

THE BUSINESS JUDGMENT RULE IN WISCONSIN

BY KENNETH B. DAVIS, JR.*

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INTRODUCTION

The business judgment rule (BJR)—the proposition that corporate directors should not be faulted for an honest error of business judgment¹—has been a mainstay of Wisconsin corporate law for more than a century.² Though denominated a rule, the BJR is in practice much more. By limiting shareholders' ability to call upon courts to review good-faith action by the board of directors, the BJR functions as corporate law's equivalent of the separation-of-powers doctrine. This function is especially powerful in Wisconsin, whose statutes grant the board greater autonomy than in many other states.³

* Kenneth B. Davis, Jr. holds the George H. Young Chair and is the former Dean of the University of Wisconsin Law School. He is of counsel to the firm of Reinhart Boerner Van Deuren s.c. Davis was Co-Reporter for the State Bar committee that recommended the Wisconsin director's immunity statute as well at the 1990 revision of chapter 180. An abbreviated version of parts of this Article is scheduled to appear in the June 2015 issue of the *Wisconsin Lawyer*.

1. See *infra* notes 10–13 and accompanying text.
2. See *infra* note 9 and accompanying text.
3. See *infra* notes 71–72 and accompanying text.

Given its foundational role, the BJR influences corporate litigation in a variety of ways. It is the source of substantive rules of law that both protect individual directors from personal liability for past decisions that have gone awry and shield the board's current decisions from attack by shareholders who favor an alternative course of action.⁴ Depending on the jurisdiction, it may also impose additional procedural burdens on the plaintiff who seeks to challenge board action.⁵

It is in this latter, procedural context that the Wisconsin Supreme Court recently considered the effects of the BJR in *Data Key Partners v. Permira Advisers LLC*.⁶ Although the issue before the court involved the Wisconsin statute immunizing directors from monetary liability,⁷ both the majority and dissent, along with the court of appeals below, framed the discussion in terms of the BJR.⁸ While the *Data Key* decision provides important insight into both the statute and the BJR, the judges' conflation of the two may be misinterpreted and lead to confusion over the separate roles played by each.

This Article therefore takes the opportunity to take a deeper look at both the statute and the BJR—what each of them does and does not do, and why. The discussion is organized as follows. Part I traces how Wisconsin courts have formulated the BJR over the years. Part II considers the separate functions of the BJR and the immunity statute. Parts III and IV discuss the procedural dimensions of the BJR and their application to the supreme court's decision in *Data Key*. Part V considers the important and evolving area of minority-shareholder protection in close corporations, where the BJR may come into conflict with other doctrines, and where the risk of misapplying *Data Key* is perhaps greatest.

I. THE BJR OVER THE YEARS

Wisconsin courts have embraced the BJR since the early 1900s.⁹ By 1929, Justice Marvin Rosenberry could cite several Wisconsin decisions for the proposition that “courts will not interfere in the internal management of corporate affairs in the absence of allegations clearly

4. See *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 32–33, 356 Wis. 2d 665, 849 N.W.2d 693.

5. See *id.* ¶¶ 34, 36–37.

6. See *id.* ¶¶ 2, 36–37.

7. WIS. STAT. § 180.0828(1) (2013–14).

8. See *infra* note 73 and accompanying text.

9. The rule first appeared in two decisions in the early 1900s. *Figge v. Bergenthal*, 130 Wis. 594, 615, 624–25, 109 N.W. 581 (1907); *Theis v. Durr*, 125 Wis. 651, 659, 104 N.W. 985 (1905).

disclosing abuse of power by corporate officers, bad faith or willful abuse of discretion or positive fraud.”¹⁰

A. The Steven Case: Motives and Discretion

Two decades later, the supreme court undertook what remains its most ambitious effort to map out the BJR’s contours. The case was *Steven v. Hale-Haas Corp.*,¹¹ and it is best known for the following articulation of the BJR, recently quoted by the majority in *Data Key*:¹²

Assuming that the evidence and findings do not disclose situations outlined in the preceding two paragraphs (that is a corrupt bargain or corporate action so patently harmful to the corporation as to indicate an abuse of discretion), this court will not substitute its judgment for that of the board of directors and assume to appraise the wisdom of any corporate action. The business of a corporation is committed to its officers and directors, and if their actions are consistent with the exercise of honest discretion, the management of the corporation cannot be assumed by the court.¹³

However, the full significance of the *Steven* decision—and with it, an appreciation for the considerable deference that Wisconsin courts are prepared to extend to board decision making—lies in the application of this language to the complex sequence of transactions before the court.

While the BJR is often described in terms of tolerance for honest “mistakes” of business judgment, BJR cases rarely involve claims of pure mistake.¹⁴ Typically, the plaintiff’s theory alleges a motive for the board’s action to further interests other than those of the corporation and its shareholders.¹⁵ That was certainly true in the *Steven* case,¹⁶ as it was in *Data Key*.¹⁷ Thus, the real test of the BJR’s strength is the burden the court imposes on the plaintiff to establish those ulterior motives. The

10. *Polacheck v. Michiwaukee Golf Club Land Co.*, 198 Wis. 78, 82, 223 N.W. 233 (1929).

11. 249 Wis. 205, 23 N.W.2d 620 (1946).

12. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 34, 356 Wis. 2d 665, 849 N.W.2d 693.

13. *Steven*, 249 Wis. at 221.

14. *See, e.g., Koelbel v. Tecktonius*, 228 Wis. 317, 320–21, 280 N.W. 305 (1938).

15. *See infra* note 22.

16. *Steven*, 249 Wis. at 210–11.

17. *Data Key*, 2014 WI 86, ¶ 11.

4-3 majority opinion in *Steven* reveals how substantial that burden can be.¹⁸

By the time of the *Steven* case, Wisconsin courts had dealt with the risk of ulterior motive in a variety of ways, which Justice John Wickhem, writing for the majority, methodically catalogued.¹⁹ One line of cases strictly condemned any arrangement that might “deprive[] [the corporation] and its stockholders of the honest judgment of its officers and directors”²⁰ or “conflict with a free and impartial discharge of their duties toward the stockholders.”²¹ These were the “corrupt bargain” cases referred to in the *Steven* passage quoted above.²² Proof of actual injury to the corporation was not required;²³ the mere possibility of a corrupting influence was sufficient. The rigor of this doctrine is best exemplified by *Timme v. Kopmeier*,²⁴ where the corporation had sold stock to a newly hired manager, subject to his agreement to resell it to one of the directors if he ever left the corporation’s employ.²⁵ Because this resale feature might later influence the director’s vote on the manager’s continuing employment, the court voided the agreement as contrary to public policy.²⁶

Conflicts of interest are likewise present whenever a director deals directly with the corporation—purchasing corporate property, for example.²⁷ When it was the interested director who was the corporation’s representative in setting the terms of the transaction, Wisconsin courts applied the same strict rule as in the corrupt-bargain cases. The transaction was voidable regardless of injury to the corporation.²⁸ When

18. See generally *Steven*, 249 Wis. 205.

19. *Id.* at 220–22.

20. *Id.* at 220.

21. *Timme v. Kopmeier*, 162 Wis. 571, 575–76, 156 N.W. 961 (1916).

22. See *Koelbel v. Tecktonius*, 228 Wis. 317, 320–21, 280 N.W. 305 (1938) (involving a payment for a corporate director’s agreement not to oppose corporate settlement); *Timme*, 162 Wis. at 572–77 (summarized in the text); *Sauerhering v. Rueping*, 137 Wis. 407, 410, 119 N.W. 184 (1909) (involving a payment for an agreement to relocate corporate headquarters); *Boyd v. Mutual Fire Ass’n*, 116 Wis. 155, 160–61, 90 N.W. 1086 (1903) (involving a corporation insuring property owned by directors at artificially low premium rates).

23. *Steven*, 249 Wis. at 229, 231–33; see also *Sauerhering*, 137 Wis. at 415 (Barnes, J., dissenting).

24. 162 Wis. 571, 156 N.W. 961 (1916).

25. *Id.* at 572–73.

26. *Id.* at 575–76. Ironically, it was the manager who was seeking to enforce the contract, following his voluntary resignation from the company. *Id.* at 573–74.

27. While on the facts of *Steven* this second category was not at issue, Justice Wickhem addressed its fit within the larger framework three years later in *Davies v. Meisenheimer*, 254 Wis. 419, 421–26, 37 N.W.2d 93 (1949).

28. *Fed. Mortg. Co. v. Simes*, 210 Wis. 139, 149–50, 245 N.W. 169 (1933); *Kline v. Little Rapids Pulp Co.*, 206 Wis. 464, 471–72, 240 N.W. 128 (1932); *Shaw v.*

others acted for the corporation, transactions with a director were still subject to close scrutiny but would be upheld if the dealings had been open and fair.²⁹

Absent these sources of corrupting influence, Justice John Wickhem viewed the BJR as restricting judicial intervention to arrangements that are “so obviously injurious to the corporation as to compel a finding that no consideration of its interests was in the minds of its officers and directors and that they must have been motivated by self-interest or by concern with the interests of outside parties.”³⁰ In other words, whenever the tangible conflicts of interest represented by the first two categories of cases are lacking, ulterior motives for the transaction can be inferred only if the “damage to the corporation and the obvious improvidence of the scheme . . . constitute proof of improper motives and of the failure to exercise the judgment and good faith required of officers and directors.”³¹

The arrangement at issue in *Steven* featured more factual convolution than most law school exams. Its purported purpose was to recapitalize the corporation by replacing preferred stock that had been issued to raise needed funds during the depression with newly issued common stock.³² The rationale was that with the preferred outstanding, it was doubtful whether dividends could be paid on the common for many years to come.³³ The dispute was principally between two shareholders, Steven (the plaintiff) and Hale.³⁴ The two of them had jointly owned the corporation with Haas, but upon Haas’s death, Hale had contracted to acquire Haas’s shares and thereby assumed control, which Hale used to replace Steven as the corporation’s president.³⁵ The new issue of common stock was to be purchased by Pedee Investment Co., which would then become the largest shareholder.³⁶ The trial court

Crandon State Bank, 145 Wis. 639, 654–55, 129 N.W. 794 (1911). This strict rule has now been displaced by statute. See WIS. STAT. § 180.0831(2) (2013–14). Corporate transactions in which one or more of the directors have a direct or indirect interest are no longer voidable per se, so long as they are either fair to the corporation or independently approved. *Id.*

29. *Davies*, 254 Wis. at 426; *McDermott v. O’Neil Oil Co.*, 200 Wis. 423, 426–27, 228 N.W. 481 (1930); *Figge v. Bergenthal*, 130 Wis. 594, 613–14, 109 N.W. 581 (1907).

