

# DELAWARE CORPORATE LAW AND THE MODEL BUSINESS CORPORATION ACT: A STUDY IN SYMBIOSIS

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## I

### INTRODUCTION

The central point of this article is that there has been a constructive symbiosis between the Model Business Corporation Act (MBCA) and Delaware's corporation law, including its statutory component (the Delaware General Corporation Law, or DGCL) and its case law. We see three main elements of this symbiosis.

First, each set of statutes has been informed by drafting and case-law experience generated under the other.

Second, especially in recent years, Delaware's legislature and judiciary have initiated important new elements of corporate law, subsequently adopted by the MBCA.

Finally, the MBCA's more deeply deliberative style has led to useful refinements of Delaware law.

We interrupt this optimistic assessment at the outset, however, to point out that this symbiosis was—put gently—not visibly intended or perceived by the original shapers of the MBCA. They publicly derided the craftsmanship of the Delaware statute (“poor in sequence and loose in its provisions”)<sup>1</sup> and stoutly asserted the superiority of their own work (“the organization of subject matter

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1. Whitney Campbell, *The Model Business Corporation Act*, 11 BUS. LAW. 98, 100 (1956).

in the Model Act is the best that can be devised”).<sup>2</sup> As they saw it, the MBCA was substantively superior to Delaware’s corporate law: with evident disdain, the MBCA drafters explained that “under the Delaware law charter amendments may be adopted upon the vote of a mere majority of the voting shares, and dividends may be declared and paid from earnings of the current or preceding year even though there may be large accumulated deficits from prior years.”<sup>3</sup> In sum, Delaware’s statute was notably infradig: “[I]t was not the type of statute which the committee should present as a model for states intending to revise their laws,” and “not a single member of the committee thought it desirable to use the Delaware statute as a pattern.”<sup>4</sup>

We loyal Delawareans do not intend to quibble with the boastful founding generation of the MBCA. True, we would not anoint the MBCA with the self-congratulatory accolades that accompanied (promoted?) the publication of the Model Business Corporation Act Annotated in 1961 (“[A] magnificent work. I cannot remember when in recent years I have experienced such sheer pleasure from reading a legal text . . .”).<sup>5</sup> But the drafters of the original MBCA had reason to take pride in their work and to plausibly contend that the MBCA was better organized and more clearly drafted than the DGCL. We do not argue that the MBCA drafters did not have a case to make on that score, particularly as we concede that the current MBCA remains arguably a better model than the current DGCL for states lacking Delaware’s highly developed judicial system and corporate case law.

As will be seen, however, our praise of the MBCA is not unalloyed: there have been occasions on which its hallmark precision has impaired its utility as a model, and its assertions of superiority have been overblown. But due to its unique form of authorship—through the work of a select committee of consistently conscientious, intelligent, and experienced corporate lawyers—the MBCA has made major contributions to U.S. corporate law and to the development of Delaware’s law itself. Delaware has contributed to the MBCA too, and these mutual contributions have had an unexpected but felicitous effect on U.S. corporate law.

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2. Ray Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAW. vii, viii (1950).

3. Things evolve, of course: Delaware’s requirement of approval of a charter amendment by a majority of shares entitled to vote is more demanding than the MBCA’s current requirement of a majority of votes cast at a meeting at which a quorum is present, compare DEL. CODE ANN. tit. 8, § 242(b)(1) (2010), with MODEL BUS. CORP. ACT § 10.03(e) (2008), and the MBCA no longer concerns itself with the existence of earned surplus in determining whether a dividend is permissible, MODEL BUS. CORP. ACT § 6.40(c) (2008).

4. Campbell, *supra* note 1.

5. Jule E. Stocker, *Model Business Corporation Act Annotated*, 16 BUS. LAW. 748, 748 (1961).

## II

## STATUTORY RELATIONSHIP

At first glance, the origins of the MBCA and the modern DGCL seem unrelated. The statutes differ materially in language, structure, and approach. Moreover, the two statutes have quite distinct foundations: the modern DGCL springs from the 1967 revision to the DGCL (1967 Revision), and a comprehensive report prepared by Professor Ernest L. Folk III (*Folk Report*).<sup>6</sup> In contrast, the MBCA's primary drafters were members of the Chicago bar, and the original MBCA (1950 MBCA) drew heavily upon the Illinois Business Corporation Act enacted in 1933.<sup>7</sup> But a closer look reveals that the origins of the modern DGCL and the MBCA are intricately intertwined.

The 1950 MBCA was essentially a restatement of the modern corporation statute.<sup>8</sup> In the decades leading up to the publication of the 1950 MBCA, a number of states, including Illinois, modernized their corporation statutes.<sup>9</sup> The bluster of Ray Garrett and other MBCA drafters in part may have been designed to hide an undeniable fact: The first generation corporation law revisions—statutes the MBCA drafters used as the grist for their restatement—were, in large part, prompted by and modeled after the DGCL itself.<sup>10</sup> They generally adopted the DGCL's enabling approach to corporation law,<sup>11</sup> but

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6. See generally *Dogsbodies of the DGCL: Revisiting Roles in the Landmark Achievement*, DEL. LAW., Spring 2008, at 10.

