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# Minority Shareholders and Direct Suits in Closely Held Corporations Where Derivative Suits Are Impractical: Durham v. Durham

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# Minority Shareholders and Direct Suits in Closely Held Corporations Where Derivative Suits Are Impractical: *Durham v. Durham*

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## I. INTRODUCTION

Suppose A, B, and C are the sole shareholders and directors of a corporation. A and B have used corporate funds for their own personal use and such use has depleted the corporation's assets. C now wishes to commence a legal proceeding to recover the damages. Should C be forced to recover through a derivative suit brought on behalf of the corporation just because the depletion of the corporate assets affected all of the shareholders and not just C? Not necessarily.

In *Durham v. Durham*,[1] the Supreme Court of New Hampshire permitted a minority shareholder, in a closely held corporation, to bring a direct suit against a corporation's officers, even though the injury suffered was incurred by the entire corporation. Prior to this decision, New Hampshire had only addressed the requirements for bringing a direct suit in a regular, or widely held, corporation.[2] In allowing the direct suit, the *Durham* court followed a minority view and adopted a standard provided by the American Law Institute's (ALI) Principles of Corporate Governance.[3] Many jurisdictions have declined to take this step. Rather, those jurisdictions insist that shareholders meet derivative pleading requirements set forth by their respective state laws, reasoning that such requirements create uniformity and predictability essential to corporate decision making.[4] In addition, many of the states that refuse to allow direct suits by a shareholder

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1. 871 A.2d 41 (N.H. 2005).

2. *See* Appeal of Richards, 590 A.2d 586, 590 (N.H. 1991) (only allowing direct suit by minority shareholders, "(1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, [or] (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders, or by the corporation itself") (citations and quotations omitted).

3. *See infra* Part II.

4. *See, e.g.*, Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379, 384 (7th Cir. 1990) (holding "[c]ommercial rules should be predictable"); Wessin v. Archives Corp., 592 N.W.2d 460, 466 (Minn. 1999) (requiring that shareholders bring a derivative suit because it provides "[a] uniform, fair and predictable mechanism for enforcing claims of the corporation").

against a closely held corporation expressly reject the standard provided by the ALI.[5]

This Note examines both the minority and majority views and justifies New Hampshire's decision to allow minority shareholders to bypass derivative pleading requirements and bring a direct action allowing them to recover personally. This Note further suggests that in the context of closely held corporations, direct actions may provide minority shareholders their only chance to receive adequate compensation for injuries they have suffered.

The remainder of this Section explains the differences between derivative and direct suits, as well as differences between widely held and closely held corporations. Part II will set forth the facts, arguments, and holding from *Durham* and explain why that decision was warranted. Part III will discuss cases from jurisdictions which decline to adopt the ALI standard and refuse to allow direct actions in closely held corporations. Part IV will provide an analysis of the two conflicting views and suggest that those jurisdictions that have rejected the ALI's proposal should reconsider. Finally, Part V will briefly conclude.

### A. *Derivative Suit vs. Direct Suit*

The fundamental difference between a derivative suit and a direct suit is that in a derivative suit a plaintiff shareholder brings a claim on behalf of the corporation and seeks recovery for the corporation, whereas, in a direct suit, the plaintiff shareholder asserts her own cause of action and seeks recovery for herself.[6] In a typical corporate setting, the board of directors initiate or decide whether a corporation should bring a lawsuit to recover damages incurred by the corporation.[7] However, in certain circumstances, minority shareholders can bring a derivative suit against directors who have breached their fiduciary duties to a corporation by depleting its assets and/or lowering its stock value. Because a derivative suit is brought by the shareholder on behalf of the corporation, any proceeds from the suit are put back into the corporate treasury, which benefits the shareholder indirectly through an increase in the value of her shares. Minority shareholders are permitted to bring such a suit because if the members of the board are the

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5. *See* Landstrom v. Shaver, 561 N.W.2d 1, 14 (S.D. 1997) (declining to adopt ALI standard because it does not consider that "[a] minority shareholder in a close corporation may have different goals than a majority").
6. FRANKLIN A. GEVURTZ, CORPORATION LAW 387 (2000).
7. *Id.*

putative wrongdoers, they would not decide to bring a suit against themselves.[8] As Gevurtz observes:

> If courts were to leave exclusive control over corporate litigation in the hands of the board, then enforcement of the director's duties to the corporation would be confined to those relatively rare cases in which the corporation goes broke and a bankruptcy trustee asserts the claim, or else there is a change in management and the new directors decide the corporation should act.[9]

Although the derivative suit provides injured minority shareholders some form of redress, the shareholders usually must conform to statutory requirements. For example, under the New Hampshire Business Corporation Act, a shareholder cannot commence a derivative suit until "a written demand has been made upon the corporation to take suitable action," and either the demand is rejected or ninety days have passed since the demand was first made.[10]

Other circumstances exist where a shareholder may be permitted to bring a direct action against the directors, which allows her to recover personally for damages. However, this usually requires the shareholder to show an injury that is separate from that which was incurred by the entire corporation.[11] This situation most often occurs when a majority shareholder breaches a shareholder's agreement or commits fraud by misleading a shareholder to buy or sell stock.[12] Direct actions are also allowed when a shareholder asserts that an officer or director interfered with her rights as a shareholder.[13]

The *Durham* court explains:

> Courts generally require a shareholder to bring a derivative, as opposed to a direct, suit against corporate officers to redress injuries to the corporation because the derivative proceeding:

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8. *Id.*
9. *Id.*
10. N.H. REV. STAT. ANN. § 293-A:7.42 (1999).
11. *See, e.g.*, *In re* Nuveen Fund Litig., 855 F.Supp. 950, 954 (N.D. Ill. 1994) (denying a direct suit by shareholders where new shares were offered to existing shareholders, diluting the value of all shares, because "the injury to each shareholder [was] of the same character") (citations and quotations omitted); Appeal of Richards, 590 A.2d 586, 590 (N.H. 1991) (stating that shareholders could not bring a direct suit because of a diminution in stock value, due to an inadequate rate increase for customers, because such an injury is not distinguishable from that suffered by all shareholders); Loewen v. Galligan, 882 P.2d 104, 112 (Or. Ct. App. 1994) (denying direct suit by shareholders after merger diminished value of their stock because they had suffered no "special" injury).
12. GEVURTZ, *supra* note 6, at 389.
13. *See* Eisenberg v. Flying Tiger Line, Inc., 451 F.2d 267, 268 (2d Cir. 1971) (allowing a direct suit where minority shareholder claimed that his ability to control the corporation through voting rights was diluted).

