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Incongruent Court Advice: Examining Fair Value and Fair Market Value Standards in Commercial Damage Cases Pursuant to Minority Claims

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Abstract

The standard of value in shareholder oppression and dissolution cases for a valuation of a minority shareholder's interest in a business in most U.S. states is fair value. The fair value standard in most U.S. states excludes discounts for control and lack of marketability. However, the three valuation approaches commonly used (income, market, and asset) all yield different levels of value. Consequently, this can unfairly negatively or positively impact minority and oppressed shareholders. In this paper we examine these inconsistencies and offer a solution to arriving at a level of value the trier of fact is seeking to obtain.

I. Introduction

Often an economic expert is engaged by an attorney to determine the value of a minority shareholder interest in a commercial or family dispute. Many times, these disputes are related to some form of disagreement over the value of a minority shareholders interest. Occasionally the economic claim to a minority shareholder is associated with a temporary loss of future profit of the company in which the minority shareholder has a claim (Scenario T), and at other times the economic claim may be associated with a permanent loss of profits or simply the loss of asset value in the company (Scenario P).

The central difference between Scenario T and Scenario P is the amount of time in the future used to calculate lost profits. In Scenario T, an expert will frequently calculate the difference between pre-allegation forecasted profits and actual or post-allegation forecasted profits over a finite period of time.[1] The forecasts will include historical and/or future profits.[2] In Scenario P, an expert would most likely perform a valuation of the minority shareholder interest in the company. A valuation is performed because the loss is permanent and based on an infinite period of time. Despite the differences in the period used to calculate the damages to the minority shareholder, various state courts apply

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[1]This assumes that the expert is calculating losses using the before and after method.

[2]See Young (2016) for an explanation of what profits should be used.

different standards to calculate the claims to the shareholder depending on whether the loss is temporary or permanent. Although New Jersey is used by way of example in this article, the underlying argument can be applied to all states in the U. S.

Temporary lost profits and the permanent loss of value to a minority shareholder are treated differently by courts (such as in New Jersey) and in most cases calculated differently by an expert. The differences in calculating either type of loss, permanent or temporary, creates a system based on partial compensation with respect to the calculation of a pecuniary damage award to the plaintiff. This paper will demonstrate this inconsistency and will provide a solution to make economic damage calculations prepared in Scenario T and Scenario P more reliable and equitable in economic damage cases.

To present this inconsistency and to explain its economic impact, this paper will progress in the following manner. Section II provides definitions of fair market value and fair value standards and how they are typically applied in Scenario P. A suggestion will be advanced, proposing the intent of the New Jersey Court with respect to the fair value (FV) standard. Modifications to the FV rule will also be presented with hopes of offering modifications of the rule to better fulfill the intentions of the New Jersey Court. Section III will then present an argument that, for the same reasons the New Jersey Court established a FV standard for Scenario P, it should adopt a similar rule to Scenario T. Section IV will conclude with a summation of the arguments and suggestions for experts and the New Jersey Court when contemplating the best approach to calculating FV commercial damage claims.

II. Applied Standards

The New Jersey Court has adopted a FV standard when calculating the value of a minority interest in a company pursuant to shareholder oppression, partnership litigation, breach of fiduciary duty, and divorce. However, before explaining the complexities of the FV standard with respect to the New Jersey Court's assumed intent, the fair market value (FMV) standard is first discussed.

Fair Market Value Standard

The FMV standard, as defined by the Internal Revenue Service Revenue Ruling 59-60, is the amount at which a property would change hands between a willing buyer and willing seller when the former is not under any pressure to buy and the latter is not under any pressure to sell, both parties having reasonable knowledge of relevant facts. The FMV standard expects that a willing buyer would take into consideration various risks associated with a purchase. The risk and reward of holding ownership interests in securities of any company is reflective of multiple factors that ultimately increase or decrease the value of the company. Although there are an unlimited number of such factors, the following factors are those typically considered when valuing a company: (1) size of the company; (2) capitalization structure of the company; (3) ownership percentage to be purchased/sold; (4) financial health of the company;

(5) liquidation possibilities for the investment; (6) industry and market structure in which the company competes; (7) quality of the company's management; and (8) efficiency of operational processes implemented at the company.