7. Campbell, *supra* note 1, at 100 (stating that the MBCA's "parent act is the Illinois Business Corporation Act enacted in 1933"); Garrett, *supra* note 2, at vii (stating that the Chicago members were the primary drafters of the MBCA).

8. Garrett, *supra* note 2, at viii ("[I]t is impossible to study and compare the statutes of all 48 states and, because of their wide diversity, almost impossible to select a mere few for the purpose. Our Committee believes that by making a carefully planned modern pattern available, a formidable amount of labor and research on the part of local groups everywhere will be avoided.").

9. See Harwell Wells, *The Modernization of Corporation Law, 1920-1940*, 11 U. PA. J. BUS. L. 573, 589 (2009) ("Beginning in the mid-1920s, a series of states, including those that dominated the nation's industrial heartland, either substantially revised or completely replaced their existing corporation laws."); Kenneth K. Luce, *Trends in Modern Corporation Legislation*, 50 MICH. L. REV. 1291, 1299 (1952) ("In the past twenty-five years new corporation codes have been enacted in Idaho, Ohio, Indiana, Illinois, California, Louisiana, Michigan, Minnesota, Washington and Pennsylvania.").

10. See Luce, *supra* note 9, at 1299 (noting that the DGCL had "particular influence" on the midcentury corporation statutes); Sveinbjorn Johnson, *Recent Judicial and Legislative Trends in Corporation Law*, 19 A.B.A. J. 631, 633 (1933) (stating that "in the majority of the cases [involving mid-century revisions to a state's corporation law] the Delaware act is the model which has been followed"). The 1933 Illinois Business Corporation Act that served as the MBCA's model was no exception. See Johnson, *supra* (stating that the DGCL was, "in a general way, . . . the model for the new law of Illinois"); see also Henry Winthrop Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357, 357 (1934) (explaining that the 1933 Illinois Business Corporation Act was "influenced to a greater or less extent by the Uniform Business Corporation Act and also by the Delaware General Corporation Law").

11. The 1950 MBCA and its predecessors were also influenced by the well-developed Delaware common law that had addressed many of the interstitial issues left open by the DGCL, although the minimal legislative history and lack of annotations make it difficult to pinpoint the level of influence. The influence of Delaware common law can be seen, however, through comments such as those of Paul

included the types of organizational and drafting improvements one would expect from a statutory overhaul.<sup>12</sup> Moreover, the various corporation-law revisions made certain policy judgments, incorporated local preferences, and reflected the boom or bust of the particular 1920s or 1930s period during which each statute was enacted.<sup>13</sup> The original MBCA was the culmination of this first era of modern corporation statutes<sup>14</sup> and restated its drafters' views of the best of those statutes.<sup>15</sup>

The MBCA's role as a restatement of the modern corporation statutes—combined with the barnstorming of the MBCA's drafters<sup>16</sup>—increased the MBCA's prominence and led to its use in thirteen states by the end of its first decade.<sup>17</sup> The publication of the first annotated version of the MBCA in 1960—an undertaking that took several years and a budget involving the current-day equivalent of \$1.5 million<sup>18</sup>—cemented the MBCA's role as a restater of modern corporation law.<sup>19</sup>

The MBCA (and its blustering drafters)<sup>20</sup> fueled competition in corporation-law revision, and by 1963, Delaware determined that it needed to revise its

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Carrington (one of the 1950 MBCA drafters) who observed that before Texas adopted the MBCA, Delaware “had the advantage over” Texas's corporation law because “the statutes of Delaware and the decisions of Delaware courts were clear on many points on which Texas law was most uncertain or non-existent.” Paul Carrington, *A Corporation Code for Texas*, 10 ARK. L. REV. 28, 29 (1955); see also ERNEST L. FOLK III, REVIEW OF THE DELAWARE CORPORATION LAW 111, 117 (1967) [hereinafter FOLK REPORT] (report of Professor Folk citing to specific instances in which the MBCA had codified the Delaware case-law method of dealing with a particular issue), available at <http://law.widener.edu/LawLibrary/Research/OnlineResources/DelawareResources/DelawareCorporationLawRevisionCommittee.aspx>.

12. See Ray Garrett, *Model Business Corporation Act*, 4 BAYLOR L. REV. 412, 421–23 (1952); see also Wilber G. Katz, *A Philosophy of Midcentury Corporation Statutes*, 23 LAW & CONTEMP. PROBS. 177, 188 (1958) (suggesting the primary difference between the DGCL and the MBCA was that the MBCA's improvements made it “vastly easier on the eyes”).

13. Garrett, *supra* note 12, at 421–23.

14. Wells, *supra* note 9, at 627 (“[The MBCA's] issuance marked a continuation of the movement to modernize corporation laws, but also the end of that movement's first era.”).

