Shareholder Access to Corporate Books and Records: the Abrogation Debate

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By Browning Jeffries

I. INTRODUCTION

It is a widely accepted principle that shareholders of corporations have rights to access the books and records of the entities in which they hold an interest. While this principle first emerged in the common law, currently all fifty states and the District of Columbia provide for access by statute. Inspection rights serve a number of functions. Inspection rights give shareholders access to the list of shareholders, and thereby the means to communicate with one another. This ability to reach out to other shareholders allows a shareholder who is unhappy with the directors and officers to wage a proxy fight to replace the current management team or to solicit support against a management proposal he thinks unwise. Even more importantly, inspection rights play a prominent role in derivative litigation. A derivative suit is one where a shareholder sues directors or officers of the corporation in the name of and on behalf of the corporation. Derivative litigation is the ultimate tool for a shareholder to police corporate managers and thereby protect his economic interest in the corporation.

Without access to books and records of the corporation, shareholders would be hard-pressed to use derivative litigation effectively for this watchdog function. This is because, in order to survive a motion to dismiss, the shareholder must first overcome certain hurdles, and must do so with only limited access to discovery. One of the more challenging hurdles is the so-called “demand” requirement, which requires the shareholder to make a formal request of the board itself to file the suit before he can proceed in a representative capacity against the alleged wrongdoers. In states that have adopted the approach of the Model Business Corporation Act (the “MBCA”), “universal” demand is required – i.e., the shareholder must, without exception, make a demand in every case. In non-MBCA states, like Delaware, demand is not universally

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1 Model Bus. Corp. Act Ann. § 16.02 annotation at 16-17 (4th ed. 2008) [hereinafter “MBCA”]. Numerous versions of the MBCA are discussed throughout this article. I will denote which particular version is being discussed throughout to ensure clarity.
3 King v. Verifone Holdings, Inc., 994 A.2d 354, 356 (Del. Ch. 2010) (“Representative litigation plays an important role in protecting the interests of stockholders…”). Though shareholders have other means of protecting their economic interest, such as selling their stock or waging proxy fights to bring about a change of guard in corporate management, the derivative suit allows the corporation to be compensated by the alleged wrongdoers, at least in theory. Thomas P. Kinney, Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers, 78 Marq. L. Rev. 172, 174 (1994).
4 The MBCA is prepared by the Committee on Corporate Laws of the Business Law Section of the American Bar Association. The Committee’s mission statement states that it has “jurisdiction over the Model Business Corporation Act, which has been adopted by thirty-two states.” American Bar Association, Business Law Section Website, http://www.abanet.org/dch/committee.cfm?com=CL270000 (last visited Jan. 29, 2011).

(1) a written demand has been made upon the corporation to take suitable action; and (2) 90 days have expired from the date the demand was made unless the shareholder has earlier been notified that the
required. Rather, demand may be excused if the shareholder can show demand would be futile because, for instance, the board is comprised of a majority of interested directors.\textsuperscript{6} Either way, once demand is made, if it is rejected, the shareholder can only proceed with the derivative suit if he can establish the rejection was wrongful. This can be a difficult showing considering that, in many jurisdictions, the business judgment rule will protect the board’s decision to reject the demand as long as the board committee making such a decision was independent and followed proper procedures in coming to its conclusion.\textsuperscript{7}

Moreover, pursuant to case law interpretations of Federal Rule of Civil Procedure 23.1\textsuperscript{8} (and its state counterparts), shareholders are not allowed access to discovery to show either demand futility or wrongful demand refusal.\textsuperscript{9} Rather, shareholders are required to rely solely on the “tools at hand” to make either showing.\textsuperscript{10} This is where shareholder inspection rights come into play. While such “tools at hand” include a number of sources, such as media publications, public filings with the Securities and Exchange Commission, and press releases, perhaps the most important of these are state shareholder inspection rights.\textsuperscript{11} As such, inspection requests play a crucial role in allowing shareholders to gather information to support an argument for either demand futility or wrongful demand refusal, and to develop further the merits of their claims.

A 2010 case out of the Delaware Chancery Court, \textit{King v. Verifone Holdings, Inc.},\textsuperscript{12} highlights the importance of shareholder inspection rights to derivative litigation. In that case, a plaintiff shareholder submitted a books and records request to Verifone after the shareholder had already instituted a derivative proceeding against certain directors and officers of the corporation in federal court in California.\textsuperscript{13} The California suit had been dismissed without prejudice for failure to show demand futility, prompting the plaintiff to submit his books and records request for additional information to supplement his complaint.\textsuperscript{14} In response to the books and records request, Verifone partially complied, but would not provide access to some of the records

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\textsuperscript{7} Auerbach \textit{v.} Bennett, 393 N.E.2d 994, 1002 (N.Y. 1979).
\textsuperscript{8} Fed. R. Civ. P. 23.1(b)(3) requires that the complaint in a shareholder derivative action state with particularity: “(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort.”
\textsuperscript{9} \textit{Verifone}, 994 A.2d at 358.
\textsuperscript{10} Brehm \textit{v.} Eisner, 746 A.2d 244, 262 n.57 (Del. 2000).
\textsuperscript{11} \textit{Verifone}, 994 A.2d at 363 n.33.
\textsuperscript{12} The derivative suit was precipitated by the acquisition of Lipman Electronic Engineering Ltd. by Verifone. Shortly after the acquisition, Verifone announced that it would need to restate its financial statements due to accounting errors arising from the integration of Lipman’s inventory systems with Verifone’s. \textit{Id.} at 357. In the derivative suit, the plaintiff alleged corporate mismanagement of the integration process.
\textsuperscript{13} \textit{Id.} at 359.
\textsuperscript{14} \textit{Id.} (“[T]he Federal Court granted King leave to amend his complaint yet again, and even suggested filing an action under §220 of the Delaware General Corporation Law in this court to obtain facts necessary to establish demand futility.”).
demanded on the theory that such records were privileged. The shareholder sued Verifone in Delaware to get access to the remaining books and records requested.

In determining whether to grant the plaintiff’s inspection request, the court had to interpret the Delaware inspection statute. Like most inspection statutes, the Delaware statute requires the requesting shareholder to have a “proper purpose” for his request. The court expressed its belief that the shareholder was simply trying to use the Delaware inspection statute to do an end-run around the “no discovery” rule provided by FRCP 23.1 and therefore did not have a “proper purpose” for his request. As the court pointed out, the “no discovery” rule serves the purpose of prohibiting a shareholder from suing first and investigating later, thereby requiring a corporation to spend time and money in discovery and trial based merely on a shareholder’s speculation and baseless conclusions. Allowing the plaintiff access pursuant to his after-the-fact request would undermine that purpose.

The upshot of Verifone is that, when a plaintiff chooses not to avail himself of an inspection request before filing a derivative suit, and such a request is made after litigation has been instituted in an unreasonably hasty manner, that request will be denied and the plaintiff will be left without any meaningful access to information to survive a motion to dismiss. In other words, the Verifone decision highlights the importance of would-be derivative plaintiffs using shareholder inspection requests as part of their “tools at hand” for pre-suit investigation before filing a complaint on behalf of the corporation.

It is no surprise, given the importance of inspection rights to the derivative litigation process and general policing of corporations, that, as mentioned above, all jurisdictions have codified these rights. Though all jurisdictions have an inspection statute, statutes in different jurisdictions take varied approaches to this issue. For instance, states may or may not allow access to the

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15 After the complaint was dismissed, and in response to the books and records request, Verifone produced approximately 1,350 pages of documents but refused to produce the audit committee report and its underlying documents prepared by Verifone’s counsel, summarizing the audit committee’s review of the post-merger integration process, which the plaintiffs alleged was mishandled. Id. at 360.

16 DEL. CODE ANN. tit. 8, § 220 (2010). All but five states (Hawaii, Maryland, Missouri, Nevada, and Texas) incorporate the “proper purpose” requirement in some respect in their inspection statutes. MODEL BUS. CORP. ACT ANN. § 16.02 annotation at 16-25 (4th ed. 2008); see HAW. REV. STAT. § 414-470 (2010); MD. CODE. ANN., CORPS. & ASS’NS § 2-513 (2010); MO. ANN. STAT. § 351.215 (2010); NEV. REV. STAT. ANN. § 78.105 (2010); TEX. BUS. ORGS. CODE ANN. § 21.218 (2010). Though the “proper purpose” requirement is used differently from state-to-state, the concept is similar across the board. This requirement will be discussed in more detail in Part II.B of this article.

17 Verifone, 994 A.2d at 356.

18 Id. at 361.

19 Id. In support of this position, Vice Chancellor Strine discussed the necessity of restricting shareholder access to documents to some degree so as not to compromise the purpose of the derivative suit by allowing counsel to “prematurely file thinly-substantiated complaints … in order to beat their competitors in the plaintiffs’ bar, and then attempt to compensate for those inadequate pleadings through an after-the-fact process that needlessly saps corporate funds through drawn-out dismissal motion practice.” Id. at 363.

20 It remains to be seen whether the position Vice Chancellor Strine adopted will be adopted by other Chancellors in Delaware or other jurisdictions, though at least one other judge from Delaware has followed Verifone in Baca v. Insight Enterprises, Inc. No. 5105-VCL, slip op. (Del. Ch. June 3, 2010). Mark Gursky & Brian Levine, One Judge’s Clampdown On Premature Derivative Suits, LAW 360, http://securities.law360.com/articles/179815 (last visited July 14, 2010).
books and records of wholly owned subsidiaries of the company,\textsuperscript{21} may differ in terms of the scope of books and records that must be provided to the shareholder,\textsuperscript{22} or may require different prerequisites that a shareholder must meet before he or she can gain access to such books and records.\textsuperscript{23} These differences reflect the varying decisions legislatures have made about how difficult or easy it should be for shareholders to get access to corporate books and records. States that have imposed fewer barriers to shareholder access seem more concerned with shareholders’ ability to protect their economic investment and hold corporate managers accountable. On the other hand, those that impose additional barriers to shareholder access may be more concerned with the importance of allowing corporations to govern themselves to the greatest extent possible without judicial or shareholder interference. In other words, the legislatures in these jurisdictions must balance the competing interests of managerial authority and managerial accountability. However, the differences among the various statutes for the most part are not too significant and, in fact, many are guided by the codification of inspection rights (and remedies for violation of such rights) provided in the MBCA.

But despite the universal adoption of statutory rights, there is a historical trend – a trend that has surprisingly maintained traction even in light of modern-day books and records statutes – to allow shareholders to assert a common law inspection right\textit{ in addition to} the rights provided by statute. The majority of courts reviewing shareholder requests for access allow shareholders to proceed under a common law theory of inspection rights, even if such shareholders have failed to meet the statutory requirements for inspection in the relevant jurisdiction.\textsuperscript{24} In other words, the courts find that, though the statutory requirements are not met, there is a separate and distinct common law right that can provide the shareholder with the requested access.

For instance, imagine that the statute in the relevant jurisdiction states that a shareholder of a public company cannot require the corporation to provide access to certain accounting records of

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\item \textsuperscript{21} Compare Del. Code Ann. tit. 8, § 220(b)(2) (which specifically provides for access to a subsidiary’s books and records in certain circumstances) with N.Y. Bus. Corp. Law § 624 (2003) (which is silent with respect to applicability to subsidiaries).
\item \textsuperscript{23} Compare Md. Code Ann., Corps & Ass’ns § 2-513 (2010) (limiting the ability to access the books of account and the shareholder list to shareholders who owned at least 5% of the stock of the corporation for at least 6 months prior to the inspection request) with Iowa Code Ann. § 490.1602 (2010) (which follows the MBCA and allows any shareholder to access accounting records and the shareholder list, so long as they establish a proper purpose and good faith).
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the company. This statute reflects the determination of the relevant jurisdiction’s legislature that, because shareholders of public companies have access to a great deal of corporate information even without the access provided by the state statute, disallowing access to certain accounting records is an appropriate way to balance the competing interests of management accountability with management authority. Now imagine that John Doe lives in this jurisdiction and is the shareholder of a public company incorporated in the same state. John would like access to certain accounting records, but the statute expressly denies such access. The court in John’s state, however, could still require the corporation to provide him the requested records based on his common law inspection rights.

Or suppose that the statute in question states that a shareholder can have access to books and records but only if that shareholder is a shareholder “of record.” Jane Doe lives in the jurisdiction where that statute is in force. She is a shareholder of a corporation that is incorporated in that state and she would like access to the minutes of the board meetings of the company for the past three years. Jane, however, is not a shareholder “of record.” Rather, as the holder of a voting trust certificate, she is considered merely a “beneficial shareholder.”25 Although she presumably would not have access under the state statute, she might still seek relief from a court, recognizing the court could allow her access based on her common law inspection rights.

These two illustrations may strike the reader, as they strike the author, as being examples of the judiciary acting contrary to legislative intent. Surely, when a statute speaks on a specific subject matter, the statute should be construed as abrogating the common law with respect to that matter. However, the fictional holdings described above actually represent the position of the majority of jurisdictions, which find that the common law is not in fact abrogated by the relevant books and records statute, but rather continues to exist as an independent set of shareholder rights and remedies.

In this article, I argue that the rationales asserted by the majority jurisdictions adhering to non-abrogation (and, thus, continued existence of a common law right) may have been appropriate under the earliest codifications of inspection rights, but they no longer make sense in light of modern-day books and records statutes. Rather, allowing both sets of rights and remedies to coexist undermines the carefully developed statutory scheme adopted by the state legislatures and results in usurpation by the judiciary of the legislature’s role. I argue that an abrogation approach is more consistent with legislative intent – that of the drafters of the MBCA and the states adopting similar inspection statutes – whereas non-abrogation results in the nullification of statutory requirements.

Additionally, I argue that there are sound policy reasons to adopt the position that state law abrogates common law inspection rights. In this modern era of large, multi-national

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25 A shareholder who enters into a voting trust agreement might assign his stock under the agreement, but solely for the purpose of conferring the right to vote. The stock is cancelled and the “voting trustees” issue trust certificates to the stockholder. As a holder of a voting trust certificate, the initial stockholder becomes a beneficial stockholder, not a stockholder of record. In other words, the stockholder no longer has the right to vote the stock, but retains all of the other incidents of ownership (e.g., has a right to the economic benefits of the shares). The stock is recorded in the names of the voting trustees, however, not in the names of the original stockholders, meaning the original stockholder is no longer a stockholder “of record.” Brentmore Estates v. Hotel Barbizon, 263 A.D. 389, 392-93 (N.Y. App. Div. 1942).
corporations, allowing shareholders to have expansive inspection rights under two different legal regimes allows the single, minority shareholder to make decisions that affect the corporation as a whole. Though the interests of the single shareholder may be served, often the multitude of other shareholders will suffer as corporations have to defer to a shareholder’s common law right to inspect books and records.\textsuperscript{26} The statutory rights and remedies regarding inspection provided by the MBCA and its progeny provide sufficient protection for shareholders interested in gaining corporate information.

In Part II, I highlight the history of the development of shareholder inspection rights, tracing their origins in the common law through their modern-day statutory codification. This section will incorporate a comparison of the 1953 edition of the MBCA with the current edition. The comparison will include an explanation of the reasons behind the substantive revisions that appear in the current MBCA, which has ramifications for my ultimate conclusion that any valid reasons that may have existed at one time for providing rights by both statute and common law no longer exist. Part III looks at the case law interpreting the statutory codifications. A discussion of the rationales put forth by the majority of jurisdictions, which find that the statutes do not abrogate the common law but rather coexist with the common law, will be presented. Additionally, this Part will discuss the handful of cases making up the minority position – that the books and records statute does in fact abrogate the common law. In Part IV, I present my arguments in favor of the minority approach – statutory abrogation of the common law – including sound policy reasons why shareholder access to corporate books and records should be limited to the rights and remedies provided by statute. Finally, in Part V, I provide some suggested revisions to the MBCA and its comments that would serve to clarify the Act and, if adopted by state legislatures, would result in abrogation of the common law by the statute.

II. DEVELOPMENT OF SHAREHOLDER INSPECTION RIGHTS

A. Overview

Shareholder inspection rights – whether under the common law or as codified by statute – evolved out of two underlying theories: the theories of ownership and agency.\textsuperscript{27} Under the ownership theory, shareholders are recognized as the beneficial owners of the corporation’s assets.\textsuperscript{28} Even though the shareholders and the corporation are legally separate from one another (and even though the actual title to the property of the corporation is vested in the name of the corporation itself, not that of the shareholders), the shareholders are still viewed as the ultimate residual owners of the corporation’s assets.\textsuperscript{29} According to this theory, a shareholder who asks

\textsuperscript{26} \textsc{Model Bus. Corp. Act Ann.} § 16.02 annotation at 16-17 (4th ed. 2008) (recognizing the inspection right cannot be absolute because of the “potential conflict between the individual interests of one shareholder and the collective interests of the other shareholders and the corporation”).

\textsuperscript{27} Guthrie v. Harkness, 199 U.S. 148, 155 (1905) (“The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property” (citing Cincinnati Volksblatt Co. v. Hoffmeister, 56 N.E. 1033 (1900)); see also Randall S. Thomas, \textit{Improving Shareholder Monitoring and Corporate Management by Expanding Statutory Access to Information}, 38 \textit{Ariz. L. Rev.} 331, 335-36 (1996) (“Inspection rights have developed from two overlapping sources: a shareholder’s property right in the corporation and the agency relationship that exists between shareholders and the corporation’s management.”)).


\textsuperscript{29} 5A Fletcher Cyc. Corp. § 2213 (2011).
to inspect the books and records of the corporation is essentially asking to inspect that which is already his.\textsuperscript{30}

The agency theory is similar to and overlaps with the ownership theory. Pursuant to the agency theory, directors and officers, as agents of the corporation, function as trustees of the shareholders’ ownership interests in the corporation.\textsuperscript{31} Shareholders need to be able to inspect the books and records of the corporation, maintained by these directors and officers, to confirm the financial well-being of the company, to ensure the directors and officers are not engaging in corporate waste or mismanagement, and otherwise to ensure that the directors and officers are properly conducting the business of the corporation and complying with their fiduciary duties.\textsuperscript{32}

These two theories formed the basis for the development of the first shareholder inspection rights at common law.

