REVOKING THE IRREVOCABLE BUYOUT: ALIGNING EQUITY WITH DUE DILIGENCE IN CORPORATE DISSOLUTION

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ABSTRACT

Judicial dissolution of a closely held corporation, the "corporate divorce," is one of the most acrimonious, expensive, and, by almost all accounts, unpopular of legal remedies available in business litigation. Modern corporate statutes tend to reflect this widely held aversion by providing courts and litigants with a variety of alternatives to ending a business's existence. The buyout election, for example, a sort of call option patterned after common law remedies and American Bar Association ("ABA") model legislation, provides one means by which shareholders and corporations can avoid the extreme remedy of corporate dissolution by forcing complaining shareholders to sell their stock to them. But when can these electing shareholders or corporations change their minds about the decision to buy out their adversaries? Many statutes deem the buyout election "irrevocable"—but then allow a court to set it aside if it would be equitable to do so. Such a fluid notion of irrevocability presents challenges.

An electing purchaser might have second thoughts about buying a greater stake in a company for any number of reasons: a precipitous decline in business, the defection of key employees, an unexplained loss (or defalcation) of assets, an owner's death; all of which will arise in something of a no-man's-land between formal civil proceedings and private negotiations found in most statutory buyout procedures. With nothing more than the invocation of equity, courts must somehow divine whether a party ought to be allowed to withdraw an irrevocable election to purchase in a shifting landscape of evolving business conditions and competing interests. Not surprisingly, the reported rulings emanating from these disputes defy cohesive analysis. Some further clarity would

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be invaluable. This article explores a proposed method to hone the broad conception of equity these statutory provisions utilize into something more manageable and easier to grasp, a limitation premised on the commonly understood business term of transactional due diligence.

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I. INTRODUCTION

Few areas in business litigation derive more acrimony than a lawsuit to dissolve a closely held corporation. Close corporations are often formed among family members or longtime friends and business partners, the kind of intimate relations that all too frequently carry simmering jealousies, sibling rivalries, personal grievances, real or imagined, all of which invariably become bound in subtle (or not so subtle) ways within the business's day-to-day operations and governance.[1] Bitter personality clashes between individuals can transform into heated commercial disagreements and corporate deadlock. The need to untangle these business

[1] *See* Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161, 1196 (2010).

relations may indeed be stark, but the separation itself is often freighted with ill will. As the Delaware Court of Chancery once observed, "[e]motions run high, feelings are frayed, and former friends and colleagues find themselves at odds."[2] Judicial dissolution petitions have been likened to a "corporate divorce," and not without justification.[3]

But because terminating a corporation's existence necessarily carries a profound impact on anyone connected to its business—the shareholders, employees, customers, vendors, and suppliers may all have considerable stakes, if not their entire livelihoods, invested in its viability[4]—there has arisen over time a prevailing view that, regardless of contention among the owners, involuntary dissolution of a corporate entity ought to be avoided if at all possible and reserved as a mechanism of last resort.[5] One alternative in particular that has gained a wide level of acceptance is a statutory right to purchase a complaining party's shares in lieu of dissolving the business.[6] In 1990 the ABA approved section 14.34 of the Model Business Corporations Act ("Model Act") to codify, as an alternative to dissolution from owner deadlock or shareholder oppression, a statutory framework to facilitate a shareholder's buyout.[7] To date, twenty-nine states have enacted some form of an elective purchase remedy within their respective corporate statutes, of which sixteen

[2] Greco v. Columbia/HCA Healthcare Corp., No. CIV.A.16801, 1999 WL 1261446, at *11 (Del. Ch. Feb. 12, 1999).

[3] *See, e.g.*, Caudill v. Eubanks Farms, Inc., 301 F.3d 658, 664 (6th Cir. 2002); Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 732 (N.J. 1999).

[4] *See* Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 296–97 (1990) (describing courts' reluctance to order dissolution, in part, because of public harm to employees, suppliers, and customers); John H. Matheson & R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business*, 91 MINN. L. REV. 657, 679–80 (2007) ("When the only option is to dissolve the (often successful) corporation, with the inevitable effect on employees, customers, and suppliers, judges are likely to require a very substantial showing of oppression.").

[5] *See, e.g.*, Bosworth v. Ehrenreich, 823 F. Supp. 1175, 1182 (D. N.J. 1993) (applying Illinois law and noting preference for appointment of a provisional director "as a less drastic alternative" to dissolution (citing Abreu v. Unica Indus. Sales, Inc., 586 N.E.2d 661, 665 (Ill. App. Ct. 1991))); Woodward v. Andersen, 627 N.W.2d 742, 752 (Neb. 2001) ("[T]he remedy of dissolution and liquidation is so drastic that it must be invoked with extreme caution." (citing Hockenberger v. Curry, 215 N.W.2d 627, 628 (Neb. 1974))); McLaughlin v. Schenck, 220 P.3d 146, 156 (Utah 2009) ("Though the Act provides for dissolution, this is often a drastic remedy that may not serve the interest of the complaining shareholder and certainly not the corporation of which he is a part owner."); McCormick v. Dunn & Black, P.S., 167 P.3d 610, 617 (Wash. Ct. App. 2007) (explaining that trial court must consider whether dissolution would be detrimental to the corporation's shareholders or injurious to the public (citing Scott v. Trans-Sys., Inc., 64 P.3d 1, 5 (Wash. 2003))).

[6] *See* Matheson & Maler, *supra* note 4, at 682 (noting that approximately forty states permit shareholder buyouts in lieu of dissolution in either statutory or common law).

[7] *See* MODEL BUS. CORP. ACT ANN., § 14.34 historical background (2008).

are patterned directly after the Model Act's section 14.34.[8]

By design, the model statute provides a straightforward mechanism to effectuate the buyout during litigation. "In a proceeding under section 14.30(a)(2) to dissolve a corporation" that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, "the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares."[9]

Filing such an election[10] carries a number of concomitant responsibilities on the part of the electing party, the corporation, the remaining shareholders, and the court overseeing the case, which are described in both substantive and temporal terms within the statute.[11] Indeed, the entire process—including prescribed notice procedures, deadlines, a mandatory negotiation period, and

[8] The states that have enacted a statutory buyout alternative to dissolution include: Alabama, Alaska, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Minnesota, Mississippi, Montana, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Utah, West Virginia, Wisconsin, and Wyoming; of these, Alabama, Arizona, Connecticut, Hawaii, Florida, Idaho, Iowa, Mississippi, Nebraska, New Hampshire, New York, Oregon, South Dakota, Utah, West Virginia, and Wyoming have adopted the Model Act's language (Rhode Island's statute could also be characterized as a loose facsimile of the Model Act's form). *See* ALA. CODE § 10A-2-14.34 (2011); ALASKA STAT. § 10.06.630 (2011); ARIZ. REV. STAT. ANN. § 10-1434 (2011); CAL. CORP. CODE § 2000 (West 2011); CONN. GEN. STAT. § 33-900 (2011); FLA. STAT. § 607.1436 (2011); GA. CODE ANN. § 14-2-942 (2011); HAW. REV. STAT. § 414-415 (2011); IDAHO CODE ANN. § 30-1-1434 (2011); 805 ILL. COMP. STAT. 5/12.56(b)(11) (2011); IOWA CODE § 490.1434 (2011); ME. REV. STAT. tit. 13-C, § 1434(2)(A) (2011); MINN. STAT. § 302A.751(2) (2011); MISS. CODE ANN. § 79-4-14.34 (2011); MO. REV. STAT. § 351.860 (2011); MONT. CODE ANN. § 35-1-939(1)(d) (2011); NEB. REV. STAT. § 21-20,166 (2010); N.H. REV. STAT. ANN. § 293-A:14.34 (2011); N.J. STAT. ANN. § 14A:12-7(c)(8) (2011); N.Y. BUS. CORP. LAW § 1118 (McKinney 2011); N.C. GEN. STAT. § 55-14-31(d) (2010); OR. REV. STAT. § 60.952(6) (2011); R.I. GEN. LAWS § 7-1.2-1315 (2010); S.C. CODE ANN. § 33-18-420 (2010); S.D. CODIFIED LAWS § 47-1A-1434 (2011); UTAH CODE ANN. § 16-10a-1434 (West 2011); W. VA. CODE § 31D-14-1434 (2011); WIS. STAT. § 180.1833(2)(a)(9) (2011); WYO. STAT. ANN. § 17-16-1434 (2011). It should be noted, however, that the absence of a statutory buyout remedy does not necessarily preclude a court from exercising its equitable powers to oversee an ordered purchase of an owner's shares as an alternative to corporate dissolution. *See, e.g.*, McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 235–36 (N.M. Ct. App. 1986) (finding oppressive conduct under involuntary liquidation statute, but offering defendants the choice of liquidating the corporation, partitioning it, or purchasing the plaintiff's shares).

[9] MODEL BUS. CORP. ACT § 14.34(a) (2011).

[10] This article will refer to the exercise of this provision as an "election to purchase" or a "buyout election."

[11] MODEL BUS. CORP. ACT § 14.34(b) (requiring corporation to give notice to all shareholders of electing shareholder's notice within ten days and shareholders who wish to participate in negotiations or valuation thirty days to file a notice to join), § 14.34(c) (directing court to enter an order directing purchase of shares in accordance with parties' negotiated settlement).

the availability of a judicial valuation hearing—would appear almost mechanical in structure and operation.[12]

Yet, within this framework the drafters of the model legislation set aside a significant role for a trial court to exercise a range of equity powers.[13] Particularly noteworthy is how the buyout election, the triggering event for the entire process, is characterized in subsection (a): "An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election."[14] Which raises the question, when might it be equitable to allow a party to withdraw such an offer?

It is an issue located at a dynamic intersection between statutory directives, corporate dispute resolution, and ancient common law principles of equitable jurisprudence. The relatively few reported decisions to construe this grant of authority have applied it in the broadest ways conceivable, relying on a seemingly unfettered grant of equitable powers within the legislation, but seldom have the courts offered definitive pronouncements about the contours of that authority or guidance for future tribunals to apply when faced with a shareholder recanting a buyout election.[15] Given the necessarily fluid nature of dissolution proceedings and the correspondingly flexible architecture dissolution statutes employ, this should hardly come as a surprise. Amidst the throng of offers, counter-offers, shifting interests and alliances, and competitive positioning within the litigation, the court becomes something of a bridge between a facilitator of corporate negotiations and an equitable arbiter should those negotiations fail.[16] Still, is it possible to discern some boundaries, some guiding limits, even in a field as wide as equity, for deciding when a shareholder may permissibly revoke his or her election to purchase? Can one find any constraints within the Model Act or the case law interpreting corporate dissolution

[12] Under the Model Act, a shareholder or corporation must file and serve its notice of election within ninety days of the filing of the dissolution lawsuit. Once invoked, a sixty-day period of negotiation follows the election to purchase, during which time the dissolution lawsuit cannot be dismissed or settled. Failing an agreement in negotiations, any party may seek to stay the dissolution and convene a formal valuation hearing to have the court determine the price and terms of the buyout, but the corporation's majority owners have the final word. If dissatisfied with the court's ruling on the share price, the corporation may concede to dissolving the business by filing a notice of intention to adopt articles of dissolution within ten days of the order, and the buyout order becomes a nullity. *See id.* § 14.34(b), (c), (d), (g).

[13] *See id.* § 14.34.

[14] *Id.* § 14.34(a).

[15] *See infra* Part III.

[16] *See infra* Part III.B.

statutes?

I believe, through the use of a modest legal fiction, it is eminently feasible to do so. Exercising the statutory election to purchase, like an arm's length transaction to acquire a stake in a business, ought to impose some level of "due diligence," as that term is commonly understood, on the part of the electing shareholder or corporation, absent which the decision should remain irrevocable. This article will examine how such a concept could yield some needed clarity in this area of the law and aid decision-makers confronted with a request to revoke what would otherwise be an irrevocable election. This article begins in Part II by briefly examining the development and more notable features of the statutory election to purchase mechanism, paying particular attention to the purposes underlying the seemingly contradictory notion of a potentially revocable irrevocable notice. Part III continues with an exposition of the case precedents surrounding election to purchase revocations, while highlighting points of tension that may have arisen among the reported decisions. Part IV explores the historic development of equity and the concept of due diligence in the law. Finally, Part V concludes by attempting to draw together all of these strands into a workable due diligence standard when a party seeks to revoke an election to purchase.

