

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

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I. Purpose

Often an economic expert is engaged by an attorney to determine the value of a minority shareholder's interest in a commercial or family dispute. Many times these disputes are related to some form of disagreement over the value of a minority shareholder interest. Occasionally the economic claims to a minority shareholder are associated with a temporary loss of future profits of the Company in which the minority shareholder has a claim (Scenario T), and at other times the economic claim may be associated with a permanent loss of profits or simply, the loss of asset value in an enterprise (Scenario P).

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

In a state like New Jersey, temporary economic damages for lost profits and permanent losses for loss of value to a minority shareholder are calculated different. The differences in calculating either type of loss, permanent or temporary, creates a system based on partial justice with respect to the calculation of pecuniary damage awards to the plaintiffs. This paper will demonstrate this dichotomy.

¹ Assumes that the expert is calculating losses uses the before and after method.

² See Young, "Integrating Dividends, Interest and Value in Commercial Damage Cases: Toward a Comprehensive Methodology, TEA, Volume 15, 2016, for an explanation of what profits should be used.

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

II. Applied Standards

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

Fair Market Value Standard

The FMV standard, as defined by the Internal Revenue Service (IRS) Revenue Ruling 59-60 is the amount at which a property would change hands between a willing buyer and willing seller, when the former is not under any pressure to buy, and the latter is not under any pressure to sell, both parties having reasonable knowledge of relevant facts. [SOURCE: Rev. Rul. 59-60, 1959-1 CB 237 – IRC Sec. 2031.] The FMV standard expects that a willing buyer would take into consideration various risks associated with a purchase. The risk and reward of holding ownership interests in securities of any company is reflective of multiple factors that ultimately increase or decrease the value of the Company. Although there are an unlimited number of such variables, the following are those typically considered when valuing a Company: (1) size of the Company; (2) capitalization structure of the Company; (3) ownership percentage to be purchased/sold; (4) financial health of the Company; (5) liquidation possibilities for the investment; (6) industry and market structure in which the Company competes; (7) quality of the Company's management; and (8) efficiency of operational processes implemented at the Company.

When a minority shareholder invests in a privately owned, closely held company, the risks associated with that investment are typically greater than the risks associated with owning a similar size interest in a publicly traded company. There are two main reasons that are important and relate to the argument made in this paper. First, interests in privately held companies are typically classified as illiquid investments, mainly due to the time needed to sell the interest. For many minority owners there is not a readily

available market, such as the public equity markets to sell these shares. Second, although many times minority shareholders in closely held, private companies have voting rights, their votes have limited ability to influence the decisions of a majority shareholder. These additional risks are classified as liquidity and control risks, as will be described later.

In order to establish a FMV, usually an expert would complete one or more of a series of valuation approaches, including but not limited to an Income Approach, Market Approach, and to a lesser extent an Asset Approach.

Income Approach

The Income Approach estimates the fair market value of a business entity based upon its future earnings capacity. An earnings stream similar to operating income or cash flow is converted into an estimate of value by discounting the future cash flows, or by capitalizing the current stream of earnings using an applicable discount or capitalization rate (CR). The Income Approach is based on the notion that the value of a business is equal to the present value of the entity's future cash flows. There are two (2) methods within this approach, the Discounted Future Benefits or Cash Flow (DCF) and Capitalization of Earnings Method (CEM). The DCF Method requires a forecast of earnings or cash flows for several finite future periods and an estimated terminal value for the business, based on the infinite period of time. These amounts are discounted to present value to determine the present value of the Company. The CEM is performed by converting an estimate of a single year's cash flow into an indication of value, either by dividing the earnings estimate by an appropriate CR³ or by multiplying the earnings estimate by an appropriate factor. This method is appropriate for a company when future operations are expected to be similar to current operations. In other words, the critical component to the value of the business is its ability to generate future earnings/cash flows.

³ For those not familiar with this concept, a CR is relatively similar to an annuity formula, whereby the future cash flow is divided by the net discount rate.