B. The Common Law Right

The common law inspection right first appeared in the 1700’s during the industrial revolution, as the modern corporation initially began to take shape.\textsuperscript{33} At the time, English courts began to provide for shareholder inspection rights based on the idea that shareholders needed a mechanism by which to protect their economic interests.\textsuperscript{34} The general rule developed that shareholders of corporations could exercise a right to inspect the books and records of the corporation, but this right was not absolute. Rather, the right could only be asserted successfully if the shareholder could show (i) that the request for inspection was reasonable in terms of time and place, and (ii) that the shareholder had a “proper purpose” for the request.\textsuperscript{35}

The reasonable time and place limitation was straightforward and fairly non-controversial. Most of the early litigation revolved instead around the question of “proper purpose.” The “proper purpose” requirement at common law evolved out of the mechanism by which shareholders would enforce their inspection rights upon denial by the corporation of an inspection request by the shareholder. Though a number of mechanisms arose in different jurisdictions, the most widely accepted means of enforcing the inspection right against a reluctant corporation was through a writ of mandamus.\textsuperscript{36} In granting or denying a writ of

\textsuperscript{30} Parsons, 426 S.E.2d at 688 (citing Cooke v. Outland, 144 S.E.2d 835, 841 (1965)).
\textsuperscript{31} Guthrie, 199 U.S. at 155 (“The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders.”) (quoting Huyler v. Cragin Cattle Co., 2 A. 274, 278 (1885)).
\textsuperscript{33} Thomas, supra note 27, at 337.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 337-38.
\textsuperscript{36} 5A Fletcher Cyc. Corp. § 2251 (2011). A writ of mandamus is generally used by a person who has a legal right to the performance of an act and is looking to compel performance of that act. See, e.g., State v. Sagl, 229 N.W. 118, 120 (Neb. 1930) (“[T]he writ may issue to any ‘corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.’”); Brecker v. Nielsen, 143 A.2d 463, 465 (Conn. Super. Ct. 1958) (“The writ of mandamus is a prerogative writ which will issue only to enforce a clear legal right where the person against whom it is directed is under a legal obligation to perform the act commanded … The discretion of the court in the issuance of a writ of mandamus will only be exercised in accordance with recognized principles of law where the plaintiff has a clear legal right to have done that which he seeks.”). Ohio provides an example of a jurisdiction adopting a different enforcement mechanism. See, e.g., Cincinnati Volksblatt Co. v. Hoffmeister, 56 N.E. 1033, 1034 (Ohio 1900) (mandatory injunction in equity, rather
mandamus, courts were obliged to exercise “sound discretion.”\textsuperscript{37} Specifically, in the context of shareholder inspection rights, courts typically would not issue a writ of mandamus “to enforce a mere naked right or gratify idle curiosity,” but rather the shareholder historically would have to show “some specific interest at stake rendering inspection necessary or some beneficial purpose for which the examination” was requested,\textsuperscript{38} and that the inspection was not sought in bad faith.\textsuperscript{39} Eventually this evolved into a “proper purpose” requirement, which was incorporated into the common law rule.

Although not all courts agree about which party has the burden with respect to the proper purpose requirement,\textsuperscript{40} or about what exactly constitutes a “proper” or “improper” purpose,\textsuperscript{41} generally speaking, at common law, a proper purpose has been described as one that is lawful and related to the petitioner’s status as a shareholder.\textsuperscript{42} Proper purposes have been found to include requesting access to the records to be able to communicate with other shareholders about matters related to their mutual interests in the corporation, investigating corporate mismanagement, and valuing a shareholder’s stock in the corporation.\textsuperscript{43} Improper purposes can include satisfying one’s idle curiosity, harassing or embarrassing the corporation or its directors or officers, using the information to compete with the corporation, and pursuing purely political or social ends.\textsuperscript{44}

But even if a shareholder has a proper purpose, a court will not issue the writ if there is another “plain and adequate remedy at law,”\textsuperscript{45} though an action for damages is usually viewed as an inadequate remedy.\textsuperscript{46} Moreover, a court has discretion to place limitations or conditions on

\textsuperscript{37} Cooke v. Outland, 144 S.E.2d 835, 843 (N.C. 1965).
\textsuperscript{39} 5A Fletcher Cyc. Corp. § 2220 (2011).
\textsuperscript{40} Many jurisdictions do not require the shareholder to state his or her purpose in the petition for inspection, but rather place the burden on the corporation to establish that the purpose was somehow improper. See, e.g., State ex rel. Dixon v. Missouri-Kansas Pipe Line Co., 36 A.2d 29, 31 (Del. Super. Ct. 1944); Cooke v. Outland, 144 S.E.2d 835, 843-44 (N.C. 1965); Soreno Hotel Co. v. State ex rel. Otis Elevator Co., 144 So. 339, 341 (Fla. 1932); see also 5A Fletcher Cyc. Corp. § 2219 (2011). But see State ex rel. Brown v. III. Investments, Inc., 80 S.W.3d 855, 860 (Mo. Ct. App. 2002); Albee v. Lamson & Hubbard Corp., 69 N.E.2d 811, 813 (Mass. 1946).
\textsuperscript{41} 5A Fletcher Cyc. Corp. § 2219 (2011).
\textsuperscript{44} Id.
\textsuperscript{45} State v. Sagl, 229 N.W. 118, 120 (Neb. 1930).
the inspection as necessary to protect the corporation.\textsuperscript{47} And courts will mandate access only to books and records that are relevant to the requesting shareholder’s proper purpose.\textsuperscript{48}

C. The Statutory Right

\textit{i. Precursors to the MBCA}

In the 1800’s, as corporations grew larger and more complex, the shareholders of any given corporation became more numerous, more geographically diverse, and less homogeneous in terms of their interests.\textsuperscript{49} In this changing corporate climate, shareholders began having less and less involvement in the operations of the corporate business and, as a result, less access to corporate information.\textsuperscript{50} The natural byproduct of the changing corporate landscape shed new light on the importance of shareholder inspection rights and the remedies the law provided to redress a corporation’s failure to respect those rights.

With this increased emphasis on shareholder inspection rights as a backdrop, by the late 1800’s, state legislatures had codified enhanced inspection rights that expanded the common law right to make it absolute.\textsuperscript{51} Rather than requiring shareholders to provide evidence of a proper purpose to grant access – or allowing corporations to show evidence of an improper purpose to permit denial of access – the requesting shareholder’s purpose became entirely irrelevant.\textsuperscript{52} Mandamus, however, generally remained the appropriate way to enforce the statutory right,\textsuperscript{53} and allowed the court to exercise its discretion in terms of granting or denying the writ.\textsuperscript{54}

\textsuperscript{47} Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 569 (Del. 1997); see also Guthrie v. Harkness, 199 U.S. 148, 156 (1905). Not only can courts place restrictions on the time and place for review of documents, courts can limit the documents that can be reviewed. 5A Fletcher Cyc. Corp. § 2245 (2011). For instance, if a shareholder requested board minutes for the past ten years, the court might require the corporation to provide access only to the minutes from the past three to five years. See, e.g., Wallace v. Miller Art Co., Inc., 6 A.D.2d 887, 887 (N.Y. App. Div. 1958) (“It would be unduly oppressive to carry the inspection back to January 1, 1948.”). The court can also limit the use of the information by the requesting shareholder by, for instance, requiring the requesting shareholder to enter into a confidentiality agreement with the company with respect to any particularly sensitive materials that might be disclosed. See, e.g., CM&M Group, Inc. v. Carroll, 453 A.2d 788, 794 (Del. 1982). Similarly, a court might require that the documents first be reviewed \textit{in camera} to make sure that trade secrets will not be disclosed or to confirm the necessity of the shareholder’s request. Strauss v. Educ. Innovations, Inc., No. FSTCV084014480S, 2008 WL 5220278, at *2 (Conn. Super. Ct. Nov. 14, 2008) (“If disputed by the corporation, the ‘connection’ of the records to the shareholder’s purpose may be determined by a court’s in camera examination of the records.”).

\textsuperscript{48} 5A Fletcher Cyc. Corp. § 2245 (2011).

\textsuperscript{49} Thomas, \textit{supra} note 27, at 338.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 339.

\textsuperscript{52} See, e.g., Cincinnati Volksblatt Co. v. Hoffmeister, 56 N.E. 1033, 1035 (Ohio 1900) (“[W]here a suitor demands the enforcement of a clear right given him by law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation.”); Furst v. W.T. Rawleigh Med. Co., 118 N.E. 763, 766 (Ill. 1918) (requiring corporation to provide access to requesting shareholder despite evidence that shareholder’s request was purely to harass and annoy the corporation); Wilson v. Mackinaw State Bank, 1920 WL 1078, 3 (Ill. App. Ct. 1920) (“[W]here a statute grants the right in absolute terms, the purpose or motive of the stockholder in seeking such inspection is immaterial and he cannot be required to state his reasons therefor…”); see also 5A Fletcher Cyc. Corp. § 2220 (2011).

\textsuperscript{53} 5A Fletcher Cyc. Corp. § 2220 (2011).

\textsuperscript{54} And recall that, in the context of inspection rights, this discretion usually took the form of disallowing the writ when there was evidence the request was for some illegal or improper purpose. See \textit{supra} note 39.
However, in light of the new mandatory statutes, courts typically granted the writ as a matter of course, exerting discretion only to ensure that the inspection was performed at reasonable times. \(^{55}\) In fact, by the early 1900’s, not only was the proper purpose requirement irrelevant, but many statutes went significantly further and provided for punitive sanctions against the corporation or its officers for denial of requests, even where those requests were for purposes that would have, at one time, been improper. \(^{56}\)

The 1930’s brought a backlash against this absolute right of inspection. \(^{57}\) The unqualified right had led to a number of shareholder abuses, such as purchasing a de minimis number of shares for the sole purpose of getting access to otherwise confidential information to use to compete with the corporation. \(^{58}\) Concern regarding the frequency of these shareholder abuses caused many state legislatures to amend their inspection statutes to move away from the absolute right of inspection and back towards some of the restrictions of the common law, such as denying access where there was evidence of improper purpose. \(^{59}\) Even in states that did not amend their statutes, courts re-visited earlier decisions and reversed course to the extent necessary to reintroduce some limitations on the inspection right. \(^{60}\)

\(\textit{ii. Development of Inspection Rights Under the MBCA}\)

\(\textit{a. Earliest Edition}\)

It was not until twenty years later that one of the earliest editions of the MBCA was published for widespread distribution in 1953. \(^{61}\) In the preface to the 1950 revision of the MBCA (prior to publication in 1953), the drafters of the MBCA \(^{62}\) noted that the MBCA emphasized the rights of shareholders in an attempt to strengthen and clearly define those rights. \(^{63}\)

As part of that overarching goal of strengthening and defining shareholder rights, the MBCA codified shareholder inspection rights and provided for remedies not available at common law for shareholders who met certain specified statutory requirements and were improperly denied access to books and records in violation of the statute. \(^{64}\) But for shareholders

\(^{55}\) See, \textit{e.g.}, Wilson, 1920 WL 1078, at *3 (“The only qualification to such examination is that it shall be exercised at reasonable times.”); \textit{see also} 5A Fletcher Cyc. Corp. § 2220 (2011).

\(^{56}\) Thomas, \textit{supra} note 27, at 339.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) 5A Fletcher Cyc. Corp. § 2220 (2011).

\(^{60}\) See, \textit{e.g.}, Tate v. Sonotone Corp., 272 A.D. 103, 104-5 (N.Y. App. Div. 1947) (“[A]lthough it has sometimes been stated that the right of inspection under [the relevant inspection statute] is absolute … [d]uring the last few years, especially, the principle that the stockholder’s bad faith and improper purposes or motives constitute a bar to the judicial enforcement of the right of inspection has received new support. As said in one late case, ‘the trend, however, is toward a reversion to the common-law rule, which makes motive and good faith material in an application for inspection.’”); \textit{see also} 5A Fletcher’s Cyc. Corp. § 2220 (2011).

\(^{61}\) \textit{MODEL BUS. CORP. ACT} (1953).

\(^{62}\) The earliest edition of the MBCA was drafted by the Committee on Business Corporations of the Section of Corporation, Banking and Mercantile Law of the American Bar Association.

\(^{63}\) \textit{MODEL BUS. CORP. ACT, Preface} to the 1950 revision, iv (1953).

\(^{64}\) \textit{MODEL BUS. CORP. ACT} § 46 (1953).
who did not meet the statutory requirements, the common law inspection rights and remedies continued to provide a mechanism for obtaining access to a corporation’s books and records.  

Specifically, the 1953 version of the MBCA provided that a shareholder of record who owned stock for at least six months immediately preceding his demand for access or who was the holder of record of at least 5% of the outstanding shares of the corporation would have the right to inspect the books and records of account, minutes, and record of shareholders. As with the common law right, the statutory right was limited by the reasonable time and proper purpose requirements. If the corporation failed to provide access to any such shareholder (i.e., a shareholder with a proper purpose who owned 5% of the stock or owned stock for at least six months pre-demand), the statute provided for specific remedies. For example, the officer or agent of the corporation who refused the demand could be held personally liable for a penalty in the amount of 10% of the value of the shares owned by the shareholder, in addition to any other remedy afforded by law, so long as the officer or agent was unable to establish one of the statutory defenses. One statutory defense was for the officer or agent to show that the person suing had, within two years, sold or offered for sale any list of shareholders of the corporation or had improperly used any information secured through prior examination of the books and records (or had aided or abetted anyone in so doing). It was also a defense to show that the requesting shareholder was not acting in good faith or did not have a proper purpose for his demand.

In addition to the statutory penalties, the 1953 edition of the MBCA contained what can be referred to as a “savings clause,” in that it “saved” the common law inspection right and allowed it to coexist with the statute. This savings clause expressly stated that nothing in the statute was meant to impair the power of a court, upon proof by a shareholder of proper purpose, to compel examination of books and records, even if the shareholder did not meet the statutory requirements of being a 5% owner or owning shares for at least six months prior to the demand. The reasoning behind the statutory scheme, according to the Official Commentary to the MBCA, was that specific penalties (namely the potential for personal liability for officers or agents of the corporation) would be available only for certain classes of shareholders (namely those who owned at least 5% of the stock or owned stock for at least six months prior to the demand). But other shareholders, who did not meet these statutory requirements, would not be without recourse. For all other shareholders seeking access to books and records, though they would not be afforded the benefit of this special statutory remedy, the common law rights and remedies still

65 MODEL BUS. CORP. ACT § 46 (1953).
66 MODEL BUS. CORP. ACT § 46 para. 2 (1953).
67 Id.
68 MODEL BUS. CORP. ACT § 46 para. 3 (1953).
69 Id.
70 Id.
71 MODEL BUS. CORP. ACT § 46 para. 4 (1953) stated: “Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof by a shareholder of proper purpose, irrespective of the period of time during which such shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation.”
exists.\textsuperscript{72} In other words, if such a shareholder could establish a proper purpose for his request, the shareholder could still be awarded \textit{access} to books and records (under the common law) but would not be entitled to \textit{damages} from the officer or agent who denied the request (under the statute).

As the drafters noted, the penalty provision “with its threat of personal liability, was intended to exert pressure on the corporation to permit inspection in cases where the [purpose] was clearly proper and to temper judgment in borderline cases.”\textsuperscript{73} The 5\% ownership requirement and the six months holding requirement thus served as proxies for reasonable inspection demands – shareholders with large or long-term commitments to the corporation were seen as more likely to have proper motives for their requests. Allowing for the penalty of personal liability would make it less likely that corporations would deny these reasonable requests.\textsuperscript{74} The remedy seemed driven by the belief that corporations tended to view shareholder inspection requests with great suspicion and routinely denied such requests, thereby requiring the shareholders to take the corporation to court to enforce their rights.\textsuperscript{75} By imposing the possibility of personal liability in those cases that seem most likely to involve reasonable requests, the drafters intended to decrease this practice of automatic denial. In fact, the drafters noted that the “primary purpose” of the inspection statute was to prescribe such penalties.\textsuperscript{76} Thus, the statutory (MBCA) and common law rights were designed to coexist.

\textbf{b. Current Formulation}

In 2008, the Committee on Corporate Laws of the Section of Business Law of the ABA promulgated the modern-day MBCA formulation of the shareholder inspection right. In the 2008 version, the 5\% ownership or six months holding requirement\textsuperscript{77} and the penalty of personal liability for officers or agents who wrongfully denied a shareholder request were dropped.\textsuperscript{78} Instead, the MBCA provided for a bifurcated approach – shareholders had to satisfy different prerequisites depending on what type of books and records the requesting shareholder was trying to access. Generally speaking, for basic books and records, access was made more liberal. But

\textsuperscript{72} See \textit{Model Bus. Corp. Act Ann.} § 52 cmt. at 129-30 (2d ed. 1971). Note that the terms of the 1971 version of the MBCA books and records provision were substantially similar to those of the 1953 version. As such, commentary from the 1971 version is equally applicable to both.


\textsuperscript{74} \textit{Model Bus. Corp. Act Ann.} § 52 cmt at 129 (2d ed. 1971).

\textsuperscript{75} \textit{Model Bus. Corp. Act Ann.} § 16.02 cmt. at 16-18 (4th ed. 2008). As noted by the drafters, at common law the shareholder’s inspection right was often “hampered by the delay and expense which often accompanied enforcement of the right.” Without penalties, the drafters noted, the corporation could refuse access to delay inspection until the right was actually litigated. \textit{Model Bus. Corp. Act Ann.} § 52 cmt at 129 (2d ed. 1971).

\textsuperscript{76} \textit{Model Bus. Corp. Act Ann.} § 52 cmt at 129 (2d ed. 1971).

\textsuperscript{77} In their comments to the 2008 edition, the drafters recognize their unwillingness to adopt the predecessor MBCA’s distinction based on the size of the shareholder’s holding or the length of time for which he was a shareholder. According to the drafters, this was due to a realization on their part that the size and time requirements were not ultimately a good proxy for the universe of shareholders likely to make reasonable inspection requests for proper purposes. \textit{Model Bus. Corp. Act Ann.} § 16.02 cmt. at 16-20 (4th ed. 2008).

