

## Going Private Outside of Delaware? An MBCA Director Raincoat Keeps Board Members Dry \*

### I. *Introduction*

Elon Musk's offer to acquire Twitter, Inc. in a "going private" merger is making news headlines for many reasons, including alleged securities law violations on Musk's part.<sup>1</sup> But another recent going private legal development also merits attention: *Meade v. Christie et al.*,<sup>2</sup> an Iowa Supreme Court decision dismissing shareholder class action claims against directors who approved a going private merger. The *Meade* dismissal was based on a director liability shield patterned on the Model Business Corporation Act ("MBCA") template. As interpreted and applied in *Meade*, the MBCA shield is more protective than the comparable Delaware provision. Equally important, *Meade* answers procedural questions that aren't fully resolved by the MBCA shield text, illustrating key pleading requirements for corporate litigants in cases where director shield defenses apply.

The Iowa director shield statute at issue in *Meade*, sometimes also called a "director raincoat," authorizes corporations to include in their articles of incorporation:

[a] provision eliminating or limiting the liability of a director to the corporation or its shareholders for money damages for any action taken, or any failure to take action, as a director, except liability for any of the following: (1) The amount of a financial benefit received by a director to which the director is not entitled. (2) An intentional infliction of harm on the corporation or the shareholders. (3) A violation of section 490.833 [a provision limiting distributions to shareholders when the corporation would become insolvent as a result]. (4) An intentional violation of criminal law.<sup>3</sup>

These or similar shield laws, in effect in nearly every state,<sup>4</sup> are designed to allow corporate "directors to take business risks without worrying about negligence lawsuits" and thus facilitate "potentially value-maximizing business decisions."<sup>5</sup> Directors are poor risk-bearers, the argument goes; their role is to manage the corporation, not to insure against losses.

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<sup>1</sup> See Reed Albergotti, *Elon Musk delayed filing a form and made \$156 million*, THE WASHINGTON POST (April 6, 2022).

<sup>2</sup> *Meade v. Christie*, 2022 WL 1695586 (Iowa Sup. Ct. May 27, 2022). The case is styled *Meade v. EMC Ins. Grp., Inc.*, No. LACL146098 (Iowa Dist. Ct. filed Oct. 22, 2019), in the Iowa Business Specialty Court where it was originally filed.

<sup>3</sup> IOWA CODE § 490.202(2)(d). See also MODEL BUS. CORP. ACT § 2.02(b)(4) (2016) (the model text for the Iowa director shield). The earliest case law reference using the term "raincoat" for director shield laws is *General Electric Company by Levit v. Cathcart*, 980 F.2d 927, 930 (3d. Cir. 1992). The moniker stuck. See, e.g., Jonathan Macey, *Delaware: Home of the World's Most Expensive Raincoat*, 33 HOFSTRA L. REV. 1131 (2005).

<sup>4</sup> As noted by the drafters of the Model Business Corporation Act: "Most jurisdictions authorize the inclusion of a provision in the articles of incorporation or bylaws that eliminates or limits the personal liability for certain breaches of fiduciary duty." MODEL BUS. CORP. ACT ANN. § 2.02 Statutory Comparison at 2-29 – 2-30 (5<sup>th</sup> ed. 2020).

<sup>5</sup> *Malpiede v. Townson*, 780 A.2d 1075, 1095 (Del. 2001).

A director liability shield is optional, of course. And there are good reasons why a cap on damages might be preferable to total elimination of liability exposure for directors.<sup>6</sup> Yet most corporations, and virtually all publicly traded ones, include a director shield in their articles of incorporation, and most choose provisions that eliminate monetary liability to the maximum extent permitted.<sup>7</sup>

Although raincoat provisions protect directors from damage claims for ordinary “due care” violations, listed exculpation exceptions in shield laws prevent corporations from sheltering directors from damage exposure for more serious misconduct. And the Iowa director liability shield, like its MBCA counterpart in effect in at least 20 states, forbids exculpation for claims based on “intentional infliction of harm on the corporation or the shareholders.”<sup>8</sup> A key holding in *Meade* is that this exception does *not* encompass claims against directors for “conscious disregard” or “intentional dereliction” of duty, an issue no appellate court in Iowa—and no reported opinion from any state that has adopted the MBCA director liability shield—had previously considered.<sup>9</sup> In contrast, Delaware’s raincoat provision permits those same claims against directors under an exception for “acts not in good faith,” an exclusion the MBCA shield omits.<sup>10</sup>

On the procedural front, *Meade* highlights another key distinction between the MBCA and Delaware shield laws. Delaware directors must plead and prove the applicability of a liability shield as an affirmative defense, while the MBCA requires a shareholder or corporate plaintiff to establish that no shield defense precludes director liability.<sup>11</sup> Applying the latter requirement, the *Meade* decision clarifies that plaintiffs aren’t required to initially plead one or more shield exceptions when suing corporate directors, since directors must first “interpose” an MBCA shield defense.<sup>12</sup> But as *Meade* also shows, once directors raise such a defense, whether through a pre-answer dismissal motion or a responsive answer, plaintiffs face a “heightened” pleading requirement that compares claims of director misconduct set out in the petition to exculpation exceptions in the MBCA raincoat. Even in “notice pleading” states like Iowa, absent sufficient factual allegations supporting a shield exception, damage claims against directors will be dismissed without the benefit of discovery, a fate the plaintiff suffered in *Meade*.

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<sup>6</sup> See, e.g., Elizabeth A. Nowicki, *Director Inattention and Director Protection Under Delaware General Corporation Law Section 102(b)(7): A Proposal for Reform*, 33 DEL. J. CORP. L. 695 (2008) (proposing various reforms for director shield laws, including permitting only caps on monetary liability, reasoning that such changes would both protect directors and preserve important incentives to stay focused on responsibilities).

<sup>7</sup> In Delaware, for example, where most Fortune 500 corporations are organized, the vast majority “have a provision in their certificate of incorporation that permits exculpation to the extent provided for by [the Delaware shield law—Del. Gen. Corp. L. § 102(b)(7)].” In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 752 (Del. Ch. 2005). See also Randy J. Holland, *Delaware Directors’ Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 692 (2009) (noting that almost all Delaware corporate charters include director shield provisions).

<sup>8</sup> IOWA CODE § 490.202(2)(d). States using the MBCA model director shield language, or something quite close to it, include Alabama, Arizona, Colorado, the District of Columbia, Hawaii, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, Nebraska, New Hampshire, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Statutory citations are collected in MODEL BUS. CORP. ACT ANN. § 2.02 Statutory Comparison at 2-26 – 2-28 (5<sup>th</sup> ed. 2020). See also Part III(A) and (B), *infra* (discussing shield laws, including Delaware and MBCA variations).

<sup>9</sup> See Part III(C), *infra*.

<sup>10</sup> *Id.*

<sup>11</sup> See Part IV(A) & (B), *infra*.

<sup>12</sup> See Part IV(B).

These director liability issues deserve attention. Securities law changes and other hazards associated with public ownership are prompting many large corporations, including companies chartered outside of Delaware, to consider going private.<sup>13</sup> Delaware corporate law rules governing such transactions are relatively well-settled, but the same is not true elsewhere. For example, a number of courts have tested and refined the Delaware liability shield's application to claims against directors who approve going private mergers.<sup>14</sup> But as indicated above, the text of the MBCA director raincoat differs markedly from its Delaware counterpart and thus poses different interpretative issues. Moreover, disputes about the scope of MBCA shield exceptions, as well as about procedural requirements for defensive use of the shield in pre-trial litigation, will arise in director liability settings other than going private mergers.

This Article is organized as follows. Part II describes the going private merger transaction that triggered the *Meade* litigation. As Part II explains, while non-shareholder constituency statutes sometimes cloud the issue, such provisions don't preclude all claims against directors who approve a going private merger. And if directors don't adequately discharge their duties when making such a decision, or when securing merger approval from disinterested shareholders, important consequences follow for controlling shareholders in both Delaware and MBCA states: deferential business judgment rule standards may not apply when shareholders challenge the transaction, and the MBCA's appraisal remedy may not be exclusive. Thus, cases challenging going private mergers typically focus on alleged fiduciary failures by directors, and the *Meade* case followed that pattern.

Part III considers director defenses available under raincoat provisions and identifies key distinctions between exculpation exceptions in the Delaware and MBCA director liability shields. Focusing on the exclusion at issue in *Meade*, the MBCA's "intentional infliction of harm" shield exception, Part III explains and supports the Iowa Supreme Court's conclusion that claims against directors for "conscious disregard" or "intentional dereliction" of duty don't qualify. Drafting choices reflected in the MBCA shield text, as well as Delaware precedent applying broader "good faith" and "duty of loyalty" exclusions from shield protection, both support a narrower reading of "intentional infliction of harm." In addition, Part III argues, defining director exculpation exceptions with bright lines, as the Iowa court did in *Meade*, helps shield laws accomplish their purpose, especially outside of Delaware.

Part IV turns to procedural rulings in *Meade* that strengthen the protections afforded by the MBCA director raincoat. The most important of these rulings is the Iowa Supreme Court's decision that corporate litigants cannot pursue damage claims against directors based solely on notice pleading allegations of fiduciary duty violations. To the contrary, *Meade* holds, invocation of a shield defense triggers "heightened" pleading rules for those who sue corporate directors. To overcome that defense a plaintiff's petition must include factual allegations of director misconduct that fall within one or more MBCA shield exceptions. Part V concludes.

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<sup>13</sup> See Marc Morgenstern & Peter Nealis, *Going Private: A Reasoned Response to Sarbanes-Oxley?* 3-6 (2004), available at <https://www.sec.gov/info/smallbus/pnealis.pdf> (discussing various reasons public companies might choose to go private).