30. *Steven v. Hale-Haas Corp.*, 249 Wis. 205, 221, 23 N.W.2d 620 (1946).

31. *Id.*

32. *Id.* at 210–12.

33. *Id.* at 216.

34. *Id.* at 214–15.

35. *Id.* at 213–14.

36. *Id.* at 214–15.

enjoined implementation of the plan, and the corporation and individual defendants appealed.³⁷

Red flags were rampant. Pedee was controlled by the long-time attorney for both the corporation and Hale.³⁸ Using funds lent to him by Pedee, Hale (one of the corporation's five directors as well as its president) had recently bought up most of the outstanding preferred stock at a price of \$75 per share, and therefore stood to reap a substantial profit when the board voted to redeem it at its call price of \$105.³⁹ Without notice to Steven (who remained the board's chairman), Hale and two other directors convened an "informal" board meeting to approve transferring Hale's contract to purchase the Haas shares to a newly created trust for employees, while allowing Hale to retain the right to vote the shares.⁴⁰ The price Pedee was to pay for the new common was \$10 per share, at a time when its book value was \$18.24.⁴¹ Further, Steven had offered to buy these same shares for \$15 but was rejected.⁴²

The task for the Supreme Court of Wisconsin, as Justice Wickhem saw it, was to test each of the facts by the case-law template he had articulated.⁴³ Had Hale supported the issuance of shares to Pedee as a quid pro quo for its lending him the funds to buy the preferred, the corrupt-bargain doctrine would apply to invalidate the entire arrangement.⁴⁴ But the trial court's findings made no direct connection between the two.⁴⁵ Judging the recapitalization plan as a whole, the majority concluded that "the providence of the scheme falls within the realm of reasonable debate," and that there was nothing in the plan itself "from which ulterior motives or abuse of discretion can be inferred."⁴⁶

Finally, there was the common stock to be issued to Pedee, which the trial court had found to be worth more than the \$10 per share price.⁴⁷ In Justice Wickhem's view, this too was insufficient to support the injunction: "[t]he question is not whether [the stock] was worth more

37. *Id.* at 232–33.

38. *Id.* at 210.

39. *Id.* at 231–32. On this part of the case, the majority held that a director's purchase of stock based on inside information of a future corporate reorganization constitutes an injury to the sellers, but not—under the law of the day—to the corporation itself, unless the corporation was thereby "forestalled of an opportunity to make the purchase to its advantage." *Id.* at 206.

40. *Id.* at 214.

41. *Id.* at 219.

42. *Id.* at 218.

43. *Id.* at 219–21.

44. *Id.* at 220–21.

45. *Id.* at 222.

46. *Id.* at 224–25.

47. *Id.* at 226.

than \$10 a share, but whether its issuance at \$10 a share was so clearly and substantially below the value of the stock as to indicate bad faith and abuse of discretion.”⁴⁸ Given the range of prices at which the corporation’s stock had recently traded hands and the overall difficulty in appraising stock of a close corporation, there was “room for difference of opinion as to the value of the stock”; and this was a matter on which the “directors had a wide discretion so long as it was honestly exercised.”⁴⁹

The lesson of *Steven* is that red flags and speculation as to ulterior motives do not in themselves rebut the BJR in Wisconsin. Instead, those red flags and ulterior motives must manifest themselves in one of three tangible ways—a corrupt bargain, self-dealing, or injury to the corporation that is so obvious that an ulterior motive is the only explanation. While the subsequent Wisconsin decisions have not necessarily adhered to the Wickhem framework and have varied in their phrasing of the BJR, they are uniform in their outcome. The only circumstance that has consistently led Wisconsin courts to deny the application of the BJR is bad faith or its equivalent.⁵⁰

B. Diligence and Preparation

More recent Wisconsin decisions have introduced a new element into the BJR’s formulation. In *Einhorn v. Culea*,⁵¹ Chief Justice Shirley Abrahamson described the rule as a “a judicially created doctrine that limits judicial review of corporate decision-making when corporate directors make business decisions on an informed basis, in good faith and in the honest belief that the action taken is in the best interests of the company.”⁵² In a similar vein, the Wisconsin Court of Appeals has observed that the “business judgment rule is designed to limit judicial involvement in business decision-making so long as a minimum level of care is exercised in arriving at the decision.”⁵³ These statements likely reflect the influence of Delaware law, where courts began to regularly include the requirement of an informed basis for the board’s decision in

48. *Id.* at 229.

49. *Id.* at 230–31.

50. *Thauer v. Gaebler*, 202 Wis. 296, 301–02, 232 N.W. 561 (1930); *Theis v. Durr*, 125 Wis. 651, 661, 104 N.W. 985 (1905); *Fanetti v. Donald A. & Marilyn J. Fanetti 2004 Rev. Tr.*, No. 2013AP1870, 2014 WL 1584461, at *12–13 (Wis. Ct. App. Apr. 22, 2014) (per curiam); *Gebhardt v. Bosben*, No. 2009AP1359, 2010 WL 2519572, at *13–14 (Wis. Ct. App. June 24, 2010) (Vergeront, J.); *Yates v. Holt-Smith*, 2009 WI App 79, ¶¶ 18–26, 319 Wis. 2d 756, 768 N.W.2d 213.

51. 2000 WI 65, 235 Wis. 2d 646, 612 N.W.2d 78.

52. *Id.* ¶ 19.

53. *Yates*, 2009 WI App 79, ¶ 22.

the 1980s.⁵⁴ In 1985, the *Smith v. Van Gorkom*⁵⁵ court denied the protections of the BJR to directors who, in the court's view, committed gross negligence in approving a merger without first adequately informing themselves.⁵⁶

These occasional choices of phrasing notwithstanding, nothing in the holdings of any Wisconsin cases suggests that its courts will follow Delaware's lead and incorporate a duty-of-care requirement into the BJR. This is not to say that Wisconsin courts would or should condone directors who shirk their responsibilities. No responsible corporate lawyer would advise a board to consider an important matter without first taking the time to inform itself about the issues at hand.⁵⁷ Rather, the argument for not incorporating a diligence requirement into the BJR—no matter whether the test is gross negligence, ordinary negligence, or something else—stems from the realities of corporate litigation.⁵⁸ Once the board's decision has gone awry, hindsight makes it all too easy to imagine a question that directors should have been asked or an expert they should have consulted. As the earlier quote from the *Steven* opinion attests, a core tenet of the BJR is that judges should not substitute their own judgment for that of the corporation's elected directors.⁵⁹ Why should judges give any less deference to the board's judgment concerning the appropriate decision process than they have long given to the decision itself?

On this issue, context is particularly important. While in theory Delaware's informed-basis requirement applies to the BJR no matter the setting, the cases where the requirement has played a decisive role have typically involved transactions in control.⁶⁰ This is a subject that has led to recent concerns over excess litigation,⁶¹ and it is also an area where

54. See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

55. 488 A.2d 858 (Del. 1985).

56. *Id.* at 874.

57. See, e.g., ABA CORP. LAWS COMM., CORPORATE DIRECTOR'S GUIDEBOOK 20 (6th ed. 2011) ("Directors must take appropriate steps to be informed. Without sufficient information, directors cannot participate meaningfully or fulfill their duties effectively.").

58. See, e.g., *Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982) ("[C]ourts recognize that after-the-fact litigation is a most imperfect device to evaluate corporate business decisions. The circumstances surrounding a corporate decision are not easily reconstructed in a courtroom years later, since business imperatives often call for quick decisions, inevitably based on less than perfect information.").

59. See *supra* note 13 and accompanying text.

60. See *Van Gorkom*, 488 A.2d at 872–74; see also *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274–75 (2d Cir. 1986).

61. See, e.g., CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS – REVIEW OF 2013 M&A LITIGATION 1 ("For the fourth consecutive year, shareholders filed suit in more than 90 percent of M&A deals valued over \$100 million."); Marc Wolinsky & Ben Schireson, *Deal Litigation Run Amok*:

Wisconsin's statutes and cases have tended to give boards a stronger hand than their counterparts in Delaware and other states. Consider four specific examples. Wisconsin has been quick to enact strong measures to empower directors to combat hostile takeovers.⁶² Compared to Wisconsin's series of three separate antitakeover statutes,⁶³ Delaware has enacted only one, which is much weaker than its Wisconsin counterpart.⁶⁴ Second, in challenges to mergers between a corporation and its controlling shareholder, Delaware requires the defendants to prove the merger's entire fairness unless a structured series of protective steps are employed at the board and shareholder levels.⁶⁵ In Wisconsin, the disgruntled minority shareholder's remedy is generally confined to an appraisal proceeding.⁶⁶ Third, in any sale of control, Delaware imposes a strict duty on directors to obtain the best available price for shareholders, to the exclusion of all other considerations;⁶⁷ Wisconsin allows boards to take the interests of other corporate stakeholders (such as employees or customers) into account.⁶⁸ Finally, as will be discussed below, the *Data Key* decision facilitates dismissal at the pleading stage of shareholder suits against the directors who approved the control transaction.

