & Thomas, *supra* note 31, at 1761).

187. *Id.*

188. *Id.* at 47.

dependent business judgment” to review the decision of a special litigation committee (SLC).<sup>189</sup> Second, although fourteen states have adopted amendments to the MBCA that would require courts to dismiss derivative actions if they find that an SLC was appointed by independent directors and conducted its investigation in good faith, at least one state court has applied the statute in a manner far different from what Carney and Shepherd would suggest.<sup>190</sup>

Furthermore, the MBCA, for all its bright-line rules, “contains no definition of this critical term [independence].”<sup>191</sup> As a result, courts applying the MBCA must borrow definitions from other jurisdictions, and the inquiries they conduct are both searching and extensive. *Einhorn v. Culea*, a 2000 decision by the Wisconsin Supreme Court remanding to gather more evidence of an SLC’s independence,<sup>192</sup> illustrates this difficulty. The court of appeals determined that the SLC at issue was indeed independent and noted that the “threshold for a determination of independence is extremely low.”<sup>193</sup> The Wisconsin Supreme Court disagreed, finding instead that the statute “directs a court to examine the characteristics of each member’s relationship to a defendant director and the corporation carefully to determine whether the member is independent.”<sup>194</sup> The court then developed an exacting test based on the case law of other states (including, but not limited to, Delaware), which included a “totality of the circumstances” test supplemented by a nonexhaustive list of seven factors, including personal relationships.<sup>195</sup> The best that can be said is that the MBCA provides a statutory starting point for the consid-

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189. See, e.g., Thompson & Thomas, *supra* note 31, at 1781 n.117 (noting that another commentator claimed Delaware courts are tougher on demand excusal than other states’ courts). Carney and Shepherd rely upon Thompson and Thomas for their “terrifying” statistics, although the latter do not suggest that Delaware directors should be suffering anxiety.

190. In *Blake v. Friendly Ice Cream Corp.*, No. 030003, 2006 WL 1579596, at \*25 (Mass. Super. Ct. May 24, 2006), a Massachusetts court, after making considerable use of Delaware case law, rejected the determination of a special litigation committee. The *Blake* court specifically rejected the “Delaware approach” to evaluating the decision of an SLC, but instead concluded that the committee did not make its decision “in good faith.” *Id.* at \*22. The difference between this analysis and the Delaware approach criticized by Carney and Shepherd is difficult to discern. The *Blake* court concluded that “the SLC Report contains numerous conclusory assertions attempting to justify questionable payments,” and proceeded to critique the SLC’s conclusions against facts alleged in the complaint. *Id.* A slender theoretical reed might be drawn between evaluating the decision of an SLC using “independent business judgment” and drawing a conclusion about the good faith of an SLC’s decision. Yet it is hard to see how, in the absence of a conflict of interest, one may pass judgment upon the “good faith” of a business decision without simultaneously coming to a conclusion as to whether the decision was objectively reasonable. That reed would not seem to support the conclusion that Delaware is more lenient to derivative plaintiffs than MBCA jurisdictions in general, let alone any jurisdiction in particular.

191. *Id.* at \*12.

192. 591 N.W.2d 908 (Wis. Ct. App. 1999), *rev’d*, 612 N.W.2d 78 (Wis. 2000).

193. *Id.* at 915 (internal quotation marks omitted).

194. *Einhorn*, 612 N.W.2d at 86.

195. *Id.* at 88–90; see also *Blake*, 2006 WL 1579596, at \*12–13 (citing five different articulations of independence from Delaware cases and six factors of independence under federal law from cases decided in the Northern District of California).

eration of a director's independence and that the tests that have evolved to interpret section 7.44 of the MBCA are similar to those in Delaware.

Even less convincing is the methodology that Carney and Shepherd use to imply that litigation in the Delaware courts proceeds at a laggardly pace.<sup>196</sup> The authors cherry-pick cases from a textbook (written by Carney)<sup>197</sup> and, after acknowledging the obvious reasons why their technique lacks any plausible demonstrative value, declare that litigation in Delaware is excessively lengthy.<sup>198</sup> We agree with Carney and Shepherd that the Delaware courts respond to injunctive relief with alacrity,<sup>199</sup> but we reject wholeheartedly the conclusion that this biased sample is suggestive of a failing of the Delaware courts.<sup>200</sup> Instead, the authors have once again provided the false impression of statistical relevance through the selective inclusion of statistical outliers.

