

July 2012

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Recommended Citation

Davidian, John E. (1981) "Corporate Dissolution in New York: Liberalizing the Rights of Minority Shareholders," *St. John's Law Review*: Vol. 56 : No. 1 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol56/iss1/2>

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CORPORATE DISSOLUTION IN NEW YORK: LIBERALIZING THE RIGHTS OF MINORITY SHAREHOLDERS

JOHN E. DAVIDIAN*

INTRODUCTION

As early as 1912, the New York Court of Appeals analogized the closely held corporation to the partnership form of doing business.¹ Thereafter, both the judiciary and legislature in New York, as well as elsewhere, have displayed a significant awareness that close corporations² oftentimes are little more than partnerships

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¹ *Ripin v. United States Woven Label Co.*, 205 N.Y. 442, 447, 98 N.E. 855, 856 (1912). While invalidating a shareholder resolution purporting to increase the number of directors of a corporation, the New York Court of Appeals in *Ripin* recognized the potential for abuse in the dealings of majority shareholders with their minority counterparts. In describing the plight of minority shareholders in close corporations formed under a former New York statute, the court noted:

By the Business Corporations Law three or more persons might form a corporation for any lawful business with certain specified exceptions. . . . Under this statute many businesses or private enterprises which formerly had been conducted by partnerships or individuals, became the subject of corporate control and ownership. Such corporations were little more (though not quite the same as) than chartered partnerships. There was danger, however, in the very plentitude of the power granted to such corporations, as has been shown by the litigations in the courts on claims of oppressive or dishonest action of the majority towards the minority. Indeed, abuse of power by a majority in many of these private corporations had become a scandal.

Id. at 447-48, 98 N.E. at 856.

² Although the term "close corporation" has been defined in a variety of ways, one author has commented that "no satisfactory all-purpose definition of a close corporation appears ever to have been worked out." *Israels, The Close Corporation and the Law*, 33 CORNELL L.Q. 488, 491 (1948). Professor O'Neal in his treatise on close corporations states that the legal profession uses the term to mean a corporation whose shares are not generally traded on the securities markets. 1 F. O'NEAL, *CLOSE CORPORATION LAW AND PRACTICE* § 1.02, at 3-4 (2d ed. 1971). This definition approximates the statutory language employed in New York to distinguish the close from the publicly held corporation. For example, section 1104-a of the Business Corporation Law, dealing with special dissolution remedies available to minority shareholders, is limited in application to corporations "no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association." N.Y. BUS. CORP. LAW § 1104-a (McKinney Supp. 1981-1982).

which have received corporate charters from the state.³ Indeed, although the participants in a closely held organization select the corporate form for a variety of reasons, including limited liability, perpetual existence, and favorable tax treatment, they still desire one or more of the attributes of partnership status.

To accommodate the needs of investors in fashioning their "chartered partnership," a number of statutory provisions have been promulgated which permit sophisticated or well-represented shareholders to achieve desired variations from traditional corporate norms.⁴ In the area of corporate dissolution, for example, New York has permitted investors to insert a provision in the certificate of incorporation calling for the dissolution of the corporation at the will of any shareholder or upon the occurrence of a specified event.⁵ Assuming minority shareholders have had the foresight to

A different approach is embodied in a Delaware statute respecting close corporations. The Delaware statute defines a close corporation as a corporation whose certificate of incorporation (1) limits record ownership of its stock to not more than a specified number of persons, not exceeding 30, (2) subjects all of its issued stock to one or more statutorily permitted restrictions on transfer, and (3) provides that the corporation will make no public offering of its stock under the Federal Securities Act of 1933. DEL. CODE ANN. tit. 8, § 342 (1975).

In *Donahue v. Rodd Electrotype Co.*, 367 Mass. 578, 328 N.E.2d 505 (1975), the court noted that there was no generally accepted definition of a close corporation. For its purposes, the court described the form of organization as "typified by: (1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation." *Id.* at 586, 328 N.E.2d at 511. See also *Galler v. Galler*, 32 Ill. 2d 16, 27, 203 N.E.2d 577, 583-84 (1965).

Notably, close corporations in California may have no more than 10 shareholders. Moreover, there must be a statement in the articles of incorporation to the effect: "This Corporation is a Close Corporation." CAL. CORP. CODE § 158(a) (Deering Supp. 1981).

³ It is not uncommon for courts or commentators to refer to the close corporation as a "chartered partnership" or "incorporated partnership." See *Ripin v. United States Woven Label Co.*, 205 N.Y. 442, 447, 98 N.E. 855, 856 (1912); *Donahue v. Rodd Electrotype Co.*, 367 Mass. 578, 586-87, 328 N.E.2d 505, 512 (1975); 1 F. O'NEAL, *supra* note 2, § 1.02, at 3 (2d ed. 1971); 4 J. SPIRES, *DOING BUSINESS IN THE UNITED STATES* § 71.01[2][b], at 71-76 (1981).

⁴ See, e.g., N.Y. BUS. CORP. LAW §§ 620 (agreements as to shareholder voting and certificate of incorporation provisions as to control of directors), 715 (shareholder election of officers), 616 (greater requirements as to quorum and vote of shareholders), & 709 (greater requirements as to quorum and vote of directors) (McKinney 1963 & Supp. 1981-1982). Recent decisions have indicated that when shareholders have not fully complied with statutory requirements to ensure partnership-like status, courts will not necessarily defeat the intended result. See *Zion v. Kurtz*, 50 N.Y.2d 92, 96-97, 405 N.E.2d 681, 682, 428 N.Y.S.2d 199, 200 (1980) (interpreting Delaware law); *Adler v. Svingos*, 80 App. Div. 2d 764, 765, 436 N.Y.S.2d 719, 721 (1st Dep't 1981).

⁵ N.Y. BUS. CORP. LAW § 1002 (McKinney 1963). Absent a provision permitted by section 1002, voluntary dissolution of a New York corporation requires authorization by the holders of two-thirds of the outstanding shares entitled to vote on dissolution. *Id.* § 1001.

include such a provision, dissolution of the corporation can be effected in the same manner as is applicable to a partnership.⁶ The focus of this article, however, pertains to the minority shareholder who, at the time of his initial investment, failed to consider adequately that, at a future date, he might desire to liquidate the corporation in order to salvage all or a portion of his investment. Respecting this shareholder, the existing remedy of involuntary dissolution traditionally has offered little solace.⁷

The plight of the minority shareholder may arise whenever two or more persons share similar desires to profit through an investment of time, money, and effort in a corporate venture. Since the contributions of each participant may vary, individual stock ownership percentages may likewise differ, thereby creating a control position for one individual or group. Nonetheless, the investors may share the expectation that they will participate in the management and control of the operation, be employed by the corporation as long as they remain shareholders, and serve as officers and directors of the corporation.⁸ Unfortunately, because all concerned agree as to their particular positions and functions within the corporation, a written shareholders' agreement and appropriate provisions in the certificate of incorporation memorializing their expectations are purposefully or inadvertently dispensed with.⁹

Several commentators have argued that the effects of section 1002 can be obtained, without the insertion of a provision in the certificate of incorporation, by virtue of a shareholders agreement requiring the shareholders to vote for dissolution at the time and under circumstances specified in the agreement. See C. ISRAELS, *CORPORATE PRACTICE* § 4.30 (2d ed. 1969); N.Y. BUS. CORP. LAW § 1002, comment at 120 (McKinney 1963); Kessler, *The Shareholder-Managed Close Corporation Under the New York Business Corporation Law*, 43 *FORDHAM L. REV.* 197, 205-06 (1974).

⁶ Section 62 of the New York Partnership Law provides, in part, that dissolution is caused by the express will of any partner at any time even if such action may breach the agreement between the partners. N.Y. PARTNERSHIP LAW § 62 (McKinney 1948).

⁷ See Note, *Corporate Dissolution in New York: The Leibert Standard and its Application Today*, 23 *SYRACUSE L. REV.* 873 (1972).

⁸ See *Exadaktilos v. Cinnaminson Realty Co.*, 167 N.J. Super. 141, 154, 400 A.2d 554, 561 (Super. Ct. Law Div. 1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (Super. Ct. App. Div. 1980) (citing Note, *Relief to Oppressed Minorities in Close Corporations: Partnership Precepts and Related Considerations*, 1974 *ARIZ. L.J.* 409, 412).

