SHAREHOLDER OPPRESSION AND THE NEW LOUISIANA BUSINESS CORPORATION ACT

*Douglas K. Moll**

* Beirne, Maynard & Parsons, L.L.P. Professor of Law, University of Houston Law Center. Thanks to Glenn Morris for helpful conversations, and to the Moll clan (Stefanie, Asher, Samara, Daisy, and Gatsby) for their patience and support.

I. INTRODUCTION

In *Gruenberg v. Goldmine Plantation, Inc.*,[1] the Louisiana Court of Appeal noted that "[o]ur substantive law . . . offers no remedy for the minority shareholder with substantial holdings who is out of control and trapped in a close[] corporation."[2] Such an observation can be explained, at least in part, by the lack of a "shareholder oppression" doctrine in Louisiana—a doctrine designed to protect minority shareholders in closely held corporations from the improper exercise of majority control.[3]

Times, however, have changed. With the passage of the new Louisiana Business Corporation Act (LBCA),[4] Louisiana becomes the fortieth state in the country to provide statutory relief for oppressive conduct.[5] Effective January 1, 2015,[6] minority

1. 360 So. 2d 884 (La. Ct. App. 1978).

2. *Id.* at 887.

3. *See generally* DOUGLAS K. MOLL & ROBERT A. RAGAZZO, CLOSELY HELD CORPORATIONS ch. 7 (Lexis 2015) (providing an in-depth discussion of the shareholder oppression doctrine); *id.* ch. 8 (providing an in-depth discussion of remedies for shareholder oppression).

4. *See* Louisiana Business Corporation Act, No. 328 (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

5. *See* MOLL & RAGAZZO, *supra* note 3, § 7.01[D][1][b] (noting that thirty-nine states provide statutory relief for oppressive conduct); *id.* fig.7.1 (providing a fifty-state chart on oppression statutes). Section 143 of the Louisiana Business Corporation Law allows a court to entertain an involuntary dissolution petition on various grounds, including director or shareholder deadlock; "[t]he objects of the corporation have wholly failed, or are entirely abandoned, or their accomplishment is impracticable"; "[i]t is beneficial to the interests of the shareholders that the corporation should be liquidated and dissolved"; and "[t]he corporation has been guilty of gross and persistent ultra vires acts." LA. REV. STAT. ANN. § 12:143 (2010). Oppressive conduct, however, is not listed in the statute. *See id.* In addition, § 151 of the Business Corporation Law provides for the appointment of a receiver when "a majority of the shareholders are violating the rights of minority shareholders and endangering their interests." *Id.* § 12:151(A)(5). While that language seems broad enough to encompass an oppression doctrine, the limited case law under that subsection is burdened by the traditional judicial reluctance to appoint receivers.

shareholders in Louisiana closely held corporations who are unjustifiably denied their participatory and financial rights can seek an escape from their "trapped" status by compelling the corporation to purchase their shares.[7]

This article examines the oppression provisions of the new LBCA.[8] The provisions reflect a great deal of thought and wisely incorporate many of the developments in oppression law over the past few decades. Moreover, the provisions unquestionably improve the rights of minority owners in Louisiana closely held corporations. While this article is not intended to provide an exhaustive treatment, it does seek to present a summary of the provisions and to call attention to some of the more noteworthy language. Part II discusses the nature of the closely held corporation and explains the national development of the doctrine of shareholder oppression. Part III provides an overview of the LBCA's oppression scheme and an analysis of selected liability and remedy provisions of the statute.

II. THE CLOSELY HELD CORPORATION AND THE DOCTRINE OF SHAREHOLDER OPPRESSION

A. THE NATURE OF THE CLOSELY HELD CORPORATION

In a publicly held corporation, a shareholder is typically a passive investor who neither contributes labor to the corporation nor takes part in management responsibilities. A shareholder in a publicly held corporation simply invests money and hopes to receive a return on that money through dividend payments and sale of the company's stock at an appreciated value.[9] By contrast, in a closely held corporation, a shareholder typically expects an

See, e.g., Allen v. Royale 16, Inc., 449 So. 2d 1365, 1371 (La. Ct. App. 1984).

6. *See* Louisiana Business Corporation Act, No. 328, § 7 (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 (stating that the "provisions of this Act shall become effective on January 1, 2015").

7. *See infra* Part III(A).

8. Sections 1-1435 to 1-1438 are the oppression provisions of the LBCA. *See* Louisiana Business Corporation Act, No. 328, §§ 1-1435 to -1438 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-1435 to -1438), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. They are reprinted in their entirety in the Appendix to this article.

9. *See, e.g.*, Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 560 (N.J. Super. Ct. Law Div. 1979) ("Large corporations are usually formed as a means of attracting capital through the sale of stock to investors, with no expectation of participation in corporate management or employment. Profit is expected through the payment of dividends or sale of stock at an appreciated value.").

active participatory role in the company, usually through employment and a meaningful role in management.[10] A shareholder in a closely held corporation also invests money in the venture, and like all shareholders, he hopes to receive a return on that money. By definition, however, a closely held corporation lacks an active market for its stock.[11] Thus, any investment return is normally provided by employment compensation and dividends, rather than by sales of stock at an appreciated value.[12]

Conventional corporate law norms of majority rule and centralized control can lead to serious problems for a minority

10. *See, e.g.*, McCallum v. Rosen's Diversified, Inc., 153 F.3d 701, 703 (8th Cir. 1998) (observing that "[o]ftentimes, a shareholder's reasonable expectations include a significant voice in management and an opportunity to work"); Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990) ("[T]he primary expectations of minority shareholders include an active voice in management of the corporation and input as an employee."); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561 (N.J. Super. Ct. Law Div. 1979) ("Unlike their counterparts in large corporations, [minority shareholders in closely held corporations] may expect to participate in management or to influence operations, directly or indirectly, formally or informally. Furthermore, there generally is an expectation on the part of some participants that their interest is to be recognized in the form of a salary derived from employment with the corporation." (citations omitted)); *see also* Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (d)(3) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 (observing that because "shareholders of a closely-held corporation are commonly compensated largely through their employment by the corporation . . . continued employment [is] a reasonable expectation in many cases").

11. *See, e.g.*, Haag Trucking Co. v. Haag, No. 49A02-0712-CV-1112, 2008 WL 5459408, at *7 (Ind. Ct. App. Nov. 26, 2008) ("A close corporation is one which typically has few shareholders and whose shares are not generally traded in the securities market"); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514 (Mass. 1975) ("In a large public corporation, the oppressed or dissident minority stockholder could sell his stock in order to extricate some of his invested capital. By definition, this market is not available for shares in the close corporation."); *see also* Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993) ("[T]he economic reality of no public market deprives investors in close corporations of the same liquidity and ability to adapt available to investors in public corporations.").

12. *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("The minority stockholder typically depends on his salary as the principal return on his investment . . . ."); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 397 (Or. 1973) ("It is also true that the Bakers, as stockholders, had a legitimate interest in the participation in profits earned by the corporation."); *see also* Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (d)(3) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 (observing that "shareholders of a closely-held corporation are commonly compensated largely through their employment by the corporation").

investor in a closely held corporation. Traditionally, most corporate power is centralized in the hands of a board of directors.[13] The directors set policy, elect officers, and supervise the normal operation of the corporation. Because directors are elected by shareholder vote, the board of a closely held corporation is typically controlled by the shareholder (or shareholders) holding a majority of the voting power. Through this control of the board, a majority shareholder (or majority group)[14] has the ability to take unjustified actions that are harmful to a minority shareholder's interests.[15] Such actions are usually designed to restrict (or deny altogether) the minority's financial and participatory rights, and they are often referred to as "freezeout" or "squeezeout" actions that "oppress" a minority shareholder.[16] Common oppressive actions include the

13. *See, e.g.*, Louisiana Business Corporation Act, No. 328, § 1-801(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-801(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 ("All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors . . . ."); *see also* LA. REV. STAT. ANN. § 12:81 (2010) (noting that "all the corporate powers shall be vested in, and the business and affairs of the corporation shall be managed by, a board of directors of not less than one natural person").

14. The terms "majority shareholder" and "minority shareholder" are often used "to distinguish those shareholders who possess the actual power to control the operations of the firm from those who do not." J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 5 n.7 (1977).

15. *See, e.g.*, Bostock v. High Tech Elevator Indus., 616 A.2d 1314, 1320 (N.J. Super. Ct. App. Div. 1992) ("[B]ased upon its voting power, the majority is able to dictate to the minority the manner in which the [closely held] corporation is run." (internal quotation omitted)); Meiselman v. Meiselman, 307 S.E.2d 551, 558 (N.C. 1983) ("[W]hen the personal relationships among the participants break down, the majority shareholder, because of his greater voting power, is in a position to terminate the minority shareholder's employment and to exclude him from participation in management decisions."); McLaughlin v. Schenck, 220 P.3d 146, 156 (Utah 2009) (observing that a minority shareholder in a closely held shareholder is left "with no remedy for the abuses and oppression that may result due to the small number of shareholders, the frequency of familial and other personal relationships, and the likelihood that majority shareholders control the board in close corporations").

Along with majority shareholders, directors and officers may also have the ability to take unjustified actions that are harmful to a minority shareholder's interests. As a result, many oppression statutes allow shareholders to bring actions against "directors or those in control." *See infra* note 29 and accompanying text.

16. The term "freezeout" is often used synonymously with the term "squeezeout." Both terms refer to conduct that is designed to deny a shareholder his participatory rights in the business, his financial rights in the business, or, most often, both sets of

termination of a minority shareholder's employment, the removal of a minority shareholder from the board of directors, the denial of access to information, the refusal to declare dividends, and the siphoning off of corporate earnings to the majority shareholder.[17]

Quite often, these tactics are used in combination. For example, rather than declaring dividends, closely held corporations often distribute their earnings to shareholders in the form of salary and other employment-related compensation. (Reasonable employment compensation is tax deductible to a corporation as a business expense, while dividend payments are not.)[18] In a closely held corporation that does not pay dividends, therefore, a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on his investment as well as any

rights. *Cf.* McCann v. McCann, 275 P.3d 824, 830 (Idaho 2012) ("Squeeze-outs, sometimes called freeze-outs, are actions taken by the controlling shareholders to deprive a minority shareholder of his interest in the business or a fair return on his investment."); Haag Trucking Co. v. Haag, No. 49A02-0712-CV-1112, 2008 WL 5459408, at *8 (Ind. Ct. App. Nov. 26, 2008) ("A freeze-out is the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the corporation or reduce the minority shareholders' voting power or claims on corporate assets to relative insignificance.").

17. *See, e.g.*, Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986) ("Tactics employed against a minority shareholder to effect a squeeze out can take on many forms including generally oppressive conduct, the withholding of dividends, restricting or precluding employment in the corporation, paying excessive salaries to majority stockholders, withholding information relating to the operation of the corporation, appropriation of corporate assets, denying dissenting shareholders appraisal rights, failure to hold meetings and excluding the minority from a meaningful role in the corporate decisionmaking."); *see also* MOLL & RAGAZZO, *supra* note 3, § 7.01[C] (describing common acts of oppression).

18. When calculating its taxable income, a closely held corporation can deduct reasonable salaries paid to its employees to decrease the amount of income tax that the company pays. *See* 26 U.S.C. § 162(a)(1) (2012) (stating that "a reasonable allowance for salaries or other compensation for personal services actually rendered" is deductible). A closely held corporation cannot, however, deduct any dividends paid to its shareholders. As a consequence, corporate income paid as dividends is subject to double taxation—once as business income at the corporate level, and once as personal income at the shareholder level. *See, e.g.*, Four Seasons Equip. Inc. v. White (*In re* White), 429 B.R. 201, 207-08 (Bankr. S.D. Tex. 2010) (explaining the concept of double taxation). As a result of the tax-disadvantaged nature of dividends, many closely held corporations forego "true" dividends and instead provide a return to shareholders via salary and other employment-related benefits. *See, e.g.*, Landorf v. Glottstein, 500 N.Y.S.2d 494, 499 (Sup. Ct. 1986) (stating that, in a closely held corporation, "dividends are often provided by means of salaries to shareholders"); *supra* note 12 and accompanying text (noting that investment return is often provided by employment compensation).

input into the management of the business.[19] Such conduct often culminates with a majority proposal to purchase the shares of the minority owner at an unfairly low price.[20] In short, this denial of financial and participatory rights is at the core of many lawsuits alleging that the majority used his control in an abusive or "oppressive" fashion against a minority shareholder.

In a publicly held corporation, a minority shareholder can largely escape these abuses of power by selling his shares into the market and correspondingly recovering the value of his investment. This ability to liquidate provides some protection to investors in publicly held corporations from the conduct of those in control.[21] In a closely held corporation, however, the minority shareholder's investment is effectively trapped, as there is no ready market for the stock of a closely held corporation.[22] In fact, often the only potential purchaser of a minority's shares is the oppressive majority himself (or the corporation controlled by the oppressive majority).[23] As mentioned, these parties will usually offer an amount that is significantly below the fair value of the

19. *See, e.g.*, Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987) ("Balvik was ultimately fired as an employee of the corporation, thus destroying the primary mode of return on his investment. Any slim hope of gaining a return on his investment and remaining involved in the operations of the business was dashed when Sylvester removed Balvik as a director and officer of the corporation."); *see also* Nagy v. Riblet Prods. Corp., 79 F.3d 572, 577 (7th Cir. 1996) ("Many closely held firms endeavor to show no profits (to minimize their taxes) and to distribute the real economic returns of the business to the investors as salary. When firms are organized in this way, *firing an employee is little different from canceling his shares*." (emphasis added)); *Landorf*, 500 N.Y.S.2d at 499 ("In a close corporation, since dividends are often provided by means of salaries to shareholders, loss of salary may be the functional equivalent of the denial of participation in dividends.").

20. *See, e.g.*, Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505, 515 (Mass. 1975) ("Majority 'freeze-out' schemes which withhold dividends are designed to compel the minority to relinquish stock at inadequate prices. When the minority stockholder agrees to sell out at less than fair value, the majority has won." (citations omitted)).

21. *See supra* note 11 (noting that a market can provide protection).

22. *See supra* note 11 and accompanying text (discussing the lack of a market).

23. *See, e.g.*, Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986) ("[A] shareholder challenging the majority in a close corporation finds himself on the horns of a dilemma, he can neither profitably leave nor safely stay with the corporation. In reality, the only prospective buyer turns out to be the majority shareholder."); *see also* Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505, 515 (Mass. 1975) ("No outsider would knowingly assume the position of the disadvantaged minority [in a closely held corporation]. The outsider would have the same difficulties.").

minority's shares—if they choose to make an offer at all.[24] Thus, a minority investor in a closely held corporation is in a vulnerable position, as he cannot escape oppressive majority conduct by selling into a well-developed market.

A market is, of course, only one way to cash out of a company. Even without a market for a company's shares, a minority shareholder could still recover the value of his investment if he could force the corporation (or the majority shareholder) to purchase his shares on demand.[25] No state's corporation law, however, provides such a right. Without an explicit buyout provision in a stockholders' agreement or a company's organizational documents, corporate shareholders have no right to compel a redemption of their holdings.[26]

Dissolution of a company can also provide liquidity to business owners by requiring the sale of the company and by allocating to each owner his proportionate share of the company's sale value (after the claims of creditors have been satisfied).[27] If a minority shareholder in a closely held corporation had the right to compel dissolution, a mechanism for recovering the value of the invested capital would exist. In the closely held corporation setting, however, a minority shareholder has no default right to dissolve a corporation by "express will"—i.e., voluntary

24. *See supra* note 20 and accompanying text (discussing "lowball" offers).

25. *See, e.g.*, Hetherington & Dooley, *supra* note 14, at 1-6 (proposing that shareholders of closely held corporations be given a right to a mandatory buyout of their shares upon demand).

26. *See, e.g.*, Goode v. Ryan, 489 N.E.2d 1001, 1004 (Mass. 1986) ("In the absence of an agreement among shareholders or between the corporation and the shareholder, or a provision in the corporation's articles of organization or by-laws, neither the corporation nor a majority of shareholders is under any obligation to purchase the shares of minority shareholders when minority shareholders wish to dispose of their interest in the corporation."); *see also* Blaustein v. Lord Baltimore Capital Corp., 84 A.3d 954, 958 (Del. 2014) ("Under common law, the directors of a closely held corporation have no general fiduciary duty to repurchase the stock of a minority stockholder. An investor must rely on contractual protections if liquidity is a matter of concern. Blaustein has no inherent right to sell her stock to the company at 'full value,' or any other price."); Whitehorn v. Whitehorn Farms, Inc., 195 P.3d 836, 842 (Mont. 2008) (rejecting a minority shareholder's argument that the corporation was obligated to purchase his shares: "The articles of incorporation do not mandate such a purchase, and [the minority] fails to point to any authority that requires a corporation to repurchase the shares of a shareholder merely because the shareholder wants out of the corporation.").

