Discounts in Business Valuations After *Cannon v. Bertrand*

By Steven G. (Buzz) Durio[1]

Valuation of interests in closely held businesses is the central issue in many business controversies. This interest valuation usually begins with valuation of the whole business. To adjust for perceived differences between the value of the whole and the value of lesser interests, for which there may be no ready market, business valuation experts have rationalized "discounting" the pro rata value of the interest to reach its "fair market value."[2] Until recently, these "discounts," sometimes referred to as "minority," "lack of control" or "marketability" discounts, have been accepted by Louisiana courts in most contexts with little or no question. On Jan. 21, 2009, the Louisiana Supreme Court issued an unanimous opinion in *Cannon v. Bertrand*, 08-1073 (La. 1/21/09), 2 So.3d 393, providing that "discounts" of minority interests must be warranted by particular facts and may be used only "sparingly."[3] This article examines the different legal contexts in which business valuations are often central, applies the principles articulated in *Cannon*, and concludes that, in Louisiana, minority or other similar discounts should now be rare.

Cannon v. Bertrand

The 3rd Circuit opinion in *Cannon*[4] had held that a 35 percent discount of a withdrawing minority partner's interest was authorized by the Louisiana Supreme Court's 1989 decision in *Shopf v. Marina del Ray Partnership*, 549 So.2d 833 (La. 1989). The Supreme Court in *Cannon*, however, distinguished *Shopf*, stating, "[B]ecause no minority discount was applied by the *Shopf* court, any mention of a minority discount by that court was mere dicta and cannot be relied upon as precedent."[5] The *Cannon* court further held that in *Shopf* "the court did not determine that fair market value was the only means of establishing 'value' as per Civ. C. art. 2823."[6]

In *Cannon*, the Supreme Court reasoned that a minority or lack of control discount was "unwarranted." Because the two remaining equal partners would have an equal say, and therefore not be subject to any lack of control, a minority discount should not apply.[7] Because they had already elected to continue the partnership, requiring the partnership to "pay in money" the value of the withdrawing partner's share, the court also remarked "neither is lack of marketability an issue."[8] In those circumstances, any discount would inequitably penalize the withdrawing partner for exercising a legal right and transfer a windfall profit to the remaining partners.[9] Adopting as its own the market value of the underlying partnership assets found by the lower court, the court increased the prior award by the amount of the trial court's discount to reflect the plaintiff's one-third share "before discounting."[10]

Cannon dramatically alters conventional wisdom regarding the relative bargaining power and outcome predictability in litigation between majority and minority interest owners in Louisiana businesses. This change should encourage settlement of such disputes by providing a more level playing field in partnership and LLC withdrawals, community property partitions, dissenting shareholder litigation, and other contexts where the relative value of minority and majority interests must be determined. *Cannon* will have different ramifications in each of these different legal contexts in which valuations, and the potential for discounts, usually occur. *Cannon*'s analysis can be used to suggest which factual showings may or may not justify discounts in each of those contexts.

History of Discounts in Louisiana Litigation

Discounts were relatively unknown in Louisiana law until the latter half of the last century. In *Leurey v. Bank of Baton Rouge*, 131 La. 30, 58 So. 1022 (1912), the Louisiana Supreme Court stated that the "value" of a distinct minority (1.5 percent of stock) in a corporation, which was so closely held that there was no evidence of its actual market value, was nevertheless "its *due proportion* of the actual assets and good will or money earning capacity[.]"[11] This "due proportion" standard left open the factual basis for the valuation, *i.e.*, market, underlying assets, or income, but literally called for a pro rata allocation of the entire value to the fractional interest without any dis-

count.

By 1985, however, the "due proportion" or "pro rata" rule was severely eroded, and discounts were sometimes applied to completely eliminate any value. In *Combs v. Howard*, 481 So.2d 179, 183 (La. App. 3 Cir. 1985), the plaintiff proved that the defendant majority owner had breached an employment contract obligating him to deliver a 49 percent stock interest in the corporate employer. The defendant's experts testified that, notwithstanding that the net assets of the corporation were $265,000, the 49 percent interest had no or negative value because majority owner Howard would still control the distribution of any future profits. The trial court accepted defendant's experts' logic. The 3rd Circuit found manifest error in the "no value" conclusion, concluded the stock had some value, and arbitrarily assessed $25,000 as damages for its nondelivery.[12]

Shopf v. Marina Del Ray

Four years later, the Supreme Court discussed minority discounts in *Shopf v. Marina del Ray Partnership*, 549 So.2d 833 (La. 1989), which involved a partnership whose sole underlying asset was an incomplete commercial real estate marina development project. One of the original partners had acquired a majority interest through a series of purchases from the other originally equal partner. Plaintiff Shopf was a recently terminated manager who had allegedly "earned" a 12 percent interest under an employment contract. When the defendant majority partner notified Shopf that his contract would not be renewed, the defendant also offered to purchase Shopf's interest, or alternatively, to sell the defendant's majority interest to Shopf, at the same price at which defendant had previously acquired the interest of the other original partner. Shopf declined to "buy or sell" at that price.

