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### The Florida Close Corporation Act: An Experiment That Failed

David L. Dickson

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# THE FLORIDA CLOSE CORPORATION ACT: AN EXPERIMENT THAT FAILED

DAVID L. DICKSON\*

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## I. INTRODUCTION

One of the major developments of twentieth century corporation law has been the increasing recognition by text writers, courts and legislatures that the so-called "close corporation" calls for legal treatment quite different from that of the publicly owned corporation.<sup>1</sup> For present purposes a "close corporation" may be defined as one with a small number of stockholders, in which stock ownership and management of the business are ordinarily united in the same persons, and in which stock transfer ordinarily occurs only when a manager-stockholder dies or withdraws from the business and a new stockholder-manager replaces him.<sup>2</sup>

In 1963 the Florida legislature sought to meet the needs of such corporations by enacting the Close Corporation Act,<sup>3</sup> hereinafter referred to as "the Act." Up to the present time, Florida has been the only state to adopt a separate statute for close corporations. Unfortunately, the Act was apparently adopted without sufficient consideration of its practical effect on the corporations subject to it, or the administrative problems of the Secretary of State, who is charged with its enforcement.<sup>4</sup> The language of the Act creates unnecessary uncertainties as to what corporations are governed by its provisions and what powers such corporations may possess. The following discussion will deal briefly with these questions, will consider to what extent objectives of the close corporation can

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\* Professor of Law, Stetson University College of Law.

1. Cf. F. H. O'NEAL, *CLOSE CORPORATIONS: LAW AND PRACTICE* (1958), and references cited therein. [Hereinafter cited as O'NEAL.]

2. Comment, *Definition of the Closed Corporation*, 16 VAND. L. REV. 1267 (1963).

3. FLA. STAT. §§ 608.0100-.07 (1965). For comments on the Act see 16 U. FLA. L. REV. 569 (1964) and 77 HARV. L. REV. 1551 (1964).

4. Letter from the office of the Secretary of State of Florida, Corporations Div., to the author, September 25, 1963, says that the bill for the Act "was introduced . . . without the knowledge of this office."

be attained outside the Act, and will conclude with suggestions as to the most practical course for the attorney to follow. Due to limitations of space, the treatment must be considered suggestive rather than comprehensive.

## II. CORPORATIONS GOVERNED BY THE ACT

Section 608.0100 undertakes to define what corporations are covered by the Act. It is difficult to determine from that section, or from the Act as a whole; (1) what corporations are eligible to come under the Act; (2) when or by what means an eligible corporation actually becomes subject to the Act; and (3) when, if at all, a corporation subject to the Act ceases to be so.

### A. *Corporations Eligible to come under the Act*

The Act is said to be available to any existing or future "close corporation," which is defined as "a corporation for profit whose shares of stock are not generally traded in the markets maintained by securities dealers or brokers."<sup>5</sup>

The first objection to this definition is its incompleteness. The definition does not clearly distinguish the "incorporated partnership," where all the shareholders are managers and thus in a position to protect themselves, from the corporation in which stock ownership and management are separated, and the non-managing shareholders are in need of protection from oppression by the managers. Since most manager-stockholders are succeeded by widows or other heirs, who may remain non-managing owners for a considerable period of time, this problem is a very real one.

More immediately troublesome to the lawyer organizing or advising a close corporation is the ambiguity of the definition. The permission granted to corporations to come under the Act unless their stock is "generally traded" would appear to cover all new corporations, large or small, since their stock would not normally be "generally traded" before it is issued. If a public offering of the stock should thereafter be made, presumably the corporation would cease to be eligible, although, as pointed out below, the Act does not cover this point. In the absence of a public offering, continued eligibility might be difficult to establish. A flurry of activity in the stock of a corporation theretofore closely held is not unknown.<sup>6</sup> Does considerable buying and selling through brokers within a short time cause a stock to be "generally traded," or must the activity extend over a period of time, and if so, how long and in what quantity? Do the sales have to be by a "dealer or broker" on behalf of

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5. FLA. STAT. § 608.0100(1), (2) (1965).

