When the World Ends I Want to be in Kentucky Because There Everything Happens Thirty Years Late: Kentucky Finally Joins the Modern Rule Against Marketability Discounts in Dissenter Rights Actions

By Thomas E. Rutledge and
Sarah J. Sloan

Introduction

Since 1982 it has been Kentucky law that a discount for minority/marketability may be applied in determining the "fair value" of shares held by a dissenting shareholder. The tide turned against this analysis in 2009 and 2010 when a pair of rulings from the Kentucky Court of Appeals rejected discounts, in effect requiring that the dissenting shareholders receive their full pro-rata value of the corporation as a going concern. Addressing the issue for the first time, the Kentucky Supreme Court affirmed this view in *Shawnee Telecom, Inc., v. Kathy Brown*,[1] thus bringing Kentucky in line with the majority of jurisdictions, however long overdue.

Dissenter Rights as a Minority Shareholder Protection Device

Historically, major corporate actions such as a merger, sale of substantially all assets or amendment of the articles of incorporation required the consent of all shareholders, a rule that protected the shareholder's vested property interest in the contractual terms of the venture.[2] This state of the law permitted opportunistic rent seeking by minority shareholders whose approval was required for significant transactions.[3] Responding to pressures to permit significant transactions upon less than a unanimous consent, various state legislatures reduced the applicable voting thresholds to less than unanimity.[4] At the same time, in order to ameliorate the impact upon the shareholder's property rights in the terms of the existing venture,[5] dissenter rights were codified,[6] which afforded minority participants in the venture the ability to, upon objecting to the proposed change in the business, extract a proportionate interest in the venture's value for investment elsewhere.[7] These rights became more important with the development of the cash-out merger,[8] morphing from a liquidity mechanism to a check on the majority's valuation of the minority's interest in the venture.[9]

The possibility of abuse can be illustrated through a simple example. Assume ABC, Inc. has two shareholders, X and Y. X holds 90 percent of ABC's stock and Y holds 10 percent. The only asset of ABC is $1,000 cash. Assume further that X caused ABC to dissolve; ignoring the transaction cost of dissolution, X would receive $900 and Y would receive $100. Imagine now that X causes ABC to undertake a short form merger in which Y's interest will be liquidated for cash.[10] Y dissents from the terms of the merger. The net asset value of Y's stock is $100, but by the application of a 25 percent minority discount, Y receives only $75. X, the sole shareholder of the NewCo into which ABC was merged, owns all of a corporation holding as its sole asset $925. The $25 that X would not have received in the merger has been transferred to Y, resulting in a windfall.

The Statutory Formula and the Trend Away From Minority Discounts

Kentucky's current Business Corporation Act (the "KyBCA" or the "Act") was initially adopted in 1988 with an effective date of January 1, 1989.[11] At the time of enactment, the Act's provision addressing the valuation of shares[12] in the context of a dissenter rights action tracked the language of the predecessor statute,[13] each providing that a shareholder exercising dissenter rights is to receive the "fair value" of the shares.[14] KRS section 271B.13-010(3) provides in part:

> "Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

At the time of this statute's adoption, the official comment to MBCA 13.01 provided in part:

> The definition of "fair value" in § 13.01(3) leaves to the parties (and ultimately to the courts) the details of which "fair value" is to be determined within the broad outlines of the definition. This definition thus leaves untouched the accumulated case law about market value, value based on prior sales, capitalized earnings value, and asset value. It specifically preserves the former language excluding appreciation and depreciation in anticipation of the proposed corporate action, but permits an exception for equitable considerations . . . .[15]

In 1999, the Committee on Corporate Laws amended MBCA 13.01 to provide that "fair value" is determined "without discounting for a lack of marketability or minority status."[16] As set forth in Official Comment 2 to MBCA § 13.01, permitting marketability discounts afforded the majority shareholders the "opportunity to take advantage of minority shareholders who have been forced against their will to accept the appraisal-triggering transaction." Kentucky's leading commentator on

corporate law has previously observed that "applying a marketability or minority discount to fair value is bad economics and encourages unfair treatment of shareholders"[17] and that:

> Notwithstanding the *Ford* case, lawyers planning acquisitions and investment bankers and other evaluators providing fair value estimates in acquisition settings should not assume that Kentucky courts will apply a marketability or minority discount in appraisal settings. It seems more likely that the Kentucky courts will take the first available opportunities to overrule that aspect of *Ford*….[18]

The case law in Kentucky on dissenter rights in general is at best sparse, and with only three exceptions has focused on issues other than the application of a marketability/minority discount.[19] Those three cases are *Ford v. Courier-Journal*, in which a marketability discount was endorsed, *Brooks v. Brooks Manufacturing*, in which a marketability discount was expressly rejected, and *Shawnee Telecom v. Brown*, in which the Court of Appeals and the Supreme Court likewise rejected marketability discounts.

Ford v. Courier-Journal Job Printing Co.