Diagnosis and Prescriptions, REV. SEC. & COMMODITIES REG., Jan. 8, 2014, at 1, 1; Steven Davidoff Solomon, *Corporate Takeover? In 2013, a Lawsuit Almost Always Followed*, N.Y. TIMES DEALBOOK (Jan. 10, 2014, 12:20 PM), dealbook.nytimes.com/2014/01/10/corporate-takeover-in-2013-a-lawsuit-almost-always-followed/?_r=0; Rodney Yap et al., *Merger Suits Often Mean Cash for Lawyers, Zero for Investors*, BLOOMBERG BUS. (Feb. 16, 2012, 12:59 PM), <http://www.bloomberg.com/news/articles/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals>.

62. See WIS. STAT. §§ 180.1130–.1134 (2013–14); *id.* §§ 180.1140–.1144; *id.* § 180.1150.

63. These include a “fair price” statute, §§ 180.1130–.1134; a “business combination” statute, *id.* §§ 180.1140–.1144; and a “control share acquisition” statute, *id.* § 180.1150.

64. DEL. CODE ANN. tit. 8, § 203 (2015). For a discussion of how Delaware's business combination statute differs from those of other states, including Wisconsin, see John F. Pritchard, *The Case for the Constitutionality of State Business Combination Statutes*, 13 DEL. J. CORP. L. 953, 955–57 (1988).

65. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 642–45 (Del. 2014); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115–18 (Del. 1994); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710–15 (Del. 1983).

66. § 180.1302(5) (providing that shareholder may not challenge corporate action “unless the action is unlawful or fraudulent”); *Kademian v. Ladish Co.*, 792 F.2d 614, 629–30 (7th Cir. 1986); *Rosenstein v. CMC Real Estate Corp.*, 522 N.E.2d 221, 225–26 (Ill. App. Ct. 1988); *HMO-W Inc. v. SSM Health Care Sys.*, 2000 WI 46, ¶ 48, 234 Wis. 2d 707, 611 N.W.2d 250; *Pritchard v. Mead*, 155 Wis. 2d 431, 435–36, 455 N.W.2d 263 (Ct. App. 1990).

67. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

68. § 180.0827; *Dixon v. Ladish Co.*, 785 F. Supp. 2d 746, 752 (E.D. Wis. 2011), *aff'd*, 667 F.3d 891 (7th Cir. 2012).

In sum, if the true role of the informed-basis requirement is to enlarge the courts' ability to scrutinize transactions in control, as many have suggested,⁶⁹ it goes directly against the spirit of Wisconsin corporate law.

II. THE BJR AND THE WISCONSIN IMMUNITY STATUTE

A key function of the BJR is to protect directors from personal liability if a decision turns out poorly and shareholders incur substantial losses. Without the protections of the rule, directors might be reluctant to pursue risky new ventures on the shareholders' behalf, or even to continue in office.⁷⁰ To further address that concern, Wisconsin enacted an additional layer of protection in 1987.⁷¹ Now section 180.0828(1), the director's immunity statute provides that notwithstanding a breach of duty, a director is not liable to the corporation or its shareholders for damages or other monetary liabilities unless the plaintiff can prove that the breach of duty fell within any of four categories, all involving willful or illegal misconduct or improper self-enrichment.⁷²

Section 180.0828(1) and the BJR therefore overlap, leading the judges in *Data Key* to characterize the immunity statute as a codification

69. A leading corporate law casebook, co-authored by the former Chancellor of Delaware, observes:

[W]e believe that subsequent developments have shown *Smith v. Van Gorkom* to be the first in a series of cases in which the Delaware courts struggled to work out a new corporate law of corporate takeovers. Thus, *Van Gorkom* has little to teach about the duty of care in ordinary business decisions

WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 233 (4th ed. 2012).

70. See *Reget v. Paige*, 2001 WI App 73, ¶ 17, 242 Wis. 2d 278, 626 N.W.2d 302 (stating that the BJR “contributes to encouraging qualified people to serve as directors by ensuring that honest errors of judgment will not subject them to personal liability”). In earlier writing, I have referred to this as the “risk allocation” rationale. See Kenneth B. Davis, Jr., *Once More, the Business Judgment Rule*, 2000 WIS. L. REV. 573, 573–80.

71. WIS. STAT. § 180.307 (1987–88) (enacted by 1987 Wis. Act 13). That statute was replaced by the current version when chapter 180 was revised in 1990.

72. WIS. STAT. § 180.0828(1) (2013–14). The specific categories are:

(a) A willful failure to deal fairly with the corporation or its shareholders in connection with a matter in which the director has a material conflict of interest. (b) A violation of criminal law, unless the director had reasonable cause to believe that his or her conduct was lawful or no reasonable cause to believe that his or her conduct was unlawful. (c) A transaction from which the director derived an improper personal profit. (d) Willful misconduct.

Id.

of the judge-made BJR.⁷³ It is important to keep in mind, however, that the statute and BJR are separate and supplement one another. The immunity statute was never intended to codify the BJR, just as its exclusions were never intended to supplant Wisconsin case law by defining what constitutes a breach of fiduciary duty. This is more than a semantic quibble—the distinction is significant for several reasons, both philosophical and practical.

A. Wisconsin's Resistance to Codification

On issues involving the conduct expected of directors and the substantive law governing their fiduciary liability, Wisconsin has generally disfavored a legislative approach and thereby has preserved the flexibility for standards to evolve over time through case law and changing business practice.⁷⁴ The Model Business Corporation Act, upon which Wisconsin chapter 180 is based, first codified the director's standard of conduct in 1974.⁷⁵ Although the duties and liability exposure of directors are issues of central importance to every corporate lawyer, Wisconsin took no initiative to follow suit. In 1987, when Wisconsin enacted a comprehensive package of legislation to govern the liability and indemnification of directors, and again in 1990, when chapter 180 was entirely revised, the State Bar Drafting Committee made the conscious choice not to include a statutory standard of conduct.⁷⁶ In 1998, the Model Act went further and codified the director's standard of liability, incorporating elements of the BJR.⁷⁷ Again, Wisconsin has not adopted these amendments.⁷⁸

73. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 1, 35, 57 & n.6, 356 Wis. 2d 665, 849 N.W.2d 693; *id.* ¶ 118 & nn.14, 65 (Abrahamson, C.J., dissenting). The court below had employed the same characterization. *Data Key Partners v. Permira Advisers LLC*, 2013 WI App 107, ¶ 20, 350 Wis. 2d 347, 837 N.W.2d 624, *rev'd*, 2014 WI 86.

74. On this point, Wisconsin clearly is in the minority. The corporation laws of 42 other jurisdictions have adopted a statutory duty of care and good faith to govern the conduct of directors. *See* 2 MODEL BUS. CORP. ACT ANNOTATED § 8.30, at 8-213 (4th ed. 2013 rev.). Notably, one of the other states in this small minority is Delaware. *Id.*

75. *Report of Committee on Corporate Laws: Changes in the Model Business Corporation Act*, 30 BUS. LAW. 501 (1974-75); *Report of Committee on Corporate Laws: Changes in the Model Business Corporation Act*, 29 BUS. LAW. 947, 949-50 (1973-74).

76. *See* CHRISTOPHER S. BERRY ET AL., WISCONSIN BUSINESS CORPORATION LAW § 180.0828, at 8-68 (1992).

77. MODEL BUS. CORP. ACT § 8.31 (2010). The official comment bears directly on the wisdom of Wisconsin's approach to the codification issue. While acknowledging that the principal elements of the BJR are "embedded" in section (a)(2) of the new statute, the drafters "expressly disclaimed" codifying the rule "[b]ecause the elements of the business judgment rule and the circumstances for its application are continuing to be

This is in sharp contrast to the 1987 initiative in which the State Bar and Wisconsin's largest businesses identified shielding directors from monetary liability as an issue of heightened importance—and one especially requiring the specificity and certainty afforded by statute—and worked with the Legislative Council to expedite passage of the immunity statute.⁷⁹ The statute purported to address neither the content of a director's duty nor what constituted a breach. Its sole objective was to identify the circumstances under which any conduct that a court might someday find to be a breach of the directors' duties could permissibly supply the basis for the imposition of monetary liability.⁸⁰

As noted, one of the virtues of the Wisconsin approach is to allow the duties and responsibilities of directors to evolve over time. By legislatively limiting the circumstances under which monetary liability may be imposed, but not codifying either the duty of care or the BJR, jurisdictions like Wisconsin and Delaware have effectively uncoupled the concept of a director's standard of conduct from the standard for liability.⁸¹ This has facilitated a more robust dialogue within the business and legal communities about what a director's job should entail—without fear that raising expectations and aspirations will cause a greater risk of personal liability. Few would dispute that boardroom culture and the sense of responsibility that directors bring to their task have significantly changed over recent years, especially in public companies, and have done so for the most part without direct legal mandate.

developed by the courts, it would not be desirable to freeze the concept in a statute.” *Id.* official cmt., Note on the Business Judgment Rule. Even with its codification of the standards of liability, the Model Act retains a separate director's immunity statute, MODEL BUS. CORP. ACT § 2.02(b)(4), which attests to the independent importance of each, *id.* official cmt. Note on Directors' Liability.

78. Compare WIS. STAT. § 180.0828(1) (2013–14), with MODEL BUS. CORP. ACT § 8.31(a)(2).

79. See generally WIS. LEGIS. COUNCIL, REPORT NO. 6 TO THE 1987 LEGISLATURE: LEGISLATION ON LIABILITY LAW AND INSURANCE (1987); G. Lane Ware & Clay R. Williams, *Director & Officer Liability: A Concern of Wisconsin Lawyers & Corporations*, WIS. B. BULL., Dec. 1986, at 9, 9–12.

80. See WIS. LEGIS. COUNCIL, REPORT NO. 6 TO THE 1987 LEGISLATURE: LEGISLATION ON LIABILITY LAW AND INSURANCE 10–15 (1987).

81. See generally Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 461–67 (1993). The Model Act seeks to achieve this same uncoupling by statute, although with a codified standard of care. See MODEL BUS. CORP. ACT §§ 8.30–31.