Discount Rate

The discount rate used to calculate a value for a company using either of the Income Approaches described here requires a calculation. Two popular discount rate methods used for private companies are the Buildup Method, and the Capital Asset Pricing Model (CAPM). Both of these methods rely upon the historical financial results of *publicly traded* companies. By way of example, the Build Up Method is an additive method that starts with the risk free rate, typically the twenty (20) or thirty (30) year treasury yield, then adjusted upward to account for the required historical returns on equity investments in the public market, and further adjusted for the returns of public companies based on the size of the firm, and the industry in which they compete. The CR is the discount rate less the long-term sustainable growth rate. **The value calculated using the income approach is typically referred to as a marketable, non-controlling value because it is completed using data aggregated from publicly traded firms and most publicly traded firms are owned by many non-controlling shareholders.** This is an important and often overlooked observation that we will address in later sections of this paper.

Market Approach

Another approach commonly used to value a company is the Market Approach. This approach calculates the value of a business using two (2) primary methods: examining private merger and acquisition (M&A) transactions involving comparable target companies (referred to herein as the Completed Transaction Method), and by examining and analyzing public companies that operate in the same or similar industry as the Company (referred to herein as the Guideline Public Company Method).

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

multiple publicly traded companies is the best reflection of the value for a company. [SOURCE: Pratt, Shannon P. “The Market Approach to Valuing Businesses,” Wiley & Sons, 2006, pp. 25-34.]

The Completed Transaction Method is a method where private or public M&A transactions are identified via multiple databases to find companies that were sold in the recent past, with similar characteristics as the Company. The average of transaction multiples are then applied to the Company’s revenue or profit metrics.

The Guideline Public Company Method calculates the value for the Company under marketable, minority value, and the Completed Transaction Method, calculates a non-marketable, control value if only using private company transaction data and marketable, control value if only using public company transaction data.

It is important to understand that the values established in the Income and Market Approaches using FMV are different, and by not taking into consideration these differences, the court is providing incongruent advice, and is opening the door for an expert to game the outcome, if they so choose. As the paper progresses, these inconsistencies will become known. In the following table, the values calculated under each approach are summarized. It is important for the court to understand these values to help better structure the proper FV standard.

Table 1: Summary of Values Established based on Approach

Approach	Marketability	Control
Income Approach	Marketable – Public Value	Non-Control
GPCM	Marketable – Public Value	Non-Control
CTM (private data)	Non-Marketable – Private Value	Control
CTM (public data)	Marketable – Public Value	Control

Fair Value Standard

Since 1968 the statutory standard for valuation in litigation in New Jersey is fair value. [SOURCE: *Balsamides v. Protameen, Inc.*, 734 A.2d 721, 736.] For shareholder oppression cases in New Jersey, since 1973 FV has been the standard of value used with the enactment of the Minority Shareholder Statute. Its purpose is to the benefit of the oppressed and to the detriment of the oppressor. The Minority Shareholder Statute however contains a clause allowing for additive or detractive equitable adjustments by the court for acts deemed oppressive, fraudulent, or an abuse of power. [SOURCE: NJ Rev Stat § 14A:12-7 (2013).]

Partnerships in New Jersey also adhere to the FV standard in buyouts. Buyouts occur when a partner is disassociated from a partnership and the entity remains operating. Disassociation may occur for a variety of reasons, such as breach of fiduciary duties, other members of the partnership voted out unanimously the leaving partner, or if it is unlawful to continue the partnership with a particular partner. As of the date of the partner's withdrawal, the buyout price is the FV based on the right to share in distributions from the partnership unless the operating agreement contains a formula for the price. In addition, if economic damages are awarded for wrongful dissociation the award is offset against the buyout price. [SOURCES: NJ Rev Stat § 42:1A-24; 31; and 34 (2013).]