Until 2010, the sole published decision in Kentucky on the utilization of marketability discount in a dissenter rights action was *Ford v. Courier-Journal Job Printing Co., Inc.*[20] This case arose in the context of a sale of corporate assets[21] from which a minority shareholding (4.9 percent) dissented. Applying KRS § 271A.405[22] and relying on the Maine decision *In re Valuation of Common Stock of Libby, McNeill & Libby*,[23] the Court of Appeals upheld the application of a 25 percent marketability discount to stock otherwise valued at $165 per share,[24] resulting in the dissenting shareholder receiving $124 per share.[25]

In the *Libby* decision, the Maine Supreme Court held that a minority discount was appropriate in determining the value of shares in a dissenters' rights action. The dispute arose out of a short form merger of Libby, McNeill & Libby, a Maine corporation, into its Delaware parent,[26] and was the first opportunity the Maine Supreme Court had to address the definition of "fair value" as utilized in Maine's statute.[27] The price awarded the dissenting shareholders by the corporation was $8.125 per share,[28] a valuation challenged by certain minority shareholders. A retired judge had been appointed the appraiser by the trial court, and he took expert testimony from the experts retained by the corporation and the dissenting shareholders. The appraiser delivered a report to the trial court setting forth conclusions as to the three methods of valuation employed and the relative weighting of each, yielding a share value of $6.00.[29] The trial court reweighted the valuation approaches, yielding a value of $8.55 per share,[30] an exercise rejected by the Maine Supreme Court.[31] Ultimately, the $6.00 per share value would be adopted.[32] While the *Libby* court at least twice described the task before it as determining what would be the price of a negotiated sale of the shares between a willing buyer and a willing seller,[33] curiously in light of its later application by the *Ford* court, the *Libby* decision contains no free-standing discussion as to whether the valuation of the individual shares of Libby stock should be subject to discount for lack of marketability or minority position. As the Libby shares were publically traded, and so that aspect of the valuation the minority discount was already included, there was still no marketability discount—the shares were traded on several exchanges including the NYSE. The opinion does not recite that per-share marketability or minority discounts were applied in the application of the investment or net asset value approaches.

Reviewing the *Libby* decision, the *Ford* court found that the appraisers retained by the trial court had appropriately utilized all three of the valuation approaches endorsed by the *Libby* decision, writing that all three must be considered.[34] Where it shows marked departure from *Libby* was in its discussion of a "marketability discount" applied by the appraisers, included to account for the non-public nature of the Courier-Journal company; the opinion is most unclear as to whether this adjustment was made only to the net-asset aspect of the valuation or rather to the value derived from the blending and weighting of all three valuation approaches.[35] Regardless, it is clear from later cases applying *Ford* that the accepted interpretation was that the shares, having been valued initially, could then be discounted.

The *Ford v. Courier-Journal* decision would remain, for the next 28-years, the sole authority in Kentucky as to the application of "fair value" as set forth in the dissenter rights statute.

Brooks v. Brooks Manufacturing

Brooks v. Brooks Furniture Mfgrs., Inc.[36] was a rare *en banc* ruling[37] of the Court of Appeals that considered a range of issues incident to the valuation of shares in a dissenter rights action, this one incident to a squeeze-out merger. While the various appraisals did not apply a marketability discount directly to Brooks' shares, the same effect was achieved by applying a marketability discount to the valuation of the corporation as a whole.[38]

After acknowledging that *Ford* permitted a marketability discount, the Court engaged in an extensive consideration of developments in the law since that time including amendments to the Model Business Corporation Act, the ALI Principals of Corporate Governance,[39] and the case law of numerous jurisdictions that have considered the meaning of "fair value." While acknowledging that Delaware does not permit marketability discounts,[40] the Court placed greatest reliance on developments in Maine law. The *Ford* decision relied upon *Libby*[41] to support applying a marketability discount.[42] Subsequent thereto, the Maine Supreme Court had again reviewed the matter and clarified *Libby* to the effect that a marketability discount should not be applied to value dissenter shares.[43] The court explained:

> Lido (appellant) would have us discount the stock for minority

status and lack of marketability in order to reflect what it calls the "real world" value of the stock to the dissenters. Lido bases its argument upon a plain misreading of our analysis in *Libby.* We there in a footnote approved the "willing buyer/willing seller" approach used by the court-appointed appraiser in *Libby* "so far as it goes" to determine stock *market* price; we did not, however, equate the price at which a willing seller would sell and a willing buyer would buy a minority block of stock with its fair value under the appraisal statute. *See Libby*, 406 A.2d at 61 n. 8. The willing seller/willing buyer price is indicative only of stock market price, and that is only one of the three factors used in the *Libby* analysis of the fair value of stock listed on the New York Stock Exchange. Especially in fixing the appraisal remedy in a close corporation, the relevant inquiry is what is the highest price a single buyer would reasonably pay for the whole enterprise, not what a willing buyer and a willing seller would bargain out as the sales price of a dissenting shareholder's shares in a hypothetical market transaction. Any rule of law that gave the shareholders less than their proportionate share of the whole firm's fair value would produce a transfer of wealth from the minority shareholders to the shareholders in control. Such a rule would inevitably encourage corporate squeeze-outs.[44]

Rejecting the possibility of doing indirectly what one may not do directly,[45] the *Brooks* court held that marketability discounts are not permissible except in exceptional circumstances and that to the degree inconsistent therewith *Ford v. Courier-Journal* was overruled.[46]

No petition for discretionary review by the Kentucky Supreme Court was filed, and the *Brooks* case was settled on confidential terms.