27. *See, e.g.*, Brenner v. Berkowitz, 634 A.2d 1019, 1031 (N.J. 1993) ("In the case of dissolution, a distribution [of assets] results in the termination of the corporation's business, with its assets being proportionately distributed to the stockholders.").

dissolution usually requires the assent of at least a majority of the outstanding voting stock of a corporation.[28] For an oppressed minority shareholder, therefore, voluntary dissolution rights are largely unhelpful.

In short, when a majority shareholder in a closely held corporation exercises his control in an oppressive fashion against a minority shareholder, the minority has little ability to exit the situation.

B. THE CAUSE OF ACTION FOR OPPRESSION

Over the years, state legislatures and courts have developed two significant avenues of relief for the "oppressed" close corporation shareholder. First, many state legislatures have amended their corporate dissolution statutes to include "oppressive conduct" by "directors or those in control" as a ground for involuntary dissolution of the corporation.[29] Moreover, when oppressive conduct has occurred, actual dissolution is not the only remedy at the court's disposal. Both state statutes and judicial precedents have authorized alternative remedies that are less drastic than dissolution (e.g., buyouts, provisional directors).[30] As

28. *See, e.g.*, Louisiana Business Corporation Act, No. 328, § 1-1402 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1402), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 (allowing dissolution upon a board recommendation and "approval of at least a majority of the votes entitled to be cast"); *see also* LA. REV. STAT. ANN. § 12:142 (2010) (allowing voluntary dissolution upon "authorization by the shareholders" with "a majority of the voting power"); Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193, 200 (1988) ("In most states a majority vote of outstanding shares is required to voluntarily dissolve a corporation, but in a significant number of states, a two thirds vote is required for this fundamental corporate change.").

29. *See, e.g.*, ALA. CODE § 10A-2-14.30(2)(ii) (LexisNexis 2013) ("The directors or those in control of the corporation have acted, are acting, or will act in a manner that is . . . oppressive . . . ."); IOWA CODE ANN. § 490.1430(2)(b) (West 2009) (same); N.J. STAT. ANN. § 14A:12-7(1)(c) (West 2003) ("[T]he directors or those in control . . . have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees."); N.Y. BUS. CORP. LAW § 1104-a(a)(1) (McKinney 2003) ("The directors or those in control of the corporation have been guilty of . . . oppressive actions toward the complaining shareholders . . . ."); MODEL BUS. CORP. ACT § 14.30(a)(2)(ii) (2010).

30. *See, e.g.*, MINN. STAT. ANN. § 302A.751 (West 2011) (authorizing any equitable relief and specifically authorizing a buyout of the shareholder's interest); N.J. STAT. ANN. § 14A:12-7 (West 2003) (providing a nonexclusive list of possible relief that includes the order of a buyout and the appointment of a provisional director or custodian); Brenner v. Berkowitz, 634 A.2d 1019, 1033 (N.J. 1993) ("Importantly, courts are not limited to the statutory remedies [for oppression], but

the alternative forms of relief have broadened over the years, orders of actual dissolution have become less frequent.[31] Thus, "oppression" has evolved from a statutory ground for involuntary dissolution to a statutory ground for a wide variety of relief.[32]

Second, particularly in states without oppression-triggered dissolution statutes, some courts have imposed a fiduciary duty between shareholders of a closely held corporation and have allowed an oppressed shareholder to bring a direct cause of action for breach of this duty. In the seminal decision of *Donahue v. Rodd Electrotype Co. of New England, Inc.*,[33] the Massachusetts Supreme Judicial Court adopted such a standard:

> [W]e hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the "utmost good faith and loyalty." Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders

have a wide array of equitable remedies available to them."); Balvik v. Sylvester, 411 N.W.2d 383, 388-89 (N.D. 1987) (listing alternative forms of relief for oppressive conduct such as appointing a receiver, granting a buyout, and ordering the declaration of a dividend); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395-96 (Or. 1973) (listing ten possible forms of relief for oppressive conduct such as ordering the reduction of excessive salaries and issuing an injunction against further oppressive acts). *But see* Ritchie v. Rupe, No. 11-0447, 2014 WL 2788335, at *11 (Tex. June 20, 2014) (concluding that "the only cause of action the [Texas oppression] statute creates is for receivership"); Giannotti v. Hamway, 387 S.E.2d 725, 733 (Va. 1990) (stating that the dissolution remedy for oppression is "exclusive" and concluding that the trial court is not permitted "to fashion other . . . equitable remedies").

31. *See* Thompson, *supra* note 11, at 708; *cf.* Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 53 (1987) (finding that courts ordered remedies other than dissolution in the majority of 37 involuntary dissolution cases studied). *See generally* Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 461-64 (1990) (discussing the development of alternative remedies).

32. Thompson, *supra* note 11, at 708-09 ("[I]t makes more sense to view oppression not as a ground for dissolution, but as a remedy for shareholder dissension.").

33. 328 N.E.2d 505 (Mass. 1975).

and to the corporation.[34]

Following the lead of the *Donahue* court, several courts outside of Massachusetts have also imposed a fiduciary duty between shareholders in closely held corporations.[35]

The development of the statutory cause of action and the shareholder fiduciary duty reflect "the same underlying concerns for the position of minority shareholders, particularly in close corporations after harmony no longer reigns."[36] Because of the similarities between the two remedial schemes, it has been suggested that "it makes sense to think of them as two manifestations of a minority shareholder's cause of action for oppression."[37] In the closely held corporation setting, therefore, it is sensible to view the parallel development of the statutory cause of action and the shareholder fiduciary duty as two sides of the same coin—i.e., the shareholder's cause of action for oppression.

34. Donahue v. Rodd Electrotype Co. of New England, Inc. 328 N.E.2d 505, 515 (Mass. 1975) (citations omitted) (footnotes omitted). The *Donahue* duty of "utmost good faith and loyalty" was later scaled back by the same court. Due to concerns that the "untempered application of the strict good faith standard enunciated in *Donahue* . . . will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned," the Supreme Judicial Court of Massachusetts suggested a balancing test in *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976). If the controlling group can demonstrate a "legitimate business purpose" for its actions, no breach of fiduciary duty will be found unless the minority shareholder can demonstrate "that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest." *Id.*

35. *See, e.g.*, Guy v. Duff & Phelps, Inc., 672 F. Supp. 1086, 1090 (N.D. Ill. 1987); Orchard v. Covelli, 590 F. Supp. 1548, 1556-59 (W.D. Pa. 1984); Johnson v. Gibbs Wire & Steel Co., No. X05CV095013295S, 2011 WL 2536480, at *8 (Conn. Super. Ct. May 31, 2011); Orlinsky v. Patraka, 971 So. 2d 796, 801 (Fla. Dist. Ct. App. 2007); Melrose v. Capitol City Motor Lodge, Inc., 705 N.E.2d 985, 991 (Ind. 1998); Evans v. Blesi, 345 N.W.2d 775, 779 (Minn. Ct. App. 1984); Fought v. Morris, 543 So. 2d 167, 170-71 (Miss. 1989); Whitehorn v. Whitehorn Farms, Inc., 195 P.3d 836, 843 (Mont. 2008); I.P. Homeowners, Inc. v. Radtke, 558 N.W.2d 582, 589 (Neb. Ct. App. 1997); Clark v. Lubritz, 944 P.2d 861, 865 (Nev. 1997); Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 456-57 (N.M. Ct. App. 2001); Crosby v. Beam, 548 N.E.2d 217, 220 (Ohio 1989); A. Teixeira & Co. v. Teixeira, 699 A.2d 1383, 1386-88 (R.I. 1997); McLaughlin v. Schenck, 220 P.3d 146, 150, 156 (Utah 2009); Jorgensen v. Water Works, Inc., 582 N.W.2d 98, 104-06 (Wis. Ct. App. 1998); *see also* Hollis v. Hill, 232 F.3d 460, 468 (5th Cir. 2000) (noting that "[*Donahue*'s] recognition of special rules of fiduciary duty applicable to close corporations has gained widespread acceptance").

36. Thompson, *supra* note 11, at 739.

37. *Id.* at 700. *See generally id.* at 738-45 (describing the "combined cause of action for oppression").

C. MEASURING OPPRESSION THROUGH "REASONABLE EXPECTATIONS"

The development of a shareholder's cause of action for oppression requires courts to determine when "oppressive" conduct has occurred. In wrestling with this issue, courts have developed three principal approaches to defining oppression.[38] First, some courts define oppression as:

> [B]urdensome, harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.[39]

Second, some courts define oppression by linking it to action that constitutes a breach of fiduciary duty.[40] Third, many courts tie oppression to majority conduct that frustrates a minority shareholder's "reasonable expectations."[41] Of these three approaches,[42] the reasonable expectations standard garners the

38. For a 50-state chart on judicial interpretations of "oppression," see MOLL & RAGAZZO, *supra* note 3, fig.7.1.

39. Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. Ct. App. 1976) (footnote omitted) (internal quotations omitted); *see, e.g.*, Skierka v. Skierka Bros., Inc., 629 P.2d 214, 221 (Mont. 1981); Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1018-19 (Sup. Ct. 1984) (noting that, along with the "reasonable expectations" definition, "[t]his [fair dealing and fair play] definition . . . has found support in New York cases"); Landstrom v. Shaver, 561 N.W.2d 1, 7 (S.D. 1997).

40. *See, e.g.*, Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 394 (Or. 1973) ("We agree, however, that the question of what is 'oppressive' conduct by those in control of a 'close' corporation as its majority stockholders is closely related to what we agree to be the fiduciary duty of good faith and fair dealing owed by them to its minority stockholders."); Masinter v. Webco Co., 262 S.E.2d 433, 440 (W. Va. 1980) ("[W]e conclude that our cases involving the fiduciary duty owed by majority shareholders, officers and directors of a corporation embrace the same standard which other courts have evolved under the term 'oppressive conduct.'").

41. *See, e.g.*, *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) (equating oppression with conduct that "defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise"); *infra* note 43 (citing cases).

42. It should be noted that courts in some jurisdictions employ more than one of these oppression definitions. *See, e.g.*, Jochimsen v. Wapsi Hunting Club, Inc., No. 10-1430, 2011 WL 2695272, at *5 (Iowa Ct. App. July 13, 2011) (citing all three definitions of oppression); Balvik v. Sylvester, 411 N.W.2d 383, 387 (N.D. 1987) (citing the fiduciary duty and reasonable expectations definitions); *see also* Georgeson v. DuPage Surgical Consultants, Ltd., No. 05 CV 1653, 2007 WL 914219, at *3 (N.D. Ill. Mar. 22, 2007) (invoking a fourth definition of oppression by stating

most approval. The highest courts in several states have adopted the reasonable expectations approach,[43] and commentators have generally been in favor of the reasonable expectations standard.[44]

The New York decision of *In re Kemp & Beatley, Inc.*[45] has been particularly influential in giving some context to the reasonable expectations standard. In *Kemp*, the court of appeals stated that "oppressive actions . . . refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise."[46] As the court continued:

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that "the few cases that address the issue under Illinois law have found that conduct is oppressive if it is arbitrary, overbearing and heavy-handed" (internal quotation omitted)).

43. *See, e.g.*, Stefano v. Coppock, 705 P.2d 443, 446 n.3 (Alaska 1985); Fox v. 7L Bar Ranch Co., 645 P.2d 929, 933-34 (Mont. 1982); Brenner v. Berkowitz, 634 A.2d 1019, 1029 (N.J. 1993); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984); Meiselman v. Meiselman, 307 S.E.2d 551, 563-64 (N.C. 1983); Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987); Masinter v. Webco Co., 262 S.E.2d 433, 442 (W. Va. 1980); *see also* McCann v. McCann, 275 P.3d 824, 830 (Idaho 2012) ("Generally, oppressive conduct includes actions that defeat the reasonable expectations held by minority shareholders."); U.S. Bank N.A. v. Cold Spring Granite Co., 802 N.W.2d 363, 379 (Minn. 2011) ("We therefore conclude that in the context of a reverse stock split, unfairly prejudicial conduct under [the oppression statute] includes conduct that violates the reasonable expectations of the shareholder."); Landstrom v. Shaver, 561 N.W.2d 1, 7, 11 (S.D. 1997) (citing the reasonable expectations standard and stating that "[w]e conclude that under either the reasonable expectations test or the burdensome, harsh and wrongful conduct test, as a matter of law, Landstrom has failed to establish oppression"). *But see* Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 265-66 (S.C. 2001) ("We find [that] adoption of the 'reasonable expectations' standard is inconsistent with [the South Carolina oppression-triggered dissolution statute], which places an emphasis not upon the minority's expectations but, rather, on the actions of the majority.").

A number of intermediate appellate courts in other states have adopted the reasonable expectations standard as well. *See, e.g.*, Maschmeier v. Southside Press, Ltd., 435 N.W.2d 377, 380 (Iowa Ct. App. 1988); McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 237 (N.M. Ct. App. 1986).

44. *See* Haynsworth, *supra* note 31, at 31 (stating that defining oppression as "conduct which frustrates the reasonable expectations of the investors" was "initially derived from English case law, and [has been] long advocated by Dean F. Hodge O'Neal as well as other leading close corporation experts"); Thompson, *supra* note 28, at 211 ("Recognition of the intimate, illiquid relationship within a close corporation therefore provides the necessary foundation for judging whether relief should be granted and, if so, what relief is appropriate; the shareholders' reasonable expectations has become the standard which best facilitates that approach.").

45. 473 N.E.2d 1173 (N.Y. 1984).

46. *Id.* at 1179.

> must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.
>
> Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture. . . .
>
> . . . A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.[47]

As the *Kemp* court illustrates, the reasonable expectations standard focuses primarily on the effect that majority conduct has on the minority shareholder's interests.[48] When majority conduct unjustifiably[49] harms the minority's reasonable expectations, oppression liability is typically found.

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47. *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984).

48. *See generally* Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 761-89 (2000) (discussing majority versus minority perspectives of oppression).

49. If the majority's allegedly oppressive action (e.g., terminating the minority's employment) is justifiable in light of the minority's misconduct or incompetence, a finding of shareholder oppression is likely unwarranted. *See* Moll, *supra* note 48, at 800-01, 813 (discussing minority misconduct or incompetence); *infra* notes 77-79 and accompanying text (discussing the role of the minority's fault). Even if the minority has engaged in wrongdoing, however, an excessive majority response should still result in oppression liability. *See* Douglas K. Moll, *Shareholder Oppression & Divided Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841, 881-88 (2003) (noting that even if a minority shareholder's misconduct or incompetence justifies the minority's termination from employment, it does not necessarily follow that the minority may be excluded from the profit distributions of the company); *see also infra* notes 77-79 and accompanying text (discussing the role of the minority's fault).

III. THE OPPRESSION PROVISIONS OF THE NEW LBCA

A. OVERVIEW OF THE STATUTORY PROCEDURE

The LBCA is based on the American Bar Association's Model Business Corporation Act (MBCA).[50] Under MBCA § 14.30, a shareholder can petition for judicial dissolution on various grounds, including when "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is . . . oppressive . . . ."[51] LBCA § 1-1430 (which is based on MBCA § 14.30) also states that a shareholder can petition for dissolution on various grounds, but the oppression basis is omitted. Instead, §§ 1-1435 to 1-1438 provide an alternative procedure that allows an oppressed shareholder in a closely held corporation[52] to withdraw from the corporation and to compel the company to purchase his shares at fair value. No other remedy for oppressive conduct is permissible. These oppression sections are somewhat unique, as they have no direct analog under the MBCA.

The "oppressed shareholder's right to withdraw" is commenced by "giving written notice to the corporation that the shareholder is withdrawing from the corporation on the grounds of oppression."[53] Such a notice operates as a sixty-day irrevocable offer by the shareholder "to sell to the corporation at fair value

50. *See* Louisiana Business Corporation Act, No. 328, § 1-101 cmt. (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

51. MODEL BUS. CORP. ACT § 14.30(a)(2)(ii) (2010).

52. The LBCA's oppression provisions are not available to shareholders in publicly held corporations. *See* Louisiana Business Corporation Act, No. 328, § 1-1435(K) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(K)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786; *see also id.* § 1-1430 cmt. (d) (noting that "covered securities" refers to "securities that are traded on a recognized national securities exchange or trading system"). In addition, given that the LBCA is a corporation statute, it is not surprising that the oppression provisions do not extend to limited liability companies (LLCs). Many closely held businesses today are organized as LLCs, however, and minority owners of such businesses are similarly vulnerable to oppressive majority conduct. *See generally* Douglas K. Moll, *Minority Oppression & The Limited Liability Company: Learning (or Not) From Close Corporation History*, 40 WAKE FOREST L. REV. 883, 883-87, 925-57 (concluding that the factors giving rise to the oppression problem in the closely held corporation setting are also present in the LLC context). As a result, it will be interesting to see whether Louisiana extends (by statute or common law) the protections of the oppression provisions to the LLC setting.