No one would assert that the *Technicolor* cases, which lasted almost twenty-three years, represented a triumph of swift litigation.<sup>201</sup> Never-

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196. Carney & Shepherd, *supra* note 1, at 44–45.

197. *Id.* at 45.

198. *Id.*

199. *Id.* (“One impressive fact can be observed: when injunctive relief is requested, the Delaware courts treat the motion and the appeal with dispatch, even where the questions of law are of first impression.”).

200. If selecting particular cases represents a scientific method for determining the length of litigation in Delaware courts, we might suggest that Carney and Shepherd consider other examples for their sample. For instance, the dispute over the proposed merger of Compaq and Hewlett Packard precipitated a hard-fought contest in the Court of Chancery in the spring of 2002. A complaint was filed on March 28, 2002, followed by a motion to dismiss on April 1 and argument on April 7. That motion was denied by an opinion issued on April 8, which was followed by expedited discovery and a three-day trial from April 23 to 25. After post-trial briefing was submitted on April 27, the opinion and final judgment were entered by the Court of Chancery just days later, on April 30. The entire case (which did not seek injunctive relief) was resolved in fewer than thirty-five days from the date of filing. See *Hewlett v. Hewlett-Packard Co.*, Civ. A. No. 19513-NC, 2002 WL 818091, at \*1 (Del. Ch. Apr. 30, 2002), printed in 28 DEL. J. CORP. L. 326, 327 (2003). A similar story can be told in a host of cases filed every year in the Court of Chancery, but we assume those stories were not told in *Mystery* because they do not support its theory of excessive litigation delay.

201. See *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182 (Del. 1988); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993); *Cede & Co. v. Technicolor, Inc.*, 636 A.2d 956 (Del. 1994); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156 (Del. 1995); *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289 (Del. 1996); *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485 (Del. 2000); *Cede & Co. v. Technicolor, Inc.*, 875 A.2d 602 (Del. 2005); *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26 (Del. 2005). Indeed, the length of suits filed in the Court of Chancery is often the result of the actions of the parties. In any given case, the parties may attempt to settle or engage in mediation or agree among themselves to a protracted discovery schedule. All of this affects the length of time that passes from the date the action was filed to the date of decision, but certainly, from this, one cannot plausibly conclude that either the Delaware courts or the alleged indeterminacy of Delaware law cause protracted litigation, thereby increasing the costs of such litigation. In addition, all cases are not made the same. Appraisal cases, for example, take much longer to process for a number of reasons, including the complexity of discovery as well as the work of experts in corporate finance who first must be retained and then must prepare reports setting forth sophisticated financial models based on the data obtained in discovery in order to establish the fair value of the stock as mandated by the appraisal statute. In contrast, injunctive cases obviously move with great speed, as do other expedited or summary proceeding cases seeking to (1) inspect corporate records under section 220, (2) compel an annual meeting of stockholders under section 211, (3) determine the composition of the board of directors under section 225, or (4) determine whether an officer or director is entitled to advancement or indemnification of legal fees under section 145. These differences in the nature and character of lawsuits are not accounted for in

theless, the lawsuits arising from the Technicolor transaction were far from typical of chancery practice, and merely excluding this case from the list of non-injunctive litigation provided by Carney and Shepherd lowers the average length of litigation from 9.5 years to 7.8 years.<sup>202</sup> By providing averages of a very small sample of cases that did not ask for injunctive relief,<sup>203</sup> Carney and Shepherd ignore the vast differences between the cases. Additionally, though the non-injunctive cases average around 9.5 years of litigation, the standard deviation for this set of cases is around 5.5 years.