Shawnee Telecom, Inc. v. Kathy Brown: The Court of Appeals

Like the *Brooks* case, *Shawnee Telecom v. Brown*[47] involved a cash-out merger. Curiously, it was *Shawnee Telecom v. Brown*, an unpublished and unanimous decision of the Court of Appeals, and not the published *en banc Brooks* ruling from which there was a dissent, that was appealed to the Kentucky Supreme Court. Likewise, it is curious that it was the rather more cursory *Shawnee Telecom* decision, as contrasted with the significantly more in-depth analysis in the *Brooks* opinion, that came before the high court. Still, the Supreme Court provided a comprehensive review of the topic and the case before it, including in its decision reference to and qualification of the *Brooks* decision.

Brown announced her desire to resign as a company employee and in connection therewith, pursuant to a shareholder agreement, sought to put her shares back to the corporation. When disagreement arose as to the value of Brown's shares, the corporation and the other shareholders effected the merger from which Brown dissented.[48] The question of valuation as referred to a Master Commissioner. The Master Commissioner's report utilized the capitalization of earnings and the net asset value approaches, giving double weight to the net asset methodology.[49] The use of the net asset methodology was rejected by the Court of Appeals,[50] and the manner of valuation was remanded to the trial court. Under the capitalization of earnings methodology Brown's stock was valued at $414,751, while using the net asset method the value was $322,526. While the trial court imposed a portion of Brown's attorney fees on the corporation, making only a conclusory determination that it acted "vexatiously, arbitrarily, and in bad faith,"[51] no finding of fact or conclusions of law supported this determination. This matter was remanded to the trial court for findings of fact and conclusions of law with the caution that fees are limited to those incurred in connection with the dissenter's rights action and not the other matters in dispute. This point was not addressed by the Supreme Court. The trial court, based on the Master Commissioner's report, applied a twenty-five percent (25%) marketability discount to Brown's interest in Shawnee Telecom.[52] The Court of Appeals rejected that discount, adopting the reasoning of the *McLoon* decision.[53]

Shawnee Telecom, Inc. v. Kathy Brown: The Supreme Court

On behalf of a unanimous court, Justice Abramson wrote the opinion by which the Kentucky Supreme Court brought Kentucky law current with the now broadly accepted standard as to valuation in a dissenter rights action, decisively rejecting minority discounts.[54]

Writing in the context of a dissenter rights action, the Kentucky Supreme Court wrote that:

> [W]e conclude that "fair value" is the shareholder's proportionate interest in the value of the company as a whole and as a going concern…. As for applying a marketability discount when valuing the dissenter's shares, we join the majority of jurisdictions which, as a matter of law, reject this shareholder level discount because it is premised on fair *market* value principles which overlook the primary purpose of the dissenter's appraisal rights—the right to receive the value of their stock in the company as a going concern, not its value at a hypothetical sale to a corporate outsider.[55]

In the course of the opinion, the court expressly addressed the prior *Ford* decision, writing that it "does not accurately address 'fair value' and should be overruled in its entirety."[56] Continuing in the same vein, the Supreme Court wrote:

> We hold, in sum, that in a KRS 271B.13 appraisal proceeding

> the dissenting shareholder is entitled to the fair value of his or her shares as measured by the proportionate interest. Those shares represent in the value of the company as a going concern a value determined in accord with the general accepted valuation concepts and techniques and without shareholder-level discounts for lack of control or marketability.[57]

And as well observed:

> Once the entire company has been valued as a going concern, however, by applying an appraisal technique that passes judicial muster, the dissenting shareholder's interest may not be discounted to reflect either a lack of control or a lack of marketability.[58]

Net Asset Value is a Viable Valuation Methodology

In *Shawnee*, Brown, the dissenting shareholder, asserted that net asset value should not have been utilized in determining the company's value, a view in turn approved by the Court of Appeals.[59] The Supreme Court did not, however, agree with that assessment. Rather, it wrote that net asset value is an accepted approach to business valuation that may be utilized by an appraiser to establish the market value of the subject company.[60] The important point is, however, that the net asset value must be used as part of an approach to determine the market value of a company on a going concern basis and not merely the liquidation value of its tangible assets.[61]