⁹ Professor O'Neal has summarized the 'situation of the minority shareholders as follows:

A person taking a minority position in a close corporation often leaves himself vulnerable to squeeze out or oppression by failing to insist upon a shareholders' agreement or appropriate charter or bylaw provisions He may be unaware of the risks involved, or his bargaining position may be so weak that he is unable to negotiate for protection. Further, he may have been given or may have inherited

To the participants' dismay, however, disagreement ultimately may develop and the minority shareholder may find himself removed from his directorship, office, and employment by action of the controlling faction. Undoubtedly, those in control will attempt to justify their action by citing the minority shareholder's alleged uncooperative attitude or other supposed misbehavior. In any event, the ousted shareholder, stripped of employment which may represent the primary source of his income, remains the owner of stock which has no immediate value. The shares of the close corporation typically do not return a dividend. Moreover, since a minority position in a close corporation, unlike its publicly held counterpart, usually lacks marketability, the shareholder is frustrated by the realization that he cannot sell his shares.¹⁰ Furthermore, the minority shareholder may receive an offer from the controlling interests to purchase his shares at a price which the minority shareholder unquestionably will deem inequitable. The shareholder then is confronted with the unenviable choice of selling his shares for a seemingly inadequate price or remaining as a perpetually impotent participant in the venture.

Until recently, a shareholder finding himself in such a position possessed no adequate statutory means for obtaining dissolution of the venture.¹¹ In 1979, however, New York added sections 1104-a

his minority interest. Finally, his lawyer . . . may not have the knowledge, experience and skill necessary to draft effective protective arrangements.

F. O'NEAL, *OPPRESSION OF MINORITY SHAREHOLDERS* § 9.03, at 582 (1975).

Professor Hetherington indicates that the attorney purportedly representing the minority shareholder may be to blame for any later predicament:

The tacitly assumed model of a close corporation is that of a group of businessmen who decide—often on the advice of an attorney—to incorporate. In the usual case, only one lawyer is consulted. . . . [W]here there is to be minority stock interest, or where there are more than two parties, the situation [confronted by such attorney] is . . . difficult. The exposure of the participant who takes a minority stock position in a close corporation to exploitation is serious, and the lawyer would appear to have a duty to explain the risks of this position. Conversely, the party taking the majority position has an interest in obtaining a strong control position. At this point it becomes difficult for the lawyer to represent both parties.

Hetherington, *Special Characteristics, Problems, and Needs of the Close Corporation*, 1969 ILL. L.F. 1, 16-17.

¹⁰ See *Exadaktilos v. Cinnaminson Realty Co.*, 167 N.J. Super. 141, 152, 400 A.2d 554, 560 (1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (1980). See also Note, *Some Specific Needs Of the Close Corporation Not Met Under the Minnesota Business Corporation Act: Suggestions for Statutory Relief*, 54 MINN. L. REV. 1008, 1025 (1970).

¹¹ See text accompanying notes 30-50 *infra*. Courts have exercised "inherent equity power" to dissolve a corporation in the absence of express statutory authorization. See text accompanying notes 51-84 *infra*.

and 1118 to its Business Corporation Law (BCL) in an effort to afford some relief to aggrieved minority shareholders.¹² Among other things, these provisions permit holders of twenty percent of the outstanding shares of a corporation to petition for judicial dissolution on grounds of oppressive actions practiced upon the complaining shareholders by directors or others in control of the business.¹³ Additionally, the corporation and noncomplaining shareholders are permitted to avoid dissolution by purchasing the petitioning shareholders' stock at its fair value.¹⁴

Shortly after these sections were enacted, a New York court was presented with the first opportunity to consider a shareholder's petition seeking dissolution on the basis of oppressive conduct. In *In re Topper*,¹⁵ the Supreme Court, New York County, determined that a shareholder has been subjected to oppressive conduct within the meaning of section 1104-a when those in control of the corporation have acted in such a manner as to defeat those expectations of the minority shareholder which formed the basis for his participation in the venture.¹⁶ In enunciating this "reasonable expectations test,"¹⁷ the court has substantially enlarged the options of a minority shareholder in a dissolution context. If the *Topper* decision is followed,¹⁸ the effect of the statutes, as so interpreted, will be to reduce the remaining gap between treatment of the close corporation and partnership forms of business organizations.

This article will focus upon the addition to the arsenal of minority shareholders' rights evidenced by sections 1104-a and 1118 of the BCL and their unique application in *Topper*. Section I examines the law of involuntary dissolution as applied to minority shareholders in New York close corporations prior to the adoption

¹² N.Y. BUS. CORP. LAW §§ 1104-a & 1118 (McKinney Supp. 1981-1982); see text accompanying notes 85-113 *infra*.

¹³ *Id.* § 1104-a.

¹⁴ *Id.* § 1118.

¹⁵ 107 Misc. 2d 25, 433 N.Y.S.2d 359 (Sup. Ct. N.Y. County 1980).

¹⁶ *Id.* at 35, 433 N.Y.S.2d at 366. A standard for dissolution based upon the unfulfilled reasonable expectations of minority shareholders previously had been recommended by commentators. See Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043, 1063 (1969); O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 885-88 (1978).

¹⁷ *In re Topper*, 107 Misc. 2d at 35, 433 N.Y.S.2d at 366.

¹⁸ To date, the *Topper* decision has been cited favorably in two subsequent opinions of the same court. See *In re Beshar*, N.Y.L.J., Feb. 16, 1981, at 6, col. 1 (Sup. Ct. N.Y. County); *In re Taines*, 444 N.Y.S.2d 540 (Sup. Ct. N.Y. County 1981).

of sections 1104-a and 1118. Section II undertakes an analysis of the recently enacted statutes and the reasonable expectations test enunciated in *Topper*. Section III considers the potential shortcomings of the statutory provisions and suggests provisions which may alleviate several of the problems relating to this area.

INVOLUNTARY DISSOLUTION PREDATING SECTION 1104-A

With characteristic insight, Professor Israels has noted that "the objective of the participants in a close corporation is to equate the scheme of governance of their enterprise to that of a partnership."¹⁹ Recognizing this desire, legislatures have made available a "clear, if technical, path"²⁰ whereby shareholders could structure their arrangement to achieve partnership-like status free from the threat of unlimited liability. Accordingly, provisions to alter typical corporate attributes could be embodied in a certificate of incorporation²¹ or in a separate shareholder's agreement.²² Fail-

¹⁹ Israels, *supra* note 2, at 491. Professor Israels notes that in either the corporate or partnership form, the participants in a "family" enterprise seek veto power over (1) the admission of new participants, (2) matters of ordinary administration, and (3) basic structural changes. *Id.*; see, e.g., *Benintendi v. Kenton Hotel, Inc.*, 294 N.Y. 112, 120-21, 128-29, 60 N.E.2d 829, 832, 836-37 (1945).

²⁰ Israels, *supra* note 2, at 506.

²¹ Corporate statutes have permitted partnership-like status pursuant to an enabling charter provision. N.Y. Bus. Corp. Law § 620(b) (McKinney 1963 & Supp. 1981-1982) permits a provision to be inserted in the certificate of incorporation which would restrict the management function of the board of directors or transfer to one or more shareholders or their designees all or any part of the management of the business. This provision was intended to expand the holding in *Clark v. Dodge*, 269 N.Y. 410, 417, 199 N.E. 641, 643 (1936), which upheld an agreement among all shareholders in a close corporation which infringed upon certain managerial functions of the directors. The provision also was intended to overrule *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 297 N.Y. 174, 179, 77 N.E.2d 633, 635 (1948), *McQuade v. Stoneham*, 263 N.Y. 323, 330, 189 N.E. 234, 237 (1934), and *Manson v. Curtis*, 223 N.Y. 313, 322-24, 119 N.E. 559, 562-63 (1918), each of which had invalidated shareholder agreements removing in whole or in part the management function of the board of directors. See *Kessler*, *supra* note 5, at 198-99. Use of such a provision permits the shareholder to create a situation corresponding to the equal management rights of all partners. See N.Y. PARTNERSHIP LAW § 40(5) (McKinney 1948).

Sections 616 and 709 of the New York Business Corporation Law are also relevant in that they permit the certificate of incorporation to include provisions calling for greater than normal quorum requirements at shareholders' and directors' meetings, as well as provisions respecting voting by shareholders and directors. N.Y. Bus. Corp. Law §§ 616 & 709 (McKinney 1963 & Supp. 1981-1982). For maximum protection of minority shareholders, provisions can be inserted which will call for 100% quorum and unanimous voting requirements. In such manner, each shareholder and director retains veto power over all matters coming before the shareholders, and board, respectively. As a result, the corporation functions much like a partnership wherein, in the absence of an agreement to the contrary,

ure to comply with the precise statutory formula for implementa-

nonordinary acts require approval by all partners. N.Y. PARTNERSHIP LAW §§ 40(5), 40(8) (McKinney 1948).