6. *Cf. Rogers v. Riddle*, 128 So.2d 409 (Fla. 3d Dist. 1961), *cert. denied*, 133 So.2d 645 (Fla. 1961).

the owner, rather than by the owner himself, in order to create the required "markets"? Who is a "dealer or broker" within the meaning of the Act? It is true that most "trading" may be stopped, and these questions thus prevented from arising, by imposing first-option restrictions on transfer, which both the Act and prior law authorize.<sup>7</sup> However, such restrictions are not required by the Act in order to qualify as a "close corporation," and in any event they do not wholly solve the problem. In the first place, they clearly cannot be imposed on unrestricted stock already outstanding in the hands of purchasers for value without notice,<sup>8</sup> although they may be enforced against a purchaser found to have "actual knowledge" without any notation on the certificate.<sup>9</sup> In the second place, even if lawful restrictions have been imposed and the purchaser has actual or constructive notice of them, they may become inoperative by subsequent agreement, by estoppel arising from inconsistent conduct, or in some other manner.<sup>10</sup> Any person concerned, whether "insider" or stranger, might therefore find it difficult to determine at any given time whether the corporation with which he was dealing, or which he represented, was or was not a "close corporation." Certainly questions of fact would frequently have to be litigated.

#### B. *How Eligible Corporations Become Subject to the Act*

Since the Act is expressly made "permissive and not mandatory," even as to new corporations, presumably some affirmative act of election by the corporation or its stockholders is necessary.<sup>11</sup> Must such election be formally stated and filed with the Secretary of State? The Act does not so specify. In fact, it implies the contrary. Although no method of election is specified for new corporations, an existing corporation may "elect to bring itself within the provisions of this act by written consent of a majority of the voting stock."<sup>12</sup> Apparently, this written consent need not be filed in the corporate records, and is effective without the knowledge or consent of the board of directors. Thus, neither the corporate secretary nor the Secretary of State would be in a position to assure anyone dealing with the corporation that it possessed the powers granted by the Act.

Equally puzzling is the question of how a new corporation may reject

7. FLA. STAT. § 608.0105(1)(d) (1965). For authorization under prior law, see *Weissman v. Lincoln Corp.*, 76 So.2d 478 (Fla. 1954); *Home Dev. Co. v. Bursani*, 178 So.2d 113 (Fla. 1965); *Coleman v. Coleman*, 191 So.2d 460 (Fla. 1st Dist. 1966).

8. *Sandor Petroleum Corp. v. Williams*, 321 S.W.2d 614 (Tex. 1959). *Cf. Annot.*, 61 A.L.R.2d 1318 (1958).

9. FLA. STAT. §§ 678.8-204 (1965).

10. *Coleman v. Coleman*, 191 So.2d 460 (Fla. 1st Dist. 1966) (stockholder held estopped to reply on restrictions); *Berkowitz v. Firestone*, 192 So.2d 298 (Fla. 3d Dist. 1966) (stockholders' agreement held void where conditions had changed).

11. The view expressed in 16 U. Fla. L. Rev. 569, 573 (1964) that the Act "automatically applies" to new corporations seeks to establish a presumption which is not warranted by the Act's language.

12. FLA. STAT. § 608.0100(1) (1965).

part or all of the Act. Such right of rejection is clearly implied by the "permissive and not mandatory" language, and many corporations may not want to be subject to control by shareholders' side agreements under section 608.0105, or otherwise subject to the Act. Section 608.0106 contains a specific provision for rejection of that section alone, and it has been argued that this may imply that no power of rejection of other sections exists.<sup>13</sup> Whether a restriction on the statutory scope of stockholders' agreements, placed in the articles of incorporation, would be effective is unclear to say the least.

