<u>BUSINESS DIVORCE LITIGATION IN NEW JERSEY VS. DELAWARE: A COMPARATIVE REPORT</u>

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It would hardly be novel to describe Corporate America's relationship with Delaware as a formidable, unwavering love affair for the ages. Over the last few decades, Delaware's body of corporate law has consistently aimed to make Delaware a desirable state to plant a business. The Court of Chancery, Delaware's premier business court, is a national leader in business law and, because of its expertise and long line of precedent, the corporate parties that come before it can expect speedier results.[1] In tandem, the state legislature continuously monitors the business landscape and frequently updates its laws to address developing case law and business trends.[2] Most significantly, however, Delaware is the top choice for businesses because its laws and policies are notoriously management-friendly.

However, New Jersey has seemingly grown tired of seeing many of its businesses take their corporate legal matters to Delaware. In response, the Garden State has, over the years, steadily enacted a host of corporate law reforms[3] that provide businesses with either a similar option to Delaware law or a workable alternative. Case in point, the law of business divorce. New Jersey has developed an active and growing body of law that governs the business divorce process, sets standards for judicial intervention and provides practical and tailored remedies for business owners in the midst of business divorce litigation. Squaring off against Delaware's scarce and rigid business divorce laws that favor its long-

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[1] Lawrence A. Goldman, *Delaware LLC vs. New Jersey LLC for Complex Business Transactions; Why it Might Be Worth Forming Your Business Entity Out of State*, New Jersey Law Journal, June 16, 2014.
[2] *Id.*
[3] In April, 2013, New Jersey Governor Chris Christie enacted three, business-friendly laws that are aligned with the laws New York and Delaware. McCarter & English, "New Jersey Makes Itself Business Friendly," http://www.mccarter.com/New-Jersey-Makes-Itself-Business-Friendly-04-05-2013/).

standing freedom of contract policies, New Jersey's flexible, discretionary approach provides an alternative perspective on resolving business divorce disputes.

In Part I, this report first considers the mechanics of business divorce, the conflicts and circumstances that often leave business owners with little option but to go their separate ways. Part II, the crux of this report, aims to expose and juxtapose the statutory frameworks of New Jersey and Delaware's business divorce laws, along with a summary of the relevant case law, that influence the field of business divorce litigation. Ultimately, the comparison exposes Delaware's deep roots and commitment in their freedom of contract policies, and highlights the areas where New Jersey laws provide more options for business owners facing the prospect of business divorce litigation.

I. WHAT IS BUSINESS DIVORCE?

Business divorce, on its face, is a simple concept. It is a term that describes the separation of business owners. However, in practice, navigating a business divorce is a complex, arduous and often emotional undertaking. "Stripped to its essence, a business divorce occurs when the owners conclude that the benefits of continuing their business relationship are outweighed by the costs (economic and human) to such an extent that continued co-ownership of the business is no longer a viable option."[4] A business relationship can take many forms and vary in scale. It can be a simple relationship where, for example, two people jointly own a single asset. Or, it can be much more complex, where many different ownership interests are tied up in a corporation, limited liability company ("LLC"), partnership or a multifaceted joint venture.

While each business relationship is unique in its own way, some businesses are more likely than others to find themselves in the throws of a business divorce dispute. Most business divorce clients are

[4] Richard R. Spore, THE GUIDE TO BUSINESS DIVORCE (2011).

private, closely held companies or ventures that are solvent or profitable enough to warrant the dispute.[5] One would think a business divorce is more likely when the company is facing an economic downturn, but the opposite has proven to be true. Often, when a company or venture is successful, the stakes are higher, and the owners have more to fight about.[6] The business entities at the center of these business divorce disputes typically take the form of one of two business governance models consisting of either active owners who share equal management and voting rights, or owners who have delegated the management and voting rights to designated managers.[7]

Typically, the parties to a business divorce have, or at least once had, close relationships usually in the form of familial, marital or social ties. "When the survival of a small business is tied to the continuing vitality of intimate personal relationships, and the parties are unable to separate the business and personal aspects of their relationships, then . . . the parties inevitably contact their lawyers and the business divorce war erupts and litigation commences."[8] The road to business divorce is unique for each business, but almost every divorce is characterized by some kind of shift in power, resulting "business asymmetries [that] alter the personal relationships."[9] Whether in contract or in form, there is often a "minority" and "majority" party, with the minority feeling oppressed, underappreciate or undervalued by the majority.[10] However, no matter the cause of the business divorce, all business divorce clients have one important thing in common: they cannot resolve their split on their own.

Implicit in every business divorce dispute is the inability of the parties to agree on how to end the

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Francis J. Sullivan, *When Small Business Owners Divorce*, Hill Wallack LLP, http://www.hillwallack.com/?t=40&an=15711; see also Jeffrey J. Mayer, *Understanding the Unusual Dynamics of Business Break-Up Litigation: Developing an Initial Litigation Checklist*, 21 Am. J. Trial Advoc. 565, 567 (1998) (explain that "parties to business divorces have relationships that pre-date and are permanently intertwined with the business relationship").
[9] *Id.*
[10] *See id.*

business relationship, and what to do with the business after the relationship ends. While some business owners adopt a preemptive approach where they mutually agree on a course of action for such an occasion and memorialize it in some form of contractual agreement (such as an operating or partnership agreement or corporate bylaws) either before or during the business relationship, not all business owners have such foresight. Understandably, no one is eager to contemplate the demise of the hope and opportunity often embodied in a business venture. It can be an emotionally uncomfortable and unsettling thing to think about, akin to anticipating a marital divorce before the wedding day. Even when business owners have agreed, in writing, to a resolution in the event the business relationship comes to an end, other obstacles may prevent a successful business divorce. For example, if a business outgrows the originally-agreed upon separation plan it may no longer be valid or realistically enforceable, and the parties are back where they started: unable to agree upon a resolution. And so, in response, the field of business divorce litigation was born.

Business divorce litigation is, in many ways, the final frontier. There are certainly available non-judicial, alternative dispute resolution options, but when those avenues have been exhausted, one of the parties, unable to come to a meeting of the minds with the other, can choose to invite a judge to settle the dispute and decide the ultimate fate of the business. Pursuing a business divorce litigation strategy is often a reluctant and expensive decision, but entirely necessary for the wellbeing of both the business owners and the business.

II. NEW JERSEY VS. DELAWARE: A COMPARATIVE ANALYSIS OF BUSINESS DIVORCE LAW

After making the determination that business divorce litigation is the appropriate course of action, one question remains: what will happen when the fate of a businesses is placed in the hands of the courts? The answer is hardly ever straightforward, but the ultimate goal is for the court to order an

appropriate remedy that the parties must abide by.