\textsuperscript{78} The drafters to the MBCA explained that the penalty approach was rejected “in part because of courts’ reluctance to impose penalties on officers or agents for actions taken on behalf of their principal and in part because concern for personal responsibility for large penalties may cause officers or agents to ignore their responsibilities to their principals.” \textit{Id.}
for more sensitive materials, or materials the drafters felt were more likely to be requested for potentially improper purposes, access was made more restrictive.\textsuperscript{79}

Currently, for certain of the most basic, least sensitive “records of the corporation,” § 16.02(a) provides a corporation must grant access to every shareholder, so long as he or she provides a written request five business days in advance of the desired inspection date.\textsuperscript{80} The concept of “shareholder” is not limited merely to shareholders of record, but rather is defined to include a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf.\textsuperscript{81} The list of basic “records of the corporation” that can be so accessed consists of: the corporation’s articles and bylaws, resolutions of the board creating one or more classes of shares (if any such shares are issued and outstanding), minutes of shareholder meetings and actions without meeting for the previous three years, written communications to shareholders within the past three years, names and addresses of directors and officers, and the most recent annual report filed by the corporation with the office of the Secretary of State.\textsuperscript{82}

For access to more sensitive materials, the shareholder, in addition to providing five business days written notice, must establish compliance with certain prerequisites before he will be granted access to the documents.\textsuperscript{83} Under § 16.02(b), this subset of more sensitive records is as follows: (i) excerpts from minutes of meetings of the board, records of board committee action, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board without a meeting (to the extent not provided for in the first category described in the immediately preceding paragraph); (ii) accounting records of the corporation; and (iii) the record of shareholders.\textsuperscript{84} Pursuant to § 16.02(c), the prerequisites a shareholder must satisfy for access to these records consist of: (i) the demand was in good faith and for a proper purpose; (ii) the shareholder described with reasonable particularity his purpose and which records he desired; and (iii) the records are directly connected with the shareholder’s purpose.\textsuperscript{85} Though “proper purpose” is not defined in the MBCA, the comments indicate that a proper purpose is one “reasonably relevant to the demanding shareholder’s interest as a shareholder.”\textsuperscript{86} In other words, the interpretations of the meaning of “proper purpose” under the MBCA are similar to the interpretations advanced by courts under the common law.\textsuperscript{87}

The modern-day formulation of the MBCA further provides that the rights granted by the section cannot be abolished or limited by a corporation’s articles or bylaws.\textsuperscript{88} And the statute contains a modified version of the earlier edition’s savings clause – § 16.02(e)(2) – which

\textsuperscript{79} See generally MODEL BUS. CORP. ACT ANN. § 16.02 (4th ed. 2008).
\textsuperscript{80} In other words, shareholder access to this sub-set of books and records is nearly absolute – no proper purpose is necessary. MODEL BUS. CORP. ACT ANN. § 16.02(a) (4th ed. 2008).
\textsuperscript{81} MODEL BUS. CORP. ACT ANN. § 16.02(f) (4th ed. 2008); See also MODEL BUS. CORP. ACT ANN. § 1.40 (4th ed. 2008).
\textsuperscript{82} MODEL BUS. CORP. ACT ANN. § 16.02(a) (4th ed. 2008); MODEL BUS. CORP. ACT ANN. § 16.01(e) (4th ed. 2008).
\textsuperscript{83} MODEL BUS. CORP. ACT ANN. § 16.02(b) (4th ed. 2008).
\textsuperscript{84} MODEL BUS. CORP. ACT ANN. § 16.02(b)(1)-(3) (4th ed. 2008).
\textsuperscript{85} MODEL BUS. CORP. ACT ANN. § 16.02(e) (4th ed. 2008).
\textsuperscript{86} MODEL BUS. CORP. ACT ANN. § 16.02 official cmt. at 16-15 to -16-16 (4th ed. 2008).
\textsuperscript{87} The official comment to the relevant provision of the MBCA notes that the MBCA continues to use the “proper purpose” formulation “because it is traditional and well understood language defining the scope of the shareholder’s right of inspection and its use ensures that the very substantial case law that has developed under it will continue to be applicable” under the modern MBCA. \textit{Id.}
\textsuperscript{88} MODEL BUS. CORP. ACT ANN. § 16.02(d) (4th ed. 2008).
expressly does not limit the ability of a court, independently of the MBCA inspection statute, “to compel the production of corporate records for examination.”

Though the current iteration of the MBCA has rejected its predecessor’s imposition of personal liability on officers or agents who wrongfully refuse a shareholder’s request, the MBCA does provide that, if a corporation refuses a shareholder’s demand, the shareholder may apply to the appropriate court for an order compelling production. If the shareholder’s request for documents is for non-sensitive documents, such as the articles or the bylaws – in other words, if the request is made under § 16.02(a) – the shareholder may seek a summary order compelling inspection because the right of inspection under § 16.02(a) is automatic and the court need only confirm that the requesting party is, in fact, a shareholder. If the requesting shareholder has demanded access to more sensitive materials, such as the books of account of the corporation – in other words, if the request is made under § 16.02(b) – then a more comprehensive analysis by the court is required, including whether the shareholder’s request was made in good faith. In such instances, the statute provides that the appropriate court must hear the shareholder’s application on an expedited basis. Moreover, if the court orders production of the books and records, the corporation must prove its refusal was in good faith or else it may be required to pay the shareholder’s attorneys’ fees and the costs of filing the suit. In the event of court-ordered production, the court may impose certain restrictions on the use or distribution of the records by the requesting shareholder.

While the initial versions of the MBCA inspection statute made it clear that the MBCA and common law inspection rights would coexist, it is not at all clear that the intent behind the modern-day formulation was the same. The changes instituted in the modern-day version support – indeed I argue they may demand – an alternative interpretation of abrogation of the common law right. This theory will be explored in more detail in Part IV below.

iii. State Adoptions and Adaptations of the MBCA

All 50 states and the District of Columbia now have some statutory codification of shareholder inspection rights. While a large number of jurisdictions follow the modern-day 2008 edition of the MBCA formulation of inspection rights, as of 2008 thirteen jurisdictions still retained an earlier version of the MBCA that required a shareholder, in order to have access to the corporate books and records, to own a certain percentage of the corporation’s outstanding stock (e.g., 5%) and/or to have owned his stock at least six months prior to the demand for

89 MODEL BUS. CORP. ACT ANN. § 16.02(e)(2) (4th ed. 2008).
92 MODEL BUS. CORP. ACT ANN. § 16.04(b) (4th ed. 2008).
93 MODEL BUS. CORP. ACT ANN. § 16.04(c) (4th ed. 2008).
94 MODEL BUS. CORP. ACT ANN. § 16.04(d) (4th ed. 2008). See supra note 47 and accompanying text for the types of restrictions that might be imposed.
96 According to the drafters of the MBCA, as of 2008, twenty-seven states had either “adopted section 16.02 [of the MBCA]” or had a statute “directly comparable” to it. Id. See, for example, the following states which either have adopted the MBCA formulation verbatim or have a statute substantially similar to it: ARK. CODE ANN. § 4-27-1602 (2010); CONN. GEN. STAT. ANN. § 33-946 (2010); FLA. STAT. ANN. § 607.1602 (2010); IOWA CODE ANN. § 490.1602 (2010); OR. REV. STAT. § 60.774 (2010); S.C. CODE ANN. § 33-16-102 (2010); TENN. CODE ANN. § 48-26-102 (2010).
access. However, unlike the earlier versions of the MBCA, these thirteen jurisdictions, for the most part, have not retained the possible remedy of personal liability of the officers or agents who wrongfully reject a shareholder inspection request. In fact, some of these states that follow the older version of the MBCA do not provide for any remedy at all—neither of the current MBCA remedies of (i) a court hearing the issue on an expedited basis nor (ii) allowing for the court to award costs (including attorneys’ fees) to a successful shareholder.

Some states, even those that have adopted a version of the current MBCA, have provided their own additional variations to the statutory requirements. For instance, though the MBCA states that the articles and bylaws of the corporation cannot limit shareholder access to books and records, some states provide for the exact opposite, expressly allowing the articles and bylaws to limit shareholder access within certain parameters. Another variation is found in North Carolina, where the statute limits the ability of shareholders of public companies to inspect accounting records or other records with respect to any matter the corporation determines in good faith may, if disclosed, negatively affect the corporation or constitute material nonpublic information. States like California and Kansas extend the shareholders’ rights of inspection of books and records of the corporation to subsidiaries of the corporation, an issue on which the MBCA is silent.

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97 As of 2008, Alabama, Arizona, Idaho, Louisiana, Maryland, Montana, Nevada, New Jersey, New Mexico, North Carolina, Virginia, Wisconsin, and the District of Columbia all had requirements of either a certain percentage ownership or a certain holdings period prior to demand (or had both a percentage requirement and a holdings period). Model Bus. Corp. Act Ann. § 16.02 annotation at 16-22 to -16-23 (4th ed. 2008). Note that in at least one of these states, the statute allows the 5% ownership requirement to be satisfied by more than one shareholder whose combined holdings achieve the requisite percentage if the shareholders make a collective request, rather than individual requests, for documents. La. Rev. Stat. Ann. § 12:103 (2010).

98 Only two of the thirteen states retain the threat of personal liability. See Ala. Code § 10-2B-16.02 (2010); N.M. Stat. Ann. § 53-11-50 (2010). Though the District of Columbia does not retain the personal liability remedy, it does not mirror the remedy of the MBCA exactly. For instance, it provides that the corporation can be fined $50 for wrongfully refusing to provide access to a requesting shareholder, in addition to any other damages afforded by law.


102 Cal. Corp. Code § 1601(a) (2010) (“The right of inspection created by this subdivision shall extend to the records of each subsidiary of a corporation subject to this subdivision.”); Kan. Stat. Ann. § 17-6510 (2010) (“Any stockholder … shall have the right … to inspect for any proper purpose, and to make copies and extracts from: … a subsidiary’s books and records, to the extent that (i) the corporation has actual possession and control of such records of such subsidiary; or (ii) the corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand (A) stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation, and (B) the subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.”). Kansas’s treatment of the subsidiary issue is notably identical to the approach used in Delaware. See Del. Code Ann. tit. 8, § 220 (2010) (identical language used).
Other states, like Delaware, have chosen to craft their own inspection statutes, with notable distinctions from the MBCA formulations. The Delaware provision, for instance, like the current MBCA, bifurcates the prerequisites for access depending on the type of materials requested and relies on the familiar concept of “proper purpose.” Unlike the MBCA, however, Delaware draws the line between access to the stock ledger and access to all other books and records. When a stockholder wants to access the stock ledger, under the Delaware code, the purpose is presumed proper and the corporation has the burden of demonstrating that the purpose is in fact improper. In order to access other books and records, the shareholder himself has the burden of proving his proper purpose. Also, unlike the MBCA, the Delaware statute does not expressly limit the realm of materials a shareholder can access by listing out specific books and records subject to inspection, though courts interpreting the statute have not found that access is limitless. Rather, as with the MBCA, courts typically require that the records requested be necessary to effectuate the stated purpose.

III. INTERPRETATION OF THE STATUTES BY THE COURTS: ABROGATION VS. NON-ABROGATION OF THE COMMON LAW

Not long after states adopted statutes regarding inspection rights did courts have the opportunity to interpret those statutes. An issue that arose almost immediately was whether the statutes abrogated the inspection rights and remedies that shareholders enjoyed at common law.

The majority of jurisdictions addressing whether the common law inspection rights would continue to exist as a separate set of rights and remedies for shareholders apart from the statute have held that the relevant statute does not abrogate the common law. Rather, the two separate sets of rights and remedies – one statutory and one at common law – coexist. In other words, the shareholder is free to pursue access to books and records under a common law theory even if (i) the shareholder has not satisfied one or more of the statutory prerequisites for access or (ii) the statute is silent with respect to the rights the shareholder is trying to assert. Only a handful of courts have held that the statute abrogates the common law, thereby finding that a shareholder seeking access who is unable to satisfy the statutory prerequisites cannot get access to the books and records under a common law theory of inspection rights.

The remainder of Part III will look at the case law supporting the majority and the minority positions regarding abrogation. In this Part, I will discuss the various rationales set forth for each position, with the intent of examining the rationales for the majority and minority positions later.

103 DEL. CODE ANN. tit. 8, § 220(c) (2010); see also Abbe M. Stensland, Note, Protecting the Keys to the Magic Kingdom: Shareholders’ Rights of Inspection and Disclosure in Light of Disney, 30 J. Corp. L. 875, 881 (2005).
104 DEL. CODE ANN. tit. 8 § 220(c) (2010) (“Where the stockholder seeks to inspect the corporation’s stock ledger or list of stockholders and establishes that such stockholder is a stockholder and has complied with this section respecting the form and manner of making demand for inspection of such documents, the burden of proof shall be upon the corporation to establish that the inspection such stockholder seeks is for an improper purpose.”); see also Stensland, supra note 103, at 881.
105 DEL. CODE ANN. tit. 8 § 220(c) (2010) (“Where the stockholder seeks to inspect the corporation’s books and records, other than its stock ledger or list of stockholders, such stockholder shall first establish that: … [I]he inspection such stockholder seeks is for a proper purpose.”).
106 Stensland, supra note 103, at 883.
108 See supra note 24 and accompanying text.
in this Article to assess whether the majority arguments make sense in light of modern-day inspection statutes, public policy, and today’s corporate climate.

A. Majority Position – Non-Abrogation

As previously noted, a majority of jurisdictions that have considered this issue have concluded that the inspection statute in the relevant jurisdiction does not abrogate the common law. Though there are a large number of cases that adhere to this majority position, they can ultimately be grouped into categories based on the reasoning each respective court uses to support its conclusion. The first category comprises the most poorly reasoned opinions – those where the court has blindly asserted the conclusion that the common law survives the codification of an inspection statute without providing any rationale for that position whatsoever. Cases not falling into this first category include those where the court was more thoughtful in its approach and provided support for its holding. However, the rationales asserted in these cases tend to be overlapping and the supporting rationales can ultimately be grouped into one of three categories: (i) what I have referred to as the “blind assertion” type; (ii) those courts holding that statutes expand, not restrict, the common law; and (iii) those courts finding the intent to override the common law must be clear on the face of the statute. These three categories of reasoning sometimes exist in isolation, other times in combination. Below, I have described each of these categories in more detail. While this section only highlights a handful of cases, they are representative of the majority of jurisdictions that have upheld the non-abrogation position.

i. Blind Assertion

The first, and most frustrating, of these apparent justifications is not much of a justification at all. Rather, in a number of opinions supporting the majority position, the court has merely made a blind assumption that the common law remains a separate avenue of rights and remedies for shareholders without providing any basis for that belief.

For instance, in Holdsworth v. Goodall-Sanford, Inc., the shareholder was seeking access to “all of the corporate books, records, documents or Directors’ and stockholders’ minutes of [the defendant corporation].”\(^{109}\) The relevant statute at the time, however, provided access to a much more limited degree: shareholders could only inspect (i) records of shareholders’ meetings and (ii) records showing the complete list of all the shareholders, with their addresses and the amount of stock held by each.\(^{110}\) The Supreme Judicial Court of Maine ultimately held that the writ should not be granted on other grounds – namely, due to failure to show proper purpose – but the court noted without discussion that a shareholder had both a statutory and a common law right of inspection. The court simply stated that in addition to the statutory right, “a stockholder has a right at common law to examine the books, records and papers of a corporation, when the inspection is sought at proper times and for a proper purpose.”\(^{111}\) The court provided no explanation for its conclusion.

The issue presented in Holdsworth – what types of documents a shareholder can have access to – is a common factual scenario in these cases. A second, but equally typical, factual

\(^{109}\) 55 A.2d 130, 131 (Me. 1947).
\(^{110}\) Id. at 132.
\(^{111}\) Id.
scenario presented itself in *Brentmore Estates v. Hotel Barbizon*. The *Brentmore* court addressed the question of, not what documents could be accessed, but rather what type of shareholder is able to access documents. The petitioners in *Brentmore* had pledged their stock as part of a voting trust agreement, and as such were holders of voting trust certificates. Since they had given up their right to vote their shares, these shareholders were considered “beneficial” shareholders, but were not shareholders of record. However, the relevant inspection statute required that a shareholder “appear on the books of the company as a stockholder” to enjoy one’s statutory inspection rights. Despite not meeting the statutory requirements, the court found without discussion that, in addition to his statutory rights, a shareholder has a common law right to inspect books and records and therefore denied the corporation’s motion to dismiss.

Still a third common factual scenario is whether shareholders of a type of business entity that is not included in the inspection statute should still be able to access books and records of the entity pursuant to a common law right. For instance, in *Scattered Corp. v. Chicago Stock Exchange, Inc.*, the petitioner was a member of a non-stock corporation, requesting access to books and records. The relevant statute was included in the corporations’ code and, as such, only applied to shareholders of stock corporations. The Delaware Chancery Court assumed without discussion that members of non-stock corporations could resort to common law procedure that was “largely (but not entirely) supplanted” by the Delaware inspection statute. Arguably, this factual scenario is somewhat different from the facts in *Holdsworth* or *Brentmore*. In those cases, the facts at issue – i.e., what books and records may be accessed or what type of shareholder may access them – were expressly provided for in the inspection statute. In *Scattered*, the question of whether non-stock members could assert books and records rights was not covered by the statute. The fact that the statute was silent on the issue may have influenced the court’s holding of non-abrogation, but we cannot know if that is the case because the Delaware court, as in the other two cases, provided no discussion of the reasons why the common law remedy would still be available. Unfortunately, examples of this type of poorly reasoned opinion are not difficult to find.