Again, Carney and Shepherd provide no comparative data to put their observations about Delaware into context.<sup>204</sup> Lengthy litigation is certainly not unknown in MBCA jurisdictions.<sup>205</sup> Further, a focus upon the length of time until final disposition in cases that do not request injunctive relief may overstate the potential cost of litigation to Delaware corporations. Any corporate legal dispute has a number of possible outcomes (e.g., settlement, dismissal on motion, alternative dispute resolution), not all of which will result in a published opinion. To conduct a

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Carney and Shepherd's selection of particular cases as demonstrative of protracted litigation and, for that reason, their argument is highly misleading. For their argument to make any sense, they would need at a minimum to include all injunctive and non-injunctive relief cases in their sample and provided a weighted average of lengths of time to disposition.

202. Carney & Shepherd, *supra* note 1, at 45 & nn.239-40.

203. *Id.*

204. Given that their sample was taken from a textbook written by Professor Carney, we find it surprising that a similar statistical analysis was not conducted based upon non-Delaware cases. We attempted to rectify this by recreating the Carney and Shepherd study using a copy of JESSE H. CHOPER ET AL., *CASES AND MATERIALS ON CORPORATIONS* (6th ed. 2004), selecting all lead non-Delaware state cases from Chapter VII: Shareholder Suits. We selected this textbook randomly from those readily available on a friend's bookshelf and chose that chapter because it appeared to include a large number of non-Delaware state decisions as lead cases. Although this method of choosing a sample was unscientific and not particularly suggestive of anything at all, it is at least slightly more random than selecting a book or article we had ourselves written. We then attempted to find beginning and end dates of litigation through a search on Westlaw.

Unfortunately, the results were inconclusive. Because many trial court decisions are not recorded, it was impossible to fix an initial date of litigation for over half of the cases, and the length of one of the eight cases could not be determined at all. Where no filing date could be established, we substituted the first date of filing mentioned in any opinion found in Westlaw (although this will understate the length of litigation of some cases). See *Fletcher v. A.J. Indus., Inc.*, 266 Cal. App. 2d 313 (Cal. Ct. App. 1968) (46.7 months); *Barth v. Barth*, 659 N.E.2d 559 (Ind. 1995) (44.3 months); *In re PSE & G. S'holder Litig.*, 801 A.2d 295 (N.J. 2002) (68.1 months); *Baker v. Health Mgmt. Sys.*, 772 N.E.2d 1099 (N.Y. 2002) (65.1 months); *Marx v. Akers*, 666 N.E.2d 1034 (N.Y. 1996) (25.7 months); *Alford v. Shaw*, 358 S.E.2d 323 (N.C. 1987) (71.0 months); *Landstrom v. Shaver*, 561 N.W.2d 1 (S.D. 1997) (93.7 months). The length of *Goldie v. Yaker*, 432 P.2d 841 (N.M. 1967), could not be determined.

The average length of non-Delaware state cases in the sample set was 4.9 years, approximately the same as the 4.8 year average of all cases selected by Carney and Shepherd, albeit shorter than the 9.3 year average of cases that did not ask for injunctive relief.

205. In *Einhorn v. Culea*, 612 N.W.2d 78 (Wis. 2000), for example, the plaintiff filed an initial complaint on December 9, 1993. The complaint was dismissed with leave to amend, after which the plaintiff filed a new complaint and the defendants appointed a special litigation committee to consider it. Litigation over the issue continued through an intermediate court of appeals, and the Wisconsin Supreme Court reversed and remanded the appellate decision in June 2000. Recorded decisions involving the case end with the Supreme Court decision, but the dispute presumably continued for some short time thereafter.

true comparative analysis, a researcher would have to consider not only the length of cases that reach a final opinion, but also the percentage of cases that end in settlement, the relative frequency and success of pre-trial motions, and the availability of alternate dispute resolution. For instance, the Court of Chancery offers a mediation procedure wherein litigants can, under the guidance of a neutral chancery judge, attempt to reach a resolution without incurring the expense of trial.<sup>206</sup>

Commentators frequently note both the flexibility and the speed of the Delaware courts in dealing with corporate cases. Former Chief Justice Rehnquist, for example, noted that because the Court of Chancery has no jurisdiction over most criminal or tort cases, it is able to process cases quickly and efficiently without the backlogs that hamper other jurisdictions.<sup>207</sup> Other commentators and scholars similarly have recognized the swiftness and care with which the Court of Chancery handles business litigation.<sup>208</sup> Admittedly, these quotations amount to little more than conventional wisdom, but we suggest that the data marshaled by Carney and Shepherd fail to convincingly refute the common perception.