> [1] prevents a multiplicity of lawsuits by shareholders; [2] protects corporate creditors by putting the proceeds of the recovery back in the corporation; [3] protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and [4] adequately compensates the injured shareholder by increasing the value of his shares.[14]

Although the courts generally require derivative suits, it is clear why shareholders would rather bring direct suits. As noted above, unlike a direct suit, a derivative suit requires that the shareholder comply with pleading requirements, such as written demands and waiting periods. Direct suits also allow the injured shareholder to recover personally, rather than have the proceeds go back into the corporate treasury. In addition, defendant directors and officers involved in a derivative suit can dispose of such suits through the use of special litigation committees, whereas defendants in a direct suit are not afforded such protections.[15]

### B. *Widely Held Corporation vs. Closely Held Corporation*

In some states, direct actions are permitted in closely held corporations even where the shareholder did not suffer a unique injury.[16] Closely held corporations are commonly defined as those with shares that are not publicly traded and have only a few shareholders, all or a majority of whom participate in the management of the corporation.[17] This definition varies slightly among the states, as courts have adopted various tests to determine whether a corporation is closely held.[18] The Supreme Court of New Hampshire has not adopted a concrete test to identify closely held corporations. However, the court has recognized that a typical closely held corporation is one where "the shareholders are few in number, know each other, and actively serve in the management of the business as officers or directors."[19]

In some states, legislation has also played a role in defining closely held corporations, as many have adopted statutes pertaining to such corpo-

14. 871 A.2d 41, 45 (N.H. 1991) (citations and quotations omitted).

15. Daniel S. Kleinberger & Imanta Bergmanis, *Direct vs. Derivative, or "What's a Lawsuit Between Friends in an Incorporated Partnership?,"* 22 WM. MITCHELL L. REV. 1203, 1204 (1996).

16. GEVURTZ, *supra* note 6, at 388.

17. Baruch Gitlin, Annotation, *When is Corporation Close, or Closely-Held, Corporation Under Common or Statutory Law*, 111 A.L.R.5TH 207, 217-18 (2004).

18. For a comparison of these various tests, consult *id.* at 218-22.

19. *Durham*, 871 A.2d at 45 (citing Landstrom v. Shaver, 561 N.W.2d 1, 13 n.15 (S.D. 1997)).

rations.[20] Some of these statutes set forth requirements that must be met in order for a corporation to qualify as being closely held, then provide various provisions applicable only to closely held corporations, often resulting in "flexibility in corporate governance . . . . Many statutes also provide an increased degree of protection for minority stockholders in close corporations."[21] Other states' laws have recognized the needs of closely held corporations by integrating provisions into their general corporation laws that are only applicable to corporations that do not publicly trade their shares.[22]

Regardless of how a closely held corporation is defined, its characteristics have led many courts and commentators to analogize such corporations to partnerships.[23] The reason many courts allow shareholders in these "partnership-like" relationships to bring direct suits is that the reasons for requiring derivative suits, stated earlier in this Section, are not applicable.[24] Still, most jurisdictions do not accept this reasoning; rather, they insist that corporations are distinct from partnerships and, therefore, should be subject to derivative pleading requirements.[25] In *Durham*, the Supreme Court of New Hampshire rejected that view.

## II. *DURHAM V. DURHAM*

### A. *Facts*

The plaintiff, Roland Durham, was one of four shareholders of a New Hampshire corporation which owned and operated a camp.[26] Roland owned forty percent of the corporation's shares, while the other three shareholders, defendants, Peter Durham, Gary Durham, and Martha Styler,

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20. Gitlin, *supra* note 17, at 217. Some commentators are of the opinion that closely held corporation statutes are ineffective. *See* Dennis S. Karjala, *An Analysis of Close Corporation Legislation in the United States*, 21 ARIZ. ST. L.J. 663, 702 (1989) (concluding that "special close corporation legislation has not been successful").

21. Gitlin, *supra* note 17, at 217. New Hampshire is not among the states that provide such statutes.

22. *Id.*

23. *See* Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505, 512, 515 (Mass. 1975) (holding that "[m]any close corporations are really partnerships, between two or three people who contribute their capital, skills, experience and labor," and further holding that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another") (citations, quotations, and footnotes omitted); Kleinberger & Bergmanis, *supra*, note 15, at 1205 (stating "modern corporate law has come to recognize, for many purposes a close corporation amounts to an 'incorporated partnership'").

24. GEVURTZ, *supra* note 6, at 388-89.

25. *See, e.g.*, Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379, 384 (7th Cir. 1990) (holding "[c]ommercial rules should be predictable"); Wessin v. Archives Corp., 592 N.W.2d 460, 466 (Minn. 1999) (requiring that shareholders bring a derivative suit because it provides "[a] uniform, fair and predictable mechanism for enforcing claims of the corporation").

26. Durham v. Durham, 871 A.2d 41, 43 (N.H. 2005).

each owned twenty percent of the shares.[27] All four shareholders were directors of the corporation and, additionally, the three defendants acted as officers.[28] However, despite the fact that Roland was a director and owned forty percent of the corporation's shares, the defendants excluded him from managerial decision making.[29]

For over twenty-five years, the camp rented cabins and cottages at market rates to families for camping.[30] Since 2000, Gary used two of the camp's cabins as his full-time residence; however, he did not pay rent to the corporation.[31] Martha and Peter also used cottages during the summer, for their own personal use, without paying a rental fee to the corporation.[32] Besides using the camp for personal use, the defendants also rented cabins to friends at "substantially below-market rates."[33]

Roland brought claims alleging that "[t]he corporation's financial reserves [were] reduced by approximately $17,600 since July 2000."[34] Additionally, Roland alleged that the defendants "failed to protect the camp's lake shore land, . . . permitted illegal tree cutting on the property and . . . failed to maintain adequate insurance on the property."[35]

### B. *Procedural History*

Roland brought direct claims against the defendants, for unlawful distributions and breach of fiduciary duties.[36] The trial court found that Roland "did not allege that the defendants owed him any special duty and that [he] did not suffer any injuries separate from those suffered by the corporation" and dismissed Roland's claims for failure to state a claim and for lack of standing to sue.[37] Because the depletion of corporate funds had a negative impact on the entire corporation, "[t]he trial court applied the general rule that corporate claims are to be prosecuted either by the corporation or derivatively, but not through direct action by a shareholder."[38]

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27. *Id.*
28. *Id.* Roland served as president of the corporation for four years before being voted out and replaced by Gary in July 2004. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* Roland had the option to use one cabin for personal use; however, this was of almost no value to him since he resided in the town where the camp was located. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* Roland's petition also requested access to corporate records and an accounting, and alleged willful and wanton conduct. *Id.*
37. *Id.* at 43-44.
38. *Id.* at 44 (quotations omitted).