II. DEVELOPMENT OF THE MODEL STATUTORY BUYOUT ELECTION

From its beginning in 1950, the ABA's Model Act has steadily evolved both in its scope and in its level of acceptance.[17] Modifications to the Model Act frequently arose from developments

[17] MODEL BUS. CORP. ACT ANN., § 14.34, xxii (2008). For a comparative review of the Model Act's enactments within states and its changes over time, see generally William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 48–55 (2009) (discussing historic innovations of the Model Act and tabulating, by state and year, adoption of Model Act reforms relating to legal capital, plurality voting, and exclusivity of dissenters' rights); Allen C. Goolsby & Louanna O. Heuhsen, *Corporate and Business Law*, 40 U. RICH. L. REV. 165, 165 (2005) ("Since 1984, the Model Act has undergone a number of significant revisions, many reflecting experience with the Model Act in the various adopting states, as well as significant technological advances affecting shareholder and director communications."); Robert W. Hamilton, *Reflections of a Reporter*, 63 TEX. L. REV. 1455, 1457 (1985) (describing the "historical accident" through which the ABA, instead of a recognized commission on uniform state laws, eventually succeeded in promulgating a model corporations act that came to receive widespread acceptance). For ease of reference, this article will refrain from distinguishing the terms "Model Act" from the "Revised Model Business Corporation Act," the latter frequently being used to refer to substantial amendments to the Model Act that were approved in 1984. MODEL BUS. CORP. ACT ANN., § 14.34, xxii.

found in reported case decisions or in academic writings, but just as often, changes would germinate when practitioners identified an unresolved problem that they perceived could be remedied by uniform legislation.[18] Not unlike the process of administrative rulemaking, the ABA Corporation, Banking, and Business Law Section's Committee on Corporate Laws (essentially, the entity charged with overseeing the Model Act) now publishes proposed amendments to the Model Act in *The Business Lawyer*, inviting comments for a period of time, which it then considers before adopting any proposed changes.[19] The buyout alternative to dissolution that came to be codified in the Model Act's section 14.34 would follow a similar historic arc.[20]

A. Common Law Origins

Its genesis can be found in the foment of equity jurisprudence. Courts had long been aware of the drastic and potentially harsh repercussions from terminating an ongoing business[21] and began harkening to their equitable powers to fashion relief that could provide redress for oppressive conduct or break deadlock, while preserving the corporate entity.[22] Among these tools, the judicially authorized buyout of a complaining owner's shares gradually came into prominence.[23] Although shareholder agreements containing

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[18] *See* MODEL BUS. CORP. ACT ANN., x, xv–xviii.

[19] *See* Hamilton, *supra* note 17, at 1458–59. For a fairly recent example of one such amendment proposal, see Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments to Permit Limitations on Separate Group Voting Rights on Certain Mergers, to Delink Voting and Appraisal Rights, and to Make Related Changes*, 65 BUS. LAW. 1121 (2010).

[20] *See, e.g.*, Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments to Chapters 1, 7, and 14 with Conforming Amendments to Related Provisions of the Act*, 60 BUS. LAW. 1577 (2005).

[21] *See* Cent. Standard Life Ins. Co. v. Davis, 141 N.E.2d 45, 51 (Ill. 1957) ("Corporate dissolution is a drastic remedy, and the teachings of generations of chancellors admonish us that it must not be lightly invoked."); Bahls, *supra* note 4, at 296–97.

[22] *See* Bahls, *supra* note 4, at 298; *see also* Maddox v. Norman, 669 P.2d 230, 237–38 (Mont. 1983) (affirming order compelling sale of minority shareholders' shares to corporation, noting that other jurisdictions had recognized equitable remedies less than dissolution, such as ordering the sale of stock); McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 236 (N.M. 1986) ("An order of corporation dissolution is a drastic remedy and should be utilized sparingly, after consideration of other alternative forms of relief." (citations omitted)); Balvik v. Sylvester, 411 N.W.2d 383, 388–89 (N.D. 1987) (reversing dissolution and listing ten nonexclusive, alternative remedies); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395–96 (Or. 1973) (describing ten potential alternative remedies to judicial dissolution of a corporation); Gordon v. Graham, 73 S.E.2d 132, 135 (W. Va. 1952) (reciting its state statute conferring equitable powers to court to dissolve corporations, provided that majority shareholders may avoid dissolution by purchasing complaining shareholders' shares).

[23] *See* Bahls, *supra* note 4, at 298*; see also In re* Kemp & Beatley, Inc., 473 N.E.2d 1173,

buyout options could to some extent prospectively address disputes among owners, the very nature of the close corporation's legal being—a potentially unending, evolving web of relations among investors, each striving to achieve their own ends within an ever-changing business environment—often generated circumstances beyond even the most sophisticated investor's predictive powers.[24] Complicating matters further was the inherently limited, if not non-existent, public demand for shares in a closely held corporation; as the Massachusetts Supreme Court observed in *Donahue v. Rodd Electrotype Co. of New England, Inc.*, there simply is no ready market to trade in a close corporation's stock.[25] Bad faith and bad blood between officers or directors would also frequently stymie self-directed efforts to negotiate a transfer in ownership.[26] Yet, in the majority of these disputes once a dissolution petition was actually filed, the litigants would eventually reach an agreement where one owner purchased the other's interest before a formal judicial decree dissolved the business.[27] Even in cases where an order of dissolution was entered, "the practical reality ha[d] been . . . a buyout negotiated among the parties and a continuation of the business."[28] A judicially ordered buyout remedy, more often than not, was neither unexpected nor in many cases unwelcomed.[29]

The court's supervision was nonetheless seen as essential.

1180–81 (N.Y. 1984) (affirming dissolution of corporation subject to majority owners' option to purchase aggrieved shareholders' shares).

[24] *See* Means, *supra* note 1, at 1187–88 (positing that rational investors will, by necessity, reach incomplete bargains at the outset of a corporation's formation); *cf.* O'Farrell v. Steel City Piping Co., 403 A.2d 1319, 1325 n.10 (Pa. Super. Ct. 1978) (construing interrelated buy-sell and employment agreements following a "marked reversal in corporate fortunes" years later). In *Whittingham v. Darrin*, the court reviewed a copartnership agreement among majority shareholders. 92 N.Y.S. 752, 753 (N.Y. Sup. Ct. 1904) ("The parties may have intended by this to manage the corporation as a mere copartnership, but such attempts are apt to result in failure sooner or later, as this case clearly shows.").

[25] The court addresses the fiduciary duty of an insider sale of shares from majority owners to the corporation. Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505, 518 (Mass. 1975) ("By definition, there is no ready market for shares of a close corporation. The [insider] purchase creates a market for shares which previously had been unmarketable.").

[26] *See id.* at 512.

[27] *See* Hunter J. Brownlee, Comment, *The Shareholders' Agreement: A Contractual Alternative to Oppression as a Ground for Dissolution*, 24 STETSON L. REV. 267, 290 (1994) ("In effect, dissolution actions serve mainly to force buyouts and valuations of petitioning shareholders' capital.").

[28] F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 10.06 (2nd ed. 2003).

[29] *See* Robert A. Rabbat, *Application of Share-Price Discounts and Their Role in Dictating Corporate Behavior: Encouraging Elected Buy-Outs Through Discount Application*, 43 WILLAMETTE L. REV. 107, 152 (2007).

Providing judicial direction within buyout deliberations furthered a number of important interests.[30] Practically speaking, it imposed some order over (and perhaps even fostered) a negotiation process that shareholders in litigation inevitably found themselves in.[31] The court's equitable involvement also discharged the judicial obligation to address potentially oppressive conduct by majority shareholders; equitable relief could bridge the gap between unanticipated or unlawful circumstances, on the one hand, and reasonable shareholder expectations, on the other.[32] In short, judicial management would strive to yield "the most efficient, least acrimonious, and most likely method to achieve a fair result" for everyone involved.[33]

Statutory enactments both followed and propelled the broader acceptance of equitable buyout remedies, as Professor Robert Thompson commented:

> After Donahue . . . the pace of legislative and judicial protection for minority shareholder[s] increased dramatically.
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> . . . .
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> Also important to the effective development of the oppression remedy was the development of a consensus that a buyout was the appropriate remedy when oppression had been shown. Again this was a combined result of legislative changes and judicial interpretations reflecting the legislative purpose in providing a judicial remedy that Kemp & Beatley recognized.[34]

B. The Model Act Buyout Election

With this backdrop, section 14.34 of the Model Act was formally

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[30] *See id.* at 118–20.

[31] *See id.* at 152 ("The 'fair value' determination is done with court oversight, feasibly encouraging a fair result. . . . [W]ithout some kind of judicial encouragement of the election to buy-out, the provision is not likely to be utilized as often as its drafters intended.").

[32] *See* Means, *supra* note 1, at 1186–87.

[33] *See* Rabbat, *supra* note 29, at 152. *But see* Brownlee, *supra* note 27, at 289–95 (describing various economic and non-economic costs and judicial inefficiencies associated with court managed dissolution).

[34] Robert B. Thompson, *Allocating the Roles for Contracts and Judges in the Closely Held Firm*, GEORGETOWN LAW, THE SCHOLARLY COMMONS, 2010, at 13–14, http://scholarship.law.georgetown.edu/fwps_papers/136; *see also* 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, 461–62 (1990) (tracing intermittent adoption of statutory buyout remedies beginning in 1941).

adopted by the ABA in 1990.[35] The published commentary accompanying section 14.34 of the Model Act reflects the Committee on Corporate Laws' recognition of the historic development of buyout alternatives, as well as a basic truth that had come to be understood about judicial dissolution of corporations: the extreme remedy was "rarely necessary."[36] Section 14.34's adoption was thus motivated more from a perceived need to impose structured oversight for a process than from a desire to create any novel remedies for shareholder dissent. While laboring to fashion a workable statute, the drafters never strayed far from the equitable moorings that anchored this body of law.[37] For example, under the finalized act, once an election is filed, the dissolution lawsuit cannot be discontinued or settled and the petitioning shareholder cannot transfer his or her shares, "unless the court determines that it would be equitable" to permit it; in a valuation hearing, the court must "determine the fair value of the [petitioning shareholder's] shares as of the day before" the petition was filed, or any other date "as the court deems appropriate under the circumstances;" after deciding the shares' value, the court's order must direct their purchase on "terms and conditions as the court deems appropriate"; and, of course, the notice of election itself is "irrevocable unless the court determines that it is equitable" to modify it or set it aside.[38]

This infusion of equity and fairness marks the balance the Model Act attempted to make within its dissolution alternatives between procedural structure and equitable relief.[39] It also reflects a merger of two ideals underlying these provisions in general, the freedom of alternative dispute resolution with the protection of judicial oversight.[40] A model statute could never address every potentiality, to be sure—the fair valuation process, to take one example, has generated a chorus of conflicting views[41]—but that same ambiguity

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[35] MODEL BUS. CORP. ACT ANN., § 14.34 historical background (2011).

[36] *Id.* § 14.34 official cmt.

[37] *See supra* Part II.A. Equitable considerations permeate the language of nearly every enacted statutory buyout procedure, whether based on the Model Act or not. *See, e.g.*, 805 ILL. COMP. STAT. 5/12.56(e)(iii) (2011) ("If the court orders a share purchase, it shall . . . [s]pecify the terms of the purchase . . . determined by the court to be equitable . . . ."); MONT. CODE ANN. § 35-1-939(1) (2011) ("In any action filed by a shareholder or director to dissolve the corporation on the grounds enumerated in 35-1-938, the court may make any order to grant the relief other than dissolution as, in its discretion, it considers appropriate . . . .").

[38] MODEL BUS. CORP. ACT ANN. § 14.34 (2011).

[39] *See id.*

[40] *See id.*

[41] *Compare* Rabbat, *supra* note 29, at 127–28 (arguing that valuation ought to incorporate appropriate discounts for minority status and lack of marketability in all election to purchase cases), *with* Murdock, *supra* note 34, at 475–83 (analyzing effects of discounting minority

would also lend to the overall process the flexibility needed to accomplish the statute's goals.[42]

However, at the same time the Model Act sought to structuralize an amorphous process by including an election to purchase provision, that alternative opened wide another door of potential uncertainties:

> Plainly, the election raises risks and strategic considerations for all parties. For the plaintiff shareholder, filing a complaint, in effect, grants a "call" to the corporation and the other shareholders—an obligation to sell, even if the plaintiff might prefer a different outcome, such as continued share ownership with a judicial order compelling a dividend. The plaintiff cannot discontinue the litigation or dispose of the shares outside of the statutory process without the court's permission. Moreover, the amount of the "fair value" is still to be determined.
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> For the majority shareholders, electing to buy has the benefit of certainty regarding type of remedy. It eliminates the possibility that a court will ultimately grant injunctive relief or dissolution. It reduces the expense, delay, and antagonism inherent in fully litigating the issues of oppression. The principal detriments are that the irrevocable decision to purchase must be made without knowing the cost, and that the "fair value" subsequently determined by the court will not include discounts for either lack of marketability or minority status.[43]

Apart from the predictive concerns, an elective buyout option also invited a more sinister externality. Courts allowing shareholder buyouts in lieu of dissolution had long decried gamesmanship on the

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share values and concluding that such discounts are generally inappropriate to determine fair value in oppression cases) *and* Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 370–81 (2004) (rejecting minority discounting in fair valuation, but advocating a choice of valuation dates in non-election dissolution cases). "To say that courts have disagreed on the subject is more than an understatement." Rabbatt, *supra* note 29, at 128.