Apparently unwilling to assume the risk of threading his way through this maze, the Secretary of State has not issued any regulations specifying how a corporation, either new or old, shall accept or reject the Act. His records do not indicate how many, if any, of the corporations organized in Florida before or after 1963 may be under the Act.<sup>14</sup> The result is that any old or new corporation may claim acceptance of the "benefits" of the Act without any specification of its position in the corporate records, and without any showing to the Secretary of State that its stock is not "generally traded," or (except for recall of directors under section 608.0106) it may claim rejection of the Act in the same way.

### C. *When a Corporation Ceases to be Subject to the Act*

Assuming that a corporation becomes qualified under the Act because its stock is not "generally traded" at the time of qualification, does it cease to be qualified if its stock thereafter becomes "generally traded"? The Act does not say.<sup>15</sup> Certainly justification for the Act's application ceases when a corporation's stock does become "generally traded," and loss of eligibility in that event might have to be implied.

Another troublesome limitation on the exercise of powers granted by the Act, and one which defies rational explanation, is the restriction of stockholder management to corporations which have "not less than three stockholders."<sup>16</sup> Articles of incorporation providing for such management, and abolishing the board of directors, may thus be subsequently nullified without amendment by transfer of stock to less than three holders.

Since all the powers granted by the Act are dependent on the *actual* absence of general trading in the stock, and the right of stockholder

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13. 16 U. FLA. L. REV. 569, 574-75 (1964).

14. Letter from the office of the Secretary of State of Florida, Corporations Div., October 6, 1966, to the author.

15. The New York, North Carolina and South Carolina Acts are much more precise as to when stockholder control is permissible. N.Y. BUS. CORP. LAW, § 620 (1965) (valid so long as the shares are not listed or regularly quoted); N. CAR. BUS. CORP. ACT, § 55-73 (1965) (valid except when shares are or subsequently become generally traded); S. CAR. BUS. CORP. ACT OF 1962, § 12-16.22 (valid so long as the shares are not listed or regularly traded).

16. FLA. STAT. § 608.0102 (1965).

management is further dependent on the stock *actually* being held by at least three stockholders, in each case with no saving clause protecting innocent persons, it would appear that no one, either inside or outside the corporation, could safely assume that at any moment in time the corporation still possessed the powers granted by the Act, even if he had satisfied himself that it had once possessed them.

### III. POWERS POSSESSED BY CORPORATIONS UNDER THE ACT

The Act purports to grant to "close corporations" and their stockholders powers of a sweeping nature which were not previously granted by statute, and which are in many cases contrary to statutory provisions that are not expressly amended nor repealed.<sup>17</sup> However, the Act also purports to grant other powers which corporations already possess, either by statute or by court decisions, and in some cases the Act may actually limit or render doubtful pre-existing powers. A brief analysis will serve to illustrate these statements.

The powers granted by the Act may be roughly classified as follows:

#### A. *Reduction of Corporate Formalities*

One of the most troublesome problems encountered by the lawyer for the small corporation is the habitual disregard by owners and managers of corporate formalities. This disregard may range all the way from occasional failure to hold stockholders' and directors' meetings to commingling of personal and corporate assets and other major disregard of the corporate entity.<sup>18</sup>

The only relief which the Act purports to grant in this connection is authorization to conduct the business of directors and stockholders without a meeting, provided that unanimous consent to the action in question is obtained.<sup>19</sup> The Act adds little to the powers possessed by all corporations in this respect, and to some extent raises problems which did not previously exist. Existing case law, in Florida and elsewhere, already permitted action by unanimous consent in place of meetings of stockholders and directors of close corporations.<sup>20</sup> The general corporation act was amended in 1965 to allow *prior unanimous consent* to validate any

17. The following sections, and possibly others, in the general corporation act are amended or repealed by implication as to "close corporations," but left in force as to all other corporations: FLA. STAT. §§ 608.03(2)(g) and (h), .07, .08, .09, .10, .11, .13, .15, .16(2), .18(1) and (8), .19, .20, .21(1), .25, .27(1), .28, .30(2)—(5), .32(1), .40, .43, .50, .52, .53, .54, .55, .56, .58 (1965).