C. *Arguments*

On appeal, the defendants maintained that Roland did not properly bring a derivative suit under the New Hampshire Business Corporation Act,[39] which requires a written demand and waiting period. The defendants also argued that the shareholder did not meet the requirements to bring a direct action under *Appeal of Richards*[40] because the injury that Roland suffered (depletion of corporate funds) was not distinct from that suffered by the entire corporation.[41]

*Richards* is distinguishable from *Durham*, however, as the former involved a widely held corporation. In *Richards*, the New Hampshire Public Utilities Commission approved a rate plan that would govern rate increases for the Public Service Company of New Hampshire (PSNH), a widely held corporation.[42] One group of appealing shareholders argued that the rate increases were too low and, therefore, "they [were] injured, in that the value of their PSNH stock [had been] decreased."[43] The shareholders brought a direct suit challenging the decision of the Public Utilities Commission.[44] In addressing the direct suit, the court held that a shareholder may "sue in his individual capacity, (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, [or] (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders, or by the corporation itself."[45] The *Richards* court held that the shareholders could not bring a direct claim because a diminution in stock value is an injury shared by the corporation itself and all of its shareholders.[46]

Despite the derivative pleading requirements and the holding from *Richards*, Roland Durham argued that "practical and policy reasons justify allowing a direct, as opposed to derivative, action against the defendants because the plaintiff is the sole aggrieved shareholder and is suing all the remaining shareholders."[47] This argument identified the distinction between Roland's situation as a shareholder of a closely held corporation and

39. *See supra* Part I.
40. 590 A.2d 586 (N.H. 1991).
41. Durham v. Durham, 871 A.2d 41, 44 (N.H. 2005).
42. 590 A.2d at 588.
43. *Id.* at 590.
44. *Id.* On appeal, the shareholders also attempted to bring a suit on behalf of PSNH; however, the court did not address their ability to do so because they failed to name PSNH as a party. *See id.* (citing Kidd. v. N.H. Traction Co., 56 A. 465, 469 (N.H. 1903), which required that a corporation be named as a party to bring a derivative action).
45. *Richards*, 590 A.2d at 590 (citations omitted).
46. *Id.*
47. Durham v. Durham, 871 A.2d 41, 44 (N.H. 2005).

that of the plaintiff-shareholder in the *Richards* case, which involved a widely held corporation whose shares were publicly traded.

D. *Court's Analysis and Holding*

The *Durham* court agreed with Roland.[48] It first acknowledged three ways in which a corporation can obtain relief from its injuries: (1) the board of directors may bring a suit on behalf of the corporation; (2) a shareholder may bring a derivative suit on behalf of the corporation; and (3) a shareholder may bring a direct suit, on her own behalf, if she can meet one of the two requirements set forth in *Richards*.[49] In response to the defendants' argument that Roland was required to bring a derivative action, the court reviewed the relevant derivative pleading requirements, including a written demand and a ninety day waiting period.[50] It recognized that in situations such as these, derivative pleading requirements were futile and burdensome.[51] The court noted that it would have been impracticable for Roland to have made a written demand asking the board to bring an action on behalf of the corporation because there were no disinterested directors on the board.[52]

In addressing the possibility of bringing a direct suit, the *Durham* court noted that courts generally require derivative suits because they: (1) prevent multiple lawsuits; (2) protect corporate creditors; (3) protect the interests of all shareholders, rather than just the shareholder bringing the claim; and (4) protect the shareholder bringing the suit through an increase in the value of her shares.[53] The court then recognized that these principles are not always applicable to a closely held corporation "because such corporations have a small number of shareholders and there is significant overlap between the ownership and management of the corporation."[54] As an example, the court observed that in the situation at hand, "a multiplicity of suits is unlikely" where all interested persons are parties in the suit.[55]

Next, the court acknowledged the difficulty in determining whether a shareholder in a closely held corporation should be allowed to bring a direct action.[56] As many other jurisdictions have done when faced with this

48. *Id.* at 46.
49. *Id.* at 44.
50. *Id.* at 44-45.
51. *Id.* at 46.
52. *Id.* at 45.
53. *Id.* The actual language used by the court is quoted above in Part I.
54. *Id.*
55. *Id.*
56. *Id.*

question, the *Durham* court sought guidance from the ALI's Principles of Corporate Governance:

> In the case of a closely-held corporation . . ., the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.[57]

The court then noted that these "factors have been criticized . . . for not including all relevant considerations in determining whether a suit should be direct or derivative."[58]

Nevertheless, the court remanded the case to the trial court, giving it discretion to allow Roland to bring a direct suit.[59] The trial court was instructed to "tak[e] into account all of the above factors, including those suggested by the ALI" when making its determination.[60] In remanding the case, the court reasoned that "[t]he derivative/direct distinction makes little sense when the only interested parties are two . . . sets of shareholders, one who is in control and the other who is not. In this context, the debate . . . can become purely technical."[61] It further reasoned that "[i]n cases such as this one . . . the principles underlying the derivative proceeding are not served."[62]

The court gave the trial court some guidance in making its determination by stating that "[a] direct action may be appropriate in this case because all of the corporation's shareholders are before the court . . .; thus, there is no risk [of exposure] . . . to a multiplicity of actions."[63] The court further noted that there are no disinterested board members that could determine whether a derivative suit would be in the corporation's best interest.[64] Finally, it cautioned the trial court to consider "whether any of the