<sup>14</sup> See Part III(C)(2), *infra*.

## II. *Background*

In order to appreciate the director liability claims at issue in *Meade* and the decisive impact of the MBCA liability shield, some background information is essential concerning the challenged going private transaction and the role corporate directors played in its approval. To that end, this Part II describes the obligations of controlling shareholders in going private mergers and the related role of independent corporate directors, and then considers the alleged director misconduct that triggered the *Meade* litigation.

### A. EMCI and its “Going Private” Merger with EMCC

From 1982 to 2019, EMC Insurance Group, Inc. (“EMCI”) operated as a publicly traded “downstream holding company” for Employers Mutual Casualty Company (“EMCC”).<sup>15</sup> This structure allowed EMCC—an Iowa mutual insurer owned by its policy holders—to access public capital markets as an additional funding source for its insurance and reinsurance business. At the same time, EMCC maintained a majority (54%) ownership stake in EMCI and thus controlled the public company. By late 2018, EMCC determined that this business structure no longer served its purposes for a variety of reasons, and on September 19, 2019, in one of the largest transactions in Iowa history, EMCC acquired EMCI’s publicly traded shares in a cash-out merger for \$36 per share.<sup>16</sup>

Under traditional American corporate law, if minority shareholders challenge going private transactions like the EMCC-EMCI merger, the presence of a controlling shareholder<sup>17</sup> on both sides of the deal requires the controller to establish the merger’s “entire fairness” to minority shareholders by showing both fair dealing and fair price.<sup>18</sup> Modern Delaware precedent recognizes an important exception, however. Under a line of cases that culminated in a 2014 Delaware Supreme Court decision known as “*MFW*,” judges review going private mergers under deferential “business judgment” standards if the transaction was conditioned on approval by: (i) an empowered and independently advised committee of disinterested directors and (ii) a well-

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<sup>15</sup> A mutual insurance company typically forms a stock subsidiary as a “downstream holding company” in order to raise capital by selling the subsidiary’s stock to the public. The funded subsidiary then invests that capital in the mutual company’s insurance operations in exchange for a share of the mutual company’s profits. See Edward X. Clinton, *The Rights of Policyholders in an Insurance Demutualization*, 41 DRAKE L. REV. 657, 667 (1992).

<sup>16</sup> *Employers Mutual Casualty Company Completes Acquisition of All Remaining Shares of EMC Insurance Group, Inc. After Receiving Overwhelming Shareholder Approval*, GLOBE NEWSWIRE (Sept. 19, 2019), available at: <https://www.globenewswire.com/news-release/2019/09/19/1918316/0/en/Employers-Mutual-Casualty-Company-Completes-Acquisition-of-All-Remaining-Shares-of-EMC-Insurance-Group-Inc-After-Receiving-Overwhelming-Shareholder-Approval.html>.

<sup>17</sup> As a 54% shareholder, there was no question that EMCC was EMCI’s controlling shareholder. Depending on how share ownership is dispersed and other factors, an owner with less than a majority share stake in a corporation may also have “controller” status. See, e.g., *Kahn v. Lynch Commc’n. Sys., Inc.*, 638 A.2d 1110, 1113-15 (Del. 1994) (affirming chancery court’s finding that 43% shareholder was a controlling shareholder that owed fiduciary duties).

<sup>18</sup> See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (applying entire fairness review standard to a controlling shareholder cash-out merger); *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107 (Del. Ch. 1952) (same). See generally FRANKLIN A. GEVURTZ, CORPORATION LAW § 7.4.1 at 777-79 (2d ed, 2010). See also note 33, *infra* (collecting authorities).

informed, uncoerced vote by a majority of the minority shareholders.<sup>19</sup> *MFW*'s rationale is that, as with director conflict of interest transactions, exacting judicial scrutiny isn't appropriate if disinterested and informed corporate decisionmakers approved the deal.<sup>20</sup> Thus, when minority shareholders challenge a Delaware corporation's going private merger, if *MFW*'s transaction metrics were satisfied, the shareholders' claim fails unless no rational person could have believed the merger was favorable to minority stockholders—a nearly impossible standard of pleading and proof.<sup>21</sup>

In MBCA jurisdictions like Iowa, MBCA Section 13.40(b)(3) provides an additional reason for a controlling shareholder to carry out a going private merger using the procedures endorsed in *MFW*. If such an “interested transaction” is approved by both disinterested directors and disinterested shareholders in the same manner as the MBCA authorizes for director conflict of interest transactions (i.e., transaction approval metrics similar to those required by *MFW* are satisfied), the statutory appraisal remedy for shareholders precludes legal or equitable proceedings to “enjoin[], set aside or rescind[]” the corporate action.<sup>22</sup> Injunctive and rescissory relief with respect to the merger are thus foreclosed once shareholders have approved the transaction.

The appraisal remedy is not completely exclusive in such cases, however. According to the MBCA commentary, Section 13.40 does not preclude other “remedies ... that shareholders may have against directors or other persons as a result of the corporate action,” apparently permitting shareholder damage actions against directors or controlling shareholders, even if MBCA Section 13.40(b)(3)'s disinterested approval requirements were satisfied.<sup>23</sup> Preserving litigation remedies against directors makes sense as a means to police failures by board members to discharge their fiduciary duties when approving the transaction.

But perhaps the appraisal remedy should be exclusive with respect to claims against a controlling shareholder if disinterested, informed directors and shareholders have approved the transaction as contemplated by Section 13.40(b)(3). Recall that Delaware's business judgment review standards effectively protect controlling shareholders from shareholder damage claims

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<sup>19</sup> *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). *See generally* Itae Fiegenbaum, *The Geography of MFW Land*, 41 DEL. J. CORP. L. 763 (2017). *See also* WACHTELL ET AL., *GOING PRIVATE GUIDE*, 18-40 (2019), <https://www.wlrk.com/files/2019/GoingPrivateGuide.pdf> (discussing entire fairness review standards and related case law on burden-shifting).

<sup>20</sup> *See, e.g.*, MODEL BUS. CORP. ACT §§ 8.60-8.63 (2016); IOWA CODE §§ 490.860-8.63 (providing disinterested director or shareholder approval procedures for director conflict of interest transactions as an alternative to requiring the director to prove the conflicted transaction was fair to the corporation).

<sup>21</sup> *Kahn*, 88 A.3d at 654.

<sup>22</sup> *See* MODEL BUS. CORP. ACT §§ 13.01 (2016) (defining “interested transaction” to include transactions between a corporation and an “interested person,” a term that encompasses a shareholder who holds more than twenty percent of corporation's voting power) and 13.40(a) & (b)(3) (providing that the shareholder's statutory appraisal remedy precludes legal or equitable proceedings to “enjoin[], set aside or rescind[]” the corporate action, except for “an interested transaction, unless it has been recommended by the board of directors in the same manner as is provided in section 8.62 and has been approved by the shareholders in the same manner as is provided in section 8.63 as if the interested transaction were a director's conflicting interest transaction”). The equivalent Iowa provisions are IOWA CODE §§ 490.1301(6) and 490.1340(1) & (2)(c).

<sup>23</sup> MODEL BUS. CORP. ACT § 13.40, cmt. (2016) (“Section 13.40 addresses challenges only to the corporate action and does not address remedies, if any, that shareholders may have against directors or other persons as a result of the corporate action ...”).

when *MFW* transaction metrics are satisfied.<sup>24</sup> In a state that has adopted the MBCA's current appraisal remedy scheme, including Section 13.40, courts could easily accomplish a similar result by precluding damage claims against controlling shareholders for an interested transaction that satisfied Section 13.40(b)(3)'s disinterested approval requirements.

For the reasons outlined above, Delaware's *MFW* deal pattern is a useful template for most going private mergers.<sup>25</sup> And not surprisingly, although EMCI was incorporated under Iowa rather than Delaware law, EMCC structured negotiation and approval of its acquisition of the minority public stake in EMCI along these lines. EMCI was represented in merger negotiations over a period of several months by a committee comprised of EMCI's independent (i.e., non-EMCC employee) directors, assisted by an independent advisory firm. The final \$36 price for each EMCI public share was an increase negotiated by the committee from EMCC's initial \$30 offer, and shareholder approval was conditioned on favorable votes by a majority of the publicly traded (i.e., non-EMCC held) EMCI shares following proxy disclosures required under federal securities laws.<sup>26</sup> Based on recommendations from the committee and its adviser, EMCI's public shareholders overwhelmingly approved the merger on those terms.<sup>27</sup>

## B. The *Meade* Litigation

Like most such transactions, EMCI's going private merger also prompted litigation, including *Meade v. EMC Insurance Group, Inc.*, a shareholder class action.<sup>28</sup> Meade, an EMCI shareholder, alleged EMCC's going private merger unfairly deprived EMCI's public shareholders of the true value of their shares (alleged to be as much as \$50) and thus breached EMCC's fiduciary duties as majority shareholder.<sup>29</sup> The \$36 merger share price EMCI directors and shareholders approved, Meade further alleged, was the result of a flawed negotiation and approval process conducted by the EMCI directors in breach of their fiduciary duties.<sup>30</sup>

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<sup>24</sup> *Kahn*, 88 A.3d at 654 (explaining that if *MFW*'s transaction metrics are satisfied and thus trigger application of the business judgment rule, the shareholder claims against the controlling shareholder fails unless no rational person could have believed the merger was favorable to minority stockholders—a nearly impossible standard of pleading and proof). *See also supra* note 21 and accompanying text.

<sup>25</sup> WACHTELL, *supra* note 19, at 21-25 (discussing *MFW* and related case law).

<sup>26</sup> For complete details of the transaction history, see EMC Insurance Group, Inc. Proxy Statement (August 2019) as filed with the U.S. Securities Exchange Commission. Available at: <https://www.sec.gov/Archives/edgar/data/356130/000104746919004645/a2239424zdefm14a.htm>.