53. Louisiana Business Corporation Act, No. 328, § 1-1435(D) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(D)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

the entirety of the shareholder's shares in the corporation."[54] The notice can specify the price that the withdrawing shareholder proposes as the fair value of the shares, but such a specification is not required.[55]

A corporation receiving a shareholder's written notice of withdrawal may choose to accept or reject the shareholder's offer to sell.[56] A corporation may accept by giving written notice of its acceptance within the sixty-day irrevocability period.[57] If the shareholder's notice of withdrawal specified a price for the shares, the corporation's acceptance operates as an acceptance of both the offer to sell and the proposed price—unless the notice of acceptance states that it is only accepting the offer to sell.[58] If such a limited acceptance is stated, "the notice of acceptance operates only as an acceptance of the shareholder's offer to sell the shares at their fair value."[59]

A notice of acceptance that operates as an acceptance of both the offer and the price forms "a contract of sale of the shares at that price."[60] The shareholder and the corporation are both given the right to file an action to enforce the contract if it is not fully performed within thirty days of the effective date of the notice of acceptance.[61]

A limited notice of acceptance that operates only as an acceptance of the shareholder's offer to sell at fair value results in a sixty-day period of negotiation between the shareholder and the corporation over the fair value of the shares and the terms under which the corporation will effectuate the purchase.[62] Within one

54. Louisiana Business Corporation Act, No. 328, § 1-1435(D) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(D)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

55. *Id.*

56. Louisiana Business Corporation Act, No. 328, § 1-1435(E) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(E)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* § 1-1435(F) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(F)).

61. Louisiana Business Corporation Act, No. 328, § 1-1435(F) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(F)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

62. Louisiana Business Corporation Act, No. 328, § 1-1436(A)(1) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(A)(1)), *available at*

year of the expiration of the sixty-day period, either party may file an action to have a court determine the fair value of the shares and the terms for their purchase.[63]

If the corporation does not accept the shareholder's offer to sell, the shareholder may file an action against the corporation in an attempt to establish oppression and to enforce a corresponding right to withdraw.[64] If the shareholder is successful in obtaining a judgment on the grounds of oppressive conduct:

> [T]he court shall stay the proceeding for a period of at least sixty days from the date that the judgment is rendered to allow the corporation and shareholder to negotiate the fair value and purchase terms for the withdrawing shareholder's shares, or other terms for the settlement of their dispute.[65]

After the expiration of the stay, either party may file an action to have a court determine the fair value of the shares and the terms for their purchase.[66]

B. ANALYSIS OF SELECTED LIABILITY PROVISIONS

1. THE DEFINITION OF OPPRESSION

Although the MBCA does not provide any definition of "oppressive" conduct, the LBCA does. Interestingly, however, LBCA § 1-1435(B) does not define oppression as conduct that frustrates a minority shareholder's reasonable expectations.[67] Instead, oppression is defined as when a corporation's practices, "considered as a whole over an appropriate period of time, are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the

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http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786; *see also id.* § 1-1435 cmt. (i).

63. *Id.* § 1-1436(A)(1) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(A)(1)); *see id.* § 1-1435 cmt. (i).

64. Louisiana Business Corporation Act, No. 328, § 1-1435(G) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(G)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. The statute does not indicate a time limit on the shareholder's ability to file this oppression action.

65. *Id.* § 1-1436(B) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(B)).

66. *Id.* The statute does not indicate a time limit on a party's ability to file this fair value action.

67. As mentioned, frustration of the minority's reasonable expectations is the definition of oppression used by many states. *See supra* notes 41-47 and accompanying text.

shareholder."[68] Thus, the LBCA comes closer to adopting the "fair dealing and fair play" definition of oppression that some courts have referenced.[69]

Although fairness to the shareholder is the touchstone for measuring oppression under the LBCA, the statute provides further guidance to courts in assessing fairness. First, although frustration of the minority's reasonable expectations is not the literal definition of oppression under § 1-1435(B), the "reasonable expectations of all shareholders in the corporation" is relevant "in assessing the fairness and good faith of the corporation's practices."[70] In other words, a minority shareholder's reasonable expectations are relevant in evaluating the corporation's obligation to deal fairly with the shareholder.[71] By emphasizing the reasonable expectations of "all" shareholders, however, the statute signals that the minority's expectations are not the sole subject of the court's inquiry; instead, the minority's expectations must be considered along with the expectations of the majority

68. Louisiana Business Corporation Act, No. 328, § 1-1435(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. The "considered as a whole over an appropriate period of time" language reflects a sentiment that oppression is often based on a pattern of abusive majority conduct. *See, e.g.*, Hayes v. Olmsted & Assocs., Inc., 21 P.3d 178, 182 (Or. Ct. App. 2001) ("Moreover, the existence of one or more badges of oppression in isolation does not necessarily justify relief. Instead, we examine the pattern of conduct of those in control and the effect of that conduct on the minority to determine whether, in sum, they show oppression."). Nevertheless, the LBCA presumably does not intend to foreclose the possibility that a single significant act of oppressive conduct may be sufficient for liability. *See, e.g.*, Schimke v. Liquid Dustlayer, Inc., No. 282421, 2009 WL 3049723, at *2 (Mich. Ct. App. Sept. 24, 2009) ("Accordingly, a single significant action that substantially interferes with a shareholder's interests as a shareholder is sufficient to support a cause of action under [the Michigan oppression statute]."); Brenner v. Berkowitz, 634 A.2d 1019, 1033-34 (N.J. 1993) (finding oppression based solely on the removal of the minority from the board of directors); *cf.* Redmon v. Griffith, 202 S.W.3d 225, 234 n.3 (Tex. App. 2006) ("Because any one of a variety of activities or conduct can give rise to shareholder oppression, the fact that there may be a lack of evidence to support the existence of one such activity does not defeat the claim so long as there is evidence to support that another such instance of conduct occurred.").

69. *See supra* note 39 and accompanying text.

70. Louisiana Business Corporation Act, No. 328, § 1-1435(B)(2) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(B)(2)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

71. *See id.* § 1-1435 cmts. (d)(1)-(2) ("The failure to satisfy reasonable expectations is not itself the direct test for oppressive conduct. Rather, those expectations are to be considered in determining whether the directors or others in control have behaved in a way that is incompatible with a genuine effort to be fair to the complaining shareholder.").

and other minority owners.[72]

Courts outside of Louisiana have expressed this point by noting that reasonable expectations can be viewed as mutual understandings between the shareholders over how their business will be run.[73] To be "reasonable," such expectations "must be known to or assumed by the other shareholders and concurred in by them."[74] Thus, the oppression doctrine is not about vindicating a plaintiff's subjective hope or desire that never becomes part of a collective understanding between the shareholders.[75] Rather, the doctrine seeks to protect rights and expectations that *all* of the owners understood were part and parcel of being a shareholder in the business. Under the LBCA, therefore, oppression can be viewed as a failure "to deal fairly and in good faith with [a] shareholder" because it deprives the shareholder of a right or benefit that was understood by all of the owners to be part of what they received as a shareholder in the business.[76]

72. *See* Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (d)(2) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 ("In determining fairness, the interests of all shareholders, not just those of the complaining shareholder, must be considered."); *see also id.* § 1-1435 cmt. (d)(1) ("[T]o justify withdrawal under the definition of oppression . . . the plaintiff must prove that the majority's behavior . . . is plainly incompatible with a genuine effort on the part of the majority to be fair to the shareholders. And the effort to be fair is to be evaluated in light of expectations that it would be reasonable for the shareholders to hold under the circumstances.").

73. *See, e.g.*, Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1019 (Sup. Ct. 1984) ("[T]he 'reasonable expectations' test is indeed an examination into the spoken and unspoken understanding upon which the founders relied when entering into the venture."); Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) ("Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court."); *see also In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) ("A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise.").

74. Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983).

75. *See, e.g.*, *id.* at 563 ("Privately held expectations which are not made known to the other participants are not 'reasonable.'"); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) (noting that unfulfilled "subjective hopes and desires in joining the venture" are insufficient to establish an oppression claim); *see also* McCann v. McCann, 275 P.3d 824, 834 (Idaho 2012) ("Defeated reasonable expectations must be more than mere disappointment.").

76. If oppression is viewed as a deviation from the collective understanding of the shareholders, the use of the term "reasonable shareholder" in § 1-1435(B)(2) is puzzling. *See* Louisiana Business Corporation Act, No. 328, § 1-1435(B)(2) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(B)(2)), *available*

Second, "the conduct of the shareholder alleging oppression" is relevant in assessing the fairness of the corporation's actions to the shareholder.[77] This reference is designed to make clear that shareholders of a closely held corporation, simply due to their status as shareholders, do not have permanent rights to participatory roles in the company regardless of their behavior. For example, it is typically not oppressive to terminate the employment of a shareholder, or to remove a shareholder from a director position, when that shareholder has engaged in substantial misconduct that harms the company.[78] Some shareholder rights, however, are possessed simply as a matter of status (e.g., the right to receive a proportionate share of any distributed profits, or the right to inspect company books and

at http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. It suggests that courts should imagine a fictitious objectively reasonable shareholder and should view the dispute from that person's perspective. Whereas a "reasonable shareholder" might not consider a termination of employment due to an economic recession as unfair under the circumstances, a shareholder who reached a mutual understanding with his fellow shareholders about the need for employment security absent shareholder misconduct or incompetence might justifiably view such a termination as unfair (at least before trying pay cuts or other options less drastic than termination). The oppression inquiry, therefore, should be viewed from the perspective of the actual plaintiff shareholder at issue, and should examine whether his complaints reflect deviations from the mutual understandings reached by all of the shareholders in the particular corporation before the court. *See supra* notes 73-755 and accompanying text.

77. Louisiana Business Corporation Act, No. 328, § 1-1435(B)(1) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(B)(1)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

78. *See, e.g.*, *id.* § 1-1435 cmt. (d)(3) ("While the shareholders of a closely-held corporation are commonly compensated largely through their employment by the corporation - making continued employment a reasonable expectation in many cases - shareholders are not entitled to keep their jobs regardless of the quality of their job performance. Incompetence, dishonesty or disloyalty on the part of an employee shareholder may justify the shareholder's termination as a corporate employee, and a justified termination would not by itself amount to oppression."); Whitehorn v. Whitehorn Farms, Inc., 195 P.3d 836, 843 (Mont. 2008) ("The only benefits Brian lost were those associated with his status as an employee and officer, which he had no reasonable expectation to retain after he converted the Corporation's property."); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561-62 (N.J. Super. Ct. Law Div. 1979) ("Plaintiff's discharge from employment with the corporation . . . was because of his unsatisfactory performance. The circumstances under which the parties' expectations in these areas were disappointed do not establish oppressive action toward plaintiff by the controlling shareholders."); Meiselman v. Meiselman, 307 S.E.2d 551, 564 (N.C. 1983) ("For plaintiff to obtain relief under the expectations' analysis, he must prove that . . . the expectation has been frustrated [and that] the frustration was without fault of plaintiff and was in large part beyond his control."); *see also* MOLL & RAGAZZO, *supra* note 3, § 7.01[D][1][d] (discussing the role of the minority's fault); *supra* note 49 (same).

records), and even a shareholder engaging in substantial misconduct cannot be properly denied these rights.[79] Thus, Louisiana courts should take care to avoid overstating the effect of the statutory consideration given to the conduct of the plaintiff shareholder.

Third, it is noteworthy that the LBCA does not follow the *Kemp* court's definition of reasonable expectations as those that are "held by minority shareholders in committing their capital to the particular enterprise" and that are "central to [a shareholder's] decision to join the venture."[80] Such a focus on the

79. *See, e.g.*, Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (d)(3) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 ("Still, a minority shareholder does not forfeit all right to any economic benefit from his shares merely because his job performance may justify his termination as an employee. A complete freezeout of a shareholder from any participation in the benefits of ownership in the corporation could be considered oppression even if the shareholder's termination as an employee was itself justified."); MOLL & RAGAZZO, *supra* note 3, § 7.01[D][1][d] ("Although the fault of the minority may be grounds for terminating the minority's employment or removing the minority from a management position, it is critical to note that such fault is unrelated to the status-based rights of being a shareholder. It is shareholder status itself—not any notion of satisfactory performance in an employment or management position—that gives rise to various rights and benefits (e.g., a right to receive a proportionate share of any distributed profits, a right to inspect company books and records, a right to vote on shareholder issues, and a right to be recognized as a shareholder)."); *id.* ("Thus, while misconduct or incompetence in an active participation role (employment, management) may justifiably forfeit the shareholder's right to that active participation, allowing the same conduct to forfeit the shareholder's passive participation (profit sharing and other status-based shareholder rights) goes too far."); *see also* Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561-62 (N.J. Super. Ct. Law Div. 1979) (concluding that a minority shareholder's termination was not oppressive in light of the minority's "unsatisfactory performance," but noting that the minority's expectation of dividends was a separate issue that could potentially establish an independent oppression claim); *In re* O'Neill, 626 N.Y.S.2d 813, 814 (App. Div. 1995) ("The [lower] court concluded . . . that while [the minority shareholder] could not expect to participate in the day-to-day operations of the corporation [after the minority's employment was terminated for a criminal conviction], he was entitled to his rights as a shareholder, and the court directed [the majority shareholder] to either alter the corporation's financial structure to commence the payment of dividends, or offer to purchase [the minority shareholder's] interest in the corporation."); Royals v. Piedmont Elec. Repair Co., 529 S.E.2d 515, 517-18, 520 (N.C. Ct. App. 2000) (involving a minority shareholder who was terminated from company employment for sexual harassment, and stating that "[a]lthough [the minority shareholder's] conduct did warrant some penalty with respect to his presence and participation in management at [the corporation], for purposes of this analysis, any penalty should not have extended to his realization of a fair return on his equity in the company"); *supra* note 49 (discussing the role of the minority's fault).

80. *See supra* text accompanying notes 46-47.

shareholder's expectations at the time he decided to invest in (and therefore join) the venture has been criticized as unduly narrow.[81] Indeed, a strict time of investment standard seems to ignore the possibility that post-investment expectations may arise. One can imagine situations where a shareholder's expectations have changed since the time of the initial investment due to developments in the company, a changing business climate, or the mere passage of years. Focusing on one point in time—the time of investment—to measure the shareholder's expectations fails to capture potentially valid and reasonable expectations that may develop well after a shareholder commits capital to the venture.

The *Kemp* definition also disadvantages persons who receive stock via gift or inheritance (transferee shareholders). Such persons become shareholders in a closely held corporation through the investment decisions of others (the transferors). Correspondingly, they gain the status of shareholder without having to contribute any capital to the venture. Under the literal *Kemp* formulation, therefore, it could be argued that shareholders who receive their stock via gift or inheritance have no reasonable expectations at all.[82]

By avoiding the "temporal" *Kemp* language and focusing on

81. *See, e.g.*, Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717, 762 (2002) ("A reasonable expectations framework that focuses solely on the time of investment, therefore, is overly restrictive. Instead . . . the framework should explicitly adopt a broader perspective that looks for investment bargains between the shareholders throughout the entirety of their relationship."); Thompson, *supra* note 28, at 218 ("Expectations of participants may change during the evolution of an enterprise and courts should examine the whole history of the participants' relationship. . . . [T]he focus in a New York decision on the petitioner's expectations at the time that he decided to join the enterprise is too narrow and may reflect the particular facts of that case.").

82. *Cf.* Guerra v. Guerra, No. 04-10-00271-CV, 2011 WL 3715051, at *6 (Tex. App. Aug. 24, 2011) ("The first part of the [oppression] definition relates to shareholders' expectations when investing in the corporation. [The plaintiff minority shareholder] received all of her shares as gifts or as a bequest from her father. Therefore, there is no evidence of shareholder oppression under this prong." (citations omitted)).