Entity Level Discounts Remain Possible

The Court held that entity level discounts, based upon the particular facts and authorities applicable to the specific company under consideration, may be appropriate. For example, the court acknowledged that it may be appropriate to apply a marketability discount to determine the value of the company as contrasted with the value of an otherwise similar publicly traded venture. The Court listed other entity level discounts that may, in a particular circumstance, be appropriate as including the key manager, limited customer/supplier base, "trapped-in" capital gains, environmental liabilities, pending litigation, portfolio and a small size.[62] On these points, the Court cited *Business Valuation Discounts and Premiums* by Shannon D. Pratt. The terminology here employed by the Court is less clear, and therefore the import of its analysis is less obvious than it might be. The Court suggested that these entity level discounts may be appropriate in valuing the corporation subject to a dissenter rights action. In other words, the Court concluded that in the process of valuation of the corporation as a whole and on a going concern basis, such discounts may be employed in coming to that valuation. However, whether and to the extent appropriate remains dependent upon the particular circumstances.

Valuation Remains an Art

The proper weighting of the market, the net asset value and capitalized earnings as well as other appropriate approaches will remain within the expertise of the valuation professional retained on the engagement. While marketability discounts, at the shareholder level, may no longer appropriate, the full range of the art of valuation remains viable in dissenter rights actions.[63] Consequently, these valuations will not be formulaic, but rather will need to be customized to the issues most relevant to the venture.

The Shawnee Telecom Decision Addresses Valuation in the Context of a Dissenters Rights Case and Not Otherwise

The Supreme Court made clear there may exist different standards for valuation to be applied in different circumstances. It did this in face of assertions by Shawnee and the Kentucky Chamber of Commerce, which filed an amicus brief in this case, to the effect that the "fair value" standard of the dissenter rights cases should be applied consistently with the fair market value standard applied in marital dissolution and tax cases.[64] The Court rejected that suggestion, noting that the dissenter rights statute has a particular purpose, namely protecting the economic interest of the minority shareholders, and for that purpose fair value was used in place of fair market value. Hence, the various discount factors that are used to determine fair *market* value in other contexts are not brought into question by this ruling.[65]

Application in Other Statutory Dissenter Rights Actions

While a statutory right to dissent does not exist in the partnership, limited partnership or LLC,[66] it does exist in the agricultural cooperative associations act.[67] Under that statute, a member of an agricultural cooperative association, upon a merger, consolidation or amendment of the articles of incorporation, may demand payout for the "fair market value" of their stock therein. The Supreme Court has made clear that "fair value" and "fair market value" have different meanings. While discounts at the owner level are not appropriate to determine "fair value," such are, at least implicitly, appropriate in determining "fair market value."[68] Ergo, in that each statute uses a different formula for what is to be paid the dissenter, the use of a shareholder-level minority interest discount is appropriate in the context of an agricultural cooperative association.

Another possible application would be in an LLC formed between 1994 and the effective date of the 1998 amendments to the LLC Act. Assume the LLC in question continues to be governed by the then applicable default rule[69] that upon dissociation from an LLC, absent its winding up and liquidation, a member is entitled to the "fair value" of their interest.[70] In this circumstance, following from the guidance of the *Shawnee Telecom* decision, a discount for minority position would be inappropriate.[71]

Application in Other Statutory Buy-Out Actions

Under the professional corporation supplement to the Business Corporation Act, upon any number of circumstances including death, termination of qualification as a licensed professional or upon

resignation from the corporation, a shareholder is entitled to have their shares therein redeemed for "fair market value."[72] As the statute specifically utilizes "fair market value" in contrast with the dissenter rights statute and its utilization of "fair value," it must be expected that there exists an intended distinction and that discounts for minority position are appropriate. This is especially the case as this statute sets forth merely a default paradigm, applicable only where the statutory invitation to provide a different mechanism is not utilized;[73] the shareholders could decide to use "fair value" or another formula for determining the payment to go to the former shareholders.

Application in Contractual Buy-Out Actions

Many closely held ventures, by private ordering, will create contractual buyout rights. For example, in a closely held firm, a share restriction agreement may provide for either the put or call, upon defined circumstances, of an owner's interest in the venture. The circumstances in which either the put or the call may be exercised is a matter of private contracting, as are the terms of the transaction, including the price. Among the many points that must be carefully drafted in such agreements is the purchase price. Especially from the date of the *Shawnee Telecom* decision, it must be expected that "fair value" and "fair market value" will not be treated interchangeably. It remains to be seen whether there can be a successful agreement that, for an agreement drafted after *Courier-Journal* and before *Shawnee Telecom*, the use of "fair value" should be read to anticipate the use of minority discounts, that being the interpretation adopted by the *Courier-Journal* Court and by at least implication incorporated into the agreement at issue. Conversely, there should be no argument that *Shawnee Telecom* informs the interpretation of an agreement that utilizes "fair market value."