B. The Separate Roles of the BJR and the Statute

Beyond the fact that those involved in drafting section 180.0828(1) never saw it as a codification of or replacement for the BJR, preserving the separateness of the statute and the rule continues to have important implications. First, the director's immunity under section 180.0828(1) may be limited by the corporation's articles of incorporation.⁸² In other words, the corporation can opt out of the statutory-based immunity. Were a corporation to do so, its directors would still have the benefit of the judicially-created BJR to protect them from personal liability.

Conversely, section 180.0828(1) protects directors even though the BJR might not be available. Given the breadth of the BJR in Wisconsin, it may be hard to imagine situations that that would negate the application of the rule but not the statute. But in Delaware, as noted earlier, a plaintiff can overcome the rule by showing that the directors committed gross negligence in failing to inform themselves before making the challenged decision.⁸³ In fact, it was the Delaware Supreme Court's adoption of this doctrine that caused that state—one year before Wisconsin—to be the first to enact a statute protecting directors from personal liability for breach of their duty of care.⁸⁴

Another example involves claims arising from the director's oversight function—that is, liability premised on losses resulting from the directors' failure to detect or prevent unlawful or unduly risky activities by corporate employees. The BJR does not ordinarily apply in these circumstances because no conscious decision by the board is at issue.⁸⁵ In Delaware, a substantial body of recent case law makes clear that even without the BJR to overcome, the plaintiff's burden remains quite substantial.⁸⁶ But in Wisconsin the precedent for the director's duty

82. WIS. STAT. § 180.0828(2) (2013–14).

83. *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985).

84. DEL. CODE ANN. tit. 8, § 102(b)(7) (2015) (enacted 1986).

85. See *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993); *Aronson v. Lewis*, 473 A.2d 805, 813 & n.7 (Del. 1984); *In re Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959, 967–70 (Del. Ch. 1996); 1 STEPHEN A. RADIN, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 87–92 (6th ed. 2009). There is, however, authority providing that the level of supervision the board chooses to employ also entails the exercise of business judgment, especially when it comes to monitoring business risk. See *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 121–31 (Del. Ch. 2009); 1 AM. LAW INST., *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* § 4.01(a) cmt. g (1992) [hereinafter ALI PRINCIPLES].

86. See, e.g., *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370, 372–73 (Del. 2006). “The theory here advanced is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment,” *Caremark*, 698 A.2d at 967; “only a sustained or systematic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and

of care is more than one hundred years old.⁸⁷ The immunity statute therefore gives directors the valuable reassurance that whatever standard of conduct a contemporary Wisconsin court might adopt, no monetary liability will attach unless the plaintiff can prove willful misconduct, improper personal benefit, or the other statutory exclusions.

The final reason for emphasizing the distinction between the statute and the rule is that the BJR protects not only the individual directors but also the board's decision itself. Suppose a shareholder sues to enjoin the corporation from carrying out a board-approved decision on the ground that an alternative course of action would create more value for shareholders. Because the directors' monetary liability is not at issue, the immunity statute has no bearing.⁸⁸ The judge-made BJR would nonetheless be available as a defense.

This illustrates the multiple rationales independently supporting the BJR. Even though the concern for putting the directors at personal risk is no longer applicable, the separate concern for judges invading the province of the board—a frequent theme in the Wisconsin case law through the years⁸⁹—continues to apply. This concern is, if anything, even stronger in the transactional context because the court is often being called upon to choose between business policies and strategies that will guide the corporation's future, as opposed to assigning responsibility for past strategies gone wrong.

In recognition of the BJR's separate functions, one prominent corporate lawyer has proposed using the term business judgment "doctrine" in the transactional context and confining the business judgment "rule" terminology to the protection against personal liability.⁹⁰ This in turn raises the question—given the different roles played by the BJR in these two contexts—whether the same elements should necessarily apply both to the rule and the doctrine. For example, if courts

reporting system exists – will establish the lack of good faith that is a necessary condition to liability," *id.* at 971.

87. See *Killen v. State Bank of Manitowoc*, 106 Wis. 546, 574–75, 82 N.W. 536 (1900); *N. Hudson Mut. Bldg. & Loan Ass'n v. Childs*, 82 Wis. 460, 475–76, 52 N.W. 600 (1892). Both cases sought recovery from the directors of financial institutions. See *Killen*, 106 Wis. at 558; *N. Hudson*, 82 Wis. at 472.

88. See WIS. STAT. § 180.0828(1) (2013–14).

89. See *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 32–34, 356 Wis. 2d 665, 849 N.W.2d 693; *Einhorn v. Culea*, 2000 WI 65, ¶ 19 & n.14, 235 Wis. 2d 646, 612 N.W.2d 78; *Gauger v. Hintz*, 262 Wis. 333, 346, 55 N.W.2d 426 (1952); *Steven v. Hale-Haas Corp.*, 249 Wis. 205, 221, 23 N.W.2d 620 (1946); *Figge v. Bergenthal*, 130 Wis. 594, 616, 109 N.W. 581 (1907); *Theis v. Durr*, 125 Wis. 651, 659, 104 N.W. 985 (1905).

90. Joseph Hinsey IV, *Business Judgment and the American Law Institute's Corporate Governance Project: The Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV. 609, 611–13 (1984).

are to adopt an informed-basis requirement, as discussed above, should it be confined to the transactional (doctrine) context, in which no personal liability is involved?⁹¹ While this remains a theoretical possibility, even the proponent of the distinction acknowledged that courts had, until then, applied essentially the same rule to both contexts.⁹² Not much has changed since. A few courts have acknowledged⁹³ and even adopted⁹⁴ the distinction, but with no resulting difference in the substantive law.⁹⁵ And to date, the distinction has played no role in Wisconsin case law.

III. PRESUMPTION, PLEADING, AND PROOF

The procedural dimensions of the BJR are less straightforward than its substantive role. The rule has often been described as creating a presumption on the director's behalf.⁹⁶ But what exactly does this mean? If it merely recognizes that the burden of proof lies with the party challenging the board's decision, the presumption label adds little to the substantive rule itself.⁹⁷ In *Reget v. Paige*,⁹⁸ the Wisconsin Court of Appeals held that the presumption requires that the plaintiff, to survive summary judgment, "come forward with sufficient evidentiary facts to

91. This was the setting of the *Hanson Trust* decision. *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264 (2d Cir. 1986).

92. See Hinsey, *supra* note 90, at 612 ("[T]he essential elements of the rule and doctrine are the same. This commonality of attributes has undoubtedly contributed to the widespread tendency to overlook the distinction.")

93. *Cox Enters., Inc. v. News-Journal Corp.*, No. 6:04-cv-698-Orl-28KRS, 2008 WL 5142417, at *9 n.15 (M.D. Fla. Dec. 5, 2008); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 n.10 (Del. 1986); *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 551 n.6 (Minn. 2008).

94. *Halebian v. Berv*, 931 N.E.2d 986, 991 (Mass. 2010).

95. See, e.g., *Cox Enters.*, 2008 WL 5142417, at *9 n.15 ("While a distinction between the business judgment rule and the business judgment doctrine may exist, the underlying rationale of protecting a director or officer's decision from post-hoc review by the courts remains the same, and herein the term 'business judgment rule' applies to both the protection from personal liability and the protection of the decision from court review."). The exception may be *Gries Sports Enters., Inc. v. Cleveland Browns Football Co.*, 496 N.E.2d 959, 964–65 (Ohio 1986), but the distinction the court draws seems to result from reading Delaware precedent out of context.

96. See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("[The BJR] is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."); *Reget v. Paige*, 2001 WI App 73, ¶ 18, 242 Wis. 2d 278, 626 N.W.2d 302 ("Procedurally, the business judgment rule creates an evidentiary presumption that the acts of the board of directors were done in good faith and in the honest belief that its decisions were in the best interest of the company.")

97. See, e.g., R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1345–46 (1992–93).

98. 2001 WI App 73.

make a *prima facie* case” that the directors’ conduct is not protected by the rule.⁹⁹ Others have argued that the presumption concept, as applied by the Delaware courts, requires both more particularized factual pleading and a higher evidentiary burden than for other civil actions.¹⁰⁰

Describing the presumption’s implications is further complicated because it necessarily functions within a larger body of rules, many of which vary from state to state. For example, the Delaware decision credited with formulating the presumption concept, *Aronson v. Lewis*,¹⁰¹ did so in order to specify the circumstances under which shareholders should be required to make a demand on the board of directors as a prerequisite to bringing a derivative suit.¹⁰² Much of the Delaware case law on rebutting the presumption thus has involved deciding whether a plaintiff’s failure to make such a demand should be excused.¹⁰³ In Wisconsin, by contrast, this issue never arises because demand is required in all cases by statute.¹⁰⁴ As an additional example, Delaware law holds that rebuttal of the presumption—by proving, for instance, the directors’ bad faith—shifts the burden to the defendants to prove the “entire fairness” of the challenged transaction.¹⁰⁵ Wisconsin’s allocation

99. *Id.* ¶ 20; see also *Dixon v. Ladish Co.*, 785 F. Supp. 2d 746, 750 (E.D. Wis. 2011) (“Thus, at the pleading stage, a plaintiff must necessarily allege facts that make rebuttal of the presumption plausible. In other words, [the plaintiff] must allege facts that plausibly show the [directors] failed to act in good faith and with a belief that their actions were in the company’s best interest.”), *aff’d sub nom. Dixon v. ATI Ladish LLC*, 667 F.3d 891 (7th Cir. 2012).

100. Balotti & Hanks, *supra* note 97, at 1347–52.

101. 473 A.2d 805 (Del. 1984).

102. See *id.* at 807–08, 812. This bears directly on Delaware’s approach to the issue considered by the Wisconsin courts in *Data Key*—whether a plaintiff must overcome the BJR at the pleading stage. See *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 16, 356 Wis. 2d 665, 849 N.W.2d 693. Because the plaintiff in a Delaware derivative suit must rebut the rule’s presumptions in order to show that the presuit demand requirement is excused, the issue is governed by the more stringent pleading requirements of Delaware’s Chancery Rule 23.1, which requires the complaint to allege “with particularity” the reasons for not making a demand. See *Brehm v. Eisner*, 746 A.2d 244, 254–55 & n.19 (Del. 2000); *Levine v. Smith*, 591 A.2d 194, 210 (Del. 1991) (“Rule 23.1 is an exception to the general notice pleading standard of the Rules.”). Nevertheless, Delaware cases have indicated that factual specificity is needed to rebut the BJR outside the demand context as well. *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 984 (Del. Ch. 2000).