Some reasonable expectations go hand-in-hand with the status of shareholder. Any shareholder, including a shareholder who received his stock via gift or inheritance, is entitled to all of the rights and benefits that traditional corporate law associates with shareholder status. At a minimum, therefore, transferee shareholders have such status-based reasonable expectations. *See supra* note 79 and accompanying text.

the "reasonable expectations of all shareholders in the corporation," the LBCA more appropriately recognizes that reasonable expectations may develop at any time and may be possessed by any shareholder, regardless of whether that particular shareholder committed capital to the venture.[83] Indeed, the statutory comment explicitly rejects the temporal aspect of *Kemp* and recognizes that second-generation shareholders may be protected under the statute.[84]

Finally, § 1-1435(B) indicates that "[c]onduct that is consistent with the good faith performance of an agreement among all shareholders is presumed not to be oppressive."[85] Such a statement defuses any concern that the oppression doctrine and its consideration of reasonable expectations may trump any existing contractual arrangements between the shareholders. Agreements, in other words, are presumed to express the reasonable expectations of the parties, and are similarly presumed to express what the owners themselves have defined as "fair" conduct in the circumstances covered by the agreement.[86]

83. *Cf.* Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) ("These 'reasonable expectations' are to be ascertained by examining the entire history of the participants' relationship. That history will include the 'reasonable expectations' created at the inception of the participants' relationship; those 'reasonable expectations' as altered over time; and the 'reasonable expectations' which develop as the participants engage in a course of dealing in conducting the affairs of the corporation.").

It should be noted that even New York courts have concluded that stockholders who receive their shares via gift or inheritance can have reasonable expectations. *See, e.g.*, *In re* Schlachter, 546 N.Y.S.2d 891, 892 (App. Div. 1989) (gift); *In re* Smith, 546 N.Y.S.2d 382, 383-84 (App. Div. 1989) (inheritance); Gunzberg v. Art-Lloyd Metal Prods. Corp., 492 N.Y.S.2d 83, 86 (App. Div. 1985) (gift); *id.* ("[I]t seems clear that the holders of over 41% of a successful corporation are entitled to have their interests protected, regardless of whether or not those shares were received as gifts.").

84. *See* Louisiana Business Corporation Act, No. 328, § 1-1435 cmts. (d)(4)-(5) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

85. Louisiana Business Corporation Act, No. 328, § 1-1435(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

86. *See, e.g.*, *In re* Apple, 637 N.Y.S.2d 534, 535 (App. Div. 1996) (involving an agreement that "explicitly binds each shareholder to offer to sell his or her stock within 30 days after ceasing for any reason, either voluntarily or involuntarily, to be in the employ of the corporation," and concluding that the "agreement is enforceable and Peter Apple cannot be heard to argue that he had a reasonable expectation that he would be employed and would be a shareholder for life"); *see also* Evangelista v. Holland, 537 N.E.2d 589, 592 (Mass. App. Ct. 1989) ("Questions of good faith and

Although the statute references agreements "among all shareholders,"[87] agreements between the corporation and the withdrawing shareholder (e.g., an employment contract) should presumably be treated similarly. After all, such a contract is assented to by the withdrawing shareholder and should be construed as defining what is fair conduct to him in the circumstances covered by the agreement.

This is not to say, however, that the "good faith performance of an agreement" language will make every oppression dispute involving a contract easy to resolve. Particularly difficult issues arise when the controlling shareholder has the unilateral power to "trigger" an agreement, such as an agreement that compels a minority shareholder to sell his stock to the company upon an involuntary termination. The protections of the oppression doctrine (or, at a minimum, the implied covenant of good faith and fair dealing in contract) would seem to restrain the controlling shareholder from purposefully triggering the agreement for self-aggrandizing or opportunistic purposes.[88] The presence of broad discretionary language in the agreement, however, often complicates the issue.[89]

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loyalty do not arise when all the stockholders in advance enter into an agreement for the purchase of stock of a withdrawing or deceased stockholder."); *In re* Pace Photographers, Ltd., 525 N.E.2d 713, 718 (N.Y. 1988) ("Participants in business ventures are free to express their understandings in written agreements, and such consensual arrangements are generally favored and upheld by the courts."); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1178 (N.Y. 1984) (observing that "[s]hareholders enjoy flexibility in memorializing [their] expectations through agreements setting forth each party's rights and obligations in corporate governance").

87. Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (f) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

88. *See, e.g.*, Jensen v. Christensen & Lee Ins., Inc., 460 N.W.2d 441, 442-44 (Wis. Ct. App. 1990) (involving a minority shareholder whose involuntary termination triggered a contractual repurchase of his stock: "Jensen [the minority] argues in effect that the other directors received financial gain by terminating his employment prior to either his voluntary or mandatory retirement because the corporation would have to pay a higher price for his stock at the time of his retirement than it had to pay at the time of his termination. . . . We hold that there are sufficient allegations to plead a claim that the defendants breached their fiduciary duty to Jensen as a minority shareholder of the close corporation."); *cf.* Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 438 (7th Cir. 1987) ("One term implied in every written contract and therefore, we suppose, every unwritten one, is that neither party will try to take opportunistic advantage of the other.").

89. *See, e.g.*, Gallagher v. Lambert, 549 N.E.2d 136, 136-38 (N.Y. 1989) (upholding a summary judgment against a terminated minority shareholder who alleged that "the sole purpose of the firing at that time [under a buyback agreement

2. THE ROLE OF THE BUSINESS JUDGMENT RULE

Many shareholder oppression disputes involve confusion over whether the business judgment rule applies and, if so, how the application of the rule affects a court's oppression analysis. The business judgment rule is an especially deferential standard of review that insulates directors and officers from liability for a poor decision so long as the decision can be attributed to a rational business purpose.[90] For the business judgment rule to be invoked, three prerequisites must be met. The decision must be made (1) in good faith, (2) on an informed basis, and (3) with no conflicts of interest.[91]

From a liability standpoint, the scrutiny given to the merits of a decision under the business judgment rule is practically nonexistent, as only a de minimis rationality standard is involved.[92] Thus, if the prerequisites of the rule are met and the rule is applied, majority decisions involving employment, management, or dividend matters—internal decisions that form the core of many shareholder oppression disputes—are largely

triggered 'upon voluntary resignation or other termination'] was to acquire the stock at a contractually and temporally measured lower buy-back price formula," and stating the following: "These agreements define the scope of the relevant fiduciary duty and supply certainty of obligation to each side. They should not be undone simply upon an allegation of unfairness. . . . Defendant agreed to abide by these terms and thus fulfilled its fiduciary duty in that respect.").

90. *See, e.g.*, *In re* Reading Co., 711 F.2d 509, 517, 520 (3d Cir. 1983); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1374 (Del. 1995); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). *See generally* MOLL & RAGAZZO, *supra* note 3, § 6.02[C][1] (discussing the business judgment rule).

91. *See, e.g.*, Brehm v. Eisner, 746 A.2d 244, 264 n.66 (Del. 2000) ("The business judgment rule has been well formulated by . . . other cases. Thus, directors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available."); *cf.* LA. REV. STAT. ANN. § 12:91 (2010) (setting forth protection for directors and officers who exercise their business judgment in good faith); Louisiana Business Corporation Act, No. 328, §§ 1-830, -831, -842 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-830, -831, -842), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 (same).

92. *See, e.g.*, Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 442-43 (1993) ("This rationality standard of review is much easier to satisfy than a prudence or reasonability standard. To see how exceptional a rationality standard is, we need only think about the judgments we make in everyday life. It is common to characterize a person's conduct as imprudent or unreasonable, but it is very uncommon to characterize a person's conduct as irrational.").

insulated from judicial oversight.[93] Significantly, the notion of balancing the corporation's interests and an individual shareholder's interests is not part of a traditional business judgment rule analysis, as such an analysis does not concern itself with a shareholder's interests at all. If a decision can be attributed to a rational business purpose, the decision is upheld, regardless of how the decision affects a particular shareholder.

Does the business judgment rule apply to shareholder oppression disputes? Some courts have explicitly acknowledged that certain decisions in closely held corporations call for more judicial scrutiny than conventional business judgment rule deference.[94] Even if a court does not explicitly repudiate the deference of the business judgment rule, the application of the oppression doctrine implicitly conveys such a repudiation. After all, the oppression doctrine is premised on the notion that decisions about seemingly routine matters (e.g., employment, management, dividends) can be part of a minority shareholder

93. *See, e.g.*, Rosenfield v. Metals Selling Corp., 643 A.2d 1253, 1262 (Conn. 1994) (describing the "business judgment doctrine" as "a rule of law that insulates business decisions from most forms of review"); *see also* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("[C]ourts fairly consistently have been disinclined to interfere in those facets of internal corporate operations, such as the selection and retention or dismissal of officers, directors and employees, which essentially involve management decisions subject to the principle of majority control."); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 (Mass. 1975) ("[T]he plaintiff will find difficulty in challenging dividend or employment policies. Such policies are considered to be within the judgment of the directors." (footnote omitted)).

94. *See, e.g.*, Smith v. Atl. Props., Inc., 422 N.E.2d 798, 801, 804 (Mass. App. Ct. 1981) (stating, in a closely held corporation dispute, that "[t]he judgment . . . necessarily disregards the general judicial reluctance to interfere with a corporation's dividend policy ordinarily based upon the business judgment of its directors"); Fox v. 7L Bar Ranch Co., 645 P.2d 929, 935 (Mont. 1982) ("When it is also considered that in close corporations dividend withholding may be used by controlling shareholders to force out minority shareholders, the traditional judicial restraint in interfering with corporate dividend policy cannot be justified." (internal quotation omitted)); Grato v. Grato, 639 A.2d 390, 396 (N.J. Super. Ct. App. Div. 1994) ("[J]udicial consideration of a claim of majority oppression or freeze-out in a closely held corporation is guided by considerations broader than those espoused in defendants' version of the 'business judgment rule.'"); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561 (N.J. Super. Ct. Law Div. 1979) ("[T]he statutory language embodies a legislative determination that freeze-out maneuvers in close corporations constitute an abuse of corporate power. Traditional principles of corporate law, such as the business judgment rule, have failed to curb this abuse. Consequently, actions of close corporations that conform with these principles cannot be immune from scrutiny.").

freezeout.[95] As a result, the doctrine recognizes that such decisions require more than a mere surface inquiry into the majority's conduct. Indeed, the fact that courts applying the oppression doctrine are subjecting the majority's actions to "reasonable expectations" inquiries or "fair dealing and fair play" analyses suggests that courts are doing more than simply asking whether a majority decision can be attributed to a rational business purpose.[96]

LBCA § 1-1435 does not clearly indicate whether the business judgment rule applies to a shareholder's attempt to establish oppression. Nevertheless, the structure of the statute suggests that the deference of the business judgment rule is inappropriate. Section 1-1435(B) indicates that a corporation is obligated "to deal fairly in good faith with the shareholder."[97] Fairness, by itself, has nothing to do with the business judgment rule. When the rule applies, a court does not inquire into the fairness of a decision at all. Moreover, as the statute indicates, fairness to an *individual shareholder's* interests is front and center in an oppression analysis, as opposed to the exclusive focus on the *company's* interests embodied in the business judgment rule. Finally, § 1-1435(B)(2) requires the court to consider the reasonable expectations of "all shareholders," which is a different and deeper inquiry than simply asking the court to determine whether there is a rational business purpose for the majority's decisions.[98]

95. *See supra* notes 16-20 and accompanying text; *cf.* Hollis v. Hill, 232 F.3d 460, 467 (5th Cir. 2000) ("In the context of a closely held corporation, many classic business judgment decisions can also have a substantial and adverse [e]ffect on the 'minority's' interest as shareholder.").

96. *See supra* text accompanying notes 39-41.

97. Louisiana Business Corporation Act, No. 328, § 1-1435(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

98. The business judgment rule does apply to a shareholder's attempt to establish oppression in the sense that the oppression provisions do not prohibit the majority from making decisions and taking action as it wishes. The courts, in other words, are not empowered by the provisions to dictate how the business will be operated. *Cf.* Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (d)(1) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786 ("This formulation [of the test for oppressive conduct] is designed to provide a generous range of discretion to the majority owners in designing corporate policies and operations that are fair."). If the overall business practices, however, "are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with [a] shareholder," the corporation may have to purchase that shareholder's interest at fair value. *Id.* § 1-1435(A)-(B) (to be codified as amended at

Some judicial decisions note that a "shareholder's reasonable expectations must be balanced against the corporation's need to exercise its business judgment and run its business efficiently."[99] Similarly, the comment to § 1-1435 of the LBCA states that "[t]he majority shareholders are entitled to control the business through the exercise of their voting power, and they are entitled as much as the minority shareholders to have their reasonable expectations respected."[100] Statements such as these should not be understood to mean that the business judgment rule applies to oppression disputes. Once again, a traditional business judgment rule application focuses exclusively on the corporation's interests and does not "balance" anything against those interests.[101] References to "balance" and respecting majority and minority expectations, therefore, are not references to the business judgment rule. Instead, they simply convey what § 1-1435(B)(2) makes clear—i.e., an oppression analysis is not based solely on an inquiry into the plaintiff's expectations. A court must attempt to measure the obligation to deal fairly and in good faith with the plaintiff by considering the reasonable expectations of all of the shareholders, including the majority's right to control the business. A requirement to consider the expectations of both the minority and the majority (not the business judgment rule), however, is very different from a requirement to defer to the majority's will upon a showing of a rational business purpose (the business judgment rule).

3. THE CORPORATION AS THE OPPRESSOR

MBCA § 14.30 indicates that a shareholder may seek judicial dissolution on the ground that "the directors or those in control of the corporation" have acted in an oppressive manner.[102] LBCA § 1-1435(A), by contrast, states that a shareholder may withdraw from a corporation and seek a buyout if the "corporation" engages in oppression of the shareholder. According to the statutory comment, the shift in focus from "directors or those in control" to a "corporation" seems to be motivated by a desire to make it easier for a plaintiff to establish an oppression claim without

LA. REV. STAT. ANN. §§ 12:1-1435(A)-(B)).

99. Willis v. Bydalek, 997 S.W.2d 798, 801 (Tex. App. 1999).

100. Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (d)(2) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

101. *See supra* text accompanying note 93.

102. MODEL BUS. CORP. ACT § 14.30(a)(2)(ii) (2010).

having to focus on the conduct of a particular individual or group. As the comment states: "Although a corporation's oppression of a shareholder is unlikely to occur without the complicity of its directors or controlling shareholders, this Section does not require the complaining shareholder to prove that any particular participant in corporate management is responsible for the oppression that occurs."[103]

Despite this apparent explanation, the notion of a corporation engaging in oppression is puzzling. While oppression can occur through corporate acts (e.g., a termination of employment by the corporation, or a payment of excessive compensation by the corporation), there are other common examples of oppressive conduct that are difficult to view as corporate acts. For example, when a majority shareholder votes to remove another shareholder as a director of the company,[104] it is hard to describe such conduct as a corporate act. After all, the shareholder is acting in an individual capacity when casting his vote and not as a corporate agent. Similarly, a director or controlling shareholder who simply embezzles money from the corporation is presumably committing an oppressive act,[105] but it is difficult to describe such conduct as the "corporation" engaging in oppression. In short, while the comment suggests that the language of § 1-1435(A) was not meant to narrow the range of conduct that would typically be characterized as oppressive, the emphasis on the "corporation" engaging in oppression may create unintended confusion among courts and litigants.

4. WAIVER OF THE RIGHT TO WITHDRAW

LBCA § 1-1435(J) allows the shareholders of a corporation to "waive the right to withdraw under this Section by unanimous written consent . . . stating that the shareholders are waiving the right provided by law to withdraw from the corporation on grounds of oppression."[106] Whether such a waiver should be

103. Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (e) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

104. *See generally* MOLL & RAGAZZO, *supra* note 3, § 7.01[C][2] (discussing interference with management participation as a common act of oppression).

105. *See generally id.* § 7.01[C][5] (discussing the appropriation of a disproportionate share of the corporation's income as a common act of oppression).

106. Louisiana Business Corporation Act, No. 328, § 1-1435(J) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(J)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

allowed is debatable.

On the one hand, oppression litigation (like all litigation) is expensive, and the buyout remedy can cause financial difficulties for the corporation.[107] If the shareholders have other mechanisms for addressing dissension (e.g., a buy-sell agreement), waiving the withdrawal right to avoid the risk of oppression litigation may be sensible.[108]

On the other hand, both courts and commentators have noted that, because owners of closely held corporations are frequently linked by family or other personal relationships, there is often an initial atmosphere of mutual trust that diminishes the sense that contractual protection is needed.[109] Commentators have also argued that owners of closely held corporations are often unsophisticated about legal matters such that the need for contractual protection is rarely recognized.[110] These "overtrust" and unsophistication arguments would seem to apply with equal force to a minority shareholder's inability to recognize that legal

107. *See infra* Part III(C)(2).