The possible remedies courts can or are willing to prescribe vary in degree. The most drastic remedy is a dissolution of the business, which is further discussed in this section. This remedy orders that the business ceases to exist and the assets, if any, are liquidated and the proceeds are distributed amongst the owners. However, less severe remedies do exist, which is also further discussed in this section, that allow the business to survive a business divorce. One example is when the court orders the sale of an interest in the business back to the business or the other side of the dispute. Often termed a "buyout," this remedy effectively removes one side of the dispute, either in whole or in part, and the remaining side gains control of the business and proceeds onward. Another option is a court appointment of an impartial third-party, usually either a custodian or a provisional manager, that aims to help the corporation resolve its dispute, either by safeguarding assets during the dispute or actually involving themselves in the business's decision-making process. Other, less-traditional, and more creative, court-ordered remedies have also been granted to resolve business divorces.

However, not all courts are as open to prescribing remedies or as willing to veer away from traditional remedies to resolve a business divorce. This is precisely the stance Delaware's Court of Chancery takes, and understandably so. For starters, the statutory framework relating to business divorce in Delaware, for corporations and LLCs alike, is scarce, and judges have been fairly conservative in granting involuntary remedies. Delaware's business divorce law is significantly influenced by its stalwart pro-freedom-of-contract stance, and, as a result, courts are typically deferential to the four corners of any existing shareholder or operating agreements, even when provisions addressing a business divorce are absent. New Jersey courts, on the other hand, have been granted wide discretion, by both the corporation and LLC statutes, when it comes to ordering and fashioning business divorce remedies, and judges have not shied away from this responsibility.

This Part proceeds in two sections by first addressing business divorce law as it pertains to corporations and then as it pertains to LLCs. Like any other area of litigation, the law that governs business divorce litigation exists mainly in two realms. The first is the relevant statutory framework enacted by the state's legislature, and second is the case law that interprets the statutory text and fill in the gaps. This section explores these two realms by identifying and juxtaposing the specific statutes in New Jersey and Delaware that govern business divorce litigation as well as providing a narrative of each state's leading judicial decisions that equally bear on the outcome of business divorce disputes. Under both the corporation and LLC sections, attention is first given to the the available judicial remedies that courts can prescribed to the ailing business divorce disputes that come before them. Each section then also considers the causes of action that allow the parties to seek judicial involvement and the standards of proof claimants must meet to warrant judicial resolution.

CORPORATIONS:

Corporations are comprised of shareholders, or, as they are called in Delaware, stockholders, who own interest in a business. Corporations vary in size, ranging from large, publicly traded corporation, to close, private corporations with only a few shareholders. The involvement of the shareholders varies, as well, ranging from those who directly run the business to those who merely serve as uninvolved investors. As mentioned above, although no corporation is immune from the perils of business divorce, close corporations are at a higher risk of turning to litigation.

In New Jersey, the relevant corporation statute that governs a judge's role in a business divorce dispute is N.J. Stat. Ann. § 14A:12-7, which was enacted in 1968 as part of the New Jersey Business Corporation Act with the intent of protecting shareholders in close corporations, focusing specifically on

problems such as minority oppression and deadlock.[11] Delaware, on the other hand, does not have a comparable statute, but the Delaware General Corporate Law does address certain remedies available to the courts in the event stockholders cannot resolve a business dispute. In addition, Delaware has an entire section devoted to laws specific to close corporation, which also contemplates an available judicial remedy.

A. JUDICIAL REMEDIES

1. Dissolution:

Involuntary dissolution is widely-considered a harsh, medieval remedy, and, as a result, courts rarely grant it. Wrestling control away from the parties only to liquidate a corporation's assets at a low-yielding "fire sale" in the face of crushing tax penalties is economically wasteful and usually unnecessary.[12] Parties continue to request dissolution simply because they can, perhaps as a retaliation or intimidation tactic, with minimal risk of it actually being granted. Nonetheless, limited circumstances do exist where dissolution is truly warranted, like, for example, when neither party can afford to buy out another party or efforts to sell the business prove fruitless.[13] But even these dire circumstances, courts will likely still prefer to first exhaust all other remedial options before assenting to dissolution.

This aversion to dissolution is made abundantly clear by Delaware's corporation dissolution statutes, reproduced in relevant part in Figure 1 below. Unless the corporation is a joint venture consisting of two equal shareholders, Delaware does not allow involuntarily dissolution of a corporation without the involvement of the Attorney General. Even then, the Attorney General must successfully show "abuse, misuse or nonuse of its corporate powers, privileges or franchises" to have the

[11] *See* Rosaria A. Suriano and Melissa A. Clarke, *Closely Held Family Businesses: What Happens When the Family is No Longer Close*, New Jersey State Bar Association, Business Law Section Newsletter, September 2013.
[12] Eileen A. Lindsay, *What Can I Do for You? Remedies for Oppressed Shareholders in New Jersey*, N.J. Law., August 2000.
[13] *Id.*

corporation's charters revoked or forfeited. Upon success, this action would have the effect of dissolving the corporation because the court can then appoint a receiver to wind up the affairs of the corporation and distribute its assets. In any event, Delaware courts have long been weary of exercising this power. "Under some circumstances courts of equity will appoint liquidating receivers for solvent corporations, but the power to do so is always exercised with great restraint and only upon a showing of gross mismanagement, positive misconduct by the corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented."[14]

In New Jersey, dissolution is much more accessible, allowing shareholders and directors to seek the remedy directly. New Jersey's corporation dissolution statutes are reproduced in relevant part in Figure 1 below. However, New Jersey courts also exercise restraint in granting dissolution, recognizing that "[d]issolution is an extreme remedy to be imposed with caution after a careful balancing of . . . the appropriateness of dissolution as a remedy against the loss to society if the corporation is forced to liquidate."[15] Although the corporation dissolution statute expressly allows for dissolution, it also provides for other remedies upon the same showing, and courts have favored these and other less severe approaches.[16]

[14] *Hall v. John S. Isaacs & Sons Farms, Inc.,* 39 Del. Ch. 244, 253, 163 A.2d 288, 293 (1960).
[15] *Brenner v. Berkowitz*, 634 A.2d 1019 (N.J. 1993).
[16] *Id*. (recognizing that "a buy-out may be preferable to dissolution," but that "other remedies may be more appropriate to a buy-out").