New Jersey has adopted, however, the American Law Institutes' (ALI) 1992 definition of FV in case law,

"...the value of the eligible holder's proportionate interest in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability," [SOURCE: American Law Institute, "Principles of Corporate Governance," § 7.22.]

By following the FV standard in New Jersey for valuations, the courts dissuade actions such as controlling shareholders pushing out non-controlling shareholders, or non-controlling shareholders from filing lawsuits against controlling shareholders to get an increase in value for their minority (and non-marketable for private companies)

interests. Moreover, by following the ALI's definition, New Jersey courts are able to permit marketability and or control discounts in uncommon cases. The extraordinary circumstance exception to the FV standard in shareholder oppression cases is the direct result of two (2) New Jersey Supreme Court's rulings in 1999.

The following are some cases in which New Jersey courts awarded or did not award appraisal discounts:

- (1) *Balsamides v. Protameen Chemicals, Inc.* - In this case the oppressed Emanuel Balsamides, Sr. (Balsamides) and oppressor Leonard M. Pearle (Perle), each owned 50.0% ownership in Protameen Chemicals, Inc. (Protameen) and had been in business together for twenty five (25) years. A series of spiteful and abusive actions by Perle against Balsamides led the oppressed to petition the court for dissolution of Protameen, pursuant to N.J.S.A. 14A: 12-7. The court ordered Perle to sell his shares to Balsamides, and deemed there were unusual circumstances surrounding the case because the oppressed was purchasing the oppressor's shares. Accordingly, to the disadvantage of Perle and to the benefit of Balsamides a marketability discount was applied. Since Perle was the oppressor, had the FV standard been permitted, Balsamides would have paid more for Perle's interest, which the court ruled was unfair. [SOURCE: *Balsamides v. Protameen Chemicals, Inc.*, 160 N.J. 352, 734 A.2d 721, 1999 N.J. LEXIS 836.]

- (2) *Lawson Mardon Wheaton, Inc. v. Smith* - On the exact same day the New Jersey Supreme Court ruled on *Balsamides v. Protameen Chemicals, Inc.*, it also ruled on the dissenting shareholder case, *Lawson Mardon Wheaton, Inc. v. Smith*. In this case the family owned multinational was attempting a corporate restructuring by creating a dual-class stock arrangement. To do this, the outstanding Company shares were to be purchased at FV. However

the Company's valuation expert applied a 25.0% marketability discount to the dissenting shareholders' shares. 15.0% of Wheaton's shareholders dissented by rejecting the value offered for their shares by its board of directors. The Supreme Court made its ruling, citing the ALI Principles of Corporate Governance, that only under uncommon circumstances may marketability or control discounts be applied. Given the circumstances it was ruled that a corporate restructuring was common, not extraordinary, for businesses and therefore neither marketability nor control discounts were warranted for their interests. [SOURCES: *Lawson Mardon Wheaton, Inc. v. Smith (II)*, 160 N.J. 383, 734 A.2d 738, 1999 N.J. LEXIS 835; and Michael L. Rich, "Fair Value' and Discounting in N.J. Shareholder Oppression Case," *New Jersey Law Journal*, November 3, 2008, pp. 1-2.]

- (3) *Wisniewski v. Walsh* - Most recently in New Jersey a shareholder oppression case ongoing for nearly twenty (20) years epitomized the extraordinary circumstance whereby the Superior Court allowed a marketability discount. In *Wisniewski v. Walsh*, three (3) siblings owned equal shares in a family trucking business. One (1) of the shareholders filed suit against the other two (2), claiming shareholder oppression, but the trial court found the plaintiff to actually be the oppressor. Using its equitable authority, the trial court forced the oppressor to sell his interest at FV. The trial and appeals courts both determined that that the circumstances were uncommon because the selling, minority, and oppressing shareholder was forcing the buyout, and therefore it should not benefit at the expense of the oppressed by receiving an undiscounted valuation. The use of a marketability discount was consequently permitted. [SOURCE: *Wisniesksi v. Walsh*, 2015 N.J. Superior Court – Unpublished, December 24, 2015.]