Partner Buy-Outs Under KyRUPA

Under the Kentucky Revised Uniform Partnership Act (2006) ("KyRUPA"),[74] a partner withdrawing or expelled from a partnership is entitled to be bought out at a "buyout price."[75] The buyout price is an amount equal to:

> the amount that would have been distributable to the dissociating partner under KRS 362.1-807(2) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date.[76]

By design, RUPA, and KyRUPA following thereon, avoided both "fair value" and "fair market value."[77] While a minority interest discount, when the value is that of a sale of the partnership's business as a going concern, would not be appropriate,[78] a lack of marketability discount may be appropriate.[79] Regardless, as KyRUPA does not utilize "fair value," *Shawnee Telecom* does not inform a valuation thereunder.

Conclusion

The nearly 30-year hiatus between *Ford* and *Shawnee Telecom* have not served Kentuckians well. The number of minority shareholders who were deprived of the true value of their shares by reason of inappropriate discounts and the number who did not exercise dissenters rights consequent to unwillingness to accept those extractions cannot be known, but none of them have been well served by the law. Fortunately, through *Brooks* and especially *Shawnee Telecom*, Kentucky law has been brought current with the national consensus.

ENDNOTES

1. 354 S.W.3d 542 (Ky. 2011).
2. *See*, *e.g.*, *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535 n. 6 (1941); *In re Valuation of Common Stock of McLoom Oil Co.*, 565 A.2d 997, 1004 (Me. 1989) ("The appraisal remedy has deep roots in equity. The traditional rule through much of the 19th century was that any corporate transaction that changed the rights of common shareholders required unanimous consent. The appraisal remedy for dissenting shareholders evolved as it became clear that unanimous consent was inconsistent with the growth and development of large business enterprises. By the bargain struck in enacting an appraisal statute, the shareholder who disapproves of a proposed merger or other major corporate change gives up his right of veto in exchange for the right to be bought out—not at market value, but at 'fair value.'" (citations omitted)) ; *In re Enstar Corp.*, 1986 WL 8062, at *5 (Del. Ch. 1986); *Chi. Corp. v. Munds*, 172 A. 452, 455 (Del. Ch. 1934); and 12B WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5906.10 (2009).
3. *See*, *e.g.*, *Salomon Bros. v. Interstate Bakeries Corp*., 576 A.2d 650, 651-52 (Del. Ch. 1989) ("[V]eto power at common law 'made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate.'") (quoting *Voeller*, 311 U.S. at 535 n. 6 (1941)); *In re Shore*, 67 A.D.2d 526 (N.Y. App. Div. 1979).
4. *See* FLETCHER, *supra* note 2 ("Consequently, statutes were enacted conferring wide powers on the majority or a specified percentage of the stock to amend the charter, sale, consolidate, merge, etc." (citation omitted)). As early as the 1928 Uniform Business Corporation Act (the predecessor to the Model Business Corporation Act), a merger could be approved by a vote of two-thirds of the shareholders. *See* UNIF. BUS. CORP. ACT § 44(II); *see also* KY. REV. STAT. ANN. § 271.415(2) (repealed 1972 Ky. Acts, ch. 274, § 165) (permitting a sale of corporate assets with the approval of a majority of the shareholders).
5. *See*, *e.g.*, *Yanow v. Teal Indus., Inc*., 422 A.2d 311, 317 n. 6 (Conn. 1979) ("The appraisal remedy has

been described as an adequate quid pro quo for statutes giving the majority the right to override the veto of a dissenting shareholder."); *Ala. By-Prods. Corp. v. Cede & Co.,* 657 A.2d 254, 258 (Del. 1995) (describing appraisal as "a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation by refusal to consent to such transactions"); *Reynolds Metals Co. v. Colonial Realty Corp.*, 190 A.2d 752, 755 (Del. 1963) (characterizing dissenter rights as "compensation" for the loss of the right to block fundamental transactions); *Salomon Bros.*, 576 A.2d at 651 ("The judicial determination of fair value pursuant to § 262 is a 'statutory right . . . given the shareholder as compensation for the abrogation of the common law rule that a single shareholder could block a merger.'" (quoting *Francis I. duPont & Co. v. Universal City Studios*, 343 A.2d 629, 634 (Del. Ch. 1975))); *In re Appraisal of ENSTAR Corp.*, C.A. No. 7802, *slip op.* at 11, 1986 WL 8062 (Del. Ch. July 17, 1986) (characterizing dissenter rights as "compensation" for the loss of the right to block fundamental transactions); *Hariton v. Arco Elecs., Inc.*, 182 A.2d 22, 25 (Del. Ch. 1962) (appraisal remedy given shareholders in "compensation" for loss of right to prevent a merger), *aff'd*, 188 A.2d 123 (Del. 1963); *Chicago Corp. v. Munds*, 172 A. 452, 455 (Del. Ch. 1934) ("In compensation for the lost right [of a stockholder to defeat a merger transaction] a provision was written into the modern statutes giving the dissenting stockholder the option completely to retire from the enterprise and receive the value of his stock in money."); and FLETCHER, *supra* note 2.