18. Too much informality has in the past, and presumably still does, permit imposition of personal liability on stockholders. Cf. *American Mortgage & Safe Deposit Co. v. Rubin*, 168 So.2d 777 (Fla. 3d Dist. 1964) 2 (liability imposed) and *Sirmons v. Arnold Lumber Co.*, 167 So.2d 588 (Fla. 2d Dist. 1964) (liability refused).

19. FLA. STAT. § 608.0103 and § 608.0104 (1965).

20. *Etheredge v. Barrow*, 102 So.2d 660, 663 (Fla. 2d Dist. 1958). Cf. O'NEAL, *supra* note 1 at Vol. I, § 3.62.

directors' action without a meeting.<sup>21</sup> Since the amendment was subsequent to the Close Corporation Act's authorization for such action by *prior or subsequent consent*,<sup>22</sup> the law has been obscured without improving it.

### B. *Stockholder Control of Corporate Operations*

The Florida general corporation act has long imposed the requirement that "the business of every corporation shall be managed and its corporate powers exercised" by the board of directors.<sup>23</sup> Without expressly amending the existing statute, the Act permits the stockholders of a close corporation to retain the board of directors and yet strip it of all of its powers if they see fit. This result is accomplished by permitting the stockholders to enter into an agreement "relating to any phase of the affairs of the corporation, including . . . management of the business of the corporation,"<sup>24</sup> and further permitting them to remove directors at any time, with or without cause, unless the articles or by-laws provide otherwise.<sup>25</sup>

Perhaps the most dangerous provision of the Act is the one permitting this radical departure from the "corporate norm" by a "side agreement," not required to be made a part of the corporate records, but sufficient if it is "in writing and signed by all the parties thereto."<sup>26</sup> Under this provision, the corporate charter can be amended and the board of directors "sterilized" by a secret agreement which might be unknown to the officers, the directors, stockholders not party to the agreement, purchasers of the corporation's stock, parties contracting with the corporation, and the corporation's creditors. It is true that such persons might not be *bound* by such an agreement in the absence of notice, but they would certainly be *affected* by it. Furthermore, the question of whether they had received notice would often be one of fact for the jury to determine on conflicting testimony. The person buying into such a corporation might find its actual power structure to be completely different from what he reasonably assumed it would be. The person contracting with such a corporation might find the corporation's stockholders asserting their power under a "side agreement" to ratify or disaffirm the action of its officers and directors, and further asserting either that he had actual notice of the agreement or that, in any event, he had no right to assume subsequent to passage of

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21. FLA. STAT. § 608.09(3) (1965).

22. FLA. STAT. § 608.0103 (1965).

23. FLA. STAT. § 608.09(1) (1965).

24. FLA. STAT. § 608.0105 (1965).

25. FLA. STAT. § 608.0106 (1965).

26. FLA. STAT. § 608.0105 (1965). *Cf.* Kessler, *The Statutory Requirement of a Board of Directors: A Corporate Anachronism*, 27 U. CHI. L. REV. 696 (1960), where such agreements are approved, provided that the statute requires that the agreement be filed with the corporation, that notice of filing be given to each stockholder, that the agreement be open to inspection, and that notice of the agreement be placed on every certificate of stock.

the Act that the officers and directors of a close corporation had any specific authority.

Prior decisions excusing the person contracting with a corporation from inquiring as to its powers would seem no longer to be applicable,<sup>27</sup> and it is doubtful that section 608.50 of the general corporation act would afford any relief. That section creates an estoppel "to set up the want of legal organization" against both the corporation and the outsider dealing with it. If this estoppel should be held to include want of "close corporation" status under the Act, then for all practical purposes any corporation can assume the status of a "close corporation" without satisfying the requirements of section 608.0100, a result clearly contrary to the policy of the Act. On the other hand, if "close corporation" status cannot be the subject of estoppel under section 608.50, the true "close corporation" will have to establish its right to that status in every litigated case, and face the possibility that different courts and juries may reach different conclusions on this point.