Also of note is section 715(b) of the New York Business Corporation Law which permits the participants to include a provision in the certificate of incorporation calling for election of officers by the shareholders instead of by the board. N.Y. BUS. CORP. LAW § 715(b) (McKinney 1963). Finally, various provisions of the New York statute indicate that the certificate of incorporation may be used to alter the voting rights of shareholders. *E.g., id.* § 501(a) (permits the division of stock into two or more separate classes); § 703(a) (provides that the certificate of incorporation can call for the election of one or more directors by the holders of any class). In such manner, classes can be established to ensure participation by representatives of minority shareholders on the board of directors in instances where such involvement would otherwise be nonexistent. *See, e.g.,* *Lehrman v. Cohen*, 43 Del. Ch. 222, 226-27, 222 A.2d 800, 803 (1966), wherein classifications were used to create representation for two families on the board of directors and as a means of avoiding deadlock.

²² A principle area wherein traditional corporate norms are altered by separate agreement relates to restrictions on transferability of stock. Assuming a market exists, corporate shares may be sold at the will of the owner and without seeking any prior consent from fellow shareholders. The purchaser thereafter acquires all rights of a shareholder in the corporation. In contrast, in the absence of agreement to the contrary, a new partner cannot enter the partnership without the consent of all existing partners. N.Y. PARTNERSHIP LAW § 40(7) (McKinney 1948). A partner can assign or sell his interest in the partnership. Such sale or assignment, however, only conveys to the purchaser the right to receive the seller's share of partnership profits and surplus. N.Y. PARTNERSHIP LAW § 53 (McKinney 1948).

Courts have reacted favorably when parties attempt to equate their corporation to the partnership form by placing restrictions on free transferability of shares. First refusal provisions, namely, prohibiting sales unless such shares are offered to the corporation or to other shareholders at a previously agreed upon price or at the price offered by a third party, typically are upheld. *See, e.g.,* *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 543, 141 N.E.2d 812, 817, 161 N.Y.S.2d 418, 424 (1957); *Hassel v. Pohle*, 214 App. Div. 654, 655, 212 N.Y.S. 561, 562 (2d Dep't 1925); *In re Mather's Estate*, 410 Pa. 361, 368, 189 A.2d 586, 590 (1963). *See also* *Triggs v. Triggs*, 46 N.Y.2d 305, 307, 385 N.E.2d 1254, 1254, 413 N.Y.S.2d 325, 326 (1978). Consent restrictions, prohibiting a transfer without the prior approval of the board of directors or shareholders, are more likely to encounter difficulties as to their enforceability. In New York, such restrictions are enforceable if such consent cannot be unreasonably withheld. If consent can be withheld for any or no reason, the restriction is considered an unreasonable restraint and void. *See* *Rafe v. Hindin*, 29 App. Div. 2d 481, 485, 288 N.Y.S.2d 662, 666 (2d Dep't), *aff'd*, 23 N.Y.2d 759, 244 N.E.2d 469, 296 N.Y.S.2d 955 (1968).

Unlike New York, Delaware has adopted an extensive statute dealing with restrictions on transfer. Sections 202(c) and (d) of the Delaware General Corporation Law provide, in part:

(c) A restriction on the transfer of securities of a corporation is permitted by this section if it:

- (1) Obligates the holder of the restricted securities to offer to the corporation or to any other holders of securities of the corporation or to any other person or to any combination of the foregoing, a prior opportunity, to be exercised within a reasonable time, to acquire the restricted securities; or
- (2) Obligates the corporation or any holder of securities of the corporation or any other person or any combination of the foregoing to purchase the securities which are the subject of an agreement respecting

tion of these changes traditionally has subjected the participants to such corporate mainstays as, for example, majority rule and separation of ownership from management.²³ In recent years, however, a trend has developed which seemingly relaxes certain of the constraints which prevented attainment of the participants' objectives absent unswerving compliance with statutory formality. In several instances, courts have displayed a willingness to apply partnership-like standards notwithstanding faulty implementation²⁴ or silence

the purchase and sale of the restricted securities; or

(3) Requires the corporation or the holders of any class of securities of the corporation to consent to any proposed transfer of the restricted securities or to approve the proposed transferee of the restricted securities; or

(4) Prohibits the transfer of the restricted securities to designated persons or classes of persons, and such designation is not manifestly unreasonable.

(d) Any restriction on the transfer of the shares of a corporation for the purpose of maintaining its status as an electing small business corporation under subchapter S of the United States Internal Revenue Code [26 U.S.C. § 1371-1379 (1976 & Supp. III 1979)] is conclusively presumed to be for a reasonable purpose.

DEL. CODE ANN. tit. 8, § 202(c), (d).

An additional area wherein the parties by agreement may alter corporate attributes involves shareholder voting agreements. Indeed, courts have enforced agreements wherein the parties (1) agreed in advance as to how their votes would be cast during the contract term or (2) agreed to cast their votes in the future in such manner as would be later agreed upon pursuant to a method fixed within the agreement. *See, e.g.,* Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 617-18, 53 A.2d 441, 445 (1947). Such agreements have also found statutory acceptance. *See* N.Y. BUS. CORP. LAW § 620(a) (McKinney 1963 & Supp. 1981-1982).

Not to be omitted is reference to provisions of the Internal Revenue Code which permit certain corporations and their shareholders to be treated for tax purposes in a manner similar to partnerships and partners, respectively. Subchapter S of the Internal Revenue Code permits most close corporations to elect partnership-like tax treatment. Thus, the corporation acts only as a conduit for tax purposes and as such pays no income tax on corporate profits. I.R.C. §§ 1372(a), 1372(b). Like partners, however, the shareholders of a Subchapter S corporation pay tax on their share of corporate profits and derive the tax advantages of operating losses. *Id.* §§ 1373, 1374. Notably, recent amendments to the tax laws have increased the number of corporations eligible to elect Subchapter S status by raising the maximum number of shareholders that a Subchapter S corporation may have from 15 to 25. *Id.* § 1371(a).

²³ *See, e.g.,* Model, Roland & Co. v. Industrial Acoustics Co., 16 N.Y.2d 703, 705, 209 N.E.2d 553, 553-54, 261 N.Y.S.2d 896, 897 (1965) (refusing to enforce a bylaw provision calling for a two-thirds shareholder vote to amend certain bylaws); *In re* William Faehndrich, Inc., 2 N.Y.2d 468, 473, 141 N.E.2d 597, 600, 161 N.Y.S.2d 99, 103 (1957) (invalidating a bylaw provision which attempted to establish a greater than normal quorum requirement for shareholders' meetings).

²⁴ Several decisions by New York courts illustrate some degree of tolerance when shareholders have attempted to alter their relationships. In *Beresovski v. Warszawski*, 28 N.Y.2d 419, 271 N.E.2d 520, 322 N.Y.S.2d 673 (1971), three shareholders, who held all the outstand-

on the part of shareholders.²⁵

ing stock of a corporation, entered into an agreement calling for, *inter alia*, supermajority voting requirements for certain director and shareholder actions. The agreement further provided that "if any illegal provision [of the contract] can be cured by amending the certificate of incorporation, the parties agree to take such action immediately." *Id.* at 423, 271 N.E.2d at 522, 322 N.Y.S.2d at 675. While noting that the supermajority voting requirements were invalid in the absence of a certificate of incorporation provision, the court held that the remedy of specific performance would lie to enforce the contract provision calling for amendment of the certificate. *Id.* at 425, 271 N.E.2d at 523, 322 N.Y.S.2d at 676. *See also* Shubin v. Surchin, 27 App. Div. 2d 452, 454, 280 N.Y.S.2d 55, 58 (1st Dep't 1967). In *Zion v. Kurtz*, 50 N.Y.2d 92, 405 N.E.2d 681, 428 N.Y.S.2d 199 (1980), a shareholders' agreement had been executed which provided that, except as otherwise specified in the agreement, no business or activity of the corporation could be conducted without the consent of a minority shareholder. In applying Delaware law, the court of appeals held that the agreement was enforceable as between the original parties to it notwithstanding the fact that all steps required by statute had not been taken. The court noted that the public policy of Delaware did not prevent the shareholders from removing all management functions from the board of directors. *Id.* at 100-01, 405 N.E.2d at 684, 428 N.Y.S.2d at 203. Moreover, the shareholder seeking to avoid the effect of the agreement had agreed to do all things reasonably required to effectively evidence the intent of the agreement. *Id.* at 101, 405 N.E.2d at 685, 428 N.Y.S.2d at 203. As a result, the court determined that since no third persons were affected and since all shareholders had assented to the arrangement, "the certificate of incorporation may be ordered reformed, by requiring [the majority stockholder] to file the appropriate amendments, or more directly he may be held estopped to rely upon the absence of those amendments from the corporate charter." *Id.* at 102, 405 N.E.2d at 685, 428 N.Y.S.2d at 204. Finally, the court, after noting the existence of section 620(b) of the New York Business Corporation Law, stated that no New York public policy prevented the court's application of Delaware law in this matter. *Id.* at 102-03, 405 N.E.2d at 686, 428 N.Y.S.2d at 204.