57. *Id.* (quoting 2 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.01(d), at 17 (1994)).
58. *Id.* at 46. Those jurisdictions which have criticized the ALI standard and refuse to allow direct suits in closely held corporations without showing distinct injury will be discussed in detail in Part III.
59. *Id.*
60. *Id.*
61. *Id.* (citation and quotations omitted).
62. *Id.*
63. *Id.*
64. *Id.*

corporation's creditors would be prejudiced by allowing the plaintiff to pursue a direct action against the defendants."[65]

### E. *Comment on* Durham

The *Durham* court's decision is justified considering the distinction between *Richards* and *Durham*. In agreeing with Roland, the court did not have to overrule *Richards* or the requirements to bring a direct suit provided by *Richards*. Rather, the court made an important distinction between *Richards*, which dealt with a widely held corporation, and *Durham*, which involved a closely held corporation. This distinction is crucial to the issue regarding direct versus derivative suits because in many situations involving closely held corporations "the principles underlying the derivative proceeding are not served."[66]

The factual circumstances of the *Durham* case support the court's conclusion that derivative suits become less sensible when dealing with only a few shareholders. First, the derivative pleading requirements set forth by section 293-A:7.42 of the New Hampshire Revised Statutes Annotated, required the plaintiff, Roland Durham, to make a written demand upon the corporation to take action, then wait until either his demand was rejected by the board or ninety days passed before bringing a derivative suit on behalf of the corporation. This requirement allowed the board of directors to decide whether a legal proceeding against the alleged wrongdoers was in the best interest of the corporation and gave the corporation an opportunity to bring the action itself. However, in *Durham*, the board of directors consisted only of Roland and the three defendants, Peter Durham, Gary Durham, and Martha Styer. It was not very likely that the three defendants would have voted in favor of bringing a lawsuit against themselves had Roland made a written demand and, thus, no purpose would have been served in making him do so.

Second, the reasons that courts generally require derivative suits are undermined when applied to the circumstances of the *Durham* case. The first of these reasons is to avoid subjecting defendants to multiple lawsuits.[67] In *Durham* all four shareholders, which included the entire board of directors and all of the officers, were all involved in the lawsuit. Thus, there were no other shareholders who could have surfaced after the lawsuit to bring the same action against the defendants.

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65. *Id.*
66. *Id.*
67. *Id.* at 45.

Another argument supporting derivative suits is that they protect the interests of all shareholders instead of allowing recovery to one shareholder which may affect the rights of others who are not party to the lawsuit.[68] As noted above, all of the shareholders in *Durham* were named as parties to the lawsuit. Accordingly, there were no other shareholders that had an interest in the damages that the plaintiff sought to recover personally.

Courts also reason that a derivative suit "adequately compensates the injured shareholder by increasing the value of his shares."[69] Allowing Roland to bring a direct suit and recover the damages directly, rather than through an increase in the value of his shares, does adequately compensate him. Indeed, Part IV of this Note suggests that allowing the direct suit may be the only way to adequately compensate him.

The final reason that courts generally require a shareholder to bring a derivative action is that it protects the corporation's creditors by putting the proceeds back into the corporate treasury and, therefore, within the reach of such creditors.[70] The *Durham* case provided no information relating to the corporation's creditors; however, the court did recognize this as a valid concern and protected potential creditors' rights by cautioning the trial court to consider this issue on remand.[71]

This reasoning compelled the *Durham* court to accept the standard set forth by the ALI and instruct the trial court to consider such factors when determining whether a direct suit is appropriate.[72] The factors suggested by the ALI adequately address the concerns expressed earlier by courts that require derivative suits; in fact, much of the language used by the ALI almost mirrors that used by the courts.[73] However, as mentioned above, the *Durham* court's view is not shared by all. While the Supreme Court of New Hampshire has accepted the ALI standard, many other jurisdictions reject that standard and refuse to acknowledge an exception for closely held corporations.[74]

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 46.
73. To compare the courts' argument supporting a preference for derivative actions with the ALI standard for determining whether a direct suit is appropriate, consult *supra* Parts I-II.
74. Durham v. Durham, 871 A.2d 41, 46 (N.H. 2005).

## III. REJECTING THE ALI STANDARD

As noted in *Durham*, those jurisdictions that continue to require derivative suits even when dealing with closely held corporations "generally do so to promote consistency and predictability in corporate law."[75] In addition, other jurisdictions decline to adopt the ALI standard arguing that it does not adequately address the reasons that courts generally require derivative suits.[76] Overall, the Supreme Court of New Hampshire's decision to adopt this standard is of the minority view.[77]

### A. *Need for Consistency and Predictability*

Some courts, in an effort to promote predictability within their corporate laws, insist that regardless of its characteristics, a closely held corporation is nonetheless still a corporation. In *Bagdon v. Bridgestone/Firestone, Inc.*,[78] the United States Court of Appeals for the Seventh Circuit determined whether a minority shareholder's claim was direct or derivative for the purpose of establishing diversity.[79] The plaintiff, Bagdon, who managed a Firestone auto center, and the defendant Bridgestone/Firestone, Inc. were the only two shareholders of this closely held corporation, owning forty-nine percent and fifty-one percent respectively.[80] Bridgestone/Firestone opened a new auto center that competed with the original center owned by itself and the plaintiff, resulting in a loss of business for the original center.[81] Bagdon alleged that, among other things, Bridgestone/Firestone "violated the duty a controlling shareholder owes to the corporation, and derivatively to the minority investors."[82] Although the alleged injury only affected Bagdon indirectly through the loss to the corporation, he nonetheless argued that a direct suit should be permitted because the corporation was closely held.[83]

Applying Delaware law, the court declined to make an exception for closely held corporations.[84] First, the court acknowledged the general rule in Delaware that an injury inflicted through the corporation must be re-

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75. *Id.*
76. *Id.*
77. Kleinberger & Bergmanis, *supra* note 15, at 1266.
78. 916 F.2d 379 (7th Cir. 1990).
79. *Id.* at 380-81.
80. *Id.* at 380. Many of the auto centers were separately incorporated in this manner in order to motivate the managers to succeed and strengthen their loyalty to the company. *Id.*
81. *Id.* This was only detrimental to Bagdon because Bridgestone/Firestone owned shares in many of its auto centers and, therefore, would profit either way.
82. *Id.* at 381.
83. *Id.* at 383-84.
84. *Id.*

dressed through a derivative suit. However, the court also noted that a "special injury" exception to this rule allows a shareholder to bring a direct suit where the injury is distinct and disproportionate to the investor.[85] Finally, it rejected the minority view, shared by the ALI, which "has expanded the 'special injury' doctrine into a general exception for closely held corporations, treating them as if they were partnerships."[86] The court reasoned that "[c]orporations are *not* partnerships" and further stated:

> Whether to incorporate entails a choice of many formalities. Commercial rules should be predictable; this objective is best served by treating corporations as what they are, allowing the investors and other participants to vary the rules by contract if they think deviations are warranted.[87]

In conclusion, the court cited Delaware case law in support of its holding.[88]

The Supreme Court of Minnesota also chose uniformity and predictability in *Wessin v. Archives Corp.*[89] In *Wessin*, the minority shareholders brought several direct claims, including breach of fiduciary duties through fraud, misrepresentation, and waste of corporate funds, alleging that the defendants used corporate assets for personal use.[90] The defendants argued that the claims should have been brought derivatively and subject to the requirements of Minnesota Rule of Civil Procedure 23.06, which provided in pertinent part:

> The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders, ***, and the reasons for the plaintiff's failure to obtain the action or for not making the effort.[91]

The court held that all of the plaintiffs' claims were derivative, reasoning that the injuries were not incurred solely by the plaintiffs, but rather, were suffered by the entire corporation.[92] Nonetheless, the plaintiffs urged

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85. *Id.* at 383.
86. *Id.* at 383-84.
87. *Id.* at 384 (emphasis in original).
88. *Id.* The court cites two cases: *Taormina v. Taormina Corp.*, 78 A.2d 473 (Del. Ch. 1951), where minority shareholders were required to bring a derivative suit after the value of their shares diminished when the controlling shareholder transferred assets for inadequate value, and *Abelow v. Symonds*, 156 A.2d 416 (Del. Ch. 1959), where minority shareholders of a closely held corporation were again required to bring a derivative suit after a ninety-five percent stockowner proposed to liquidate at a price thought to be inadequate.
89. 592 N.W.2d 460 (Minn. 1999).
90. *Id.* at 462-63.
91. *Id.* at 464 (quoting former MINN. R. CIV. P. 23.06, renumbered MINN. R. CIV. P. 23.09 in 2005).
92. *Id.* at 465.

the court to adopt the ALI's rule and allow them to bypass the derivative pleading requirements because they were shareholders of a corporation which Minnesota statute defined as closely held.[93] The court rejected this request along with the assertion that derivative suits in this context were pointless because the proceeds are returned to the hands of the alleged wrongdoers.[94] Rather, the court maintained that "a closely held corporation is still a corporation with all of the rights and limitations proscribed by legislature."[95] It then followed the same formulaic approach as the *Bagdon* court, and quoted *Bagdon* in holding that "[c]orporations are *not* partnerships."[96] The *Wessin* court also added that, "[a] uniform, fair and predictable mechanism for enforcing claims of the corporation is important for the corporation and all of the shareholders."[97] Finally, it offered a policy based argument that the derivative pleading requirements encourage communication among the leaders of a corporation before utilizing the court system.[98]

### B. *Alleged Inadequacy of the ALI Standard*

Other courts contend that the ALI standard is flawed. In *Landstrom v. Shaver*,[99] the Supreme Court of South Dakota rejected a shareholder's plea to adopt the ALI standard and provided reasons beyond a mere need for predictability.[100] There, a minority shareholder brought a direct suit against the remaining few shareholders of a closely held corporation, alleging, among other claims, shareholder oppression and breach of fiduciary duties that led to a diminution in stock value.[101] The court wasted no time in establishing that "[d]iminution in the value of stock is a loss that is sustained by all shareholders and thus subject to the derivative action re-

93. *Id.* at 466. "*Minnesota Statutes section 302A.011*, subd. 6a (1998) defines a closely held corporation as 'a corporation which does not have more than 35 shareholders.'" *Id.* at 466 n.1 (emphasis in original).

94. *Id.* at 466.

95. *Id.*

96. *Id.* (emphasis in original) (citation omitted).

97. *Id.*

98. *Id.* at 467. The *Wessin* court did not need to take this hard-line approach and expressly rejected the proposed exception for closely held corporations. Even if the court had applied the ALI standard, the minority shareholders' claims would have likely failed anyway since the plaintiffs represented only "some" of the minority shareholders. *Id.* at 462. The ALI suggests, among other factors, that a direct suit should only be permitted where it does not "interfere with a fair distribution of the recovery among all interested persons." *See supra* Part II. Having found that the plaintiffs' claims were derivative in nature, the court could have simply dismissed the direct suit on these grounds by noting that other shareholders, not named in the lawsuit, might be denied their rights to the proceeds.

99. 561 N.W.2d 1 (S.D. 1997).

100. Although much of the court's analysis of the ALI's proposed rule involved a critique of the rule itself, it did quote language from *Bagdon* expressing concerns for predictability. *Id.* at 14.

101. *Id.* at 3.

quirement," and further provided the reasons courts generally require derivative actions.[102]

The court, nonetheless, addressed the proposed ALI exception, observing the potential abuse by dissenting minority shareholders who might bring direct suits because of mere differences of opinions with majority shareholders.[103] One example the court provided was "[a] dispute over maximization of short-term profits as against the long-term financial health and growth of the corporation."[104] It then suggested that this abuse might place an undue financial burden on corporations, which would be especially detrimental in South Dakota given the considerable number of small corporations.[105]

The *Landstrom* court also criticized the ALI's proposed exception asserting that it fails to consider each of the four reasons that courts generally require derivative actions.[106] Specifically, the court was concerned that the ALI standard did not "address whether a derivative suit [could] suffice to adequately compensate the injured shareholder" and further noted that this should be considered, given that it is the ultimate goal of the plaintiff.[107]

Before dismissing the ALI proposal altogether, the court went on to apply the ALI standard to the circumstances surrounding the *Landstrom* case.[108] It conceded there was no chance of exposure to a multiplicity of actions; however, it also observed the likelihood of injury to corporate creditors given the corporation's financial status at the time.[109] Next, the court criticized the trial court's reasoning that "requiring a derivative action might [have] result[ed] in an unfair distribution of the recovery among all interested persons."[110] The trial court was concerned that if proceeds were returned to the corporation to increase the value of its shares, the alleged wrongdoers would benefit along with the injured minority shareholder.[111] The *Landstrom* court clarified the issue by explaining that the defendants receive no windfall since the proceeds come from their pockets in the first place, thus, it does not matter that the value of their own shares increase along with those of the plaintiff.[112] The court concluded its analysis of the ALI standard by suggesting that the ALI's proposed rule may