6. For a review of the adoption of the appraisal remedy and its development since that time, see Robert B. Thompson, *Exit, Liquidity and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L. REV. 1 (1995-96). In 2007 Kentucky's partnership, limited partnership and LLC acts were amended to expressly provide that, in those organizational contexts, dissenter rights would exist only if provided for by private agreement. These amendments preclude the argument that dissenter rights are a matter of common law that protect the interests of partners and LLC members. *See* Thomas E. Rutledge, *The 2007 Amendments to the Kentucky Business Entity Statutes*, 97 KY. L.J. 229, 248 (2008-09); *see also Shawnee Telecom*, 354 S.W.3d at 552-556 (recognizing that dissenter rights were created to compensate corporate shareholders for the loss of a common law right).
7. As such, upon certain transactions, a minority shareholder may cause to be set aside the otherwise applicable rules described as alternatively "defensive asset partitioning," Henry Hausmann & Renier Krackman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 394-95 (2000), or "capital lock-in." *See* Lynn Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253 (2005).
8. Under the Kentucky enactment of the Uniform Business Corporation Act, *see* 1946 Ky. Acts, ch. 14l, there was no provision for the issuance of cash to a shareholder in a corporation taking part in a merger, KY. REV. STAT. ANN. § 271.470 (repealed 1972 Ky. Acts, ch. 274, § 165). By the 1972 adoption of the Model Business Corporation Act, cash was permitted consideration in a merger. KY. REV. STAT. ANN. §271A.355(2)(c) (adopted 1972 Ky. Acts, ch. 274, § 71; repealed 1988 Ky. Acts ch. 23, § 248).
9. *See* Thompson, *Exit, Liquidity, and Majority Rule*, *supra* note 6 at 22.
10. *See* KY. REV. STAT. ANN. § 271B.13-010(3); *see also infra* note 11 and accompanying text.
11. 1988 Ky. Acts, ch. 23. While, since its initial adoption the KyBCA has been repeatedly amended, *see*, *e.g.*, 1992 Ky. Acts, ch. 161; 1992 Ky. Acts, ch. 341; 2002 Ky. Acts, ch. 102; 2007 Ky. Acts, ch. 137; and 2010 Ky. Acts, ch. 51, since its adoption in 1988, KRS § 271B.13-010(3) has not been amended.
12. KY. REV. STAT. ANN. § 271B.13-010(3).
13. *Id.* § 271A.405(1) (repealed 1988 Acts, ch. 23, § 248) (stating that dissenting shareholder is entitled to receive "payment of the fair value of such shareholder's shares as of the day prior to the date on which the vote was taken approving the proposed corporate action, excluding any appreciation or depreciation in anticipation of such corporation action").
14. As this article's focus is upon the question of applying a minority discount in the valuation of the dissenter's stock, it intentionally omits any review of the sometimes intricate processes employed in the exercise of dissenter rights under the KyBCA.
15. Rev. Model Bus. Corp. Act § 13.01 cmt. (3) (1984).
16. *Id.* at 3d § 13.01(4)(iii) (1984) (amended 1999). The full definition of fair value as currently set forth in Model Business Corporation Act § 13.01(4)(iii) is as follows:
    > "Fair value" means the value of the corporation's shares determined:
    > (i) immediately before the effectuation of the corporate action to which the shareholder objects;
    > (ii) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and
    > (iii) without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to section 13.02(a)(5).