When a minority shareholder invests in a privately owned, closely held company, the risks associated with the investment are typically greater than the risks associated with owning the same size interest in a similar company that trades in the public markets. There are two main reasons that are important and relate to the argument made in this paper. First, interests in privately held companies are typically classified as illiquid investments, mainly due to the time needed to sell the interest. For many minority owners there is not a readily available market, such as the public equity market to sell these shares. Second, although many times minority shareholders in closely held, private companies have voting rights, their votes have limited ability to influence the decisions of a majority shareholder. These additional risks are classified as marketability and control risks and are described later.

In order to establish FMV, usually an expert would complete one or more of a series of valuation approaches, including but not limited to an income approach, market approach, and to a lesser extent an asset approach (not discussed here).

Income Approach

The income approach estimates the fair market value of a company based upon the future earnings capacity of the company. An earnings stream similar to operating income or cash flow is converted into an estimate of value by discounting the future cash flows, or by capitalizing the current stream of cash flow or earnings using an applicable discount or capitalization rate (CR). The income approach is based on the notion that the value of a company is equal to the present value of the entity's future cash flows. There are two methods within this approach, the Discounted Cash Flow Method (DCFM) and the Capitalization of Earnings Method (CEM). The DCFM requires a forecast of cash flows for several finite future periods plus an estimated terminal value for the company, based on an infinite period of cash flows. These future cash flows and terminal value are discounted to the present time, resulting in the present value of a company. The CEM is performed by converting an estimate of a single year's cash flow into an indication of value, either by dividing the future earnings estimate by an appropriate capitalization rate (i.e., the discount rate less the company's expected long-term growth rate of earnings) or by multiplying the earnings estimate by an appropriate factor. This method is appropriate for a company when future financial results are expected to be similar to current financial results. In other words, the critical component to the value of the company is its ability to generate future cash flows.

The discount rate used to calculate a value for a company using either of the income approaches described here requires a calculation. Two popular discount rate methods used for private companies are the Buildup Method, and the Capital Asset Pricing Model (CAPM). Both of these methods rely upon the historical financial results of publicly traded companies. By way of example, the

Buildup Method is an additive method that starts with the risk-free rate, typically the 20- or 30-year treasury yields, then adjusted upward to account for the required historical returns on equity investments in the public market, and further adjusted for the returns of public companies based on the size of the firm, and the industry in which they compete.

As described by Mercer (1990), the prevailing view in the marketplace is that the value calculated using the income approach is typically referred to as a marketable, non-controlling value because it is completed using data aggregated from publicly traded firms where most publicly traded firms are owned by many non-controlling shareholders.

Despite the prevailing practice there is some debate in the literature about the value created using the DCFM or CEM approach. Some argue that these approaches create marketable, non-controlling values and others believe it creates marketable, control values. Nath (1990) suggests that most public companies trade at or near their takeover or controlling value because the presence of liquidity tends to eliminate control discounts in well-managed, transparent public companies. In a rebuttal to Nath, Mercer (1990) writes that the prevailing valuation practice of most experts is that the public stock market provides marketable, non-controlling interest values for publicly traded companies. Although Mercer is providing commentary on the prevailing practice, he also agrees that the DCFM and CEM create marketable, non-control values; however, he disagrees with the size of the discount created using these approaches. Mercer (2017) explains that the control discount created using the DCFM and CEM approach is much smaller than what people have historically believed to be true. To understand the prevailing view and to put Mercer's ideas in context it is important to understand how the control discount is typically calculated. The control discount is the difference in equity prices before and after a publicly traded company is purchased in its entirety. The prevailing view suggests, and as Mercer points out, that the increase in equity prices when a publicly traded company is purchased occurs because the equity prices before the purchase are based on non-controlling value and that a purchaser is looking to buy control which increases the price. Because of this, most public traded companies which are sold have an increase in value and a run up in the stock price until the deal closes. Although Mercer agrees that part of the increase in equity price is because the stock was trading at a non-controlling discount, he suggests that the increase in price is not only for control but also for strategic and synergistic purposes. In hopes of mediating the ideas of Nath and Mercer, Bolotsky (1991) suggests that Nath's comments that public companies trade at or near their takeover or controlling value and no additional premium for control should be applied is not fully accurate. According to Bolotsky, this idea has not been proven nor has it been disproven. In light of such, Nath's statement would more accurately read "some" companies instead of "most." Based on the literature review above, the prevailing view suggests that the DCFM and CEM create a marketable, non-control value, and Mercer agrees but suggests that the discount is much less than what has historically been considered. Nath suggests that a liquid market will remove this discount but provides little evidence to support this hypothesis.

In sum, the prevailing practice still appears correct and that the DCFM and CEM create a marketable, non-controlling value but that the control discount is much less than what was originally believed to be true.