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113 *Id.* at 391.
114 *Id.* at 390.
115 *Id.* at 392.
116 *Id.* at 393.
117 *Id.* at 393-94.
118 671 A.2d 874, 875 (Del. Ch. 1994).
119 *Id.* at 876.
120 *Id.* at 880.
121 For other cases similarly characterized by a lack of justification for the non-abrogation conclusion, see also *Gimpel v. Bolstein*, 125 Misc. 2d 45, 57 (N.Y. Sup. Ct. 1984) (“[I]n the absence of bad faith, a shareholder has a statutory right to examination of shareholder records … and a common law right to examine the corporate books of account.”); *Estate of Bishop v. Antilles Enter., Inc.*, 252 F.2d 498, 500 (3d Cir. 1958) (“[I]t is generally held that statutory provisions securing to stockholders the right to inspect books and records are to be regarded as supplemental to the common law right to such inspection and not as a restriction upon it.”); *Albee v. Lamson & Hubbard Corp.*, 69 N.W.2d 811, 813 (Mass. 1946) (noting at the outset of the opinion that the petitioner was “not seeking to enforce any statutory right of examination of the books and records” as provided by the relevant statute in the jurisdiction at the time, but rather was seeking to enforce his common law right).
ii. Statutes Expand, Not Restrict, the Common Law

A second line of cases that have adopted the majority position of non-abrogation have found that the statutes, when enacted, were meant to expand, not restrict, the rights and remedies of shareholders. Thus, to give effect to the legislative intent of the statutes, the courts have reasoned (i) the rights and remedies at common law must remain in place, and (ii) the statute supplements, not abrogates, the common law. These courts have held that to find otherwise would have the unintended consequence of restricting, rather than expanding, shareholder access to books and records.

Many of the cases that rely on this justification point to the fact that the statutory enactment omitted the “proper purpose” requirement that was part of the common law.\textsuperscript{122} For instance, in \textit{Rockwell v. SCM Corporation}, the petitioning shareholder failed to meet the statutory requirements for access.\textsuperscript{123} Specifically, he held only 1.3% of the outstanding shares of the corporation, below the statutory minimum, and had not yet been a shareholder for the required six months.\textsuperscript{124} In holding that the common law right survived enactment of the New York statute, the United States District Court for the Southern District of New York noted that the statutory right of inspection was intended to expand the common law right by omitting the “proper purpose” requirement.\textsuperscript{125} The statute was meant to provide an absolute right of inspection for a certain subset of shareholders, regardless of purpose.\textsuperscript{126} It was not meant to deny the right of inspection to others who, though they did not meet the statutory prerequisites, could show that their request was indeed in good faith and for a proper purpose, and thus satisfied the traditional common law requirements.\textsuperscript{127}

It is not just the removal of the “proper purpose” requirement that courts have relied on to make the argument that the statutes are meant to expand, not restrict, shareholder inspection

\textsuperscript{122} One of the earliest cases to use this rationale was \textit{In re Steinway}, a 1899 case from the Court of Appeals of New York. 53 N.E. 1103. In this case, the statute at issue provided for an absolute right of inspection for shareholders with respect to the stock book, but not to other books and records. \textit{Id.} at 1107. In other words, shareholders need not show a “proper purpose” to get access to the stock book. \textit{Id.} The court held, however, that this statute was not meant to suggest that shareholders could not access other corporate books and records through their common law inspection right, so long as they showed a proper purpose. \textit{Id.} The Court noted that the statute “did not imply repeal the common-law rule” just by enabling a stockholder “to get some information in a new way ... By simply providing an additional remedy the existing remedy was not taken away.” \textit{Id.}

\textsuperscript{123} 496 F. Supp. 1123 (S.D.N.Y. 1980).

\textsuperscript{124} \textit{Id.} at 1125.

\textsuperscript{125} \textit{Id.} at 1126.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} A similar argument was made by the court in \textit{Texas Infra-Red Radiant Company, Inc. v. Erwin}, 397 S.W.2d 491 (Tex. Civ. App. 1965). In that case, the shareholder had received a beneficial interest in stock as part of a divorce decree but the stock was held in trust and the husband had the right to vote the shares. As such, she was not a stockholder “of record” as required by the statute to get access. \textit{Id.} at 493. The court held the inspection statute did not abrogate the common law because inspection statutes are not meant to abridge a stockholder’s rights, but rather to enlarge those rights by removing common law limitations. \textit{Id.} In this case, the statute required shareholders to state their “purpose” but did not require that such purpose be “proper” before inspection would be granted. \textit{Id.} See also \textit{Soreno Hotel}, 144 So. at 340 (statute did not abrogate common law because the statute made the inspection right absolute for holders of a certain percent, “without requiring him to allege in detail such grounds as would show the request was made for ‘a proper purpose,’ as required under the common law).
rights. In *Parsons v. Jefferson-Pilot Corporation*, the Supreme Court of North Carolina used a particularly unique argument for expansion of the common law right (and, therefore, non-abrogation). The statute at issue in this case generally allowed shareholders access to accounting records of a corporation, but provided that shareholders of public companies were not entitled to inspect or copy accounting records. The petitioning shareholder was a shareholder of a public company seeking access to accounting records on the theory that the statute did not abrogate his common law rights. Part of the court’s holding, that the common law rights were not abrogated, relied on the fact that the statute provided shareholders with certain rights of inspection of corporate records that did not exist under the common law. For instance, there was a statutory requirement that the requesting shareholder provide written notice to the corporation of his or her demand at least five business days before the date on which he wished to inspect the documents. The court curiously viewed this statutory requirement as an expansion of rights, providing “a new right to an expedited inspection of a corporation’s … records within five business days after making a proper demand,” rather than viewing this as a restriction on shareholder access, disallowing access to shareholders who did not follow proper procedures by providing proper notice.

Finally, several cases have adopted this notion that the statute is an expansion of the common law but fail to expressly address the reasons for the assertion. For instance, in *Schwartzman v. Schwartzman Packing Company*, the Supreme Court of New Mexico stated without explanation that the inspection statute did not abrogate the common law because the statutory right of inspection is sometimes described as “an extension or even an enlargement of the right as recognized under the common law.” However, the court provided no basis for this conclusion and the rationales described above – that the proper purpose requirement was removed by the statute or that the statute provided for an expedited basis for review upon five days’ notice – do not seem to apply. The statute at issue in this case included a proper purpose requirement, did not provide for access on an expedited basis, and did not otherwise appear to expand shareholder access. If anything, the statute appeared to restrict shareholder access by narrowing the scope of documents that could be reviewed (to books and records of account, minutes, and the record of shareholders) and limiting access to shareholders who either have owned their shares for six months prior to the demand or own at least 5% of the outstanding stock of the corporation.

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128 426 S.E.2d 685 (N.C. 1993).
129 Id. at 688.
130 Id.
131 Id.
132 Id.
133 Id.
134 659 P.2d 888, 891 (N.M. 1983).
135 Id.
136 Id. The only possible support for the conclusion that the statute was an expansion of the common law right comes from the fact that the statute provided the remedy of potential personal liability of the officer or agent of the corporation who wrongfully refused a shareholder’s reasonable request. However, since the court does not describe the basis for its conclusion that the statute is an expansion of rights, it is unclear whether this was what the court had in mind. A similarly poorly reasoned case came out of the Supreme Court of Florida. In *Soreno Hotel Co. v. State ex rel. Otis Elevator Co.*, the shareholder, pursuant to the Florida inspection statute, had to show that his holdings represented “at least one-tenth of the subscribed stock.” 144 So. 339, 340 (Fla. 1932). It was undisputed that the holdings of the shareholder in *Soreno Hotel* did not reach the requisite one-tenth threshold so the question was
iii. Intent to Override Common Law Must Be Clear on Face of Statute

A number of jurisdictions that support the majority position of non-abrogation of the common law justify non-abrogation by finding that statutes that would otherwise restrict common law rights must be strictly construed to leave those rights intact, unless the intent to override the common law is expressed clearly in the language of the statute.

For instance, in State of Missouri ex rel. Brown v. III Investments, Inc., the scope of the books and records requested by the petitioning shareholder was broader than that allowed by the relevant statute. The petitioning shareholder argued to the Missouri Court of Appeals that his common law inspection rights would provide him access to this broader spectrum of materials. The court agreed, finding that the statute did not abrogate the common law. The court noted that the legislature, where it intends to abrogate a common law right, must do so clearly and that, unless a statute clearly abrogates a common law right – either expressly or by necessary implication – the common law right remains. Unless a statutory remedy fully “comprehends and envelopes the remedies provided by common law,” such statute will not displace the common law.

Specifically, the court noted that the statute itself never mentioned the common law, foreclosing the possibility of express abrogation. The statute also did not implicitly abrogate the common law because, according to the court, the statutory inspection rights differ from the common law in both “requirements and scope.” In order to exercise the common law right, the shareholder had to show proper purpose and, upon doing so, could then inspect any

whether such shareholder could resort to a common law theory to gain access to the books and records. Id. at 341. In holding that the common law right still existed, the court reasoned that the statutory inspection rights enlarge and extend the common law “by removing some of the common-law limitations.” Id. at 340. Note that the court did not describe what those common law limitations were or otherwise provide an indication of how the statute was an expansion of the common law.

In III Investments, the corporation, in response to the shareholder’s inspection request, had provided the shareholder with a consolidated financial statement for the corporation, but had refused to allow the shareholder access to the underlying documents from which the financial statements were prepared and certain other requested documents. The statute allowed shareholders to have access to the “books” of the company, but this provision did not seem to include many of the documents being requested. For instance, the statute did not appear to include things like inter-office communications with internal analysis. State of Missouri ex rel. Brown v. III Inv., Inc., 80 S.W.3d 855, 860 & n.5 (Mo. Ct. App. 2002).

Id. at 860.

Id. at 859-60.

Id. at 860 (quoting Dierkes v. Blue Cross & Blue Shield of Mo., 991 S.W.2d 662, 668 (Mo. 1999)).

The statute the III Investments court was considering stated:

Each corporation shall keep correct and complete books and records of account, including the amount of its assets and liabilities, minutes of the proceedings of its shareholders and board of directors, and the names and business or residence addresses of its officers; and it shall keep at its registered office or principal place of business in this state ... books and records in which shall be recorded the number of shares subscribed, the names of the owners of the shares, the number owned by them respectively, the amount of shares paid, and by whom, and the transfer of such shares with the date of transfer. Each shareholder may at all proper times have access to the books of the company, to examine the same, and under such regulations as may be prescribed by the bylaws.

MO. ANN. STAT. § 351.215 (2000); III Invs., 80 S.W.2d at 860 n.5.

Id.
documents that related to the proper purpose. On the other hand, under the statutory right, it was the corporation that would bear the burden of showing an improper purpose. If the corporation did not do so, the shareholder could examine only the books of the corporation, but the purpose was irrelevant. According to the court, a shareholder might be able to exercise the statutory right even if unable to meet the common law requirement. The court used this reasoning to support its holding that both the statutory and common law rights should remain available. In further support of this holding, the court noted that a shareholder might be entitled to view a wider assortment of documents under the common law (if able to establish a proper purpose) than would be available under the statute. Given the differences between the two remedies and the different availability of each, the court reasoned that the common law rule should coexist with the statute.

The identical issue arose in Tucson Gas & Electric Company v. Schantz, where the petitioning shareholder sought access to certain books and records that were not provided for by statute. The Court of Appeals of Arizona noted that where a statute revises the common law and is clearly designed to be a substitute for it, the common law is repealed. But the court also stated that statutes cannot abrogate the common law by implication unless legislative intent to do so is clear. Ultimately, the court concluded that if a remedy exists at common law and a statute is enacted that also provides a remedy for a similar issue, the statutory remedy is cumulative of the common law unless it explicitly provides that it is exclusive. The court held that, in this instance, the statute was “partially declaratory of the common law,” but did not abolish the remainder of the common law rule since the legislature did not clearly manifest an intent to repeal the common law rule or “specifically declare the statutory remedy to be exclusive.”

This rationale understandably gains more traction in cases where the issue is not one expressly provided for in the relevant inspection statute. For instance, in State ex rel. Boldt v. St. Cloud Milk Producers’ Association, the petitioner was a member of a cooperative (a non-stock corporation). The relevant statute was in the corporations’ code and, as such, only applied to stock corporations, not other types of business organizations. Therefore, the question was whether the petitioner had any common law right to access the books and records of the

\[\text{\textsuperscript{143} Id.}\]
\[\text{\textsuperscript{144} Id.}\]
\[\text{\textsuperscript{145} Id.}\]
\[\text{\textsuperscript{146} Id. at 860-61.}\]
\[\text{\textsuperscript{147} III Invs., 80 S.W.2d at 860.}\]
\[\text{\textsuperscript{148} Id.}\]
\[\text{\textsuperscript{149} 428 P.2d 686 (Ariz. Ct. App. 1967). In this case, the documents sought were copies of the proxies held and the ballots cast in the election of the board of directors at the annual meeting of shareholders. Id. at 686. The statute, however, only required corporations to provide shareholders access to the share register, books of account, and minutes and proceedings of the shareholders and board of directors and of executive committees of the board. Id. at 687.}\]
\[\text{\textsuperscript{150} Id.}\]
\[\text{\textsuperscript{151} Id.}\]
\[\text{\textsuperscript{152} Id.}\]
\[\text{\textsuperscript{153} The court unfortunately did not explain where it thought the statute and the common law intersected and where the two diverged.}\]
\[\text{\textsuperscript{154} Tucson Gas, 428 P.2d at 690.}\]
\[\text{\textsuperscript{155} 273 N.W. 603, 604 (Minn. 1937).}\]
cooperative. In finding that the petitioner did have common law rights, even in light of his failure to satisfy the statutory prerequisites to inspection, the court harnessed this notion that “existing common-law remedies are not to be taken away by a statute unless by express enactment or necessary implication.” Since the statute did not contain “any clause repealing, restricting, or abridging the rule then in effect,” the statute was seen merely as a supplement to the common law.

iv. Legislative Intent as Reflected in Savings Clause

The various courts’ reasoning in each of the foregoing cases is based on a finding that the legislative intent is unclear – i.e., there has been no express abrogation and there is insufficient evidence of implicit abrogation. Therefore, the statute must be construed narrowly so as not to abrogate the common law. However, some jurisdictions go farther than this. Instead of stating that the legislative intent is unclear, the courts in these jurisdictions hold that the legislative intent – that of non-abrogation – is actually quite clear as evidenced both by the language of the statute itself and the official comments thereto.

Specifically, § 16.02(e) of the current MBCA states that the inspection statute does not affect:

1. the right of a shareholder to inspect records under [the section of the MBCA regarding access to the shareholders’ list prepared prior to each shareholders’ meeting] or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant; or
2. the power of a court, independently of this Act, to compel the production of corporate records for examination.

Courts in jurisdictions that have adopted this part of the current MBCA look to the language in subsection (e)(2), what I will refer to as the “Savings Clause,” as support for the legislative intent that the statute not abrogate the common law. The argument is that this language, to have any meaning at all, must refer to the ability of courts to enforce a shareholder’s common law inspection rights, even if he fails to meet the statutory requirements. Since statutes must be construed so as not to render a provision absurd, inoperative, useless, or meaningless, the Savings Clause must be read as “saving” the common law or otherwise it would have no purpose.

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156 Id. at 605. Note that this case is somewhat different from the others described above where the particular factual scenario at issue was actually addressed by the statute. For instance, in both Tucson and III Investments, the shareholders sought access to documents over and above those provided for expressly by the relevant statutes. 

157 Id. at 606.

158 Id. The Supreme Court of Minnesota reached the same result based on the same reasoning when it addressed whether shareholders of a banking corporation should have inspection rights. Though the statute did not relate to banking corporations, the court found the common law right still existed. State ex. rel. G.M. Gustafson Co. v. Crookston Trust Co., 22 N.W.2d 911, 917 (Minn. 1946) (“Statutes relating to a stockholder’s right of inspection change the common law only to the extent they so provide. Where there is no provision for a repeal of the common-law rule or a statutory declaration that the statutory rule shall be exclusive, the common-law rules remain in effect.”).

In further support of this theory, courts have cited to the official commentary of the MBCA (or the relevant state statute that has adopted the MBCA commentary). The official comment to § 16.02 states the section represents “an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist … as a ‘common law’ right of inspection, if any is found to exist by a court, to examine corporate records.”^160 According to the official comment, the section “simply preserves whatever independent right of inspection exists under these sources and does not create or recognize any rights, either expressly or by implication.”^161 Though the drafters were agnostic about whether a common law inspection right does in fact exist, courts in jurisdictions that have adopted the MBCA and its official comments use this language as clear support for a non-abrogation stance.

The North Carolina Supreme Court examined this issue in Parsons v. Jefferson-Pilot Corporation. As noted earlier, the court in Parsons relied partially on the argument that the statute was an expansion, not a restriction, of the common law right and thus the common law right should continue to exist. But the court also supplemented its reasoning by addressing this issue of legislative intent. Specifically, the court looked at the legislative intent as established by the North Carolina Savings Clause and the official comment to the North Carolina inspection rights statute, both of which were substantially similar to the MBCA’s § 16.02(e) and related commentary.\(^{162}\) The court was persuaded that the language of the North Carolina statute, expressly providing that the statute does not affect the power of the court to compel production of corporate records, was evidence of legislative intent for non-abrogation.\(^{163}\) The court also relied on the commentary, noting that the commentary to a statutory provision, though not controlling, can be helpful in discerning legislative intent.\(^{164}\) The court concluded that, because the legislature intended to leave in effect any common law rights of inspection to the extent any such rights existed at the time of the statutory enactment in North Carolina, and there were common law rights in existence at the time of the enactment of the statute, the common law remained in existence post-statute.\(^{165}\)

**B. Minority Position – Abrogation**

The majority of jurisdictions that have addressed this issue, as highlighted above, have concluded that the codification of inspection rights by statute does not abrogate a shareholder’s common law right to access books and records. Only a handful of cases represent the minority position – that the statute abrogates the common law and serves as a shareholder’s exclusive right and remedy with respect to access to corporate materials.

The few cases supporting the minority position use consistent reasoning to hold in favor of abrogation. The first of the rationales that supports the abrogation position is the idea that, if the statute were read to allow for the coexistence of the common law inspection right, it would render the statute meaningless. The second is a related rationale that considers the comprehensiveness of the statutory scheme and posits that allowing the common law to coexist with such a fully realized statute on the same subject would subvert the legislative intent.


\(^{161}\) Id. at 16-16 to -16-17.

\(^{162}\) 426 S.E.2d 685, 688-89 (N.C. 1993).

\(^{163}\) Id. at 688.

\(^{164}\) Id. at 689.