#### IV. CONCLUSIONS

The “mystery” that applies to almost every section of *The Mystery of Delaware Law’s Continuing Success* is how a valid comparison can be made between a statute bereft of interpretation and a developed body of case law. Carney and Shepherd do not identify the state to which corporations should turn to avoid the purported indeterminacy of Delaware

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206. DEL. CH. CT. R. 174. See generally Leo E. Strine, Jr., *Mediation-Only Filings in the Delaware Court of Chancery: Can New Value Be Added by One of America’s Business Courts?*, 53 DUKE L.J. 585 (2003).

207. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 6 (Del. Dep’t of State Div. of Corps. 2007) (1993), available at [http://corp.delaware.gov/whydelaware/whycorporations\\_web.pdf](http://corp.delaware.gov/whydelaware/whycorporations_web.pdf).

208. See, e.g., John Armour & David A. Skeel, *Who Writes the Rules for Hostile Takeovers and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1743 (2007) (calling Delaware “the nation’s most sophisticated and efficient corporate law arbiter”); Dooley & Goldman, *supra* note 11, at 765 (noting that “[t]he Delaware judiciary undoubtedly accounts for most of [the] perception” that Delaware corporate law is predictable and stable); Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 5 (1995) (“Delaware’s Chancery Court is renowned for its contributions to the corporate area, in terms of both the quality of law it has created and its efficiency in resolving disputes.”); Kahan & Rock, *supra* note 27, at 1613 (“Delaware’s judiciary, in particular, is highly respected for its technocratic expertise and represents a model of nonpartisanship.”); Kahan & Kamar, *supra* note 12, at 708 (“A principal attraction of incorporating in Delaware is the high quality of its chancery court.”); *id.* at 725 (“The main advantage that Delaware possesses is its specialized corporate court.”); Kahan & Kamar, *supra* note 25, at 1212 (“Delaware’s chancery court is one of the most highly regarded courts in the country.”); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354–55 (1992) (calling the Court of Chancery “an important contributor to our national system of justice” and “an inspiration to everyone concerned with the administration of justice in our nation”); E. Lee Reichert & John R. Chadd, *Dissenters’ Rights: The Colorado Supreme Court Finally Speaks*, COLO. LAW., Apr. 2005, at 53, 58 (“[T]he Delaware Chancery Court is widely held in high esteem by business attorneys.”); David A. Skeel, *Icarus and American Corporate Regulation*, 61 BUS. LAW. 155, 167 (2006) (“[A]s even Delaware’s critics concede, the Delaware court system is remarkably efficient.”).

law. Though the MBCA itself is monolithic and universal, real jurisdictions are diverse. Some states have adopted business courts even more specialized than the Court of Chancery, while others have not. There are states in which the “safe harbors” of the MBCA have proven more treacherous than advertised, and others with an uncertain or incomplete body of decisional law. The authority of new and unincorporated revisions of the MBCA in a given state remains in question. Where Carney and Shepherd rely upon statistics to support their claims, the force of their numbers evaporates when put in a comparative context.

The data presented above is not strong enough to sustain the argument that Delaware law is superior to that of other states or that Delaware is winning a race to the top. Hopefully our effort will inspire others to fill in the gaps in Carney and Shepherd’s research so that practitioners and legal academics may achieve a better understanding of the strengths and weaknesses of Delaware law (and the MBCA). We doubt that the final result of such research will be as one-sided as that presented by *The Mystery of Delaware Law’s Continuing Success*. As Carney and Shepherd admit, the null hypothesis for those steeped in the tools of economics is not that a market has failed—quite the opposite. Before Carney and Shepherd start on a sequel that searches for the reasons that incorporations have not rejected Delaware law, they should take their mystery back to the editing room, round out its cast of characters to replace model statutes with actual states, and consider whether what remains is a mystery. Given the degree to which the corporate law of Delaware influences the MBCA, and vice versa, it may be that they find that they are left with a romance.