Thus the unrestricted power of stockholder control granted by the Act is a potential danger to every outsider dealing with the corporation, and an equal danger to any corporation which departs from the "corporate norm" in reliance on the Act.

### C. *Abolition of the Board of Directors*

The Act authorizes the articles of incorporation to provide that "the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors, provided that there be not less than three stockholders;" and in that event, the stockholders "shall be deemed directors for purpose of applying the provisions of part I, chapter 608" and "shall be subject to the liabilities imposed by part I, chapter 608 for action taken by directors."<sup>28</sup> This section does not in terms authorize the abolition of the board of directors, but it appears to imply such authorization, and will be so construed in the discussion which follows.

It has been pointed out that this provision represents an "unprecedented departure" from the "corporate norm," which previously vested management in the board of directors, and that it contains "illogical limitations and disappointing omissions."<sup>29</sup> One "illogical limitation" arises

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27. Typical of the decisions is *Knights of Pythias v. State Bank*, 79 Fla. 471, 84 So. 528 (1920), where it is said that if the contract has some fair relation to the corporation's business, the corporation must bring to the other party's attention any limiting provisions. Under FLA. STAT. § 608.0105 (1965), authorizing any limitation that stockholders wish to impose on directors and officers, it would seem that the other party is put on notice that he must inquire as to their authority.

28. FLA. STAT. § 608.0102 (1965).

29. 16 U. FLA. L. REV. 569, 577-78 (1964).



from the fact that the section has been made inapplicable in the very situation where it is most needed, *i.e.*, where there are only one or two stockholders. Furthermore, the amendment to the articles abolishing the board of directors can be adopted by a majority of the directors and officers, unless the articles otherwise provide,<sup>30</sup> thus enabling a majority to abolish the position of a minority director without his consent.<sup>31</sup>

Perhaps the most serious ambiguity arises from the provision that the stockholders acting as directors "shall be subject to the liabilities imposed by part I, chapter 608 for action taken by directors."<sup>32</sup> In Florida, as generally elsewhere, most of the duties of directors are imposed by case law rather than by statute, and the measure of their duties is fundamentally different from that of ordinary stockholders. Directors are required by the decisions of our courts to act as fiduciaries toward all the stockholders and the corporation in reaching decisions.<sup>33</sup> On the other hand, stockholders (other than controlling stockholders) may ordinarily vote according to their selfish interests.<sup>34</sup> The Act makes no attempt to resolve this problem.<sup>35</sup> Worse, it appears to imply that all of the fiduciary duties so carefully worked out by the courts in the absence of statute are abolished, since it limits the liability of stockholders' voting as directors to that "*imposed* by part I, chapter 608 . . ." (Emphasis added.)

One example, among many that could be given, will show the gravity of this problem. Section 608.13(14) of the general corporation act authorizes a corporation, unless otherwise provided in its charter, to indemnify officers and directors against expenses, including attorney fees, incurred in defending a derivative suit unless they are "adjudged" guilty of negligence or misconduct. No court approval of such indemnification is required. Such indemnification would now be available to stockholders acting in the place of directors, since they are "deemed" directors under part I.<sup>36</sup> In exercising this corporate power to vote indemnification, are stockholders subject to the fiduciary duty of directors, or only the lesser duty of stockholders, as laid down in the cases? We do not know. The vicious potentialities of indemnification without court review to the un-

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30. FLA. STAT. § 608.18 (1965).

31. 16 U. FLA. L. REV. 569, 579 (1964).