\(^{165}\) Id.
The first rationale had appeared by 1900, in perhaps the earliest case to support the minority position. In *Cincinnati Volksblatt Co. v. Hoffmeister*, the Supreme Court of Ohio addressed whether a requesting shareholder had to set out his reasons for desiring inspection prior to getting access.\(^{166}\) Under the relevant statute in *Hoffmeister*, there was no requirement that the shareholder show proper purpose.\(^{167}\) However, the common law in that jurisdiction had previously required such a showing.\(^{168}\) The corporation argued that the common law requirement should still apply because the statute was merely intended to codify the existing common law.\(^{169}\) The court held that the petitioning shareholder need not establish a proper purpose because the statute incorporated no such requirement.\(^{170}\) In so holding, the court speculated that the legislature would not have taken the trouble to codify shareholder inspection rights if the intent had merely been to affirm the common law rule.\(^{171}\) The court noted that a more reasonable conclusion was that “the object [of the legislature] was to get rid of all uncertainty, and of various conditions, whatever they were, and establish the right by a rule clear, direct, simple, and practically without qualification.”\(^{172}\) Though the court did not expressly state in its holding that the statute entirely abrogates the common law, the rationale asserted may point to that conclusion.

Admittedly, however, this rationale is fairly similar to the concept set forth by the courts adhering to the majority position that the statute is an expansion, not a restriction of the common law. As such, if the roles had been reversed, and it was the shareholder who had tried to invoke the common law because of his own failure to satisfy the statutory requirements rather than the corporation invoking the common law to block access, it is certainly possible this court’s opinion might have ultimately looked more like one of the cases in Part III.A, with the court finding there to be no preemption of the common law by statute. Also, though this case has not been expressly overturned, in the 2004 case *Danzinger v. Luse*, the Supreme Court of Ohio was asked to address whether shareholders had a common law right to access books and records of a wholly-owned subsidiary of the corporation in which they held stock.\(^{173}\) The Ohio statute was silent with respect to access to the records of wholly-owned subsidiaries. As such, there was no statutory right available but the court held that there was a common law right.\(^{174}\)

Later cases regarding the meaninglessness of the statute if the common law is found to coexist have articulated this point more completely. Nearly forty years after *Hoffmeister*, for

\(^{166}\) 56 N.E. 1033, 1034 (Ohio 1900). Note that the reasons for invoking the common law in this case were somewhat different than the reasons we saw in the cases described in Part III.A above. In those cases, the common law was used by the petitioning shareholder as a sword to try to get the corporation to provide access, even though the shareholder did not satisfy the requirements of the inspection statute. In *Hoffmeister*, the common law was used by the defendant corporation as a shield, arguing that, even though the shareholder could get access under the language of the statute, the common law requirements would forbid him from doing so. Despite these differences, however, *Hoffmeister* can provide some initial insight into the rationales that support the minority position of statutory abrogation of the common law.

\(^{167}\) Id.

\(^{168}\) Id.

\(^{169}\) Parsons, 426 S.E. 2d at 689.

\(^{170}\) Id. at 1035.

\(^{171}\) Id. at 1035.

\(^{172}\) Id. at 1035.

\(^{173}\) 815 N.E.2d 658, 660 (Ohio 2004).

\(^{174}\) Id.
instance, the Appellate Court of Illinois used this rationale to support its holding in *Neiman v. Templeton, Kenly & Co., Ltd.* In that case, the court was asked to address whether a shareholder who did not meet the 5% ownership requirement of the statute could still assert a common law right to inspection. In concluding that the enactment of the statute foreclosed any possibility of asserting a common law right of inspection, the court relied partially on standard tenets of statutory construction, including that statutes should be read in a way such that no one part negates another. If the Savings Clause were read as allowing the common law rights to exist simultaneously with the statute, the court reasoned that would be tantamount to the legislature “having solemnly prescribed certain requirements,” and then repealing them in the same section. Later courts have adopted similar reasoning.

The second rationale regarding the comprehensiveness of the statutory scheme was articulated in 1983 by the United States District Court for the District of Maryland. In *Caspary v. Louisiana Land and Exploration Company*, a shareholder requested access to books and records of a corporation in which he held only a very small interest. The statute at the time was similar to the 1971 version of the MBCA in that it included the requirement that a requesting shareholder own at least 5% of the stock to gain access to the stockholder list. It was undisputed that the shareholder did not meet the 5% ownership prerequisite and, therefore, he asserted a common law theory for inspection rights, arguing that the statute was merely a supplement to the common law right of inspection.

The court rejected this assertion, reasoning that a statute that deals with an entire subject matter is generally thought to abrogate the common law with respect to that subject matter. The court pointed out that the statutory scheme adopted by Maryland’s legislature was comprehensive in its treatment of shareholders’ inspection rights. Under the statute, all shareholders were provided access to certain documents but the shareholder list was only provided to shareholders who owned the 5% threshold amount – in other words, the 5% shareholders had more extensive inspection rights. This, the court noted, was “intended to strike a delicate balance between a shareholder’s right to inspect his company’s records and management’s need to conduct day to day business without undue interference.”

176 *Id.*
177 *Id.* at 292.
178 *Id.*
179 For a similar argument based on statutory interpretation and legislative intent, see Daurelle v. Traders Fed. Sav. & Loan Ass’n, 104 S.E.2d 320, 330 (W. Va. 1958) (“[T]he provisions of the present statute, clearly indicate that in enacting the present statute the Legislature intended to deprive the stockholder of his common-law right to inspect the books and records of the corporation and to give him instead only such rights of that nature as are expressly mentioned in the statute. To give the statute any other meaning or effect would emasculate the statute and defeat the purpose of the Legislature in enacting it. If the stockholder after the enactment of the present statute still retains and may exercise his common-law right of inspection there is no need for the present statute, there was no valid reason for its enactment, and it should be regarded as inoperative and ineffective legislation.”).
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *Caspary*, 560 F. Supp. at 857.
186 *Id.*
legislative intent was to preclude abuse of inspection rights by a single shareholder when his small share holdings are insignificant in relation to the size of the company.\textsuperscript{187} If the court allowed the common law to provide inspection rights in such circumstances, it would “run the risk of tipping the balance one way or the other.”\textsuperscript{188}

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the lower court’s holding that the Maryland statute abrogated the common law with respect to shareholder inspection rights.\textsuperscript{189} Agreeing with the District Court, the Court of Appeals stated it would be difficult to imagine why the common law should be kept alive when the statute “did everything for the shareholder that the common law did and more,” and that this was a clear case of the statute dealing with the entire subject matter of shareholder inspection rights.\textsuperscript{190} In response to the argument that the statute actually expanded, rather than restrained, the common law remedy, the court pointed out that, while inspection statutes initially enlarged the rights presented under the common law, the later trend was away from this expansion in favor of limitations restricting the rights.\textsuperscript{191} Additionally, the court noted that reliance on this “expansion” concept was misplaced because it could be viewed as either an expansion or a restriction, depending on the viewpoint adopted. In other words, while it may look like an expansion from the shareholder’s perspective – enhancing a shareholder’s right to access books and records – it is a restriction when viewed from the corporation’s perspective – restricting a corporation’s right to reject shareholder requests for access.\textsuperscript{192} Therefore, to say the common law survives the statute because it is an “expansion” of rights, according to the court, was potentially just a “play on words.”\textsuperscript{193}

It became clear on appeal, however, that there was one significant difference between the Maryland statute and that of the MBCA. As the Court of Appeals pointed out, the Maryland statute did not contain the Savings Clause language of the MBCA that provided that nothing in the statute would impair the power of a court to compel the production of documents outside of the statutory inspection rights (regardless of percentage ownership).\textsuperscript{194} As such, the Maryland statute also did not include the previously described official comment in the MBCA that explained that the statute was not meant to be a substitute for any common law right of inspection, if any were found to exist by a court. It is unclear whether the opinion of the Court of Appeals would have been different had the statutory language been different and included the Savings Clause.

There is precedent, however, suggesting that the rationale set forth by the District Court and Court of Appeals in \textit{Caspary} would still be applicable even in states where the Savings Clause language of the MBCA has been adopted. For instance, in \textit{Neiman}, discussed above, the Savings Clause language was included in the statute, but the court still held the statute abrogated

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\textsuperscript{187} & \textit{Id}. \\
\textsuperscript{188} & \textit{Id}. \\
\textsuperscript{189} & \textit{Caspary v. La. Land & Exploration Co.}, 707 F.2d 785 (4th Cir. 1983). \\
\textsuperscript{190} & \textit{Id}. at 789 n.8. \\
\textsuperscript{191} & \textit{Id}. at 791. In support of this position, the court cited the historical trend away from disfavoring legislative action, stating that three-quarters of a century ago, when there was a much greater distaste for statutory intrusion on the common law than there is today, the result might have been different. \textit{Id}. at 793. \\
\textsuperscript{192} & \textit{Id}. at 791. \\
\textsuperscript{193} & \textit{Id}. \\
\textsuperscript{194} & \textit{Id}. at 789. \\
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the common law. Even more recently, in 2003, the United States District Court for the Eastern District of Pennsylvania confronted the same issue in Perilstein v. United Glass Corporation.195 The case involved the statutes of three states – Georgia, Kentucky, and Pennsylvania – and required the court to determine whether a common law inspection right survived the codification of such rights in any of those states.196 Each of the relevant statutes at the time included the MBCA language allowing a court to compel production of corporate books and records outside of the inspection statute – i.e., a version of the Savings Clause.197 The issue in the case was whether or not the petitioning shareholder could be granted inspection rights without first making a written demand on the corporation stating his purpose, as required by the statute.198 The court held that, even if the common law of Kentucky, Georgia, or Pennsylvania at one time would have allowed the petitioner to get access without written demand, the statutory scheme of each state “clearly abrogates any such hypothesized common law right.”199 Despite Savings Clause language in each statute, the court found it would be “inconceivable that the Georgia, Kentucky, or Pennsylvania Supreme Court would subvert the well-ordered statutory schemes” of those states by recognizing the continued existence of the common law right.200

In the most recent case to hold that the inspection statute abrogates the common law, the Fulton County, Georgia Superior Court’s Business Court relied on a combination of the two arguments discussed above to support its position. In the 2010 case, Mannato v. SunTrust Banks, Inc., the petitioner owned a de minimis number of shares in SunTrust.201 The shareholder brought suit against the corporation, seeking access to certain books and records.202 Though the Georgia inspection statute is largely modeled on the MBCA, it included additional language not found in the MBCA, expressly allowing a corporation to restrict access in its articles or bylaws to shareholders who own more than 2% of the corporation’s stock.203 The bank’s bylaws did just that.204 Since the shareholder in question did not satisfy the 2% ownership requirement, he sought access to the books and records under his common law right.205 The court granted SunTrust’s Motion to Dismiss, holding that the plaintiff shareholder could not subvert the inspection statute requirements by asserting a common law right.206 Specifically, the court found that invocation of the common law would “thwart the statutory scheme” set up by the legislature.

196 Id. at 255-56.
197 Id. at 256.
198 Id.
199 Id.
200 Perilstein, 213 F.R.D. at 256.
202 Id.
203 Id. at 2 para. 6. GA. CODE ANN. § 14-2-1602(e) (2010) states: “The right of inspection granted by this Code section may not be abolished or limited by a corporation’s articles of incorporation or bylaws. However, the right to inspection enumerated in… this Code section may be limited by a corporation’s articles of incorporation or bylaws for shareholders owning 2% or less of the shares outstanding.”
204 Order, supra note 201, at 2 para. 5.
205 Id. at 2 para. 8.
206 Id. at 2 para. 9.
and would ascribe to the legislature a “wholly unreasonable intention.” They were aided in reaching this conclusion by legislative history that clearly confirmed the legislature’s intent to abrogate the common law.

IV. ARGUMENTS IN SUPPORT OF STATUTORY ABRIGATION OF COMMON LAW INSPECTION RIGHTS

Though the majority of jurisdictions addressing this issue have held that statutory inspection rights do not abrogate common law inspection rights, I argue in this Part IV that the minority position – that of abrogation – is more appropriate, at least with respect to certain types of cases.

A study of the cases that support the majority position indicates that they can be grouped into one of two different factual categories. The first are the cases that evolved out of facts specifically addressed in the relevant statute. For instance, the petitioning shareholder is requesting access to books and records but only owns 1% of the outstanding stock of the corporation; the statute requires the shareholder to own 5% of the outstanding stock before the statutory rights and remedies will be triggered. The question is whether, even without satisfying the statutory prerequisites, this shareholder might still get access to the books and records under a common law theory. Other typical examples of this type of factual scenario are (i) where the shareholder must satisfy a holdings requirement (such as six months prior to demand) to get access but has failed to do so; (ii) where the statute requires the shareholder to be one “of record” but the requesting shareholder is merely a beneficial shareholder; and (iii) where the shareholder is requesting access to a type of books and records that are either expressly off limits under the statute or are beyond the scope of those expressly provided for in the statute. I will refer to these types of cases as “Statutory Treatment Cases.”

The second type of cases involve facts about which the statute is silent. For instance, the relevant statute provides shareholders a mechanism to access books and records of a corporation in which it owns an interest, but is silent as to whether the inspection rights extend to subsidiary corporations. The petitioning shareholder is attempting to get access to books and records of a wholly owned subsidiary of the corporation in which he owns shares. Though he satisfies all of the statutory prerequisites necessary to get access to the books and records of the corporation in which he holds an interest, since the statute does not address subsidiaries specifically, the shareholder asks the court to grant him access under a common law theory. Other examples of this type of case involve application of the statute to certain other types of business entities, most notably nonstock corporations, banking institutions, or foreign corporations, and the petitioner is a member or shareholder of such an entity. I will refer to these as “Silent Statute Cases.”

For Statutory Treatment Cases, a non-abrogation approach is problematic for a number of reasons. First, a non-abrogation approach flies in the face of the legislative intent of the state legislatures that have enacted comprehensive statutory inspection schemes. Moreover, non-abrogation in the context of Statutory Treatment Cases leads to confusion – confusion that

207 Id. at 2-3 para. 9.
208 Id. at 3 para. 9.
209 Such as when the statute provides that shareholders of public companies cannot have access to financial records and the petitioning shareholder is seeking such documents.
210 For instance, the statute provides access to the share register, the books of account, and the minutes of shareholder meetings and the petitioning shareholder is seeking copies of the board minutes.
legislatures likely were intending to get rid of and which could be eliminated by an abrogation theory that leaves just a single set of rights and remedies for requesting access to books and records. Finally, allowing the common law right to coexist with the statutory scheme presents public policy concerns about achieving the proper balance between managerial authority and managerial accountability. These concerns will all be addressed in more detail in this and the following parts.

These concerns are not as distinct in Silent Statute Cases. As previously discussed, in Silent Statute Cases, the legislature has not necessarily contemplated the particular factual scenario at issue in these cases. Rather, leaving the common law intact in Silent Statute Cases provides additional rights and remedies for issues not addressed in any statute. Whether such additional rights and remedies should ultimately be codified is a different issue, and one that will be addressed briefly in Part V, though a complete discussion of this issue is beyond the scope of this article.

In this Part IV, I explain why a non-abrogation approach, while it may have been logical when inspection statutes were first enacted, is no longer desirable, at least with respect to Statutory Treatment Cases. First, I will address the arguments relied on by the courts supporting non-abrogation and will explain how many of these arguments are no longer consistent with modern corporate law. In this Part, I show that the legislative intent behind many modern-day inspection statutes likely was not that the common law coexist with the statutory inspection scheme. Even if non-abrogation were the legislative intent behind the inspection statutes, however, this Part concludes with a discussion of the various policy reasons that support – and, in the author’s opinion, demand – the adoption of an abrogation approach on a going-forward basis for Statutory Treatment Cases.

A. Arguments of Jurisdictions Taking Majority Approach No Longer Hold Up

As described in Part III.A above, cases asserting the majority position draw on relatively few rationales to support their non-abrogation stance. In some cases, the non-abrogation position is asserted blindly without any rationale whatsoever. For obvious reasons, these cases lack persuasive value and will not be addressed here. However, there are three additional arguments proffered by the majority that merit discussion: (i) statutes generally expand, not restrict, the common law; (ii) the intent to override the common law must be clear on the face of the statute; and (iii) the legislative intent of non-abrogation is reflected in the Savings Clause of the MBCA and the official commentary related thereto. Each of these arguments will be addressed in turn.

i. Statutes Generally Expand, Not Restrict, the Common Law

As previously discussed, courts asserting the majority position often rely on the notion that inspection statutes are meant to expand shareholder rights, not restrict the rights existing under the common law and, as such, should not abrogate those common law rights. Some of the cases that have articulated this rationale are not particularly well-reasoned. For instance, in the Parsons case described in Part III.A.ii, the court viewed the statutory language requiring shareholders to provide five-days notice of intent to inspect as an expansion of rights, providing for an “expedited” process. This view of the notice requirement seems like a particularly tortuous reading of what might more reasonably be interpreted as a restriction on access (albeit a mild one) rather than an expansion. Even less well-reasoned are those cases, like Schwartzman,
that provide no explanation whatsoever for the conclusion that the statute is an expansion of the common law.

But not all opinions adhering to this expansion rationale are so poorly reasoned. And while courts supporting the minority position have tried to refute this expansion rationale, they have not always done so with much conviction. For instance, the U.S. Court of Appeals for the Fourth Circuit, in *Caspary*, suggested that reliance on this “expansion” concept was inappropriate because it was merely a trick of semantics – while the original statutes could be seen as an expansion of a right (of shareholders’ ability to access books and records), they could also been seen as a restriction of rights (of corporations’ ability to reject shareholder requests for access) and, as such, this “expansion” argument does not carry as much weight. But this rationale lacked persuasive force because the court did not articulate any support for the claim that the statute was intended to be a restriction of the corporation’s rights.

More persuasively, the court in *Caspary* rightly pointed out that, while expansion may have been the initial goal of the inspection statutes, the more recent trend has been toward restricting shareholder rights. Though the court did not explore this idea in depth, it is this observation that lends the most credible support to the argument that the expansion approach is no longer viable.