15. Garrett, *supra* note 2, at viii.

16. See, e.g., Garrett, *supra* note 12 (encouraging Texas to adopt the MBCA); Campbell, *supra* note 1, at 110 (addressing the Utah Bar Association); see also Ernest L. Folk III, *State Statutes: Their Role in Prescribing Norms of Responsible Management Conduct*, 31 BUS. LAW. 1031, 1054 (1976) (“The Model Act Committee was also given to proselytizing its own work.”).

17. See George D. Gibson, *The Chairman's Report to the Members of the Section*, 15 BUS. LAW. 247, 247 (1960) (“The present stature of the Model Business Corporation Act is further shown by its use, in whole or in part, in 13 States during the decade of the 'Fifties . . . .”).

18. See George C. Seward, *Report of the Committee on Corporate Laws*, 10 BUS. LAW. 65, 65 (1955).

19. See Stocker, *supra* note 5, at 749 (“[T]his is a text that belongs in their libraries along with such books as the Restatements of the Law.”).

20. The comments of Floyd Wright, who drafted the Oklahoma and Florida corporation laws, suggest that the competition between draftsmen was perhaps even more vigorous than the competition between states of incorporation. See Floyd A. Wright, *Current Developments in Statutory Corporation Law*, 7 MIAMI L.Q. 1, 7 n.22 (1952) (quoting Garrett, *supra* note 2, at viii) (criticizing the MBCA drafters' comment that the MBCA “has reached the *ultimate* and is ‘*the best that can be devised.*’”).

corporation law to remain competitive.<sup>21</sup> The Delaware Corporation Law Revision Committee was formed, and the Revision Committee hired Professor Folk to undertake a comprehensive review of the DGCL.<sup>22</sup>

Professor Folk in turn made the MBCA an important part of the *Folk Report*. The *Folk Report* is replete with references to the MBCA. Some of those references encouraged Delaware to adopt a particular modernization or policy approach taken by the MBCA.<sup>23</sup> Other references suggested that the DGCL adopt the MBCA's codification of certain principles that were already well-developed in the Delaware case law.<sup>24</sup> Still other references included the MBCA as an example of the road not taken in Delaware.<sup>25</sup>

Yet, the MBCA's influence on the 1967 Revision went beyond prompting the revision and being an integral part of the *Folk Report's* survey of modern corporation law—the MBCA had a nontrivial role in shaping the text of the 1967 Revision. Sam Arsht, one of the 1967 Revision's primary draftsmen, observed that the drafters of the 1967 DGCL looked to the MBCA as one of their main sources of guidance, in addition to the *Folk Report* and the Revision Committee minutes.<sup>26</sup> Furthermore, presaging the future, the drafters of the DGCL and MBCA worked hand-in-hand in drafting the statutory approach to the high-profile and contentious topic of the period—indemnification.<sup>27</sup>

Although the MBCA's influence on the 1967 Revision is perhaps underappreciated in modern times, the growing importance of the MBCA was meaningful enough during the revision process that one member of the Law

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21. Act of Dec. 31, 1963, ch. 218, § 1, 54 Del. Laws 724, 724 (“WHEREAS, many states have enacted new corporation laws in recent years in an effort to compete with Delaware for corporate business”); see also Minutes of the Delaware Corporation Law Revision Committee, 1st Meeting, at 1 (Jan. 21, 1964) (“The Committee discussed the advisability of making a comprehensive study of the Delaware Corporation Law with the possibility of revising the law so as to make it comparable with recently enacted legislation in other states.”).

22. See S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 14–17 (1976).

23. See, e.g., FOLK REPORT, *supra* note 11, at 19 (suggesting the DGCL follow the MBCA's default that a corporation is of perpetual duration unless otherwise stated in its charter); *id.* at 178–79 (suggesting the DGCL follow the MBCA in allowing the corporation to prepare a restated charter rather than requiring the secretary of state to do so).

24. See, e.g., *id.* at 111 (suggesting the DGCL follow the MBCA in expressly codifying the Delaware case law requiring a corporation to hold an annual meeting to elect directors); *id.* at 117 (suggesting the DGCL follow the MBCA in expressly codifying the Delaware case law requiring a statement of the purpose of any special meeting).

25. See, e.g., *id.* at 31 (citing the MBCA's vesting of bylaw power exclusively with directors unless otherwise provided in the charter); *id.* at 117 (citing the MBCA's requirement that certain derivative plaintiffs post security).

26. See Arsht, *supra* note 22, at 16 (noting that the drafting subcommittee looked “to the *Folk Report*, to the minutes of the Revision Committee and to other sources such as the Model Business Corporation Act for guidance”).

27. See, e.g., Orvel Sebring, *Recent Legislative Changes in the Law of Indemnification of Directors, Officers, and Others*, 23 BUS. LAW. 95, 96 (1967) (describing the coordination of the Law Revision Committee and the Committee on Corporate Laws to produce nearly identical indemnification statutes).