Market Approach

Another approach commonly used to value a company is the Market Approach. This approach calculates the value of a company using two primary methods: examining private merger and acquisition (M&A) transactions and involving comparable target company transactions, or Completed Transaction Method (CTM); and by examining and analyzing public companies that operate in the same or similar industry, called the Guideline Public Company Method (GPCM).

GPCM is a valuation method that utilizes prices of comparable publicly traded companies. Valuation multiples are computed from public company sources, adjusted, and evaluated for relative strengths and weaknesses, and then applied to the subject firm. This approach is based on the theory that a market made up of multiple publicly traded companies is the best reflection of the value for a company.

As explained by Pratt (2006), the CTM is a method where private or public M&A transactions are identified by screening and analyzing databases which store historical deals to find companies that were sold in the recent past with similar characteristics as the company be valued. The mean, median and harmonic mean of transaction multiples are then applied to the company's revenue or profit metrics.

GPCM calculates the value for the company under marketable, minority value based on the same theoretical foundation as discussed above using the DCFM and CEM approaches. CTM calculates a non-marketable, control value if only using private company transaction data and marketable, control value if only using public company transaction data.

It is important to understand that the fair market value established in the income and market approaches are different, and by not taking into consideration these differences, the New Jersey Court is providing incongruent advice, and is opening the door for experts to manipulate the outcomes. As the paper progresses, these inconsistencies will be explained. In Table 1 the value calculated under each approach is summarized. It is important for the New Jersey Court to understand these values to help better structure the proper FV standard.

Table 1
Summary of Fair Market Values Based on Various Approaches

Valuation Approach	Public or Private Value	Level of Control
Income Approach	Marketable – Public Value	Non-Control
GPCM	Marketable – Public Value	Non-Control
CTM (private data)	Non-Marketable – Private Value	Control
CTM (public data)	Marketable – Public Value	Control

Fair Value Standard

Beginning in around 1968 the statutory standard for valuation in litigation in New Jersey has been FV *(Balsamides v. Protameen Chemicals, Inc*, 1999). In 1973, New Jersey expanded on this statute enacting the Minority Shareholder Statute, created to assist in eliminating the financial incentive of a controlling, majority shareholder to oppress a non-controlling, minority shareholder when FMV is the proposed standard. As previously discussed, when the FMV standard is used, the value of a minority, non-controlling share is less than the value of a majority, controlling share. The difference in the price of the shares is due to the controlling shareholder's ability to effectuate change which may be to the detriment of the minority, non-controlling shareholder. The Minority Shareholder Statute was put in place so that the majority, controlling shareholder will be dis-incentivized from oppressing the minority shareholder, and subsequently purchasing the shares of the minority at a discounted price, only to gain from the purchase instantly upon acquisition.

The Minority Shareholder Statue[3] also contains language for allowing additive or detractive equitable adjustments by the New Jersey Court for acts deemed oppressive, fraudulent, or an abuse of power.

Partnerships in New Jersey also adhere to the FV standard when a partner is bought out by another partner or group of partners due to disassociation. Disassociation may occur for a variety of reasons, such as breach of fiduciary duty, other members of the partnership unanimously vote out the leaving partner, or if it is unlawful to continue the partnership with a particular partner.[4]

New Jersey has adopted, however, the American Law Institutes' (ALI) 1992 definition of FV in case law. The definition suggests that a minority shareholder should receive the proportionate interest in the corporation, without any discount for minority status, absent any extraordinary circumstances.

By following the FV standard, the New Jersey Court dissuades actions such as controlling shareholders pushing out non-controlling shareholders, or non-controlling shareholders from filing lawsuits against controlling shareholders to get an increase in value for their minority (and non-marketable for private companies) interests. Moreover, by following the ALI's definition, New Jersey Courts are able to permit marketability and/or control discounts in uncommon cases. The extraordinary circumstance exception to the FV standard in shareholder oppression cases is the direct result of the New Jersey Supreme Court rulings in *Balsamides v. Protameen Chemicals, Inc*. (1999) and *Lawson Mardon Wheaton, Inc. v. Smith* (1999). In addition to the aforementioned cases, below are additional cases in which the New Jersey Court awarded or did not award valuation discounts:

1. *Balsamides v. Protameen Chemicals, Inc*. (1999). In this case the oppressed Emanuel Balsamides, Sr. (Balsamides) and the oppressor Leonard M. Perle

[3]See NJ Rev Stat § 14A:12-7, 2013.
[4]See NJ Rev Stat § 42:1A-24; 31; and 34, 2013.