103. See, e.g., *Brehm v. Eisner*, 746 A.2d 244, 258–66 (Del. 2000); *Aronson v. Lewis*, 473 A.2d 805, 812–15 (Del. 1984).

104. WIS. STAT. § 180.0742(1) (2013–14).

105. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (“[T]he presumption[] can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith. If that is shown, the burden then shifts to the director defendants to demonstrate that the challenged act or transaction was entirely fair to the corporation and its shareholders.”); *Cinerama, Inc. v. Technicolor*,

of the burden of proof, in cases of director self-interest, is less clear.¹⁰⁶ What does seem clear from the Wisconsin case law, however, is that proof of bad faith does not simply shift the burden of persuasion—it suffices to establish the director’s breach of fiduciary duty and thereby entitles the plaintiff to relief.¹⁰⁷

Thorny issues like these have led one corporate law scholar to describe the presumption concept as “frequently ambiguous” and “especially obscure in the context of the business judgment rule.”¹⁰⁸ This concern for the aptness of the terminology is especially relevant in Wisconsin, where presumptions are governed by statute, with the general rule being that the party relying on the presumption bears the burden of proving the underlying facts,¹⁰⁹ a result that does not fit the operation of the BJR. Yet the core question remains: Does the spirit of the BJR, and the accompanying judicial reluctance to intervene in the corporation’s internal affairs, require that plaintiffs bear a different burden of production or proof than that imposed on the ordinary litigant?

One important context for addressing this question has been when defendants invoke either the BJR or the immunity statute to seek judgment at the pleadings stage. This was the setting for the Supreme Court’s recent decision in *Data Key*.

IV. DATA KEY

Data Key was a shareholder suit challenging the sale of Renaissance Learning, Inc. to Permira Advisers LLC.¹¹⁰ Terms of the sale called for Permira to pay \$15 per share to Judith and Terrance Paul, who held 69

Inc., 663 A.2d 1156, 1162–63 (Del. 1995); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

106. Language in the cases, all of which are older, varies widely. *Compare Fed. Mortg. Co. v. Simes*, 210 Wis. 139, 147, 245 N.W. 169 (1932) (requiring “the utmost candor and fair and open dealing” and close scrutiny “for assurance that the interests of the corporation have not been injured”), with *Thauer v. Gaebler*, 202 Wis. 296, 301, 232 N.W. 561 (1930) (requiring allegations of “abuse of corporate power, bad faith, or willful abuse of discretion, or positive fraud”).

107. *Yates v. Holt-Smith*, 2009 WI App 79, ¶¶ 23–26, 319 Wis. 2d 756, 768 N.W.2d 213.

108. Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271, 1283–84 (1992–93); see also ALI PRINCIPLES, *supra* note 85, § 4.01(d) cmt. a (describing the term “presumption” as “imprecise and subject to misinterpretation”). Alternatively, another scholar has argued that while *Aronson’s* formulation of a presumption is “legally sound,” it does not represent the BJR. Lyman P.Q. Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625, 628–31 (1999–2000).

109. WIS. STAT. § 903.01 (2013–14).

110. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 1, 4, 356 Wis. 2d 665, 849 N.W.2d 693.

percent of Renaissance Learning's stock, and \$16.60 per share to the minority holders.¹¹¹ The board rejected a competing bidder's offer to pay \$16.90 for all of the shares.¹¹² After its efforts to enjoin the sale failed, Data Key Partners, a Renaissance shareholder cashed out in the merger, filed a class action against the company's directors and controlling shareholders, seeking to recover damages.¹¹³ Among its claims were that the directors breached their fiduciary duty by approving the sale, and that their actions represented willful misconduct and a willful failure to deal fairly with the corporation's shareholders, thereby depriving the directors of immunity from monetary liability under section 180.0828(1).¹¹⁴

Relying principally upon the BJR, the circuit court dismissed the complaint for failure to state a claim, but was reversed on appeal.¹¹⁵ Citing Wisconsin's liberal standards of notice pleading, the court of appeals reasoned: "courts in notice pleading jurisdictions traditionally disfavor application of the business judgment rule at the motion to dismiss stage because application of the rule generally requires a fact-intensive analysis that would be incompatible with notice pleading."¹¹⁶

In a 4-3 decision, the supreme court in turn reversed the court of appeals.¹¹⁷ Writing for the majority, Justice Patience Roggensack began by examining Wisconsin's pleading requirements in light of the U.S. Supreme Court's recent *Bell Atlantic Corporation v. Twombly*¹¹⁸ decision, and concluded: "*Twombly* makes clear the sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled. Plaintiffs must allege facts that plausibly suggest they are entitled to relief."¹¹⁹ Treating section 180.0828(1) as Wisconsin's codification of the BJR, the court held that under the *Twombly* standard:

In order to fall outside of the protection that the legislature has granted directors, plaintiffs must plead facts that create a

111. *Id.* ¶¶ 5, 7.

112. *Id.* ¶ 8.

113. *Id.* ¶ 9; *Data Key Partners v. Permira Advisors LLC*, 2013 WI App 107, ¶ 12, 350 Wis. 2d 347, 837 N.W.2d 624, *rev'd*, 2014 WI 86.

114. *Data Key*, 2014 WI 86, ¶¶ 10–11.

115. *Id.* ¶¶ 13–14.

116. *Data Key*, 2013 WI App 107, ¶ 23, *rev'd*, 2014 WI 86.

117. *Data Key*, 2014 WI 86.

118. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The *Data Key* majority saw *Twombly* as consistent with Wisconsin precedent. *Data Key*, 2014 WI 86, ¶ 30 (citing *Strid v. Converse*, 111 Wis. 2d 418, 422–23, 331 N.W.2d 350 (1983)).

119. *Data Key*, 2014 WI 86, ¶ 31.

plausible claim that the directors' acts were taken in contravention of § 180.0828(1). Therefore, to survive a motion to dismiss, plaintiffs must plead facts sufficient to plausibly show that the directors' actions constitute: (1) a "willful failure to deal fairly" with the minority shareholders on a matter in which the director has "a material conflict of interest"; (2) receipt of an "improper personal profit"; or (3) "[w]illful misconduct."¹²⁰

In applying this "plausible claim" standard to the complaint, the court examined each of the alleged benefits to the directors (including retaining their board seats and fees, vesting of their restricted stock, and rights to indemnification) that, according to the plaintiffs, caused them to improperly favor Permira over other bidders and concluded that none represented a "willful failure to deal fairly," "material conflict of interest," "improper personal profit," or "willful misconduct" within the meaning of section 180.0828(1)(a), (c), and (d).¹²¹

Given the lack of Wisconsin case law, both the majority and Chief Justice Abrahamson's dissent drew heavily from state and federal decisions applying Delaware law.¹²² Because both these opinions, along with that of the court of appeals, equated section 180.0828(1) with the BJR, they focused on cases addressing the criteria for dismissal under the rule itself, as opposed to under the immunity statute, which would seem more directly relevant.¹²³ But even had the court looked to this alternative line of cases, the outcome would almost certainly have been the same. In contrast to Wisconsin's opt-out approach, Delaware's section 102(b)(7) requires that the exculpatory provisions be affirmatively set forth in the corporation's charter.¹²⁴ Otherwise, the Delaware statute is comparable to section 180.0828(1) in identifying specific categories of misconduct for which exculpation is impermissible. Citing the "public policy" underlying section 102(b)(7)—enacted in response to the same concerns that led to the Wisconsin statute—Delaware courts have upheld early dismissal of monetary claims against directors that involve only the duty of care or

120. *Id.* ¶ 39 (quoting WIS. STAT. § 180.0828(1)(a), (c)–(d) (2013–14)).

121. *Id.* ¶¶ 44–56.

122. *See, e.g., id.* ¶¶ 63–64 (citing *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022 (Del. Ch. 2012)); *id.* ¶¶ 140–43 (Abrahamson, C.J., dissenting) (citing *In re Tower Air, Inc.*, 416 F.3d 229 (3d Cir. 2005); *Shamrock Holdings, Inc. v. Arenson*, F. Supp 2d 599 (D. Del. 2006)).

123. *See supra* note 73.

124. DEL. CODE ANN. tit. 8, § 102(b)(7) (2011).

other exculpable conduct.¹²⁵ They take this position even though Delaware views section 102(b)(7) as being “in the nature of an affirmative defense,” for which defendants “will normally bear the burden of establishing each of its elements.”¹²⁶ The case for requiring plaintiffs to specifically plead the exclusions is therefore even stronger in Wisconsin, since 180.0828(1) explicitly places the burden of proof on the person contesting the director’s immunity.¹²⁷

What about dismissal on the pleadings if only the judge-made BJR applies? Consider, for example, *Data Key*’s earlier suit seeking to enjoin the merger. Because only injunctive relief was at issue, section 180.0828 would not have been available. While the *Data Key* majority’s specific reliance on the statutory language no longer applies, the logic of its analysis—and particularly its discussion of the BJR’s procedural role in limiting judicial review¹²⁸—retains full force. Also, the policy arguments for early resolution of the plaintiff’s claims are now even more pressing, for the challenged transaction will often be on hold pending the outcome. The reasonable reading of *Data Key* is therefore that, in order to avoid dismissal of an action to which section 180.0828 does not apply, the plaintiff would nonetheless be required to rebut the availability of Wisconsin’s case-law BJR by pleading facts sufficient to meet the “plausible claim” standards of *Twombly*.