If one looks at the expansion rationale in light of modern-day inspection statutes, it becomes apparent the argument is now largely moot. The most well-reasoned of the opinions where courts have asserted this rationale have done so by pointing to the fact that the relevant inspection requirement did not require the shareholder to establish a proper purpose, whereas such a requirement had been imposed under the common law. As such, the argument goes, the purpose of the statute was to allow a certain subset of shareholders (e.g., 5% owners) to get access to books and records without having to assert a proper purpose, while allowing shareholders who did not meet the statutory prerequisite (e.g., those with less than a 5% ownership interest) to still obtain access under the common law so long as they could show a proper purpose.

This argument was true with respect to the initial statutory codifications of shareholder inspection rights. But this argument cannot be sustained when viewed in the light of modern-day inspection statutes. The current MBCA no longer provides for different inspection rights depending on the characteristics of the requesting shareholder. As discussed in Part II.C.ii above, now the MBCA treats all shareholders equally in terms of access to books and records. Moreover, the current MBCA incorporates the concept of “proper purpose.” While certain nonsensitive materials are available to shareholders without making a showing of proper purpose, any of the more controversial documents, like the shareholder list and accounting records, can only be accessed if the shareholder establishes a proper purpose. Today, even in states that retain the 5% ownership requirement or the six months holding requirement (or some variation thereof), the codification typically incorporates the concept of proper purpose.212

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211 *Caspary*, 707 F.2d at 791.
212 The commentary to the MBCA provides a list of the states that have and have not adopted some form of the proper purpose requirement. According to the commentary, Hawaii, Maryland, Missouri, Nevada, and Texas are the only states that do not incorporate the proper purpose requirement into the books and records statute. *MODEL BUS.*
Take, for example, the 1980 case Rockwell v. SCM Corporation described in Part III.A.ii above. The New York inspection statute in place at the time of that decision allowed a category of shareholders – those who owned a certain percentage of the company’s stock – to access books and records without showing a proper purpose. The court relied on this fact to suggest the common law should still have life – providing a remedy for those shareholders who could not meet the threshold requirement but who could establish a proper purpose. As of 2010, however, the New York statute requires every shareholder to establish that his purpose is “reasonably related” to his “interest as a shareholder” in order to gain access. Therefore, the court’s explanation in Rockwell, that the statute was meant to provide an absolute right of inspection for a certain class of shareholders, is no longer supported by the modern statute. Based on this reasoning, it is not clear that the holding in Rockwell – or the holdings in similar cases in other jurisdictions where the statute has been modernized over time – should hold up.

ii. Intent to Override Common Law Must Be Clear on Face of Statute

Jurisdictions will also sometimes support their non-abrogation position by pointing out that, while the common law can be abrogated by statute, the intent to so abrogate must be clear, either through express language of the statute or through “necessary implication.” Though jurisdictions supporting the majority position do not believe the intent to abrogate the common law is clear from the statute, a more reasonable argument can be made that, in fact, such an intent is clear. Though the current MBCA and its progeny do not include express language to suggest abrogation of the common law, it is reasonable, and arguably necessary, to conclude that the common law has been abrogated through “necessary implication.”

This position is supported by case law. In Caspary, the U.S. District Court for the District of Maryland reasoned that a statute that deals with an entire subject matter must abrogate the common law with respect to that subject matter. The U.S. Court of Appeals for the Fourth Circuit affirmed this position, finding that where a statute “did everything that the common law did and more,” this is a classic case of a statute dealing “with an entire subject matter.”

Modern day inspection statutes are, for the most part, comprehensive in their treatment of shareholder inspection rights. As previously noted, the majority of modern inspection statutes have now incorporated the common law “proper purpose” requirement. Modern statutes also typically address the types of books and records that can be inspected, sometimes providing a bifurcated approach like the MBCA, giving shareholders easier access to less sensitive materials. Today, most statutes specify the procedures a shareholder is required to follow before inspection access will be granted, such as providing written notice of intent to inspect to the corporation a

\(^{213}\) N.Y. BUS. CORP. LAW § 624 (2010).
\(^{214}\) See also Soreno Hotel Co. v. State ex rel. Otis Elevator Co.,144 So. 339 (Fla. 1932). As further described in note 136 above, that case involved the Florida inspection statute which, at the time, allowed shareholders who owned at least one-tenth of the outstanding shares of the corporation to inspect books and records without showing proper purpose. The current Florida statute, however, tracks the MBCA and, as such, grants access to only a very limited set of documents (like the articles and bylaws) without showing proper purpose. FLA. STAT. ANN. § 607.1602 (2010). For anything else, including the shareholder list, the requesting shareholder must show a proper purpose to gain access. Therefore, the expansion argument does not hold up.

\(^{215}\) III. Insvs., 80 S.W.3d at 860.
\(^{216}\) Caspary, 707 F.2d at 789 n.8.
Of the desired inspection. Some states require still other prerequisites that shareholders must meet before they will gain inspection rights, such as owning a threshold amount of stock in the corporation. Generally speaking, the current MBCA and its progeny have left no area related to inspection rights of shareholders unaddressed. With such a comprehensive statutory scheme in place, the most reasonable position seems to be one of abrogation.

Other examples of this principle of statutory abrogation of the common law where the statute has spoken comprehensively on the issue exist in the corporate arena. For instance, in In re Morse, the Court of Appeals of New York addressed the issue of whether a voting trust agreement, which would have been viable at common law, was effective in light of the fact that it did not meet the requirements of the relevant statute regulating voting trusts. The plaintiffs argued that the common law, rather than the voting trust statute, should still apply, which, they argued, would have invalidated the voting trust. The court held that the statute applied and abrogated the common law. In so holding, the court pointed out that New York voting trusts “do not stand or fall on common law theories” but are “recognized and regulated by statute,” and “whether they would be valid at common law in the absence of a statute defining and regulating them is immaterial.” The court noted that “[w]hen the field was entered by the Legislature it was fully occupied and no place was left for other voting trusts.”

As with the voting trust agreement in Morse, the field of shareholder inspection rights has been “fully occupied” by the all-encompassing inspection statutes.

iii. Legislative Intent of Non-Abrogation as Reflected in Savings Clause in Statute

The argument that the MBCA’s Savings Clause reflects a legislative intent of non-abrogation is probably the most persuasive argument in support of the majority position. The argument is really two-fold: partly based on the actual language of the statute and partly based on the official comment to the statute.

Addressing the Savings Clause first, the MBCA states that the inspection statute does not affect “the power of a court, independently of this Act, to compel the production of corporate records for examination.” Shareholder plaintiffs, as in Parsons, have argued that this language is an indication of the legislature’s intent to allow the common law inspection rights to continue to exist. Corporations, however, have argued that the language of the Savings Clause does not mean that the common law should continue to exist and have provided alternative interpretations for the meaning of the provision.

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217 In re Morse, 160 N.E. 374 (N.Y. 1928).
218 Id. at 377.
219 Id. at 376.
220 Id. For examples of cases outside of the corporate context where the court held a statute abrogated the common law, see, e.g., Nicholas v. Baldwin Piano Co., 123 N.E. 226, 226 (Ind. Ct. App. 1919) (statutory abrogation of common law rule giving innkeepers a lien upon goods brought into inn by guests); Burnett v. Myers, 173 N.W. 730, 731 (S.D. 1919) (statute prescribing remedy for damages caused by another’s trespassing animal abrogated common law remedy and plaintiff’s claim dismissed due to failure to comply with statutory procedures to secure the remedy); Boston Ice Co. v. Boston & M.R.R., 86 A. 356, 358-59 (N.H. 1913) (railroad insurer’s common law right of subrogation in the event of negligently caused fire annulled by statute dealing with right of subrogation).
The fact that there is some disagreement over what the language of the statute means suggests this is an ambiguous provision. When analyzing the meaning of an ambiguous statute, the statutory cannons of construction are often invoked. Particularly instructive here for would-be plaintiff/shareholders is the cannon that mandates that a provision of a statute must not be interpreted in such a way as to negate a provision of the statute. The argument can be made that, if the Savings Clause was not, in fact, intended to “save” the common law, then the Savings Clause would have no meaning whatsoever, and would be meaningless surplusage in the statute. Such an argument, however, fails to take into account other possible meanings of the Savings Clause that would not render the language superfluous. For instance, the language could be referencing the ability of the court to compel production when production is required pursuant to the federal securities regulations or other state statutes outside of the corporate code. Additionally, the language of the Savings Clause never even mentions the common law. Had the drafters intended what the proponents of this argument suggest, they could have used clear, unambiguous language – with express reference to the common law – to fulfill that intent.

This argument also ignores the reality that, if in fact the language is meant to maintain the existence of the common law, the remainder of the inspection statute in its entirety arguably becomes meaningless. As previously indicated, the current MBCA (and its relevant state counterparts) provides a comprehensive statutory scheme for inspection rights. This comprehensive scheme was a product of the legislature’s balancing of interests – weighing the

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222 For instance, pursuant to Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934, broker-dealers are required to maintain certain records and produce them upon request to the Securities and Exchange Commission. 17 C.F.R. § 240.17a-3; 17 C.F.R. § 240.17a-4. Similarly, Rule 14a governs the information that must be disclosed to shareholders in proxy statements. 17 C.F.R. § 240.14a-3.

223 See, e.g., Del. Code Ann. tit. 3, § 1226 (2010) (permitting the Department of Agriculture to enter upon private premises with written approval of the occupier in order to inspect books and records relating to shipment, sale, or use of pesticides. If the Department is denied, it can apply to a court of competent jurisdiction for a search warrant); Del. Code Ann. tit. 5, § 2417 (2010) (providing the State Bank Commissioner with authority to access books and records of licensed lenders); Del. Code Ann. tit. 6, § 2432A (2010) (allowing the Attorney General to access books and records of an entity licensed to provide debt management services); Del. Code Ann. tit. 26, § 201 (giving the Public Service Commission the right to review the books and records of utilities); 30 Del. Code Ann. tit. 30 § 364 (2010) (permitting the Secretary of Finance to examine any books and records bearing on matters required to be included in a return.) While I have used Delaware as an example here, a simple search in any state would indicate a number of specialized statutes outside of the corporate code that permit inspection of books and records.

224 In Caspary, the U.S. Court of Appeals for the Fourth Circuit suggested that the Maryland statute could have used the following language had its intention been non-abrogation: “Besides introducing a 5% requirement for exercise of the existing unlimited right of inspection, we also intend to allow the common law right of inspection to any stockholder who demonstrates proper purpose.” 707 F.2d at 792 n.15. As precedent for this notion that the legislature might actually reference the common law in the statute if non-abrogation had been its intent, the court pointed to a provision of the Maryland criminal code, which stated: “Every person convicted of the common-law crime of indecent exposure, is guilty of a misdemeanor and shall be punished by imprisonment for not more than three years or a fine of not more than $1,000 or both.” Id.

225 This argument was unsuccessful when made by the defendant corporation in Rockwell v. SCM Corporation. 496 F. Supp. 1123 (S.D.N.Y. 1980). Specifically, the defendant argued that if the common law right were still available to shareholders, it would render the statute “absurd.” Id. at 1126. Though the U.S. District Court for the Southern District of New York rejected the argument, the court relied on the fact that the statute, by omitting the proper purpose requirement for a certain sub-set of shareholders (e.g., 5% owners), was meant to be an expansion of the common law, not a restriction. As already discussed in Part IV.A.i. above, this argument no longer carries any weight in light of the modern-day inspection statutes in New York and elsewhere.
interests of shareholders in protecting their investment and policing corporate mismanagement against the interest of the corporate directors and officers to be able to fulfill their statutory mandate of managing the affairs of the corporation free of shareholder interference. Construing the Savings Clause so that it permits the continued existence of the common law inspection rights permits courts to perform their own balancing of interests and defeats the purpose of the rest of the statute altogether. In other words, each restriction on access enacted by the legislature can be bypassed by simply reverting to the common law. As the Appellate Court of Illinois found in Neiman, to construe the Savings Clause as allowing the common law to coexist is to conclude that the legislature made a body of rules and then repealed them in the same statutory section.226

A second cannon of construction relevant to this debate is the notion that statutes that are “remedial” in nature should be construed liberally in favor of those whom they are intended to benefit.227 This cannon of construction would seem useful for interpreting the earliest statutory codifications of inspection rights, which were certainly characterized by a “remedial” quality. As previously discussed, many of the initial statutes of the late 1800’s provided for an absolute right of inspection for shareholders, eliminating any requirements like having to establish a proper purpose. Even the initial version of the MBCA, promulgated in the middle of the twentieth century, seemed “remedial” for shareholder interests. The annotation to the MBCA’s § 16.02 expressly states that the earliest version of the MBCA was intended to result in “greater freedom of access to the books by shareholders with large or long-term commitments to the corporation.”228 The initial version provided for an absolute right of inspection for a certain class of shareholders (i.e., those who owned 5% of the stock or had owned stock for more than six months). Moreover, the initial formulation of the MBCA provided for a penalty of potential personal liability for officers and agents of the corporation of an amount of 10% of the value of the shares owned by the shareholder whose request was denied.

However, this “greater freedom of access” was taken away by the modern formulation of the MBCA with its removal of the separate provisions for 5% or six-month shareholders. The modern formulation also removes the onerous penalty of personal liability for officers and agents. In comparison with its statutory precursors, the current MBCA begins to look less remedial for individual shareholder inspection rights and more in favor of the interests of the remaining, non-requesting shareholders and the corporations, who are able to invoke more protections against inspection requests.229 It could be argued that the current MBCA provides a modest expansion of rights by providing an absolute right of inspection to all shareholders to a certain sub-set of documents, as provided in § 16.02(a). However, the documents that shareholders can access under this section are non-sensitive documents, like the articles or bylaws, which corporations rarely have a hesitation to provide anyway (and some of which are available in the public record). Thus to say this is an “expansion” of the inspection right seems disingenuous.

226 Neiman, 13 N.E.2d at 291. For further discussion of Neiman, see part III.B. above.
229 There is precedent to support this notion that there has been a “trend away from an earlier tendency to expand the inspection rights of shareholders beyond their rights at common law in favor of limitations restricting the rights.” Caspary, 707 F.2d at 790 (citing 5 Fletcher Cyc. Corp. § 2215.1 (Rev. Vol. 1976)).
In addition to the actual language of the statute, the language of the Official Comment to § 16.02 of the MBCA prepared by the drafters of the Act supports the majority position that the intent of the legislature was non-abrogation of the common law. The drafters stated that the MBCA inspection statute represents “an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist … as a ‘common law’ right of inspection, if any is found to exist by a court, to examine corporate records.”\(^{230}\) Such language has been used as an expression of legislative intent that justifies the majority position.\(^{231}\) However, this argument is flawed.

The language of the official comment, even in states where it has been adopted as the official comment of that jurisdiction, is not the law. Indeed, the Parsons court, which looked to this language in support of its non-abrogation provision, conceded that the comments are not controlling law.\(^{232}\) Though not controlling, the comments can be indicative of legislative intent. But it is not a foregone conclusion that the intent so expressed is that the common law inspection rights continue to exist alongside the statutory inspection scheme. First, the language of the comment does not expressly state whether the drafters believed any common law right of inspection existed in the first place. Rather, the drafters are non-committal on this point, referencing a common law right of inspection “if any is found to exist.”

Second, even if the drafters of the MBCA comment intended for the continued existence of the common law, that does not necessarily translate into legislative intent on the part of the adopting jurisdictions. For instance, in Georgia, which has adopted a modified version of the current MBCA books and records statute (and commentary),\(^{233}\) there is convincing legislative history to suggest an opposite legislative intent.\(^{234}\) Specifically, statements made by then Senator Roy Barnes, in expressing support for the restrictions in the inspection statute, “focused on the need to prevent harassment of corporations by shareholders who own relatively small interests.”\(^{235}\) Other senators supported this position, expressing the belief that the restrictions were necessary for Georgia to remain “a probusiness state.”\(^{236}\) The legislators appear to have adopted the books and records language of the MBCA and the comment without considering the idea that the Savings Clause could be interpreted to continue to give shareholders rights and remedies over and above those provided by statute. Rather, according to the legislative history,

\(^{230}\) MODEL BUS. CORP. ACT ANN. § 16.02 cmt. 4 at 16-16 (4th ed. 2008).

\(^{231}\) See, e.g., Parsons, 426 S.E.2d 685. See Part III.A.ii. above for further discussion of Parsons.


\(^{233}\) GA. CODE ANN. § 14-2-1602 (2010) is substantively identical to the modern MBCA formulation except it provides an additional provision that gives corporations a right to limit shareholder inspection rights in their bylaws or articles for shareholders owning 2% or less of the outstanding shares. Notably, the Georgia statute does include the Savings Clause of the modern MBCA. Additionally, the official comment to the Georgia statute uses language as found in the MBCA comments, stating that the statute is not a substitute for a common law right of inspection, to the extent one is found to exist by a court.

\(^{234}\) Courts have noted that the statements of a single legislator do not hold precedential value as evidence of the entire legislature’s intent. Tucson Gas, 428 P.2d at 689-90; Shabshelowitz, 588 N.E.2d at 632. Even though such evidence might not dictate a particular outcome, however, does not mean such evidence is not important to the debate.


\(^{236}\) Id. at 300.
statutory revisions were being enacted to restrict shareholder access to corporate books and records.

The Georgia statute differs from the MBCA by allowing corporations to opt to restrict access to certain enumerated books and records to those shareholders owning more than 2% of the corporation’s stock. Such election could be made in the bylaws of the corporation. The legislative history referenced above reflects Georgia’s intent to restrict access in certain circumstances and to abrogate the common law. But Georgia’s legislative history relates to the adoption of the 2% ownership provision and, as such, would not necessarily relate to other states that do not have such a provision. Despite the differences in the statutes, however, this legislative history is indicative of a larger point – that state legislatures may adopt the MBCA comments as a matter of routine, without giving them much thought. The Georgia legislators appear to have adopted the language of the MBCA and its comments without considering the idea that the Savings Clause and its related comment might be interpreted to give shareholders rights and remedies over and above those provided by statute. Though the intent appears to have been to restrict shareholder access to corporate books and records, the incongruity between this intent and the MBCA comment were not recognized.