108. Perhaps a waiver would also alleviate concerns that banks will be reluctant to lend to closely held corporations because the company might face an oppression-based buyout in the future and an accompanying cash drain. Under LBCA § 1-1436(E), however, a court has the ability to mitigate any harm to creditors from a buyout. *See infra* Part III(C)(2); Louisiana Business Corporation Act, No. 328, § 1-1436(E) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(E)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. Moreover, in jurisdictions with oppression statutes that do not allow waiver, see *infra* note 112 and accompanying text, the continued existence of closely held corporations suggests that lending persists, despite the possibility of a buyout.

109. *See, e.g.*, Brenner v. Berkowitz, 634 A.2d 1019, 1026 (N.J. 1993) ("Shareholders of close corporations are often family or close friends. Those persons often fail to provide for involuntary dissolution because they do not expect irreconcilable differences to arise." (citation omitted)); Meiselman v. Meiselman, 307 S.E.2d 551, 558 (N.C. 1983) (observing that "close corporations are often formed by friends or family members who simply may not believe that disagreements could ever arise" (internal quotation omitted)); *see also* Thompson, *supra* note 11, at 705 ("Investors often . . . demonstrate an overly optimistic trust in those with whom they are undertaking the venture.").

110. *See, e.g.*, Laurel Wheeling Farrar & Susan Pace Hamill, *Dissociation from Alabama Limited Liability Companies in the Post Check-the-Box Era*, 49 ALA. L. REV. 909, 931 (1998) (noting that closely held corporation shareholders "did not and for the most part, due to their level of sophistication, will not, bargain ahead of time to address separations from the business"); F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 884 (1978) ("[M]any participants in closely held corporations are 'little people,' unsophisticated in business and financial matters."); *id.* at 883 (noting that shareholders in closely held corporations "may be unaware of the risks involved").

protection, such as the oppression doctrine, may be needed down the road. A waiver of the right to withdraw, therefore, may simply reflect a minority shareholder's overtrust, unsophistication, and desire not to "rock the boat,"[111] rather than an informed weighing of the pros and cons of relinquishing a legal right. Perhaps for these reasons, some courts in jurisdictions with oppression statutes have held that waivers of rights under such statutes are against public policy and unenforceable.[112]

C. ANALYSIS OF SELECTED REMEDY PROVISIONS

1. REVERSING THE MBCA'S "DISSOLUTION UNLESS BUYOUT" SCHEME

As mentioned, MBCA § 14.30 indicates that a shareholder may seek judicial dissolution on the ground that "the directors or those in control of the corporation" have acted in an oppressive manner.[113] Although the MBCA does not explicitly provide any remedy for oppressive conduct other than dissolution, § 14.34 does permit the corporation or the other shareholders to "elect" to purchase the shares of the petitioning investor to circumvent the dissolution proceeding. To avoid the possibility of dissolution, in other words, the corporation or the other shareholders can choose to buy out the shares of the allegedly oppressed investor.[114]

The LBCA oppression provisions reverse this "dissolution unless buyout" scheme in favor of a "buyout unless dissolution"

111. *See, e.g.*, Hetherington & Dooley, *supra* note 14, at 36-37 ("[T]he minority investor may be hesitant to raise too many reservations for fear of demonstrating too little confidence in the majority and thereby queering the deal. Introducing the subject of future dissension may produce present discontent and prevent the firm from being organized." (footnote omitted)); Thompson, *supra* note 28, at 224 ("A prolonged focus on the 'downside' may seem inconsistent with the mutual trust on which the business must depend.").

112. *See, e.g.*, *In re* Validation Review Assocs., Inc., 646 N.Y.S.2d 149, 149, 152 (App. Div. 1996) (holding that a provision in a shareholders' agreement that waived the shareholders' statutory and common-law rights to petition for judicial dissolution was unenforceable as against public policy), *rev'd on other grounds*, 690 N.E.2d 487 (N.Y. 1997); *cf.* REVISED UNIF. LTD. LIAB. CO. ACT §§ 110(c)(7), 701(a)(5) (2006), 6B U.L.A. 443, 506 (2008) (stating that an operating agreement may not vary the power of a court to decree dissolution on the grounds of oppressive conduct).

113. *See supra* note 102 and accompanying text.

114. *See* MODEL BUS. CORP. ACT § 14.34 cmt. (2010) (noting that "section 14.34 affords an orderly procedure by which a dissolution proceeding under section 14.30(a)(2) can be terminated upon payment of the fair value of the petitioner's shares").

procedure. LBCA § 1-1435(A) provides for the remedy of a fair-value buyout in the event of oppressive conduct.[115] Section 1-1438(A) then provides that a corporation may convert a buyout proceeding "into a proceeding for a court-supervised dissolution of the corporation if the dissolution is approved as provided in R.S. 12:1-1402 [allowing for voluntary dissolution upon the approval of the board and a majority of the voting shares]."[116] Such a motion for conversion may be filed "at any time before final judgment" in the buyout proceeding.[117] By using this procedure, a judicial dissolution is a potential remedy in an oppression lawsuit only if the corporation chooses to invoke it. As the comment to § 1-1435 concludes:

> [T]he main effect of the four new Sections is to reverse the order of the remedies provided by the Model Act for oppression, from dissolution unless the corporation or its shareholders choose quickly to buy out the plaintiff shareholder, to a buyout of the plaintiff shareholder unless the corporation chooses to dissolve before final judgment in the suit is rendered.[118]

Why reverse the MBCA scheme under the new LBCA provisions? The comment to § 1-1435 states:

> This change in the order of remedies is designed to do two things: allow the corporation to contest the plaintiff shareholder's allegations of oppression without risking an involuntary dissolution of the entire company, and align the statutory remedies for oppression more closely with those that have been provided in most of the reported American cases on the subject.[119]

With respect to the first of these explanations, it is true that contesting the allegations of oppression under the MBCA scheme will usually require the corporation and the other shareholders to

115. Louisiana Business Corporation Act, No. 328, § 1-1435(A) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(A)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

116. *Id.* § 1-1438(A) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1438(A)).

117. *Id.* § 1-1438(B) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1438(B)).

118. *Id.* § 1-1435 cmt. (a).

119. Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (b) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

forego electing a buyout. If oppression is established, therefore, there is some risk that a court will order dissolution as a remedy.[120] In many jurisdictions, however, the risk that a business will actually be liquidated as a result of oppressive conduct is more theoretical than real. After all, even in jurisdictions where dissolution is the only remedy explicitly stated in the statute, courts regularly conclude that the power to order a buyout or other remedy in lieu of dissolution is part of their equitable authority,[121] and they typically grant such alternative remedies.[122] Indeed, if the legislature provides courts with the authority to dissolve a corporation, it is not a stretch to presume that such authority includes the power to craft less drastic remedies.[123]

Nevertheless, courts in some jurisdictions have interpreted

120. Under MBCA § 14.34(b), a buyout election must be made "within 90 days after the filing of the [dissolution] petition . . . or at such later time as the court in its discretion may allow." MODEL BUS. CORP. ACT § 14.34(b) (2010). In general, it will take more than ninety days for a court to resolve whether oppressive conduct has occurred. As a consequence, contesting the allegations of oppression usually results in the corporation or the nonpetitioning shareholders failing to elect during the ninety-day window. While an election can theoretically be made after that time, the court has discretion to deny it and to continue with the dissolution proceeding. Thus, after the expiration of the ninety-day window, there is no guarantee that dissolution can be avoided if the court finds that oppressive conduct has occurred.

121. *See, e.g.*, Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 274 (Alaska 1980); Sauer v. Moffitt, 363 N.W.2d 269, 274-75 (Iowa Ct. App. 1984); Edenbaum v. Schwarcz-Osztreicherne, 885 A.2d 365, 380-81 (Md. Ct. Spec. App. 2005); 21 West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858, 867 (Mo. Ct. App. 1995); Maddox v. Norman, 669 P.2d 230, 237 (Mont. 1983); McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 235-36 (N.M. Ct. App. 1986); *see also* Bedore v. Familian, 125 P.3d 1168, 1172 (Nev. 2006) (noting that "courts have recognized that dissolution statutes do not provide the exclusive remedies for oppressed shareholders" (internal quotation omitted)); Masinter v. Webco Co., 262 S.E.2d 433, 439 (W. Va. 1980) ("Most states have adopted the view that a dissolution statute does not provide the exclusive remedy for injured shareholders and that the courts have equitable powers to fashion appropriate remedies . . . ."); *supra* note 30 and accompanying text (discussing authority for alternative remedies).

122. *See supra* note 31 and accompanying text (noting that orders of dissolution have become less frequent); *infra* note 126 and accompanying text (noting that a buyout is the most common remedy for oppression).

123. *See, e.g.*, Brenner v. Berkowitz, 634 A.2d 1019, 1031 (N.J. 1993) ("That the court would have the statutory power to order dissolution of a corporation, but not the lesser authority to compel the corporation to use its assets to acquire the stock of an oppressed shareholder, would make no sense."); *see also* Brodie v. Jordan, 857 N.E.2d 1076, 1082 n.7 (Mass. 2006) ("In most of these States, statutes authorize the more drastic remedy of involuntary dissolution, and thus courts have understandably inferred the power to order the lesser remedy of a buyout.").

their oppression statutes literally and have concluded that dissolution or receivership is the only permitted remedy.[124] If the LBCA drafters were concerned that Louisiana courts might reach the same conclusion, it makes sense to provide a court with explicit statutory authority to order a buyout, but deny the court authority to compel dissolution (unless the corporation elects it). By reversing the MBCA scheme in this manner, the LBCA allows a defendant to contest oppression allegations without risking an unwanted judicial dissolution.

The second explanation for reversing the MBCA scheme—to "align the statutory remedies for oppression more closely with those that have been provided in most of the reported American cases on the subject"[125]—is a direct reference to the prevalence of the buyout remedy. A buyout of the oppressed investor's stockholdings is the most common remedy for oppression.[126] In general, courts prefer buyouts because they provide a mechanism for a shareholder to extricate his investment from a venture without having to liquidate the business. The remaining shareholders continue to operate the business and to participate in the company's successes and failures, while the departing shareholder recovers the value of his invested capital and removes himself from the company's affairs. This equitable "parting" avoids a number of practical problems that often arise when more conventional remedies are considered. For example, injunctions are often problematic because they force the acrimonious parties to continue working together and correspondingly obligate a court to supervise an ongoing difficult relationship.[127] Damage awards can be similarly problematic because they "keep[] the investment of the aggrieved shareholder locked into the company and, relatedly, force[] the aggrieved

124. *See, e.g.*, Giannotti v. Hamway, 387 S.E.2d 725, 733 (Va. 1990) (stating that the dissolution remedy for oppression is "exclusive" and concluding that the trial court is not permitted "to fashion other . . . equitable remedies"); *see also* Ritchie v. Rupe, No. 11-0447, 2014 WL 2788335, at *11 (Tex. June 20, 2014) (concluding that "the only cause of action the [Texas oppression] statute creates is for receivership").

125. Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (b) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

126. *See, e.g.*, Ritchie v. Rupe, No. 11-0447, 2014 WL 2788335, at *28 (Tex. June 20, 2014) (Guzman, J., dissenting) (noting that "leading scholars on shareholder oppression have observed that buyouts are the most common remedy for dissension within a close corporation" (internal quotation omitted)).

127. *See, e.g.*, Douglas K. Moll, *Reasonable Expectations v. Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 B.C. L. REV. 989, 1019 & n.119, 1021 (2001).

shareholder to trust that a previously oppressive majority shareholder will not oppress again."[128] Simply put, a buyout often gives all of the shareholders what they want—the minority exits the venture with the value of his investment, and the majority remains in control of an operating business. In this respect, the LBCA's emphasis on the buyout (rather than dissolution) as the first remedial option is sensible.[129]

2. THE DOWNSIDE OF A BUYOUT

Despite the advantages of a buyout, the remedy can be problematic. In particular, the party ordered to effectuate the buyout may not have sufficient financial resources to accomplish the purchase. Courts have mitigated such concerns by ordering the purchase price to be paid in installments or extending the amount of time to complete the buyout.[130] Some statutes also provide similar flexibility. Under the MBCA, for example, a buyout election in lieu of dissolution can result in a judicial determination of fair value.[131] MBCA § 14.34(e) states, in part, that:

> Upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and

128. Moll, *supra* note 127, at 1021.

129. Some statutes have a similar approach in that they instruct a court to consider whether any other alternative remedy is sufficient to resolve the dispute before ordering dissolution. *See* 805 ILL. COMP. STAT. ANN. 5/12.56 (West 2010); N.Y. BUS. CORP. LAW § 1104-a(b)(1) (McKinney 2003).

130. *See, e.g.*, Kaplan v. First Hartford Corp., 671 F. Supp. 2d 187, 190-91 & nn.5-6 (D. Me. 2009) (adopting the special master's proposal that a buyout in an oppression dispute should be effectuated in the following manner: $500,000 paid to the oppressed minority shareholder immediately, the remainder of the approximately $2.4 million paid over five years, the provision of commercially reasonable security to the minority, and the award of pre-judgment and post-judgment interest); Meiselman v. Meiselman, 307 S.E.2d 551, 572-73 (N.C. 1983) (Martin, J., concurring) ("If it is determined that the granting of relief will be unduly burdensome to the corporation or other shareholders, the trial court should consider this in determining whether to grant relief and, if so, whether this should affect the purchase price or value attached to plaintiff's shares or the method of payment."); Link v. L.S.I., Inc., 793 N.W.2d 44, 47-48, 52-53 (S.D. 2010) (affirming the trial court's order of monthly installment payments over five years for a corporation that elected to buy out a petitioning shareholder); *see also* Robert W. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 83 (1982) (discussing the possibility of "structur[ing] installment payments with a commercially reasonable rate of interest over an extended period of time").

131. *See* MODEL BUS. CORP. ACT § 14.34 (2010).

> conditions as the court deems appropriate, which may include payment of the purchase price in installments, where necessary in the interests of equity, [and] provision for security to assure payment of the purchase price and any additional expenses as may have been awarded . . . .[132]

The subsection also states that "[i]nterest may be allowed at the rate and from the date determined by the court to be equitable."[133] The key point is that both judicial and statutory authority permit a court to use its discretion to structure a buyout transaction in a manner that considers the interests of both the seller and the buyer.

The LBCA provisions also address the financial issues surrounding a buyout. Section 1-1436(E) states that "[i]f at the conclusion of the trial [determining fair value] the court finds that the corporation has proved that a full payment in cash of the fair value of the . . . shares would violate . . . R.S. 12:1-640 [improper distributions] or cause undue harm to the corporation or its creditors," the court shall render a final judgment "[o]rdering the corporation to issue and deliver to the shareholder within thirty days of the date of the judgment an unsecured negotiable promissory note of the corporation."[134] The note must be in a principal amount equal to the fair value of the shares, and it must provide for simple interest "at a floating rate equal to the judicial rate of interest."[135] In addition, the note may have a term of up to ten years, and it may contain "such other terms, customary in negotiable promissory notes issued in commercial transactions, as the court may order."[136] The judgment must also provide that the seller's ownership is terminated "upon delivery to the shareholder of the note."[137]

Compared to the MBCA approach, the LBCA provisions provide a court with much less discretion to mitigate the financial

132. MODEL BUS. CORP. ACT § 14.34(e) (2010).

133. *Id.*

134. Louisiana Business Corporation Act, No. 328, § 1-1436(E)(1) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(E)(1)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

135. *Id.* § 1-1436(E)(1)(b)-(c) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(E)(1)(b)-(c)).

136. *Id.* § 1-1436(E)(1)(d)-(e) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(E)(1)(d)-(e)).

137. *Id.* § 1-1436(E)(2) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(E)(2)).

effects of a buyout. Whereas a court under the MBCA is empowered to "enter an order directing the purchase upon such terms and conditions as the court deems appropriate,"[138] a court under the LBCA essentially has one option—order full payment via an unsecured promissory note that is due within ten years. In particular, it is noteworthy that a Louisiana court is seemingly unable to order security for the note or to decrease the face amount of the note by compelling an immediate cash payment of some amount. Given that the shareholder's ownership terminates upon delivery of the note (rather than payment of the note), the inability of a court to require security is even more striking, as the oppressed shareholder bears the risk of the company's nonpayment as a mere unsecured creditor.[139]

3. THE MEANING OF "FAIR VALUE"

In jurisdictions that recognize the oppression doctrine and a buyout as a potential remedy, the buyout price is typically set at the "fair value" of the minority's shares. The buyout statutes in several states are phrased in terms of fair value,[140] and even

138. MODEL BUS. CORP. ACT § 14.34(d) (2010).

139. The LBCA does follow the MBCA and allows for security when a buyout is elected in lieu of a possible judicial dissolution on deadlock, business abandonment, or other non-oppression grounds. *See* Louisiana Business Corporation Act, No. 328, §§ 1-1430, -1434(E) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. §§ 12:1-1430, -1434(E)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. A court's inability to provide security when a buyout is the remedy for oppression, therefore, seems particularly odd. *Cf.* Link v. L.S.I., Inc., 793 N.W.2d 44, 53 (S.D. 2010) ("'[B]efore ordering payment in installments, the court should be satisfied with the purchaser's ability to meet the scheduled payments and to provide such security as the court deems necessary.'" (quoting MODEL BUS. CORP. ACT § 14.34 cmt. 4(b) (2010))). One might speculate that there was some concern over whether a secured note would interfere with the company's ability to obtain financing in the future, as a lender might be unwilling to offer favorable terms without a first-priority security interest in the company's assets. Providing a court with discretion to order security, however, would allow courts to consider such concerns and to mitigate them by, for example, requiring only partial security, ordering that the shareholder accept a subordinated secured status to a particular lender, or denying security all together.