Revision Committee argued that the DGCL should not adopt a particular MBCA provision “because we do not want to be a ‘me too’ State in view of the fact that in the past most of the other States had copied our laws and that we should be a leader not a follower.”<sup>28</sup> The reality, of course, was that Delaware was far from a “me too” state in the 1967 Revision. Early in the revision process, the Law Revision Committee made a clear choice that it would “change [the DGCL] only where necessary, and also to keep as much of the original language as possible, especially where it had a heavy gloss of case law.”<sup>29</sup> And many of the new provisions—such as those relating to stockholder meetings and stockholder inspection rights—were primarily codifications of the preexisting Delaware case law that more-modern statutes, including the MBCA, had built into their own statutory framework.<sup>30</sup>

### III

#### DELAWARE AS INITIATOR

Despite their common roots, a striking but ultimately unsurprising difference has emerged between the MBCA and Delaware corporate law in the last twenty-five years: with a few exceptions, and as demonstrated in the chronology below, Delaware has been the more prolific source of innovation in statutory corporate law.<sup>31</sup>

*1986:* Responding to concern over the cost and availability of director- and officer-liability insurance, Delaware adopted section 102(b)(7), permitting charter provisions that eliminate director liability for monetary damages for breach of fiduciary duty except in limited circumstances. The MBCA adopted a similar provision four years later.<sup>32</sup>

*1990:* Following a court opinion questioning their validity, Delaware amended section 212(c) to validate proxies conferred by electronic transmission; the MBCA followed six years later.<sup>33</sup>

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28. Minutes of the Delaware Corporation Law Revision Committee, 4th Meeting, at 1 (July 16, 1964) (comments of Mr. David H. Jackman, President of the U.S. Corp. Co. of N.Y., regarding the adoption of the MBCA’s provision on the reservation of names).

29. Folk, *supra* note 16, at 1055 n.92.

30. See FOLK REPORT, *supra* note 11, at 111 (stockholder meetings); *id.* at 165 (stockholder inspection rights).

31. Although it is beyond the scope of this article, we have even more confidence that Delaware courts were a more prolific source of corporate-common-law innovation than the courts of other states. We do not attempt to address in any meaningful way the numerous case-law innovations during the last twenty-five years that helped, among other things, create a strong impetus for the election and empowerment of independent directors.

32. Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 739 (2001).

33. Act of July 17, 1990, ch. 376, § 6, 67 Del. Laws 809, 809–10; Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendments Pertaining to Shareholder Meetings and Voting*, 51 BUS. LAW. 209, 216–17 (1995); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendments Pertaining to*



1990: Delaware added section 231 mandating the appointment of inspectors of election for public companies and specifying their duties. The MBCA followed six years later.<sup>34</sup>

1983 and 1994: Delaware permitted charter provisions defining the rights of shares to be made dependent on facts ascertainable outside the charter itself; the MBCA followed in 2002.<sup>35</sup> In this instance, the MBCA improved upon the Delaware version by extending the concept to *any* charter provision, and Delaware adopted that MBCA refinement in 2004.<sup>36</sup>

1998 (for mergers) and 2003 (for other matters approved by the board of directors and presented to stockholders for a vote): Delaware adopted so-called “force the vote” statutes authorizing a commitment to present a matter for a stockholder vote even if the board of directors subsequently determines that the matter is no longer advisable.<sup>37</sup> The MBCA adopted this innovation in 2008.<sup>38</sup>

2002: Delaware provided for “householding” of notices to stockholders; the MBCA followed four years later.<sup>39</sup>

2009: DGCL amendments validated bylaws requiring the corporation to include stockholder nominees in the company’s proxy materials or to reimburse stockholder proxy-solicitation expenses.<sup>40</sup> At the same time, Delaware

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*Shareholder Meetings and Voting*, 52 BUS. LAW. 225, 227 (1996) (adopting amendments to section 7.22).

34. Act of July 17, 1990, ch. 376, § 9, 67 Del. Laws 810–11; Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendments Pertaining to Shareholder Meetings and Voting*, 51 BUS. LAW. 209, 220–21 (1995); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendments Pertaining to Shareholder Meetings and Voting*, 52 BUS. LAW. 225, 227 (1996) (adopting section 7.29).

35. Act of July 8, 1983, ch. 112, § 8, 64 Del. Laws 285, 286; Act of June 27, 1994, ch. 264, § 1, 69 Del. Laws 524, 524; Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act Pertaining to Shares and References in Documents to Extrinsic Facts*, 57 BUS. LAW. 355, 356 (2001); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act Pertaining to Shares and References in Documents to Extrinsic Facts*, 57 BUS. LAW. 1665, 1665 (2002) (adopting amendments to sections 1.20, 2.02, and 6.01).

36. Act of July 6, 2004, ch. 326, § 1, 74 Del. Laws 813, 813 (adding section 102(d)).

37. Act of June 29, 1998, ch. 338, § 44, 71 Del. Laws 870, 872 (amending section 251(c)); Act of June 30, 2003, ch. 84, § 3, 74 Del. Laws 214, 214 (adding section 146).

38. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Force the Vote Amendments to Chapter 8, 9, 10, 11, 12, and 14*, 63 BUS. LAW. 511, 511–12 (2008); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendment to Section 6.24, Adoption of Section 8.26 (“Force the Vote”) and Related Amendments to Chapters 9, 10, 11, 12, and 14*, 63 BUS. LAW. 1275, 1275–76 (2008) (adopting section 8.26 and related amendments).