Shortly after *Zion* was decided, a provision in a shareholders' agreement relating to a New York corporation was held valid notwithstanding the fact that the clause provided that all corporate operations required unanimous consent of the shareholders and that no enabling provision under section 620(b) had been inserted in the certificate of incorporation. In so holding, the court noted that "the parties intended that the ministerial act of amending the certificate of incorporation would be accomplished to effectuate the agreement's provisions." *Adler v. Svingos*, 80 App. Div. 2d 764, 765, 436 N.Y.S.2d 719, 721 (1st Dep't 1981).

²⁵ One area wherein a close corporation most resembles a partnership involves fiduciary obligations among the participants. The fiduciary relationship among partners, coupled with the utmost good faith attendant thereto, is fundamental to the partnership form of doing business. *See Meinhard v. Salmon*, 249 N.Y. 458, 463-64, 164 N.E. 545, 546 (1928). Each partner shares in the profits derived and losses sustained through the combined efforts of all partners, and each may be bound by the actions of his colleagues. *See* N.Y. PARTNERSHIP LAW §§ 20 & 40 (McKinney 1948). As a result, the partners tend to place a great deal of reliance upon each other and derive a measure of protection from the fiduciary standards placed on each participant.

Like their partnership counterparts, shareholders in a close corporation are dependent on one another in connection with the business. Accordingly, similar concepts of fiduciary responsibility have been applied particularly to protect minority shareholders from potential inequities at the hands of the controlling shareholders. *See, e.g.,* *Pepper v. Litton*, 308 U.S. 295, 306 (1939); *Bayliss v. Rood*, 424 F.2d 142, 146 (4th Cir. 1970); *United States v. Gates*, 376 F.2d 65, 76-77 (10th Cir. 1967); *Helms v. Duckworth*, 249 F.2d 482, 486-87 (D.C.

The area of corporate dissolution, however, traditionally has resisted the trend to treat shareholders of a closely held corporation in a manner akin to their partnership counterparts. Pursuant to partnership statutes, any partner, including one with a minimal interest in the business, is empowered to force dissolution of the partnership.²⁶ Prior to the enactment of section 1104-a of the BCL, however, statutory provisions in New York placed substantial, if not insurmountable, obstacles in the path of minority shareholders seeking to dissolve a corporation in the absence of an enabling charter provision.²⁷ Moreover, the judiciary, while recognizing the inequities which may be suffered by minority shareholders in a close corporation, was reluctant to order dissolution,²⁸ equating such action to "judicially imposed death."²⁹

Traditional Statutory Remedies

Despite repeated efforts to improve the position of minority shareholders of close corporations,³⁰ the New York statutory scheme, prior to the adoption of section 1104-a, offered little to an aggrieved minority shareholder with respect to standing to petition for judicial dissolution. For example, Article 11 of the BCL, in addition to sanctioning involuntary dissolution at the behest of the state attorney general³¹ or the corporation's board of directors,³²

Cir. 1957); *Perlman v. Feldman*, 219 F.2d 173, 175 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955); *In re Brunner Air Compressor Corp.*, 287 F. Supp. 256, 263 (N.D.N.Y. 1968); *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 848-49, 353 N.E.2d 657, 661 (1976); *Donahue v. Rodd Electrotpe Co.*, 367 Mass. 578, 589, 328 N.E.2d 505, 512-13 (1975); *Schwartz v. Marien*, 37 N.Y.2d 487, 491, 335 N.E.2d 334, 337, 373 N.Y.S.2d 122, 126 (1975); *Katzowitz v. Sidler*, 24 N.Y.2d 512, 518, 249 N.E.2d 359, 363, 301 N.Y.S.2d 470, 475 (1969); *Modlin v. Licht*, 224 App. Div. 614, 615, 231 N.Y.S. 265, 266 (2d Dep't 1928), *aff'd mem.*, 252 N.Y. 589, 170 N.E. 154 (1929); *Levine v. Styleart Press, Inc.*, 31 Misc. 2d 106, 107, 217 N.Y.S.2d 688, 689 (Sup. Ct. N.Y. County 1961).

²⁶ N.Y. PARTNERSHIP LAW § 62 (McKinney 1948).

²⁷ See notes 30-50 and accompanying text *infra*.

²⁸ See notes 51-84 and accompanying text *infra*.

²⁹ *In re Radow & Neidorff*, 307 N.Y. 1, 7, 119 N.E.2d 563, 565 (1954). See also *In re Gordon & Weiss, Inc.*, 32 App. Div. 2d 279, 282, 301 N.Y.S.2d 839, 843 (1st Dep't 1969) (McGivern, J., dissenting) where a decree of dissolution was described as "a judicial thunderbolt [that] sundered the corporation."

³⁰ See, e.g., *Consultant's Report No. RR-70*, STATE OF NEW YORK JOINT LEGISLATIVE COMMITTEE TO STUDY REVISION OF THE CORPORATION LAWS 2-3 (1958), wherein it was suggested that the judicial dissolution provisions be altered to permit standing by any shareholder. Curiously, prior to 1929, a single shareholder or director of a New York corporation was permitted to seek dissolution. N.Y. GEN. CORP. LAW § 172 (McKinney 1917), as amended by ch. 650, § 103, [1929] N.Y. Laws 1544.

³¹ N.Y. BUS. CORP. LAW § 1101(a) (McKinney 1963) provides:

permits the holders of a majority of all outstanding voting shares to adopt a resolution effectively calling for the dissolution of the corporation.³³ The resolution must state (1) that the shareholders find corporate assets insufficient to discharge liabilities or (2) that dissolution would be beneficial to the shareholders.³⁴ Upon adoption of the resolution, the shareholders may petition for judicial dissolution. The decision to dissolve the corporation, however, rests in the court's discretion.³⁵

While the statute is significant insofar as it provides an avenue for dissolution when a two-thirds vote of shareholders approving voluntary dissolution cannot be obtained,³⁶ it is readily apparent that the majority voting requirement of the provision obviates its usefulness for the minority. At best, since the shareholders' meeting held to consider the resolution may be called by the holders of

(a) The attorney-general may bring an action for the dissolution of a corporation upon one or more of the following grounds:

(1) That the corporation procured its formation through fraudulent misrepresentation or concealment of a material fact.

(2) That the corporation has exceeded the authority conferred upon it by law, or has violated any provisions of law whereby it has forfeited its charter, or carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state has become liable to be dissolved.

³² *Id.* §-1102. This section permits a majority of the board of directors to adopt a resolution stating (1) that corporate assets are insufficient to discharge liabilities or (2) that dissolution would be beneficial to shareholders, and to thereafter petition for judicial dissolution.

³³ *Id.* § 1103(a). This section, while of no utility for minority shareholders, is an improvement over prior law. Previously, only the board of directors could petition for dissolution on these grounds. N.Y. GEN. CORP. LAW § 101 (McKinney 1943), as amended by N.Y. Bus. Corp. Law § 1102 (McKinney 1963); see Hoffman, *New Horizons for the Close Corporation in New York Under Its New Business Corporation Law*, 28 BROOKLYN L. REV. 1, 12-13 (1961).

³⁴ N.Y. BUS. CORP. LAW § 1103(a) (McKinney 1963). Assuming a petition is filed pursuant to this section it is not as yet certain what must be established to support dissolution. I. KANTROWITZ & S. SLUTSKY, *WHITE ON NEW YORK CORPORATIONS* ¶ 1102.02, at 11-13 (1981). With respect to a petition based on inability to discharge liability, one author argues that insolvency in the bankruptcy sense is contemplated, that is, total liabilities must exceed total assets. O'Connell, *Dissolution as a Remedy for Dissension and Deadlock in the New York Closely-Held Corporation*, 19 BUFFALO L. REV. 585, 586 (1970). In construing a predecessor statute, however, the court in *In re Gail Kiddie Clothes, Inc.*, 56 N.Y.S.2d 117 (Sup. Ct. Orange County 1945) also required a showing that the corporation was unable to pay its debts in the ordinary course of its business. *Id.* at 119. With respect to "benefit to shareholders" as supporting dissolution, no court has apparently had the opportunity to apply this standard.

³⁵ N.Y. BUS. CORP. LAW § 1111 (McKinney 1963).