140. *See, e.g.*, ALA. CODE § 10A-2-14.34 (LexisNexis 2013); ALASKA STAT. § 10.06.630 (2012); ARIZ. REV. STAT. ANN. § 10-1434 (2013); CAL. CORP. CODE § 2000 (West 1990); IOWA CODE ANN. § 490.1434 (West 2009); ME. REV. STAT. ANN. tit. 13-C, § 1434(2)(A) (2005 & Supp. 2012); MINN. STAT. ANN. § 302A.751 subd. 2 (West 2011); N.J. STAT. ANN. § 14A:12-7(8) (West 2003); N.Y. BUS. CORP. LAW §§ 1104-a, 1118 (McKinney 2003); N.D. CENT. CODE § 10-19.1-115 (2012); S.D. CODIFIED LAWS § 47-1A-1434 (2007); MODEL BUS. CORP. ACT § 14.34(a) (2010); *see also* Thompson, *supra* note 11, at 718 (noting that "[s]everal of the largest commercial states permit a corporation or its majority shareholders to avoid involuntary dissolution by

courts in jurisdictions without statutory authorization for a buyout have ordered buyouts at fair value as part of their equitable authority.[141]

Although there is widespread support for a fair value buyout as a possible remedy for oppression, there is disagreement about what fair value means. Broadly speaking, two conflicting positions have developed on this issue. The first position equates fair value with "fair market value" and incorporates the discounts that a fair market value analysis would apply. A fair market value analysis determines the value of closely held corporation shares by asking what someone would hypothetically pay for those shares. More precisely, fair market value is defined as "the price at which property would change hands between a willing buyer and a willing seller when neither party is under an obligation to act."[142] A willing and noncompelled buyer would generally pay more for shares that possess value-enhancing attributes (e.g., control or liquidity) than it would for shares that lack such features. To reflect this economic reality, it is fairly standard for a fair market value appraisal to reduce or "discount" the purchase price of shares that lack control or other valuable attributes.[143] Because the shares of a typical minority investor in a closely held corporation are characterized by a lack of control and a lack of liquidity,[144] one can expect the fair market value of those shares to be lower than shares that possess such features. If a court accepts that fair value is equivalent to fair market value, therefore, discounting the buyout price of shares for the absence of value-enhancing attributes is appropriate.[145]

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purchasing the shares of the petitioning shareholders at their 'fair value'").

141. *See, e.g.*, Davis v. Sheerin, 754 S.W.2d 375, 378, 381 (Tex. App. 1988) (stating, in a jurisdiction without statutory authorization for a buyout, that "[a]n ordered 'buy-out' of stock at its fair value is an especially appropriate remedy in a closely-held corporation"). *But see* Ritchie v. Rupe, No. 11-0447, 2014 WL 2788335, at *11 (Tex. June 20, 2014) (concluding that "the only cause of action the [Texas oppression] statute creates is for receivership").

142. Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 362 (Colo. 2003) (en banc).

143. *See* ROBERT F. REILLY & ROBERT P. SCHWEIHS, THE HANDBOOK OF ADVANCED BUSINESS VALUATION 303 (2000) (noting that "[d]iscounts are part of the 'willing buyer, willing seller' concept that defines fair market value").

144. By definition, a "minority" shareholder lacks sufficient voting power to control the operations of the firm. *See supra* note 14. Moreover, the shares of a closely held corporation are not easily converted into cash due to the absence of withdrawal rights and the lack of an active market. *See supra* text accompanying notes 22-26.

145. *See, e.g.*, Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 360 (Colo. 2003) (en banc) ("Another interpretation of fair value is to value the dissenters' specific

The second position on the meaning of fair value equates fair value with "enterprise value." The enterprise value approach views a shareholder in a buyout setting as an investor forced to relinquish his ownership position, rather than as an investor looking to sell his shares. Such an approach assumes that, absent the oppression-related conduct, the investor would have retained his ownership position in the corporation and would have continued to receive the benefits of owning a stake in the overall enterprise. Under this position, the value of shares in a closely held corporation is determined not by reference to what the particular shares would fetch in a hypothetical market sale, but instead by valuing the company as a whole and by ascribing to each share its pro rata portion of that overall enterprise value.[146] Viewed in this manner, the specific shares of, for example, a 25% minority investor are not valued in and of themselves. Instead, they are valued solely as a part (25%) of the overall value of the closely held corporation as an operating business, with no discounting for the shares' lack of particular features.

To distinguish these two positions on the meaning of fair value, a brief illustration is helpful. Assume that a closely held corporation is valued on a going concern basis at $10 million. Assume further that a court is valuing the shares of a 25%

allotment of shares, just as one would value the ownership of a commodity. Under this view . . . the 'fair value' of [an] ownership interest is only the amount a willing buyer would pay to acquire the shares. In effect, this interpretation reads fair value as synonymous with fair market value."); *id.* ("An investor who wants to buy a minority allotment of shares in a closely-held corporation would discount the price he was otherwise willing to pay for the shares because the shares are a minority interest in the company and are a relatively illiquid investment. Likewise, under this [fair market value] interpretation, the trial court should usually apply minority and marketability discounts."); *cf.* N. Air Servs, Inc. v. Link, 804 N.W.2d 458, 463 n.6 (Wis. 2011) ("'Fair market value' per share refers to a share's value after downward adjustments are made to its 'fair value' to account for lack of control (in the case of shares representing a minority interest) and lack of ready marketability. This is opposed to 'fair value' per share, which is the net worth of a closely held corporation, divided by the number of shares." (citations omitted)).

146. As the Supreme Court of Colorado observed:

> One possible interpretation . . . is that fair value requires the court to value the dissenting shares by looking at what they represent: the ownership of a certain percentage of the corporation. In this case, the trial court found that Holding Company, as an entity, was worth $76.1 million. Lindoe owned 5.71 percent of Holding Company and therefore, under this view, Lindoe is entitled to 5.71 percent of Holding Company's value, or just over $4.3 million. Because the proper measure of value is the shareholder's proportionate interest in the value of the entity, discounts at the shareholder level are inapplicable.

Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 360 (Colo. 2003).

minority investor in a buyout proceeding. Under an enterprise value approach, a 25% ownership stake in a $10 million company would be valued on a pro rata basis at $2.5 million. Under a fair market value approach, however, a court would discount that $2.5 million amount to reflect (1) that a purchaser would pay less for a minority block of stock because it lacks control (the minority discount) and (2) that a purchaser would pay less for a block of closely held corporation stock because it cannot easily be sold (the marketability discount).[147] If the combined effect of these discounts reduces the $2.5 million amount by 40%,[148] the buyout price would decrease to $1.5 million. The valuation difference between the two approaches, in other words, is equivalent to the amount of the discounts.

Courts in many jurisdictions have wrestled with the debate over fair value and the propriety of discounts in oppression disputes. While courts largely agree that the minority discount should be rejected in the oppression setting,[149] less consensus exists on the propriety of the marketability discount.[150]

147. *See generally* MOLL & RAGAZZO, *supra* note 3, § 8.02[B][3][b]-[d] (discussing the minority discount, the marketability discount, and arguments for and against discounts).

148. The combined effect of discounts may be even greater than 40%. *See, e.g.*, Murdock, *supra* note 31, at 479 ("The cumulative effect of these [minority and marketability] discounts can reduce the value of the minority shares by fifty percent or more."); *id.* at 489 (observing that minority and marketability discounts "can have a dramatic and devastating impact on the value of minority interests").

149. *See, e.g.*, Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834, 838 (Minn. Ct. App. 1994); Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 349 (App. Div. 1985); Chiles v. Robertson, 767 P.2d 903, 926 (Or. Ct. App. 1989); Charland v. Country View Golf Club, Inc., 588 A.2d 609, 612 (R.I. 1991); *see also* Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 734-35 (N.J. 1999) (listing cases). *See generally* MOLL & RAGAZZO, *supra* note 3, fig.8.1 (providing a fifty-state chart indicating whether minority discounts are applied in the oppression context). *But see* McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 243-45 (N.M. Ct. App. 1986) (allowing a minority discount); MODEL BUS. CORP. ACT § 14.34 cmt. 4(b) (2010) ("In cases where there is dissension but no evidence of wrongful conduct, 'fair value' should be determined with reference to what the petitioner would likely receive in a voluntary sale of shares to a third party, taking into account the petitioner's minority status.").

150. *Compare* Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 733, 735-36, 738 (N.J. 1999) (applying a marketability discount to a buyout of the oppressor's shares by the oppressed investor), *and* Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 349 (App. Div. 1985) (rejecting a minority discount but stating the following: "A discount for lack of marketability is properly factored into the equation because the shares of a closely held corporation cannot be readily sold on a public market. Such a discount bears no relation to the fact that the petitioner's shares in the corporation represent a minority interest."), *and* Munshower v. Kolbenheyer, 732 So. 2d 385, 386 (Fla. Dist. Ct. App. 1999) (affirming a marketability discount and stating that "we

In Louisiana, the LBCA's oppression provisions resolve the discount issue. Section 1-1435(A) states that a buyout of an oppressed investor's shares shall be at "fair value."[151] Section 1-1435(C) indicates that "fair value" has "the same meaning . . . as it does in R.S. 12:1-1301(4) concerning appraisal rights . . . ."[152] Specifically, § 1-1301(4) defines "fair value" as:

> [T]he value of the corporation's shares determined immediately before the effectuation of the corporate action to which the shareholder objects, using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, and *without discounting for lack of marketability or minority status* . . . .[153]

Thus, under the LBCA, the statutory language clearly indicates that the remedy of a fair value buyout for oppressive conduct will be calculated without the inclusion of discounts.

4. THE EXCLUSIVITY OF THE BUYOUT REMEDY

As mentioned, when oppressive conduct is established in a closely held corporation, courts are generally authorized (either by statute or judicial decision) to offer a wide range of remedies.[154] Under § 1-1435(L) of the LBCA, however, the buyout is the only remedy available for oppression. As that subsection states:

> Without limiting any remedy available on other grounds, the right to withdraw in accordance with this Section and R.S. 12:1-1436 is the exclusive remedy for oppression. An allegation of oppression, as such, does not provide an independent or additional basis for an action by a

rely on New York case law as persuasive in this matter"), *with* Chiles v. Robertson, 767 P.2d 903, 926 (Or. Ct. App. 1989) (rejecting a marketability discount), *and* Charland v. Country View Golf Club, Inc., 588 A.2d 609, 612-13 (R.I. 1991) (same). *See generally* MOLL & RAGAZZO, *supra* note 3, fig.8.1 (providing a fifty-state chart indicating whether marketability discounts are applied in the oppression context).

151. Louisiana Business Corporation Act, No. 328, § 1-1435(A) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(A)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

152. *Id.* § 1-1435(C) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(C)).

153. *Id.* § 1-1301(4) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1301(4)) (emphasis added).

154. *See supra* note 30 and accompanying text.

> shareholder to recover damages from the corporation or its directors, officers, employees, agents, or controlling persons.[155]

Outside of Louisiana, a number of courts have taken advantage of the remedial flexibility provided by the oppression doctrine and have imposed remedies other than a buyout or dissolution.[156] Such courts presumably believed that those remedies were better suited for the particular oppressive conduct at issue. To the extent that the remedial flexibility of the oppression doctrine allows courts to fine-tune a remedy for a particular situation, the LBCA's removal of that flexibility is questionable.

In addition, there are some fact patterns where a buyout (or dissolution) seems clearly inadequate as a remedy. For example, assume that the majority shareholder and the minority shareholder own the same class of stock. The majority shareholder uses his control over the board to declare substantial dividends but pays them only to himself. The minority has clearly been harmed by not receiving his share of the dividends. A buyout would provide the oppressed shareholder with both an exit and compensation for the value of his investment, but it would not rectify the effective conversion of his share of the dividends.[157] Perhaps the solution to this and similar problems is to recognize that § 1-1435(L) only limits the remedy for an oppression action; other remedies may be pursued on non-oppression grounds. Thus, an action for conversion or "illegal dividend" might provide compensation for the denied dividends.[158]

155. Louisiana Business Corporation Act, No. 328, § 1-1435(L) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(L)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

156. *See, e.g.*, Brenner v. Berkowitz, 634 A.2d 1019, 1033 (N.J. 1993) (affirming the reinstatement of a minority shareholder to a director position and an injunction against any future acts of misconduct); Davis v. Sheerin, 754 S.W.2d 375, 378, 388 (Tex. App. 1988) (upholding various awards of damages, the appointment of a receiver, and an injunction prohibiting the majority shareholder from contributing to a profit-sharing plan unless a proportionate sum was paid to the minority shareholder).

157. *See, e.g.*, Moll, *supra* note 49, at 890-93 (discussing remedies when a shareholder has been excluded from dividends); *id.* at 890, 892 (noting that "[a] buyout award . . . does not provide the aggrieved minority shareholder with compensation for the past . . . dividends that it failed to receive," and stating that an oppressed shareholder excluded from dividend payments "should receive its portion of the prior dividend payments and its share of the company's value").

158. *Cf.* Moll, *supra* note 49, at 893 ("At some level, disputes involving de facto

In other situations, derivative actions for breach of fiduciary duty may be helpful.[159]

5. STAY OF DUPLICATIVE PROCEEDINGS

LBCA § 1-1437(A) indicates that "[o]n motion by the corporation, a court shall stay a duplicative proceeding by a shareholder who has given a notice of [oppression-based] withdrawal to the corporation." A "duplicative proceeding" is defined as:

> [A]ny proceeding in which a shareholder, on his own behalf or as a representative of the corporation, alleges a cause of action against the corporation, or against a director, officer, agent, employee, or controlling person of the corporation, on grounds of a breach of duty owed by that person to the corporation or to the shareholder in the shareholder's capacity as shareholder.[160]

According to the comment, a stay is warranted because "[t]he continuation of other shareholder litigation while the complaining shareholder is attempting to withdraw under [§ 1-1435] imposes litigation expenses that will not be justified if the withdrawal remedy is granted . . . ."[161] The comment further states that § 1-1437 "allows the corporation to avoid the potentially wasteful litigation expenses by obtaining a stay of the action until the outcome of the withdrawal effort by the complaining shareholder is known."[162]

While the prevention of unjustified litigation expenses is laudable, this statutory provision raises some concerns. First,

dividends are relatively easy to resolve. After all, these disputes typically involve a majority shareholder who takes a disproportionate amount of the company's profit. Such conduct, simply put, is clearly unlawful, and it can be characterized as unlawful in a number of different ways—for example, fraud on the minority investors, bad faith to the minority investors, an illegal dividend to the majority, or plain and simple theft by the majority.").

159. It should be noted that § 1-1437 of the LBCA may stay actions seeking remedies on non-oppression grounds. Louisiana Business Corporation Act, No. 328, § 1-1437 (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1437), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786; *see also infra* Part III(C)(5).

160. Louisiana Business Corporation Act, No. 328, § 1-1437(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1437(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

161. *Id.* § 1-1437 cmt. (a).

162. *Id.*

there is tension between this section and the exclusivity of the buyout remedy in LBCA § 1-1435(L). Reconsider the example of the shareholder who has been denied his share of declared dividends.[163] While the exclusivity language of § 1-1435(L) would not prevent a conversion, illegal dividend, or other action on non-oppression grounds to recover the denied dividends, such an action may very well be characterized as a claim involving a "breach of duty" owed "to the shareholder in the shareholder's capacity as shareholder."[164] If so, the action would be considered a "duplicative proceeding" and would be stayed (upon motion by the corporation).[165] Given that a buyout would not rectify the effective conversion of the shareholder's dividends,[166] it seems odd to characterize such an action as a "litigation expense[] that will not be justified if the withdrawal remedy is granted," or as "potentially wasteful litigation expenses."[167] It would seem more efficient to allow such a non-oppression claim to proceed at the same time the oppression action is being heard.