39. Act of June 20, 2002, ch. 298, § 9, 73 Del. Laws 786, 786–87 (adopting section 233); 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, 1578 (2005); 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*, 61 BUS. LAW. 1183, 1183–84 (2006) (adopting section 1.44). The MBCA also at that time adopted an amendment permitting shareholder action by less than unanimous consent, a feature of Delaware law since 1967.

40. Act of April 10, 2009, ch. 14, §§ 1–2, 77 Del. Laws (adopting sections 112 to 113). The DGCL amendments followed the Delaware Supreme Court’s decision in *CA, Inc. v. AFSCME Employees*

permitted companies to separate record dates for notice of and voting at stockholder meetings.<sup>41</sup> With unusual expedition, the MBCA adopted similar provisions later that year.<sup>42</sup>

The MBCA's adoption of Delaware's corporate-law innovations has extended as well to encompass innovations by the Delaware courts:

*1989:* The MBCA's provisions governing shareholder derivative suits were thoroughly overhauled.<sup>43</sup> This overhaul included innovations of its own,<sup>44</sup> but it drew heavily on Delaware case law,<sup>45</sup> and the accompanying official comment recognized that the MBCA had theretofore been silent on some important issues that courts in Delaware and elsewhere had already been required to address.<sup>46</sup>

*1996:* The widely cited *Caremark* decision<sup>47</sup> analyzed the circumstances in which directors might be held personally liable for failures to exercise sufficient oversight over corporate affairs. That decision articulated a standard of liability keyed to whether the plaintiff demonstrates "a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists."<sup>48</sup> Two years later, the same

*Pension Plan*, 953 A.2d 227 (Del. 2008). The amendments codified existing law and arguably obviated any claim that the fiduciary out concept—which before *AFSCME* had been applied by Delaware courts only to constrain director rather than stockholder action—blocks stockholders from adopting bylaws on proxy access and proxy-expense reimbursement.

41. Act of April 10, 2009, ch. 14, § 5, 77 Del. Laws (amending section 213(a)).

42. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments to Shareholder Voting Provisions Authorizing Remote Participation in Shareholder Meetings and Bifurcated Record Dates*, 65 BUS. LAW. 153, 156–57 (2009); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Shareholder Proxy Access Amendments to Chapters 2 and 10*, 64 BUS. LAW. 1157, 1157–59 (2009); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Shareholder Proxy Access Amendments to Chapters 2 and 10*, 65 BUS. LAW. 1105, 1106–08 (2010); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments to Shareholder Voting Provisions Authorizing Remote Participation in Shareholder Meetings and Bifurcated Record Dates*, 65 BUS. LAW. 1119, 1121–23 (2010).

43. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendments Pertaining to Derivative Proceedings*, 45 BUS. LAW. 1241, 1241–42 (1990) [hereinafter *Derivative Proceedings*].

44. We discuss in part IV below, somewhat critically, the notable innovation of the universal demand requirement in section 7.42 of the MBCA.

45. Dooley & Goldman, *supra* note 32, at 745 (describing section 7.44(c) of the MBCA as codifying Delaware law regarding standards of director independence); MODEL BUS. CORP. ACT. ANN. § 7.44 cmt. at 7-347 (2008) (noting that subsections (d) and (e) of section 7.44 "follow the first *Aronson* [*v. Lewis*, 473 A.2d 805 (Del. 1984)] standard in allocating the burden of proof depending on whether the majority of the board is independent").

46. MODEL BUS. CORP. ACT ANN. § 7.44 cmt. at 7-341 to -342 (2008) ("The prior version of the Model Act did not expressly provide what happens when a board of directors properly rejects a demand to bring an action . . . [and] was also silent on the effect of a determination by a special litigation committee of independent directors that a previously commenced derivative action can be dismissed.").

47. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967–71 (Del. Ch. 1996).

48. *Id.* at 971.



adjective *Caremark* used—“sustained”—to describe the kind of inattention necessary for a finding of director liability was introduced into the MBCA for the same purpose.<sup>49</sup>

2004: The decision in *Gilliland v. Motorola, Inc.* reaffirmed the equitable (that is, corporate common law) duty under Delaware law to provide financial information to minority shareholders in a squeeze-out merger in order to enable them to determine whether to seek appraisal of their shares.<sup>50</sup> In 2006, the MBCA was amended to recognize the duty articulated in *Gilliland*—acknowledging *Gilliland* in the accompanying official comment—and to bring some predictability to the scope of the information to be provided.<sup>51</sup>

What might account for Delaware’s relatively greater level of innovation and resulting influence on the MBCA?<sup>52</sup> Surely not the native creativity or breadth of practice experience of the drafters of its corporate statute: although Delawareans have been reasonably well represented on the Committee on Corporate Laws, the collective expertise of the Committee’s members is undoubtedly at least as formidable as that of their Delaware counterparts, the Council of the Delaware State Bar Association’s Corporation Law Section. The better explanation involves institutional position and structure. Delaware’s courts and legislative drafters routinely confront problems and uncertainties in the administration of the DGCL that cannot, consistent with Delaware’s corporate-law mission, be tolerated in the long run.<sup>53</sup> Delaware must innovate—

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49. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendments Pertaining to Electronic Filings/Standards of Conduct and Standards of Liability for Directors*, 53 BUS. LAW. 157, 172 (1997); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act Pertaining to the Standards of Conduct and Standards of Liability for Directors—Final Adoption*, 53 BUS. LAW. 813, 813 (1998) (adopting section 8.31, particularly subsection (a)(2)(iv)).