[42] *See* Sean R. Matt et al., Comment, *Providing a Model Responsive to the Needs of Small Businesses at Formation: A Focus of* Ex Ante *Flexibility and Predictability*, 71 OR. L. REV. 631, 677–79 (1992).

[43] Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. CORP. L. 371, 416 (2003); *see also* MODEL BUS. CORP. ACT ANN. § 14.34, official cmt. (2011); Eileen A. Lindsay, *What Can I Do For You? Remedies for Oppressed Shareholders in New Jersey*, N.J. LAW., Aug. 2000, at 37, 40 (noting pros and cons of election to purchase).

part of the electing shareholder or corporation.[44] The election to purchase could provide an avenue for a viable business to endure a shareholder's petition to dissolve its existence, but it could also be used by the corporation or its majority owners as a "potent weapon to temporarily silence" that same shareholder, leaving them free to continue with the allegedly oppressive conduct that may have given rise to the dissolution action in the first place.[45] The fear was not unfounded; a majority ownership still in control of the business's assets could, in theory, protract the entire process to the point of breaking the minority shareholder's means, only to renege on its offer to buy the petitioner's shares.[46]

Recognizing this potential for abuse, the drafters of section 14.34 made the election to purchase irrevocable, and at the same time prohibited the petitioning shareholder from discontinuing or settling the dissolution proceeding.[47] The link between these two prohibitions is clear from the Model Act's official commentary: "These provisions are intended to reduce the risk that either the dissolution proceeding or the buyout election will be used for strategic purposes."[48] The same comment then concludes:

> Once an election is filed, it may be set aside or modified only for reasons the court finds equitable. If the court sets aside the election, the corporation or the electing shareholders are released from their obligation to purchase the petitioner's shares. Under section 14.34(a), the court also has discretion to "modify" the election by releasing one or more electing

[44] *See* Papillo v. Pockets, Inc., 704 A.2d 448, 453 (Md. Ct. Spec. App. 1997) (noting that unbridled ability to revoke election could thwart legislative goal of protecting minority shareholders); *In re* Pace Photographers, Ltd., 557 N.Y.S.2d 443, 445 (N.Y. App. Div. 1990) ("Business Corporation Law § 1118(a) was amended in part to remedy the problems generated by delays in the negotiation of a fair value for a petitioner's stock." (citing Rey v. Pan Am. Cash & Carry Corp., 548 N.Y.S.2d 524, 527 (N.Y. App. Div. 1989))); *Rey*, 548 N.Y.S.2d at 527 ("The legislative purpose for not allowing an election to be revocable without court approval was to ensure that negotiations to determine fair value be conducted expeditiously and in good faith and that the election not be made for strategic purposes.").

[45] Bogosian v. Woloohojian, 749 F. Supp. 396, 399 (D.R.I. 1990) ("It should not be expected that the General Assembly of the State of Rhode Island intended to vest such capricious power in a corporation or that it intended to deny an opposing shareholder her rights so completely [as to expressly limit revocability] and without a remedy. Of course, the statute must be construed to avoid such an absurd result.").

[46] *See* John E. Davidian, *Corporate Dissolution in New York: Liberalizing the Rights of Minority Shareholders*, 56 ST. JOHN'S L. REV. 24, 71 (1981) ("Once made, the election should remain irrevocable . . . . [T]he majority, now in exclusive control of the business, will seek all avenues of delay in the hope of forcing the petitioner to accept a lesser price for his stock.").

[47] MODEL BUS. CORP. ACT ANN. § 14.34(a), (b).

[48] *Id.* § 14.34, official cmt.

shareholders without releasing the others.[49]

Thus, the "potent weapon" of majoritarian delay tactics, as well as the threat of a minority shareholder's strategic abatement or dismissal of a dissolution petition would all be relegated to a court's supervision.

Beyond these remarks, no other substantive guidance exists within the Model Act that addresses the potential revocation of an election to purchase. The lack of definitive benchmarks was likely purposeful; a fluid terminology complements the wide swath of discretion most corporate statutes reserve in the area of shareholder disputes,[50] and indeed, the predominant role that equity has come to play in the development of contractual and corporate law in general.[51] Section 14.34 and statutes patterned after it are no exception in either regard.[52] Yet the expansive reach illustrates something of an incongruence between the model language that was ultimately adopted and the stated objective underlying the irrevocability limitation. If "strategic purposes" and preventing tactical abuses in litigation were the predominant concerns, the statutory prohibition against revoking an election could have easily been confined to situations where the court determined the election had been filed "in bad faith" or merely for "purposes of delay."[53] Both the language of section 14.34(b) and its commentary, however, cast the discretionary review far more widely.[54]

Why, one could ask, was the election's irrevocability tied to a potentially limitless universe such as equitable discretion? Clearly some circumstances, some eventualities, beside sharp gamesmanship might justify a withdrawal of a buyout election. A truly irrevocable election, or one limited to withdrawal only for

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[49] *Id.*

[50] *See* Art, *supra* note 43, at 372 (commenting that "only a sliver" of definitional guidance exists within corporation statutes regarding minority shareholder oppression).

[51] Means, *supra* note 1, at 1194–95 ("Since at least the nineteenth century merger of law and equity, courts have placed equitable limits on the substance of contract and have taken a substantial ex post role in interpreting contract terms . . . ." (footnote omitted)). Means argues that relational aspects of incorporation defy narrow application of the contractual view of shareholder protections. *Id.*

[52] *See* MODEL BUS. CORP. ACT § 14.34; *see also supra* text accompanying note 8.

[53] *See* MODEL BUS. CORP. ACT ANN. § 14.34, official cmt. An analogous limitation is found in certain non-Model Act jurisdictions, which limit the court's discretion to modify a purchase order, once it is entered, to situations where "changes in the financial or legal ability of the corporation or other purchaser to complete the purchase justify a modification." GA. CODE ANN. § 14-2-942(c) (2011); Mo. Ann. Stat. § 351.860(3) (West 2011); S.C. Code Ann. § 33-18-420(c) (2010).

[54] *See* MODEL BUS. CORP. ACT ANN. § 14.34(b), official cmt.

instances of fraud, would be too rigid. The Model Act's drafting in section 14.34 corrals together, as much as possible, what are actually two competing concerns. It addresses overly strategic proclivities of litigating shareholders by making the election to purchase irrevocable, but then leaves some room—an enormous amount, actually—for the unforeseen. As discussed next, when given such a free rein, the courts have drawn the contours in this area of the law as widely as the statute's conferral of discretion.

III. SEARCHING FOR A STANDARD IN BUYOUT REVOCATIONS

At common law, elections to purchase in dissolution proceedings were never truly irrevocable.[55] Invariably there could always be a string for an electing shareholder to pull back the buyout election if he or she proved some equitable basis to be allowed to do so. Codification has done little to change that aspect of dissolution law.[56] Surveying a number of state corporation statutes and court holdings, the Court of Special Appeals of Maryland summarized the state of the law in *Papillo v. Pockets, Inc.*: "[T]hose states providing a statutory right to purchase a petitioner's stock in order to avoid dissolution have found a common thread with regard to the right to revoke the election: judicial discretion."[57] A limit on that discretion has yet to be found.[58] In the two decades since section 14.34's promulgation and throughout the states that have adopted buyout election provisions within their respective corporation statutes, only one categorical principle seems to have emerged as to when a shareholder will ordinarily be prohibited from rescinding a buyout election, where the election becomes, in actual application, irrevocable: that is when the purchase price of the shares is the only reason for withdrawing the offer.[59] Otherwise, the courts

[55] *See, e.g.*, Brodsky v. Seaboard Realty Co., 24 Cal. Rptr. 61, 69 (Cal. Dist. Ct. App. 1962) (holding that the court has the discretion to allow a president of corporation to revoke his election to purchase shares).

[56] *See* Rey v. Pan Am. Cash & Carry Corp., 548 N.Y.S.2d 524, 528 (N.Y. App. Div. 1989).

[57] Papillo v. Pockets, Inc., 704 A.2d 448, 454 (Md. Ct. Spec. App. 1997).

[58] *See* Matheson & Maler, *supra* note 4, at 688 (noting that the prevalence of the buyout mechanism in lieu of dissolution has been criticized for "its vague standards" and because the trial courts are given "boundless discretion").

[59] *See, e.g.*, Smith v. Russo, 646 N.Y.S.2d 711, 712 (N.Y. App. Div. 1996) (rejecting withdrawal based on "impossibility of performance" assertion that electing parties' financial difficulties made the share price unaffordable); Chu v. Sino Chemists, Inc., 595 N.Y.S.2d 465, 466 (N.Y. App. Div. 1993) ("[T]he reasons set forth in support of revocation [of respondent's election to purchase] suggest that the respondent was simply dissatisfied with the Referee's determination as to valuation."); *In re* Pace Photographers, Ltd., 557 N.Y.S.2d 443, 445 (N.Y. App. Div. 1990) (reviewing the Supreme Court decision following remittance and finding that

addressing buyout election revocations are often drawn into the realm of equity with no clear end in view and without a specific approach in mind, other than to assure that, whatever its means or however applied, a broad grant of discretion over the issue resides with the finder of fact.[60] The following survey of some of the notable cases on this issue illustrates how widely that exercise of discretion can vary.

A. Survey of the Reported Rulings

An early example of both the establishment and the reach of judicial discretion over buyout revocations was the case of *Brodsky v. Seaboard Realty Co.*, where the president of a failing real estate business was allowed, under California's corporate statutes, to rescind his election to purchase a dissenting owner's shares.[61] Without substantial comment, both the trial and appellate courts concluded that the statute's silence on whether the president could revoke his election was no impediment to the trial court's exercise of its discretion over the issue.[62] In line with that discretion the events chronicled in the holding—a loan default and threatened foreclosure on the corporation's principal asset of vacant land, unequal investments of time and money in the business between the litigants, a downturn in the corporation's financial health, and a personal guarantee of a corporate loan that was, at some point, made on the part of the electing shareholder—were found to justify the court's intervention to relieve the president of his buyout election.[63]

Unfortunately, having opened this field of discretion, the *Brodsky* court left the boundaries undefined. After determining that trial judges do, in fact, have the discretionary authority to rule on the issue of whether a shareholder could rescind his or her election, the court never addressed the questions that conferral necessarily raises: What kind of evidence should the trial court have focused on when exercising its discretion over these disputes? Which facts, if

the Court of Appeals' reversal of favorable share price valuation would not justify revocation of election to purchase). Even this, however, is not entirely free from qualification, as a different result may arise where the electing party is a corporation and redeeming the petitioner's shares would render it insolvent. *See In re* Androtsakis, 553 N.Y.S.2d 125, 125 (N.Y. App. Div. 1990) (citing Vowteras v. Argo Compressor Serv. Corp., 441 N.Y.S.2d 562 (N.Y. App. Div. 1981)).

[60] *See* Matherson & Maler, *supra* note 4, at 687.

[61] Brodsky v. Seaboard Realty Co., 24 Cal. Rptr. 61 (Cal. Dist. Ct. App. 1962).

[62] *See id.* at 69.

[63] *See id.* at 70.

believed, warranted the president's revocation of his buyout election, and which ones would perhaps hold less importance in dissolution proceedings under the statute? That the appellate court recognized the necessity for some cohesive framework on this issue is evident from its exhaustive review of California law on the extent of deference ordinarily given to trial courts when ruling on conflicting evidence or weighing the credibility of witnesses.[64] Relating that discretion and deference to the facts before it, however, much less constructing a substantive standard for a buyout revocation, was a task the *Brodsky* court left for another day.[65]

The irrevocable statutory buyout election has also been applied with some apparent rigidity. One such example can be found in *In re Dissolution of Penepent Corp.*, where the choice between enforcing a statutory election to purchase and enforcing a shareholder agreement came into direct conflict.[66] A shareholder filed a dissolution petition against his brother, as co-owner of their prosperous family business; the respondent made an election to purchase, but before a price could be negotiated or the fair value adjudicated, the petitioning brother died.[67] Under the terms of a shareholder agreement entered into decades earlier between the brothers, the petitioner's estate would have been bound to sell the shares at a contractually set value, an amount which turned out to be substantially less than what the stock's "fair value" would have been in the dissolution proceeding.[68] Not surprisingly, the surviving brother sought to rescind his election in order to effectuate the more favorable terms of the shareholders' agreement and purchase the shares at the contractual price.[69] The New York Court of Appeals acknowledged that shareholder agreements, such as the one before it, were ordinarily enforced according to their terms, but the irrevocability of the statute's buyout election prevailed because it conferred a "vested right" to the petitioning shareholder to have his shares purchased at fair value, a right that survived his death.[70] Of

[64] *Id.* at 69–70.