FIGURE 1: CORPORATIONS – INVOLUNTARY DISSOLUTION	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 14A:12-1(f); N.J. Stat. Ann. § 14A:12-7	**Del. Code Ann. tit. 8, § 284; Del. Code Ann. tit. 8, § 273**
N.J. Stat. Ann. § 14A:12-1(f): Methods of dissolution: (1) A corporation may be dissolved in any one of the following ways (f) By a judgment of the Superior Court in an action brought pursuant to section 14A:12-6 or 14A:12-7, or otherwise; **N.J. Stat. Ann. § 14A:12-7**: Involuntary dissolution; other remedies. (1) The Superior Court, in an action brought under this section, may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock as provided below, **or enter a judgment dissolving the corporation**, upon proof that (a) The shareholders of the corporation are so divided in voting power that, for a period which includes the time when two consecutive annual meetings were or should have been held, they have failed to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors; or (b) The directors of the corporation, or the person or persons having the management authority otherwise in the board, . . . , are unable to effect action on one or more substantial matters respecting the management of the corporation's affairs; or (c) In the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees. (2) An action may be brought under this section by one or more directors or by one or more shareholders. (9) In determining whether to enter a judgment of dissolution in an action brought under this section, the court shall take into consideration whether the corporation is operating profitably and in the best interests of its shareholders, but shall not deny entry of such a judgment solely on that ground.	**Del. Code Ann. tit. 8, § 284**: Revocation or forfeiture of charter; proceedings. (a) The Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse or nonuse of its corporate powers, privileges or franchises. The Attorney General shall, upon the Attorney General's own motion or upon the relation of a proper party, proceed for this purpose . . . . **Del. Code Ann. tit. 8, § 273**. Dissolution of joint venture corporation having 2 stockholders. (a) If the stockholders of a corporation of this State, having only 2 stockholders each of which own 50% of the stock therein, shall be engaged in the prosecution of a joint venture and if such stockholders shall be unable to agree upon the desirability of discontinuing such joint venture and disposing of the assets used in such venture, either stockholder may, unless otherwise provided in the certificate of incorporation of the corporation or in a written agreement between the stockholders, file with the Court of Chancery a petition stating that it desires to discontinue such joint venture and to dispose of the assets used in such venture in accordance with a plan to be agreed upon by both stockholders or that, if no such plan shall be agreed upon by both stockholders, the corporation be dissolved. . .

2. Buyout:

One of the alternative remedies expressly mentioned in New Jersey's corporation law, reproduced in relevant part below in Figure 2, is the buyout remedy. It allows the corporation itself or any shareholder party to a business divorce suit to, by motion, request that the court "order the sale of all shares of the corporation's stock held by any other shareholder who is a party to the proceeding to either the corporation of the moving shareholder or shareholders." Additionally, the court may order a buyout if it decides "in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case."

Although a buyout is a significantly less drastic remedy than a dissolution, it can still be an invasive procedure that can push a shareholder, or shareholders, out of the corporation against his or her own will. However, the New Jersey Supreme Court has interpreted its buyout statute to only apply to voluntary purchases where a shareholder moves to have his or her own shares bought out.[17] Despite this less-invasive remedial purpose, New Jersey courts continue to recognize that "the court's equitable power might encompass the power to compel an involuntary buy-out by the other shareholders," but that this power must be exercised cautiously and "should be reserved primarily for those instances in which the only practical alternative to an involuntary buy-out would be dissolution."[18]

Delaware, in direct opposition to New Jersey, does not recognize its court's power to order a buyout, whether voluntary or involuntary. Furthermore, the Court of Chancery is equally dismissive of prescribing such a remedy. Delaware's Supreme Court wrote, "It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed

[17] *Brenner v. Berkowitz*, 134 N.J. 488, 512, 634 A.2d 1019, 1031 (1993) ("Although the Commissioners' Comment suggests that a motion by a shareholder may be sufficient to compel a purchase by the corporation, . . . we are inclined to construe the statute as authorizing specifically only voluntary purchases by either a shareholder or the corporation.").
[18] *Id.*

stockholder buy-out for which the parties had not contracted."[19]

FIGURE: 2: CORPORATIONS – BUYOUT	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 14A:12-7	**N/A**
Involuntary dissolution; other remedies. (1) The Superior Court, in an action brought under this section, may . . . order a sale of the corporation's stock as provided below . . . [***Subsections (a)-(c) provide the standard of proof***] (8) Upon motion of the corporation or any shareholder who is a party to the proceeding, the court may order the sale of all shares of the corporation's stock held by any other shareholder who is a party to the proceeding to either the corporation or the moving shareholder or shareholders, whichever is specified in the motion, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case. [***Subsection (a) governs the purchase price of the shares and subsections (b)-(f) provide further rules regarding the buyout***]	

3. **Appointing a Custodian or Provisional Manager**:

The least drastic of the express remedies recognized by New Jersey's corporation, reproduced in relevant part below in Figure 3, is the appointment of a custodian or a provisional director. A provisional director takes on an active role and assumes "all the rights and powers of a duly elected director of the corporation, including the right to notice of and to vote at meetings of directors." A provisional director is usually appointed in a deadlock to acts as a mediator or to cast a tie-breaker vote.[20] A custodian has the broader power "to exercise all of the powers of the corporation's board and officers to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors." A custodian is generally more appropriate when there is some evidence of intentional wrongdoing, mismanagement or fraudulent or illegal conduct within the corporation.[21] Again, deciding when to appoint a custodian or a provisional direct is in the discretion of the court if it believes an appointment is

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[19] *Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1993).
[20] *See* Lindsay *supra* note 12.
[21] Frederic K. Becker & Anita J. Dupree, *Equitable Remedies in Corporate Divorces: A Look at* Brenner v. Berkowitz *and the Corporate Dissolution Statute*, N.J. Law., November/December 1994.

"in the best interests of the corporation and its shareholders."

Delaware also recognizes a similar remedy for corporations by allowing the court, upon application of a stockholder, to appoint a custodian and a receiver, if necessary, only in the event that the corporation is deadlocked or has been abandoned. Under this statute, reproduced in part in Figure 3 below, a custodian has the powers of a receiver, and, in addition, the "authority . . . to continue the business of the corporation and not to liquidate its affairs and distribute its assets" unless the court so orders or is otherwise permitted by statute. In addition, Delaware's statutes for close corporations, reproduced in part in Figure 3, allow for the appointment of a custodian and a provisional director in the case of a deadlock.

Although judges in Delaware, as in New Jersey, are given discretion when appointing a custodian or a provisional director, the standard that warrants this remedy for a Delaware corporation is much greater. Recognizing that it is "unusual to grant such relief,"[22] Delaware courts apply "careful judicial scrutiny" in determining whether a corporate deadlock warrants an appoint of custodian or provisional director.[23] This seems more strict than New Jersey's "best interest" standard.