102. *Id.* at 12. For the reasons courts prefer derivative, as opposed to direct actions, consult *supra* Part I.
103. *Landstrom*, 561 N.W.2d at 13.
104. *Id.* at 13-14.
105. *Id.* at 14 n.16.
106. *Id.* at 14.
107. *Id.*
108. *Id.* at 14-15.
109. *Id.*
110. *Id.* at 15.
111. *Id.*
112. *Id.*

result in forced buy-outs of the minority shareholders' shares due to litigation or in some cases, the mere threat of having to finance a judicial proceeding.[113]

## IV. ANALYSIS

The argument for adopting the ALI rule and allowing direct actions by minority shareholders in closely held corporations is that derivative pleading requirements are futile in the context of a close corporation and that the reasons that courts generally require derivative actions are addressed by the ALI standard. On the other hand, the majority view is that there is a strong need for predictability within the corporate context and that the ALI standard is not comprehensive enough to adequately address the courts' concerns. The *Landstrom* court also reasoned that the ALI standard creates a potential for abuse by minority shareholders.[114] While both views have merit, in this case, practicality should prevail over predictability and alleged inadequacy. The majority view's reasons for rejecting the ALI's proposed standard are unconvincing and should be reconsidered by those jurisdictions that have outright rejected it; for at least in some cases, it may be the fairest solution.

### A. *Potential Abuse by Minority Shareholders*

Adopting the ALI standard will not lead to an increase in claims; rather, it will merely change the way in which claims are brought. The *Landstrom* court expressed concern that the adoption of the ALI standard would open the door for any disgruntled minority shareholder to bring a suit simply because she has different objectives than the majority.[115] However, the door is already open since disgruntled shareholders can already bring derivative suits that may be based on a mere difference in opinion. The court further worried that increased litigation could negatively impact corporations financially. While this may be a valid point, it fails to explain exactly how allowing direct suits will lead to more litigation or more costly litigation than if shareholders were limited to derivative suits. Although derivative pleading requirements provide the board with substantial discretion to reject a demand from a minority shareholder who requests that the corporation bring a suit, if the demand is rejected there is often litigation over whether the rejection was in good faith or whether the demand can be

113. *Id.*
114. *See supra* Part III.
115. Landstrom v. Shaver, 561 N.W.2d 1, 14 (S.D. 1997).

excused. Additionally, the determination to reject a demand usually comes from a special litigation committee who has spent time investigating the matter. These proceedings all cost the corporation money as well. Moreover, these disputes often arise where the majority of the board is not disinterested, which is a setting familiar to disputes within closely held corporations.[116]

Legislation could also play a role in preventing the abuse with which the *Landstrom* court was concerned by providing statutory penalties for unjustified claims. This would discourage minority shareholders from bringing suits that would usually be dismissed under the business judgment rule. Indeed, some states have already provided such a penalty for unjustified derivative claims.[117]

### B. *Need for Predictability*

The desire for consistent and predictable rules is not irrational because such rules put shareholders on notice and, thus, allow them to protect themselves from liabilities. However, the need for predictability is not as strong in closely held corporations because of the small numbers of shareholders and the relationships that usually exist among those shareholders. However, jurisdictions such as Delaware and Minnesota dismiss this reasoning and instead maintain that "the closely held nature of the corporation [is] irrelevant to the distinction between direct and derivative actions."[118]

Rules governing dispute resolution are more important to circumstances surrounding a widely held corporation where shareholders are entrusting their investment to a board with whom they are not personally familiar. Those directors may need the comfort of being able to predict rules. However, in closely held corporations, the shareholders often "know each other,"[119] thus, the relationship is more personal and often accompanied by an unspoken expectation that nobody will be wronged by others with whom they have entered into a close, albeit business, relationship. Furthermore, this relationship, when coupled with the fact that most of these shareholders participate in the management of the corporation, dem-

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116. *See, e.g.*, Zapata Corp. v. Maldanado, 430 A.2d 779 (Del. 1981); Marx v. Akers, 666 N.E.2d 1034 (N.Y. 1996); Auerbach v. Bennett, 393 N.E.2d 994 (N.Y. 1979).

117. New Hampshire has such a statute which provides in pertinent part: "On termination of the derivative proceeding the court may . . . order the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose." N.H. REV. STAT. ANN. § 293-A:7.46 (1999).

118. Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 378, 384 (7th Cir. 1990) (citations and quotations omitted).

119. Durham v. Durham, 871 A.2d 41, 45 (N.H. 2005).

onstrates that shareholders in closely held corporations have more in common with partners than they do with shareholders of a widely held corporation. Treating all corporations the same ignores this reality, which other jurisdictions have acknowledged by writing statutes specific to closely held corporations and following the *Donahue* view that shareholders in closely held corporations owe duties to each other similar to those present in a partnership.[120]

Consider two hypothetical situations involving a potential defendant, "Director." In the first situation, Director is considering taking a position on the board of "Widely-Held Corp." She is comforted to know that any minority shareholders who may bring claims against her will likely be forced to bring a derivative action, assuming Director's actions do not specifically injure an individual shareholder. Here, Director should be able to rely on the protections afforded by a derivative suit since she may need to defend herself against an unknown number of shareholders. In this context, Director should not be automatically subjected to the allegations of the potential millions of minority shareholders who may question her judgment by allowing them to bypass derivative pleading requirements.

In the second situation, Director and "Minority" are the sole shareholders of "Closely Held Corp.," owning sixty percent and forty percent of the corporation's stock respectively. Director started the corporation but then sold forty percent of her stock to Minority as an investor. Here, Director does not have as strong of a need to rely on the protections afforded by a derivative suit. Director knows Minority, who is the only person who could potentially bring claims against her for injury to the corporation. In fact, in many situations, Director and Minority are friends or members of the same family who intend to act like partners but choose to structure the business as a corporation to benefit from limited liability. This relationship reduces the chances that Director will be sued because of actions she has taken and, therefore, decreases the need that she be protected by a derivative suit.