There remains the important question of how *Data Key* will be received in the federal courts. As Chief Justice Abrahamson observed in her dissent, “[C]ases under federal notice pleading do not rely on the business judgment rule at the motion to dismiss phase.”¹²⁹ This is a product of both federal notice-pleading rules and characterizations of the BJR as an affirmative defense or too fact intensive for resolution on the pleadings.¹³⁰ The *Data Key* majority, on the other hand, specifically rejected the position of the leading federal case that a plaintiff is required

125. *Malpiede v. Townson*, 780 A.2d 1075, 1093–96 (Del. 2001); *McPadden v. Sidhu*, 964 A.2d 1262, 1273–75 (Del. Ch. 2008) (dismissing claims alleging “conduct that constitutes reckless indifference or actions that are without the bounds of reason” on the ground that such conduct falls within the definition of exculpable gross negligence, rather than nonexculpable bad faith). See generally Richard B. Kapnick & Courtney A. Rosen, *The Exculpatory Clause Defense to Shareholder Derivative Claims*, BUS. TORTS J., Winter 2010, at 1.

126. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1223–24 (Del. 1999).

127. As discussed in Part V.B *infra*, it is important to stress that this statutory allocation of the burden of proof applies only to the availability of immunity. The statute does not alter the burden of proving the underlying breach of duty.

128. *Data Key*, 2014 WI 86, ¶ 34.

129. *Id.* ¶ 140 (Abrahamson, C.J., dissenting).

130. See, e.g., *Levin v. Miller*, 763 F.3d 667, 671 (7th Cir. 2014); *Stanziale v. Nachtoml (In re Tower Air, Inc.)*, 416 F.3d 229, 238 (3d Cir. 2005); *FDIC v. Baldini*, 983 F. Supp. 2d 772, 783–84 (S.D. W. Va. 2013) (collecting cases).

to “plead around” the BJR only if it is raised on the face of the complaint.¹³¹ Federal courts applying *Data Key* will therefore be faced with the question of whether the issue is “substantive,” and thus controlled by Wisconsin law, or “procedural,” as to which the Federal Rules of Civil Procedure might dictate a different outcome¹³²—and further, whether the answer should be the same for the judge-made rule as for the immunity statute.¹³³ As for the rule, the Seventh Circuit’s view is that it is a defense and therefore, even after *Twombly* and *Iqbal*,¹³⁴ cannot be the basis for a motion to dismiss.¹³⁵

V. CLOSELY-HELD CORPORATIONS

Data Key involved a company traded on the Nasdaq with thousands of shareholders,¹³⁶ but both the BJR and immunity statute apply alike to publicly-traded and closely-held corporations.¹³⁷ Indeed, the overwhelming share of Wisconsin cases applying the BJR have involved close corporations.¹³⁸ In that context, as recognized by Wisconsin courts early on, the rule operates to uphold the majority shareholders’ prerogative to decide corporate policy, over the objection of the minority.¹³⁹

131. *Data Key*, 2014 WI 86, ¶¶ 40–43 (discussing *In re Tower Air, Inc.*, 416 F.3d at 238).

132. See *IT Litig. Trust v. D’Aniello (In re IT Group Inc.)*, No. 02–10118, Civ.A. 04–1268–KAJ, 2005 WL 3050611, at *8 n.10 (D. Del. Nov. 15, 2005) (discussing the issue under Delaware law).

133. The federal cases applying Delaware law have generally held that exculpation under section 102(b)(7), like the BJR, is an affirmative defense that cannot be the basis for dismissal under rule 12(b)(6). See, e.g., *Burtch v. Opus, L.L.C. (In re Opus East, L.L.C.)*, 480 B.R. 561, 572 (Bankr. D. Del. 2012) (collecting cases); *Ad Hoc Comm. of Equity Holders of Tectonic Network, Inc. v. Wolford*, 554 F. Supp. 2d 538, 560–61 (D. Del. 2008). *Contra In re IT Group Inc.*, 2005 WL 3050611, at *11 n.13. The question under Delaware law is further complicated because, as noted above, unlike Wisconsin, the exculpatory provisions must be included in the corporation’s charter. This raises the issue of whether the charter is a “matter outside the pleading” that cannot be the subject of a motion to dismiss or is instead an appropriate item for judicial notice. See *Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F. Supp. 2d 376, 399 (S.D.N.Y. 2013).

134. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

135. *Levin*, 763 F.3d at 671 (applying Indiana law).

136. *Data Key*, 2014 WI 89, ¶ 4.

137. Davis, Jr., *supra* note 70, at 589–95.

138. See, e.g., *Einhorn v. Culea*, 2000 WI 65, 235 Wis. 2d 646, 612 N.W.2d 78; *Steven v. Hale-Haas Corp.*, 249 Wis. 205, 221, 23 N.W.2d 620 (1946); *Yates v. Holt-Smith*, 2009 WI App 79, 319 Wis. 2d 756, 768 N.W.2d 213; *Reget v. Paige*, 2001 WI App 73, 242 Wis. 2d 278, 626 N.W.2d 302.

139. See, e.g., *Figge v. Bergenthal*, 130 Wis. 594, 613–14, 109 N.W. 581 (1907).

A. The BJR and Protecting Minority Shareholders

Over the last 30 to 40 years, however, a countervailing concern has emerged, one that recognizes the special vulnerability of the close corporation shareholder, who has no outside market for his or her stock and is therefore particularly vulnerable to being taken advantage of by those in control. The challenge for corporate law is that the conduct at issue often involves matters—such as dividends, employment, and salaries—traditionally entrusted to the board. Courts across the country have struggled with defining the boundary between permissible business judgment and unlawful exploitation of the minority.¹⁴⁰ It remains a work in progress.¹⁴¹

Consider the hypothetical case of Ann, Bill, and Charley, equal shareholders in a close corporation that they started together and built into a highly successful business. They have been paying themselves substantial salaries but reinvesting what was left after expenses back into the business, rather than paying dividends. After a dispute, Ann and Bill terminate Charley's employment on the ground that he is no longer pulling his weight. But to Charley, that is simply a self-interested pretext to deprive him of his fair share of the corporation's cash flow. To what extent should the BJR rule foreclose judicial intervention into shareholder disputes such as these?

The Wisconsin case law suggests four possible avenues that Charley might pursue, each with different implications for the BJR. Most directly, if Charley can prove that Ann's and Bill's true motives for terminating him were in bad faith—for instance, to pressure him into selling his shares at an unfairly low price—he can rebut the BJR and recover.¹⁴²

B. Constructive Dividends, Fairness, and the Immunity Statute

Otherwise, perhaps Charley can show that the purported salary payments to Ann and Bill were based not on the work they performed but were instead a division of corporate profits. If so, *Jorgensen v. Water Works, Inc. (Jorgensen II)*¹⁴³ permits him to maintain a direct action against Ann and Bill for failing to treat him equitably with other

140. See 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS: PROTECTING MINORITY RIGHTS IN SQUEEZE-OUTS AND OTHER INTRACORPORATE CONFLICTS § 10.4 (rev. 2d ed. 2004).

141. See, e.g., *id.* (criticizing courts' "indiscriminate" application of the BJR to close corporations).

142. *Yates v. Holt-Smith*, 2009 WI App 79, ¶¶ 20–26, 319 Wis. 2d 756, 768 N.W.2d 213.

143. 2001 WI App 135, 246 Wis. 2d 614, 630 N.W.2d 230.

shareholders.¹⁴⁴ The fact remains, however, that Ann and Bill are actually continuing to perform services for the corporation, while Charley is not, and therefore should be entitled to some differential compensation for their efforts. Although if Ann and Bill set the amount of that compensation themselves, they cannot expect the benefits of the BJR.¹⁴⁵

Jorgenson II referred to the BJR only in a footnote, distinguishing the *Reget* case where salaries had been set by the outside directors.¹⁴⁶ In the absence of such independent approval by the directors or shareholders, Ann's and Bill's compensation will be reviewable for its fairness;¹⁴⁷ the only question is who bears the burden of proof. An argument might be made for subjecting compensation arrangements to less scrutiny than other types of conflict-of-interest transactions,¹⁴⁸ particularly in smaller corporations where it is often difficult to enlist a sufficient number of outsiders to serve on the board. Otherwise, the controlling shareholders could be forced to defend their compensation on a regular basis. Nonetheless, the rule remains that they bear the burden of proof.¹⁴⁹

This allocation of the burden of proof is not affected by the Wisconsin immunity statute, even though that statute specifically imposes the burden on the person asserting liability.¹⁵⁰ Hopefully, this

144. *Id.* ¶¶ 16–18. The Wisconsin Supreme Court has extended this “constructive dividend” analysis to other types of payments made to or on behalf of majority shareholders. *Notz v. Everett Smith Group, Ltd.*, 2009 WI 30, ¶ 4, 316 Wis. 2d 640, 764 N.W.2d 904; *see also Krier v. Vilione*, 2009 WI 45, ¶¶ 84–89, 317 Wis. 2d 288, 766 N.W.2d 517 (Bradley, J., dissenting).

145. Section 180.0811 permits directors to set their own compensation but does not address the standard of judicial review. WIS. STAT. § 180.0811 (2013–14).

146. *Jorgensen II*, 2001 WI App 135, ¶ 12 n.7 (citing *Reget v. Paige*, 2001 WI App 73, ¶¶ 21–22, 242 Wis. 2d 278, 626 N.W.2d 302). The court also noted the increased hardship suffered by the Jorgensens because, given the corporation's tax status, they were taxed on their share of its profits even though they received no distributions. *Id.* ¶ 14.

147. *See* § 180.0831(2); *Gauger v. Hintz*, 262 Wis. 333, 349–50, 55 N.W.2d 426 (1952); *Jacobson v. Am. Tool Cos.*, 222 Wis. 2d 384, 397, 588 N.W.2d 67 (Ct. App. 1998).

148. *See* ALI PRINCIPLES, *supra* note 85, § 5.03 cmt. c.