[65] The court's summation of the trial court's discretion was as follows: "Under the circumstances the trial court did not abuse its discretion." *Id.* at 70.

[66] *In re* Dissolution of Penepent Corp., 750 N.E.2d 47 (N.Y. 2001).

[67] *Id.* at 48–49.

[68] *Id.* at 48. According to a footnote in the opinion, the last time that the parties had modified the agreed upon share price under their agreement was six years prior to the filing of the first dissolution petition. *Id.* at 48 n.1.

[69] *Id.* at 49.

[70] *Id.* at 51.

course, this vested right effectively expunged another party's pre-existing contractual right, an issue the court summarily resolved by announcing the following rule: "Absent an agreement otherwise, divestiture events under a mandatory buy-out agreement—e.g., death, retirement, termination—will not operate to frustrate a preexisting section 1118 election."[71] Apart from this context, however, we are left to puzzle whether a shareholder's death could ever justify equity's intervention to relieve a party of a buyout election,[72] and, if not, why it falls beneath the purview of equitable considerations that would permit a revocation.

While the substantive demarcations for equitable buyout revocations have remained in much the same unsettled condition today as they were when *Brodsky* was decided, one court was not at all hesitant to extend equity's reach into the procedural mechanisms governing a revocation. In *Bendetson v. Killarney, Inc.*, the New Hampshire Supreme Court affirmed the trial court's *sua sponte* revocation of a shareholder's election to purchase shares under the state's buyout statute.[73] The ruling is especially noteworthy, if for no other reason than because it arose from what appears to have been an unremarkable set of facts. Bendetson, one of two equal owners of a deadlocked real estate development business known as Killarney, Inc., initiated a dissolution action. In response, his equal partner, Buonato, filed a notice of election to purchase Bendetson's shares.[74] The same litigants were also parties to a separate dissolution proceeding over a related limited partnership, which was structured so that whoever owned Killarney, Inc. would also own the majority interest of the limited partnership.[75] This arrangement apparently troubled the trial court so much that, at the outset of the valuation hearing for Killarney, Inc., the court, on its own initiative and over Bendetson's objection, reversed a predecessor judge's ruling and set aside Buonato's election (even though Buonato had never made such a request).[76]

On appeal, the court in *Bendetson* recognized, and indeed, to a

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[71] *Id.* at 50.

[72] *See* Bogosian v. Woloohojian, 749 F. Supp. 396, 400 (D.R.I. 1990) (holding that the death and illness of two management team shareholders would not relieve corporation of buyout election).

[73] Bendetson v. Killarney, Inc., 913 A.2d 756, 760 (N.H. 2006) ("An election pursuant to this section shall be irrevocable, unless the court determines that it is equitable to set aside or modify the election." (citing N.H. REV. STAT. Ann. § 293-A:14.34(a) (2011))).

[74] *Id.* at 758–59.

[75] *Id.* at 759.

[76] *Id.*

degree, struggled with the language of the buyout election provision and the *sua sponte* revocation by the trial court.[77] The statute's conjoining use of the term "election" with revocation, the court noted, implied a connection that would seemingly connote withdrawal only on the part of the electing party.[78] But the statute's incorporation of equitable principles triumphed over grammatical convention:

> We agree with the respondents to the extent that the term "irrevocable" commonly describes the relationship between an actor and an action initiated by that actor. Thus, generally speaking, if an action is irrevocable, the actor who initiated the action may not withdraw it, alter it, or otherwise call it back. . . .
>
> . . . .
>
> Nothing in the notice provision, however, grants the electing party an unassailable right to elect. Rather, it simply informs shareholders of whatever election rights exist under RSA 293-A:14.34(a), and we have concluded that the election provision renders the electing party's right to elect subject to the trial court's authority to set aside the election when equity so requires.[79]

One need not dive very far beneath the surface of this procedural dispute (whether a trial court could revoke an election to purchase on its own motion) to discover the strong current of equity propelling the outcome. Consider from Bendetson's view that: (i) there was no express authority within the statutory language that authorized the trial court to *sua sponte* revoke his adversary's election;[80] (ii) the common understanding of "irrevocable" within the statute implied that only the electing party could properly seek to withdraw a buyout election;[81] (iii) under the *Penepent* holding, Bendetson would have had a vested, enforceable right to sell his shares, a right that was eviscerated by the trial court's *sua sponte* ruling;[82] and (iv) principles of comity[83] weighed against the trial

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[77] *Id.* at 760–61.

[78] *Id.* at 761.

[79] *Id.* at 761, 763–64.

[80] *Id.* at 761.

[81] *Id.*

[82] *See* Bendetson v. Killarney, Inc., 913 A.2d 756, 764–65 (N.H. 2006); *In re* Dissolution of Penepent Corp., 750 N.E.2d 47, 51 (N.Y. 2001).

[83] This point was never raised in *Bendetson*, however, a trial judge who takes over a case is ordinarily expected to afford a degree of deference to a previous judge's rulings out of comity (courteous respect) to another member of the judiciary and in order to promote judicial

judge's revocation since the prior judge presiding over the case had ordered a valuation hearing to be convened on the election to purchase.[84] No matter, according to the New Hampshire Supreme Court, because the reference to equity in the statute's provision "indicates that the legislature intended to empower the court to enforce principles of fair play"—an empowerment that apparently justified the trial court's insertion of those principles on its own accord.[85]

Over time, the absence of standards in this area of the law has led to emerging conflicts within jurisdictions, as a comparison of two New York appellate cases illustrates. On the one hand, in *Rey v. Pan American Cash & Carry Corp.*, the Appellate Division considered a shareholder's request to revoke his election to purchase a supermarket business after a fire gutted the entire building.[86] Although insurance proceeds would have mitigated the loss to some extent, the *Rey* court affirmed the revocation, particularly noting the limited degree of foreseeability of such an occurrence:

> We are convinced that an unforeseeable fire, which impairs, if not destroys, the value of corporate stock, constitutes a "just and equitable consideration", within the purview of the statute. Under the circumstances, it would be unreasonable to expect Capote to purchase Rey's shares at their prepetition value, when the stock has been rendered worthless because of an unfortunate and unanticipated event.[87]

economy. *See* Castner v. First Nat'l Bank of Anchorage, 278 F.2d 376, 379–81 (9th Cir. 1960) (tracing the evolution of rule regarding when another judge sitting in the same case may review or reverse his or her predecessor's rulings); Shermer v. State, 16 So. 3d 261, 265 (Fla. Dist. Ct. App. 2009) ("As a matter of 'comity and courtesy,' a judge should hesitate to undo the work of another judge who presided earlier in the case." (quoting Hull & Co. v. Thomas, 834 So. 2d 904, 906 (Fla. Dist. Ct. App. 2003)).

[84] *Bendetson*, 913 A.2d at 759.

[85] *Id.* at 763. The court tacitly conceded its affirmance may have strayed beyond the limits of the trial court's statutory authorization when, near the conclusion of its analysis on the issue, it invited the legislature to amend the irrevocability provision if it disagreed with the court's construction of the statute. *Id.* at 764 (citing Marceau v. Concord Heritage Life Ins. Co, 818 A.2d 1264, 1269 (N.H. 2003)). Perhaps indicative of *Bendetson*'s procedural ramifications, one trial court in a neighboring jurisdiction felt it necessary to predicate its scheduling of an election to purchase valuation hearing on a finding that the election was not inequitably made, even though no party had made such an argument to the court. *See* Stone v. R.E.A.L. Health, P.C., No. CV98414972, 2000 WL 33158565, at *1 (Conn. Super. Ct. Nov. 15, 2000).

[86] Rey v. Pan Am. Cash & Carry Corp., 548 N.Y.S.2d 524, 526 (N.Y. App. Div. 1989).

[87] *Id.* at 529.

And yet, equally dire circumstances would leave the same court unmoved in *Chu v. Sino Chemists, Inc.*[88] In *Chu*, the electing corporation faced a series of unfortunate events: an eviction from one of its two locations orchestrated by the petitioning shareholder, alleged self-dealing and conversion of assets by the same party, and the death of the corporation's other one-third owner.[89] None of which, according to the court, justified the corporation's withdrawal of its notice of election to purchase.[90] Citing New York's adoption of the Model Act's limitation on revoking elections to purchase as well as the *Rey* decision, the *Chu* court reversed the trial court's allowance of the revocation and summarily rejected the corporation's allegations of changed circumstances as sufficient equitable grounds to justify revocation.[91]

Certainly, one could marshal distinguishing features between the facts of these two cases, but one could also accept, as the trial court had, that the facts of the *Chu* case warranted equity's intervention, like the facts in *Rey* did four years earlier. The resemblance between the essentials of the circumstances raised in these two cases—which could fairly be said had profound implications for both businesses—merits a brief attempt to lay hold of the most compelling distinguishing feature between them, if one can be found.

The real distinction between *Chu* and *Rey* may have had less to do with the nature or degree of the adverse events themselves than with their foreseeability. For example, addressing the allegations of improper shareholder conduct, the court in *Chu* pointed out that "[t]he circumstances . . . were known to the respondent prior to its election to purchase his shares and prior to the [valuation] hearing."[92] This stands in stark contrast to *Rey*'s observations about the unforeseeability of destructive fire.[93] The principle contingencies in *Chu*—the retaliatory eviction and alleged self-dealing—were known contingencies, probably even well known, at

[88] Chu v. Sino Chemists, Inc., 595 N.Y.S.2d 465 (N.Y. App. Div. 1993).

[89] *Id.* at 466.

[90] *Id.* at 466–67.

[91] *Id.* The appellate court was apparently convinced that the true impetus behind the request to revoke the election was dissatisfaction with the appraised value of the shares. *See id.* ("[T]he reasons set forth in support of revocation suggest that the respondent was simply dissatisfied with the Referee's determination as to valuation.").

[92] *Id.*

[93] Rey v. Pan Am. Cash & Carry Corp., 548 N.Y.S.2d 524, 529 (N.Y. App. Div. 1989) (citing *In re* Fontana D'oro Foods, Inc., 482 N.E.2d 1216, 1217 (N.Y. 1985)).

the time the election was made.[94] A possible conclusion one could draw from these two rulings, then, is that foreseeable circumstances are categorically different than truly unforeseeable circumstances, and therefore, receive different consideration in terms of whether equity will intervene to revoke a buyout election.[95] To date, however, no court has yet expounded on this as a basis for revocation.

B. The Dilemma of Uncertainty

The absence of fixed standards thwarts a discernible synthesis of equity into corporate dissolution. As one commentator observed:

> While courts have engaged in extensive analysis of the equitable remedies available for responding to dissension, courts have not squarely addressed the issue of standards for selecting the appropriate remedy. In most cases, appellate courts state a deference to the trial court selecting the remedy. This approach, of course, provides no guidance to trial courts that are searching for appropriate, usable standards. Those courts that do describe standards generally use the vaguest of terms. Courts use maxims like "do complete justice," "give such relief as justice and good conscience may require," "tailoring the remedy to fit the particular case," and consider the "totalities of the circumstances." These dusty pearls of judicial wisdom are actually no more than statements of the most basic principles of equity and do not provide the court with usable, reliable standards for making difficult determinations.[96]

The narrower issue of revoking a buyout election is no exception. Synthesizing cogent benchmarks or substantive baselines from among the relatively few reported cases on what is, at bottom, an equitable determination would be an elusive, if not impossible,

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[94] One would intuit that a shareholder in a close corporation has an especially heightened sensitivity and strong motivation to investigate the slightest suspicion of malfeasance by his co-owners. Given the acrimonious nature of close corporation disputes, retaliatory conduct in related businesses should not come as any surprise during the course of dissolution proceedings. *See* Sandra K. Miller, *Should the Definition of Oppressive Conduct by Majority Shareholders Exclude a Consideration of Ethical Conduct and Business Purpose?*, 97 DICK. L. REV. 227, 234 (1993) (arguing that ethical factors ought to be considered when comparing minority and majority shareholder conduct in corporate disputes, because "[b]roken promises, unconscionable bargains, and angry retaliation" are common).

[95] If that is the case, then at least a modicum of precedent for a "due diligence" criterion, explored later in this article, may arguably exist. *See infra* Part V.