<sup>27</sup> *See* note 16, *supra*.

<sup>28</sup> *Meade v. EMC Ins. Grp., Inc.*, Case No. LACL146098 (Iowa Dist. Ct. filed Oct. 22, 2019). Two related suits failed on technical grounds. *Shepard v. Emp.'s Mut. Cas. Co.*, 998 F.3d 330 (8th Cir. 2021) (concluding that direct claims brought against EMCC and its directors by Shepard, a 5% EMCI shareholder, were derivative claims belonging to EMCI and affirming dismissal); and *EMC Ins. Grp., Inc. v. Shephard*, 960 N.W.2d 661 (Iowa 2021) (affirming summary judgment for EMCI in an appraisal action filed by 5% shareholder based on shareholder's failure to timely provide consent of the record owner of the shares).

<sup>29</sup> *Meade v. EMC Ins. Grp., Inc.*, Case No. LACL146098 (Iowa Dist. Ct.), Orders re: Motion to Dismiss at pp. 7-8, 32 (summarizing allegations in Plaintiff's petition) (available at [https://www.iowacourts.gov/static/media/cms/Order\\_Mot\\_Dismiss\\_Meade\\_v EMC\\_17DEB5D08C6A7.pdf](https://www.iowacourts.gov/static/media/cms/Order_Mot_Dismiss_Meade_v EMC_17DEB5D08C6A7.pdf)) [hereinafter "*Meade* Dismissal Order"].

<sup>30</sup> *Id.* These claims, and the director defenses later raised against them, follow the same pattern or "rhythm" that has emerged in Delaware shareholder litigation over going private mergers:

In the realm of Delaware post-closing shareholder litigation, over the past seven years, a rhythm has emerged in the assertion of claims and defenses as our courts have clarified and refined the application of standards

## 1. Controlling Shareholder Claims

A pre-trial ruling by the Iowa Business Specialty Court (an Iowa district court designated to try complex business and commercial disputes) dismissed claims against EMCC as controlling shareholder on the theory that, under Iowa law, majority shareholders owe fiduciary duties only in the closely held corporation setting.<sup>31</sup> That ruling is understandable because much of American corporate law's "majority shareholder as fiduciary" jurisprudence has developed in the context of close corporation disputes, and Iowa is no exception.<sup>32</sup>

That is not to say the pre-trial ruling was correct. American courts have recognized fiduciary duties for controlling shareholders both within and outside of the close corporation setting.<sup>33</sup> In fact, this principle is sufficiently well-settled that a "controlling shareholder as fiduciary" fact pattern was the basis for the *Corporation & LLCs* Question on the MultiState Essay Bar Examination in July 2019.<sup>34</sup>

The reason courts recognize fiduciary duties for controlling shareholders is simple. Consider the situation where such a shareholder stands on both sides of a corporate transaction. Because the

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for reviewing fiduciary conduct. In hopes of securing more rigorous judicial scrutiny of fiduciary conduct, stockholders invoke the sounds of minority blockholders who act as if they are controlling stockholders, fiduciary decisionmakers who are overcome by allegiances to the controller, and stockholders who are coerced to sell their shares while starved of accurate and complete information. In hopes of securing more judicial deference to fiduciary decision making, defendants invoke the sounds of passive minority blockholders and presumptively disinterested, independent (and often exculpated) fiduciaries who have faithfully served fully informed, uncoerced stockholders. When laid down on the same track, the sounds can be perceived as noise. But to the accustomed ear, there is rhythm.

In re GGP, Inc. Stockholder Litig., 2021 WL 2102326, \*1 (Del. Ch. 2021).

<sup>31</sup> *Meade* Dismissal Order, *supra* note 29, at 41-48. For an explanation of Iowa's Business Specialty Court and its jurisdiction, see MATTHEW G. DORÉ, 6 IOWA PRACTICE—BUSINESS ORGANIZATIONS § 39:1 (Thomson Reuters 2021-22 ed.).

<sup>32</sup> See generally F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS (2d. rev. ed. 2004 and Supps.). Thus, both Iowa case law and statutes protect minority shareholders from overreach by majority shareholders in close corporations. See generally DORÉ, *supra* note 31, §§ 31:10-31:11. See also Matthew G. Doré et al., *How You Gonna Keep 'Em Down on the Farm after Baur v. Baur Farms, Inc.? An Analysis and Defense of the "Reasonable Expectations" Standard for Iowa Oppression Cases*, 18 DRAKE J. AGRIC. L. 429 (2013).

<sup>33</sup> The leading cases are from Delaware (see note 18, *supra*), but courts in other states have reached the same conclusion. See, e.g., *Data Key Partners v. Permira Advisors LLC*, 837 N.W.2d 624, 636-39 (Wis. Ct. App. 2013) (allegations in minority shareholder's complaint stated a claim for breach of fiduciary duty against majority shareholders of public corporation); *Leader v. Hycor, Inc.*, 479 N.E.2d 173 (Mass. 1985) (holding majority shareholders' fiduciary duties to minority shareholders in a public company did not forbid a recapitalization transaction initiated by the majority, but remanding for a determination whether minority shareholders received fair value). See also *Howing Co. v. Nationwide Corp.*, 927 F.2d 263, 269-70 (6th Cir. 1991) (declining to reach question whether Ohio law imposed disclosure duties on majority shareholder as a corporate fiduciary in a going private merger because federal securities law already imposed those same duties). Cf. *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464 (Cal. 1969) (majority shareholders breached fiduciary duty to minority by transferring their control block in savings and loan association to holding company to create a market for shares). See generally WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §§ 5810-5811 (available on Westlaw as FLETCHER-CYC).

<sup>34</sup> See NATIONAL CONFERENCE OF BAR EXAMINERS, MULTI-STATE ESSAY EXAMINATION QUESTION 3 CORPORATIONS AND LLCs (July 2019).

controller has both the power to appoint the corporation's board and majority voting power at the shareholder level, the controller can cause the corporation to consent to transactions that direct disproportionate benefits to the controller at the expense of minority shareholders.<sup>35</sup> While that danger is particularly acute in closely held corporations, where shareholders have no ready exit rights, similar risks can arise in public corporations.

EMCC's going private merger with EMCI, where a sale to other bidders was not an option that EMCC was willing to consider, is a classic example. If a controller like EMCC can effectuate its going private transaction without meaningful judicial review, public share trade results for EMCI might simply reflect the controller's offering price, whether fair or not, leaving dissenting shareholders with statutory appraisal actions as the sole remedy.<sup>36</sup> The appraisal remedy is not without force, particularly under the MBCA, which allows appraisal suits by public company shareholders in the context of conflict of interest transactions.<sup>37</sup> But as shareholders of EMCI discovered following the EMCC merger, pursuing the appraisal remedy, an intricate ten-step *pas de deux* between corporation and shareholder, is complex.<sup>38</sup> And as a practical matter, given the cost of procuring expert witness testimony on valuation, appraisal is a meaningful option only for shareholders with significant ownership stakes.<sup>39</sup>

As explained in Part II(A), under MBCA Section 13.40(b)(3), the appraisal remedy is intended to be exclusive, or nearly so, and thus prevents injunctive relief with respect to "interested transactions," like mergers with controlling shareholders if the transaction was secured through approval by both informed, disinterested directors as well as by disinterested shareholders who received meaningful disclosure.<sup>40</sup> As suggested in Part II(A), it might also be appropriate to preclude shareholder class claims seeking "fair value" damages from the controller if that process was followed.<sup>41</sup> In the absence of an objectively fair approval process, however, courts can and should balance the scales by applying fiduciary standards to majority shareholders, with an accompanying burden to show that merger terms were, in fact, fair.

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<sup>35</sup> See Fiegenbaum, *supra* note 19, at 71-72 (describing "[m]yriad methods ... though which unscrupulous control[ing shareholders] can extract a disproportionate level of corporate value [from minority shareholders]").

<sup>36</sup> Under some state corporation codes, the appraisal remedy may be exclusive even when a controlling shareholder takes the company private. See, e.g., *Sifferle v. Micom Corp.*, 384 N.W.2d 503 (Minn. Ct. App. 1986) (interpreting Minnesota's appraisal statute as the exclusive remedy for a going private freeze-out merger). As discussed in the text accompanying note 22, *supra*, the MBCA's current appraisal scheme, which Iowa has adopted, contemplates a different result. The appraisal remedy is exclusive for an "interested transaction" by a controlling shareholder only if the transaction has been approved by both disinterested directors and disinterested stockholders.

<sup>37</sup> See MODEL BUS. CORP. ACT § 13.02(b)(4) (2016) (preserving appraisal rights for publicly traded shares "where the corporate action is an interested transaction"). Commentators have praised the MBCA appraisal remedy, which Iowa has adopted, as a marked improvement over its Delaware counterpart. See, e.g., Mary Siegel, *An Appraisal of the Model Business Corporation Act's Appraisal Remedy*, 74 L. & CONTEMP. PROBS. 231 (2011); Robert B. Thompson, *The Case for Iterative Statutory Reform: Appraisal and the Model Act*, 74 L. & CONTEMP. PROBS. 253 (2011).

<sup>38</sup> See MODEL BUS. CORP. ACT §§ 13.03, 13.20-13.31 (2016) and IOWA CODE §§ 490.1303, 490.1320-1331. Missteps are easy, even for well-advised shareholders. See *EMC Ins. Grp., Inc. v. Shephard*, 960 N.W.2d 661 (Iowa 2021) (affirming summary judgment for EMCI in an appraisal action filed by 5% shareholder based on shareholder's failure to timely provide consent of the record owner of the shares).