Regardless of the shareholders' relationship, using the ALI standard will not result in unpredictable corporate laws that deprive shareholders of the chance to protect themselves from liabilities. If a state, such as Minnesota, adopted the ALI rule, directors entering into closely held corporations would still be able to predict their potential liability; it would just be different than it is at the present time. For example, all shareholders forming a closely held corporation in New Hampshire are now advised that they

120. *See* Barth v. Barth, 659 N.E.2d 559, 561-62 (Ind. 1995) (adopting ALI standard in part because "shareholders of closely-held corporations have very direct obligations to one another," and owe each other the "utmost good faith and loyalty") (citations and quotations omitted).

can be sued directly by other shareholders if there is no chance of multiple suits, thus, creditors are not prejudiced and all interested persons are entitled to a fair distribution of the proceeds. With such notice, shareholders, officers, and directors who find this outcome undesirable can protect themselves by privately contracting out of such liability.

### C. *Alleged Inadequacy of the ALI Standard*

There is also little merit to the *Landstrom* court's assertion that "[t]he ALI rule does not include all relevant considerations."[121] The court's specific concern is that the rule "fails to address whether a derivative suit can suffice to adequately compensate the injured shareholder."[122] As mentioned earlier, courts have generally required derivative actions because they prevent a multiplicity of lawsuits, protect creditors, protect the interests of all shareholders by increasing the value of their shares, and *adequately compensate the injured shareholder by increasing the value of his shares*.[123] Meanwhile, the ALI recommends that a direct suit may be brought when there is no chance of multiple lawsuits, prejudice to creditors, or interference with a fair distribution to all shareholders.[124] *Landstrom* points to the ALI's omission of the fourth reason given by the courts, regarding adequate compensation for the injured shareholder.

The assertion that the ALI rule "fails to address whether a derivative suit can suffice to adequately compensate the injured shareholder" makes no sense. The ALI is advocating for direct suits; thus, any concern should focus on whether direct suits adequately compensate an injured shareholder to the same extent that she would recover in a derivative suit. This would have been a valid question, since the other three reasons derivative suits are generally required are addressed by the ALI. However, the obvious answer to this question likely explains why the ALI did not bother to include it in its analysis—of course a direct suit would adequately compensate an injured shareholder by allowing her to recover personally.

### D. *Inadequacy of the Derivative Suit*

The discussion relevant to adequate compensation for the injured shareholder actually strengthens the argument for adopting the ALI standard by exposing the inadequacy of derivative suits in these situations. When dealing with closely held corporations, a direct suit may be the only

121. Landstrom v. Shaver, 561 N.W.2d 1, 14 (S.D. 1997).
122. *Id.*
123. *Durham*, 871 A.2d at 45.
124. *Id.* (citation omitted).

way to adequately compensate an injured minority shareholder because the shares are usually not publicly traded and, therefore, the shareholder may not have the opportunity to sell her shares on the open market. Ironically, this point is best made by *Thomas v. Dickson*,[125] which the *Landstrom* court cites indirectly to support its assertion that the ALI rule "fails to address whether a derivative suit can suffice to adequately compensate the injured shareholder."[126]

In *Thomas*, the Supreme Court of Georgia did in fact consider whether a *derivative* suit would adequately compensate the injured shareholder and held that it would not.[127] There, the court believed that it, along with "other state courts should look at the 'realistic objectives' of a given case to determine if a direct action is proper," and thus, allowed a plaintiff to bring a direct suit where "the reasons underlying the general rule calling for corporate recovery [did] not exist."[128] The court then explained why each of the reasons that derivative suits are generally required were not applicable in that particular case.[129] When addressing adequate compensation for the injured shareholder, the court observed:

> [The plaintiff] would not be adequately compensated by a *corporate recovery*. For a shareholder, the potential benefit of a corporate recovery in such cases is the increase in the value of his or her shares. There would be no such benefit to [the plaintiff], however, since, in a closely held corporation, there is no ready market for her shares.[130]

Once the statement is put into context, the ALI's omission of the inquiry regarding adequate compensation for an injured shareholder in a closely held corporation cannot be perceived as a flaw. If anything, that inquiry only strengthens the argument for allowing direct suits in such situations by exposing a flaw in the derivative action. The increase in the value of shares may not compensate the injured shareholder where her ability to sell those shares, and realize her investment, is contingent on the approval of her co-owners.

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125. 301 S.E.2d 49 (Ga. 1983).
126. *Landstrom*, 561 N.W.2d at 14. *Landstrom* cites a footnote from Kleinberger & Bergmanis, which states that "[t]he ALI approach does not encompass all previous rationales," and further explains that the *Thomas* court "addressed not only the issues considered by the ALI but also whether a derivative suit would suffice to adequately compensate the injured shareholder." *Id.* (citing Kleinberger & Bergmanis, *supra* note 15, at 1265 n.315).
127. 301 S.E.2d at 51.
128. *Id.* (citations omitted).
129. *Id.*
130. *Id.* (emphasis added) (citation omitted).

The *Durham* court also acknowledged this potential problem: "[a]ny recovery from a derivative proceeding goes to the corporation and thus would be under the control of the alleged wrongdoers."[131] In the *Durham* case, a successful derivative suit would have resulted in an increase in the value of Roland's shares; however, he would have been at the mercy of the board as to the means by which he could benefit from that investment. This is evidenced by the fact that the board had already voted him out as an officer and "actively excluded [him] from management of the corporation."[132]

This flaw in the derivative suit greatly weakens the argument by the majority view, which declines to adopt the ALI rule under any circumstances. Those courts should not ignore the possibility that forcing a minority shareholder to bring a derivative suit will likely deny her of the very damages she seeks. In fact, it was the *Landstrom* court that stressed the importance of adequate compensation, "[s]ince that is the ultimate goal should the plaintiff prevail on the evidentiary burden."[133]

The courts that refuse to adopt the ALI rule outright, should instead consider a conditional adoption of the rule contingent on whether a derivative action can adequately compensate the injured shareholder based on her ability to receive proceeds. *Landstrom* recognized the possibility that this trend has already begun: "It would appear that those courts which have adopted the ALI rule have done so when faced with claims of fraud or freeze-outs."[134] Granted, this may lead to more complicated litigation to determine whether in fact a freeze-out has impaired the shareholder's ability to benefit from her investment,[135] but the effort is justified by the need for plaintiffs to achieve their "ultimate goal." This exception is further justified given the strong likelihood that a minority shareholder in a closely held corporation will inevitably face a freeze-out at the commencement of her suit, if it has not already occurred.