149. The specific theory adopted by Wisconsin courts is that the directors' self-interest renders the board decision a nullity, so that they can recover the fair value of their services only on a theory of implied contract. *Gauger*, 262 Wis. at 349; *Mulder v. Mittelstadt*, 120 Wis. 2d 103, 109–10, 352 N.W.2d 223 (Ct. App. 1984). While the vitality of this line of reasoning is doubtful in light of Wisconsin statute section 180.0831, the ultimate conclusion—that the directors have the burden of proving their compensation is fair—is entirely consistent with more contemporary authorities. *See, e.g., Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 745–46 (Del. Ch. 2007); *Marx v. Akers*, 666 N.E.2d 1034, 1043 n.6 (N.Y. 1996); *Wilderman v. Wilderman*, 315 A.2d 610, 615 (Del. Ch. 1974); ALI PRINCIPLES, *supra* note 85, § 5.03(b).

150. § 180.0828(1).

distinction will not become a source of confusion in the aftermath of *Data Key*. The purpose of statutes such as Wisconsin section 180.0828(1) and Delaware section 102(b)(7) was to distinguish between the director's duty of loyalty and duty of care, and to protect directors against monetary risk for the latter. These statutes were not intended to change the underlying substantive law. Thus, in the case of Ann's and Bill's compensation—or any other instance of self-dealing that has not been independently approved by the directors or shareholders—the burden remains on the interested director to prove fairness. If he or she fails to do so, they will be deemed to have breached their fiduciary duty. If the remedy includes damages or other monetary liability, only then does the burden shift to the plaintiff to prove that the type of breach fits one or more statutory categories—in this case, an “improper personal benefit.”¹⁵¹

There is, moreover, the threshold question of whether the immunity statute even applies in cases like that against Ann and Bill. The salaries at issue were paid to them as officers and employees, not as directors. Can it be said that the duty at issue is one that results “*solely* from his or her status as a director,” as required by the statute?¹⁵² All types of agents have a fiduciary duty not to unfairly enrich themselves at the principal's expense.

An appreciation for the legislative background of the immunity statute is important here. Unlike the close-corporation roots of Wisconsin's BJR, the immunity statute was a response to problems principally facing publicly-traded companies.¹⁵³ The mergers, acquisitions, and hostile takeovers of the 1980s had put directors increasingly at risk of personal liability.¹⁵⁴ Obtaining adequate insurance coverage had become difficult and created a concern over the continuing ability of Wisconsin corporations to recruit and retain competent outside directors—or to remain incorporated in the state.¹⁵⁵ Thus, while the immunity statute applies by its terms to corporations of all sizes, courts should be wary of applying it too expansively to resolve disputes between the shareholders of a close corporation. Nothing in either the letter or spirit of *Data Key*—a case involving the kind of public-company merger at the heart of the legislature's concern—changes this.

151. *Id.* § 180.0828(1)(c).

152. *Id.* § 180.0828(1) (emphasis added).

153. *See* WIS. LEGIS. COUNCIL, REPORT NO. 6 TO THE 1987 LEGISLATURE: LEGISLATION ON LIABILITY LAW AND INSURANCE 10–15 (1987).

154. *Id.*

155. *Id.*

C. Fiduciary Duties of Majority Shareholders

A third possibility is a suit against Ann and Bill in their capacity as majority shareholders. The first *Jorgensen* decision recognized a direct action for breach of fiduciary duty by the directors and majority shareholders that results in an injury primarily to the minority shareholders as individuals.¹⁵⁶ This recognition is only a starting point, however. Few areas of U.S. corporate law have been as susceptible to overgeneralization as the question of who owes fiduciary duties to whom. Rather than a cohesive theory with well-defined boundaries, branding the majority shareholders as fiduciaries is often little more than a convenient means to a much narrower end. In Wisconsin, for example, the proposition's origins lie in a case involving the inferences to be drawn from the majority shareholders' refusal, on Fifth-Amendment grounds, to answer questions about the corporation's books and records.¹⁵⁷ The case law imposing fiduciary duties on majority shareholders might therefore be better analyzed as a series of separate doctrines, each with its own specific objective in mind.

The most obvious of these objectives is to impose liability on the majority or controlling shareholder in its capacity as such, but even here the cases can be subdivided into two categories. The more far reaching of the two bases liability on action taken at the shareholder level and therefore requires creating an exception to the general principle that shareholders are free to vote or transfer their shares as they please.¹⁵⁸ Alternatively, the basis for liability may be a decision made at the board level that benefits the majority to the detriment of the other shareholders. The important difference from the first category is that imposing fiduciary status on the controlling shareholder does not create a duty where none would otherwise have existed—the root breach of duty is the directors' approval of the underlying transaction and is thereby governed by mainstream fiduciary law. The objective of this second category of cases is simply to extend liability to the person who both exercised

156. *Jorgensen v. Water Works, Inc. (Jorgensen I)*, 218 Wis. 2d 761, 779, 582 N.W.2d 98 (Ct. App. 1998).

157. *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239–41, 172 N.W.2d 812 (1969).

158. A leading example is a California case holding liable the majority shareholders of a savings and loan association for transferring their shares to a newly-formed and publicly-traded holding company, rather than creating a public market for the savings and loan shares themselves—one in which the association's minority shareholders could also participate. *Jones v. H. F. Ahmanson & Co.*, 460 P.2d 464, 471–74 (Cal. 1969).

control over, and received the benefits from, that breach of duty, but who might not itself be a director.¹⁵⁹

The difference between these two categories of cases is evident in *Data Key* and helps to explain the differing outcomes reached by the circuit court and the court of appeals on the issue of majority-shareholder liability. The plaintiffs claimed that the Pauls improperly favored the sale to Permira because it had agreed to grant them a license to continue using Renaissance software—a benefit not available to the minority shareholders.¹⁶⁰ As described by the court of appeals, the “crux” of the lower court’s reasoning for dismissing this portion of the plaintiff’s case was that “the Pauls had the right to sell their shares and to vote their shares in their own interests.”¹⁶¹ The court of appeals, on the other hand, interpreted the plaintiff’s claims as fitting into the second category of cases:

[c]onstrued liberally, the complaint allegations support a reasonable inference that the Pauls used their majority control, including their ability in that capacity to elect directors, to exert undue influence over the board to cause a sale of the *entire* company under terms that provided special personal benefits to the Pauls and harmed the minority shareholders.¹⁶²

Justice Roggensack’s analysis in the supreme court majority opinion, in contrast, would encompass either category of cases. She characterized the majority shareholders’ fiduciary duty to minority shareholders as “very limited” under Wisconsin law: “[s]imply stated, majority shareholders cannot use their voting power to require corporate action that grants majority shareholders an improper material benefit at the expense of minority shareholders.”¹⁶³ Because there was no indication that the value of the Pauls’ software license exceeded the additional per-share consideration paid to the minority shareholders,¹⁶⁴ the plaintiffs’ claims were appropriately dismissed for failure to plausibly demonstrate that the Pauls had improperly benefitted at the minority’s expense.

159. This is the case, for example, if the controlling shareholder is a parent corporation. See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710–11 (Del. 1983); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 719–20 (Del. 1971).

160. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 60, 356 Wis. 2d 665, 849 N.W.2d 693.

161. *Data Key Partners v. Permira Advisers LLC*, 2013 WI App 107, ¶ 39, 350 Wis. 2d 347, 837 N.W.2d 624.

162. *Id.* ¶ 40.

163. *Data Key*, 2014 WI 86, ¶ 59.

164. *Id.* ¶ 60.

Many of the majority-duty cases are specifically attuned to addressing the plight of people like Charley—minority shareholders in close corporations. An important line of Massachusetts cases analogizes the close corporation to a partnership and on that basis imposes more stringent fiduciary duties than those applicable to corporations generally.¹⁶⁵ Here, unlike the cases discussed earlier, the challenged conduct typically involves action taken by the controlling shareholders in their capacity as directors and is thereby already subject to fiduciary obligation, but because of the minority's enhanced vulnerability in the closely-held corporate context, that obligation requires the "utmost good faith and loyalty."¹⁶⁶ Exactly how that standard differs from the conventional director's duty of loyalty has never been fully articulated, but one practical implication for litigation is that any action that treats the minority differently from those in control—such as the termination of Charley's employment—will be closely scrutinized. Rather than being protected by the BJR, the defendants are required to demonstrate a legitimate business purpose for their actions, which the minority shareholder can then rebut by showing that same purpose could have been achieved by alternative, less harmful means.¹⁶⁷

An additional purpose for recognizing this partnership-like duty is to permit the aggrieved minority holder to bring a direct claim for relief rather than be limited to suing derivatively on the corporation's behalf. This was the issue in *Jorgensen I*.¹⁶⁸ While the court cited one of the Massachusetts cases in support, its analysis addressed only the existence of a direct claim, not the level of duty entailed.¹⁶⁹ It would therefore be premature to infer, without more, that Wisconsin courts would follow Massachusetts in applying a heightened fiduciary duty to majority shareholders in close corporations.¹⁷⁰ Consequently, when acting in their capacity as directors, majority shareholders of Wisconsin close corporations should continue to enjoy the BJR's protection against

165. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 661–63 (Mass. 1976); *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515–16 (Mass. 1975).

166. *Donahue*, 328 N.E.2d at 515.

167. *See Wilkes*, 353 N.E.2d at 663 (removal of minority shareholder from payroll and refusal to reelect him as a salaried officer and director). *Compare Donahue*, 328 N.E.2d at 518–19 (offer to repurchase shares must be extended to minority shareholder), with *Nixon v. Blackwell*, 626 A.2d 1366, 1379 (Del. 1993) (selective repurchase found to be fair).

168. The trial court had interpreted prior cases to limit that right to shareholders in statutory close corporations under Wisconsin statute section 180.1833. *Jorgensen I*, 218 Wis. 2d 761, 773–76, 582 N.W.2d 98 (Ct. App. 1998).

169. *Id.* at 779.