<sup>39</sup> See, e.g., Edmund Mantell & Edward Shea, *Development and Application of Business Valuation Methods by Delaware Courts*, 17 HASTINGS BUS. L. J. 335, 336 (2021) (noting that in Delaware appraisal litigation "attorneys for the parties call expert witnesses who are often leaders in the field of business valuation").

<sup>40</sup> See *supra* notes 22-23 and accompanying text.

<sup>41</sup> See *supra* notes 23-24 and accompanying text.

## 2. Director Claims

Meade also brought breach of fiduciary duty claims against the EMCI directors. The petition alleged that the directors: (i) should have rejected EMCC's merger offer as inadequate; (ii) failed to include pertinent information in the shareholder proxy statement describing the offer; (iii) failed to properly inform themselves about EMCI's valuation and related expert opinions; (iv) failed to disclose another shareholder's interest in making a competing offer; and (v) generally engaged in a conflicted and flawed process that resulted in an inadequate merger price.<sup>42</sup> The Iowa Business Specialty Court appropriately treated these claims as duty of care rather than duty of loyalty claims, because the going private merger was not a conflict of interest transaction for the four independent directors who negotiated and approved the merger on EMCI's behalf.<sup>43</sup>

### a. The Derivative Claim Defense

The Iowa Business Specialty Court refused the directors' request to dismiss the shareholder class claims for failure to follow Iowa derivative suit procedures.<sup>44</sup> The directors based their argument on Iowa Business Corporation Act ("IBCA") Section 490.1108A, Iowa's non-shareholder constituency statute. Like similar laws in other states, this provision allows directors to consider the interests of corporate constituencies other than shareholders when evaluating an acquisition proposal.<sup>45</sup> IBCA Section 490.1108A goes further than most constituency statutes, however: it permits directors to *subordinate* shareholder interests to those of other corporate constituencies.<sup>46</sup> If Iowa law imposes no duty to maximize shareholder value in the acquisition setting, the directors argued, there could be no breach of that duty and no direct suit by minority shareholders like Meade, even if EMCC, as controlling shareholder, paid an unfairly low price in the going private merger. The argument has surface appeal and has been accepted by at least one state supreme court.<sup>47</sup>

Because the director shield defense proved dispositive in the *Meade* appeal (see Part III below), the Iowa Supreme Court declined to consider the derivative suit argument. But for reasons this Author has explored in more detail elsewhere, the Iowa Business Specialty Court properly rejected the directors' contention. The argument was, in essence, that Iowa's non-shareholder constituency

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<sup>42</sup> See *Meade* Dismissal Order, *supra* note 29, at 32 (summarizing allegations in Plaintiff's petition).

<sup>43</sup> In contrast, EMCI's remaining director, Bruce Kelley, who was both a director and CEO of EMCC, was conflicted. Kelley addressed that conflict by recusing himself from participating in the merger approval on EMCI's behalf, and the Iowa Business Specialty Court dismissed all claims against him for that reason. *Id.* at 39-41.

<sup>44</sup> *Id.* at 13-23.

<sup>45</sup> IOWA CODE § 490.1108A ("A director, in determining what is in the best interest of the corporation when considering a ... merger ... or similar proposal, may consider any or all of the following community interest factors ..."). Listed factors include "[t]he effects of the action on the corporation's employees, suppliers, creditors, and customers." For a more detailed discussion of Section 490.1108A, see DORÉ, *supra* note 31, § 28:9.

<sup>46</sup> IOWA CODE § 490.1108A(2) ("... Consideration of any or all of the community interest factors is not a violation of the business judgment rule or of any duty of the director to the shareholders, ... even if the director reasonably determines that a community interest factor or factors outweigh the financial or other benefits to the corporation or a shareholder or group of shareholders.").

<sup>47</sup> *Int'l Bhd. Elec. Workers Local No. 129 Benefit Fund v. Tucci*, 476 Mass. 553, 557-64, 70 N.E.3d 918, 922-28 (2017). The decision has been severely criticized. See JAMES D. COX AND THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 15:3 (3d ed. Dec. 2021 update) (calling the decision "startling") (available on Westlaw).

statute transforms any shareholder challenge to the fairness of a merger from a direct claim into a derivative claim.<sup>48</sup> The argument is overbroad and, as applied to the *Meade* facts, is flawed for a simple reason: a non-shareholder constituency statute is irrelevant when a controlling shareholder of a downstream holding company effectuates a going private merger, as EMCC did with respect to EMCI. EMCI's only purpose was to provide equity funding from its shareholders to EMCC in exchange for an appropriate return on that investment. EMCI thus had no constituency other than its shareholders. For such a company the controller's going private merger is nothing more than a forced buyout of public minority shareholders' ownership stake at the stated merger price. That buyout, accomplished through a corporate transaction in which the target corporation has no interest, will injure only minority shareholders if the approval process is defective (e.g., shareholders don't get accurate information before voting on the deal) or if the cash-out merger price is unfair.

#### b. The Director Shield Defense

The Article now turns to the defense that proved successful for the directors in *Meade*: that if they did fail to exercise sufficient care when negotiating and approving EMCC's merger offer, EMCI's director raincoat provision fully exculpated the resulting fiduciary violations. *Meade* overcame the shield defense at the pre-trial dismissal phase by arguing that the failures outlined in his petition alleged the directors had "*intentionally* failed to act in the face of a known duty to act, thus demonstrating *conscious disregard* for their duties."<sup>49</sup> The Iowa Business Specialty Court concluded that, if true, such claims fell within Iowa's director liability shield exclusion for "intentional infliction of harm" by a director.<sup>50</sup> The Iowa Supreme Court authorized an interlocutory appeal to consider this issue, as well as the derivative suit defense discussed above.<sup>51</sup>

### III.

#### *The Director Liability Shield Defense and the Limits of the "Intentional Infliction of Harm" Shield Exception*

##### A. Historical Background

*Smith v. Van Gorkom*, the Delaware Supreme Court's famous—or infamous—1985 decision, withheld business judgment rule protection and imposed liability on directors who had hastily approved the cash-out merger of a prominent national corporation.<sup>52</sup> The case reportedly sent shock waves through the American business community, prompting resignations on the part of some directors and causing others to decline service.<sup>53</sup> Because the ruling came at a time when director and officer ("D & O") insurance had become both less protective and more expensive, the

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<sup>48</sup> DORÉ, *supra* note 31, § 39:5.

<sup>49</sup> *Meade* Dismissal Order, *supra* note 29, at 32 (emphasis in original).

<sup>50</sup> *Id.* at 32-33.

<sup>51</sup> *Meade v. Christie*, 2022 WL 1695586, \*1 (Iowa Sup. Ct. May 27, 2022).

<sup>52</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (overruled on other grounds by, *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009)). The court declined to apply the business judgment rule because it concluded that the board was not adequately informed about the transaction or the corporation's intrinsic value when it approved the merger.

<sup>53</sup> Robert W. Hamilton, *Reliance and Liability Standards for Outside Directors*, 24 WAKE FOREST L. REV. 5, 28-29 (1989).

threat of liability suddenly appeared very real for corporate directors.<sup>54</sup>

The resulting “crisis,” real or imagined, also prompted legislation.<sup>55</sup> First Indiana, then Delaware amended their respective corporation codes to reduce liability exposure risks for directors.<sup>56</sup> Indiana raised the standard of liability necessary to recover damages from directors, and Delaware authorized corporations to add an optional certificate of incorporation provision limiting or eliminating directors’ liability for damages in certain breach of fiduciary duty cases.<sup>57</sup> The Delaware model proved more popular, and nearly all states, including Iowa in 1987, amended their business organization codes to authorize corporations to adopt director liability shields.<sup>58</sup> Effective January 1, 2003, Iowa replaced its original Delaware-style raincoat provision with the MBCA model quoted in the Introduction to this Article.<sup>59</sup>

A director liability shield is noteworthy in several respects. For example, because a raincoat provision precludes claims for gross negligence by directors, the armor a shield provides is stronger than that afforded by the business judgment rule. As a case law doctrine, the metes and bounds of business judgment protection are at best uncertain, and the rule may not apply when directors are grossly negligent in assembling information before making a business decision.<sup>60</sup> Shield laws are intended to be more protective of directors.

A director raincoat might also offer better protection than traditional devices that reduce risk for directors, like indemnification and D & O insurance. Indemnification rights vary depending on the director’s success in defending an action, on whether the claim asserted is the corporation’s claim, and on other factors.<sup>61</sup> D & O insurance protection depends on the coverage provided and on the corporation’s ability to buy it.<sup>62</sup> In contrast, if a corporation includes director raincoat language in its original or amended articles, that provision either eliminates or limits directors’ liability exposure for monetary damages for many future fiduciary duty claims.

What happens at that point—are the corporation and its shareholders totally without remedies

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<sup>54</sup> BRIAN SABIA ET AL., D&O: WHAT TO KNOW at 12 (2016) (available online at [https://www.partnerre.com/opinions\\_research/do-what-to-know/](https://www.partnerre.com/opinions_research/do-what-to-know/)) (stating that for D&O policies in the mid to late-1980s “[renewal premium] increases were in excess of 200%,” and that “deductibles increased dramatically, coverage became more restrictive, and policy limits were reduced”).

<sup>55</sup> See generally James J. Hanks, Jr., *Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS.LAW. 1207 (1988) (surveying state laws enacted to protect directors). Whether there really was a director liability “crisis” is subject to debate. See, e.g., Elizabeth A. Nowicki, *Not in Good Faith*, 60 SMU L. REV. 441, 471-81 (2007) (arguing that both haste and scant legislative history suggest that the Delaware director liability shield law was an unnecessary piece of reactionary legislation).