[22] *TransPerfect Global, Inc. v. Elting (In re Shawe & Elting LLC)*, 2015 Del. Ch. LEXIS 211, *2 (Del. Ch. Aug. 13, 2015).
[23] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 239, 1982 Del. LEXIS 453, *18, 34 A.L.R.4th 1 (Del. 1982).

FIGURE 3: CORPORATIONS – APPOINTMENT OF CUSTODIAN OR PROVISIONAL MANAGER	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 14A:12-7(3) & (4)	**Del. Code Ann. tit. 8, § 226;** **Del Code Ann. tit. 8, § 353**
Involuntary dissolution; other remedies. (1) The Superior Court, in an action brought under this section, may appoint a custodian [or] appoint a provisional director . . . upon proof that [***Subsections (a)-(c) provide the standard of proof***] (2) . . . [I]n the case of appointment of a custodian or a provisional director, the court may proceed in a summary manner or otherwise. (3) **One or more provisional directors may be appointed if it appears to the court that such an appointment may be in the best interests of the corporation and its shareholders**, notwithstanding any provisions in the corporation's by-laws, certificate of incorporation, or any resolutions adopted by the board or shareholders . . . . (4) **A custodian may be appointed if it appears to the court that such an appointment may be in the best interests of the corporation and its shareholders**, notwithstanding any provisions in the corporation's by-laws, certificate of incorporation, or any resolutions adopted by the shareholders or the board. . . . [***Sections (5) and (6) provides additional duties and section (7) governs compensation***]	**Del. Code Ann. tit. 8, § 226:** Appointment of custodian or receiver of corporation on deadlock or for other cause. (a) The Court of Chancery, upon application of any stockholder, **may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers**, of and for any corporation when: (1) At any meeting held for the election of directors the stockholders are so divided that they have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors; or (2) The business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division; or (3) The corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets. [***Section (b) governs the powers of custodian or receiver***] **Del. Code Ann. tit. 8, § 352**: Appointment of custodian for close corporation. (a) In addition to § 226 of this title respecting the appointment of a custodian for any corporation, the Court of Chancery, upon application of any stockholder, **may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers**, of any close corporation when: (1) Pursuant to § 351 of this title the business and affairs of the corporation are managed by the stockholders and they are so divided that the business of the corporation is suffering or is threatened with irreparable injury and any remedy with respect to such deadlock provided in the certificate of incorporation or bylaws or in any written agreement of the stockholders has failed **Del Code Ann. tit. 8, § 353:** Appointment of a provisional director in certain cases. (a) Notwithstanding any contrary provision of the certificate of incorporation or the bylaws or agreement of the stockholders, the Court of Chancery **may appoint a provisional director for a close corporation** if the directors are so divided respecting the management of the corporation's business and affairs that the votes required for action by the board of directors cannot be obtained with the consequence that the business and affairs of the corporation can no longer be conducted to the advantage of the stockholders generally.

4. **Other Remedies:**

Although the New Jersey corporation statutes specify certain remedies the court may prescribed, these remedies are not the end of the road for New Jersey judges. In the 1993 case *Brenner v. Berkowitz*, the New Jersey Supreme Court officially blew open the door for judicial discretion in fashioning remedies for corporations in business divorce disputes. The Court construed the statutory word choice 'may' to mean that the state legislature intended to give courts discretion to prescribe not only the statute's enumerated remedies, but also any of the "wide array of equitable remedies available to them."[24] To really drive the message home, the court rattled off thirteen additional, novel remedies, including, "[p]roviding for the sale of all the property and franchises of the corporation to a single purchaser" and "[r]escinding a corporate act that is unfair to the minority."[25] The *Brenner* decision stands in stark contrast to the limited way Delaware courts interpret their remedial powers under the statutes that govern business divorce disputes concerning corporations. There is little evidence of judicial discretion in fashioning remedies for shareholder disputes beyond those prescribed by statue.[26]

B. **CAUSES OF ACTION**:

Before any court can grant a remedy to a business divorce, the complaining shareholders must first trigger the application of the relevant statute by successfully pleading a specified cause of action. There are certain causes of actions that are typical in business divorce disputes, such as deadlocks and minority oppression, that are of particular importance when comparing New Jersey and Delaware laws.

1. **Deadlock**:

Generally speaking, deadlock is a "state of inaction resulting from opposition, a lack of compromise or resolution, or a failure of election" between the shareholders or directors of a

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[24] *Brenner v. Berkowitz*, 134 N.J. 488, 512, 634 A.2d 1019, 1033 (1993).
[25] *Id.* at 1032.
[26] *See e.g.*, *Millien v. Popescu*, No. CIV.A. 8670-VCN, 2014 WL 463739, at *15 (Del. Ch. Jan. 31, 2014) (granting specific performance of a contract to breaks a stockholder deadlock).

corporation.[27] Furthermore, "deadlocks are a small corporation phenomenon" because "[i]n publicly traded companies, the corporation's stock is owned by such a large number of shareholders, the risk of a deadlock is virtually nonexistent."[28] Both New Jersey and Delaware corporation laws expressly recognize, in some shape or form, this cause of action and provide a remedy. In New Jersey, a shareholder or direct in any corporation can request any judicial remedy upon meeting the deadlock standard as defined in the statute reproduced in relevant part below in Figure 5. Under Delaware law, reproduced in relevant part below in Figure 5, only a 50% stockholder in a two-person joint venture corporation may seek dissolution. However, a deadlock may warrant the appointment of a custodian, receiver or provisional manager of any Delaware corporation or close corporation.

Both New Jersey and Delaware seem committed to preserving a deadlock cause of action. In New Jersey, the legislature actively sought to "'[enlarge] the rights and remedies available in the event of corporate deadlock or shareholder 'freeze-out' situations" in enacting the current deadlock statute.[29] Similarly, Delaware courts have taken an aggressive stance in remedying corporate deadlocks and preventing "the wrongful subversion of corporate democracy by manipulation of the corporate machinery or by machinations under the cloak of Delaware law."[30] In response, Delaware judges give "careful judicial scrutiny [to] a situation in which the right to vote for the election of successor directors has been effectively frustrated and denied by the willful perpetuation of a shareholder-deadlock and the resulting entrenched board of directors."[31] However, unlike the New Jersey shareholder statute, Delaware's shareholder statutes consistently limit judicial action to situations where an existing agreement does not provide otherwise or, if it does, the other agreed-upon remedies have failed.