(Perle), each owned 50% ownership in Protameen Chemicals, Inc. A series of spiteful and abusive actions by Perle against Balsamides led the oppressed to petition the New Jersey Court for dissolution of Protameen, pursuant to N.J.S.A. 14A: 12-7. The New Jersey Court ordered Perle to sell his shares to Balsamides and deemed there were unusual circumstances surrounding the case because the oppressed was purchasing the oppressor's shares. Accordingly, to the disadvantage of Perle and to the benefit of Balsamides a marketability discount was applied. Since Perle was the oppressor, had the FV standard been permitted, Balsamides would have paid more for Perle's interest, which the New Jersey Court ruled was unfair.

2. *Lawson Mardon Wheaton, Inc. v. Smith* (1999). On the same day the New Jersey Supreme Court ruled on *Balsamides v. Protameen Chemicals, Inc.*, it also ruled on the dissenting shareholder case, *Lawson Mardon Wheaton, Inc. v. Smith*. In this case Lawson Mardon Wheaton, Inc. was attempting a corporate restructuring by creating a dual-class stock arrangement. To do this, the outstanding company shares were to be purchased at FV. However, the company's valuation expert applied a 25% marketability discount to the dissenting shareholders' shares. Fifteen percent of the company's shareholders dissented by rejecting the value offered for their shares by its board of directors. Rich (2008) suggests that the New Jersey Supreme Court made its ruling, citing the ALI Principles of Corporate Governance, that only under uncommon circumstances may marketability or control discounts be applied. Given the circumstances it was ruled that a corporate restructuring was common, not extraordinary, for businesses and therefore neither marketability nor control discounts were warranted for their interests.
3. *Wisniewski v. Walsh* (2015). Most recently in New Jersey a shareholder oppression case ongoing for nearly 20 years epitomized the extraordinary circumstance whereby the New Jersey Superior Court allowed a marketability discount. In *Wisniewski v. Walsh*, three siblings owned equal shares in a family trucking company. One of the shareholders filed suit against the other two, claiming shareholder oppression, but the trial court found the plaintiff to be the oppressor. Using its equitable authority, the New Jersey trial court forced the oppressor to sell his interest at FMV. The trial and appeals courts both determined that the circumstances were uncommon because the selling, minority, and oppressing shareholder was forcing the buyout, and therefore it should not benefit at the expense of the oppressed by receiving an undiscounted valuation. The use of a marketability discount was consequently permitted.
4. *Brown v. Brown* (2002). In marital dissolution cases the New Jersey Court, using the FV standard, has applied the extraordinary circumstance condition to value a minority company interest. A husband owned 47.5% in his family's wholesale florist company and was facing a divorce from his wife. The husband's valuation expert applied minority and marketability discounts, while the wife's valuation expert applied neither. Since the divorce and its proceedings were neither unique nor unusual, Rich (2008)

suggests that the appellate court held that discounts should not be applied to the husband's interest in the floral company.

5. *Casey v. Amboy Bancorporation* (2006). In *Casey v. Amboy Bancorporation*, the New Jersey Court found no evidence of an extraordinary case. In this case, dissenting shareholders sought a valuation for their shares when the company was attempting to convert from a C to an S corporation. Marketability and control discounts were not utilized, and the New Jersey Court deemed that the circumstances surrounding this case (a restructuring) were normal.

Deriving from the New Jersey case law previously presented and based on the underlying arguments made in the cases, it appears that the New Jersey Court is suggesting that FV represents a marketable and control value, void of any discounts for marketability and control.

Outside of New Jersey, the doctrine used in shareholder oppression, fiduciary duty, and divorce cases is similar in approach to the FV standard. Some cases of states excluding discounts in judicial settings include the following:

1. Iowa's Supreme Court in *Woodward v. Quigley* (1965) did not permit a minority discount when the majority shareholders voted to extend the life of the *Telegraph-Herald* into perpetuity in spite of its pending expiration in a year's time and the dissent of a minority shareholder.
2. In Maine's Supreme Court (1989), two dissenting shareholders opposed the merging of three companies into one. The majority shareholder voted through the merger and offered to the dissenting shareholders a price for their pro rata interests including discounts. It was ruled that marketability and control discounts run counter to Maine's appraisal statue that protects dissenting shareholders in such a case.
3. The Supreme Court of Delaware (1989) concluded that marketability and control discounts are unnecessary when the standard of value is FV. This case involved a short form merger of a minority shareholder's stock. Delaware's Supreme Court found that since the premise of value was that the appraised shares were of a going concern entity, which was contrary to the facts.
4. The Civil Appeals Court of Alabama (2010) prohibited the use of marketability and control discounts in *Grelier v. Grelier*, a divorce case. In this case the trial court permitted a combined 40% marketability and control discounts to the husband's interests in many private businesses. However, these discounts were reversed because the premise of value for the company interests was that of a going concern and removed the discounts to the total interests valued.