<sup>56</sup> Hanks, *supra* note 55, at 1209 (“The first state to respond to the developments of the mid-1980s was Indiana, in April 1986, followed by Delaware in June.”).

<sup>57</sup> See IND. CODE § 23-1-35-1(e) (directors exposed to liability only for “willful misconduct or recklessness”); DEL. CODE ANN. TIT. 8 § 102(b)(7) (authorizing inclusion of a provision in the certificate of incorporation limiting or eliminating director liability for damages, but subject to certain exceptions).

<sup>58</sup> Hanks, *supra* note 55, at 1210 (noting that Delaware’s “charter option” was “the most popular form of director liability statute[s]”). Iowa initially copied the Delaware shield in Iowa Code § 496A.49 and, in 1989, reenacted that provision as Iowa Code Section 490.832.

<sup>59</sup> IOWA CODE § 490.202(2)(d). See *supra* note 3 and accompanying text.

<sup>60</sup> For a discussion of Iowa’s business judgment rule jurisprudence, see DORÉ, *supra* note 31, §§ 28:6 & 28:7.

<sup>61</sup> *Id.*, §§ 28:15-28:21 (discussing director indemnification under the Iowa Business Corporation Act).

<sup>62</sup> See generally SABIA, *supra* note 54.

for breach of duty by directors? Not quite. The shield applies to monetary damage claims, *not* to director fiduciary duties. Thus, an action against directors seeking something other than monetary damages based on breach of duty (e.g., injunctive relief) is still possible.<sup>63</sup> Even more important, *exclusions* from permissible exculpation are built into shield laws.

B. Exclusions For Intentional Violations of Criminal Law, For Illegal Distributions, and For a Director's Receipt of a "Financial Benefit" to Which the Director Was "Not Entitled"

Like its MBCA counterpart, exclusions in the IBCA shield preserve claims against directors based on "[a]n intentional violation of criminal law" or for "violation of section 490.833"—an illegal distribution to shareholders.<sup>64</sup> The first category of conduct is non-exculpable for obvious reasons. Forbidding exculpation for illegal dividends makes sense as well, since restrictions on distributions are designed to protect creditor interests, not corporate or shareholder welfare.<sup>65</sup>

While the Delaware director liability shield also forbids exculpation for breaches of the "duty of loyalty," IBCA Section 490.202(2)(d)—like its MBCA counterpart—omits that exception.<sup>66</sup> And at first glance, permitting exculpation for such violations is disturbing. A director's duty of loyalty—the obligation to put the corporation's interests ahead of the director's own interests—is the most basic fiduciary duty a director owes. Why should violations be exculpable?

But the MBCA / IBCA shield does exclude exculpation for "[t]he amount of a financial benefit received by a director to which the director is not entitled."<sup>67</sup> And as made clear in the MBCA Official Comments, this language authorizes duty of loyalty claims by a corporation or its shareholders if the director has benefitted financially from breach of that duty.<sup>68</sup> The exception therefore permits suits *to recapture profits* a director earns from competition with the corporation, from a conflicting interest transaction, or from misappropriation of a business opportunity—all classic duty of loyalty prohibitions.<sup>69</sup> But because such excepted claims recoup only improper director gains that result from duty of loyalty transgressions and similar violations, the damages owed are likely to be modest, at least when compared to damages that might result from director errors in decision-making or oversight (duty of care claims).

To put the latter in perspective, in *Meade* the plaintiff alleged EMCi might have obtained a

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<sup>63</sup> MODEL BUS. CORP. ACT § 2.02, cmt. E (2016) (stating that "[director shield protection] does not apply to equitable relief").

<sup>64</sup> See IOWA CODE § 490.202(2)(d)(3) & (4); MODEL BUS. CORP. ACT § 2.02(b)(4)(iii) & (iv) (2016).

<sup>65</sup> For a discussion of the IBCA's limits on corporate distributions to shareholders, see DORÉ, *supra* note 31, §§ 30:4-30:8.

<sup>66</sup> Compare DEL. CODE ANN. TIT. 8 § 102(b)(7) with MODEL BUS. CORP. ACT § 2.02(b)(4) (2016) and IOWA CODE § 490.202(2)(d).

<sup>67</sup> See MODEL BUS. CORP. ACT § 2.02(b)(4)(i) (2016); IOWA CODE § 490.202(2)(d)(1) (emphasis supplied).

<sup>68</sup> See MODEL BUS. CORP. ACT, § 2.02 (2016), cmt. E.

<sup>69</sup> The MBCA drafters indicate that this shield exclusion term is left for "judicial development" and list, as an example, a director who misappropriates a corporate opportunity. *Id.* If such conduct has occurred, the director has received a "financial benefit ... to which the director is not entitled" (non-shieldable conduct) and should thus respond in damages. And a similar result should follow if the director benefits financially from misappropriation of corporate property, improper competition with the corporation, or a conflicting interest transaction. For a discussion of these fiduciary claims under Iowa law, see DORÉ, *supra* note 31, §§ 28:10-28:12.

merger price as high as \$50 if the directors had properly discharged their duties.<sup>70</sup> If valid, such a claim would have produced damages of \$14 per share for the 9.9 million public shareholders of EMCI—roughly \$139 million. The MBCA’s carefully tailored “[improper] financial benefit” exception from exculpation is thus consistent with an overarching policy goal of reducing excessive financial exposure risks for directors while preserving fundamental fiduciary duty principles like the duty of loyalty.

As explained in Part II(B)(2) above, the *Meade* case did not involve credible allegations that the defendant directors engaged in duty of loyalty violations.<sup>71</sup> But other director liability suits over going private mergers may bear out the significance of the MBCA drafters’ decision to use an “improper financial benefit” exculpation exclusion rather than one for the duty of loyalty. In Delaware, the latter exception from exculpation prevents courts from dismissing claims based on conflicting loyalties by directors who approved a corporate merger, even if the directors themselves reaped no financial benefit from the transaction.<sup>72</sup> But the same will not be true for a corporation that has adopted a raincoat provision protecting directors to the fullest extent permitted by the MBCA.

### C. The Shield Exclusion For “Intentional Infliction of Harm on the Corporation or its Shareholders”

The meaning of the remaining shield exception, for claims based on a director’s “*intentional infliction of harm on the corporation or its shareholders*,” is a bit less clear. Rarely will case facts support claims that directors intended to harm the corporation or shareholders, but allegations that directors failed to sufficiently discharge their duties—and in some cases, egregiously so—are commonplace. For example, the *Meade* complaint alleged that the independent directors who evaluated, negotiated and recommended EMCC’s going private merger to EMCI shareholders: (i) should have rejected the merger offer as inadequate; (ii) failed to include pertinent information in the shareholder proxy statement describing the offer; (iii) failed to properly inform themselves about EMCI’s valuation and related expert opinions; (iv) failed to disclose another shareholder’s interest in making a competing offer; and (v) generally engaged in a conflicted and flawed process that resulted in an inadequate merger price.<sup>73</sup>

When the EMCI directors asserted the shield defense as a basis for their motion to dismiss, Meade successfully argued to the Iowa Business Specialty court that the above-listed failures fit the “intentional infliction of harm” exclusion because they showed the directors “*intentionally* failed to act in the face of a known duty to act, thus demonstrating *conscious disregard* for their duties.”<sup>74</sup> The Iowa Supreme Court’s *Meade* decision declined to read “intentional infliction of harm” this broadly, however. The following paragraphs explore and support the court’s reasoning.

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<sup>70</sup> *Meade v. Christie*, 2022 WL 1695586, at \*6 (Iowa Sup. Ct. May 27, 2022).

<sup>71</sup> See *supra* note 43 and accompanying text.

<sup>72</sup> See, e.g., *In re Pattern Energy Group Inc. S’holder. Litig.*, 2021 WL 1812674, at \*46-58 (Del. Ch. 2021) (applying Delaware’s “duty of loyalty” and “not in good faith” exceptions from exculpation and declining to dismiss claims against directors because it was “reasonably conceivable that the Special Committee favored [bidders based on] ‘inappropriate’ reasons that undermined the interests of the stockholders”).

<sup>73</sup> See *Meade* Dismissal Order, *supra* note 29, at 32 (summarizing allegations in Plaintiff’s petition).

<sup>74</sup> *Id.* (emphasis original). See also Final Brief for Appellee, at 60-69, *Meade v. Christie*, Iowa Sup. Ct. No. 21-0098, <https://www.iowacourts.gov/courtcases/14381/briefs/4681/embedBrief>.

# 1. The MBCA's "Intentional Infliction of Harm" Exception Targets More Serious Director Misconduct Than Delaware's "Not in Good Faith" Exception

To put the interpretative issue in context, it is instructive that Delaware law, like the IBCA's original director liability shield, forbids exculpation of directors for "*acts or omissions not in good faith or which involve intentional misconduct.*"<sup>75</sup> And the Delaware Supreme Court, construing the "not in good faith" portion of this exclusion in *In re Walt Disney Co. Derivative Litigation* in 2006, stated that non-exculpable acts include both "conduct motivated by an actual intent to do harm" (subjective bad faith) as well as lesser forms of bad faith, like a director's "*conscious disregard for ... responsibilities*" or "*intentional dereliction of duty.*"<sup>76</sup>

The distinctions drawn in *Disney* proved critical to the Iowa Supreme Court's interpretation of the "intentional infliction of harm" shield exclusion in *Meade*. Reversing the Iowa Business Specialty Court's ruling that "conscious disregard" or "intentional dereliction" of duty can constitute "intentional infliction of harm" for purposes of the MBCA / IBCA director raincoat, the Iowa Supreme Court noted: "In contrast to Delaware's statute, Iowa's director shield statute includes *no* exception enabling liability for 'acts not in good faith.'" <sup>77</sup> And as the court recognized, it is the "not in good faith" exclusion that forms the statutory predicate for the "conscious disregard" and "intentional dereliction of duty" shield exceptions *Disney* and other Delaware decisions have recognized.<sup>78</sup>

The *Meade* court also found support in the MBCA's Official Comments discussing the "intentional infliction of harm" standard, which the court quoted:

The use of the word 'intentional,' rather than a less precise term such as 'knowing,' is meant to refer to the specific intent to perform, or fail to perform, the acts with actual knowledge that the director's action, or failure to act, *will cause harm ...*."<sup>79</sup>

Applying this intentional infliction of harm standard to the alleged director misconduct in *Meade*, the Iowa Supreme Court concluded that the allegations in *Meade*'s petition were "insufficient." The court explained:

The bulk of the allegations ... recite failures to perform duties or incompetent performance, none of which suffices. *Meade*'s allegations that the directors consciously disregarded their duties is similarly insufficient. The statute, in short, requires a plaintiff to show a director's specific intent to harm the corporation or its shareholders, as opposed to recklessness or dereliction in performing (or failing to perform) their duties. The statute sets a high bar, no doubt; but its

<sup>75</sup> DEL. CODE ANN. TIT. 8 § 102(b)(7).