50. *Gilliland v. Motorola, Inc.*, 859 A.2d 80, 86 (Del. Ch. 2004). *Gilliland* followed a long line of Delaware cases on this point. *See, e.g.*, *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992); *Turner v. Bernstein*, 776 A.2d 530, 542 (Del. Ch. 2000).

51. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments Relating to Chapters 8 and 13*, 61 BUS. LAW. 1191, 1193 (2006); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments Relating to Chapters 8 and 13*, 62 BUS. LAW. 1061, 1062 (2007) (adding new paragraphs (d) and (e) to section 13.20).

52. The MBCA has not been barren of innovation itself, and the mere fact that Delaware has not adopted some of the MBCA’s innovations does not negate their utility. In particular, the MBCA amendments adopted in 1999 reflected great creativity and insight. *See* Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Appraisal Rights*, 54 BUS. LAW. 209, 210–51 (1998) (amending section 13.02 to rationalize the availability of appraisal rights); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Fundamental Changes*, 54 BUS. LAW. 685, 687–89, 700, 708–09 (1999) [hereinafter *Fundamental Changes*] (amending sections 6.21, 10.03, 11.04(e), 12.02(e), and 14.02(e) to create a uniform rule governing the shareholder vote required to approve fundamental corporate changes); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act Pertaining to Appraisal Rights and to Fundamental Changes—Final Adoption*, 55 BUS. LAW. 405, 406 (1999) (amending section 12.02 to clarify when shareholders are entitled to vote on sales of corporate assets).

53. Delaware’s reputation as a desirable jurisdiction for incorporation depends in significant part on its ability to keep its corporate statute as up to date as possible in addressing emerging questions of

within narrow bounds, to be sure—to maintain its preeminence. The Council, similar to the Committee on Corporate Laws, receives input from a national constituency about areas for statutory improvement; but the Council acts faster to address new issues and proposed changes.<sup>54</sup> In contrast, the MBCA is under no such pressure to innovate. The MBCA’s drawn-out, formal process (three formal “readings” and publication of an exposure draft following the second reading)<sup>55</sup> is not conducive to nimble adaptation, but promotes the clarity of drafting and internal coherence suitable to a model statute.

#### IV

#### MBCA AS REFINER

In at least some circumstances, however, the MBCA’s deliberative process generates refinements that improve on and influence Delaware law. These refinements generally reflect the MBCA’s propensity to build bright-line rules into the statute in an attempt to create greater certainty.<sup>56</sup> Often, an MBCA refinement signals to the Delaware judiciary that the Delaware common law needs to be refined. Less frequently, given Delaware’s inclination to trust the common-law process, an MBCA refinement triggers statutory reform.

One example of the positive influence of MBCA refinements is the MBCA’s refinement of the statutory scheme governing asset dispositions. Under section 271 of the DGCL, stockholder approval is required for a sale of “all or substantially all of [a corporation’s] property or assets.” The seminal Delaware case interpreting this phrase<sup>57</sup> added arguably needless uncertainty by requiring an evaluation of the quantitative and qualitative characteristics of the transaction and closely examining whether a transaction involving only twenty-six percent and forty-one percent of a corporation’s total and net assets required a stockholder vote.<sup>58</sup> Such case law left Delaware corporations wondering whether stockholder approval was required for transactions that were seemingly far outside the statute’s reach under any plain reading of “substantially all.”

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corporate law. See, e.g., Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 240 (1985).

54. See Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1756–57 (2006) (discussing the Council process and the role of non-Delawareans).

55. MODEL BUS. CORP. ACT ANN. intro. at xxviii–xxix (2008) (describing the composition and procedures of the Committee on Corporate Laws).

56. See, e.g., Goldman & Dooley, *supra* note 32, at 764–66 (discussing the MBCA’s tendency toward bright-line rules).

57. *Gimbel v. Signal Cos.*, 316 A.2d 599, 605 (Del. Ch. 1974), *aff’d*, 316 A.2d 619, 620 (Del. 1974).

58. See *Hollinger Inc. v. Hollinger Int’l, Inc.*, 858 A.2d 342, 376–79 (Del. Ch. 2004) (discussing *Gimbel*); see also *In re Nantucket Island Assocs. Ltd. P’ship Unitholders Litig.*, 810 A.2d 351, 369–72 (Del. Ch. 2002) (noting the “extreme caution” practitioners had to take in planning asset sales because *Gimbel* had departed so starkly from the “substantially all” language of section 271).