Second, when does the language of § 1-1437 allow an action to recover the denied dividends to proceed? Section 1-1437(A) simply states that "[t]he court shall lift the stay on motion by the shareholder when a judgment denying the shareholder's right to withdraw becomes final and definitive."[168] Thus, if the shareholder loses on his oppression claim, he will be allowed to pursue actions that were stayed. But what if the shareholder prevails and is to be bought out at fair value by the corporation? Under the literal language of § 1-1437(A), the stay cannot be lifted, which suggests that the shareholder will *never* be permitted to pursue an action to recover the denied dividends. To sidestep this result, a plaintiff would need to avoid the effect of § 1-1437 by pursuing the non-oppression dividends action to

163. *See supra* text accompanying notes 157-159.

164. Louisiana Business Corporation Act, No. 328, § 1-1437(B) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1437(B)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786. Conversion, for example, could be characterized as a breach of a tort duty. Similarly, an illegal dividend might be characterized as a breach of a statutory duty to pay declared dividends on a pro rata basis to shareholders owning the same class of stock.

165. *Id.*

166. *See supra* note 157 and accompanying text.

167. Louisiana Business Corporation Act, No. 328, § 1-1437 cmt. (a) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

168. *Id.* § 1-1437(A) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1437(A)).

completion before giving notice of an oppression-based withdrawal to the corporation.[169]

Third, even with § 1-1437, a court will still need to resolve derivative-lawsuit-related issues in the oppression proceeding. Assume, for example, that a director and majority shareholder has misappropriated a disproportionate share of the corporation's earnings through embezzlement, payments of excessive compensation, or unfair related-party transactions. Such conduct would typically be characterized as a breach of fiduciary duty to the corporation and would be remedied through a derivative lawsuit seeking damages on behalf of the corporation.[170] On motion by the corporation, however, this derivative lawsuit would be stayed under § 1-1437 as a duplicative proceeding if an oppression-based withdrawal action was also pending.

Nevertheless, the court in the oppression proceeding will still need to resolve the issues raised in the derivative action because they affect the court's determination of fair value. For buyout purposes, the fair value of a closely held corporation is most commonly derived by calculating investment value—a calculation that is usually based upon the earnings of the corporation.[171]

169. Alternatively, the plaintiff would need to hope that a court does not characterize the dividends action as a "duplicative proceeding" in the first place. Given the breadth of the definition of "duplicative proceeding," however, this outcome is far from certain. *See supra* text accompanying note 160.

170. *See, e.g.*, Schautteet v. Chester State Bank, 707 F. Supp. 885, 889 (E.D. Tex. 1988) (noting that "most abuses of majority control constitute breaches of the fiduciary duties the majority owes to the corporation, just as officers and directors owe fiduciary duties solely to the corporation"); *see also* McCann v. McCann, 61 P.3d 585, 590 (Idaho 2002) (noting that "[a] stockholder's derivative action is an action brought by one or more stockholders of a corporation to enforce a corporate right or remedy a wrong to the corporation in cases where the corporation, because it is controlled by the wrongdoers or for other reasons fails and refuses to take appropriate action for its own protection" (quoting 19 AM. JUR. 2d *Corporations* § 2249, at 151-52 (1986))).

171. *See, e.g.*, Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 347 (App. Div. 1985) (discussing market value, investment value, and net asset value, and noting that "[w]ith a [closely held] corporation like the one in issue herein, investment value will usually be the primary criterion upon which 'fair value' is based"); *id.* at 348 ("Investment value is usually a function of the earning power of the corporation."); Thompson, *supra* note 28, at 233 ("The most common method for determining fair value is to calculate investment value, usually based on the company's earnings."); *see also* SHANNON P. PRATT, ROBERT F. REILLY, & ROBERT P. SCHWEIHS, VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES 40 (3d ed. 1996) ("Generally, earning power is the important internal variable affecting the going-concern value of the business.").

Before performing a valuation that is based upon the amount of profits that a corporation generates, the company's books must be adjusted to account for the misappropriated profits (that is, the misappropriated amounts must be added back into the company's earnings).[172] Even though the derivative action has been stayed, in other words, a court will still need to decide whether misappropriation has occurred (and, if so, in what amounts) to fully compensate the minority for the fair value of his shares. Thus, while the stay may eliminate the need to resolve the same issues in two different proceedings, a resolution of those issues is necessary as part of a court's fair value determination.

6. TERMINATION OF SHAREHOLDER STATUS

Whenever a judicial (or contractual) buyout is contemplated, it is very important to clearly designate when the selling investor no longer has the rights of a "shareholder."[173] LBCA § 1-1435(F) indicates that "[a] notice of acceptance that operates as an acceptance of both the shareholder's offer to sell and the shareholder's proposed price forms a contract of sale of the shares at that price, payable in cash."[174] It also states that "[e]ither party may file an action to enforce the contract at the specified price if the contract is not fully performed within thirty days after the effective date of the notice of acceptance."[175]

172. *See, e.g.*, Raskin v. Walter Karl, Inc., 514 N.Y.S.2d 120, 121 (App. Div. 1987) (noting that in calculating the earnings of an enterprise, any excess compensation that has been paid to shareholder-employees and corporate officers should be added to reported corporate earnings to determine the company's real earning power); *see also* Murdock, *supra* note 31, at 428 ("[I]f the majority is taking excessive salaries to the exclusion of the minority, the earnings of the corporation will be thereby reduced and any valuation technique predicated upon earnings, such as capitalized earnings or discounted cash flow, will be 'unfair' unless earnings and cash flow are adjusted to reflect the situation that would exist absent the oppressive conduct.").

173. *Cf.* Drewitz v. Motorwerks, Inc., 728 N.W.2d 231, 233-35, 238 (Minn. 2007) (involving a buy-sell agreement triggered by a termination of employment and the question of whether shareholder status ended simultaneously with the termination of employment: "As to when shareholder status does end, we join other jurisdictions and conclude that when the parties are governed by a shareholder agreement, shareholder status terminates when the corporation or other purchaser tenders payment for the shareholder's shares that conforms with the terms of the shareholder agreement").

174. Louisiana Business Corporation Act, No. 328, § 1-1435(F) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(F)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

175. Louisiana Business Corporation Act, No. 328, § 1-1435(F) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1435(F)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

Until the contract is performed, does the selling investor still have the rights of a shareholder? This could be very important if, for example, dividends are paid or the investor requests information about the corporation in the period of time after the buyout contract has been entered into, but before the contract is performed. LBCA § 1-1435 does not provide a clear answer to this question, but the comment does:

> If a contract of sale is created as provided in Subsection F of this Section, ownership of the offered shares is transferred from the withdrawing shareholder to the corporation when the contract comes into existence, which occurs when the corporation's notice of acceptance becomes effective under the rules stated in R.S. 12:1-141. After that point, the rights of the corporation and former shareholder with respect to the relevant shares are limited to their contract rights against one another under the Subsection F contract. Because ownership of the shares will be transferred immediately and by operation of law, the only items left to be performed under the contract are (1) the corporation's obligation to pay for the shares and (2) the shareholder's obligation with respect to any certificates issued by the corporation for the shares.[176]

The comment is consistent with (and presumably derives from) Louisiana Civil Code art. 2456, which states that "[o]wnership is transferred between the parties as soon as there is agreement on the thing and the price is fixed, even though the thing sold is not yet delivered nor the price paid."[177] According to the comment and the Civil Code provision, therefore, shareholder status ceases when the notice of acceptance becomes effective, as that signifies that the contract has come into existence. After that point in time, the selling investor retains only the right to enforce the contract.

If a contract of sale is not created under § 1-1435(F) (either because the corporation accepted the offer to sell but not the price, or because the corporation did not accept the offer to sell at all),[178] the selling investor maintains his shareholder status and his corresponding shareholder rights until the court has rendered final judgment in its determination of fair value. LBCA § 1-

176. Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (j) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

177. LA. CIV. CODE ANN. art. 2456 (1996).

178. *See supra* Part III(A).

1436(D) states, in relevant part, the following:

> [A]t the conclusion of the trial [which determines fair value] the court shall render final judgment as follows:
>
> (1) In favor of the shareholder and against the corporation for the fair value of the shareholder's shares.
>
> (2) In favor of the corporation and against the shareholder for the following:
>
> (a) Terminating the shareholder's ownership of shares in the corporation.
>
> (b) Ordering the shareholder to deliver to the corporation within thirty days of the date of the judgment any certificate issued by the corporation for the shares or an affidavit by [the] shareholder that the certificate has been lost, stolen, or destroyed.[179]

Thus, if a contract of sale is not created under § 1-1435(F), the statute itself indicates when the selling investor's status as a shareholder, and his corresponding rights as a shareholder, cease.[180]

IV. CONCLUSION

"The old story, so often told, of [an investor's] reply to the question of what the shares in his company were worth, is very apt: 'There are 51 shares,' said he, 'that are worth $250,000. There are 49 shares that are not worth a [*%@!].'"[181]

As this passage crassly reveals, the minority shareholder in a closely held corporation is in a difficult position. Without the

179. Louisiana Business Corporation Act, No. 328, § 1-1436(D) (May 30, 2014) (to be codified as amended at LA. REV. STAT. ANN. § 12:1-1436(D)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786.

180. *See* Louisiana Business Corporation Act, No. 328, § 1-1435 cmt. (k) (May 30, 2014), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=912786; *cf.* MODEL BUS. CORP. ACT § 14.34(f) (2010) ("Upon entry of an order under subsections (c) or (e), the court shall dismiss the petition to dissolve the corporation under section 14.30(a)(2), and the petitioning shareholder shall no longer have any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded by the order of the court which shall be enforceable in the same manner as any other judgment.").

181. Humphrys v. Winous Co., 133 N.E.2d 780, 783 (Ohio 1956) (quoting John H. Doyle, President, Ohio State Bar Ass'n, Address before the Annual Meeting of the Ohio State Bar Association (July 1893)).

ability to control the direction of the company, and without the liquidity of publicly traded stock, minority owners in closely held corporations are particularly vulnerable to oppressive majority conduct.

Over time, however, the law has developed to offer relief. In many jurisdictions today, the shareholder oppression doctrine helps to protect minority shareholders in closely held corporations from the improper exercise of majority control. With the passage of the LBCA, Louisiana joins this national trend, as its oppression provisions offer an exit to minority shareholders who have been treated unfairly. These provisions dramatically improve the legal rights of minority owners, and they signal an important shift in Louisiana's law of closely held corporations. In short, under the oppression provisions of the new LBCA, those forty-nine shares are looking a whole lot better.

APPENDIX

LBCA §§ 1-1435 to 1-1438

§ 1–1435 OPPRESSED SHAREHOLDER'S RIGHT TO WITHDRAW

A. If a corporation engages in oppression of a shareholder, the shareholder may withdraw from the corporation and require the corporation to buy all of the shareholder's shares at their fair value.

B. A corporation engages in oppression of a shareholder if the corporation's distribution, compensation, governance, and other practices, considered as a whole over an appropriate period of time, are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder. Conduct that is consistent with the good faith performance of an agreement among all shareholders is presumed not to be oppressive. The following factors are relevant in assessing the fairness and good faith of the corporation's practices:

(1) The conduct of the shareholder alleging oppression.

(2) The treatment that a reasonable shareholder would consider fair under the circumstances, considering the reasonable expectations of all shareholders in the corporation.

C. The term “fair value” has the same meaning in this Section and in R.S. 12:1–1436 as it does in R.S. 12:1–1301(4) concerning appraisal rights, except that the value of a withdrawing shareholder’s shares under this Section and R.S. 12:1–1436 is to be determined as of the effective date of the notice of withdrawal under Subsection D of this Section.

D. A shareholder may assert a right to withdraw under this Section by giving written notice to the corporation that the shareholder is withdrawing from the corporation on grounds of oppression. When the notice becomes effective it operates as an offer by the shareholder, irrevocable for sixty days, to sell to the corporation at fair value the entirety of the shareholder’s shares in the corporation. The notice need not specify the price that the withdrawing shareholder proposes as the fair value of the shares, but if the notice does specify a price, the price shall be part of the offer to sell made by the shareholder.

E. The corporation may accept the offer to sell made in the shareholder’s notice of withdrawal by giving the withdrawing shareholder written notice of its acceptance during the sixty days that the offer is irrevocable. If the shareholder’s notice of withdrawal specifies a price for the shares, the corporation’s notice of acceptance operates as an acceptance of both the offer to sell and the proposed price unless the notice states that the corporation is accepting the offer to sell, but not the price; in that case the notice of acceptance operates only as an acceptance of the shareholder’s offer to sell the shares at their fair value. The corporation’s acceptance of the shareholder’s offer does not operate as an admission or as evidence that the corporation has engaged in oppression of the shareholder.

F. A notice of acceptance that operates as an acceptance of both the shareholder’s offer to sell and the shareholder’s proposed price forms a contract of sale of the shares at that price, payable in cash. The contract includes the warranties of a seller of investment securities under the Uniform Commercial Code and imposes a duty on the selling shareholder to deliver any certificates issued by the corporation for the withdrawing shareholder’s shares or, if a certificate has been lost, stolen, or destroyed, an affidavit to that effect. Either party may file an action to enforce the contract at the specified price if the contract is not fully performed within thirty days after the effective date of the notice of acceptance. If a withdrawing shareholder fails to deliver the certificate for a share purchased by the corporation under a contract formed under this Subsection, the shareholder owes the same indemnity obligation as a shareholder who sells shares as described in R.S. 12:1–1436(F).

G. If the corporation does not accept the withdrawing shareholder's offer as provided in Subsection E of this Section, the shareholder may file an ordinary proceeding against the corporation in district court to enforce the shareholder's right to withdraw. A judgment in the action that recognizes the right of the shareholder to withdraw on grounds of oppression is a partial judgment under Code of Civil Procedure Article 1915(B). The trial on the valuation of the shares is governed by R.S. 12:1–1436.

H. Venue for an action filed under Subsection F or G of this Section lies in the district court of the parish where the corporation's principal office or, if none in this state, where its registered office is located.

I. A corporation's purchase of a withdrawing shareholder's shares is subject to the rules on a corporation's acquisition of its own shares provided in R.S. 12:1–631 and to the limitations on distribution imposed by R.S. 12:1–640.

J.(1) The shareholders of a corporation may waive the right to withdraw under this Section by unanimous written consent, provided in accordance with R.S. 12:1–704, stating that the shareholders are waiving the right provided by law to withdraw from the corporation on grounds of oppression. The waiver takes effect when the last consent required to make the consent effective under R.S. 12:1–704 is delivered to the corporation, and the corporation shall send written notice to the shareholders of that date promptly after it is known. The waiver remains in effect for fifteen years from the date that it becomes effective, or for any shorter period stated in the waiver to which the shareholders consent.

(2) The existence of the waiver shall be noted on each share certificate in the same way that the existence of a unanimous governance agreement is required to be noted under R.S. 12:1–732(C), and the failure to note the existence of the waiver on a share certificate has the same effect with respect to the waiver as a failure to note a unanimous governance agreement has with respect to that agreement. Except as stated in this Subsection and in Subsection K of this Section, the right of an oppressed

shareholder to withdraw from a corporation under this Section may not be diminished.

K. This Section shall not apply in the case of a corporation that, on the effective date of the withdrawal notice under Subsection C of this Section, has shares that are covered securities under Section 18(b)(1)(A) or (B) of the Securities Act of 1933, as amended.

L. Without limiting any remedy available on other grounds, the right to withdraw in accordance with this Section and R.S. 12: 1–1436 is the exclusive remedy for oppression. An allegation of oppression, as such, does not provide an independent or additional basis for an action by a shareholder to recover damages from the corporation or its directors, officers, employees, agents, or controlling persons.

Comments—2014 Revision

(a) Model Act Section 14.34 provides a mechanism under which the corporation or its shareholders may elect to buy out the interests of a shareholder who is seeking to have the corporation dissolved under Model Act Paragraph 14.30(a)(2). This Section retains the Model Act approach with respect to dissolution on grounds of deadlock under R.S. 12:1–1430(A)(2)(a) and (c). But, with respect to other grounds for dissolution under R.S. 12:1–1430(A)(2), this Section replaces the Model Act scheme with four entirely new Sections, R.S. 12:1–1435 through 1–1438. As explained in Comment (c), below, the four new Sections provide remedies for a claim under R.S. 12:1–1430(A)(2) only on grounds of oppression. But the main effect of the four new Sections is to reverse the order of the remedies provided by the Model Act for oppression, from dissolution unless the corporation or its shareholders choose quickly to buy out the plaintiff shareholder, to a buyout of the plaintiff shareholder unless the corporation chooses to dissolve before final judgment in the suit is rendered.