<sup>76</sup> *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 62–68 (Del. 2006) (emphasis supplied). Although the court stated that acts "not in good faith" could encompass a range of director misconduct, the court refused to hold that the director misconduct at issue—grossly negligent approval of a disastrous CEO employment contract—so qualified.

<sup>77</sup> *Meade v. Christie*, 2022 WL 1695586, \*17 (Iowa Sup. Ct., May 27, 2022).

<sup>78</sup> *Id.* ("Under Delaware law, actions that amount to 'conscious disregard for responsibilities' or 'intentional dereliction of duty' fall under Delaware's 'bad faith' exception to the director shield—not under the statute's 'actual intent to do harm' exception.").

<sup>79</sup> *Id.*, citing MODEL BUS. CORP. ACT § 2.02, cmt. E. (2016).

elevated placement has been determined by the legislature in its choice of language.<sup>80</sup>

In this Author's view, the Iowa Supreme Court properly recognized that the intent standard contemplated by the MBCA's "intentional infliction of harm" exception is more protective of directors than Delaware's "not in good faith" standard. The latter, like corporate and securities law scienter standards generally, can be satisfied by a showing of recklessness or conscious disregard on a director's part.<sup>81</sup> But the MBCA drafters crafted the statute's director raincoat, Section 2.02(b)(4), with Delaware Section 102(b)(7) as an obvious model and excluded both the "not in good faith" and "duty of loyalty" exceptions. As one commentator has explained, the apparent concern was that creative litigants could easily re-cast claims based on honest errors in director oversight or decision-making (appropriately exculpable duty of care claims) as breaches of open-ended duties like good faith or loyalty.<sup>82</sup>

And there is good reason to draw exculpation lines more precisely, especially outside of Delaware. To the extent Delaware Section 102(b)(7) shield exceptions are vague or ambiguous, the constant stream of corporate litigation in chancery and appellate courts will inevitably clarify the contours of director exculpation. In fact, and as discussed further below, the Delaware courts have significantly narrowed the "not in good faith" exception over the last few decades and thus extended broader liability protections to directors. But *outside* of Delaware, relatively few director liability claims are litigated and fewer still ever reach state appellate courts.

If exculpation is to achieve its intended purpose—to provide flexibility for director decisions without unreasonable attendant liability risks—clear lines are needed. Thus, as described in Part III(B) above, the drafters of MBCA Section 2.02(b)(4) omitted a broad "duty of loyalty" exception and substituted a narrower exception for a director's "receipt of [an improper] financial benefit."<sup>83</sup> The drafters' decision to include an "intentional infliction of harm" exception rather than a "not in good faith" exception should be viewed in the same light, and *Meade*'s holding implicitly embraces that interpretative perspective.

## 2. Relevant Delaware Precedent and Experience

It is also worth noting that, despite the broad statements in *Disney*, subsequent Delaware decisions have not been generous when applying the "conscious disregard" and "intentional dereliction of duty" prongs of the "not in good faith" shield exception. In *Stone v. Ritter*, for example, directors asserted the Delaware liability shield as a defense to claims stemming from their alleged failure to monitor corporate affairs.<sup>84</sup> The Delaware Supreme Court held that non-exculpable "conscious disregard" or "intentional dereliction" of directors' oversight duty occurs only when they egregiously fail to discharge that responsibility. Plaintiff must show that "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having

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<sup>80</sup> *Id.*

<sup>81</sup> See *Matrixx Initiatives, Inc. v. Siracusano*, 536 U.S. 27, 48 (2011) (assuming without deciding that "recklessness suffices to fulfill the scienter requirement" under federal securities law).

<sup>82</sup> See Bryn R. Vaaler, *2.02(B)(4) Or Not 2.02(B)(4): That is the Question*, 74 LAW & CONTEMP. PROBS. 79, 83-84 (2011) (explaining the evolution of the language used in the MBCA director liability shield and quoting from the original official comments to that provision).

<sup>83</sup> See *supra* notes 66-70 and accompanying text.

<sup>84</sup> *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

implemented such a system or controls, [they] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems.”<sup>85</sup>

More to the point for purposes of the *Meade* dispute and similar going private litigation, the Delaware courts require a near impossible showing when plaintiffs sue directors for “conscious disregard” or “intentional dereliction” of duty in a transaction involving sale of a corporation. Allegations of a flawed sale process alone *do not* suffice; plaintiff must instead show that directors “utterly failed to attempt to obtain the best price” for shareholders.<sup>86</sup> As one court recently put it, “[i]n the context of a sale of corporate control, bad faith is qualitatively different from ‘an inadequate or flawed effort’ to obtain the highest value reasonably available for a corporation.”<sup>87</sup> To show the level of conscious disregard or intentional dereliction of duty required for the “not in good faith” exculpation exclusion to apply, plaintiff must plead that a director decision approving the corporation’s sale “lacked any rational conceivable basis associated with maximizing stockholder value.”<sup>88</sup> Thus, even if the Iowa Supreme Court had applied Delaware’s “not in good faith” shield exclusion to the EMCI director failures alleged in *Meade*, the court would likely have concluded that the plaintiff’s allegations reflected, at best, claims for exculpable gross negligence.<sup>89</sup>

The animating policy for broad director protection is reflected by *In re Cornerstone Therapeutics Inc., Stockholder Litigation*, a recent Delaware Supreme Court decision that considered a shareholder challenge to a going private merger.<sup>90</sup> The court made clear that whether a shield law protects directors from damage claims when they approve a going private merger is a separate question from whether the controlling shareholder’s merger terms are eligible for business judgment rule protection. While the latter hinges on whether the transaction itself satisfied *MFV*’s disinterested director and shareholder approval metrics, the former does not. The court stated:

We decline to adopt an approach that would create incentives for independent directors to avoid serving as special committee members, or to reject transactions solely because their role in negotiating on behalf of the stockholders [under *MFV*] would cause them to remain as defendants until the end of any litigation challenging the transaction. ... As is well understood, the fear that directors who faced personal liability for potentially value-maximizing business decisions might be dissuaded from making such decisions is why Section 102(b)(7) was adopted in the first place.<sup>91</sup>

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<sup>85</sup> *Id.* The court concurred with Chancellor Allen’s observation that such lack of oversight is “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.” *Id.* at 372 (citing *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)).

<sup>86</sup> *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009).

<sup>87</sup> *In re Essendant, Inc. Stockholders Litig.*, 2019 WL 7290944, at \*13 (Del. Ch. 2019).

<sup>88</sup> *Id.* (internal quotes omitted).

<sup>89</sup> *See, e.g., Jaroslawicz v. M&T Bank Corp.*, 2017 WL 1197716, at \*7 (D. Del. 2017) (applying director liability shield and finding “not in good faith” exception inapplicable even though directors approved a going private transaction after only seven days of due diligence, stating: “At best, Plaintiffs’ allegations about the directors’ efforts amount to negligent conduct, which falls short of stating a breach of fiduciary duty under *Disney*.”); *In re USG Corp. Stockholder Litig.*, 2020 WL 5126671, at \*23-\*30 (Del. Ch. 2020) (applying director liability shield and finding the “not in good faith” exception inapplicable, stating: “The Plaintiffs may contend that the Board negotiated poorly, perhaps unreasonably, but that alone is insufficient to plead bad faith.”).

<sup>90</sup> *In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173 (Del. 2015).

<sup>91</sup> *Id.* at 1186-87.

Thus, and as explained in Part II(A), if shareholders sue the controlling shareholder of a Delaware corporation for paying an unfairly low merger price, a reviewing court will give business judgment deference to the transaction terms under *MFW* only if there were informed, disinterested approvals of the merger by directors and shareholders. But whether or not *MFW*'s metrics are satisfied (an issue that may require a trial), raincoat protection is available for independent and disinterested directors who approved the deal, so long as no exculpation exceptions apply.