When the Delaware courts have addressed a topic, even in a less than optimal way, the Delaware Council tends to be reluctant to codify a different approach. There are two reasons for that reluctance. First and foremost, many topics addressed by corporate common law are difficult ones that have been left for development by the case-by-case common-law method for good reason. Although that method has costs, it allows for low-cost learning and it does not threaten to rigidify a bright-line approach that, given the fallibility of humans, might be wrong.<sup>59</sup> Second, there is some reluctance on the part of the Council to express disagreement with the courts by taking action that could be seen as statutorily overruling a judicial decision.<sup>60</sup>

By contrast, the Committee on Corporate Laws has traditionally viewed as one of its core functions the proposal of more effective statutory approaches to areas of corporate practice that have been less adroitly addressed by the common-law technique. This is precisely what happened when the Committee considered revisions to the MBCA's provisions regarding asset dispositions. The Committee created a task force to review the issue and ultimately adopted new statutory language in 1999.<sup>61</sup> A primary innovation of the 1999 amendments was to refine the asset-disposition test to focus on what the corporation retained, rather than what it sold. Thus, the relevant test became whether the corporation retained a "significant continuing business activity."<sup>62</sup> The 1999 amendments also added much needed clarity by creating a statutory safe harbor<sup>63</sup> and expressly establishing that assets of consolidated subsidiaries were deemed assets of their parent corporation for purposes of the asset-disposition test.<sup>64</sup>

When the MBCA is revised to address a topic covered by Delaware common law, those revisions can provide logical support to Delaware judges who perceive that the existing common-law approach to the topic could use improvement. This is precisely what happened in 2004 when the Delaware Court of Chancery, in part influenced by the MBCA's "valuable perspective on § 271,"<sup>65</sup> refocused the common law on a more faithful reading of section 271's "substantially all" requirement.<sup>66</sup> Moreover, the court cited the MBCA's provision on the treatment of subsidiaries for purposes of its asset-disposition

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59. See Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1268-72 (2001).

60. See Hamermesh, *supra* note 54, at 1771 n.98, 1777-81.

61. See *Fundamental Changes*, *supra* note 52, at 685-86.

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

63. *Id.* (making clear that stockholder approval is not required if the corporation retains a business activity that represented twenty-five percent of net assets at the end of the last fiscal year and twenty-five percent of either income or revenue for that fiscal year).

64. *Id.* § 12.02(h).

65. *Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 386 n.79 (Del. Ch. 2004).

66. See *id.* at 345 ("Has the judiciary transmogrified the words 'substantially all' in § 271 of the Delaware General Corporation Law into the words 'approximately half?'").

test in discussing the somewhat-contradictory Delaware case law on that point.<sup>67</sup> Inspired by *Hollinger* (and ultimately by the MBCA's clarity on the point), Delaware amended section 271 to clarify that assets of a corporation for purposes of that statute include the assets of its wholly owned subsidiaries.<sup>68</sup>

*Hollinger* is not the only example of how the MBCA's deliberative, precision-focused amendments have influenced Delaware law: others include refining the scope of section 145(c)'s mandatory indemnification to exclude employees and agents,<sup>69</sup> and expanding the permitted use of facts-ascertainable provisions in corporate charters.<sup>70</sup>

On occasion, the MBCA's refinements achieve a false, or at least dubious, clarity. One example is the MBCA's universal demand requirement for derivative litigation.<sup>71</sup> Attempting to improve upon Delaware's practice, the MBCA's drafters stated that this requirement "will eliminate the often excessive time and expense for both litigants and the court in litigating the question whether demand is required."<sup>72</sup> This is likely wishful thinking: The same issues litigated in demand futility cases (for example, director disinterestedness and independence) must still be litigated, based on pleadings alone, when the corporation moves to dismiss the derivative proceeding.<sup>73</sup> A second example is the MBCA's Herculean attempt<sup>74</sup> to create a comprehensive, bright-line rule approach to director-conflict transactions. Despite its intense detail, the approach ultimately breaks down in practice and requires the use of judicial discretion in reviewing conflict transactions.<sup>75</sup>

On balance, however, the MBCA and Delaware are good partners in a longstanding symbiotic relationship, as perhaps most vividly illustrated by their recent handling of the issue of majority voting in the election of directors. In

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67. *Id.* at 373 n.35.

68. Act of May 17, 2005, ch. 30, § 28, 75 Del. Laws 21, 24 (adding subsection 271(c)).

69. *See Cochran v. Stifel Fin. Corp.*, No. Civ.A. 17350, 2000 WL 286722, at \*19 (Del. Ch. Mar. 8, 2000) (discussing how Delaware followed the MBCA's lead in amending its mandatory-indemnification provision to exclude employees and agents).

70. *See supra* notes 35–36 and accompanying text.

71. *Derivative Proceedings*, *supra* note 43, at 1241–42; *see also* MODEL BUS. CORP. ACT § 7.42 (2008).

72. *Derivative Proceedings*, *supra* note 43, at 1241–42.