Regarding the FV standard, Table 2 provides the valuation approach (Column A) and the required adjustments necessary to bring the valuation to a marketable control value (Column B). To develop the FV standard from the FMV standard, assuming different approaches, it becomes clear that sometimes

Table 2
Required Adjustments to Meet FV Standard from FMV Standard

Valuation Approach	Required Adjustment to Achieve FV
Income Approach	Add a Control Premium
GPCM	Add a Control Premium
CTM (Private Data)	Add a Marketability Premium
CTM (Public Data)	No Adjustment

adjustments for control and marketability are required to achieve the goal set out by the New Jersey Court—a marketable, control value.

The indicated value each valuation approach derives, but for the CTM using public data, necessitates either a control or marketability premium in order to achieve the value the New Jersey Court seeks in FV circumstances. The expert should apply a control premium to the income approach and GPCM because they are both calculated using information from publicly traded companies and are based on non-controlling values. Since the New Jersey Court appears to require controlling value, the only way to accomplish this if relying on the income approach or GPCM is by applying a control premium to their indicated value. Conversely, the CTM using private company deal information provides a value based on a controlling interest but is based on non-marketable transactions. Considering this, the value should be adjusted upward for a marketability premium. Lastly, the value calculated using the CTM using public company information is based on a marketable, control value and therefore does not require any adjustment.

Control and Marketability Premiums

Control premiums and discounts are crucial to company valuations. A control premium is an amount that a buyer is willing to pay over the current market price of a publicly traded company in order to acquire a controlling share in that company. Control confers value, and therefore a controlling shareholder, or membership interest, in a company can dictate the course of a company, which leads to an increase in a majority interest. Control premiums and discounts are used in a variety of scenarios, including gift, estate, income tax, and litigation cases. A review of the Factset Mergerstat control premium study (2018) database for the past 10 years reveals an average control discount and control premium of 27.93% and 53.17%, respectively.

Regarding marketability, Pratt (2015) suggests that marketability is the ability to quickly convert property to cash at minimal cost. Marketability discounts represent an amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability. Conversely, a marketability premium is the amount that a buyer is willing to pay over the current market price of a privately held company so that the buyer can take advantage of the liquidity of a public company, should the buyer decide to sell any portion of its ownership interests in the short term.

From restricted stock studies, to private placements and private investments in public equity (PIPE) studies, and pre-IPO studies, marketability discounts are used to discount the value of privately-held entities. The valuation approaches that yield marketable values like the income approach or GPCM require a marketability discount because private companies lack open and public markets for their shares.

Based on the particular study or analysis completed to quantify the marketability discount, the factor varies. As cited in the Job Aid for IRS Valuation Professionals (2009) the cost of flotation studies reveals an estimated average marketability discount of 16.70%. As explained in BVR's *Guide to Discounts for Lack of Marketability* (2013), in two different pre-IPO studies from Willamette Management Associates and Robert W. Baird & Company Studies the average estimated marketability discounts of 23.90% and 46%. Other studies cited in BVR's *Guide to Discounts for Lack of Marketability*, such as restricted stock studies, private placement analyses, and PIPE analyses have shown the average marketability discount is equal to 19.30%. Across all of these analyses and studies, the average marketability discount is approximately 26.48%. The marketability premium would be applied to a non-marketable indicated value to yield a publicly company value. If the CTM is used relying on private company transactions from a database, such as Pratt's Stats or BizComps, and produces an indicated value for a privately held company of $25 million, applying the marketability premium increases its value to $34 million. The indicated value is then a controlling and marketable value.

Should the control and marketability premiums be applied in fair value cases, as outlined here, holding all things constant, the overall value of permanent economic damages would increase.