- (4) *Brown v. Brown* - In marital dissolution cases New Jersey courts using the FV standard have also applied the extraordinary circumstance condition to value a minority business interest. A husband owned 47.5% in his family's wholesale florist business, and was facing a divorce from his wife. The husband's valuation expert applied minority and marketability discounts, while the wife's valuation expert applied neither. Since the divorce and its proceedings were neither unique nor unusual, the appellate court held that discounts should not be applied to the husband's interest in the floral business. The court in its ruling states,

“Given the purpose of equitable distribution to fairly divide the accumulated wealth of a marital partnership, and that the purpose of valuing the shareholder spouse's interest is to determine the non-owner spouse's fair share of other marital assets; where the shareholder will retain his shares and the divorce will not trigger a sale of those shares, lack of liquidity does not affect the fair value of the minority interest. Neither discount is appropriate.”
[SOURCE: *Brown v. Brown*, 348 N.J. Super. 466, 792 A.2d 463, 2002 N.J. Super. LEXIS 105.]

- (5) *Casey v. Amboy Bancorporation* – In *Casey v. Amboy Bancorporation*, the a New Jersey court found no evidence of an extraordinary case. In this case, dissenting shareholders sought a judicial valuation for their shares when the company was attempting to convert from a C to an S corporation. Marketability and control discounts were not utilized, as the court deemed that the circumstances surrounding this case (a restructuring) were normal. [SOURCE: *Kathryn Casey v. Amboy Bancorporation*, No. A-0715-04T3 (N.J. Supr. August 8, 2006).]

Gleaning from the New Jersey case law previously presented, and based on the underlying arguments made in the cases, it appears that the New Jersey Judicial System is

suggesting that FV represents a marketable, and control value, void of any discounts for liquidity and control.

Outside of New Jersey, the doctrine used in shareholder oppression, fiduciary duty, and divorce cases adopt a similar approach and FV standard. Douglas Moll argues that, “the buyout remedy should provide an oppressed minority investor with his pro rata share of the company’s overall value, with no reductions (or “discounts”) for the lack of control or liquidity associated with the minority’s shares.” [SOURCE: Moll, D.K, Shareholder Oppression and “Fair Value”: Of Discounts, Dates, and Dastardly Deeds in the Close Corporation,” Duke Law Journal, November 2004, Volume 54, Number 2, p.1.]

Some cases of states excluding discounts in judicial settings include the following.

- (1) Iowa’s Supreme Court in 1965 in *Woodward v. Quigley* did not permit a minority discount when the majority shareholders voted to extend the life of the Telegraph-Herald into perpetuity in spite of its pending expiration in a year’s time, and the dissent of a minority shareholder. [SOURCE: *Woodward v. Quigley*, 133 N.W.2d 38, 257 Iowa 1077 (1965).]
- (2) Maine’s Supreme Court in 1989 in *Re Valuation of Common Stock of McLoon Oil Co.*, two dissenting shareholders opposed the merging of three companies into one. The majority shareholder voted through the merger and offered to a the dissenting shareholders a price for their pro rata interests including discounts. It was ruled that marketability and control discounts run counter to Maine’s appraisal statue that protects dissenting shareholders in such a case. [SOURCE: *Re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1008 (Me.1989).]
- (3) The Supreme Court of Delaware concluded in 1989 also that marketability and control discounts are unnecessary when the standard of value is FV. This

case involved a short form merger of a minority shareholder's stock, and the rejected offer of \$93,950. Delaware's Supreme Court found that since the premise of value was that the appraised shares were of a going concern entity, which was contrary to the facts.

- (4) The Civil Appeals Court of Alabama prohibited the use of marketability and control discounts in *Grelrier v. Grelrier*, a divorce case. In this case the trial court permitted a combined 40.00% marketability and control discounts to the husband's interests in many private businesses. Yet these discounts were reversed since the premise of value for the business interests was going concern, and removed the discounts to the total interests valued. [SOURCE: *Grelrier v. Grelrier*, 63 So. 3d 668 (Ala. Civ. App. 2010).]