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[27] *Grand View Developers, Inc. v. Celentano*, 2006 WL 163502 (N.J. Super. Ct. Ch. Div. 2006)
[28] Barry F. Gartenberg, *The New Jersey Revised Uniform Limited Liability Company Act's Oppression and Deadlock Remedy*, N.J. Law., October 2014.
[29] *Brenner v. Berkowitz*, 134 N.J. 488, 504, 634 A.2d 1019, 1026 (1993).
[30] *Giuricich v. Emtrol Corp*., 449 A.2d 232, 239 (Del. 1982).
[31] *Id.*

FIGURE 5: CORPORATIONS – DEADLOCK	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 14A:12-7 (1)(a)	**Del. Code Ann. tit. 8, § 226;** **Del. Code Ann. tit. 8, § 273**
Involuntary dissolution; other remedies. (1) The Superior Court, in an action brought under this section, may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock as provided below, or enter a judgment dissolving the corporation, upon proof that (a) The **shareholders of the corporation are so divided in voting power** that, for a period which includes the time when two consecutive annual meetings were or should have been held, they have failed to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors; or (b) The **directors of the corporation, or the person or persons having the management authority otherwise in the board**, if a provision in the corporation's certificate of incorporation contemplated by subsection 14A:5-21(2) is in effect, **are unable to effect action on one or more substantial matters respecting the management of the corporation's affairs**;	**Del. Code Ann. tit. 8, § 273:** Dissolution of joint venture corporation having 2 stockholders. (a) If the stockholders of a corporation of this State, having only 2 stockholders each of which own 50% of the stock therein, shall be engaged in the prosecution of a joint venture and if such **stockholders shall be unable to agree upon the desirability of discontinuing such joint venture and disposing of the assets used in such venture**, either stockholder may, unless otherwise provided in the certificate of incorporation of the corporation or in a written agreement between the stockholders, file with the Court of Chancery a petition stating that it desires to discontinue such joint venture and to dispose of the assets used in such venture in accordance with a plan to be agreed upon by both stockholders or that, if no such plan shall be agreed upon by both stockholders, the corporation be dissolved. . . . **Del. Code Ann. tit. 8, § 226**: Appointment of custodian or receiver of corporation on deadlock or for other cause. (a) The Court of Chancery, upon application of any stockholder, may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of and for any corporation when: (1) At any meeting held for the election of directors the stockholders are so divided that they have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors; or (2) The business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division; **Del. Code Ann. tit. 8, § 352**: Appointment of custodian for close corporation. (a) In addition to § 226 of this title respecting the appointment of a custodian for any corporation, the Court of Chancery, upon application of any stockholder, may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of any close corporation when: (1) Pursuant to § 351 of this title the business and affairs of the corporation are managed by the stockholders and they are so divided that the business of the corporation is suffering or is threatened with irreparable injury and any remedy with respect to such deadlock provided in the certificate of incorporation or bylaws or in any written agreement of the stockholders has failed **Del Code Ann. tit. 8, § 353:** Appointment of a provisional director in certain cases. (a) Notwithstanding any contrary provision of the certificate of

	incorporation or the bylaws or agreement of the stockholders, the Court of Chancery may appoint a provisional director for a close corporation if the directors are so divided respecting the management of the corporation's business and affairs that the votes required for action by the board of directors cannot be obtained with the consequence that the business and affairs of the corporation can no longer be conducted to the advantage of the stockholders generally.

2. Minority Oppression:

Although New Jersey and Delaware corporation laws are somewhat aligned when it comes to judicially resolving corporate deadlock, this could not be less true in situations of minority oppression. Minority oppression occurs when the majority shareholders act in a way that oppresses the minority and leaves the powerless within the corporate structure. "Shareholder oppression concerns are, as a practical matter, limited to small, privately held corporations" because, "[i]n the case of publicly traded companies, there is a ready market for the corporation's stock and, therefore, dissatisfied shareholders may easily relinquish their ownership and receive at least what the market perceives to be fair value for the shares."[32] New Jersey has emerged as a leader in protecting minority shareholders when it enacted the minority oppression cause of action "in response to the failure of traditional principles of corporate law, such as the business judgment rule, to curb these abuses."[33] Delaware, on the other hand, stands firmly behind its deferential business judgment rule.

Under New Jersey corporation law, reproduced in relevant part in Figure 6 below, the minority oppression cause of action is reserved for shareholders in close corporations "having 25 or less shareholders." To prove oppression, the New Jersey Supreme Court has required a minority shareholder to "show that her reasonable expectations had been frustrated, that the majority shareholders had breached their fiduciary duty to her, or that the majority's misconduct had led to a change in the

[32] Gartenberg, *supra* note 28 at 43, 43-44.
[33] *Muellenberg v. Bikon Corp.*, 143 N.J. 168, 179, 669 A.2d 1382, 1387 (1996).

minority's position within the corporate structure."[34] In addition, there must be a "nexus between" the oppressive conduct and harm caused to the minority shareholder. In determining the existence of such a nexus, "the court must consider those acts that affect or jeopardize a shareholder's stock interest as well as those acts that may be specifically targeted to the shareholder."[35]

Delaware, in contrast, does not recognize a minority oppression cause of action, neither in statute nor in common law. In fact, Delaware courts have expressly rejected the need to remedy minority oppression. The Supreme Court of Delaware reasoned that "[a] stockholder who bargains for stock in a closely-held corporation and who pays for those shares . . . can make a business judgment whether to buy into such a minority position, and if so on what terms. One could bargain for definitive provisions of self-ordering permitted to a Delaware corporation through the certificate of incorporation or by-laws . . . ."[36]

Despite the lack of statutory support, some believe that Delaware courts do, in fact, recognize a similar cause of action under which oppressed minority stockholders can file suit.[37] However, the standard used to evaluate this form of minority oppression is quite different, and resembles the one Delaware courts use for claims of a breach of fiduciary duties.[38] As a result, minority stockholders must rebut the business judgment rule by proving that the majority stockholders either "(i) had a personal

[34] *Brenner v. Berkowitz*, 134 N.J. 488, 494, 634 A.2d 1019, 1022 (1993).
[35] *Id.* at 1028-29.
[36] *Nixon v. Blackwell*, 626 A.2d 1366, 1379-80 (Del. 1993)
[37] Ladd A. Hirsch, *Tales from the Trenches: Business Divorces Involving Disputes Among Owners of Private Companies (Under Texas and Delaware Law)*, 2014 ABA Section of Litigation, Section Annual Conference (2014). Hirsch cites the Court of Chancery's recognition of the minority shareholder cause of action in *Little v. Waters*. In *Litle*, the court defined minority shareholder oppression as "a violation of the 'reasonable expectations' of the minority" and a "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." *Litle v. Waters*, No. CIV. A. 12155, 1992 WL 25758, at *8 (Del. Ch. Feb. 11, 1992).
[38] *Id.*

interest in the subject matter of the action; was not fully informed in approving the action; or (iii) did not act in good faith in approving the action.[39] Upon a successful showing by the minority, the court will then place the burden on the majority to prove "entire fairness" to the corporation.[40] Although this is not nearly as effective in protecting oppressed minorities as having a direct cause of action, Delaware courts consider this adequate protection for their minority stockholders.[41]

FIGURE 6: CORPORATIONS – MINORITY OPPRESSION	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 14A:12-7(1)(c)	**N/A**
Involuntary dissolution; other remedies. (1) The Superior Court, in an action brought under this section, may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock as provided below, or enter a judgment dissolving the corporation, upon proof that (c) In the case of a corporation having 25 or less shareholders, the directors or those in control have . . . **acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees**.	