Even the drafters of the MBCA do not appear to have fully considered the ramifications of the Savings Clause in the modern formulation of the inspection statute. The comment about preserving the common law appears to be a relic of the earlier formulations of the section. Originally, as has already been discussed, the MBCA provided for a dichotomy between the statutory right and the common law right because different penalties were associated with each. Under earlier formulations of the MBCA, for instance, if a shareholder held 5% of the shares of the corporation, such shareholder had the ability to enforce a penalty of personal liability against the officers or agents who wrongfully refused the request. If a shareholder did not meet the 5% threshold, the shareholder could still assert his common law inspection rights, but the penalty of personal liability was not available to him. In fact, the drafters of the MBCA indicated that the “primary purpose” of the inspection legislation at the time was to “prescribe penalties which should make it unlikely that reasonable requests will be refused.”\(^{237}\) In other words, the purpose of the initial MBCA inspection statute was to allow a certain class of shareholders to have a special remedy – that of personal liability for officers and agents – while shareholders who did not meet that classification would be able to access books and records under the common law, but would not get the special statutory remedy.

Under the current MBCA, there is no longer a threat of personal liability for the officers or agents of the corporation.\(^ {238}\) There is no longer a set of special remedies for any class of shareholder – rather, all shareholders are collapsed into one category and all must show a “proper purpose” to gain access to the more sensitive corporate books and records. All shareholders now have access to the same set of remedies, and those remedies do not include the ability to impose personal liability on officers and agents.\(^ {239}\) As such the original reason the drafters gave for the


\(^{238}\) The drafters recognized that courts were reluctant to impose penalties on officers or agents for action taken on behalf of their principals, which was one reason for rejection of this remedy in the later versions of the MBCA. Model Bus. Corp. Act Ann. § 16.02 annotation at 16-19 (3d ed. 1996).

\(^{239}\) According to the drafters of the MBCA, there are still twelve states that adhere to a version of the earlier edition of the MBCA, requiring either a percentage ownership requirement (e.g., 5%) or a requirement of ownership for a
need to maintain the common law rights and remedies of shareholders no longer seems to apply. The modern statutory scheme does still provide certain remedies not available at common law. Specifically, under the MBCA, if the court orders the corporation to provide the shareholder access to its books and records, the shareholder can recover its costs of enforcement, including attorneys’ fees.\textsuperscript{240} However, these limited additional remedies do not seem like reason enough to subvert the comprehensive statutory scheme by allowing shareholders who do not meet the statutory requirements to still gain access to books and records based on a separate common law theory.

**B. Public Policy Reasons in Support of Abrogation of Common Law Inspection Rights**

The reasons outlined above for why state inspection statutes should abrogate the common law are largely based on the notion that a non-abrogation position flies in the face of the legislative intent to provide for one comprehensive set of inspection rights and remedies. However, even if this underlying assumption is ultimately flawed – in other words, even if the legislative intent was, in fact, not to trump the common law, but to allow it to coexist – this Part argues there are important policy considerations that favor legislative reform that would effectuate the abrogation of common law inspection rights.

Specifically, many of the same policy concerns that support the need for checks and balances on derivative litigation also support a position of statutory abrogation of the common law inspection rights. As such, in order to provide some background, this Part IV.B will first provide an overview of some of the policies behind placing limitations on the availability of derivative litigation. I will then apply those same policy considerations to the context of shareholder inspection rights.

\textit{i. The Need for Checks and Balances on Derivative Litigation}

As mentioned in Part I above, inspection rights play an important role in derivative litigation, and derivative litigation, in turn, plays an important role in protecting the interests of shareholders.\textsuperscript{241} Representative litigation not only provides a remedy to the corporation for losses it suffered at the hands of corrupt or incompetent managers, but also purportedly deters directors and officers from engaging in wrongful behavior in the first place.\textsuperscript{242} But protection of shareholder interests is not the only policy concerned in representative litigation. A byproduct of the deterrence afforded by derivative litigation is that officers and directors may also be reluctant to engage in entrepreneurial risk-taking, resulting in a decline in competitiveness due to a play-it-

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\textsuperscript{240} \textit{Model Bus. Corp. Act Ann.} § 16.02 annotation at 16-23 to -16-24 (4th ed. 2008). However, of these twelve, only two, Alabama and New Mexico, still retain the personal liability penalty of the earlier MBCA. \textit{ Ala. Code} § 10-2B-16.02 (2010); \textit{ N.M. Stat. Ann.} § 53-11-50 (2010). Therefore, the same reasoning that I am advancing with respect to the modern MBCA should apply in the majority of jurisdictions. In fact, two of the states that still retain the threshold requirements (Louisiana and New Jersey) have not only gotten rid of the personal liability provision but provide for no remedy at all. \textit{ La. Rev. Stat. Ann.} § 12.103 (2010); \textit{ N.J. Stat. Ann.} §§ 14A:5-23, 14A:5-28 (2010). This provides even more support for the argument that there is no need to retain the common law inspection rights, even if such a need existed at the time the initial versions of the MBCA were promulgated.

\textsuperscript{241} \textit{Verifone}, 994 A.2d at 356.

\textsuperscript{242} Kinney, \textit{supra} note 3, at 174-75.
safe mentality. As such, courts recognize the importance of allowing corporations to govern themselves to the maximum extent possible without judicial involvement in their internal business affairs. A tension thus exists between allowing shareholders to demand management accountability and requiring shareholders to respect management authority.

When a court allows a shareholder to proceed with a derivative suit, where the shareholder sues on behalf of and in the name of the corporation, an odd role-reversal takes place—the shareholder steps into the role of management, making decisions about who the corporation will sue and all of the other litigation-related decisions, such as when to settle and for what amount. But the shareholder may not be in the best position to make such decisions. For instance, a potential conflict can arise between the interests of one shareholder—particularly a shareholder with an investment in the corporation that is small in size as compared to the size of the corporation as a whole—and the interests of the other shareholders and the corporation. Also, not being used to the managerial role, the shareholder might have a more short-sighted or narrow vision of the corporation than those charged with running the company. Finally, since shareholders are not typically bound by fiduciary duties as are corporate officers and directors, there is nothing to deter them from acting in their own self-interest and ignoring the interests of the other shareholders to the extent their interests are not aligned.

This tension between the competing values of managerial authority and managerial accountability has always been at the core of corporate jurisprudence. However, concerns become even more prominent when placed in the context of modern-day derivative litigation and the ever-increasing prevalence of the “strike suit.” In a “strike suit,” it is actually the plaintiff’s attorneys who are driving the derivative litigation, not the actual wronged shareholders themselves. As an uninterested third party with no economic investment in the corporation, this attorney has no reason to protect the corporation’s interests.

243 Id.
244 Verifone, 994 A.2d at 361 n.26 (citing 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1831 (3d ed. 2010)).
245 Stensland, supra note 103, at 893-94.
246 Id. at 889 (“[E]ach individual shareholder has some personal reasons for being involved, and those personal reasons are not shared by the shareholders-at-large. Therefore the potential for divergent interests arises again.”).
247 In other words, even when there is evidence of corporate mismanagement, handling the matter internally rather than suing the wrongdoers, and thereby making the matter public, might ultimately serve the corporate interests more. Id. at 894. Often, management is in a better position to think through the more long-term effects of such actions than are individual shareholders.
248 Id.
250 STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS 234 (6th ed. 2006) (“To this day, the principal effective incentive that generates derivative actions is legal fees, not shareholder dissatisfaction.”).
251 Verifone, 994 A.2d at 363 n.31 (“[T]he derivative action is susceptible to abuse in cases where derivative claims are filed ‘more with a view to obtaining a settlement resulting in fees to the plaintiff’s attorney than to righting a wrong to the corporation (the so-called “strike suit”).’”) (quoting from DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 1384-85 (5th ed. 1998).
252 Stensland, supra note 103, at 893-94.
Strike suits have led to concerns about the effectiveness of derivative litigation. While the stock price may show improvement as a result, such improvement is typically marginal, and the lengthy and often complex litigation, costly for the corporation, usually settles for far less than the amount sought.\textsuperscript{253} Moreover, where the corporation is contractually obligated to indemnify management for suits where there has been no breach of the duties of loyalty or good faith, the wrongdoers are not the ones actually paying. Instead, the corporation’s premiums on its directors’ and officers’ insurance increase, and it is the attorneys who are left as the main beneficiaries.\textsuperscript{254}

Examples abound of plaintiff’s attorneys relying on “professional plaintiffs” to do their bidding, highlighting the fact that it is too often the attorneys driving the course of – and ultimately benefiting from – the litigation, not the shareholders themselves.\textsuperscript{255} Such “career” or “professional” plaintiffs are repeat plaintiffs who, because they own a small amount of stock in many companies, regularly are proffered as the named plaintiff in derivative suits.\textsuperscript{256} Such plaintiffs have little say in the representation and, as such, it is left to the attorneys to decide when to settle and for how much based on their own financial interests.\textsuperscript{257}

It is not hard to find particularly egregious examples of this where the attorney has not even met the purported plaintiff, despite being well into the litigation process. In one case in North Carolina, for instance, the court admonished the attorney in a derivative suit for knowing virtually nothing about his client.\textsuperscript{258} The court instructed the attorney to at least find out how many shares of the corporation his client owned. It was only upon making this inquiry, at the behest of the court, that the attorney learned the plaintiff had actually sold his minimal interest in the corporation and therefore lacked standing to sue.\textsuperscript{259} The same firm was involved in a suit in New York with similar results. In that case, the firm had proffered a plaintiff who had no understanding of the nature of the derivative action.\textsuperscript{260} The firm failed to consult with the plaintiff about critical events in the litigation, but again was instructed to do so by the court. It was only from the court-ordered consultation with its client that the firm learned that the plaintiff wanted to withdraw from the case because he doubted it had any merit.\textsuperscript{261} The firm replaced the initial plaintiff with a professional plaintiff whose services were “at the beck and call” of his friend, an attorney.\textsuperscript{262} The attorney/friend would monitor the professional plaintiff’s investments, decide when he would serve as a plaintiff in derivative litigation, and refer him to a plaintiff’s attorney.\textsuperscript{263} The court noted that this named plaintiff was “appallingly ignorant” of the many derivative actions – twenty-five at the time – that had been filed in his name.\textsuperscript{264}

\textsuperscript{253} Kinney, supra note 3, at 174.
\textsuperscript{254} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{259} Id.
\textsuperscript{260} In re JP Morgan, 2008 WL 4298588, at *8.
\textsuperscript{261} Id. at 4.
\textsuperscript{262} Id. at 5.
\textsuperscript{263} Id. It is probably a safe bet to assume this attorney/friend received referrals in return from the plaintiff’s attorneys to whom he directed his career plaintiff friend.
\textsuperscript{264} In re JP Morgan, 2008 WL 4298588, at *10.
Despite these problems with derivative litigation, it still remains an important means through which a shareholder can protect his economic interest in the corporation. However, in balancing the interests of managerial authority and accountability, courts also recognize that derivative litigation is not the only protection that shareholders have against corporate mismanagement. A number of additional protections exist—both formal and informal. Among the informal protections are various market forces. Managers, for instance, have their reputations to protect and often their bonus compensation is tied to stock performance. Similarly, since managers often own stock in their own corporations, arguably their interests are aligned with those of the corporation and other non-management shareholders.

Formal protections mostly exist for shareholders of publicly traded corporations. Such formal protections include the federal regulations mandated by the Sarbanes-Oxley Act of 2002 that expanded disclosure and governing rules, requiring public corporations to establish audit committees and prohibiting auditors from providing any services to their audit clients other than audit services to avoid any conflicts of interest. NYSE and NASDAQ have also imposed stringent listing requirements. For instance, corporations listed on the NYSE, in addition to having an independent audit committee, must have a majority of independent directors and shareholder approval of equity compensation plans. Public corporations are also subjected to rigorous disclosure requirements pursuant to the Securities Exchange Act of 1934. Companies with more than $10 million in assets or more than 500 shareholders must file annual and other periodic reports with the Securities and Exchange Commission, which are made publicly available to shareholders. The Securities Exchange Act also governs the disclosures in materials used to solicit shareholders’ votes in annual and special meetings of the shareholders. Such formal protections are constantly evolving. For instance, in light of the most recent corporate corruption scandals emerging from the housing market crash, a House-Senate conference committee recently approved proposals to restrict trading by banks for their

265 As Professor Bainbridge notes: “Managers, [unlike shareholders], cannot diversify their firm-specific human capital (or their general human capital, for that matter). If the firm fails on their watch, it is the top management team that suffers the principal losses.” Stephen M. Bainbridge, Unocal at 20: Director Primacy in Corporate Takeovers, 31 Del. J. Corp. L. 769, 827 (2006).


267 There are, however, state law protections that apply to both private and public corporations, such as the corporate jurisprudence involving oversight liability. For instance, directors have an obligation to take affirmative compliance measures by ensuring that proper reporting systems are established by management. The Convergence of Good Faith, supra note 249, at 594-95.

268 Id. at 571.

269 Id. at 572; NYSE Euronext, Listed Company Manual §§ 303A.01, 303A.06, 303A.08 (2009), available at http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F5F1%5F4%5F3&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F (The section numbers are listed on the left hand side of the website; click on the section number to hyperlink to the section materials) (last visited Jan. 30, 2011).

270 15 U.S.C. § 78l(g)(1) (section 12(g) of the Securities Exchange Act of 1934) (2010); Exemption from 12(g) of Securities Exchange Act of 1934, 17 C.F.R. § 240.12g-1 (2011) (“An issuer shall be exempt from the requirement to register any class of equity securities pursuant to section 12(g)(1) if on the last day of its most recent fiscal year the issuer had total assets not exceeding $10 million and, with respect to a foreign private issuer, such securities were not quoted in an automated inter-dealer quotation system.”).

own benefit and requiring banks and their parent companies to segregate much of their derivatives activities into separately capitalized subsidiaries.\textsuperscript{272}

Given all these considerations, courts and legislatures have carefully balanced the competing interests of managerial authority and accountability and determined that it is appropriate to erect certain barriers in the way of a would-be litigant wanting to file a derivative lawsuit. Such barriers include the demand requirement and the “no discovery” rule of FRCP 23.1, each discussed in Part I supra. One purpose of such hurdles was to deter the “sue first, investigate later” mentality often espoused by plaintiffs’ attorneys, who file suit and only then go through corporate files “hunting for wrongdoing.”\textsuperscript{273}

\textit{ii. The Need for Checks and Balances on Inspection Rights}

These same policy concerns support a position of statutory abrogation of the inspection rights shareholders had under the common law. Because shareholders are denied access to discovery in pleading demand futility or improper demand rejection, it is critical that they still retain their basic rights to access the books and records of the corporations in which they invest. However, such inspection rights must be tempered for the same reasons driving the various barriers to derivative litigation.

The notion of a potential conflict of interest between the interests of one minority shareholder (or his attorney) and the interests of the collective group of shareholders is no more apparent than in the inspection arena. An individual shareholder may experience personal gain from inspection of the books and records, but such inspection might not benefit, and in fact might actually harm, the corporation as a whole. This reality is particularly obvious in some cases, where it is clear that the shareholder does not have the interests of the corporation in mind at the time of the request.

For instance, a shareholder might request access to documents for the primary purpose of harassing corporate management. This may be with an eye toward personal gain – harassing management so as to create a nuisance value for the shareholder’s stock, essentially forcing the corporation to purchase his stock at a premium.\textsuperscript{274} Or perhaps a stockbroker shareholder wants to depress the market value of the stock with the hopes of facilitating her dealing in the same


\textsuperscript{273} Kinney, supra note 3, at 178-79. This purpose was also discussed by the Delaware Chancery Court in \textit{King v. Verifone Holdings, Inc.}, 994 A.2d 354 (2010). In that case, the Delaware Chancery Court addressed the issue of whether it was proper for Verifone to deny the plaintiff-shareholder access to the requested books and records, and in so doing expressed its extreme displeasure with the plaintiff’s failure to make any meaningful pre-suit investigation. Rather than using the inspection statute and the other “tools at hand” to gather information before filing the derivative suit, the shareholder hastily filed the suit a mere eleven days after the precipitating event – Verifone’s restatement of its earnings. \textit{Id.} at 358. The court surmised that the reason the shareholder – or perhaps more to the point, his attorney – filed on such an expedited basis was merely to “win the filing Olympics” and be appointed lead plaintiff. \textit{Id.} at 355. As soon as Verifone announced it was restating its earnings, the attorneys “sprinted to the court: to file the derivative suits.” \textit{Id.} at 357. The court pointed out that the complaints did not seek expedited treatment or injunctive relief. \textit{Id.} Rather, they simply sought “monetary damages for the consequences of past events” and, as such, there was no reason for the haste that would benefit the shareholders of the corporation. \textit{Id.} Rather, the real reason was related to the self-interest of the attorney “jockeying for position as lead counsel.” \textit{Id.}

stock as a broker.\textsuperscript{275} Harassment might be motivated by even baser desires than personal gain, such as revenge against corporate management. A shareholder might, motivated by personal hostility toward one or more officers or directors of a corporation, make requests with the hope of finding something he might use out of context to stir up dissatisfaction in the other shareholders with the current management.\textsuperscript{276}

In addition to harassment, competition is another personal reason for which a shareholder might make an inspection demand on a corporation.\textsuperscript{277} If the shareholder owns only a small interest in the corporation, but owns a large interest in its rival, that shareholder would be individually benefited by passing along corporate information to the competitor, whereas the corporation as a whole and the other shareholders would clearly be harmed.

Even when shareholders making inspection requests think they are acting in the best interests of the corporation, a conflict with the other shareholders and the corporation may arise. Complying with inspection demands is not costless, particularly for large multi-national corporations.\textsuperscript{278} The burdens placed on the corporation in responding to any given inspection request might not be worth the resulting benefit to the corporation, assuming any such benefit will even materialize.\textsuperscript{279} Though the MBCA provides a mechanism whereby a corporation might charge a shareholder reasonable costs for production and reproduction of the relevant documents,\textsuperscript{280} a corporation still may have to expend a large number of man-hours and incur attorneys’ fees to accommodate a request.