[96] Bahls, *supra* note 4, at 315–16 (citations omitted).

undertaking. But, that does not diminish the importance of fashioning workable standards for deciding these disputes. The Model Act's invocation of equity plants the trial court into the thick of the weeds when a shareholder tries to revoke his or her buyout election.[97] It must sort through the workings of an unfamiliar business, the legal relationships of warring parties, ascertain a preliminary understanding of a company's value, and then weigh all of these competing considerations to reach a decision that will ultimately affect the business's continued existence.[98] Any revocation ruling the trial court makes will shape the entire litigation and could very well be dispositive of the case's resolution.[99] Such a ruling comes without the benefit of legislative direction and scarce precedential guidance from the appellate courts. For better or worse, every time this issue arises before a trial court, it becomes a case of first impression.[100]

Aside from judicial quandaries, the foregoing review demonstrates a pragmatic pitfall for the shareholders and businesses availing themselves of these statutes as well. Equitable rulings that lack substantial predictive force or value leave future litigants in doubt when reckoning the likelihood of whether or not their particular case for revoking an election to purchase will be granted or denied.[101] This uncertainty, in turn, could actually foster dilatory revocations of buyout elections; one could easily imagine a certain ilk of shareholder, who, perceiving no definitive standards or holding little aversion to risk in general, might attempt to rescind an election to purchase solely out of spite, or in the hope that some manufactured justification might prevail on the conscience of a particular trial judge. Either of which would, of course, be a mischief the irrevocability provision was supposed to prevent.[102] If the statute's conferral of equitable discretion is not to degenerate

[97] *See supra* Part III.A.

[98] *See* Hugh T. Scogin, Jr., *Withdrawal and Expulsion in Germany: A Comparative Perspective on the "Close Corporation Problem*,*"* 15 MICH. J. INT'L L. 127, 171 (1993) (noting how lack of clear standards and "open-ended grant of authority" in dissolution remedies raise concerns over excessive entanglement in business by a court of law).

[99] *See supra* text accompanying notes 73–85.

[100] The early equity jurists would have likely thought this for the better, assuming, the claim was indeed one grounded in equity. *Cf.* Rivers v. Derby, (1688) 23 Eng. Rep. 656 (EWHC (Ch)) 657; 2 Vern. 72 (rejecting counsel's recitation of precedent in equity claim because each case should stand on its own merit).

[101] Bahls, *supra* note 4, at 316. Although it may be tempting to simply defer these issues to exercises of judicial discretion, as Justice Cardozo once warned: "We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103 (1921).

[102] *See supra* text accompanying notes 47–49.

into a "roving writ" of ameliorating acrimony during an election buyout,[103] and still guard the alternative remedy from improper stratagems, perhaps the time has come to examine some potential limiting factor on its scope and application. Meaningful lines, if any can be found, could be useful in sorting equitable revocations from those that ought to remain under the corporate statute's prohibition. Thus far, the case law has yet to draw those lines. Fortunately, equity jurisprudence already holds a tool that could shape some definitive features into what is still a mostly bare artifice of the law.

IV. SHAPING A DUE DILIGENCE STANDARD FROM EQUITY

There are grains of equity to be found in every crevasse of American law. From the time of our nation's founding, equity was enshrined within the Constitution as part of the judicial powers of Article III.[104] Its development, like much in our jurisprudence, was anything but methodical, but the trajectory of its prominence over time cannot be viewed as anything other than ascendant.[105] Entire constellations of civil jurisprudence have come to revolve around equitable remedies.[106] Litigants are now free to assert equitable claims alongside their legal claims ever since the pleading distinctions were abolished with the adoption of civil procedure

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[103] *Cf.* Jamo v. Katahdin Fed. Credit Union (*In re* Jamo), 283 F.3d 392, 403 (1st Cir. 2002) (noting that bankruptcy statute's authorization to "issue any order, process, or judgment" does not offer "a roving writ, much less a free hand" for bankruptcy courts to dispense equitable remedies).

[104] U.S. CONST. art. III, § 2, cl. 1.

[105] Professor Friedman commented on the "suppleness" with which American courts incorporated traditionally equitable devices, such as receiverships and injunctions, into law actions once the two forms were merged in the nineteenth century, a merger where "equity came out on top." *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 298 (3d ed. 2005). For a general overview of the development of equity in American law, see Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 265–91 (2010); John R. Kroger, *Supreme Court Equity, 1789–1835, and the History of American Judging*, 34 HOUS. L. REV. 1425 (1998).

[106] A mortgage foreclosure, to take one timely example, remains an action founded primarily in equity. *See, e.g.*, Thompson v. Orcutt, 777 A.2d 670, 676–78 (Conn. 2001) (holding that the equitable defense of unclean hands applied to mortgage foreclosure actions); Watson v. Vafides, 212 So. 2d 358, 361 (Fla. Dist. Ct. App. 1968) ("[T]he historical reason for equitable courts to have asserted jurisdiction in controversies between mortgagors and mortgagees has been for the primary purpose of holding an umbrella over the head of a mortgagor, protecting him from the harsh rain of forfeiture . . . ."); Hill v. Cross Country Settlements, LLC, 936 A.2d 343, 360 (Md. 2007) ("Mortgage foreclosure is an equitable remedy in Maryland." (citing Wells Fargo Home Mortg., Inc. v. Neal, 922 A.2d 538, 551 (Md. 2007))).

rules in the twentieth century.[107] Modern legislative enactments, such as the Model Act's section 14.34, frequently incorporate discretionary tenets within statutory language.[108] Before examining how this area of law could be better grafted into buyout revocation disputes, it may be helpful to refresh our knowledge about equity's underlying principles.

A. Fundamentals of Equitable Limitations

At its most intrinsic level, equity exists to afford relief that is clearly called for, but would not otherwise be available. Natural justice, basic fairness, just desserts—however one wishes to cast the notion, its aim is to see "that that is done which ought to be done" in the disposition of people's rights.[109] "[A] court of equity is a court of conscience," declared the Florida Supreme Court more than half a century ago.[110] That conscience aims to assure that for every wrong there is a remedy, with equity both defining and then rectifying the cases where actions at law might fail to meet the ends of justice.[111]

Equity's function is inextricable from its flexibility. As Justice Story reflected in his monumental work on the subject: "one of the most striking and distinctive features of courts of equity [was], that they could adapt their decrees to all the varieties of circumstances, which might arise, and adjust them to all the peculiar rights of all the parties in interest."[112] Thus, its early jurisprudence generally avoided fixing set premises or establishing firm demarcations on its scope.[113] The proposition that equity was ever truly, as some early English chancery jurists thought, a boundless body of natural law where "there can be no precedent"[114] perhaps overstated its reach.[115]

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[107] *See* FED. R. CIV. P. 2; Ross v. Bernhard, 396 U.S. 531, 539–40 (1970).

[108] In Florida, for instance, statutes explicitly direct courts to apply equity or equitable considerations in such varied circumstances as the disposition of marital assets in divorce proceedings, FLA. STAT. § 61.075 (2011), quieting title to real estate, FLA. STAT. § 65.061 (2011), issuing declaratory judgments, FLA. STAT. § 86.111 (2011), *ultra vires* challenges to a corporate act, FLA. STAT. § 607.0304(3) (2011), and, of course, whether or not to set aside a buyout election in corporate dissolution proceedings, FLA. STAT. § 607.1436 (2011).

[109] Meddaugh v. Wilson, 151 U.S. 333, 346 (1894).

[110] Wicker v. Bd. of Pub. Instruction of Dade Cnty., 106 So. 2d 550, 558 (Fla. 1958) (affirming lower court's decision on rehearing).

[111] Ver Brycke v. Ver Brycke, 843 A.2d 758, 774 n.12 (Md. 2004) (citing Manning v. Potomac Elec. Power Co., 187 A.2d 468, 472 (Md. 1963)).

[112] JUSTICE JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 28 (3d ed. 1920).

[113] *See* Kroger, *supra* note 105, at 1434.

[114] Fry v. Porter, (1669) 86 Eng. Rep. 898 (EWHC (Ch)) 902; 1 Mod. 300, 307.

[115] At most it was a relatively short-lived view of English equity given the "legalization" reforms of the eighteenth century chancery court jurists. Kroger, *supra* note 105, at 1436–37; *see also* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 43 (Spencer W.

It is certainly disclaimed by the state of the law today.[116]

A host of venerable maxims have sprouted up, rooted in equity's precedents, which serve to impose limits on the scope of equitable remedies available to a litigant.[117] For example, there is the old and oft-quoted adage, "he who seeks equity must do equity."[118] When challenging the propriety of another's actions, the principle that "equity imputes an intent to fulfill an obligation" has on occasion been employed to limit a prospective remedy.[119] But of the remedial restraints that have developed over time,[120] one in particular merits special attention for purposes of corporate buyout election revocations: *vigilantibus et non dormientibus jura subveniunt* ("The laws aid those who are vigilant, not those who sleep.").[121]

B. Components of the Vigilance Limitation

To a certain degree, the law of equity expects people to look after themselves.[122] Failing to take reasonable precautions to protect one's interests will bar equitable relief if reasonable actions or

Symons ed., 5th ed. 1941) (1881) ("[E]very decision [if based upon a judge's conception of justice] would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost.").

[116] 1 POMEROY, *supra* note 115, § 62, at 81–82.

[117] *See generally* 30A CORPUS JURIS SECUNDUM: EQUITY §§ 96–137 (2011) (surveying various equity maxims and their applications).

[118] Poff v. Brown, 288 S.W.3d 620, 622–23 (Ark. 2008) (affirming denial of real estate broker's specific performance claim to purchase mineral rights based upon broker's misrepresentations and unconscionable contract); Curtis v. Dorn, 234 P.3d 683, 692 (Haw. Ct. App. 2010) (quoting maxim to permit equitable offset of rental value in partition action (quoting Adair v. Hustace, 640 P.2d 294, 300 n.5 (Haw. 1982))); Goldiluxe, LLC v. Abbott, 306 S.W.3d 613, 616 n.4 (Mo. Ct. App. 2010) ("'[T]he first and prime essential of rescission is that he who seeks equity must do equity,' which means in part that 'neither party will be materially enriched or materially impoverished by the relief.'" (quoting Davis v. Cleary Bldg. Corp., 143 S.W.3d 659, 667 (Mo. Ct. App. 2004))); People's Sav. Bank v. Bufford, 155 P. 1068, 1070 (Wash. 1916) ("The first maxim in equity is: 'He who seeks equity must do equity.'"). The defense of "unclean hands," in which a defendant asserts the allegedly iniquitous conduct of a plaintiff as a ground to avoid liability on an equitable claim, is a closely related concept. *Poff*, 288 S.W.3d at 623.

[119] *See* Fed. Land Bank of Omaha v. Bollin, 408 N.W.2d 56, 62 (Iowa 1987) (citing maxim in construing mortgagors' redemption rights under stipulated bankruptcy agreement (citing Fischer v. Klink, 14 N.W.2d 695, 700 (Iowa 1944))); *In re* Liquidation of United Am. Bank in Knoxville, 743 S.W.2d 911, 920–21 (Tenn. 1987) (quoting maxim and finding creditor's claim of illegal preferential treatment by receiver premature because no accounting or distributions had occurred under receiver's purchase and assumption agreement).

[120] 2 POMEROY, *supra* note 115, § 418 ("The principle embodied in this maxim . . . operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs . . . ." (citation omitted)).

[121] BLACK'S LAW DICTIONARY 1764 (8th ed. 1999).

[122] *See* 2 POMEROY, *supra* note 115, § 419.

safeguards could have otherwise prevented injuries later claimed in a lawsuit.[123] A variety of justifications have been advanced to support this limitation, as one commentator summarized:

> Those who are diligent find equity always ready to extend just aid, but the slothful are not favored. There is no principle of equity sounder or more conservative of peace and of fair play than this, which requires a party who has a claim to prefer or a right to assert to do so with a conscientious promptness while the witnesses to the transaction are yet available and before the facts shall have faded from their memories. It is a fact of universal experience that men will generally use diligence to get what rightfully belongs to them, and will unreasonably delay only as to false or inequitable claims, [sic]—thus in the hope that fortuitous circumstances may improve their otherwise doubtful chances. If therefore a party delay the bringing of his suit, or delay the taking of some particular step therein, to such an unreasonable time that to allow him so late to proceed would work an injustice and injury upon the opposite party, it will require a much stronger case to move the court to action than if the matter had been seasonably presented; and if on account of the delay a serious injustice would result to the opposite party the court may decline to proceed at all.[124]

Courts have invoked this principle to deny equitable relief in a wide range of disputes: in an election lawsuit where the candidates' failure to file their nomination petitions by an amended deadline kept them off the voting ballots;[125] in a quiet title action that turned on whether or not landowners were aware they owned an easement at the time of a purchase, ruling that had they obtained a survey any doubt would have been removed;[126] in bankruptcy, to prohibit creditors from claiming security interests that they failed to perfect;[127] and to deny injunctive relief for the Veterans of Foreign

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[123] SDG Macerich Props., L.P. v. Stanek Inc., 648 N.W.2d 581, 583 (Iowa 2002) (citing maxim in opening sentence of opinion and holding that lessee's excuse of forgetting to send notice to renew lease would not justify an equitable remedy regarding the lease agreement); Mueller v. Bohannon, 589 N.W.2d 852, 860–61 (Neb. 1999) (holding that easement holders' defense of lack of knowledge of their easement in response to landowners' abandonment claim in quiet title action was insufficient where easement holders could have identified easement by obtaining a survey at the time they purchased their property).