LIMITED LIABILITY COMPANIES:

The limited liability company ("LLC"), which combines the pass-through taxation function of a partnership and the limited liability of a corporation, is a popular business structure, especially for small business owners looking to take advantage of the tax benefits and liability protection, as well as retain greater control over their business conduct and affairs.[42] An LLC is comprised of members (or a single member) who, like in a corporation, own interest in the business and may serve different functions within the business, ranging from active to passive. Although LLC-specific laws are enacted in each

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *See* Bonnie C. Park, *Business Divorce After RULLCA*, New Jersey State Bar Association, Business Law Section Newsletter, September 2013.

state, courts sometimes look to the corporation statutes and the relevant jurisprudence, as well, for guidance and may even extend some shareholder rights or remedies to LLC members.

In the context of business divorce law, New Jersey codifies the available judicial remedies and causes of action in the New Jersey Revised Uniform Limited Liability Company Act ("NJRULLCA") at N.J. Stat. Ann. § 42:2C-48. The NJRULLCA, which now governs all New Jersey LLCs, was enacted in 2012 and completely overhauled New Jersey's previous LLC act.[43] The novelty of the NJRULLCA laws has provided some uncertainty for LLC members and their attorneys, but the new laws are helpful in resolving some of the common business divorce issues facing LLC members by providing default operating agreement provisions and also codifying the minority oppression cause of action.[44]

Delaware's LLC business divorce law counterpart is codified within the Delaware Limited Liability Company Act ("DLLCA") at Del. Code Ann. tit. 6, §§ 18-801, 802, which explicitly allows for dissolution of an LLC under certain circumstances, but provides little guidance on other judicial remedies or causes of actions. Despite the availability of judicial dissolution, the DLLCA emphasizes that "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."[45] Consistent with this policy, the common law stance on business divorce disputes can be summarized in one sentence: "LLC members' rights begin with and typically end with the Operating Agreement."[46]

A. JUDICIAL REMEDIES

1. Dissolution:

As previously discussed under the Corporation Dissolution section above, the dissolution is a drastic and invasive remedy that is prescribed with incredible caution and in very limited

[43] *See* Gartenberg, *supra* note 28.
[44] *See* Park, *supra* note 42.
[45] Del. Code Ann. tit. 6, § 18-1101
[46] *Walker v. Res. Dev. Co., L.L.C.* (DE), 791 A.2d 799, 813 (Del. Ch. 2000)

circumstances.[47] The same is also true in the context of LLC business divorce suits.

When it comes to dissolution, New Jersey and Delaware laws overlap. Under both statutes, any member can bring an action for dissolution. In addition, looking at Figure 7 below, it is clear that both dissolution statutes apply the same "not reasonably practicable" standard which considers whether the LLC can carry on its business in conformity with the operating agreement. Both statutes are also designed to be equally vague as to what constitutes "not reasonably practicable," purposefully leaving it to the courts to create the appropriate standard.

In New Jersey, there are very few cases that interpret this standard because the NJRULLCA provision is barely three years old. Recently, New Jersey's Appellate Division held that "[i]n the context of a judicial dissolution, it will no longer be 'reasonably practicable to carry on the business of the LLC' when 'the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock of where the defined purpose of the entity has become impossible to fulfill.'"[48] Citing a Colorado appellate court decision, the court also endorsed seven factors that may be considered when making such a determination, including, but not limited to "'(1) whether the management of the entity is unable or unwilling reasonably to permit or promote the purposes for which the company was formed; (2) whether a member or manager has engaged in misconduct; (3) whether the members have clearly reached an inability to work with one another to pursue the company's goals; (4) whether there is deadlock between the members; (5) whether the operating agreement provides a means of navigating around any such deadlock; (6) whether, due to the company's financial position, there is still a business to operate; and

[47] See, e.g., *In re Seneca Investments LLC*, 970 A.2d 259, 263-64 (Del. Ch. 2008) ("The role of this Court in ordering dissolution under § 18-802 is limited, and the Court of Chancery will not attempt to police violations of operating agreements by dissolving LLCs.")
[48] *IE Test, LLC v. Carroll*, No. A-6159-12T4, 2014 WL 8132907, at *6 (N.J. Super. Ct. App. Div. Mar. 17, 2015) (citing 51 Am.Jur.2d Limited Liability Companies § 35 (2011)).

(7) whether continuing the company is financially feasible.'"[49] Time will tell to what extent other New Jersey courts will apply this standard, or adopt an alternative way to measure what "not reasonably practicable" means within the context of judicial dissolution.

Delaware case law, on the other hand, provides more established guidance on the "not reasonably practicable" standard. The courts have interpreted Section 18-802, reproduced in relevant part in Figure 7 below, to allow, but not mandate, judicial dissolution if a member can show that the purpose of the business is frustrated or that there is a deadlock.

With respect to showing that the purpose of the business has been frustrated, the Court of Chancery has considered whether the LLC could "take the actions necessary to continue functioning as a business" in accordance with the operating agreement.[50] As for deadlock, the most commonly accepted deadlock interpretation was laid out in *Fisk Ventures, LLC v. Segal*,[51] where the Court of Chancery described "three factual scenarios" that should be considered "when ordering judicial dissolution under Section 18-802's reasonable practicability standard: 1) whether the members' vote is deadlocked at the Board level; 2) whether there exists a mechanism within the operating agreement to resolve this deadlock; and 3) whether there is still a business to operate based on the company's financial condition."[52] However, "none of these factors is individually conclusive, nor must each be found for a court to order dissolution," but are meant to "provide guidance to the ultimate inquiry of whether the company can continue to pursue its stated business purpose with reasonable practicability."[53] In addition, Delaware courts continue to be deferential to existing operating agreements, and if an