17. Rutheford B. Campbell, Jr., *Corporate Fiduciary Duties in Kentucky*, 93 Ky. L.J. 551, 603 (2004-05). Other scholarly criticism of the application of discounts to dissenting shareholder values, particularly in the context of a squeeze out merger, were collected by the Supreme Court. *See Shawnee Telecom*, 354 S.W.3d at 552-56.
18. *Id.* at 605. Obviously, the *Brooks* and *Shawnee Telecom* courts accepted and implemented that suggestion.
19. *See*, *e.g.*, *Yeager v. Paul Semonin Co.*, 691 S.W.2d 277 (Ky. App. 1985) (exclusivity of the dissenters' rights remedy); *Acree v. EIFC, Inc*., 502 S.W.2d 43 (Ky. App. 1973) (whether dissenting shareholders satisfy various predicate requirements); *Mountain Racing, Inc. v. Jennings*, Nos. 2000-CA-002563-MR and 2000-CA-002599-MR (Ky. App. 2002) (valuation methodology) (unpublished decision); *Hollan v. Progressive Endeavors Corp*., No. 95-CA-1479-MR (Ky. App. 1997) (exclusivity of the dissenters' rights remedy) (unpublished decision); *Josephine Bancshares, Inc. v. Blatt*, No. 94-CA-002741-MR (Ky. App. 1996) (weighting of various valuation methods) (unpublished decision).
20. 639 S.W.2d 553 (Ky. App. 1982). The Kentucky Supreme Court denied the requested discretionary review.
21. *See* Ky. Rev. Stat. Ann. § 271A.400(1)(b) (repealed 1988 Ky. Acts. ch. 23 § 248) (affording dissenter rights in the context of an asset sale); *see also id.* § 271B.13-020(1)(c).
22. *See supra* note 13.
23. *In re Valuation of Common Stock of Libby, McNeill & Libby*, 406 A.2d 54 (Me. 1979).
24. 639 S.W.2d at 555-56.
25. *Id.* at 556-57.
26. Libbys was primarily a canned food company. Readers of a certain age may recall television ads featuring the jingle, "If it says Libbys, Libbys, Libbys on the label, label, label you will like it, like it, like it on your table, table, table."
27. *Libby*, 406 A.2d at 57 ("For the first time since the enactment of the Maine Business Corporation Act, effective January 1, 1972, the courts are in this case called upon to construe and apply the dissenting shareholder appraisal provisions of the Act, 13-A M.R.S.A. § 909 (1974).").
28. *Id.* at 70.
29. *Id* at 59.
30. *Id.*
31. *Id.* at 61-62.
32. *Id.* at 70.
33. *Id.* at 62 ("[T]he price that would be bargained out in a completely free market between any willing buyer and any willing seller in the absence of the merger."); *id*. n. 8.
34. 639 S.W.2d at 555; *id*. at 556.
35. *Contrast id.* at 556 ("The 25 per cent reduction in net asset value based upon marketability ….") *with id*. ("The 'marketability discount' referred to by the appraisers and complained of by the appellants merely indicates that the appraisers gave some weight to the market value of the stock in computing the fair value thereof, which they are free to do.").
36. 325 S.W.3d 904 (Ky. App. 2010).
37. For the year July 2010 through June 2011, the Court of Appeals issued 1,213 opinions, of which 976 were published and 237 unpublished. *Brooks* was the only *en banc* decision rendered in that year. *See also* S.Ct.R. 1.030(7)(d).
38. 325 S.W.3d at 907, 910 (the discount at issue is alternately described as being twenty or thirty percent). In effect, the assumption was that the company was not marketable.
39. *See* 325 S.W.3d at 912-131. The American Law Institute ("A.L.I.") has recognized the national trend of interpreting fair value as the proportionate share of a going concern "without any discount for minority status or, absent extraordinary circumstances, lack of marketability." A.L.I., Principles of Corporate Governance: Analysis and Recommendation § 7.22(a) (1994). The comments further provide that the trial court must determine the aggregate value of the firm as an entity, and then allocate that value *pro rata* in accordance with the shareholders' percentage of ownership. A.L.I. Principles § 7.22 cmt. d.
40. *See* 325 S.W.3d at 913-14 (referencing *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1127 (Del. 1989)).
41. 406 A.2d 54 (Me. 1979).
42. *See* 639 S.W.2d at 913-14.
43. *See In re Valuation of Common Stock of McLoon Oil Co*., 565 A.2d 997, 1004-5 (Me. 1989).
44. 325 S.W.3d at 913, quoting *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d at 1004-05 (internal quotations, citations and footnotes omitted).
45. *Id.* at 914-915.
46. *Id.* at 911. The Court cited with approval comment e to the ALI Principles of Corporate Governance § 7.22 for guidance as to what is an "exceptional circumstance."
47. Nos. 2008-CA-00042-MR & 2008-CA-000167-MR, 2009 WL 2475269, 2009 Ky. App. Unpub. LEXIS 675 (Ky. App. Aug. 14, 2009) (unpublished decision).
48. *Id.* at *2-3.
49. *Id.* at *3.
50. *Id.* at *4-5.
51. *See* Ky. Rev. Stat. Ann. § 271B.13-310(1).
52. *Id.* at *7-8.
53. *Id.* The *Shawnee Telecom* court quoted the same section of *McLoon* relied upon by the *Brooks* court. *See supra* note 43 and accompanying text.
54. *Shawnee Telecom v. Kathy Brown*, 354 S.W.3d 542 (Ky. 2011).
55. *Id.* at 544.
56. *Id.* at 552.
57. *Id.* at 559.
58. *Id.* at 564.
59. *Id.* at 548. Curiously, in the *Libby* case relied upon by the Kentucky Court of Appeals in *Courier-Journal*, the dissenting shareholder had argued that only net asset value should have been relied upon in the valuation *In re Valuation of Common Stock of Libby, McNeill &*

Libby, 406 A.2d 54, 67 (Me. 1979). This review was rejected by the *Libby* court, but the net asset value was discounted in weighting in comparison to the market value and capitalized earnings approaches.