[124] V. A. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE: EQUITY § 41 (2d. ed. 1950), *quoted in* Osborne v. Vince, 129 So. 2d 345, 348 (Miss. 1961).

[125] Valenti v. Mitchell, 962 F.2d 288, 292–93. 299 (3d Cir. 1992).

[126] *Mueller*, 589 N.W.2d at 860–61.

[127] Bank of N.Y. v. Epic Resorts-Palm Springs Marquis Villas, LLC (*In re* Epic Capital

Wars, ("VFW"), when the VFW sought to enjoin the unlicensed manufacture of its insignias and uniforms, a practice that had been going on for years without objection.[128] Maintaining vigilance underpins nearly every expression of the justification for laches, an equitable defense that can bar an excessively belated lawsuit.[129] God helps those who help themselves, the old saw goes.[130] The same holds true in earthly courts; equity will not lend its help to those who have lacked the customary degree of vigilance.[131]

Conceptually, the vigilance limitation could be further broken down into two components, which we may call awareness and diligence. Although, as will be seen, they are really two sides of the same coin.

1. Awareness

Beginning with the first component, cases of deliberate concealment aside, when a litigant seeks equitable relief from his or her entanglement within factual circumstances, courts give careful examination to what that party knew and when the party knew of the conditions from which a remedy is sought.[132] As one writer commented, the availability of equitable remedies is inescapably correlative to one's awareness: "[F]or many equitable doctrines, the binding of a person's conscience will depend upon some state of awareness. This is not surprising since . . . it is difficult to see how a person's conscience can be affected by facts of which he is justly ignorant."[133] This also holds true for equitable defenses as well.

Corp.), 290 B.R. 514, 523 (Bankr. D. Del. 2003) (citing Esta Later Charters, Inc. v. Ignacio, 875 F.2d 234, 239 n.11 (9th Cir. 1989)).

[128] Veterans of Foreign Wars of U.S. v. Durable Outfitters, Inc., 88 F. Supp. 731, 732 (S.D.N.Y. 1949).

[129] *See* NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985) ("Laches is founded on the notion that equity aids the vigilant and not those who slumber on their rights."); Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 702 (2000) ("[L]aches is premised upon the maxim that 'equity aids the vigilant, not those who slumber on their rights.'" (citations omitted)).

[130] The saying is ordinarily attributed to Benjamin Franklin. *See* Benjamin Franklin, *Poor Richard's Almanack*, *in* AUTOBIOGRAPHY, POOR RICHARD, AND LATER WRITINGS 459, 461 (1997) (1736) ("God helps them that help themselves.").

[131] *See Veterans of Foreign Wars of U.S.*, 88 F. Supp. at 732. The doctrine is by no means limited in scope to human lethargy; corporations and associations that fail to act on their claims or rights will find available equitable relief foreclosed. *See id.* at 731; Gatlin Plumbing & Heating, Inc. v. Estate of Yeager, 921 N.E.2d 18, 25 (Ind. Ct. App. 2010).

[132] *See, e.g.*, *In re* Estate of Bovey, 244 P.3d 716, 721 (Mont. 2010).

[133] Dennis R. Klinck, *"The Nebulous Equitable Duty of Conscience"*, 31 QUEEN'S L.J. 206, 250 (2005) (tracing role of personal conscience in application of equity).

Laches and equitable estoppel defenses often turn upon the litigant's state of knowledge, that is, the awareness of a potential invasion of his or her rights.[134]

Awareness is not limited to a static snapshot of the facts already within one's ken. In equity jurisprudence, awareness also encompasses the extent of effort that was undertaken with the facts at hand, so that a litigant is charged not only with what he or she knew, but with what he or she should have known.[135] Some courts have gone so far as to reword the vigilance maxim outright along this line, holding that "[e]quity will not aid someone who deliberately foregoes an opportunity to discover material facts."[136] A person's limited awareness of a state of affairs may establish a legal duty to explore them further, to fully ascertain the extent of possible injuries, wrongdoing, or liability; by failing to do so, an equitable court will refuse relief.[137] The familiar standard of reasonableness emerges as the guiding factor in this regard.[138] Equity litigants bear responsibility for those things within their realm of inquiry notice, which looks beyond what is known to what should reasonably be suspected.[139] Facts only dimly seen or half understood, but which could fairly be said to raise a person's suspicions, create a duty to go out and attempt to learn more, to

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[134] *In re Estate of Bovey*, 244 P.3d at 721 ("Laches is an equitable concept that precludes enforcement of a right . . . when the party is actually or presumptively aware of his rights but fails to act." (citing Cole v. State *ex rel.* Brown, 42 P.3d 760, 763 (Mont. 2002))); *see also* T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 650–51 (2007) (arguing that developing cases on equitable estoppel have relaxed intent requirement to allow one's knowledge to satisfy state of mind element of the claim).

[135] *See* Morgan Guar. Trust Co. of N.Y. v. Am. Sav. and Loan Ass'n, 804 F.2d 1487, 1494 (9th Cir. 1986).

[136] *Id.* (citing Harley v. Magnolia Petroleum Co., 37 N.E.2d 760, 765–66 (Ill. 1941)).

[137] The Delaware Court of Chancery, in *Fike v. Ruger*, barred a minority co-venturer's claims against a joint venture because of excessive delay in bringing his action because his "limited awareness" of alleged wrongdoings put him on inquiry notice, so that any "lack of knowledge was due to his failure to exercise his right to obtain information, as provided by the [joint venture agreement] and by law." 754 A.2d 254, 262 (Del. Ch. 1999) ("'Equity aids the vigilant, not those who slumber on their rights.'" (quoting Adams v. Jankouskas, 452 A.2d 148, 157 (Del. 1982))). Similarly, in *Banco Urquijo, S.A. v. Signet Bank/Maryland*, the court denied a foreign bank's unjust enrichment claim against a domestic bank for allegedly misleading advice regarding lender's creditworthiness. 861 F. Supp. 1220, 1251 (M.D. Pa. 1994) ("Progreso consciously decided to make advances to Intershoe in the face of insufficient information, did not act prudently when it failed to require monthly financial statements although entitled to do so and converted itself from a secured creditor with respect to Spanish shoes into a general, unsecured creditor.").

[138] *See* William Lynch Schaller, *Secrets of the Trade: Tactical and Legal Considerations from the Trade Secret Plaintiff's Perspective*, 29 REV. LITIG. 729, 833 (2010) ("[E]xtraordinary vigilance is not the test.").

[139] *See* Jolly v. Eli Lilly & Co., 751 P.2d 923, 927–28 (Cal. 1988).

further the reach of one's actual awareness before relying on judicial intervention.[140] Awareness, then, although seemingly a passive element, is inextricably bound to its more active counterpart of diligence, as it is to the vigilance maxim's overall operation.[141]

2. Diligence

Turning to the second component of the vigilance maxim, the equitable limitation also revolves around the extent of diligence, or activity, on the part of the party seeking judicial relief.[142] This mandate for action applies on its most fundamental level to the viability of a cause of action.[143] When one who is aware of a potential claim fails to bring a lawsuit to enforce his or her rights, if there was an excessive delay in bringing the lawsuit that was "wholly unexcused . . . and both the nature of the claim and the situation of the parties was such as to call for diligence,"[144] laches, an offshoot of the vigilance maxim, may bar the entire action.[145]

The extent of diligent activity also colors the substantive merits of an equity dispute, assuming the action proceeds forward.[146] Of course, diligence commonly implies doing something.[147] The law expects individuals to do what they can to protect themselves before

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[140] *See id.* at 928.

[141] *See* Sullivan v. Portland & Kennebec R.R. Co., 94 U.S. 806, 811–12 (1876) ("'A court of equity . . . has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time.'" (quoting Smith v. Clay, (1767) 27 Eng. Rep. 419, 420 (H.L.) Ambler 646, 647)); Tillamook Country Smoker, Inc. v. Tillamook Cnty. Creamery Ass'n, 465 F.3d 1102, 1108 (9th Cir. 2006).

[142] *See, e.g.*, Drew v. Dep't. of Corr., 297 F.3d 1278, 1290–91 n.5 (11th Cir. 2002) (discussing cases applying a diligence standard in laches and tolling claims); Ohio v. Peterson, 651 F.2d 687, 692–93 (10th Cir. 1981) (examining American and English case law regarding required level of diligence for purposes of equitable tolling); Mueller v. Bohannon, 589 N.W.2d 852, 861 (Neb. 1999) ("The Bohannons had the means in their possession to obtain actual knowledge of the easement.").

[143] *See Drew*, 297 F.3d at 1290–91 n.5.

[144] Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (quoting Benedict v. City of New York, 250 U.S. 321, 328 (1919)).

[145] *See* Whittington v. Dragon Grp., L.L.C., 991 A.2d 1, 8 (Del. 2009) ("[The Laches] doctrine is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights." (quoting Adams v. Jankouskas, 452 A.2d 148, 157 (Del. 1982); Reid v. Spazio, 970 A.2d 176, 182 (Del. 2009))); Emily A. Calwell, Note, *Can the Application of Laches Violate the Separation of Powers?: A Surprising Answer from a Copyright Circuit Split*, 44 VAL. U. L. REV. 469, 482–83 (2010) ("Based on the maxim *vigilantibus non dormientibus aequitas subvenit* (equity aids the vigilant, not those who sleep on their rights), laches is a flexible doctrine that has no fixed time for the barring of a claim." (footnotes omitted)).

[146] *See Whittington*, 991 A.2d at 7.

[147] Diligent is defined as "careful; attentive; persistent in doing something." BLACK'S LAW DICTIONARY 489 (8th ed. 1999).

resorting to litigation to seek equity's aid.[148] Not only must litigants have exerted some effort to safeguard their interests, courts will examine those efforts temporally to see if they were undertaken when they should have been.[149] This can be seen most clearly in the interplay between contract law and principles of equity.[150] Courts will ordinarily refuse to unwind an agreement or relax a contractual provision where, in hindsight, one of the parties made what turned out to be a hard bargain or did not read the terms of their contract closely enough.[151] Similarly, equitable remedies cannot be applied after the fact when a contractual remedy conceivably could have been negotiated that would have afforded the same protection.[152] The Supreme Court of Virginia provided a cogent justification for this limitation in a commercial lease dispute:

> [T]he powers of equity courts will not be arbitrarily exercised to alter the terms of a contract in order to correct an unfortunate situation resulting from a tenant's negligent failure to observe the contract requirements. "Hard cases must not be allowed to make bad equity any more than bad law." The hardship relied on to gain relief must be related to some principle within which equity moves, otherwise relief would be measured not by the contract made by the parties

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[148] In other words, a court in equity will not rescue litigants from their own neglect or inattention. *See* Fidelity Nat. Bank & Trust Co. of Kansas City v. McNeal, 2 F. Supp. 506, 511–12 (N.D. Okla. 1933); Trueman-Aspen Co. v. N. Mill Inv. Corp., 728 P.2d 343, 344 (Colo. App. 1986). Or, stated in the converse, equitable principles only act to protect those who cannot protect themselves. *See* Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998) (explaining the interaction of equitable principles and fiduciary duties of corporate directors).

[149] *See* B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 483, 493 (Miss. 2005) (denying a bank's equitable estoppel claim and refusing to compel arbitration where a bank had six opportunities to include arbitration provisions in its contracts with plaintiff but failed to do so).

[150] *See* Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 298–321 (1999) (surveying various effects equity has had on the law of contracts). For a more focused consideration of how this interaction may affect an extracontractual remedy for minority owners of limited liability companies in a context similar to the one explored in this article, see Sandra K. Miller, *Legal Realism, the LLC, and a Balanced Approach to the Implied Covenant of Good Faith and Fair Dealing*, 45 WAKE FOREST L. REV. 729 (2010).

[151] *See, e.g.*, Estate of Etting v. Regents Park at Aventura, Inc., 891 So. 2d 558, 558 (Fla. Dist. Ct. App. 2004) (holding that the fact that a nursing home patient was legally blind at the time she signed a contract containing an arbitration provision did not relieve her estate from the provision's enforcement).