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[49] *Id.* (citing *Gagne v. Gagne*, 338 P.3d 1152, 1159 (Colo. Ct. App. 2014)).
[50] *In re Silver Leaf, L.L.C.*, No. CIV. A. 20611, 2005 WL 2045641, at *10 (Del. Ch. Aug. 18, 2005)
[51] *Fisk Ventures, LLC v. Segal*, No. CIV.A. 3017-CC, 2009 WL 73957, at *3 (Del. Ch. Jan. 13, 2009) aff'd, 984 A.2d 124 (Del. 2009).
[52] *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, No. CIV.A. 4479-VCN, 2009 WL 4052681, at *5 (Del. Ch. Nov. 12, 2009) (citing *Fisk Ventures, LLC v. Segal*, No. CIV.A. 3017-CC, 2009 WL 73957, at *3 (Del. Ch. Jan. 13, 2009) aff'd, 984 A.2d 124 (Del. 2009)).
[53] *Id.*

operating agreement specifies a viable,[54] alternative remedy or solution to a problem, "dissolution under § 18-802 might not be warranted."[55]

Both the New Jersey and Delaware courts seem to allow for a flexible, fact-specific inquiry into whether it is not reasonably practicable for a business to carry out its function before prescribing dissolution. Generally speaking, New Jersey and Delaware courts have essentially interpreted the "not reasonably practicable" standard to encompass and apply mainly to deadlock situations. Therefore, although neither the NJRULLCA nor the DLLCA expressly recognize a deadlock cause of action, the common law in both states have unequivocally done so in its place. However, the NJRULLCA, reproduced in relevant part in Figure 7 below, expressly recognizes other situation that may warrant judicial involvement, most notable of which is the minority oppression cause of action, discussed later in this section.

Another significant difference between the New Jersey and Delaware LLC statutory frameworks is how each treats the validity of a waiver of the right to seek judicial dissolution. In New Jersey, judicial dissolution brought under N.J. Stat. Ann. § 42:2C-48(a)(4) or (5) is not a right that can be waived in an operating agreement.[56] In Delaware, however, the right to judicial dissolution can be waived in an operating agreement.[57] This is further in keeping with New Jersey's aim to protect disenfranchised and minority shareholders, and Delaware's aim to protect the right to freely contract.

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[54] In determining the viability of an exit mechanisms provided in an operating agreement, courts will consider if they are voluntary versus mandatory, and if they are adequate and fair. *See Id.*; *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004).
[55] *Haley v. Talcott*, 864 A.2d 86, 88 (Del. Ch. 2004).
[56] N.J. Stat. Ann. § 42:2C-11.
[57] *See R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC*, No. CIV.A. 3803-CC, 2008 WL 3846318, at *6 (Del. Ch. Aug. 19, 2008) ("Sections 18-802, 18-803, and 18-805 are not mandatory provisions of the LLC Act that cannot be modified by contract"); *see also Huatuco v. Satellite Healthcare*, 2013 WL 6460898 (Del. Ch. Dec. 9, 2013).

FIGURE 7: LLCS – INVOLUNTARY DISSOLUTION	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 42:2C-48(a)(4)&(5)	**Del. Code Ann. tit. 6, § 18-801(a)(5);** **Del. Code Ann. tit. 6, § 18-802;**
Events causing dissolution. a. A limited liability company is dissolved, and its activities shall be wound up, upon the occurrence of any of the following: (4) on application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that: (a) the conduct of all or substantially all of the company's activities is unlawful; or (b) it is **not reasonably practicable to carry on the company's activities in conformity with one or both of the certificate of formation and the operating agreement**; or (5) on application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that the managers or those members in control of the company: (a) have acted, are acting, or will act in a manner that is illegal or fraudulent; or (b) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.	**Del. Code Ann. tit. 6, § 18-801(a)(5)**: Dissolution. (a) A limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following: (5) The entry of a decree of judicial dissolution under § 18-802 of this title. **Del. Code Ann. tit. 6, § 18-802:** Judicial dissolution. On application by or for a member or manager the Court of Chancery may decree dissolution of a limited liability company whenever it is **not reasonably practicable to carry on the business in conformity with a limited liability company agreement.**

2. Buyout:

The buyout remedy, a less-severe alternative to dissolution, is also prescribed within the context of LLC business divorce disputes. In New Jersey, the NJRULLCA buyout provision, reproduced in relevant part in Figure 8 below, expressly allows for a judicial buyout in lieu of a dissolution "if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case." Although the statute is vague on its face and the precedent on the issue has not yet developed, the language of the LLC buyout remedy is substantively identical to the buyout remedy under New Jersey's shareholder statute, N.J. Stat. Ann. § 14A:12-7, reproduced in relevant part in Figure 2 above. Judges will therefore likely turn to the case law surrounding the shareholder buyout statute for interpretive guidance, and attorneys can similarly consult the existing jurisprudence in

counseling their clients.[58]

The DLLCA, on the other hand, does not have a similar buyout provision, but Delaware courts have seemed somewhat willing to consider and prescribe similar remedies. For example, the Court of Chancery ordered the dissolution and sale of an LLC in a private, "English-style" auction which had the effect of a buyout because only members of the LLC were permitted to bid.[59]

FIGURE 8: LLCS – BUYOUT	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 42:2C-48(b)	**N/A**
Events causing dissolution. b. In a proceeding brought under paragraph (4) or (5) of subsection a. of this section, the court may . . . **order the sale of all interests held by a member who is a party to the proceeding to either the limited liability company or any other member who is a party to the proceeding**, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case.	

3. Appointing a Custodian or Provisional Manager

The judicial appointment of a custodian or a provisional manager as a remedy to the business divorce of an LLC serves the same function as it does in a business divorce of a corporation. Like the judicial buyout provision, the NJRULLCA custodian and provisional manager appointment provision, reproduced in relevant part in Figure 9 below, substantively tracks its shareholder statute counterpart, N.J. Stat. Ann. § 14A:12-7(3) & (4), reproduced in relevant part in Figure 3 above. Likewise, judges are likely to turn to the case law surrounding the shareholder custodian and provisional manager appointment statute for interpretive guidance, and attorneys can similarly consult the existing

[58] *See* Andrea J. Sullivan, Steven B. Gladis, *New Remedies for LLC Members Oppression and Fiduciary Duties Under the Revised Uniform Limited Liability Company Act*, N.J. Law., April 2014, at 72, 73.
[59] *In re Interstate Gen. Media Holdings, LLC*, No. CIV.A. 9221-VCP, 2014 WL 1697030, at *1 (Del. Ch. Apr. 25, 2014).

jurisprudence in counseling their clients.[60] In Delaware, the DLLCA does not have an express provision allowing for the judicial appointment of a custodian or provisional manager, but the Court of Chancery has permitted LLCs to apply for a custodian or receiver under Delaware shareholder statute, Del. Code Ann. tit. 8, § 226, reproduced in relevant part in Figure 3 above.[61]