³⁶ See *id.* §§ 1001, 1103, comment at 172 (McKinney 1963).

ten percent of all outstanding voting shares,³⁷ the statute may be used by the minority only as a limited nuisance vehicle. At worst, the statute may be invoked by a simple majority in an attempt to freeze out the minority, through dissolution and liquidation, from an interest in the corporation. Fortunately, however, courts have been disposed to prevent dissolution on the petition of the majority when the majority is motivated by bad faith, fraud, or other breach of trust.³⁸

Also of limited significance for the minority shareholder is section 1104 of the BCL, which authorizes involuntary dissolution on the grounds of deadlock and dissension.³⁹ More specifically, dissolution may be sought by the holders of one-half of the outstanding voting shares of the corporation⁴⁰ if (1) the directors are so divided in their management function that sufficient votes for board action cannot be obtained, (2) division among shareholders is such that the election of directors cannot be obtained, or (3) internal dissension among the shareholders makes dissolution beneficial for the shareholders.⁴¹ Section 1104 further provides that if a supermajority voting requirement for board or shareholder action exists,⁴² the percentage stock ownership required to petition for dissolution under this section would be reduced to one-third.⁴³ Finally, any shareholder may petition for judicial dissolution upon the sole ground that the shareholders have failed for at least two consecutive annual meetings to elect successors to directors whose

³⁷ N.Y. BUS. CORP. LAW § 1103(b). To avoid abuse, a meeting sought by a minority shareholder pursuant to this section may not be called more than once in any 12 month period. *Id.*

³⁸ See *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185, 196, 123 N.E. 148, 152 (1919).

³⁹ N.Y. BUS. CORP. LAW § 1104 (McKinney 1963).

⁴⁰ *Id.* § 1104(a).

⁴¹ *Id.*; see, e.g., *In re Sheridan Constr. Corp.*, 22 App. Div. 2d 390, 392-93, 256 N.Y.S.2d 210, 211-12 (4th Dep't), *aff'd*, 16 N.Y.2d 680, 209 N.E.2d 290, 261 N.Y.S.2d 300 (1965). In *Sheridan*, the court stated that, pursuant to section 1104 of the Business Corporation Law, if management of a corporation is so divided that the board is totally ineffective in managing the corporation, then "dissolution is the only practical and feasible solution." *Id.* (citations omitted).

⁴² N.Y. BUS. CORP. LAW § 616(b) (McKinney 1963). Section 616(b) permits the certificate of incorporation to provide that the proportion of shareholder votes needed for the transaction of any business by shareholders shall be greater than the proportion normally required in the absence of such a provision. *Id.* A similar statutory provision exists with respect to action taken by the board of directors. *Id.* § 709(a)(2).

⁴³ *Id.* § 1104(b).

terms have expired.⁴⁴ This latter provision has been over-enthusiastically referred to as "the ultimate in legislative recognition of the true 'partnership' character of the close corporation."⁴⁵

While section 1104 ostensibly aids minority interests, the practical effect of the provision as a remedial device is negligible. Indeed, the fifty percent stock ownership requirement has been set sufficiently high so that minority shareholders effectively are foreclosed from using the provision. The high ownership requirements are particularly bothersome in light of the apparent purpose of the ground for dissolution relating to internal shareholder dissension. This provision was adopted in order to clarify the fact that dissolution may be a reasonable remedy when dissension among shareholders, particularly those in close corporations, makes continuance of the business unworkable and disadvantageous to the shareholders.⁴⁶ If such be the case, and the aggrieved shareholder can convince a court that dissolution should be ordered, the shareholder's holdings in the corporation seem of little significance.⁴⁷ In fact, the Model Business Corporation Act requires no similar percentage ownership requirement.⁴⁸ Furthermore, the reduced percentage set forth when supermajority voting requirements are applicable does not alleviate the problem. Surely, if the minority has inserted supermajority voting requirements in the corporate charter as a means of control over the majority, one would expect the insertion of a further provision ensuring the availability of voluntary dissolution upon the happening of specified events, including approval by the minority.⁴⁹

Moreover, although section 1104 sanctions dissolution based upon a failure to elect directors or upon board deadlock, such provisions are of little comfort to the minority. If no shareholders' agreement exists or the shareholders have not produced a certifi-

⁴⁴ *Id.* § 1104(c).

⁴⁵ Hoffman, *supra* note 33, at 19.

⁴⁶ N.Y. BUS. CORP. LAW § 1104, comment at 175 (McKinney 1963).

⁴⁷ See Note, *Minority Dissolution of the Close Corporation*, 35 GEO. WASH. L. REV. 1068, 1080 (1967).

⁴⁸ ABA-ALI MODEL BUS. CORP. ACT § 97 (1972), provides in part:

The . . . courts shall have full power to liquidate the assets and business of a corporation:

(a) In an action by a shareholder when it is established:

(1) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof

⁴⁹ N.Y. BUS. CORP. LAW § 1002 (McKinney 1963).

cate of incorporation altering traditional corporate norms, the majority will control the election of directors. Accordingly, deadlock among the shareholders preventing the election of directors simply will not exist. Moreover, once the majority has obtained control of the board, it is unlikely that directors will pursue their duties in such a manner as to result in management deadlock. Finally, the ability of the majority to elect its directors causes the statutory provision covering failure to elect directors for two consecutive annual meetings to be a hollow right of the minority.

A cursory review of the statutory scheme existing prior to section 1104-a indicates, therefore, that notwithstanding the ability of shareholders to petition for judicial dissolution in the event of insolvency, deadlock, or dissension, the statutes are of no real significance to shareholders who, in the aggregate, own less than fifty percent of the corporation's stock. While there may be legitimate reasons for establishing a minimum ownership percentage prior to invoking the relief envisioned, such as the avoidance of strike or nuisance suits,⁵⁰ the percentages chosen seem excessive. A reduction in the percentage requirements coupled with continued discretion in the courts to order dissolution would realistically balance the respective positions of minority and majority shareholders. Nonetheless, the high percentage requirements exist and, prior to 1979, represented the exclusive means by which shareholders could petition for corporate dissolution. Consequently, the statutory remedy of involuntary dissolution had been effectively withheld from minority shareholders.

Judicially Sponsored Dissolution

Recognizing the tenuous position of minority shareholders in closely held corporations, courts have evinced a desire to redress wrongs notwithstanding the absence of statutory authorization for dissolution. Courts have indicated that, while there may exist no express statutory authority for dissolution at the behest of the minority, such relief may be available as a matter of "judicial spon-

⁵⁰ See Comment, *Dissolution Under the California Corporations Code: A Remedy for Minority Shareholders*, 22 U.C.L.A. L. REV. 595, 617 (1975), wherein the author noted that a minimum percentage for a dissolution petition was adopted by the California legislature due to its apprehension regarding strike suits. The author recognized that such requirements and concern for the majority can "unfairly prejudice close corporation shareholders." *Id.*

sorship."⁵¹ To date, however, such relief has been granted sparingly. Since 1963, four decisions of the New York Court of Appeals have touched upon this issue, intimating that the minority effectively may resort to the judicially created remedy only in the most egregious instances of overreaching by the majority.⁵²

While courts and commentators for some time had considered the advisability of equitable remedies for the minority in the absence of a statute,⁵³ the first decision wherein the Court of Appeals adopted involuntary dissolution via "judicial sponsorship" was *Leibert v. Clapp*.⁵⁴ In *Leibert*, the plaintiff instituted a class action on behalf of minority shareholders to compel the directors of a concededly profitable and dividend-paying corporation to commence dissolution proceedings.⁵⁵ The plaintiff alleged, *inter alia*, that the directors and others in control of the corporation had looted corporate assets, continued the corporation for the sole benefit of those in control, and attempted to coerce the minority to sell their interests to the control group.⁵⁶ The defendants responded with a motion to dismiss the complaint for failure to state a cause of action.⁵⁷

In reviewing the plaintiff's contentions, the court agreed that dissolution through judicial sponsorship may serve as an alterna-

⁵¹ *Leibert v. Clapp*, 13 N.Y.2d 313, 315, 196 N.E.2d 540, 541, 247 N.Y.S.2d 102, 104 (1963).

⁵² See, e.g., *Gilbert v. Hamilton*, 29 N.Y.2d 842, 277 N.E.2d 787, 327 N.Y.S.2d 855 (1971), *aff'g* 35 App. Div. 2d 715, 715, 315 N.Y.S.2d 92, 93 (1st Dep't 1970); *Nelkin v. H.J.R. Realty Corp.*, 25 N.Y.2d 543, 549-50, 255 N.E.2d 713, 718, 307 N.Y.S.2d 454, 459 (1969); *Kruger v. Gerth*, 16 N.Y.2d 802, 210 N.E.2d 355, 263 N.Y.S.2d 1 (1965), *aff'g* 22 App. Div. 2d 916, 917, 255 N.Y.S.2d 498, 500 (2d Dep't 1964); *Leibert v. Clapp*, 13 N.Y.2d 313, 316, 196 N.E.2d 540, 542, 247 N.Y.S.2d 102, 105 (1963).