Summary of New Jersey and General Observation of Other States

Should this be the case, the values calculated using the Income Approach, and the Marketability Approach, as presented in Table 1 should be adjusted differently to account for the FV standard.

Table 2 provides the FMV approach, the value established taking into consideration marketability and control values, and the required adjustments necessary to bring the valuation to a marketable, control value. To develop the FV standard from the FMV standard, assuming different approaches, it becomes clear that sometimes adjustments for control and marketability are required to achieve the goal set out by the court – a marketable, control value.

(Table follows on the next page)

Table 2 – Required Adjustments to Meet FV Standards

FMV Approach	Marketability	Control	Required Adjustment to achieve FV
<i>Control Premiums Required</i>			
Income Approach	Marketable – Public Value	Non-Control	Add a Control Premium
GPCM	Marketable – Public Value	Non-Control	Add a Control Premium
<i>Marketability Premiums Required</i>			
CTM (private data)	Non-Marketable – Private Value	Control	Add a Marketability Premium
<i>No Adjustments Required</i>			
CTM (public data)	Marketable – Public Value	Control	No Adjustment Necessary

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

Control and Marketability Premiums

Control Premiums and Discounts (the inverse of the premium) have been dissected, analyzed, and are crucial to business valuations. A Control Premium is an amount that a buyer is willing to pay over the current market price of a publicly traded company in order to acquire a controlling share in that company. Control confers value, and therefore a controlling shareholder, or membership interest, in a business can dictate the course of a company, which leads to an increase in a majority interest. [SOURCE: Robert J. Grossman, “Advance Discounts and Premiums,” Chapter 2, pp. 2-3.] Control

Premiums and Discounts are used in variety of scenarios. Gift, estate, and income tax cases have allowed Control Discounts ranging between 10.10% and 50.00%, ESOP valuations have allowed Control Discounts ranging between 13.00% and 45.00%, and marital dissolution cases as well between 20.00% and 38.30%. Additionally, tax and litigation cases the courts have permitted Control Premiums, between 20.00% and 25.00%. An analysis of the transactions from the *Mergerstat Control Premium Study* reveals an average Control Discount and Control Premium of 21.26% and 42.62%, respectively.

For valuation approaches yielding non-controlling values, such as the Income Approach, a Control Premium adjustment to reflect a controlling value is necessary. An Income Approach method like the discounted cash flow computes a marketable and non-controlling value. If this method is implemented and yields a value such as \$100 million, applying a Control Premium to this indicated value increases it. Applying a Control Premium of 42.62% to a non-controlling and marketable value of \$100 million, then yields a controlling and marketable value of \$142.62 million.

Similar to Control Premiums and Control Discounts, the idea of marketability has been analyzed and studied thoroughly by finance and accounting academics and professionals alike. Marketability is the ability to quickly convert property to cash at minimal cost.⁴ Marketability discounts represent an amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability⁵. Conversely, a Marketability Premium is an amount that a buyer is willing to pay over the current market price of a privately held company so that it can take advantage of the liquidity of a public company, should it decide to sell any portion of its ownership interests in the short term.

⁴ International Glossary of Business Valuation Terms

⁵ *ibid*

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

Based on the particular study or analysis completed to quantify the marketability discount, the factor varies. For instance the cost of flotation studies reveal an average marketability discount of 20.66%, while pre-IPO studies reveal the average marketability discount is 34.95%. Other studies and analyses like restricted stock studies, private placement analyses, and PIPE analyses have shown the average marketability discount is equal to 21.66%. The American court system has permitted marketability discounts, averaging 28.78%. Across all of these analyses and studies, the average marketability discount is approximately 26.51%. The Marketability Premium would be applied to a non-marketable indicated value to yield a publicly company value. The inverse of the 26.51% Marketability Discount above is 36.07%. If the CTM is used relying on private company transactions from a database, such as Pratt's Stats or BizComps, and yields an indicated value of a privately held business is \$25 million, applying the Marketability Premium increases its value to \$34.02 million. The indicated value is then a controlling and marketable value.