FIGURE 9: LLCS – APPOINTMENT OF CUSTODIAN OR PROVISIONAL MANAGER	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 42:2C-48(b)	**N/A**
Events causing dissolution. b. In a proceeding brought under paragraph (4) or (5) of subsection a. of this section, the court may order or a party may seek a remedy other than dissolution, including, but not limited to, the appointment of a custodian or one or more provisional managers. **The court shall appoint a custodian or one or more provisional managers if it appears to the court that such an appointment may be in the best interests of the limited liability company and its members**. . . . The court may appoint a custodian or one or more provisional managers in a summary proceeding or otherwise	

B. CAUSES OF ACTION:

1. Deadlock:

As previously discussed, although not expressly addressed in either the NJRULLCA or the DLLCA, the deadlock cause of action is firmly encompassed in the "not reasonably practicable" standard that warrants judicial dissolution. One important difference, however, is that the NJRULLCA does not allow members to waive their right to seek dissolution, or some other judicial remedy, when there is a deadlock, or the member can otherwise show that it is "not reasonably practicable" to run their

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[60] Sullivan and Gladis, *supra* note 58.

[61] *In re Seneca Investments LLC*, 970 A.2d 259, 264 (Del. Ch. 2008) (analyzing whether an appointment of a custodian or a receiver under Del. Code Ann. tit. 8, § 226 is warranted for an LLC).

business in accordance with the operating agreement.[62] The DLLCA preserves no such right, and, in fact, members are encouraged to draft the operating agreements however they see fit.

Dissolution is not the only available remedy available in the case of a deadlock. Similar to the shareholder statute, NJRULLCA expressly authorizes New Jersey courts to prescribe remedies in addition to dissolution, and gives judges discretion in fashioning such remedies.[63] The DLLCA, in contrast, does not expressly give Delaware courts such power and discretion, but the Court of Chancery has recognized its "capacious remedial discretion . . . to address inequity."[64] However, the DLLCA's explicit deference to the operating agreement makes it difficult for judges to actually exercise such discretion.

2. **<u>Minority Oppression</u>:**

In 2012, when New Jersey reformed its LLC laws and enacted the NJRULLCA, one of the most significant changes was the new, express minority oppression cause of action, reproduced in relevant part in <u>Figure 10</u> below, that allows any member of an LLC to petition the court to order dissolution, or fashion some other remedy, where "manager, or those member in control of the company . . . have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant." In addition, the NJRULLCA does not allow members to alter or waive the right to seek a judicial remedy

[62] N.J. Stat. Ann. § 42:2C-11.
[63] N.J. Stat. Ann. § 42:2C-48(b) ("In a proceeding brought under paragraph (4) or (5) of subsection a. of this section, the court may order or a party may seek a remedy other than dissolution, including, but not limited to, the appointment of a custodian or one or more provisional managers . . . or order the sale of all interests held by a member who is a party to the proceeding to either the limited liability company or any other member who is a party to the proceeding, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case."). The "including, but not limited to" language is key in granting judicial discretion to prescribe an alternative remedy not explicitly provided in the statute.
[64] *McGovern v. Gen. Holding, Inc.*, No. CIV. A 1296-N, 2006 WL 1468850, at *24 (Del. Ch. May 18, 2006).

in the case of minority oppression in an operation agreement.[65] Prior to the enactment of the NJRULLCA, New Jersey courts seemed hesitant to extend the minority oppression cause of action found in New Jersey's shareholder statute, reproduced in relevant part in Figure 6 above.[66] Therefore, it will take some time for the case law to develop and determine how New Jersey courts will choose to interpret and apply NRULLCA's fledgling minority oppression statute.

The DLLCA, in stark contrast, makes no recognition of a minority oppression cause of action, and Delaware courts have similarly refrained from recognizing one in common law. "Delaware does not have a statutory cause of action for minority shareholder oppression. Moreover, the Delaware Supreme Court has refrained from applying remedies for alleged oppression, finding that a person buying into a minority position can bargain for certain protections."[67]

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[65] *See* N.J. Stat. Ann. § 42:2C-11

[66] *See Tutunikov v. Markov*, No. A-1827-10T3, 2013 WL 3940889, at *9 (N.J. Super. Ct. App. Div. Aug. 1, 2013) ("Given the lack of an oppressed member provision in the LLCA, our holding in *Denike* and the Legislature's recent actions, we think it clear that the BCA's oppressed shareholder provisions have no application to an LLC."); *see also Casella v. Home Depot USA, Inc.*, No. CIV.A. 09-0421 (JAP), 2010 WL 3001919, at *4 (D.N.J. July 28, 2010) (refusing to extend the shareholder minority oppression statute to LLCs).

[67] *Nightingale & Associates, LLC v. Hopkins*, No. CIV. 07-4239 (FSH), 2008 WL 4848765, at *6 (D.N.J. Nov. 5, 2008) (applying Delaware law to a claim of minority oppression).

FIGURE 10: LLCS – MINORITY OPPRESSION	
NEW JERSEY	**DELAWARE**
N.J. Stat. Ann. § 42:2C-48(a)(5)(b)	**N/A**
Events causing dissolution. a. A limited liability company is dissolved, and its activities shall be wound up, upon the occurrence of any of the following: (5) on application by a member, the entry by the Superior Court of an order dissolving the company on the grounds that the managers or those members in control of the company: (a) have acted, are acting, or will act in a manner that is illegal or fraudulent; or (b) **have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.** b. "In a proceeding brought under paragraph (4) or (5) of subsection a. of this section, the court may order or a party may seek a remedy other than dissolution, including, but not limited to, the appointment of a custodian or one or more provisional managers . . . or order the sale of all interests held by a member who is a party to the proceeding to either the limited liability company or any other member who is a party to the proceeding, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case."	

III. CONCLUSION

Comparing the New Jersey and Delaware statutes that govern business divorce litigation, as well as the supporting case law, the main disparities lie in the judicial discretion afforded to judges when prescribing and fashioning remedies in the case of shareholder or member dissension and the willingness to protect oppressed minority shareholders. Consistent with the rest of its freedom-of-contract obsessed statutory framework and business law policies, Delaware provides less protection for minority or oppressed business owners than does New Jersey. New Jersey, on the other hand, provides more options and protections for the minor and oppressed owners, but also empowers judges to look beyond the parties and their agreements and consider other circumstances in forming the remedies they believe will

best resolve the business divorce. Delaware provides judges with no such discretion. In sum, before a New Jersey-based corporation or LLC seeking to incorporate in Delaware under the impression that Delaware is the more corporate-friendly option, the business owners are apt to look closely at the New Jersey business divorce laws, as they might just provide more protections and a better resolution should the business owners find themselves in need of a divorce.