73. *See* MODEL BUS. CORP. ACT § 7.44(a), (c), (d) (2008); *see also* Robert Thompson, *Delaware's Disclosure: Moving the Line on Federal–State Corporate Regulation*, 2009 U. ILL. L. REV. 167, 174 ("The result [of the MBCA's universal demand requirement] is to move the point of judicial review a bit deeper into the litigation, but not necessarily to produce a more determinate result."); Kenneth B. Davis, Jr., *The Forgotten Derivative Suit*, 61 VAND. L. REV. 387, 449 (2008) ("[I]n those cases where the board or an SLC has recommended dismissal, courts applying the MBCA test generally have taken a rigorous approach to assessing the directors' independence and good faith, as well as the reasonableness of their investigation.").

74. MODEL BUS. CORP. ACT §§ 8.60–8.63 (2008).

75. William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L. REV. 95, 120 ("An analysis of the case law, however, suggests that the MBCA's bright-line rules [on director conflict transactions] are not a panacea for the pains of litigation.").

that instance, the MBCA's formal process benefited Delaware and corporate law generally by educating key constituencies (including Delaware's corporate bar) and building national consensus. Responding to calls for mandatory majority voting, the Committee on Corporate Laws formed a task force (co-chaired by Delaware lawyer A. Gilchrist Sparks III, now chair of the Committee on Corporate Laws); issued a "discussion paper" on the subject in June 2005, inviting comments; published a Preliminary Report and Annex in January 2006, inviting further comments; published draft amendments upon "second reading" in March 2006, yet again inviting comments; and adopted the amendments in June 2006.<sup>76</sup> While the MBCA drafters were doing all this, Delaware's drafters—closely following the MBCA's progress—were able to take a quieter and more limited approach, which was adopted into law in August 2006.<sup>77</sup> Judged by adoptions alone, the MBCA's approach has thus far had very limited success: only a few states have adopted its majority-voting approach,<sup>78</sup> while hundreds or perhaps even thousands of companies have taken advantage of Delaware's more open-ended solution.<sup>79</sup> But using adoptions as a measure of success fails to give the MBCA its due: It is questionable whether Delaware's approach would have yielded such dramatic change without the public education generated by the efforts of the MBCA's drafters.

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76. See Comm. on Corporate Laws, ABA Section of Bus. Law, Discussion Paper on Voting by Shareholders for the Election of Directors 17–18 (June 22, 2005), available at <http://www.abanet.org/dch/more.cfm?com=CL270000&mod=10>; Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments to Chapter 8 and 10 Relating to Voting by Shareholders for the Election of Directors*, 61 BUS. LAW. 399, 400–01 (2005); COMM. ON CORPORATE LAWS, ABA SECTION OF BUS. LAW, REPORT OF THE COMMITTEE ON CORPORATE LAWS ON VOTING BY SHAREHOLDERS FOR THE ELECTION OF DIRECTORS 1–2 (Mar. 13, 2006), available at <http://www.abanet.org/dch/more.cfm?com=CL270000&mod=10>; Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendments to Chapter 7 and Related Provisions Relating to Shareholder Action Without a Meeting, Chapters 8 and 10 Relating to Shareholder Voting for the Election of Directors, and Chapter 13 Relating to Appraisal and Other Remedies for Fundamental Transactions*, 61 BUS. LAW. 1427, 1427–28 (2006).

77. Unlike former section 7.28(a) of the MBCA, section 216 of the DGCL had long permitted the bylaws—and thus the stockholders, unilaterally—to vary the default plurality-vote standard. Thus, while the MBCA's 2006 amendments afforded shareholders only a limited new opening to adopt a majority-vote rule, the field was already wide open in Delaware, and Delaware's 2006 amendments merely established (1) the efficacy of an advance director resignation keyed to the shareholder vote on election, and (2) the prohibition against board amendment of a shareholder-adopted majority-vote bylaw.

78. See CONN. GEN. STAT. § 33-809 (2009); IND. CODE § 23-1-39-4 (2009); UTAH CODE ANN. § 16-10a-1023 (2010); WASH. REV. CODE § 23B.10.205 (2009); WYO. STAT. ANN. § 17-16-1023 (2010). Other MBCA states have adopted less-cumbersome provisions that are more akin to the Delaware approach. See, e.g., FLA. STAT. § 607.0728 (2009); GA. CODE ANN. § 14-2-728 (2008); VA. CODE ANN. § 13.1-669 (2007).

79. More than seventy percent of S&P 500 companies have adopted a majority-vote standard. See *Protecting Shareholders and Restoring Public Confidence by Improving Corporate Governance: Hearing Before the Subcomm. on Sec., Ins. & Inv. of the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. (2009) (statement of John J. Castellani, President, The Bus. Roundtable).



## V

## CONCLUSION

The MBCA and Delaware corporate law remain usefully distinct. Driven by circumstance, Delaware innovates; driven by its institutional character, the MBCA restates, refines, and clarifies. The feedback loop between the two bodies of law serves them both well, in ways that their original architects surely never foresaw.