⁵³ See, e.g., *Kroger v. Jaburg*, 231 App. Div. 641, 645, 248 N.Y.S. 387, 391-92 (1st Dep't 1931); *Hoffman*, *supra* note 33, at 13-14; *Hornstein, A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder*, 40 COLUM. L. REV. 220, 222 (1940).

⁵⁴ 13 N.Y.2d 313, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963). The *Leibert* decision has spawned a substantial amount of commentary. See, e.g., *Note, Dissolution of the Close Corporation*, 41 ST. JOHN'S L. REV. 239, 250-51 (1966); *Note, Corporate Dissolution in New York: The Leibert Standard and Its Application Today*, 23 SYRACUSE L. REV. 873, 874-86 (1972); *Comment, New York Broadens Availability of Involuntary Dissolution as Remedy for Intracorporate Oppression of Minority Shareholders*, 39 N.Y.U. L. REV. 697, 699-705 (1964).

⁵⁵ 13 N.Y.2d at 320, 196 N.E.2d at 545, 247 N.Y.S.2d at 108. Prior to *Leibert*, equitable dissolution appeared restricted to corporations that were not profitable. See *Kroger v. Jaburg*, 231 App. Div. 641, 643, 248 N.Y.S. 387, 391 (1st Dep't 1931); *Note, Corporate Dissolution in New York: The Leibert Standard and Its Application Today*, 23 SYRACUSE L. REV. 873, 875 (1972).

⁵⁶ 13 N.Y.2d at 315-16, 196 N.E.2d at 542, 247 N.Y.S.2d at 104.

⁵⁷ *Id.* at 315, 196 N.E.2d at 541, 247 N.Y.S.2d at 103.

tive to statutory authorization for such a remedy.⁵⁸ As to this particular action, the majority noted that the allegations, if established at trial, were sufficient to furnish a basis for relief notwithstanding the profitability of the corporation and the availability of alternative relief through the mechanism of a shareholder's derivative suit against the alleged wrongdoers.⁵⁹ While noting that the legislature had vested decisions as to the desirability of, or need for, dissolution in the directors and majority shareholders, the court recognized that such determinations were to be made in their capacity as fiduciaries, in good faith and in consideration of the interests of both majority and minority shareholders.⁶⁰ The court further reasoned that if the allegations of the complaint were accepted as true, the directors and majority shareholders had indeed breached the fiduciary duty they owed to minority shareholders, and thus were "disqualified from exercising the exclusive discretion and dissolution power given to them by statute."⁶¹ Upon such disqualification, the court posited that it could fill the resultant void.⁶²

Armed with the potential for dissolution sanctioned in *Leibert*, minority shareholders might well have anticipated that the traditional judicial reluctance to decree dissolution on their behalf would subside. It shortly became evident, however, that such would not be the case. In *Kruger v. Gerth*,⁶³ for example, minority shareholders holding forty-six percent of the common stock of a

⁵⁸ *Id.* at 315, 196 N.E.2d at 541, 247 N.Y.S.2d at 104.

⁵⁹ The court determined that the charges of "persistent corporate abuses" made the remedy of a derivative suit inadequate and inappropriate. Further, the court noted:

[I]t is alleged, *inter alia*, that the primary, if not the sole, purpose of preserving [the corporation's] separate existence is to effect an unlawful diversion of large portions of its earnings to its parent corporation and other members of the group. If this and the other allegations of misconduct be established, it follows that to restrict the minority shareholders to a derivative suit would be to commit them to a multiplicity of costly, time-consuming and difficult actions with the result, at most, of curing the misconduct of the past while leaving the basic improprieties unremedied. It is the traditional office of equity to forestall the possibility of such harassment and injustice.

Id. at 317, 196 N.E.2d at 543, 247 N.Y.S.2d at 106.

⁶⁰ *Id.* at 316-17, 196 N.E.2d at 542, 247 N.Y.S.2d at 105.

⁶¹ *Id.* at 317, 196 N.E.2d at 543, 247 N.Y.S.2d at 105 (quoting Hoffman, *New Horizons for the Close Corporation in New York Under Its New Business Corporation Law*, 28 BROOKLYN L. REV. 1, 14 (1961)).

⁶² 13 N.Y.2d at 317, 196 N.E.2d at 543, 247 N.Y.S.2d at 105.

⁶³ 22 App. Div. 2d 916, 255 N.Y.S.2d 498 (2d Dep't 1964), *aff'd mem.*, 16 N.Y.2d 802, 210 N.E.2d 355, 263 N.Y.S.2d 1 (1965).

corporation sought to compel dissolution on the ground that the corporation was incapable of producing net income over and above the salary and bonus paid to the majority shareholder.⁶⁴ The majority shareholder controlled the business and, each year in question, received compensation from the corporation which consumed almost all of the corporate earnings.⁶⁵ Consequently, no dividends were paid on the common stock held by the plaintiffs.⁶⁶ Moreover, since the plaintiffs were not salaried officers or employees of the corporation, they, in effect, were receiving no return relating to their interest in the corporation. Although the corporation apparently was being operated for the sole benefit of the majority shareholder, the Court of Appeals, on the basis of the majority opinion below, refused to order dissolution.⁶⁷ In distinguishing *Leibert*, the appellate division had noted that no claim had been set forth that the majority engaged in a "calculated deflation or impairment in the value of the capital stock in order to coerce the minority stockholders to sell their shares at depressed prices."⁶⁸ While agreeing that dissolution would be warranted if those in control maintained the corporation for their own benefit at the expense of the minority, the court noted that dissolution would not be decreed on a "meager showing" that bonuses paid to the majority disabled the plaintiffs from receiving a fair return on their investments.⁶⁹

Despite the negative outcome in *Kruger*, the decision was of positive significance for minority shareholders in general due to the

⁶⁴ 22 App. Div. 2d at 916, 255 N.Y.S.2d at 500.

⁶⁵ From 1958 to 1961, corporate sales ranged from \$245,000 to \$275,000. Net profits before income taxes, however, totalled less than \$2,000 per year. During this period, salary and bonuses to the majority shareholder ranged from approximately \$14,850 to approximately \$16,500. *Id.* at 916-17, 255 N.Y.S.2d at 500.

⁶⁶ The corporation had made dividend payments on certain preferred stock. *Id.* at 916, 255 N.Y.S.2d at 500.

⁶⁷ *Kruger v. Gerth*, 16 N.Y.2d 802, 804, 210 N.E.2d 355, 355, 263 N.Y.S.2d 1, 2 (1965).

⁶⁸ 22 App. Div. 2d at 917, 255 N.Y.S.2d at 501.

⁶⁹ *Id.* As a result of *Kruger's* holding, the holders of a sizeable interest in a corporation valued at more than \$100,000 will receive no return on their ownership interest, will be unable to dispose of their investments through dissolution, and as a practical matter, will be unable to sell their interest. See Note, *Corporations: Suit by Minority Shareholder of Close Corp.*, 51 CORNELL L.Q. 538, 540 (1966). Of course, it is arguable that the result may be justified by considering the particular positions of the plaintiffs and the individual from whom they inherited their stock. The plaintiffs were operating a business in competition with the corporation they sought to dissolve. Indeed, they had testified that their business would profit should dissolution take place. *Id.* at 917-18, 255 N.Y.S.2d at 501-02. Moreover, the plaintiffs' predecessor-in-interest had been employed by the corporation until illness forced him to retire in 1950. From 1950 to 1961, however, he continued to receive salaries and bonuses from the corporation. *Id.* at 917, 255 N.Y.S.2d at 501.

dissenting opinions therein. Particularly significant was the dissent of Judge Fuld, who would have considered the close corporation as a partnership for purposes of dissolution.⁷⁰ Noting that participants in close corporations typically regard themselves as partners or joint venturers, he opined that they should be subjected to the burdens of a partnership relationship, including the ability of a court to decree dissolution.⁷¹ More specifically, as "the fiduciary obligation of the majority to the minority extends considerably beyond what would be its reach in the context of a larger or less closely held enterprise,"⁷² breach of that obligation empowers the court to take steps necessary to achieve a fair result. In fashioning a remedy, Judge Fuld would have the court consider all the facts of the case, including the parties' interests, motivations, and good faith. Moreover, the dissent would consider relief short of dissolution, such as permitting either interest to purchase the others shareholdings at a value determined by the court.⁷³

The position of minority shareholders was next considered by the Court four years later in *Nelkin v. H.J.R. Realty Corp.*⁷⁴ In *Nelkin*, the petitioners, who were four-ninths shareholders in a cooperative apartment building, had entered into a shareholders' agreement permitting shareholder-tenants of the building to be charged a rental discounted below the fair rental value of the property.⁷⁵ While all of the shareholders initially had benefited from this arrangement, the petitioners ultimately vacated the building, leaving the majority shareholders to reap the sole benefit of reduced rentals. The net result of the bargain was that the corporation, though worth in excess of \$350,000, failed to show more than a negligible profit.⁷⁶ Indeed, all benefits derived from the operation

⁷⁰ 16 N.Y.2d at 806, 210 N.E.2d at 357, 263 N.Y.S.2d at 4.