After further issues arose, Shopf was fired and sued by the partnership for breach of fiduciary duty, and he reconvened for breach of his employment contract. Shopf then withdrew from the partnership and added a claim for determination of the amount due him under Articles 2823-2825. Because the partnership had a negative book value at the time of the termination, and its value was then based only on future development which the trial court considered "speculative," the trial court reached the astounding conclusion that Shopf's 12 percent interest had "no value"![13] The court of appeal affirmed. A writ was granted to determine the correctness of the ruling that the plaintiff's partnership share had zero value on the date of the withdrawal.[14] The Supreme Court reversed. A close reading of its opinion reveals that the use of "fair market value" to define "value" was merely conceded by the parties, not decided by the court. After discussing minority discounts, however, *Shopf* applied "a reduction" (as opposed to a minority, marketability or lack of control discount) to a "per point price" (as opposed to fair market value) of the interest (as opposed to the entity) to determine the "value" under Article 2823 of the withdrawing partner's share. Therefore, *Shopf* did not, strictly speaking, enunciate a rule of law, even generally approving, much less requiring, the use of fair market value, or the application of minority, marketability, lack of control or other discounts, in the determination of "value" under Article 2823 and the "amount" to be paid under Article 2824. Unfortunately, the dicta in *Shopf*'s discussion of minority discounts would be read at least to allow the use of a minority discount.[15]

Post-*Shopf* Decisions

At about the same time as *Shopf* was being decided, the 4th Circuit stated in *Ziegler v. Ziegler*, 537 So.2d 1207 (La. App. 4 Cir.1989), "We are convinced that the value of an unliquidated undivided interest . . . is rarely if ever as great as the mathematical . . . percentage of a partnership[.]"[16] This statement, like the statements in *Shopf*, was ultimately dicta, as the opinion, nevertheless, approved the pro rata value employed by the lower court in *Ziegler*. The same court backed away from its *Ziegler* dicta in *Mexic v. Mexic*, 577 So.2d 1046 (La. App. 4 Cir. 1991), only two years later. There, the husband, "[r]elying on this court's observations in *Ziegler*," contended for a "15% 'marketability' " discount, but the court found no error in the trial court's adoption of a value without this discount.[17]

The 2nd Circuit specifically rejected a "minority/ marketability" discount in *Head v. Head*, 30,585 (La. App. 2 Cir. 5/22/98), 714 So.2d 231. In *Head*, experts for the parties differed as to the application of "minority/marketability" discounts, one applying a 35 percent discount and the other applying none. The nondiscounting expert opined that "marketability was not a factor in determining value in cases in which a business was not being sold to a third party," and testified that a "minority/marketability discount rate only applied in cases where privately held corporations value for purposes of reaching a mutually agreeable sales price in a sales contract between the owner(s) and the third party."[18] Adopting this analysis, the 2nd Circuit observed as a matter of law, "Where a sale of the business to a third party is not contemplated, the value of the stock should be determined without discounting for lack of marketability."[19] The 2nd Circuit also ultimately held that, in the context of a community property partition, "the value . . . without minority/ marketability discount . . . is the lowest value of the range within the trial court's discretion."[20]

The following year, in *Smith v. James, Hardy & Smith*, 31,812 (La. App. 2 Cir. 5/19/99), 736 So.2d 996, the 2nd Circuit read *Shopf* to authorize the application of fair market value and minority discounts in determining the value of a withdrawing partner's share under Civil Code Articles 2823-2825, but said: "We decline to use the 'market value' calculation theory."[21] The 2nd Circuit then applied arts. 2823 and 2824 literally to require a proportionate part of the net asset value be paid to a withdrawing partner, and specifically rejected the application of a "minority discount."[22]

Notwithstanding these criticisms of minority discounts in *Head* and *Smith v. James Hardy*, the 3rd Circuit in *Cannon*, evidently based on its own discussion of *Shopf*, stated:

> [O]ur Supreme Court has specifically interpreted La. Civ. Code arts. 2823-2824 to allow the use of minority discounts in cases such as the one before us . . . . As such, we find no abuse of discretion in the trial court's decision to use a minority discount.[23]

The 3rd Circuit also held that *Shopf* gave courts the "option" and "flexibility" to apply a "minority discount" under Articles 2823-25.