60. *Shawnee Telecom*, 354 S.W.3d at 561 ("Brown claims that as a matter of law the appraisers' net asset approach to valuing Shawnee should have been disregarded. The Court of Appeals agreed with her but we do not. Net asset value is a standard business valuation approach, and in that approach one of the things the appraiser seeks to do is to establish the market value, as opposed to the book value, of the subject company's assets. Shannon P. Pratt, *Valuing a Business, The Analysis and Appraisal of Closely Held Companies,* Chapter 14 (5th ed. 2008).").
61. 354 S.W.3d at 562 n. 8.
62. *Id.* at 554 n. 3.
63. *Id*. at 559, n. 6.
64. *Id.* at 559-61.
65. *See*, *e.g.*, *Jones v. Jones*, No. 2001-CA-002742-MR, 2003 Ky. App. Unpub. LEXIS 903 (Aug. 29, 2003) (unpublished decision) (looking to the fair market value of house owned by divorcing spouses); *Zink v. Zink*, No. 2007-CA-000419, 2009 WL 484963 (Ky. App. 2009) (valuing, in the context of a divorce, corporate shares based upon the price to which the shares were subject to acquisition under a shareholder agreement).
66. *See supra* note 6. Note that there are not statutory dissenter rights under the Kentucky Uniform Limited Cooperative Association Act, enacted by the 2012 Kentucky General Assembly. *See* 2012 Ky. Acts. ch. 160. Likewise, there are no statutory dissenter rights under the Kentucky Uniform Statutory Trust Act as enacted by the 2012 Kentucky General Assembly. *See* 2012 Ky. Acts, ch. 81, §§ 1-76.
67. *See* Ky. Rev. Stat. Ann. § 272.321; *see also id*. § 272.205.
68. As for the definition of "fair market value," "an accountant once told me that the definition of fair market value for tax purposes is the value arrived at in negotiations between a willing tax lawyer and a willing revenue agent, neither of whom has ever bought or sold anything of consequence in his life." Attributed to Paul H. Asofsky, *Tax Quotes - Just for Fun*, http://www.johnscreekcpa.com/Home/Tax_Quotes/ (last visited July 3, 2012).
69. Such could come about, for example, if the LLC's operating agreement incorporated the terms of the LLC Act "as in effect on the date hereof irrespective of its subsequent amendment."
70. *See* Ky. Rev. Stat. Ann. § 275.215 (prior to amendment by 1998 Ky. Acts, ch. 341, § 59). For a review of the developments under the LLC Act as to a member's right to redemption, see Thomas E. Rutledge, *LLC Operations* § 7.3.8, Limited Liability Companies in Kentucky (3d ed. University of Kentucky College of Law 2011); Rutledge, *Chapman v. Regional Radiology Associates, PLLC*: *A Case Study in the Consequences of Resignation*, 100 Ky. L.J. Online 15 (2011).
71. *See also* Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky's New Organizational Options*, 83 Ky. L.J. 1, 28 n. 16 (1994-95)
("The fair value of the member's interest should be the prorata portion of the entire value of the LLC and not merely the book value of the interest as shown in the ledger accounts. Therefore, the distribution upon withdrawal should be based upon an appraisal of the LLC operating on an on-going basis, *i.e.*, a going concern value that should account for the appreciation and depreciation of LLC assets and the good will of the business. Also, as the valuation of the member's interest should be based on a going concern value, no minority discount should be applied to the distribution.").
72. *See* Ky. Rev. Stat. Ann. § 274.095(4) ("fair market value"); *id*. § 274.095(4)(a) ("fair market value").
73. *See*, *e.g.*, *id.* at § 274.095(1) ("The articles of incorporation may provide ...."); *id*. § 274.095(4) ("In the absence of an article, bylaw or agreement as provided for in subsection (1) of this section ....").
74. *Id*. at §§ 362.1-101 *et seq*.
75. *Id*. at § 362.1-701(1).
76. *Id*. at § 362.1-701(2).
77. *See* Thomas E. Rutledge and Allan W. Vestal, Rutledge & Vestal on Kentucky Partnerships and Limited Partnerships § 2.6.1 n. 630 and accompanying text.
78. *See id*. n. 632 and accompanying text.
79. *Id*. n. 633 and accompanying text.

Thomas E. Rutledge is a member of Stoll Keenon Ogden PLLC, resident in the Louisville office. A frequent speaker and writer on business organization law, he has published in journals including The Business Lawyer, the Delaware Journal of Corporate Law, the American Business Law Journal and the Journal of Taxation, and is an elected member of the American Law Institute.

Sarah J. Sloan is an associate with Stoll Keenon Ogden PLLC, resident in the Lexington office. A 2009 graduate of the University of Kentucky College of Law, where she served as the Editor-in-Chief of the *Kentucky Law Journal*, she is a former clerk (2009-10) to the Hon. Eugene E. Siler, Jr., Circuit Judge, the United States Court of Appeals for the Sixth Circuit.