Chief Judge Desmond dissented in a separate opinion in which, relying on *Leibert*, he argued that the majority had breached its fiduciary duties to the minority by continuing the corporation solely to pay a salary and bonus to the controlling shareholder. *Id.* at 804-05, 210 N.E.2d at 355-56, 263 N.Y.S.2d at 2-3 (Desmond, C.J., dissenting).

⁷¹ *Id.* at 806, 210 N.E.2d at 357, 263 N.Y.S.2d at 4 (Fuld, J., dissenting); see N.Y. PARTNERSHIP LAW § 62 (McKinney 1948).

⁷² 16 N.Y.2d at 806, 210 N.E.2d at 357, 263 N.Y.S.2d at 4 (Fuld, J., dissenting).

⁷³ *Id.* at 807, 210 N.E.2d at 357, 263 N.Y.S.2d at 4-5 (Fuld, J., dissenting). Judge Fuld's dissent closely approaches the provisions of sections 1104-a and 1118 of the present Business Corporation Law. See N.Y. PARTNERSHIP LAW § 69 (McKinney 1948).

⁷⁴ 25 N.Y.2d 543, 255 N.E.2d 713, 307 N.Y.S.2d 454 (1969).

⁷⁵ *Id.* at 546, 255 N.E.2d at 714-15, 307 N.Y.S.2d at 456.

⁷⁶ *Id.* at 550-51, 255 N.E.2d at 717-18, 307 N.Y.S.2d at 460 (Fuld, C.J., dissenting). Adding to the predicament of the minority shareholders was an offer for their stock made

effectively were funnelled to the majority shareholders in the form of discounted rentals.

Upon considering petitioners' request for dissolution, the Court of Appeals dismissed the proceeding for failure to state a cause of action. Distinguishing *Leibert*, the court noted that there was no allegation that the majority was wrongfully diverting corporate assets and income for its own personal benefit.⁷⁷ Furthermore, as in *Kruger*, the court found no evidence that the majority was guilty of looting or exploiting the corporation to the detriment of the minority or of having breached a fiduciary obligation owed to the minority.⁷⁸ In fact, the court stated that the majority's conduct was consistent with the terms of the shareholders' agreement. Moreover, any damage sustained by the minority arose as a result of its own voluntary conduct in vacating the premises. Dissenting, Judge Fuld argued that a showing of looting or wrongful diversion of assets was not a necessary prerequisite for dissolution. Instead, the dissent asserted that the dissolution remedy should exist when the corporation is continued solely and exclusively for the benefit of the majority. The dissent further argued that if the corporation neither fulfilled its original function nor served the collective interests of its shareholders, no justification existed for its continuance.⁷⁹

In light of the facts and holdings in *Nelkin* and *Kruger*, it became difficult to discern a situation wherein dissolution would be decreed based on a *Leibert*-type allegation that the corporation was being continued for the sole benefit of those in control. Accordingly, a showing of looting of corporate assets or attempts to coerce the minority to sell their interests seemed essential for dissolution to be ordered. Moreover, the most recent decision of the Court of Appeals on the subject of dissolution via judicial sponsorship added to the uncertainty of this remedy.

In *Gilbert v. Hamilton*,⁸⁰ the court affirmed, without opinion, an appellate division ruling that the petitioner had stated a cause of action for equitable dissolution. The petitioner had set forth al-

by the controlling interests for a price equal to what the minority had originally paid. *Id.* at 547, 255 N.E.2d at 715, 307 N.Y.S.2d at 456-57.

⁷⁷ *Id.* at 548, 255 N.E.2d at 715-16, 307 N.Y.S.2d at 457-58.

⁷⁸ *Id.*, 255 N.E.2d at 716, 307 N.Y.S.2d at 458.

⁷⁹ *Id.* at 551-52, 255 N.E.2d at 718, 307 N.Y.S.2d at 461 (Fuld, C.J., dissenting).

⁸⁰ 35 App. Div. 2d 715, 315 N.Y.S.2d 92 (1st Dep't 1970), *aff'd mem.*, 29 N.Y.2d 842, 277 N.E.2d 787, 327 N.Y.S.2d 855 (1971).

legations of mismanagement and had alleged that the corporation was being carried on for the sole purpose of benefiting the defendants to the detriment of the minority.⁸¹ No allegation was made, however, that looting had taken place or that the majority was attempting to freeze out the minority.⁸² Nonetheless, the court refused to dismiss the complaint. Unfortunately, the failure of both the Court of Appeals and appellate division to indicate precisely why they held as they had did little to enlighten minority shareholders as to their rights. At a minimum, however, the decision indicated that the standard for dissolution enunciated in *Leibert* retained some, albeit uncertain, viability notwithstanding *Kruger* and *Nelkin*.

Review of the decisions from *Leibert* through *Gilbert* readily illustrates the difficulties encountered by minority shareholders in seeking non-statutory dissolution. While the *Leibert* standard remained as the appropriate guide, the reaction of the court in *Kruger* and *Nelkin* evidenced the fact that a minority shareholder might only take comfort in his position when he had alleged looting or diversion of corporate assets. It is not surprising, therefore, that commentators have concluded that the availability of dissolution via judicial sponsorship remained a limited remedy, to be applied only in extraordinary cases.⁸³ In short, a liberalized dissolution remedy, equating the treatment of a close corporation to that of a partnership, would not be forthcoming based upon judicial precedent. If anything, the precarious position of the minority shareholder was accentuated by the decisions subsequent to *Leibert*.⁸⁴

EXPANDING INVOLUNTARY DISSOLUTION

Given the uncertain potential for judicially sponsored dissolution after *Leibert*, the position of aggrieved minority shareholders

⁸¹ 35 App. Div. 2d at 716, 315 N.Y.S.2d at 94.

⁸² *Id.*

⁸³ See I. KANTROWITZ & S. SLUTSKY, *supra* note 34, ¶ 1102.03, at 11-20.3; O'Connell, *supra* note 34, at 588.

⁸⁴ See also *Horne v. Radiological Health Servs., P.C.*, 83 Misc. 2d 446, 450-51, 371 N.Y.S.2d 948, 956-57 (Sup. Ct. Suffolk County 1975). In an action by a minority shareholder and former employee seeking dissolution of the corporation, the *Horne* court held that the plaintiff had failed to establish that the majority had looted or had exploited the corporation's assets for their own benefit and that a mere showing that the corporation continued for the singular purpose of providing a salary and bonus to the majority was insufficient grounds for dissolution.

was unenviable. Notably, other jurisdictions already had acted to ease the powerlessness felt by the minority.⁸⁵ At least twelve other states and the District of Columbia, following the lead of the Model Business Corporation Act,⁸⁶ had enacted statutes containing more liberal standing requirements than those encountered in New York.⁸⁷ Ultimately, recognizing the disadvantageous position of the minority shareholder, the New York legislature responded by enacting sections 1104-a and 1118 of the BCL.⁸⁸

The New Statutory Framework

In an attempt to broaden the standing of minority shareholders, section 1104-a permits the holders of twenty percent of the outstanding voting shares of a corporation to petition for involuntary dissolution on various grounds.⁸⁹ The shareholders must allege and prove (1) that the directors or others controlling the corporation are guilty of "illegal, fraudulent or oppressive actions" toward the complaining shareholders⁹⁰ or (2) that corporate property is being looted, wasted, or diverted by the directors, officers, or others in control of the corporation.⁹¹ Limitation of the scope of the section to closely-held corporations is evidenced by the fact that the statute applies only to corporations whose shares are not listed on a national securities exchange or regularly quoted in an over-the-counter market.⁹²

⁸⁵ A memorandum of Assemblyman William B. Finnerman in support of the addition of sections 1104-a and 1118 to the New York Business Corporation Law, noted the existence of similar statutes in several jurisdictions and stated that it was "time for New York State to join with other states in recognizing the need for such protection and to conform its statutes to those of other states." Memorandum of Assemblyman Finnerman, *reprinted in* [1979] N.Y. LEGIS. ANN. 143, 144.

⁸⁶ ABA-ALI MODEL BUS. CORP. ACT § 97 (1972).