The 3rd Circuit opinion in *Cannon* clearly created a conflict with the decision of the 2nd Circuit in *Head* since, under *Head*, the use of a minority discount would abuse discretion in the 2nd Circuit, but in the 3rd, under *Cannon*, would not. The *Cannon* opinion by the 3rd Circuit also stated: "[T]he value addressed in Article 2823 consists of the true market value of that share. See *Shopf*."[24] Thus it also created a conflict in the interpretation of Article 2823 with the decision of the 2nd Circuit in *Smith v. James Hardy*, since the determination of "market value" was not required in the 2nd Circuit, but in the 3rd Circuit under *Cannon*, "true market value" was required.

General "*Can[n]ons*" Against Discounts

Before a discussion of the particular facts and contexts that might affect the application of discounts, some general observations concerning the Supreme Court's decision in *Cannon* may be useful.

Cannon does not establish a bright line rule eliminating discounts. The opinion refers to the difficulty of fashioning a "one size fits all" pattern for discounts.[25] The briefs indicate *Cannon* argued for the virtual elimination of discounts, similar to the 2nd Circuit's rule in *Head*, but that view was clearly not accepted.

Cannon does appear to have been intentionally written for broad application. Its reasoning is not based upon the limited statutory context of partners withdrawing from partnerships without term. The court apparently intended that its fact-based methodology for handling discounts was to be applied generally, and not limited to the specific statutory context before the court.

Cannon effectively reverses the presumption regarding discounts. Language in *Shopf* suggesting that pro rata value "must" be discounted for a minority interest had created a presumption for their use. Cases like *Head* and *Smith v. James Hardy* were seen as isolated exceptions. *Cannon*'s doubt about the place of discounts and its directive for their sparing use effectively reverses this presumption. Now discounts may only be used when warranted by unusual facts and are presumptively inapplicable.

Finally, *Cannon* deals as much with the different bases of valuation as it does the use of discounts. It clearly continues to allow, but not require, the use of fair market value as the basis of valuation, even where the applicable statute, such as in the area of partnerships, does not employ that specific term. This is consistent with developments in business valuation techniques, in which selecting an appropriate basis for valuation is becoming as much a concern as the methodology of valuation.[26] This flexibility in the basis for valuation increases the court's ability to avoid discounts and achieve equitable results.

Partnership and LLC Interests

Partnerships in Louisiana are classified as either with or without term.[27] A partner in a term partnership, which explicitly sets forth a specific period or term for its duration, may not withdraw before the expiration of the term without just cause.[28] A partner in a non-term partnership may withdraw at any time after timely notice that is not inconvenient or prejudicial to the partnership.[29] When a partner withdraws from a non-term partnership, Arts. 2823-2825 specifically require that the "value" of his interest be determined and liquidated, either through liquidation of the whole partnership or by payment of the value "in money" to the withdrawing partner. *Cannon* involved a non-term partnership, but it would apply in principle to the valuation of term partnership interest, where the valuation of a withdrawing interest is at issue, as in cases of withdrawal upon or after the expiration of the term.

Under *Cannon*, fair market, book or other basis for valuation may be appropriate, depending on the nature of the partnership. Although the Civil Code articles refer only to "value," both *Shopf* and *Cannon* suggest that "fair market value" may be appropriate.[30] The Civil Code articles also juxtapose the "value to be paid in money" should the partnership continue, with the value which would otherwise be received in liquidation, suggesting that "value" means something more than the alternative minimum of "liquidation value."[31] Because liquidation value is usually based on "market" transactions, fair market value may also be particularly appropriate if the partnership continues. Some courts, such as the 2nd Circuit in *Smith v. James Hardy*, have recognized that partnerships should be valued at the book or adjusted value of their assets.[32] There is no reason articulated in *Cannon* to suggest that the logic of those cases should not continue to apply.