[152] Lazard Debt Recovery GP, LLC v. Weinstock, 864 A.2d 955, 969 (Del. Ch. 2004) ("To sustain the plaintiffs' claim for breach of fiduciary duty [against their former employees] here would be to create a biased common law of equity whereby employers who fail to protect themselves through contract can seek to control employees by threatening them with suit for breach of ill-defined, judge-imposed fiduciary duties.").

> but by what might be considered by the court to be the exigencies of the situation in the particular case.[153]

What one knows defines what one must do to satisfy the vigilance maxim, which, in turn, will measure the availability of an equitable remedy.[154]

C. Due Diligence in Commercial Transactions

Keeping this brief overview of first principles in mind, an attempt can be made to formulate a standard that may hold some utility when deciding buyout election revocations. As we have seen, awareness, inquiry, and diligence share a prominent place in the application of equity to contracts. This same bundle of principles has an apt analog in the world of commerce as well. They are the crux of "due diligence," a term frequently bandied between transactional practitioners and corporate in-house counsel when referring to the investigative part of their work negotiating corporate or asset purchases.[155] What due diligence comprises depends on the context of a particular transaction, but some generalities can be stated. One Louisiana appellate court gave this exposition about the hallmarks of due diligence in business dealings:

> In the area of commercial transactions, the term "due diligence" has acquired the status of a term of art, with similar but subtly different definitions for different transactions, dependent upon their context. Although it is a broad term, in the context of commercial business acquisition "due diligence" may briefly be defined as "the inspection and investigation of a business entity before a buyer makes the final decision whether to consummate an acquisition. More precisely, it is the point in the transaction at which the seller of the business must demonstrate that the representations and warranties made in the course of the negotiations are supported in fact, and the point at which the buyer must test his assumptions about the seller and its business." As the

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[153] Sentara Enters., Inc. v. CCP Assocs., 413 S.E.2d 595, 598 (Va. 1992) (quoting McClellan v. Ashley, 104 S.E.2d 55, 60 (Va. 1958)).

[154] *See, e.g.*, *id.* at 598.

[155] In the corporations and securities context due diligence is defined as "[a] prospective buyer's or broker's investigation and analysis of a target company, a piece of property, or a newly issued security. A failure to exercise due diligence may sometimes result in liability, as when a broker recommends a security without first investigating it adequately." BLACK'S LAW DICTIONARY 488 (8th ed. 1999).

> previous writer has explained, "the goal of any due diligence investigation from the buyer's perspective is to fully understand the seller's business, its markets, customers, financial condition, legal position, and any other risks or uncertainties inherent in acquiring and operating the business."[156]

A fairly straight-forward summary of the concept was also explained as follows:

> Due diligence is a program of critical analysis that companies undertake prior to making business decisions in such areas as corporate mergers/acquisitions or major product purchases/sales. The due diligence process, whether outsourced or executed in-house, is in essence an attempt to provide business owners and managers with reliable and complete background information on proposed business deals so that they can make informed decisions about whether to go forward with the business action. "The [due diligence] process involves everything from reading the fine print in corporate legal and financial documents such as equity vesting plans and patents to interviewing customers, corporate officers, and key developers," wrote Lee Copeland in Computerworld. The ultimate goal of such activities is to make sure that there are no hidden drawbacks or traps associated with the business action under consideration.[157]

The subject matters for potential investigation and the extent of inquiry are predicated on a whole host of variables.[158] The nature of the transaction, for one, will determine much of the due diligence work.[159] The potential purchase of an established franchise requires a very different scope of due diligence work than what a corporate attorney may have to consider in the possible acquisition of a one-of-a-kind business entity. Within a single transaction, the level of due diligence may also vary from party to party. For example, what a title agent reviews before issuing a buyer's insurance policy will likely be more limited than what the real estate attorney preparing for closing will have to consider before advising her client to close on

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[156] Levin v. May, 2003–2205 (La. App. 1 Cir. 9/17/04); 887 So. 2d 497, 501–02 (footnotes and citations omitted).

[157] *Due Diligence Law & Legal Definition*, USLEGAL, http://definitions.uslegal.com/d/due-diligence (last visited October 4, 2011) (citations omitted).

[158] *See generally id.* (explaining the meaning of due diligence and the areas of due diligence).

[159] *See id.*

the transaction. And then, economies of scale often dictate the extent of due diligence, since relatively small transactions may not justify the significant investigation expenditures that a larger, more complicated purchase would entail.

We could, of course, supplement these definitional and anecdotal offerings still further and to a wider variety of contexts. Like many terms of art, due diligence carries a somewhat flexible understanding.[160] But it is not necessary to quibble over the extent of the concept's scope when the focus is on one kind of transaction, the negotiated buyout of a corporation's shares. In this area, due diligence presents itself in a ready-made form from which a standard could be crafted.[161] It is universally understood to be an integral part of any significant purchase or sale of a close corporation's stock.[162] As a concept, it incorporates awareness, inquiry, and investigative effort within the ambit of its meaning. But, much like the governing principles of equity, it eschews fixed pronouncements about their extent, remaining malleable to the circumstances of each transaction.[163] It would seem, then, that "due diligence" neatly captures all of the constituent components of the equitable vigilance limitation, the overarching imprimaturs of equity in general, and the context of buying and selling a corporation's shares of stock in particular.

V. INCORPORATING A DUE DILIGENCE STANDARD INTO STATUTORY BUYOUT REVOCATIONS

The topics we have canvassed can now be drawn back together into the realm of corporate dissolution buyouts. To review, many statutory buyout provisions adopt equity as the operative baseline

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[160] Gary DiBianco & Wendy E. Pearson, *Anti-Corruption Due Diligence in Corporate Transcations: How Much is Enough?*, 41 REV. SEC. & COMMODITIES REG. 125, 127 (2008), *available at* http://www.skadden.com/content/Publications/Publications1408_0.pdf (discussing goals of due diligence).

[161] In fact, due diligence, as a legal standard, appears to have originated in the realm of securities law. Levin v. May, 887 So. 2d 497, 501 n.5; Clement A. Evans & Co. v. McAlpine, 434 F.2d 100, 104 (5th Cir. 1970). More specifically, it evolved as a defense to a Rule 10b-5 claim, allowing defendants who allegedly fail to adequately disclose material information about stock they sold to avoid liability if the plaintiff, in the exercise of due care, could have discovered the undisclosed facts for itself. *See id.*; Richard A. Booth, *The End of the Securities Fraud Class Action as We Know It*, 4 BERKELEY BUS. L.J. 1, 24 n.57 (2007) ("Although the due diligence defense under Rule 10b-5 has been narrowed in recent years, it is still recognized.").

[162] For an example of a due diligence outline and checklist of matters for a corporate acquisition, see David A. Katz, *Due Diligence in Acquisition Transactions*, *in* CONDUCTING DUE DILIGENCE 271 (2003).

[163] *See supra* notes 155–57 and accompanying text.

to address an electing party's attempt to revoke an election to purchase.[164] The adoption of equitable principles, while laudable as an attempt to vest sufficient discretion with trial judges to adjudicate these matters, unfortunately leaves the courts without a clear framework from which to analyze whether the circumstances of a case justify equity's intervention or its indifference.[165] The few reported rulings from these disputes have likewise eschewed fixing any firm guidelines or pronouncements as to when it would be equitable to allow a revocation, essentially deciding the issue each time from a clean page.[166] All of these concerns have left uncertainty and the threat of strategic gamesmanship—two problems the irrevocable buyout provision was meant to address—unresolved.[167] There is, however, a commonly used term of art in commercial transactions, due diligence, at the ready, which could possibly serve as a refining filter for the broader principles of equity that the Model Act's irrevocability provision invokes.[168]

Before proceeding further into what such a standard might entail, it ought to be noted that as a legal concept, due diligence already carries a level of acceptance in other areas of business litigation. Courts have recognized in private Rule 10b-5 lawsuits a due diligence defense to a plaintiff's claim of concealed or misleading information in connection with the sale of securities, an inquiry which examines, among other facts, "the plaintiff's sophistication, expertise and business acumen . . . his access to information and opportunity to detect the fraud."[169] In some jurisdictions, claims of fraud or concealment relating to the purchase of real estate may turn on whether the buyer, in the exercise of due diligence prior to closing, could have discovered an allegedly defective condition of the property.[170] Within the realm of stolen art litigation, courts have developed a tolling defense that considers an artwork buyer's prior

[164] *See supra* note 8 and accompanying text.

[165] *See supra* Part III.

[166] *See id.*

[167] *See supra* notes 44–50 and accompanying text.

[168] *See supra* Part IV.C.

[169] Clement A. Evans & Co. v. McAlpine, 434 F.2d 100, 104 (5th Cir. 1970) (citing Kohler v. Kohler, 319 F.2d 634, 641–42 (7th Cir. 1963)).

[170] *See* Wasser v. Sasoni, 652 So. 2d 411, 412 (Fla. Dist. Ct. App. 1995) ("[A] misrepresentation is not actionable where its truth might have been discovered by the exercise of ordinary diligence."); Shaw v. Robertson, 705 S.E.2d 210, 212–14 (Ga. Ct. App. 2010) (affirming summary judgment in favor of sellers where buyer could have learned that property was located in a flood zone had she reviewed publicly available FEMA maps). *But see* Johnson v. Davis, 480 So. 2d 625, 628–29 (Fla. 1985) (abolishing caveat emptor for purchase and sale of residential real estate).

due diligence (regarding the veracity of the work's ownership) into formulations of when a theft victim's civil statute of limitation against the buyer would begin to run.[171] By several accounts, due diligence is a proven and workable legal standard for measuring remedies in a variety of commercial disputes.[172] In whatever manner it operates, the concept is by no means a novel one for formulating standards or limitations in business law.

A. The Proposed Standard

How would one phrase a due diligence standard for corporate buyout election revocations? Different wordings come to mind, but something premised along the following line might prove workable:

> A buyout election will not be set aside if the equitable grounds asserted were either known at the time the election was made, or, between the time the dissolution petition was served and the filing of the election, the grounds could have been discovered through the exercise of reasonable due diligence.

A few points of clarification ought to be made. First and foremost, this proffered formulation is obviously not intended to be, nor would it function as, a litmus test to sort permissible from impermissible attempts to revoke an election to purchase. Indeterminacy resides in "due diligence," a term which, in most contexts, takes into account the circumstances of the parties, their respective sophistication, their prior knowledge, what information was readily available to them, the degree of inquiry notice that may have been implicated, and how quickly or easily information could be obtained under the circumstances.[173] A due diligence standard here would also be colored by the ninety-day time limit an electing shareholder faces under the statute,[174] as well as a potentially truncated timeframe imposed by the dissolution litigation, which may have court mandated deadlines, calendared hearings, or other constraints that could conceivably affect the ability to perform pertinent

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[171] *See* Phelan, *supra* note 129, at 639–43.

[172] *See, e.g.*, *Wasser*, 652 So. 2d at 412 (holding fraudulent misrepresentation concerning sale of commercial real estate not actionable because the fraud could have been discovered with due diligence); *Clement A. Evans & Co.*, 434 F.2d at 104 (finding no error in a jury verdict that found for the defendant in a securities case involving information that could have been discovered with due diligence); *see also supra* Part IV.C.

[173] *See supra* Part IV.

[174] MODEL BUS. CORP. ACT § 14.34(b) (2011) (requiring election to purchase to be filed within ninety days of dissolution petition unless the court allows a longer time).

investigative work.[175] In that same vein, though, an argument could be made that the forum of civil litigation, and the avenues of potential discovery it opens, may actually broaden the requirements of due diligence in certain cases.[176] It is fully anticipated that no two cases will have the same predicate baseline for the amount of diligence that the standard would require or even a common sphere of awareness as to what categories of conditions might warrant an attempt to revoke an election to purchase.

What has been proffered, then, is simply a framework. But by constructing a formulation, such as what has been attempted here, around the concept of transactional due diligence it becomes possible to hone the scope of inquiry and provide guiding principles and a level field of argument for what has been an unsettled corner of the law. A functional standard brings the high notions of equity down into something that can be more readily grasped. "Due diligence" becomes a surrogate for the statute's more elusive standard of "equitable" circumstances to assure that equity's underlying goals of fairness, justice, and equal treatment are realized in the corporate dissolution context. As a component of everyday corporate transactional work, the due diligence standard is one that is accessible, not only to the courts charged with applying the Model Act's directions, but also for practitioners and their clients who work and deal in commercial settings where the term of art has a ring of familiarity (or, at least, a firmer meaning than a Latin maxim). The courts, the litigants, and their attorneys would thus meet at a mutual place of reference, a common starting point from where the parties could advocate their positions, instead of what, at present, is essentially a tug-of-war without a goal line that the lack of a working standard has created.