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131. Durham v. Durham, 871 A.2d 41, 46 (N.H. 2005).

132. *Id.* at 43.

133. Landstrom v. Shaver, 561 N.W.2d 1, 14 (S.D. 1997).

134. *Id.* at 15 n.18.

135. For a discussion of freeze-outs and their effects on shareholders of a closely held corporation, consult *Sugarman v. Sugarman*, 797 F.2d 3 (1st Cir. 1986). The *Sugarman* court held that in order to prove a freeze out:

> [T]he minority shareholder must first establish that the majority shareholder employed various devices to ensure that the minority shareholder is frozen out of any financial benefits from the corporation through such means as the receipt of dividends or employment, and that the offer to buy stock at a low price is the capstone of the majority plan to freeze-out the minority.

*Id.* at 11 (citation and quotation omitted).

### E. *Rationality of the ALI Standard*

While adopting the ALI rule conditionally would be a positive first step, all jurisdictions should simply adopt the rule outright. Courts which have rejected the rule treat it as if it were "a general exception for closely held corporations" where all shareholders in such corporations would be permitted to bring a direct suit in any situation.[136] This rule would be unreasonable and overbroad. For example, given Minnesota's statutory definition of a closely held corporation, shareholders in that State would be permitted to bring a direct suit even though there could be over thirty other shareholders who could bring multiple suits and would have an interest in the same corporate funds that the plaintiff-shareholder sought.[137] However, ALI's proposal is not that broad; it does not suggest that all closely held corporations should be treated as partnerships.

Adopting the ALI rule does not mean that all shareholders of closely held corporations will *always* be able to bring direct suits. Adopting the rule simply allows courts to use discretion to determine whether the rationales supporting a derivative suit are applicable or if a direct suit is more practical and fair. The rule still allows a court to dismiss a direct suit if any of the circumstances that make a direct suit inappropriate are present. For example, the *Landstrom* court did apply the ALI rule to the facts of its case even though it rejected the rule outright.[138] There, the court noted that,

> [g]iven [the corporation's] recent financial tailspin, the confidence of the creditors . . . to survive this condition and meet its financial obligations in the future would be best served by paying the millions awarded as damages, to [the corporation] rather than individually to Landstrom.[139]

In this situation, a court that had adopted the ALI rule could still find that a direct suit is not appropriate because the second factor that the ALI rule considers is whether any corporate creditors would be prejudiced.[140] However, courts should have the discretion to hold otherwise in cases where there are no corporate creditors that would be prejudiced.

The ALI standard prevents demand futility and allows a frozen-out, minority shareholder to recover damages directly when appropriate, but also reserves a court's right to require a derivative suit when a direct suit is

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136. Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379, 383-84 (7th Cir. 1990).
137. Wessin v. Archives Corp., 592 N.W.2d 460, 466 (Minn. 1999).
138. *Landstrom*, 561 N.W.2d at 14-15.
139. *Id.*
140. *See supra* Part II.

not appropriate. This is easily demonstrated by comparing the majority view and the ALI standard after removing the substance of the arguments: The majority view maintains that although derivative suits are not always practical, they should always be required because it is important to prevent A, B, and C from occurring. The ALI rule does not suggest that A, B, and C are not important concerns; in fact, the rule acknowledges their importance by asking, "Is there any chance that A, B, or C will occur? If not, then a direct suit is permissible." Thus, the rule provides the best of both worlds—the flexibility to require a derivative suit where any of the reasons supporting such a suit are applicable, and also, the ability to allow a direct suit where such reasons are not applicable and a shareholder would not receive adequate compensation if she were unable to recover personally.

## V. CONCLUSION

While consistency and predictability in corporate law is important, courts can better serve the public's needs when they have the flexibility to apply new rules that make sense in a given situation. The Supreme Court of New Hampshire took a seemingly bold step in *Durham*. Roland Durham asked the court to adopt the standard set forth by the ALI that had been widely criticized by a majority of the states; and the court did just that. In doing so, the court did not disregard the majority view but, rather, it addressed the majority position and then provided its own well-reasoned approach to the issue.

The court, of course, held that minority shareholders, in these situations, should have the option to bring a direct suit, assuming the ALI standard has been satisfied. Perhaps the best response given by the court to justify this decision was that requiring a minority shareholder to bring a derivative suit "makes little sense."[141] The court simply chose practicality over predictability. The court reasoned that derivative pleading requirements serve no purpose where the demand to bring a suit will be made to the alleged wrongdoers. This makes sense given the strong unlikelihood that a majority shareholder would decide to sue herself. Thus, in the context of the closely held corporation, where all shareholders are interested parties, the demand requirement only burdens the already wronged minority shareholder and allows the majority shareholder an extra ninety days to continue violating her fiduciary duties.

Besides the futility of pleading requirements, the impracticality of the derivative suit itself should also be clear in this context. It "makes little

141. Durham v. Durham, 871 A.2d 41, 46 (N.H. 2005).

sense" to worry about a multiplicity of suits where all shareholders are already parties to the suit.[142] It "makes little sense" to worry about protecting the interests of all the shareholders. Again, they're all involved in the suit. It "makes little sense" to worry about whether the minority shareholder will be adequately compensated. Few situations, if any, exist where a minority shareholder, especially one who is inevitably facing a freeze-out, would not be adequately compensated by recovering directly rather than having the value of her shares increased. While it does make sense to worry about creditor's rights, the ALI standard already provides for this consideration.

The ALI, and states such as New Hampshire that have adopted its standard, have provided a fair and reasonable common law solution to accommodate needs that were not considered when corporate laws were drafted. Furthermore, an adoption of the ALI standard does not undermine any of the reasons the courts generally require a derivative suit. So in retrospect, the *Durham* court's decision was not really that bold, it was simply right.

142. The *Landstrom* court acknowledges that "[t]his apparently is a common occurrence in ALI cases." 561 N.W.2d 1, 14 (S.D. 1997).