32. FLA. STAT. § 608.0102(1) (1965).

33. Citizens State Bank v. Adams, 140 Fla. 578, 193 So. 281 (1940) (fiduciary); Rogers v. Riddle 128 So.2d 409 (Fla. 3d Dist. 1961), *cert. denied*, 133 So.2d 645 (Fla. 1961) (quasifiduciary).

34. For the duty of majority stockholders, *cf.* Southern Pacific Co. v. Bogert, 250 U.S. 483, 487-88 (1919), and Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), *cert. denied*, 316 U.S. 675 (1942). It has been argued that in a close corporation all stockholders participating in control should owe fiduciary obligations. Winer, *Proposing a New York "Close Corporation Law,"* 28 CORNELL L.Q. 313, 321 (1943).

35. Chayes, *Madame Wagner and the Close Corporation*, 73 HARV. L. REV. 1532, 1549 (1960) points out that the close corporation protagonists have argued almost wholly in the direction of greater permissiveness, without recognizing and working out the duties and restrictions which are implicit in their own assumptions.

36. FLA. STAT. § 608.0102(1) (1965).

faithful stockholder or officer of a close corporation, who has settled his liability for misconduct but has not been "adjudged" guilty, are multiplied by this uncertainty.

In view of the inherent differences between directors and stockholders, the failure to spell out exactly how the stockholders are to exercise the directors' powers presents a very troublesome practical problem. For example, will the stockholders who are acting as directors vote according to the number of shares they hold, as stockholders normally do,<sup>37</sup> or will they vote per capita, according to the procedure for directors?<sup>38</sup> Will an absent stockholder be entitled to give his proxy, as is usual for stockholders,<sup>39</sup> or must he vote in person, like a director? Either answer to these questions raises serious difficulties. For example, if stockholders acting as directors may give proxies, the Act has at one stroke abolished the fiduciary duty of directors to exercise their discretion personally for the benefit of the corporation and all its stockholders. On the other hand, if such stockholders may not give proxies when voting as directors, then either they will always be required to attend and vote personally in both capacities, or it will become necessary to distinguish the votes in which they are acting as directors from the votes in which they are acting as stockholders—in other words, to re-establish the previous corporate norm on division of duties in order to determine the applicable procedure.

#### D. *Dissolution*

Another troublesome problem in the law of close corporations is how to obtain dissolution, with fairness to all concerned, when stockholders are deadlocked and the deadlock cannot be broken. The Act exacerbates rather than solves this problem.

Under previous case law, various deadlock-breaking devices established by stockholders' agreements under authority contained in the charter had come to be accepted.<sup>40</sup> In the event a deadlock could not be broken and the voting power of stockholders and directors was equally divided, the Florida statute provided that the court "may entertain" a stockholder's petition for dissolution.<sup>41</sup> Even in the absence of statute, the inherent power of equity to order dissolution, or at least liquidation, has been recognized.<sup>42</sup> Florida courts have refused to order dissolution

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37. FLA. STAT. § 608.10(3) (1965).

38. FLA. STAT. § 608.09 (1965).

39. FLA. STAT. § 608.10(5) (1965).

40. The following deadlock-breaking devices have been sustained at various times: (1) Buy-out arrangement, whereby the corporation or the majority acquires the stock of a dissident minority at a previously arranged price. O'NEAL, *supra* note 1, at Vol. I, §§ 9.09-9.05. (2) Voting trust effective in event of deadlock. *Id.* § 9.07. (3) Arbitration. *Id.* §§ 9.08-9.16. (4) Special class of stock, nominal in value, issued to a neutral party and authorized to elect a deadlock-breaking director, *Lehrman v. Cohen*, 222 A.2d 800 (Del. 1966).