For instance, in Mannato v. SunTrust Banks, Inc., a shareholder who owned approximately 300 shares of SunTrust, i.e., a de minimis interest, requested documents related to the corporation’s decision to refuse its demand to bring suit against some of the officers and directors of the company for corporate mismanagement.\textsuperscript{281} Specifically, the shareholder requested, among other things, “every document provided to, presented to, created by or for, or otherwise reviewed by” the Board or Senior Management (a group totaling at least 31 individuals) over the previous four and a half years that concerned the impact of “deteriorating housing market conditions” on SunTrust’s performance.\textsuperscript{282} This request came after the corporation had already provided the requesting shareholder with a 65-page report of the Demand Review Committee (comprised of three independent directors and independent counsel)

\textsuperscript{275} Moore v. Rock Creek Oil Corp., 59 S.W.2d 815, 818 (Tex. Comm’n App. 1933).
\textsuperscript{278} In Holdsworth v. Goodall-Sanford, Inc., the court noted how careful it must be in granting the power to inspect books and records because an inspection order can “affect unfavorably so many innocent stockholders, and may cause such inconvenience or perhaps such ruinous results” to an international corporation with extensive operations.” 55 A.2d 130, 132-33 (Me. 1947).
\textsuperscript{279} As one author has pointed out, the costs of generating information at some point “fall short of the benefits of having more information,” at which point an inspection request for such information becomes “wealth-reducing.” Once the request becomes wealth-reducing, presumably the shareholders as a group would not want to require the corporation to produce the information. Fred S. Mchesney, ‘Proper Purpose,’ Fiduciary Duties, and Shareholder-Raider Access to Corporate Information, 68 U. Cin. L. Rev. 1199, 1207 (2000).
\textsuperscript{280} MODEL BUS. CORP. ACT ANN. § 16.03(d) (4th ed. 2008).
\textsuperscript{282} Complaint, \textit{supra} note 281, at 11 nn. 2-3, 41 para. 108.
outlining its conclusion that the demand lacked factual or legal merit.\textsuperscript{283} Considering this request was made in 2010, two years after the housing market crash and ensuing financial crisis, to comply with this request would have been no small order.

Man-hours, copying, and mailing are not the only costs associated with compliance. In most jurisdictions, courts are empowered to craft reasonable restrictions on the inspection rights so as to protect the legitimate business concerns of the corporation.\textsuperscript{284} So, for instance, a court might require a shareholder to sign a confidentiality agreement with the corporation, agreeing not to disclose certain information learned from the inspection, for instance, competitors.\textsuperscript{285} There are costs associated with drafting and negotiating such confidentiality agreements or complying with other “reasonable restrictions.” And, when the corporation feels the confidentiality agreement has been breached, there are costs associated with enforcement.\textsuperscript{286}

Compounding all of these factors, of course, is the issue of the strike suit discussed above. Since the person driving the litigation might not be a shareholder at all, this person has nothing to lose from decisions that might ultimately harm the corporation. If the books and records request is made as part of such a suit, the collective shareholders and the corporation as a whole might suffer from costly production of documents, simply as part of the process of padding the plaintiff’s attorney’s wallet.

As discussed in Part I, inspection rights play an important role in corporate jurisprudence and are increasingly important as one of the “tools at hand” available for would-be plaintiffs in shareholder derivative suits. But allowing shareholders to circumvent the additional restrictions imposed by inspection statutes by reverting to outdated theories of the common law discounts the thoughtful policies behind the barriers that currently exist for would-be derivative plaintiffs. Certainly, more expansive access to books and records allows shareholders to do at least a partial end-run around the FRCP 23.1 “no discovery” rule discussed above that prohibits shareholders from gaining access to more sensitive and voluminous corporate materials at an early stage of litigation. Such an end-run discredits the very real concerns about the “sue first, investigate later” mentality that is common place in derivative litigation, particularly attorney-driven suits where the attorney is concerned with being appointed lead counsel.

\textsuperscript{283} Complaint, \textit{supra} note 281, at Exhibit I.


\textsuperscript{285} Johnathan D. Horton, Essay, \textit{Oklahoma Shareholder and Director Inspection Rights: Useful Discovery Tools?}, 56 \textit{OKLA. L. REV.} 105, 118 (2003). Another common limitation is when the court restricts the manner in which the documents may be reviewed. For instance, with an eye toward preventing dissemination of the information, a court might require that the documents be reviewed on the premises. 5A Fletcher Cyc. Corp. § 2245 (2011). Though this might protect the corporation from unwanted and harmful dissemination of the information, providing on-site access can have costs for the corporation as well. For instance, if a team of five accountants is hired to inspect the books and records of the corporation and this team has to be provided access on the corporate premises during business hours, their presence could be fairly disruptive. See, e.g., Schwartzman v. Schwartzman Packing Co., 659 P.2d 888 (N.M. 1983).

\textsuperscript{286} Practically speaking, particularly when large numbers of shareholders request access to the same documents, enforcement might not even be possible. For instance, a corporation likely would not be able to determine exactly who breached the agreement. Confidentiality agreements are not costless for shareholders either. It may have a chilling effect in that a shareholder, particularly a less savvy shareholder, when faced with having to sign a confidentiality agreement to access documents, might decide not to make the request in the first place. Stensland, \textit{supra} note 103, at 896.
The MBCA inspection statute and its progeny recognized these concerns by borrowing some restrictions from the common law (such as the proper purpose requirement) and imposing additional restrictions formulated by the MBCA drafters and state legislators (such as allowing access only to a defined list of books and records). By imposing statutory restrictions on shareholders seeking access to books and records, an individual shareholder – or an individual plaintiff’s attorney, as the case may be – is prevented from unduly burdening the resources of the corporation to benefit one at the expense of the whole. The inspection rights are not intended to give shareholders a right in the day-to-day management of the firm and, as such, must be restricted. The statute provides for virtually automatic access to basic documents like the articles and bylaws of the corporation and minutes from recent shareholders’ meetings. Additionally, it provides for attorney-fee-shifting under § 16.04 if the corporation has frivolously refused access to a shareholder. This statutory regime, combined with the other formal and informal protections that exist to safeguard shareholders’ economic interests, strike the appropriate balance between managerial authority and autonomy.

V. **SUGGESTED REVISIONS TO THE MBCA TO EFFECTUATE ABDROGATION OF COMMON LAW INSPECTION RIGHTS**

As set forth above, the drafters of the MBCA and the legislatures adopting the MBCA likely did not intend for the common law rules to survive enactment of the books and records statute, at least not in its current form, which is more restrictive than the common law in a number of ways. However, even if the legislative intent was to allow the common law inspection rights to continue, the public policy reasons outlined above suggest the need for reform.

In order to encourage the shift from a non-abrogation to abrogation position by those jurisdictions currently adhering to the majority position, some changes are necessary to the MBCA inspection statute. Fortunately, it only requires modest changes to the inspection statute to have a great impact on the abrogation debate. In fact, though §§ 16.01 through 16.04 and certain other discreet sections of the MBCA, such as § 7.20, all deal directly with shareholder inspection rights, only § 16.02 requires amendment. Specifically, statutory abrogation of the common law could be clearly achieved by (i) removing the Savings Clause language in § 16.02(e)(2), and (ii) incorporating a new subsection (g) that would expressly abrogate the common law. These two suggested revisions are set out more clearly in Table 1, attached to this article. As discussed above, the Savings Clause could be interpreted to mean courts are still able to compel production of documents under other statutes (such as the federal securities laws), and not under the common law. Despite this alternative interpretation, the language of the Savings Clause has clearly caused confusion in the law and ultimately the provision is not necessary.

In addition to the revisions to the actual statutory language, the Official Comment to § 16.02 also requires amendment. The language of the Official Comment does not directly state that a common law inspection right exists. Even though the comment is agnostic about the existence of a common law right, it still lends itself to the interpretation that the drafters’ intent is for non-abrogation. As such, the language in Section 4 of the Official Comment (regarding §§ 16.02(d) and (e) of the statute), should be revised by removing the current reference to the potential existence of a common law right. In its place, language should be added expressly indicating the

287 Id. at 886.
intent that a shareholder only be able to access the books and records of a corporation if it meets the statutory requirements therefor.

These two simple changes will sufficiently address Statutory Treatment Cases. Shareholders seeking access to books and records will be able to review the relevant statute and know exactly what prerequisites will need to be established before they have viable inspection rights. Though some of the issues involved in such a determination – such as establishing the existence of a proper purpose and good faith – ultimately may require court intervention, this change should somewhat streamline books and records litigation by making it clear exactly what types of documents are available for inspection. For instance, a shareholder will only be able to seek access to minutes of meetings of the board and shareholders (or action taken without meeting), accounting records, and the record of shareholders. Shareholders will not be able to access internal memoranda and other sensitive materials. This may eliminate overreaching on the part of plaintiff’s attorneys attempting to subvert the FRCP 23.1 “no discovery” rule. Additionally, in one of the dozen or so jurisdictions that have imposed additional requirements on shareholders, such as a minimum ownership requirement for access to sensitive books and records, shareholders who do not meet that threshold would be discouraged from litigating an inspection request, knowing there is no other potential avenue for such access.288

Silent Statute Cases would not necessarily be affected by these suggested changes. In Silent Statute Cases, the statute does not expressly address the subject matter. Therefore, the question of whether a shareholder should be able to access the books and records of the entity in question would still be open to debate. Allowing litigants to resort to common law theories of inspection rights for these cases does not present the same concerns as exist in Statutory Treatment Cases. For Statutory Treatment Cases, the legislature has spoken on the very factual scenario at issue in the case, such as, for instance, where the legislature has specifically delineated what books and records are available for inspection (minutes and accounting records) and the shareholder seeks access to something else (internal memoranda). For Silent Statute Cases, the argument that the legislature has not preempted the arena is more plausible because the statute is silent on the particular factual scenario at issue.289

288 Note that two such states that maintain these additional requirements – Louisiana and Maryland – have gotten it right by eliminating the MBCA Savings Clause language and the related commentary. MD. CODE ANN., CORPS. & ASS’Ns §§ 2-512, 2-513 (2010); LA. REV. STAT. ANN. § 12.103 (2010).

289 While allowing for the common law to coexist in these Silent Statute Cases may be acceptable in certain instances, addressing some (though not all) of these issues in the MBCA could provide additional clarity in the law. And providing statutory treatment of Silent Statute Cases is not without precedent. For instance, in the inspection provisions of the Delaware code, found in § 220 of title 8 of the Code, the legislature has specifically provided for the inspection by shareholders of books and records of a wholly-owned subsidiary. In Delaware, a shareholder can access the books and records of a corporation’s wholly-owned subsidiary so long as such inspection (i) would not breach an agreement between the subsidiary and a third party or the corporation and a third party and (ii) the subsidiary would not have the right to deny the corporation the documents if the corporation, rather than a shareholder of the corporation, had requested the documents. DEL. CODE ANN. tit. 8, § 220(b)(2). Another example exists with respect to foreign corporations. The MBCA, like many states, is silent on how inspection rights should be handled. Under § 1.40, the MBCA expressly sets out that the word “corporation” when used throughout the Act refers only to domestic, not foreign corporations. As such, the inspection provisions of the MBCA do not contemplate foreign corporations being included in the books and records requirements and the issue is left to common law. However, as with subsidiary corporations, there is precedent for codification of inspection rights with respect to foreign corporations. The California inspection statute, for instance, applies to foreign corporations that
VI. CONCLUSION

Shareholder inspection rights historically have played a prominent role in shareholder derivative litigation. Moreover, the losses suffered by companies and investors in the wake of the 2008 financial crisis have brought shareholder access issues to the forefront. In light of the obfuscation involving subprime mortgages that led, in part, to the financial crisis, the natural temptation is to react against the lack of transparency that characterized the transactions leading to the meltdown. The most obvious reaction is thus to open the floodgates to shareholders, allowing them more and more access to corporate books and records—a reaction that a majority of jurisdictions seem poised to follow given their previous unwillingness to limit shareholder access to that granted by state statutes. However, such a reaction would undermine the thoughtful barriers placed on derivative litigation, potentially increasing strike suits to the benefit of plaintiffs’ attorneys and to the detriment of the majority of shareholders, and upset the balance created by state legislatures in enacting inspection statutes. Moreover, such a reaction does not take into account other protections—both formal and informal—that already exist for shareholders to protect their economic interest in the corporation.

By clarifying § 16.02 of the MBCA and the related Official Commentary, and specifically providing for abrogation of the common law rules regarding shareholder access, the drafters of the MBCA would remedy confusion in the law surrounding the existence of two separate regimes governing the rights and remedies of shareholders requesting corporate books and records.

Such a position is justified by the fact that the arguments of jurisdictions taking the non-abrogation approach no longer hold up in light of modern-day books and records statutes. Though early inspection statutes did not require a shareholder to establish a “proper purpose” to obtain access, and therefore could be viewed as an expansion of the common law rather than a restriction, most modern-day statutes do incorporate such a requirement. As such, the notion that the common law should continue to exist because it was more restrictive than the statutes is no longer accurate. Additionally, though the MBCA and its progeny do not include express language to suggest abrogation of the common law, it is reasonable to conclude that the common law has been abrogated through “necessary implication” by the statutes. The statutes are, for the most part, comprehensive in their treatment of shareholder inspection rights. With such a complete statutory scheme, there is virtually no area of inspection rights of shareholders left unaddressed and there is no room for the continued existence of the related common law rules. Finally, though a reasonable interpretation of the Savings Clause is that the legislative intent was for non-abrogation, it is certainly not the only interpretation. In fact, if the language of the Savings Clause was meant to maintain the common law, the remainder of the inspection statute arguably becomes meaningless.

There are also sound policy reasons for the inspection statutes to trump their common law counterpart. In the inspection arena, there is a real potential for a conflict of interest between the

_Keep their records in California or that have their principal executive office in the state._ **CAL. CORP. CODE § 1601 (2010).** A complete discussion of the proper statutory treatment of the silent statute cases, however, is beyond the scope of this article.
interests of one shareholder (or his attorney) and the interests of the collective group of shareholders. An individual shareholder may experience personal gain from inspection of the books and records, while that same inspection request might actually harm the corporation – and therefore the other shareholders – as a whole. Compounding this potential conflict is the issue of the strike suit. Since the person driving the litigation might not be a shareholder at all, but rather an attorney, this person has nothing to lose from decisions that might ultimately harm the corporation. Additionally, allowing shareholder-plaintiffs to circumvent the restrictions imposed by inspection statutes discounts the thoughtful policies and legislative balancing behind the barriers that currently exist. The statutory regime of the MBCA, as modified per my suggestions in Part V, combined with the other formal and informal protections that exist to safeguard shareholders’ economic interests, provide the appropriate protection for shareholders and strike the right balance between managerial authority and accountability.

As previously discussed, these modifications to the MBCA would really only have an impact on the Statutory Treatment Cases – the Silent Statute Cases would not necessarily be affected by these suggested changes. As discussed in Part IV above, the most common Silent Statute Cases involve the following questions: (i) whether shareholders can access the books and records of a wholly-owned subsidiary of a corporation in which they own an interest, and (ii) whether members of banking corporations, foreign corporations, or non-stock corporations should be able to access books and records of the entities in which they hold an interest. Neither of these is specifically addressed by statute and this article does not suggest that such issues need to be codified in the inspection statute. Allowing courts to use the common law to guide them on whether such access should be permissible is acceptable to the extent the legislature has not codified the matter, either through its state inspection statute or through some other means. However, it would seem that once courts have made the determination that a shareholder or member does in fact have some base level right of access in these situations the scope of the access granted should not be greater than that provided by the inspection statute.

While allowing for the common law to coexist in these Silent Statute Cases may be acceptable in certain instances, addressing some (though not all) of these issues in the MBCA could provide additional clarity in the law. It is beyond the scope of this article, however, to fully address the different types of Silent Statute Cases and the proper statutory treatment of each. The concerns presented by Statutory Treatment Cases are much more immediate than those presented by Silent Statute Cases, and can be – indeed, should be – addressed by the changes to the MBCA and Official Commentary (and state counterparts thereof) described above and delineated in Table 1.

290 For instance, to the extent that a state’s LLC code addresses the inspection of books and records by members of an LLC, that should trump any common law discussion of the issue.
291 Unless, of course, another statute conflicts with this. For instance, if the LLC statute provides for more access to books and records for members of an LLC than the relevant state statute on shareholder inspection rights, then this additional access should be granted. Of course, in this instance where there is a statute on point, the common law would not have been involved in the first place.
Table 1
Proposed Revision

<table>
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<tr>
<th>2008 MBCA</th>
<th>Proposed Revision</th>
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<tr>
<td>§ 16.02. INSPECTION OF RECORDS BY SHAREHOLDERS</td>
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<tr>
<td>(a) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation’s principal office, any of the records of the corporation described in section 16.01(e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.</td>
<td>(a) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation’s principal office, any of the records of the corporation described in section 16.01(e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.</td>
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<tr>
<td>(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:</td>
<td>(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:</td>
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<tr>
<td>(1) excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting to the extent not subject to inspection under section 16.02(a);</td>
<td>(1) excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting to the extent not subject to inspection under section 16.02(a);</td>
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<td>(2) accounting records of the corporation; and</td>
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<td>(3) the record of shareholders.</td>
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<td>(c) A shareholder may inspect and copy the records described in subsection (b) only if:</td>
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<td>(1) his demand is made in good faith and for a proper purpose;</td>
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</tr>
<tr>
<td>(2) he describes with reasonable particularity his purpose and the records he desires to inspect;</td>
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<tr>
<td>and</td>
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<tr>
<td>(3) the records are directly connected with his purpose.</td>
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<tr>
<td>(d) The right of inspection granted by this section may not be abolished or limited by a corporation’s articles of incorporation or bylaws.</td>
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</tr>
<tr>
<td>(e) This section does not affect:</td>
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</tr>
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<td>(1) the right of a shareholder to inspect records under section 7.20 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant;</td>
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<tr>
<td>(2) the power of a court, independently of this Act, to compel the production of corporate records for examination.</td>
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</tr>
<tr>
<td>(f) For purposes of this section, “shareholder” includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf.</td>
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<td>(g) This section abrogates any inspection rights that any shareholder of a corporation may have had at common law.</td>
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</tbody>
</table>