Should the Control and Marketability Premiums be applied in fair value cases, as outlined here, *ceteris paribus* the overall value of economic damages such as shareholder oppression and business divorce would increase.

Section III – Application to Scenario T

There are many other instances where a minority shareholder is damaged by the majority shareholders or another party and yet where the damages are temporary. Take for instance a case⁶ most recently adjudicated, where there were two main shareholders, each contributing certain proprietary services to Company X, in exchange for ownership in Company X. One of the shareholders owned 70.0% (Majority Shareholder (Maj)), and the other owned 30.0% (Minority Shareholder (Min)) of Company X, where there was only one form of stock, and both shareholders had equal rights. Maj not only had shareholder control, but also had the majority of participants on the board of directors and put in place three (3) of the four (4) c-level executives.

Both shareholders agreed to launch the services (a combined service of both companies) of Company X on a date approximately fifteen (15) months from the time they signed the shareholder agreement. Unfortunately, this never occurred because Maj eventually decided after fourteen (14) months of the signing of the shareholder agreement that they were going to start the venture alone and not move forward with Min. During the period of time after the signing of the shareholder agreement and prior to Maj's decision to not move forward both companies contributed intellectual property, trade secrets, know-how, additional cash for capital purchases, employee time and other related resources. Upon the decision of Maj to not move forward, Min filed a lawsuit in New Jersey, claiming shareholder oppression, among other counts. Part of the argument was that Min was harmed and that the harm would be temporary based on their ability to find a similar partner to move forward with the venture. Among other damages, Min was requesting historical and future lost profits.

⁶ This is a case that the author worked on previously, yet the material facts and circumstances are modified.

Lost Profits

Not unlike the valuation discussed above with respect to Scenario P, a similar approach is applied to a lost profits case. In a lost profits case, the expert would identify the future profits of Company X into the future, and then reduce these profits by the post-allegation profits. In the case discussed herein, Company X would have lost profits for a few years, mainly because the expert assumed that it would take Company X a few years to find a suitable partner who would be able to provide the same services as Maj. After calculating the future lost profits, the expert would then discount these future profits using a discount rate that would be calculated in the same manner as previously discussed in the Income Approach. As discussed above, the damages calculated using this approach would yield a non-controlling, marketable value. Based on this premise, this value would need to be adjusted upward to account for a control premium. Similar to Scenario P, the damages calculated would increase.

Section IV – Summary

We have shown that the FV standard required by the courts in many litigated matters is inconsistent, and can be manipulated by an experienced expert. We have presented case law that suggests that FV is created absent of any discounts for marketability and control. We have also suggested that the intention of the court in calculating FV is to create a marketable, control value when calculating the value of closely held, private companies in litigated matters. We have shown that this advice by the court creates inconsistencies and that to essentially calculate a marketable, control value, the expert, in many cases will need to apply either marketability or control premiums; and without providing these premiums, the values calculated using different approaches will lead to something other than FV. Because of the seemingly overlooked complexities in calculating FV, the court has unintentionally created an inaccurate outcome for the plaintiff and defendant where the values created are a combination of FMV and FV. Depending upon the valuation approach, the outcome calculated by the expert may be FV, and in others times it may be FMV. To an experienced expert, this

creates an opportunity to manipulate the valuation process in order to best serve the self-interest of the client. We have provided guidance on how to best ensure that a marketable, control value is created depending upon the valuation approach utilized by the expert. Additionally, we suggested that the FV approach used in long-term, permanent economic losses should also be adopted for short term economic losses as well. By doing this, the court will be ensuring that the methods used in calculating damages in consistent.

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