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[175] *Cf.* David H. Freedman, *A Prudent & Practical Approach to Protecting the 1031 Exchange Client in Tenant in Common (TIC) Investments*, 36 REAL EST. L.J. 261, 262–63 (2007) (noting that forty-five day deadline to identify replacement property under 1031 exchange, as well as the relative sophistication of investors, could pose challenges for due diligence leading up to the transaction).

[176] A shareholder is entitled to review the books and records of a corporation. *See* 5A WILLIAM MEADE FLETCHERET ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2213 (perm ed. rev. vol. 1995) ("The existence of a right, either under the common law or by virtue of constitutional or statutory provisions, in every shareholder to inspect the books and records of the corporation seems to be accepted without question throughout the states."). That same shareholder, as a party to a civil action, however, has a right to obtain a far wider range of documents, including those from other litigants, to subpoena records from nonparties, take depositions of parties and witnesses, and have interrogatories and requests for admission answered. *See, e.g.*, FED. R. CIV. P. 30 (taking depositions), 33 (obtaining interrogatories), 34 (producing documents, electronically stored information, or tangible things), 36 (requests for admission), 45 (issuing subpoenas).

B. Reexamining the Rulings Under the Proposed Standard

To test the efficacy of this formulation it may prove useful to attempt its application within some of the reported facts from the cases discussed in Part III.A. In two of the rulings, the task was, to some extent, already started. Consider again the contrast touched upon earlier between the *Chu* and the *Rey* holdings.[177] In both cases, each of the business' primary assets had been drastically impacted prior to the valuation hearing in the dissolution proceeding.[178] The distinction the *Chu* court attempted to draw was that the shareholder before that court knew (or, perhaps more accurately, should have known) about the complained actions or the potential of retaliatory conduct prior to making the election to purchase.[179] That knowledge prevented withdrawal of his irrevocable buyout election.[180] Conversely, *Rey* made it a point to emphasize that "an unforeseeable fire," an "unfortunate and unanticipated event," justified the equitable revocation of the shareholder's election to purchase.[181] An implied determinative factor appeared to arise from the differing degrees of foreseeability, but only a short step further would bring these holdings in alignment with a true due diligence standard. The electing shareholder in *Chu* knew of his co-owner's alleged misappropriations of corporate funds, as well as the identity of the owner of his corporation's landlord, when he made his election.[182] Not only was he aware that money had been depleted from the corporation's accounts, but with reasonable reflection, he should have been aware that his election to purchase could trigger an eviction lawsuit from his antagonistic co-owner.[183] At both points of realization, he should have either accepted the contingency that the funds might remain unrecovered, while taking steps to prevent a potential hostile eviction,[184] or, failing all that, decline to exercise

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[177] Chu v. Sino Chemists, Inc., 595 N.Y.S.2d 465, 466–67 (N.Y. App. Div. 1993); Rey v. Pan Am. Cash & Carry Corp., 548 N.Y.S.2d 524, 529 (N.Y. App. Div. 1989).

[178] *Chu*, 595 N.Y.S.2d at 466; *Rey*, 548 N.Y.S.2d at 529.

[179] *Chu*, 595 N.Y.S.2d at 466–67.

[180] *Id.*

[181] *Rey*, 548 N.Y.S.2d at 529.

[182] *Chu*, 595 N.Y.S.2d at 466–67.

[183] *Id.* at 466.

[184] To be clear, I am not suggesting that due diligence would have required the electing shareholder to abandon his claims for the sake of his buyout election, only that he accept those claims for what they were at the time he made his election to purchase: a contingent recovery that was dependent on the outcome of related litigation and the creditworthiness of the shareholder defendant. With respect to the tenancy of the business location, ordinary due

his statutory right to purchase the petitioner's shares. What he knew governed what he should have done to guard his interests. By reframing the holdings on these lines, the constituent components of awareness and diligent activity that span both the due diligence standard and the equitable maxim of vigilance come to the forefront and provide a clearer basis for understanding why the shareholder in *Rey* was allowed to revoke his irrevocable election to purchase, while the shareholder in *Chu* was not.

Using a due diligence standard might have yielded a markedly different result than what was reached under the reported facts in *Bendetson*.[185] Assuming the issue of revocation had been presented by the electing shareholder, Bendetson would have had a difficult time credibly explaining his lack of awareness that a change in ownership of Killarney, Inc. would adversely affect the control and ownership of a related limited partnership, particularly since the partnership was also the subject of litigation among the same parties.[186] Even if he could disclaim direct awareness of his companies' connections, ascertaining a business's organization, control, and ownership relations with third parties is usually one of the first areas covered during the due diligence of a corporate purchase.[187] That would be the sort of information that is customarily exchanged at the outset of negotiations and would certainly have been within relatively easy means of discovery had some effort been made. Most likely, then, a court applying a transactional due diligence standard, if confronted with the same reported facts as in *Bendetson*, would not allow the electing shareholder to revoke his offer to purchase the petitioner's shares. Whether that would be a better result for the dispute is impossible to say,[188] but then, that is precisely the drawback with the absence of meaningful limitations. Without common means to evaluate

diligence in a typical corporate purchase would involve verifying the terms and conditions of a leasehold agreement, as well as the possibility of its termination by the landlord. *See* Katz, *supra* note 162, at 331 (providing form due diligence checklist item addressing business assets to be acquired). One item on the checklist is "[l]ist of real property leased (whether or not currently leased) by the company and its past or present subsidiaries, together with (a) location and brief description, and (b) if available, a summary of date, term and termination rights, renewal rights and rent." *Id.*

185 Bendetson v. Killarney, Inc., 913 A.2d 756 (N.Y. App. Div. 1989).

186 *Bendetson*, 913 A.2d at 758–59.

187 Katz, *supra* note 162, at 330 (listing corporate records and organization first in the checklist).

188 If it is assumed that the equitable vigilance maxim applies as a feature of "equitable" circumstances to be considered in an election revocation (as I believe it ought to be), then a normative, legal basis to make such an assertion indeed exists. *See supra* Part IV.B.

resolutions to these problems, courts are left to grasp for whatever meaning they can derive from the sweeping invocation of equity in corporate statutes. Trial judges faced with such precedents may find it challenging to apply or distinguish the work of other courts, perhaps even those that would be controlling authority for their cases. By inserting the rudimentary framework of transactional due diligence into the issue, regardless of whether the buyout revocation is permitted or denied, the rationale for doing so becomes clearer, more understandable, and much more accessible to further analysis, application, and refinement.

The *Penepent Corp.* case poses something of a challenge for applying the due diligence standard; at the same time, though, it may also serve to illustrate a useful point of clarification for its use.[189] Recall that in that case, the petitioning shareholder died between the time an election to purchase was filed and when a valuation hearing could be convened—an event that brought to the forefront an older shareholder agreement with a buyout provision that effectively gave a much better share price to the corporation than what the surviving shareholder could have hoped for in a valuation proceeding to purchase the decedent's stock directly.[190] The *Penepent Corp.* court held the election irrevocable by focusing both on its antecedence to the agreement's operation (the election was made before the agreement's triggering event—the decedent's death—occurred), as well as the fact that the buyout election created a statutory right in the decedent's estate to sell his shares upon its filing.[191] The court's decision was based predominantly on when the parties' respective rights vested,[192] a fundamentally different kind of analysis than what an equitable overview, such as a due diligence approach, would typically entail. It is difficult to imagine how the electing shareholder's due diligence—what he was aware of or whether he conducted some manner of investigation into the business prior to his election—could have shed any light on the dispositive issue the court identified. This case, however, was something of a unique situation.

The dispute in *Penepent Corp.* had nothing to do with alleged adverse circumstances affecting the value of a corporation (which is the more typical dispute in buyout revocations), but instead revolved around the priority between a valid shareholder's

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189 *In re* Dissolution of Penepent Corp., 750 N.E.2d 47 (N.Y. 2001).
190 *Penepent Corp.*, 750 N.E.2d at 48–49.
191 *Id.* at 50–51.
192 *Id.* at 51.

agreement and an irrevocable statutory buyout election.[193] The electing shareholder was not contending that any detrimental or unfortunate change in circumstances with the corporation he had elected to purchase had arisen. Quite the contrary, he still wanted to obtain control of the company's shares, just at the lower price that the shareholder agreement provided to the corporation.[194] Indeed, one could argue this was not a true buyout *revocation* at all, just an attempt to alter the means through which the stock would ultimately be acquired.[195]

Regardless, *Penepent Corp.* offers an opportunity to consider an important caveat to the due diligence standard proposed here. That is, the standard should apply only when the revoking shareholder truly does not wish to obtain the petitioner's shares and where the inquiry concerning that revocation turns on an issue involving the corporation itself, its value, its viability, or its desirability to own or operate. While most buyout revocations will likely fall within that class of cases, due diligence may be a somewhat ill-suited standard for resolving those occasional disputes that do not.

Those instances aside, incorporating a due diligence standard within the cases reviewed would illuminate each court's application of its statutory buyout provision. It would furnish clarity, but equally important, it would in no way hamstring the flexibility the Model Act's drafters intended to reserve for trial courts hearing these disputes.[196] Due diligence, as an offshoot of equity's vigilance limitation, asks only that the revoking party has done what he or she ought to have done before exercising a statutory right to effectuate a change in a corporation's ownership. Engaging in that inquiry when a party seeks to revoke its buyout election requires nothing more than verifying that which equity demands from all its claimants.

VI. CONCLUSION

As long as close corporations populate themselves with family and friends as their owners, their dissolutions will remain bitter legal contests. The most carefully drawn legislation or profound judicial edict is unlikely to ever change that dynamic. But the externalities

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[193] *Id.* at 50.

[194] *Id.* at 49.

[195] An important distinction, to be sure, since the remaining litigants stood to gain or lose in zero-sum terms depending on which procedural means was enforced. *See id.* at 50.

[196] *See* MODEL BUS. CORP. ACT ANN. § 14.34 official cmt. (2008).

that come of these disputes—the disruption to businesses and their dependent livelihoods, the instability created within a segment of commerce, the expenses of waging litigation, and the potential for escalating, retaliatory infighting among management and shareholders—can and should be mitigated wherever possible. All the more so if, as many believe, the optimal resolution for most corporate dissolution petitions is some form of a buyout among the owners and their business.

The progress over the past several decades to shepherd dissolution proceedings into a fair and viable procedure that can effectuate a transfer of ownership has been remarkable.[197] The statutory buyout election, in particular, when implemented as a concomitant part of a judicially supervised structure for negotiations and a share valuation procedure, gives feuding shareholders a forum to resolve their differences short of terminating the business they built.[198] As more jurisdictions adopt buyout statutes similar to the Model Act's section 14.34, or apply its remedial equivalent within their common law, the challenge turns to refinement. The statutory buyout election, we have seen, is in need of some further gloss to rein its incorporation of equity and fairness—when deciding whether an election can be revoked—into a realm where there is a little more certainty.[199] Without which, delay, indeterminacy, and a perverse incentive for adversaries to game untoward advantages in negotiations may continue to mar the statute's procedure.[200]

I have proposed the following limiting rule that, it is hoped, would serve to advance the important aim of refining buyout revocations:

> A buyout election will not be set aside if the equitable grounds asserted were either known at the time the election was made, or if, between the time the dissolution petition was served and the filing of the election, the grounds could have been discovered through the exercise of reasonable due diligence.

This standard aspires to fulfill the first principles of equity law without transgressing their proper limits. It does so by grafting

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[197] *See* Matheson & Maler, *supra* note 4, at 679–82 (discussing the increasingly prevalent view in favor of alternative remedies to dissolution, including, for example, a court-ordered buyout).

[198] *See* MODEL BUS. CORP. ACT ANN. § 14.34 official cmt.

[199] Indeed, modern law continually strives for a "restatement that will bring certainty and order out of the wilderness of precedent." BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW, 1 (1924).

[200] *See* discussion *supra* Part III.

commonly understood nomenclature from commercial parlance, that of transactional due diligence, into the statute's contemplation of equitable circumstances that would justify a buyout election's withdrawal. The concept is one that can be apprehended by most parties, articulated by their counsel, and applied by the courts with greater precision than what these stakeholders presently must struggle through to arrive at a resolution.

To be sure, what has been proposed involves employing something of a legal fiction, a device that carries a long history of eliciting both approbation and detraction.[201] And its efficacy can only be measured in cases where some adversity or occurrence has befallen the business, which, in turn, has led the electing shareholder to retreat from any further intention of acquiring the petitioning owner's shares. Still, with that caveat and confined within the typical scenario for most buyout revocations, a standard that fuses the equitable materials of awareness and diligence together could clarify this facet of corporate law and enable courts to more precisely measure the equity they dispense in dissolution proceedings.

[201] *See* Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 4 (2010) (comparing William Blackstone's "tepid approval" of legal fictions, Jeremy Bentham's "rage[] against common law fictions," and Lon Fuller's balanced treatment of their use).