41. FLA. STAT. § 608.28 (1965).

42. Although dissolution was refused, liquidation was ordered in the following cases:

unless deadlock had progressed to the point where the corporate purpose was impossible of attainment.<sup>43</sup> Thus the deficiency in existing law lay not so much in lack of the court's *power* to dissolve as in the *refusal* of the court to exercise that power except in the most extreme cases. A statutory provision requiring the court to give effect to stockholders' agreements for dissolution, subject to the court's right to impose fair conditions, might have solved the problem.<sup>44</sup>

The Act fails to meet the problem in any manner. If it had contained no dissolution provision, counsel could have argued that the broad authorization for stockholders' agreements in section 608.0105 was intended to comprehend agreements for dissolution in the event of deadlock. However, other provisions of the Act render that construction difficult if not impossible. In the first place, the enumeration in section 608.0105 of the subjects on which stockholders may agree includes only "arbitration of issues" on which stockholders and directors are deadlocked. Since the section also provides that the subjects of agreement may include "any phase of the affairs of the corporation, including, but not limited to" those enumerated, the omission would not have been serious if the Act had merely failed to mention dissolution. Unfortunately, dissolution is comprehensively covered by section 608.0107, which says (following section 608.28 of the general act) that the court "may entertain" a stockholder's petition for dissolution "when it is made to appear" that the directors or stockholders are deadlocked "and" that "*arbitration or any other remedy provided in any written agreement of the stockholders upon deadlock of the directors or stockholders has failed.*" (Emphasis added.) Thus, the court may not even "entertain" a petition for dissolution unless *any* remedy provided in the agreement has already failed. Obviously the "remedy" which is "provided" in the "agreement" and which must fail before a petition for dissolution is filed could not include the remedy of dissolution itself.

Section 608.0107 may even, by implication, be construed to impose a mandatory requirement additional to that of existing case law, that is, that the petitioner's case shall include a showing that the parties have agreed on arbitration or some other remedy, that the remedy has been tried, and that it has failed. A remedy can hardly be said to have "failed" until the party who invokes it has sued to enforce it, and the Act may

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Tampa Waterworks Co. v. Wood, 97 Fla. 493, 121 So. 789 (1929); Wofford v. Wofford, 129 Fla. 445, 176 So. 499 (1937); Kay v. Key West Dev. Co., 72 So.2d 786 (Fla. 1954); Blanchard v. Commonwealth Oil Co., 116 So.2d 663 (Fla. 3d Dist. 1959). Dissolution was ordered in *Levant v. Kowal*, 350 Mich. 232, 86 N.W.2d 336 (1957) and *Leibert v. Clapp*, 13 N.Y.2d 313, 196 N.E.2d 540 (1963).

43. *News-Journal Corp. v. Gore*, 2 So.2d 741 (Fla. 1941); *Hanes v. Watkins*, 63 So.2d 625 (Fla. 1953); *Freedman v. Fox*, 67 So.2d 692 (Fla. 1953).

44. Recent statutes specifically authorizing provisions for dissolution in the certificate of incorporation are N.Y. BUS. CORP. LAW, § 1002 (1965) and S. CAR. BUS. CORP. ACT OF 1962, § 12-22.14 (1965).

therefore require a suit to enforce arbitration or some other remedy prior to the suit for dissolution.<sup>45</sup>

Even if we disregard the above language of section 608.0107, we are no better off. The Act makes clear that any agreement by the stockholders for dissolution in the event of deadlock would not be automatically enforceable in court, since the court "may entertain"—and by inference "may not entertain"—the petition. Furthermore, the Act does not make stockholders' agreements on any subject valid as against all objections and all persons. On the contrary, it merely abolishes "as between the parties thereto" the specific objections that the agreement "is an attempt to treat the corporation as if it were a partnership," and that it "interfere(s) with the discretion of the board of directors."<sup>46</sup> Since the well established judicial requirement that dissolution will not be ordered unless the corporate purpose be impossible of attainment does not arise "between the parties" to the agreement, the court could and doubtless would follow prior case law in deciding whether to "entertain" the petition for dissolution.<sup>47</sup>

Thus, far from solving the problem of breaking deadlocks in close corporations, the Act, by its obscurities and rigidity, has made the solution more difficult.