### 3. Exculpation Doesn't Exclude Director Conduct from Scrutiny

A final—and perhaps the most important—reason to narrowly interpret the MBCA / IBCA “intentional infliction of harm” exception from exculpation, as the *Meade* court did, is that such a ruling will *not* shield director misconduct from scrutiny in going private litigation. The Iowa Business Specialty Court's separate pre-trial ruling, that EMCC had no fiduciary obligation to treat minority public stockholders fairly in the going private merger, was wrong for the reasons explained in Part II(B) above. Plaintiffs in cases like *Meade* should be allowed to pursue claims for payment of fair value for their shares against controlling shareholders like EMCC.<sup>92</sup> But as also explained in Part II, the level of judicial scrutiny applied to such a claim (business judgment deference or not under *MFW*), and whether the appraisal remedy is exclusive under MBCA Section 13.40(b), should hinge on whether independent and disinterested directors adequately discharged their fiduciary duty of care when negotiating and approving the transaction and when providing disinterested shareholders relevant information before the shareholder vote.<sup>93</sup>

If a corporation has adopted a director raincoat provision, the financial risk of any director failures in that regard will not fall on exculpated directors but instead—and appropriately in this Author's view—on the controlling shareholder who potentially benefited from that misconduct. And if the director or shareholder approval process *was* flawed due to director errors, a controlling shareholder can still defeat shareholder claims for payment of fair value by establishing that the merger price and terms were fair.<sup>94</sup>

## IV.

### *The MBCA / IBCA Director Liability Shield: Procedural Issues*

The *Meade* decision also addressed important procedural issues associated with the MBCA / IBCA director raincoat. The court ruled that corporate directors' assertion of the shield defense triggers a “heightened” pleading standard for those who sue them and that failure to satisfy that pleading standard may result in dismissal of claims against directors even before discovery begins.<sup>95</sup> The Iowa Supreme Court addressed this issue in connection with its interpretation of the “intentional infliction of harm” shield exception because the director defendants had sought dismissal of the breach of duty claims against them, in part, because *Meade*'s initial shareholder class action petition did not reference EMCI's raincoat provision or expressly assert any applicable

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<sup>92</sup> See Part II(B)(1), *supra*.

<sup>93</sup> See *supra* notes 17-24 and accompanying text.

<sup>94</sup> See *supra* note 18 and accompanying text.

<sup>95</sup> *Meade v. Christie*, 2022 WL 1695586, \*18 (Iowa Sup. Ct., May 27, 2022).

shield exceptions.<sup>96</sup> The directors reasserted this same position on appeal, and amicus briefing was filed in support of it.<sup>97</sup>

The Iowa Business Specialty Court had rejected the directors' pleading argument based on Iowa's "notice pleadings" standards, concluding that Meade's initial pleading was sufficient at the motion to dismiss stage, despite these omissions.<sup>98</sup> That ruling was not surprising under Iowa Supreme Court precedent, which generally interprets notice pleading to require only that plaintiff plead facts that "inform the defendant of the incident giving rise to the claim and the claim's general nature."<sup>99</sup> Under this standard, "nearly every case will survive a motion to dismiss."<sup>100</sup> Thus, some MBCA / IBCA context is helpful to fully appreciate the Iowa Supreme Court's decision to depart from ordinary pleading standards when the director shield defense applies.

Under MBCA Section 8.31(a)(1)(i) and its IBCA counterpart, Iowa Code Section 490.831(1)(a)(1), when a plaintiff corporation or shareholder pursues monetary damage claims against directors, the "*party asserting liability*" must "*establish[] ... [t]hat ... [n]o defense interposed by the director based on ... [an applicable director shield] precludes liability.*"<sup>101</sup> At the same time, related MBCA commentary characterizes the director shield as an "affirmative defense," apparently assuming directors will "interpose" the defense in response to a liability claim.<sup>102</sup> In civil litigation, the defendant typically bears the burden of production and pleading on any affirmative defense, and perhaps the burden of proof as well.<sup>103</sup> MBCA Section 8.31(a)(1)(i) and IBCA Section 490.831(1)(a)(1), quoted above, clearly reverse the burden of proof on the shield defense, but both are silent concerning pleading burdens.

#### A. Assertion of Director Shield Defenses Under Delaware's Notice Pleading Rules

As with substantive director liability shield exclusions, Delaware offers some instructive comparisons on the procedural front. Section 102(b)(7), the Delaware director raincoat provision, functions as a true affirmative defense: directors who assert shield protection must also prove inapplicability of any shield exceptions that plausibly apply.<sup>104</sup> And some Delaware authority indicates that, unless the original complaint pleads or otherwise refers to the shield provision, thus putting the shield's existence before the court, directors cannot properly assert a shield defense in a pre-answer motion to dismiss under the state's equivalent to Federal Rule of Civil Procedure 12(b)(6).<sup>105</sup>

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<sup>96</sup> *Meade* Dismissal Order, *supra* note 29, at 30-33. The Business Specialty Court's ruling denying the Motion to Dismiss on this ground was also challenged in the interlocutory appeal.

<sup>97</sup> See Brief for the Iowa Association of Business Industry & the Iowa Business Council as Amici Curiae Supporting Appellants, *Meade v. Christie*, Iowa Sup. Ct. No. 21-0098, [Microsoft Word - 02422588.DOCX](https://www.iowacourts.gov/cases/21-0098) ([iowacourts.gov](https://www.iowacourts.gov)).

<sup>98</sup> *Meade* Dismissal Order, *supra* note 29, at 30-33.

<sup>99</sup> See, e.g., *Rees v. The City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004).

<sup>100</sup> *Id.*

<sup>101</sup> MODEL BUS. CORP. ACT § 8.31(a)(1) (2016); IOWA CODE § 490.831(1)(a)(1)(a) (emphasis supplied).

<sup>102</sup> MODEL BUS. CORP. ACT § 8.31, cmt. 1(A) (2016).

<sup>103</sup> See, e.g., *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 258 (Iowa 2012) (defendant bears the burden of proof on a state action defense in an antitrust case). See generally 31A C.J.S., EVIDENCE § 104(b)(1964); 29 AM.JUR. 2D EVIDENCE § 129 (1967).

<sup>104</sup> See, e.g., *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (burden of proving good faith is on the party seeking protection from the director liability shield).

<sup>105</sup> See OLSON ET AL., DIRECTOR AND OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE § 1:21 (2020-21 ed.)

However, the Delaware Supreme Court, in *Malpiede v. Townson*, recognized an apparent exception to this rule if the trial court takes judicial notice of an applicable shield in the corporation's certificate of incorporation (a public filing).<sup>106</sup> In that situation, *Malpiede* and other Delaware decisions have approved pre-answer dismissal motions by defendant directors on the basis of director raincoat provisions.<sup>107</sup> This more generous approach seems appropriate in cases where shield defenses apply because, as the *Malpiede* court noted, it can be "onerous" to answer "a long and prolix complaint" of the sort typically filed in director litigation.<sup>108</sup>

*Malpiede* also illustrates another important point. Although Delaware's notice pleading standards are generous at the motion to dismiss stage (courts may dismiss "only where the court determines with 'reasonable certainty' that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint"), when a complaint raises no plausible exception to the shield defense, a suit against directors should not continue through discovery and summary judgment phases.<sup>109</sup> *Malpiede* involved alleged fiduciary violations by directors who approved a merger. Plaintiffs resisted the shield defense on the basis that the asserted claims for director gross negligence (exculpable due care claims) were "inextricably intertwined with [non-exculpable] loyalty and bad faith claims" and that Delaware directors have the burden of proof on shield defenses.<sup>110</sup> But the *Malpiede* court, after concluding that plaintiffs' proffered interpretations of Delaware's loyalty and bad faith exculpation exceptions were overly broad and therefore legally insufficient, denied plaintiffs access to discovery on those issues and dismissed the remaining gross negligence claims based on the director shield.<sup>111</sup>

#### B. Assertion of Director Shield Defenses Under the "Heightened" Pleading Rules Announced in *Meade*

Although the *Meade* decision did not reference or discuss Delaware's procedural requirements for defensive use of the shield, the Iowa Supreme Court embraced the same position as Delaware courts on the issue of *initial* pleading for director raincoat defenses. The court acknowledged that the MBCA / IBCA director liability statute requires corporate and shareholder plaintiffs to establish that shield defenses don't apply, but nonetheless concluded that *Meade* was not obligated to anticipate and negate that defense in his initial petition asserting the EMCI directors' breach of

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(collecting authorities).

<sup>106</sup> *Malpiede v. Townson*, 780 A.2d 1075, 1090-92 (Del. 2001).

<sup>107</sup> *Id.* at 1094-95. *See also* *In re Wheelabrator Technologies Inc. S'holder Litig.*, 18 Del. J. Corp. L. 778, 1992 WL 212595, at \*800-02 (Del. Ch. 1992) (dismissing specific liability claims against directors on the basis of a director liability shield in the corporation's articles and stating: "The Court is not barred from taking judicial notice of a Delaware corporation's certificate of incorporation simply because the procedural setting is a motion to dismiss under Rule 12(b)(6)."). *See also* *Rothenberg v. Santa Fe Pacific Corp.*, 18 DEL. J. CORP. L. 743, 1992 WL 111206, at \*752-53, \*\*4-5 (Del. Ch. 1992) (noting that whether or not a Rule 12(b)(6) dismissal motion was appropriate, defendants could properly pursue a separate motion to dismiss duty of care claims for which the corporation's charter clearly provided exculpation).

<sup>108</sup> *Malpiede*, 780 A.2d at 1092, n. 56 (citing *Brehm v. Eisner*, 746 A.2d 244, 249 (Del. 2000) ("The Complaint, consisting of 88 pages and 285 paragraphs, is a pastiche of prolix invective ... [and] serve(s) no purpose other than to complicate the work of reviewing courts.")).

<sup>109</sup> *Id.* at 1082-1083.

<sup>110</sup> *Id.* at 1093-1095.

<sup>111</sup> *Id.*

duty. “The phrase ‘[interposed] by the director’ [in IBCA Section 490.831(1)(a)(1)],” the court noted, “naturally suggests that the director bears the burden of interposing one of the defenses listed in the statute.”<sup>112</sup> But the Iowa Supreme Court then added two very important qualifications.