(b) This change in the order of remedies is designed to do two things: allow the corporation to contest the plaintiff shareholder's allegations of oppression without risking an involuntary dissolution of the entire company, and align the statutory remedies for oppression more closely with those that have been provided in most of the reported American cases on the subject.

(c) This Section narrows the grounds for withdrawal from those provided in the Model Act for dissolution. Under the Model Act, a shareholder may seek dissolution on grounds of deadlock, illegality, fraud, waste or oppression. This Section retains the Model Act approach to deadlock. However, this Section provides a withdrawal remedy only for oppression, and not for illegality, fraud or waste. The elimination of the other grounds for relief does not mean that illegality, fraud or waste, even if directed toward the complaining shareholder, are irrelevant in determining whether oppression has occurred; they may be highly relevant. Rather, illegality, fraud and waste are omitted as independent grounds for withdrawal to avoid the implication that simple occurrences of illegal, fraudulent, or wasteful behavior in some aspect of the corporation's operations may be enough by themselves to justify withdrawal. While illegal, fraudulent or wasteful acts are likely to justify some form of penalty or remedy in favor of an appropriate person, they do not justify the remedy of withdrawal unless, taken as a whole and in context, they amount to oppression of the complaining shareholder.

(d) The Model Act does not define the term "oppression." This Section defines the term in Subsection B in a way that combines the two leading tests of oppression used in the case law of other states, the "reasonable expectations" test and the "departure from standards of fair dealing" test. Those two tests have been incorporated into this Section to permit comparisons between cases arising under this Section and those in other jurisdictions in which oppressive behavior has been considered as grounds for relief in favor of a minority shareholder. However, the statutory definition in this Section differs in five respects from at least some versions of the oppression tests articulated by courts in other states:

(1) The failure to satisfy reasonable expectations is not itself the direct test for oppressive conduct. Rather, those expectations are to be considered in determining whether the directors or others in control have behaved in a way that is incompatible with a genuine effort to be fair to the complaining shareholder. This formulation is designed to provide a generous range of discretion to the majority owners in designing corporate policies and operations that are fair. Withdrawal is not justified on grounds of oppression merely because the business has not been as successful as hoped, or because the minority's reasonable expectations have been disappointed in some way, or even because some instances of unfairness can be shown to have

occurred. Rather, to justify withdrawal under the definition of oppression in Subsection D of this Section, the plaintiff must prove that the majority's behavior, taken as a whole over an appropriate period of time, is plainly incompatible with a genuine effort on the part of the majority to be fair to the shareholders. And the effort to be fair is to be evaluated in light of expectations that it would be reasonable for the shareholders to hold under the circumstances.

(2) In determining fairness, the interests of all shareholders, not just those of the complaining shareholder, must be considered. The majority shareholders are entitled to control the business through the exercise of their voting power, and they are entitled as much as the minority shareholders to have their reasonable expectations respected. The evaluation of challenged conduct as "oppressive" should be guided by principles appropriate to the interpretation of a contract that calls for cooperation and fair dealing from all parties in the operation of a business that entails uncertainty and risk. A failure by the majority over an extended period of time to provide a minority investor with any reasonable participation in the benefits of a successful business will be difficult in most cases to reconcile with a genuine effort on the part of the majority to be fair to all shareholders. However, the majority shareholders owe no duty to sacrifice their own legitimate interests as majority owners of the business, or to make payments or provide benefits to the minority investor that are out of proportion to the value of the contributions to the business by the minority investor or his predecessor in interest.

(3) The conduct of the complaining shareholder is to be taken into account in deciding whether withdrawal on grounds of oppression is warranted. While the shareholders of a closely-held corporation are commonly compensated largely through their employment by the corporation—making continued employment a reasonable expectation in many cases—shareholders are not entitled to keep their jobs regardless of the quality of their job performance. Incompetence, dishonesty or disloyalty on the part of an employee shareholder may justify the shareholder's termination as a corporate employee, and a justified termination would not by itself amount to oppression. Still, a minority shareholder does not forfeit all right to any economic benefit from his shares merely because his job performance may justify his termination as an employee. A complete freezeout of a

shareholder from any participation in the benefits of ownership in the corporation could be considered oppression even if the shareholder's termination as an employee was itself justified. See, Gimpel v. Bolstein, 477 N.Y.S.2d 1014 (Sup. 1984).

(4) A leading case concerning "reasonable expectations" requires the plaintiff in an oppression case to prove that the conduct of the controlling shareholders has substantially defeated expectations that "objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." Matter of Kemp & Beatley, Inc., 473 N.E.2d 1173 (N.Y. 1984). This Section embraces the "objectively reasonable under the circumstances" part of the test, but for the reasons explained in the next comment, it drops the requirement that the plaintiff prove that the expectations in question actually played some role in the plaintiff's own decision to join the corporation as a shareholder.

(5) Among the original investors, actual expectations will be highly relevant to what a shareholder would be reasonable in considering fair under the circumstances. But disputes within closely-held corporations commonly arise among the children of the founding shareholders, making it unlikely that the litigating shareholders' expectations will have played any role in the investment decisions that were made when the inherited shares were first purchased. The arrangements made and practices followed by the founding shareholders could play some role in shaping what a person succeeding to the founders' shares would be reasonable in expecting. But a reasonable person should expect some adjustment in those practices to occur as a result of the passing of the shares from one generation to another. The personalities, interests and skills of the second generation of shareholders may differ substantially from those that shaped the expectations and practices of the original investors. This Section allows those changed factors to be taken into account in determining the expectations that it would be reasonable for a shareholder in the plaintiff's position to hold.

(e) In contrast with the Model Act's focus on wrongful conduct by "the directors or those in control of a corporation," this Section defines oppression by reference to the corporation's treatment of the complaining shareholder. Although a corporation's oppression of a shareholder is unlikely to occur without the complicity of its directors or controlling shareholders, this Section does not require the complaining shareholder to prove that any particular participant in corporate management is responsible for the oppression that occurs.

(f) The second sentence of Subsection B of this Section creates a presumption that conduct is not oppressive if it is consistent with the good faith performance of an agreement among all shareholders. A unanimous governance agreement under R.S. 12:1–732 is included among the unanimous agreements contemplated by the presumption, but the presumption is not limited to that particular form of agreement. It applies with respect to all unanimous agreements among the shareholders.

(g) Conduct that is consistent with the good faith performance of a unanimous shareholders' agreement should be considered oppressive only rarely. The fact that an agreement operates imperfectly, and even unexpectedly in some respects, is not sufficient to rebut the presumption created in Subsection B of this Section. Conduct that qualifies for the presumption in Subsection B of this Section should be treated as oppressive only if (1) it would be considered oppressive but for the presumption and (2) the identities of the shareholders, the nature of the corporation's affairs or other relevant circumstances have changed so profoundly since the signing of the agreement that the fact finder is justified in concluding that parties to the agreement could not have intended to approve as fair, in context, the conduct being challenged as oppressive.

(h) The definition of "fair value" in Subsection C of this Section is not affected by the terms of any agreement among the shareholders or in the articles or bylaws of the company that state the value of the shares or state how the value is to be determined. But the definition in Subsection B of this Section applies only in the context of a shareholder's withdrawal on grounds of oppression. It does not affect the valuation of a withdrawing shareholder's shares under other agreements or governance documents, which often deliberately impose some form of discount as a means of discouraging the kind of withdrawal contemplated by the pertinent provision. A corporation's adherence to an agreed value or valuation methodology in connection with a shareholder's withdrawal on grounds other than oppression does not itself constitute oppression under Subsection B of this Section or violate the rule in Subsection J of this Section against the diminution of a shareholder's right to withdraw from the corporation on grounds of oppression.

(i) Subsection D of this Section treats a notice of withdrawal as an offer of sale by the withdrawing shareholder, and Subsection E of this Section treats the corporation's notice of acceptance as an acceptance of that offer of sale. But that process creates a contract of sale only if the offer includes a price for the offered shares as provided in Subsection D of this Section and if the corporation accepts that price as provided in Subsection F of this Section. Otherwise, the corporation's acceptance of the shareholder's offer to sell triggers only the right to file an action under R.S. 12:1–1436(A) to obtain a court-ordered sale at a fair price set by the court.

(j) If a contract of sale is created as provided in Subsection F of this Section, ownership of the offered shares is transferred from the withdrawing shareholder to the corporation when the contract comes into existence, which occurs when the corporation's notice of acceptance becomes effective under the rules stated in R.S. 12:1–141. After that point, the rights of the corporation and former shareholder with respect to the relevant shares are limited to their contract rights against one another under the Subsection F contract. Because ownership of the shares will be transferred immediately and by operation of law, the only items left to be performed under the contract are (1) the corporation's obligation to pay for the shares and (2) the shareholder's obligation with respect to any certificates issued by the corporation for the shares.

(k) If the exchange of offer and acceptance does not create a contract of sale under Subsection F of this Section, but only the right to pursue a court-ordered purchase and sale, the shareholder remains a shareholder in the company until the court-ordered transaction is consummated as provided in R.S. 12:1–1436(C) or until the shares are transferred in some other fashion.

(l) In some states, courts have used a fiduciary duty theory to protect minority shareholders in a closely held corporation against conduct of the kind defined as oppression in Subsection B of this Section. Subsection L of this Section rejects the treatment of oppression as a breach of fiduciary duty that may justify an action for damages against the corporation, the directors or others in control. Instead, it provides the dissolution and buyout remedies that are set forth in this Section and in R.S. 12:1–1436. Subsection L of this Section does not affect any of the remedies that are available on grounds other than oppression, including the remedies that were available before the special remedy provided by this Section for oppression became effective.

§ 1–1436 JUDICIAL DETERMINATION OF FAIR VALUE AND PAYMENT TERMS FOR WITHDRAWING SHAREHOLDER'S SHARES

A.(1) If a shareholder's right to withdraw from a corporation is recognized by means of a notice of acceptance under R.S. 12:1–1435(E), but the notice does not create a contract under R.S. 12:1–1435(F), the corporation and shareholder shall have sixty days from the effective date of the notice of acceptance to negotiate the fair value of the shareholder's shares and the terms under which the corporation is to purchase the shares. Within one year after the expiration of the sixty-day period, either party may file an action against the other to determine the fair value of the shares and the terms for the purchase of the shares. Venue for the action lies in the district court of the parish where the corporation's principal office or, if none in this state, where its registered office is located.

(2) If neither party files an action to establish the fair value of the shares within the time period provided in this Subsection, then subject to the terms of any settlement reached between the parties, the effects of the earlier notices of withdrawal and acceptance under R.S. 12:1–1435 are terminated. The termination of the effects of the earlier notices does not affect the right of the shareholder to reassert the shareholder's right to withdraw through the filing of a new notice of withdrawal in accordance with R.S. 12:1–1435(D).

B. If a shareholder's right to withdraw from a corporation is recognized by a judgment in an action under R.S. 12:1–1435(G), the court shall stay the proceeding for a period of at least sixty days from the date that the judgment is rendered to allow the corporation and shareholder to negotiate the fair value and purchase terms for the withdrawing shareholder's shares, or other terms for the settlement of their dispute. After the stay expires or is lifted, either party may file a motion to have the court determine the fair value and terms for the purchase of the shares.

C. The court shall conduct the trial of the action under Subsection A of this Section or the motion under Subsection B of this Section by summary proceeding.

D. Except as provided in Subsection E of this Section, at the conclusion of the trial the court shall render final judgment as follows:

(1) In favor of the shareholder and against the corporation for the fair value of the shareholder's shares.

(2) In favor of the corporation and against the shareholder for the following:

(a) Terminating the shareholder's ownership of shares in the corporation.

(b) Ordering the shareholder to deliver to the corporation within thirty days of the date of the judgment any certificate issued by the corporation for the shares or an affidavit by shareholder that the certificate has been lost, stolen, or destroyed.

E. If at the conclusion of the trial the court finds that the corporation has proved that a full payment in cash of the fair value of the withdrawing shareholder's shares would violate the provisions of R.S. 12:1–640 or cause undue harm to the corporation or its creditors, the court shall not render the judgment specified in Subsection D of this Section, but shall instead render final judgment which provides for both of the following:

(1) Ordering the corporation to issue and deliver to the shareholder within thirty days of the date of the judgment an unsecured negotiable promissory note of the corporation which is all of the following:

(a) Payable to the order of the shareholder.

(b) In a principal amount equal to the fair value of the withdrawing shareholder's shares.

(c) Bearing simple interest on the unpaid balance of the note at a floating rate equal to the judicial rate of interest.

(d) Having a term up to ten years, as specified by the court in its judgment as necessary to prevent a violation of R.S. 12:1–

640 or undue harm to the corporation or its creditors.

(e) Containing such other terms, customary in negotiable promissory notes issued in commercial transactions, as the court may order.

(2) Terminating the shareholder's ownership of shares in the corporation upon delivery to the shareholder of the note required by the judgment under Paragraph (E)(1) of this Section, and ordering the shareholder to deliver to the corporation, within ten days of the delivery of the note, any certificate issued by the corporation for the shares or an affidavit by shareholder that the certificate has been lost, stolen, or destroyed.

F. If a withdrawing shareholder fails to deliver the certificate for a share covered by a judgment rendered under Subsection C or D of this Section, and a third person presents the certificate to the corporation after the shareholder's ownership of the share is terminated by the judgment, the shareholder shall indemnify the corporation for any dilution in value imposed on other shareholders as a result of the corporation's obligations to recognize the person presenting the certificate as the owner of the shares represented by the certificate.

§ 1–1437 STAY OF DUPLICATIVE PROCEEDINGS

A. On motion by the corporation, a court shall stay a duplicative proceeding by a shareholder who has given a notice of withdrawal to the corporation as provided in R.S. 12:1–1435(D). The court shall lift the stay on motion by the shareholder when a judgment denying the shareholder's right to withdraw becomes final and definitive.

B. For purposes of this Section, a "duplicative proceeding" is any proceeding in which a shareholder, on his own behalf or as a representative of the corporation, alleges a cause of action against the corporation, or against a director, officer, agent, employee, or controlling person of the corporation, on grounds of a breach of duty owed by that person to the corporation or to the shareholder in the shareholder's capacity as shareholder.

Comments—2014 Revision

(a) A shareholder's filing of a notice of withdrawal under R.S. 12:1–1435(D) begins a process under which the corporation may be required to purchase the entirety of the withdrawing shareholder's shares in the corporation at the fair value of the shares. The continuation of other shareholder litigation while the complaining shareholder is attempting to withdraw under R.S. 12:1–1435 imposes litigation expenses that will not be justified if the withdrawal remedy is granted, either voluntarily or by virtue of a judgment in an action to enforce the withdrawal remedy. This Section allows the corporation to avoid the potentially wasteful litigation expenses by obtaining a stay of the action until the outcome of the withdrawal effort by the complaining shareholder is known.

(b) If all of the complaining shareholder's shares are purchased, the shareholder's right to pursue any action that is available only to shareholders of a corporation would be terminated, and any action stayed by this provision would then be subject to dismissal on an exception of no right of action.

§ 1–1438 CONVERSION OF OPPRESSION PROCEEDING INTO COURT-SUPERVISED DISSOLUTION

A. A corporation may by contradictory motion convert a withdrawal or valuation proceeding under R.S. 12:1–1435 or 1–1436 into a proceeding for a court-supervised dissolution of the corporation if the dissolution is approved as provided in R.S. 12:1–1402. If the court finds after the hearing on the conversion motion that the dissolution was approved as provided in R.S. 12:1–1402, it shall do all of the following:

(1) Render a judgment dissolving the corporation as provided in R.S. 12:1–1433.

(2) Dismiss the withdrawal or valuation cause of action.

(3) Make the complaining shareholder in the dismissed cause of action a party to the court-supervised dissolution proceeding.

(4) Appoint a liquidator in accordance with R.S. 12:1–1432, or order the corporation to submit to the court for its approval a plan of liquidation and such interim and final reports on the liquidation as the court may consider necessary to protect the interests of the complaining shareholder.

B. A motion under Subsection A of this Section may be filed at any time before final judgment.

C. If a corporation dissolves or terminates while a withdrawal or valuation proceeding under R.S. 12:1–1435 or 1–1436 is pending, but does not file a motion to convert the proceeding as provided in Subsection A of this Section, the complaining shareholder in the proceeding may by contradictory motion seek to convert the proceeding into one for a court-supervised dissolution of the corporation. If the court finds that the conversion is necessary to protect the interests of the shareholder, it shall grant the motion and take the actions contemplated by Subsection A of this Section for the conversion of a proceeding to a court-supervised dissolution