#### IV. A PRACTICAL COURSE FOR COUNSEL TO PURSUE IN ORGANIZING A FLORIDA CLOSE CORPORATION

Until the Close Corporation Act is either repealed or authoritatively and favorably construed on all essential points, it is submitted that the careful attorney will refrain from including in articles of incorporation any provision the validity of which depends on the coverage or interpretation of the Act. Fortunately, his clients' legitimate wishes can generally be met under other statutes or case law.

Space does not permit detailed discussion of the drafting problems, which are covered in many excellent texts.<sup>48</sup> The most important affirmative duty of the attorney is, so far as possible, to anticipate and provide in the stockholders' agreement, articles and by-laws for the solution of future problems of control, employment, devolution of interests, resolution of disagreements and other fundamental questions, and, so far as he may not be able to anticipate all of them, to include in his drafts carefully

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45. Suits to enforce agreements to arbitrate and to enforce the award are authorized by FLA. STAT. §§ 57.12, .21, .24 (1965).

46. FLA. STAT. § 608.0105(2), (3) (1965).

47. O'Neal, *Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration*, 67 HARV. L. REV. 786, 808 (1954) pointed out that in recent years the New York courts, even without a statutory requirement, "have shown a tendency to require arbitration before considering the petition for dissolution." As stated in 16 U. FLA. L. REV. 569, 593 (1964): "If such a test is applied the legislature will have added nothing to the law by enacting Section 608.0107."

48. Cf. O'NEAL, *supra* note 1.

prepared arbitration clauses. At the time the corporate enterprise is inaugurated, unanimous consent of the stockholders to such provisions can readily be obtained. After a dispute arises, it cannot be. Unanimous consent of all interested persons, subsequently acted on by the parties in forming the corporation and operating the business, will in most cases estop any consenting party from questioning the powers or procedures that he previously approved.<sup>49</sup> The case law so declaring has of course been reinforced by the Close Corporation Act, which enunciates a public policy in Florida favoring agreements among stockholders, even when such agreements contravene the "corporate norm."

One further duty of the attorney deserves mention here. He should carefully review each provision of the Act before drafting his articles, with a view to specifically rejecting therein any provisions that might endanger his clients' interests, such as the broad power to make "side agreements" or to remove directors without cause. While, as pointed out above, such rejection may not be wholly effective, it should at least suffice as "a written agreement, embodied in the articles of incorporation" which should estop the parties thereto from pursuing a different course, and which, after filing of the articles in the office of the Secretary of State, would constitute constructive notice to outsiders of its limitations. In the latter respect, at least, it would be far preferable to silence.

#### V. CONCLUSION

From the longer range point of view, it would seem highly desirable to repeal the Close Corporation Act and follow the lead of other states by enacting either carefully drawn amendments to the general corporation act, or a complete revision of the general corporation act to include integrated provisions for close corporations. Any such amendments or revision should certainly be based on the extensive studies made in other states; on a detailed analysis of the existing statutory and case law in Florida; on careful consideration of the extent to which it is desirable to freeze development by statute, rather than permitting it to continue by case law; and on suggestions which could be made by the Secretary of State and by all interested members of the bar.

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49. *Sommers v. Apalachicola Northern R. Co.*, 85 Fla. 9, 96 So. 151 (1923); *Weissman v. Lincoln Corp.*, 76 So.2d 478 (Fla. 1954); *Blanchard v. Commonwealth Oil Co.*, 91 So.2d 803 (Fla. 1956); *Etheredge v. Barrow*, 102 So.2d 660 (Fla. 2d Dist. 1958); *Alliegro v. Pan American Bank*, 136 So.2d 656 (Fla. 3d Dist. 1962) (dictum); *Collins v. Collins Fruit Co.*, 189 So.2d 262 (Fla. 2d Dist. 1966). A recent Illinois case has pointed out that the basically controlling factor is the absence of an objecting minority interest, together with the absence of public detriment. *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1965).