170. *See McVeigh v. Grum*, No. 98-2559, 2000 WL 387516, at *4 (Wis. Ct. App. Apr. 18, 2000) (per curiam) (rejecting the argument that *Jorgensen I* adopted the Massachusetts approach).

liability for breach of fiduciary duty, to the same extent as any other director. And, independent of the BJR, if the breach entails their duties as directors, they are shielded against monetary liability by the immunity statute, so long as none of its exceptions apply. If, on the other hand, the duty at issue results from the defendant's status as a majority or controlling shareholder, the immunity statute is not available.¹⁷¹

D. Oppression

While the BJR therefore remains an available defense to a claim for breach of fiduciary duty, its relationship to Charley's final remedial alternative—a suit for dissolution—is murkier. This remedy is based on the 1990 addition of “oppressive” conduct to the statutory grounds by which a minority shareholder can seek judicial dissolution of the corporation based on the actions of its directors or others in control.¹⁷² Recognizing that dissolution is an extreme measure, particularly for a profitable going concern,¹⁷³ Wisconsin courts have interpreted their statutory authority to include the fashioning of alternative equitable remedies, including ordering a buyout of the minority's shares.¹⁷⁴

The court in *Jorgensen I* described oppression as “closely related” to breach of fiduciary duty.¹⁷⁵ But the focus of the two remedies differs. By claiming a breach of fiduciary duty, Charley seeks compensation for his removal from office. Absent proof of bad faith, courts will not second guess whether Ann and Bill were right or wrong in deciding that Charley's services were no longer of value to the corporation. The dissolution remedy, in contrast, responds to the overall equity of Charley now being entirely at the mercy of Ann and Bill even though one-third of the enterprise represents his invested capital. For this reason, courts in several states have taken the position that business-judgment type

171. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 57, 356 Wis. 2d 665, 849 N.W.2d 693.

172. WIS. STAT. § 180.1430(2)(b) (2013–14).

173. *Notz v. Everett Smith Group, Ltd.*, 2009 WI 30, ¶ 52–54, 316 Wis. 2d 640, 764 N.W.2d 904 (Roggensack, J., concurring) (calling dissolution a “harsh” remedy, and stating that “petitions for dissolution rarely result in the actual dissolution of the corporation”); *Dickman v. Vollmer*, 2007 WI App 141, ¶ 27, 303 Wis. 2d 241, 736 N.W.2d 202 (“Dissolution is discretionary.”).

174. Use of equitable remedies in lieu of dissolution has been upheld in a number of unpublished opinions. See, e.g., *McMorrow ex rel. Estate of Sheppard v. Specht*, No. 2012AP1633, 2013 WL 3198424, at *2 (Wis. Ct. App. June 26, 2013) (per curiam); *N. Air Servs., Inc. v. Link*, No. 2008AP2897, 2012 WL 130531, at *5 (Wis. Ct. App. Jan. 18, 2012) (Cane, J.); *Edler v. Edler*, No. 2006AP2937, 2007 WL 4530823, at *3 (Wis. Ct. App. Dec. 27, 2007) (per curiam); *Senty v. Senty*, No. 2004AP1556, 2006 WL 770479, at *8, ¶ 48 (Wis. Ct. App. Mar. 28, 2006) (per curiam).

175. *Jorgensen I*, 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998).

deference does not apply in the oppression context.¹⁷⁶ Alternatively, given Wisconsin's history of a strong judicial commitment to the BJR, it may be more palatable to treat the BJR and the oppression doctrine as in a way complementing each other. That is, in response to a minority shareholder's claim of oppression, a Wisconsin court might be reluctant to second-guess the majority directors' decision, but because of that reluctance, be more open to facilitating the minority's exit from the corporation.

In practice, the exact role to be played by the BJR necessarily depends on how "oppression" is defined, and courts have developed two principal contenders. One equates oppressive conduct with defeating the "reasonable expectations" that were the basis of the minority shareholder's joining the venture.¹⁷⁷ Under this definition, Ann's and Bill's ouster of Charley might well be found oppressive even though it is the product of their good faith business judgment that he is no longer pulling his weight. The alternative, associated with the Oregon Supreme Court's *Baker v. Commercial Body Buildings, Inc.*¹⁷⁸ decision, defines oppression as conduct that is "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."¹⁷⁹ In contrast to the reasonable-expectations test, many elements in this second definition would suffice to negate the BJR's availability; but insofar as the definition's various component tests are disjunctive, it is still possible that some conduct might fit within both the *Baker* definition of oppression and the scope of the rule. Could Charley's termination be

176. *Fox v. 7L Bar Ranch Co.*, 645 P.2d 929, 934–35 (Mont. 1982); *Grato v. Grato*, 639 A.2d 390, 396 (N.J. Super. Ct. App. Div. 1994); *Application of Topper*, 433 N.Y.S.2d 359, 362 (Sup. Ct. 1980). *But see Ritchie v. Rupe*, 443 S.W.3d 856, 869 (Tex. 2014) (holding that conduct is oppressive under Texas receivership only if it is "inconsistent with the honest exercise of business judgment").

177. *See, e.g., In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (N.Y. 1984).

178. 507 P.2d 387 (Or. 1973).

179. *Id.* at 393. Interestingly, both definitions trace to the United Kingdom, which first enacted an oppression remedy in 1948. Companies Act, 1948, 11 & 12 Geo. 6, c. 38, § 210 (U.K.), available at http://www.legislation.gov.uk/ukpga/1948/38/pdfs/ukpga_19480038_en.pdf. The *Baker* language was taken from a student law review comment, which quoted two British decisions. *See id.* at 393 n.9 (citing Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128). The reasonable-expectations test was popularized by F. Hodge O'Neal in his treatise and was derived from an Australian scholar's analysis of the experience under the U.K. and Commonwealth statutes. *See* Allen B. Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043, 1043 & n.1, 1063 (1969).

regarded as “a violation of the rules of ‘fair play,’”¹⁸⁰ for example, even though he cannot prove that Ann and Bill acted in bad faith?

In *Jorgensen I*, the court adopted the *Baker* language but added that it intended the definition “to be broad and flexible, rather than narrow.”¹⁸¹ Further expanding the potential boundaries of the test, the court observed in a footnote that it saw the *Baker* language “as including consideration of the frustration of the reasonable expectations of shareholders, when that is appropriate.”¹⁸² *Jorgensen I*’s adoption of the *Baker* language has been cited in several subsequent cases and endorsed by the supreme court,¹⁸³ but it has rarely been applied to a specific set of facts in a published opinion. The lone instance is *Reget v. Paige*, where the court read *Jorgensen I* to require “that the complaining shareholder prove that those in control of the corporation willfully and wrongfully inflicted a direct injury upon him that benefited the stockholders who were not injured.”¹⁸⁴ Importantly, it added: “[d]ecisions of the board made in good faith cannot satisfy the definition we established for oppressive conduct in *Jorgensen*.”¹⁸⁵ Taken alone, this sentence suggests that in Wisconsin, unlike some of the other jurisdictions referred to above, the BJR is a defense to claims of oppression. But *Reget*’s claims exclusively involved conduct that affected all shareholders equally—excessive compensation and the failure to pay dividends or make a market in the corporation’s stock.¹⁸⁶ It therefore remains to be seen whether Wisconsin courts would take a similarly narrow view of the oppression concept in the more typical fact pattern where, as in *Charley*’s case or *Jorgensen* itself, the minority shareholder claims to have been singled out for unfair treatment.

Whatever the relationship between oppression and the BJR, the role of the immunity statute is more clear-cut. Conduct may be found to be oppressive independent of whether it meets any of the statutory

180. See *Lynch v. Carriage Ridge, LLC*, No. 02-0528, 2003 WL 21706305, at *4 (Wis. Ct. App. July 24, 2003) (per curiam).

181. *Jorgensen I*, 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998) (citing *Fix v. Fix Material Co.*, 538 S.W.2d 351, 358 (Mo. Ct. App. 1976)).

182. *Id.* at 783 n.10; see also *Edler v. Edler*, No. 2006AP2937, 2007 WL 4530823, at *2 (Wis. Ct. App. Dec. 27, 2007) (per curiam). The author of the leading treatises on close corporations and oppression has observed that *Baker*’s “definition of oppression, viewed from a twenty-first century perspective, looks narrow” and has characterized the reasonable-expectations test as now “the most widely accepted standard to trigger . . . judicial relief.” Robert B. Thompson, *Allocating The Roles for Contracts and Judges in the Closely Held Firm*, 33 W. NEW ENG. L. REV. 369, 370, 378 (2011).

183. *N. Air Servs., Inc. v. Link*, 2011 WI 75, ¶ 75 n.32, 336 Wis. 2d 1, 804 N.W.2d 458.

184. *Reget v. Paige*, 2001 WI App 73, ¶ 25, 242 Wis. 2d 278, 626 N.W.2d 302.

185. *Id.* ¶ 26.

186. *Id.* ¶ 8.

exceptions to immunity listed in section 180.0828(1). The immunity statute enters the picture only to exclude monetary liability from the remedies available against the defendants in their capacity as directors. Only to the extent that the remedy entails damages for the breach of a “duty resulting solely from [the defendant’s] status as a director” is the plaintiff required to prove that one or more of the statutory exceptions apply.¹⁸⁷

CONCLUSION

Despite the Wisconsin BJR’s long history, important new issues continue to arise, as *Data Key* attests. To facilitate the rule’s continuing evolution, Wisconsin has chosen not to cast it into fixed statutory language.¹⁸⁸ Similarly, Wisconsin has principally left it to the courts to determine the content of a director’s duties as well as the boundaries of protection for minority shareholders in close corporations.¹⁸⁹ The director’s immunity statute, in contrast, reflects a tailored solution to address a singular problem—the director’s exposure to monetary liability for breach of fiduciary duty.¹⁹⁰ The *Data Key* court’s identification of the statute with the judge-made rule should not be misread to permit the terms of the statute to narrow or displace the ongoing case-law development of either the BJR or remedies to protect the minority shareholder from breach of fiduciary duty or oppression.

187. WIS. STAT. § 180.0828(1) (2013–14).

188. *See supra* Part II.A.

189. *See supra* Part II.A.

190. § 180.0828(1).