The facts which made a discount "unwarranted" in *Cannon* will be present in most cases in which a minority partner withdraws. Whenever the partnership continues, "marketability will not be an issue" since the remaining partners will already have elected to "pay in money the amount determined" as the "value" of the withdrawing interest. The remaining partners, if equal before, will have an "equal say" after the interest is purchased. Therefore, in partnership withdrawals, it is difficult to imagine that discounts may ever be applied without abuse of discretion. In contexts other than withdrawal, such as the assessment of damages for failure to deliver a promised interest, discounts may still be used, but even then only "sparingly."

Louisiana LLCs also may be classified as term or non-term, and, in the absence of a specific agreement to the contrary, the statutory method for withdrawal operates in a manner similar to that for partnerships.[33] The *Cannon* decision and its presumption against discounts should therefore be directly applicable to LLC interests.[34]

Community Property Partitions

La. R.S. 9:2801 specifies that the basis for valuation in community property partitions is "fair market value." Ordinarily, this basis provides the rationale for discounts which supposedly mimic market behavior. In the 2nd Circuit, however, as discussed above in connection with *Head v. Head*, fair market value "without

discounts" is the lowest value in the trial court's discretion. *Cannon*'s holding does not interfere with the *Head* decision. Outside the 2nd Circuit, however, discounts may or may not be applied in community property partitions, depending on how *Cannon* is applied to circumstances which may vary greatly.

For example, a community may own 100 percent of a business entirely. Is the undivided 50 percent interest of the other spouse a minority interest which can be discounted? Another community may own a majority, but not 100 percent of a business. May the allocable share of each spouse be considered a minority and discounted? Or a community may only own a minority interest in a business, of which each spouse's undivided interest is also a minority. Each of these situations must be analyzed separately under *Cannon*.

When the community owns the entire business, even if the 50 percent share of the transferor spouse can be considered a minority, the transferee spouse will maintain a controlling interest throughout the partition, and is not subject to a prospective lack of control, as was noted in *Cannon*, so discounts should not be applied. Additionally, a discount in a partition necessarily penalizes the transferor spouse by reducing the equalizing payment otherwise due, and unduly rewards the transferee spouse, whose resulting 100 percent will never be discounted. Furthermore, the transferee is then prospectively free to realize a "windfall profit" in the amount of the discount. In this situation, some business appraisers could even argue that the 50 percent interest of the transferor should command a premium for control instead of being discounted. In fact, even aside from *Cannon*, because La. R.S. 9:2801 requires that the court value the community assets, the arguable minority interest in the hands of either spouse cannot be discounted because it is not the subject of the evaluation. This is clearly a situation in which *Cannon* would dictate that a discount would be inequitable and an abuse of discretion.

When the community owns a majority, but not the entire business, all these same considerations still apply. This is essentially the situation in which *Cannon* has already held a discount to be an abuse of discretion.[35]

Dissenting Shareholder's Rights Litigation

Corporate law provides that extraordinary transactions, such as a sale of all or substantially all the corporate assets, must be approved by two-thirds, rather than a simple majority of the shareholders.[36] Furthermore, if such a transaction is approved by less than 80 percent of the shareholders, the 21 percent or more voting against the transaction may exercise their dissenting shareholder's rights and tender their shares to the corporation, which must purchase at the "fair cash value" of the tendered shares.[37] As a matter of fact, however, "fair cash value" is usually proven by testimony regarding "fair market value." Once again, fair market value serves as the basis upon which discounts have been rationalized.[38]

The principles of *Cannon* dictate against the application of a minority discount in such transactions, especially involving dissenting shareholders. Because the transferee corporation will not be subject to a lack of control, a minority discount should not apply. Because the transaction will liquidate all or substantially all of the assets, presumably at a price equal to or in excess of the value of the corporation itself, reflecting a premium for control, marketability should not be an issue. If the dissenter gets less than his *pro rata* share of the price of the transaction, he will have been penalized for exercising his legal right to dissent, and the other shareholders will receive, through the corporation, an excess windfall in the same amount as the discount exacted from the dissenters. Under *Cannon*'s principles, this would be inequitable, so a discount applied to fair cash value in such a transaction would be an abuse of discretion.[39]

Freeze Out Mergers

Dissenters' rights may not be available in some transactions approved by more than 80 percent of the shareholders which may, nevertheless, liquidate minority interests. For example, pursuant to terms of some mergers, minority interests below a certain threshold percentage may be eliminated by the payment of a value determined for the shares. *Cannon* should not allow discounts to be used in the valuation of such interests for these transactions for the same reasons it precludes discounts in dissenting shareholder transactions.