III. Application to Scenario T

There are many other instances where a minority shareholder is damaged by a majority shareholder or another party and yet where the damages are temporary. Take for instance a case recently settled where temporary damages were awarded and where there were only two shareholders. Names and other material facts are for illustrative purposes only because this case was settled under a confidentiality agreement. The following summary facts are consistent with this underlying New Jersey case. There were two shareholders who came together to start a new company (Company X). Each of these two shareholders also separately owned their own company (later referred to as Company B and Company C), where they had assets that they were going to contribute to start Company X. One of the shareholders (Saul) owned 100% of company B, and contributed $700,000 of value made up of intellectual property and cash from Company B to Company X. The other shareholder (Robert) owned 100% of Company C, and contributed $300,000 of value made up of intellectual property and cash from Company C to Company X.

Together, with their investments from Company B and Company C, Saul and Robert started Company X. For his contributions, Saul received 70% (Majority and Controlling Shareholder) of Company X, and Robert received

30% (Minority and Non-Controlling Shareholder). Both shareholders agreed with these percentages. Both shareholders decided to slowly shut down their existing companies so that when they were to begin operations of Company X, they would have not outside distractions. Both Company B and Company C provided similar but inferior services to the planned services of Company X. All customers from Company B and Company C were to be proactively migrated to Company X, when the company began operations. There was only one form of stock and each shareholder had the same rights for each share owned. In addition to the shares owned, Saul had shareholder control and was able to vote for three of the four board member positions. For his contributions Saul received voting and board control over Company X.

Saul and Robert agreed to begin marketing and selling services of Company X approximately 15 months from the time they signed the final shareholder agreements. However, Company X never began operations because Saul decided after 14 months from the signing of the shareholder agreement that it was not going to move forward with Robert and so removed his capital and intellectual property. Saul's decision allegedly caused harm to Robert, as a shareholder of Company X, and as a shareholder of Company C. Robert filed a lawsuit in New Jersey, claiming shareholder oppression, among other counts. Part of the argument was that Robert was harmed and that the harm would be temporary based on his ability to find a similar partner to Saul. Among other damages, Robert was requesting future damages pertaining to Company X.

Not unlike the valuation discussed previously with respect to Scenario P, a similar approach is applied to a lost profits case, as herein described in Scenario T. In a lost profits case, the expert would forecast the future pre-allegation profits of Company X, and then reduce these profits by the expert's forecasted post-allegation profits. In Scenario T, Company X would have lost profits for a few years, mainly because it would take Company X a few years to find a suitable partner who would be able to provide the same services as Saul. After calculating the future lost profits, the expert would discount these future profits using a discount rate that would be calculated in the same manner as previously discussed with the income approach in Scenario P. Also discussed above the damages calculated using the income approach would yield a non-controlling, marketable value. In Scenario P, it was discussed that the court does not allow for discounts for control or marketability, and so it is suggested here that this idea should also apply in temporary lost profits cases as well. Based on this premise, the damages calculated in Scenario T value would need to be adjusted upward to account for a control premium that is inherently built into the income approach. Similar to Scenario P, the damages calculated would increase. At the moment, this adjustment does not occur in litigated, short term lost profits cases, such as the case described in Scenario T.

IV. Summary

We have shown that the FV standard required by the New Jersey Court in many litigated matters is inconsistent and can be manipulated by an experienced expert. We have presented case law that suggests that FV is to be calculated without any discounts for marketability and control in New Jersey. We have also suggested that the intention of the New Jersey Court in calculating FV is to create a marketable, control value when calculating the value of closely held private companies in litigated matters. We have shown that this advice by the New Jersey Court creates inconsistencies and that to essentially calculate a marketable, control value, the expert, in many cases will need to apply either marketability or control premiums; and without providing these premiums, the values calculated using different approaches will lead to something other than FV. Because of the overlooked complexities in calculating FV, the New Jersey Court has unintentionally created an inaccurate outcome for the plaintiff and defendant where the values created are a combination of FMV and FV. Depending upon the valuation approach, the outcome calculated by the expert may be FV, and in other times it may be FMV. To an experienced expert, this creates an opportunity to manipulate the valuation process in order to best serve the self-interest of the client. We have provided guidance on how to best ensure that a marketable, control value is created depending upon the valuation approach utilized by the expert. Additionally, we suggested that the FV approach used in long-term, permanent economic losses should also be adopted for short-term economic losses as well. By doing this, the New Jersey Court will be ensuring that the methods used in calculating damages is consistent.

This research adds to the existing literature by showing analytically the shortcomings of the FV standard and provides suggestions of how the New Jersey Court can better achieve its intentions, when taking into consideration the valuation approach.

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