First, as Delaware courts have permitted in *Malpiede* and similar decisions, the *Meade* court held that directors may raise the shield defense in a pre-answer dismissal motion that asks the court to take judicial notice of an applicable director raincoat:

[T]he statute doesn’t prescribe a particular pleading in which the defense must be made. ... The statute doesn’t require interposition in, for example, a list of affirmative defenses in an answer. [Here the] directors ..., as part of their motion to dismiss, asked the business court to take judicial notice of EMCI’s publicly filed articles of incorporation. The court did. The directors recited the director shield protections in the articles of incorporation as a defense to Meade’s claim. This satisfied the directors’ burden to interpose a defense to liability under section 490.202(2)(d).<sup>113</sup>

It remains to be seen whether other MBCA jurisdictions will adopt the same approach, thus sparing shielded directors the need to answer (often-lengthy) corporate litigation complaints that allege only fiduciary violations covered by a raincoat provision.

The *Meade* court then added a second, more important, procedural qualification when it reversed the trial court’s ruling that, under generally applicable state court “notice pleading” standards, Meade was not required to “set forth facts in [his] petition that ultimately establishes the unavailability of [shield] defenses.”<sup>114</sup> To the contrary, the Iowa Supreme Court held, once directors have “interposed” a shield defense, an opposing corporate litigant must allege an applicable shield exception through “heightened” pleading.<sup>115</sup>

The *Meade* opinion did not fully explicate this new standard, but in federal court “heightened” pleading generally obligates a plaintiff to plead facts supporting a claim with “particularity” or “specificity.” The standard has been described as requiring plaintiffs “to plead the who, what, when, where, and how, similar to the first paragraph of any newspaper story.”<sup>116</sup> Classic examples include pleading rules for fraud claims generally under Federal Rule of Civil Procedure 9(b), as well as pleading requirements for securities fraud claims under the Private Securities Litigation Reform Act.<sup>117</sup>

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<sup>112</sup> *Meade v. Christie*, 2022 WL 1695586, \*13 (Iowa Sup. Ct., May 27, 2022).

<sup>113</sup> *Id.* See also IOWA R. CIV. P. 1.421(1)(f) (defendant may assert plaintiff’s failure to state a claim by pre-answer motion) and IOWA R. EVID. 5.201(b) (permitting courts to take judicial notice of facts in certain circumstances). Copies of an Iowa corporation’s articles of incorporation as filed with the Secretary of State are publicly available, including through on-line searches. See <https://sos.iowa.gov>.

<sup>114</sup> *Meade*, 2022 WL 1695586, at \*14-15 (“On this point, we disagree with the business court’s interpretation of the [director shield] statute and thus its application of the general pleading standard to the statute.”).

<sup>115</sup> *Id.* at \*18-19.

<sup>116</sup> *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8<sup>th</sup> Cir. 2011).

<sup>117</sup> FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”); 15 U.S.C. § 78u-4(b)(1) (Private Securities Litigation Reform Act requirement that, if a complaint for securities fraud alleges untrue statements or omissions, the complaint must “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed”).

Curiously, when applying the announced “heightened” pleading standard in *Meade*, the Iowa Supreme Court never used the terms *particularity* or *specificity*. Rather, it simply found Meade’s allegations of director misconduct insufficient after testing his petition against the MBCA / IBCA shield exception for “intentional infliction of harm.” The petition did not show the EMCI directors’ “specific intent to harm the corporation or its shareholders,” the court held, but only “failures to perform duties or incompetent performance, none of which suffices.”<sup>118</sup> Concluding that Meade’s claims against directors must therefore be dismissed, the court summarized: “A lawsuit pursuing claims against a corporate director is the type of case where a plaintiff can plead himself out of court by alleging facts that show he has no claim.”<sup>119</sup>

At a minimum, *Meade*’s new heightened pleading rule endorses the EMCI directors’ position that, in a petition seeking damages from corporate board members who are protected by an MBCA raincoat provision, specific facts must support a reasonable inference that a director exculpation exception listed in the MBCA may apply.<sup>120</sup> As discussed in Part IV(A) above, decisions like *Malpiede* have reached similar results under Delaware’s relatively lenient notice pleading standards.<sup>121</sup> Of course, if federal heightened pleading standards *are* the touchstone for what *Meade* requires, then courts may expect more from plaintiffs who need to establish exclusions from director exculpation.<sup>122</sup>

Whatever the rigor of *Meade*’s heightened pleading requirement, the policy justification for the new rule is clearly rooted in the considerable costs (both time and money) that are entailed by discovery. As in other civil cases, if a corporate or shareholder plaintiff survives a motion to dismiss, a lengthy discovery phase ensues before the court considers summary judgment disposition. And the *Meade* court referenced this reality as it pertains to director raincoat exceptions:

This heightened pleading requirement protects directors not merely against having to pay damages for inadequate claims, but also against the cost and stress of litigation when plaintiffs are unable to allege claims that would permit them to receive money damages. ... And those protections would be undermined if defendant directors had to engage in pretrial discovery to find out exactly what wrong the plaintiff was charging them with.<sup>123</sup>

To be sure, when compared to notice pleading rules applicable to other litigants, *Meade*’s

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<sup>118</sup> *Meade*, 2022 WL 1695586, at \*18.

<sup>119</sup> *Id.* at \*19. Somewhat more surprising was the court’s denial of Meade’s contingent appellate request for leave to amend his petition if the Iowa Supreme Court determined that his claims warranted dismissal. The court simply noted that while contingent requests for leave to amend are permissible, post-dismissal motions for leave to amend are disfavored. *Id.* at 20-21. The court also observed that Meade had “failed to share any facts suggesting that he has claims that are not barred by the director shield provision that would warrant leave to amend.” *Id.* at 20.

<sup>120</sup> *Id.* at \*14 (summarizing the defendant directors’ position on pleading requirements). These exceptions, discussed above in Part III(B) and (C), include claims that directors violated criminal law, approved illegal distributions, received improper financial benefits, or intentionally inflicted harm on the corporation or shareholders.

<sup>121</sup> *Malpiede v. Townson*, 780 A.2d 1075, 1094, n. 65 (Del. 2001) (“Plaintiffs are not required ... ‘to plead facts negating the elements of a §102(b)(7) defense.’ Rather, plaintiffs must plead facts supporting a claim that is not barred by the exculpatory charter provision ...”). See also *supra* notes 109-111 and accompanying text.

<sup>122</sup> See *supra* notes 116-117 and accompanying text.

<sup>123</sup> *Meade*, 2022 WL 1695586, at \*18-\*19.

heightened pleading requirement imposes a unique burden for those who sue shielded directors. But there are other information access points for such plaintiffs. These include securities law disclosures, some of which are unique to “going private” transactions like the one challenged in *Meade*.<sup>124</sup> And state corporate law provides more generalized information rights to shareholders who wish to assert them, including rights of access to minutes of directors’ meetings.<sup>125</sup>

To the extent that courts in other states adopt *Meade*’s procedural template for director liability claims subject to an MBCA liability shield, the lessons for corporate litigants are clear. An original petition asserting director liability need not expressly reference a liability shield or applicable exception. Once a director shield defense has been “interposed by” directors, however, whether through answer or a motion to dismiss, a plaintiff whose original petition did not allege *facts* that support a shield exclusion is at risk.<sup>126</sup> If that plaintiff does not appropriately amend the petition with leave of court, which (in Iowa) “shall be freely given when justice so requires,” the claims against directors should be dismissed before discovery.<sup>127</sup> Conversely, a plaintiff whose petition does not reference the shield but which includes facts supporting a shield exception, either originally or by amendment after the shield defense is raised, should be entitled to continue the litigation through summary judgment proceedings where the claims against directors can be further tested for factual support.

## V. *Concluding Observations*

Approval of going private mergers by controlling shareholders outside of Delaware, like the transaction litigated in *Meade*, should follow the well-traveled path laid out in Delaware’s *MFV* jurisprudence and in MBCA Section 13.40(b)(3). This approval channel, which cedes control to disinterested, independent directors and well-informed, disinterested shareholders, obviates the need for entire fairness review of the controlling shareholder’s merger terms if they are challenged in subsequent litigation. Qualified corporate directors should be encouraged to participate in that disinterested approval process without fear of disproportionate liability risks.

As shown by the *Meade* case, when such directors are protected by an MBCA raincoat provision, a narrow interpretation of the “intentional infliction of harm” shield exception can accomplish that goal. Such an interpretation is consistent with Delaware practice and experience, and reflects intentional drafting choices in the MBCA and the benefits that flow from bright-line director exculpation exceptions outside of Delaware.

The related decision in *Meade*, that those who sue directors in the face of raincoat provisions must plead facts establishing shield exceptions through “heightened” pleading, is equally significant. Such a pleading requirement might be unduly burdensome if it requires allegation of facts supporting shield exceptions with great particularity or specificity. But, as applied in *Meade*,

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<sup>124</sup> See, e.g., 17 C.F.R. § 240.13e-3 (requiring disclosure of corporate directors’ opinion concerning the “fairness” of a going private merger).

<sup>125</sup> See, e.g., MODEL BUS. CORP. ACT §§ 16.02-16.04 (2016) (providing shareholder rights to inspect corporate records and related enforcement mechanisms).

<sup>126</sup> See IOWA R. CIV. P. 1.421(1)(f) (defendant may assert plaintiff’s failure to state a claim by pre-answer motion).

<sup>127</sup> IOWA R. CIV. P. 1.402(4).

the new standard appears to require only that a petition's fact allegations raise an inference that director fiduciary duty violations fall within one of the MBCA's narrowly drawn exculpation exceptions. So applied, a heightened pleading requirement is not unreasonable. While somewhat more onerous than traditional notice pleading, the new standard promises to spare shielded directors from the burdens of litigation discovery in many cases and thus dovetails with the general intent and purpose of the MBCA raincoat.