Shareholder Agreements, Rights of First Refusal, Other Contracts

Cannon recognizes that the partners or shareholders in closely held corporations or other contractual parties are free to specify, as part of their formation documents or other contracts, the basis upon which the interests in their business entity will be valued for various purposes, including the application of discounts, and that these terms will be enforceable as the law of the parties, notwithstanding the provisions of suppletive law such as the Civil Code, or Business Corporation Law, or the principles set forth in *Cannon*.[40] Unless such agreements specifically call for the use of discounts, however, the principles of *Cannon* and the presumption against judicial application of discounts should still apply. So, for example, even under an agreement calling for a price to be determined by fair market value, that value should not be discounted, but must be paid *pro rata*, unless the general presumption against the application of discounts specified in *Cannon* can be rebutted. On the other hand, where an agreement specifically calls for a discount, such a discount should also apply under *Cannon*.

Family Limited Partnerships

Many practitioners, especially tax specialists, will be familiar with the effect of *Cannon* on family limited partnerships. These entities are usually created to use "discounts" for the specific purpose of separating control from proportionate value, and thereby reducing estate taxes in connection with intergenerational transfers of family businesses. According to the principle just stated for agreements that explicitly call for the application of discounts, the formation documents in

these entities are drafted to implicitly, if not explicitly, call for the application of discounts. This use of discounts should be unaffected by *Cannon*.

Value as Damages

The most likely context for application of discounts after *Cannon* is the valuation of a minority interest for the purpose of assessing damages. An example of this context is *Combs v. Howard*, discussed above. The plaintiff would-be transferee in *Combs* would have been subject to a lack of control had the agreement to convey the minority interest been performed. The transferor would have been under no legal obligation to repurchase, and marketability might, therefore, have also been an issue. The transferee would not be penalized by a discount reflecting his pre-existing lack of control. The transferor defendant would not necessarily receive a windfall profit, even though, as noted in *Cannon*, he would not be subject to a prospective lack of control. The criticisms of unreasonableness would still apply to an extreme discount, but under the principles of *Cannon*, a moderate discount would probably not be an abuse of discretion.

Conclusion

The principles enunciated by *Cannon* indicate that, in Louisiana, judicially applied discounts will now most probably be rare. Except in unusual legal contexts or peculiar factual circumstances, judicial application of such discounts will now ordinarily be an abuse of discretion. In appropriate circumstances, careful practitioners will draft agreements to apply discounts notwithstanding *Cannon*, and will recognize that, after *Cannon*, and in the absence of contrary agreements, disputes regarding value should usually be resolved without using discounts.

FOOTNOTES

1. The author practices as a member of the firm of Durio, McGoffin, Stagg & Ackermann, Lafayette, La. (*www.dmsfirm.com*) and served as trial and appellate counsel for the plaintiff in Cannon v. Bertrand, 08-1073 (La. 1/21/09), 2 So.3d 393, which reversed the underlying decisions of the 3rd Circuit and district courts at 07-1278 (La. App. 3 Cir. 4/16/09), 981 So.2d 169. The author acknowledges the professional contributions of A. Anderson Hartiens, CPA, CVA, of Hartiens & Faulk, Lafayette, La., the plaintiff's expert valuation witness. The views expressed herein are solely those of the author.

2. *See generally*, Sharon Pratt, *The Lawyer's Business Valuation Handbook* (Chicago: American Bar Asso., 2000), Chapter 13 at p. 196, *et seq*. From the perspective of the appraiser, the use of a discount for a minority interest reflects the commonly accepted notion that one would not pay proportionately as much for part of a business as one would for the whole. Put another way, the discount compensates for the additional risk to the prospective purchaser of a minority interest resulting from a lack of control. Discounts are used by appraisers to mimic or approximate this presumed marketplace behavior in order to reach an estimate of "fair market value" even where an actual market or market data may not be available.

3. Cannon, p. 5, 2 So.3d at 396, also noted in fn. 4, "Nationally, the trend in law is away from applying such discounts. *See, e.g.*, 7 La. Civ. L. Treatise, Business Organizations § 4.11 (2008)."

4. 07-1278 (La. App. 3 Cir. 4/16/08), 981 So.2d 169.

5. Cannon, p. 5, 2 So.3d 396.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Cannon, p. 7, 2 So.3d at 397.

11. Leurey, 131 La. at 43, 58 So. at 1027 (emphasis added).

12. Judge Knoll, now associate justice of the Louisiana Supreme Court, dissented; in one of the earliest criticisms of discounts, she explained that minority discounts were inconsistent with the economic reality of proportional ownership and could be unreasonable:

> The award of $25,000 for Combs' 49% interest of the stock in PCI means that *the majority discounted his minority interest by approximately 80%, which in my view is unreasonable.*
>
> . . .
>
> From an economic standpoint, shares of stock represent voting rights, *and a fraction of ownership. Although a minority stockholder may not have effective voting rights, such minority holder nonetheless has a cognizable ownership interest proportional to the percentage of stock owned.*

Combs v. Howard, 481 So.2d 179, 183 (La. App. 3 Cir. 1985), Knoll J, dissenting in part (emphasis added).

13. *See* Shopf, 549 So.2d 833 at 836.

14. *Id.*

15. *See* Glenn G. Morris and Wendell H. Holmes, 7 La. Civ. Law Treatise, Business Organizations (St. Paul: West Group, 1999), discussed at notes 3, *supra* and 31 *infra*, and Smith v. James, Hardy & Smith, discussed in text *infra*, both of which read *Shopf* broadly. Before the decision in Cannon, Morris and Holmes had already thoroughly criticized minority discounts as discussed in Shopf and other cases.

16. Ziegler v. Ziegler, 537 So.2d at 1211.

17. 577 So.2d at 1050.

18. 714 So.2d 231 at 238.

19. *Id.*

20. *Id.*, at 239.

21. 736 So.2d at 999, n. 9.

22. *See* 736 So.2d at 999.

23. 981 So.2d at 174.

24. *Id.*

25. Cannon, p. 6, 2 So.3d at 397.

26. After Cannon, the first step in any valuation should be determining the appropriate basis for valuation. The concept of "fair" value is increasingly replacing "fair market value" in contexts in which discounts are inappropriate or market value is unavailable. *See* Pratt, *supra*, note 2, at Chapter 1, "Defining Value in the Relevant Context: Definitions and Premises of Value," p. 3, et seq.; p. 197.

27. *See* La. Civ.C. arts. 2821-2822.

28. *See* La. Civ.C. art. 2821.

29. *See* La. Civ.C. art. 2822.

30. *See* Shopf, 549 So.2d at 837 ("The Code does not contain a definition of the word 'value' in Article 2825 which authorizes a request for a judicial determination of the value of the share. It is therefore up to the courts to determine the

method of valuation") and Cannon at p. 5, 2 So.3d at 396 ("Clearly, in Shopf, this court determined that (1) fair market value may be used as the value referenced in Civ. C. art. 2823[.]")

31. *See* La. Civ.C. art. 2824, 1980 Revision comment (c) and Shopf, 549 So.2d 837 at note 9. *See also* Morris and Holmes, *supra*, note 15, *supra*.

32. *See* Smith v. James, Hardy & Smith, 736 So.2d at 1001-1003.

33. *See* La. R.S. 12:1325. Unlike the statutory steps for withdrawal from a partnership, this statute does not set forth an alternative obligation between the payment in money or the interest in liquidation to be determined by an election of the remaining partners or interests. The Cannon opinion of the Supreme Court does refer to this election by the remaining partners, but in both partnerships and LLCs the partner or member is allowed a legal right to withdraw, and the opinion's rationale that the exercise of this right should not be penalized is also applicable to LLCs.

34. La. R.S. 12:1325C provides that on withdrawal the member must be paid "fair market value." Cannon was litigated, argued and reasoned on a fair market value basis, so this distinction from Civ.C. arts. 2823-2825 should not make a difference in result.

35. Arguably, such a majority but less than complete interest might still be subject to a lack of marketability discount, but that requires a discrimination not made in Cannon, which regarded the interest before it as a combination of minority marketability discount, and a level of technical expertise beyond the scope of this article.

36. *See* La. R.S. 12: 121B.

37. *See* La. R.S. 12: 131.

38. *See* notes 2 and 26, *supra*.

39. One commentator has also pointed to the decision in Yuspeh v. Koch, 02-698 (La. App. 5 Cir. 2/25/03), 840 So.2d 41, *writ denied*, 03-1134 (La. 6/27/03), 847 So.2d 1277, as a laudable departure from Shopf, even though it did not cite or distinguish Shopf, because Yuspeh did not apply a minority discount. *See*, Stephen J. Paine, "Achieving the Proper Remedy for a Dissenting Shareholder in Today's Economy: Yuspeh v. Koch," 65 La. L. Rev. 91 (2005). In any case, Cannon now makes Shopf explicitly inapplicable to minority discounts in any context.

40. Cannon, p.6, at fn. 7, 2 So.3d at 397.

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