⁸⁷ *See, e.g.*, CONN. GEN. STAT. § 33.382(b) (1981); D.C. CODE § 29-931b(a) (1973); FLA. STAT. § 607.274 (1977); ILL. ANN. STAT. ch. 32, § 157.86 (Smith-Hurd Supp. 1979); IND. CODE ANN. § 2361-7-3 (Burns 1972); ME. REV. STAT. ANN. tit. 13-A, § 1115 (1974); MD. CORP. & ASS'NS CODE ANN. § 4-602 (1975); MINN. STAT. ANN. § 301.50 (West 1969); N.H. REV. STAT. ANN. § 294:97 (1978); N.C. GEN. STAT. § 55-125 (1975); PA. STAT. ANN. tit. 15, § 2107 (Purdon 1967); R.I. GEN. LAWS § 7-1.1-90 (1970); TENN. CODE ANN. § 48-1008 (1979); W. VA. CODE § 31-1-134 (1975).

⁸⁸ N.Y. BUS. CORP. LAW §§ 1104-a, 1118 (McKinney Supp. 1981).

⁸⁹ *Id.* § 1104-a(a).

⁹⁰ *Id.* § 1104-a(a)(1).

⁹¹ *Id.* § 1104-a(a)(2).

⁹² *Id.* § 1104-a(a). Similar language is utilized throughout the New York Business Corporation Law in those instances where the legislature deemed it advisable to differentiate the treatment of the closely-held and public corporation. *See, e.g., id.* § 620(c) (McKinney

Despite the legislative sanction of a dissolution remedy upon the petition of minority shareholders, the grant of such remedy remains in the discretion of the judiciary.⁹³ Like other involuntary dissolution situations, the benefit to shareholders of a dissolution is of paramount importance⁹⁴ for the court and dissolution is not to be denied merely because the business has been or can be operated at a profit.⁹⁵ In addition, section 1104-a specifically guides a court in the exercise of its discretion. The provision indicates that a court considering judicial dissolution thereunder must evaluate (1) whether liquidation is the only feasible means for petitioning shareholders to obtain a fair return on their investment⁹⁶ and (2) whether liquidation is necessary for the protection of any substantial number of shareholders or petitioners.⁹⁷

Having to some extent alleviated the untenable position of minority shareholders in a closely held corporation, the legislature considered the posture of the majority when confronted with a petition for dissolution premised upon section 1104-a. While the minority typically is at the mercy of the majority with respect to the corporation, the remedy created by section 1104-a carried with it the possibility that the party seeking dissolution may have encouraged the actions by the controlling faction with an eye toward dissolution at a later date. For example, since each of the shareholders in the corporation typically participates in the management and operation of the business, each becomes equally knowledgeable about the business and its customers.⁹⁸ Eventually, however, the minority may feel that with its expertise and share of capital generated by a subsequent liquidation of the business, it may be in a position to create a new enterprise and capture the former clientele of the dissolved business.⁹⁹ Accordingly, the mi-

1963) (provisions in the certificate of incorporation restricting the managerial discretion of directors); *id.* § 630 (liability of ten largest shareholders for wages due to employees).

⁹³ *Id.* § 1111(a).

⁹⁴ *Id.* § 1111(b)(2).

⁹⁵ *Id.* § 1111(b)(3) (McKinney Supp. 1981).

⁹⁶ *Id.* § 1104-a(b)(1).

⁹⁷ *Id.* § 1104-a(b)(2).

⁹⁸ Notably, a joint legislative committee suggested that the dissolution provision be amended to permit any shareholder to avoid dissolution of the corporation by purchasing the complaining shareholder's stock at its fair cash value. *Consultant's Report No. RR-70*, STATE OF NEW YORK JOINT LEGISLATIVE COMMITTEE TO STUDY REVISION OF CORPORATION LAW 32 (1959).

⁹⁹ See generally *In re Radom & Neidorff, Inc.*, 307 N.Y. 1, 11, 119 N.E.2d 563, 567 (1954) (Fuld, J., dissenting).

nority may act to stimulate discord between corporate factions, thereby facilitating dissolution and liquidation of the corporation pursuant to the statute.

Recognizing the potential for minority abuse and following the lead of several other jurisdictions, the New York legislature fashioned an alternative to dissolution under section 1104-a. Pursuant to section 1118 of the BCL, and upon the commencement of a dissolution proceeding under section 1104-a, any nonpetitioning shareholder or the corporation itself may elect to purchase the shares owned by the petitioners at fair value.¹⁰⁰ Such election may be exercised at any time within 90 days after the filing of the petition or at such later time as the court shall in its discretion permit.¹⁰¹ Since at this stage of their relationship the parties may be unable to reach agreement on the fair value of the shares, the section further provides that in such event the prospective purchasers can require the court to stay the dissolution proceedings and determine the fair value of the petitioners' stock.¹⁰² For this purpose, fair value is to be determined as of the day immediately preceding the filing of the petition for dissolution.¹⁰³

The "buy-out" alternative to dissolution under section 1118 provides a mechanism analogous to the appraisal remedy given to dissenting shareholders in certain cases of fundamental corporate changes.¹⁰⁴ In the event the petitioning shareholder is using section 1104-a as a vehicle to recover the fair value of his investment, the petitioner should have no objection to the resultant forced sale.¹⁰⁵ Moreover, the majority may welcome the section 1104-a petition as a triggering device which will force the parties to agree on a price for the minority's interest in the business. Conversely, if the petition for dissolution is being used by the minority as a tactic to

¹⁰⁰ N.Y. BUS. CORP. LAW § 1118(a) (McKinney Supp. 1981-1982). Similar provisions have been enacted in other jurisdictions. *See, e.g.*, MD. CORP. & ASS'NS CODE ANN. art. § 4-603 (1975); R.I. GEN. LAWS § 7-1.1-90 (1970); W. VA. CODE § 31-1-134 (1975).

¹⁰¹ N.Y. BUS. CORP. LAW § 1118(a) (McKinney Supp. 1981-1982).

¹⁰² *Id.* § 1118(b).

¹⁰³ *Id.*

¹⁰⁴ Pursuant to section 623(h)(4) of the New York Business Corporation Law, N.Y. BUS. CORP. LAW § 623(h)(4) (McKinney 1963), a shareholder entitled to appraisal rights ultimately may have a court fix the value of his shares for purposes of repurchase by the corporation. *Id.* Such value is to be determined as of the close of business on the day preceding the shareholder's authorization which triggered the appraisal. The court is empowered to appoint an appraiser to gather evidence and recommend a decision as to fair value.

¹⁰⁵ *See Consultant's Report No. RR-70, STATE OF NEW YORK JOINT LEGISLATIVE COMMITTEE TO STUDY REVISION OF CORPORATION LAWS 33 (1959).*

reach a result other than withdrawal of its investment, the section 1118 buy-out option may remove the *in terrorem* effect of such petition. For example, if the minority ultimately desires to purchase the interest of the majority or to induce other shareholders to agree to a change in the policies of the business,¹⁰⁶ the risk of a purchase of the minority's shares may cause the minority to forego any leverage which might otherwise have accrued to it by virtue of a section 1104-a petition. Accordingly, one author has noted that section 1118 has nullified the beneficial effects of section 1104-a,¹⁰⁷ and another has noted that an oppressed shareholder who seeks a remedy other than appraisal probably will not petition for dissolution.¹⁰⁸

Nevertheless, the addition of the purchase option in section 1118 is significant in that it provides a vehicle to preserve the corporate existence and avoid "judicially imposed death."¹⁰⁹ Moreover, the buy-out provision affords the majority an opportunity to ensure the smooth functioning of the entity free from the negative aspects which the dissolution litigation might otherwise entail. For example, the BCL authorizes a court presented with a petition for involuntary dissolution to order the corporation to furnish a schedule containing the names and addresses of each corporate creditor and claimant, including those with whom the corporation has unfulfilled contracts.¹¹⁰ Thereafter, these persons are to be advised of the pendency of the proceeding by service of a copy of the order to show cause relating to the dissolution.¹¹¹ Management, placed in

¹⁰⁶ It has been noted that a shareholder seeking dissolution is typically striving for one of three possible outcomes: (1) withdrawal of his investment, (2) a purchase of the other shareholders' interests in the business, or (3) the creation of sufficient fear of dissolution in the other shareholders that they will consent to changes in the balance of power or policies of the business. Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 27 (1977).

¹⁰⁷ Hornstein, *Supplementary Analysis of Business Corporation Law*, N.Y. BUS. CORP. LAW app. 1, at 127 (McKinney Supp. 1981). The author observed that experiences in other states have indicated that similar options, when they may be asserted by a wrongdoer, have had a chilling effect on the use of oppression statutes. *Id.*

¹⁰⁸ Schaeftler, *1979 Survey of New York Law—Corporations*, 31 SYRACUSE L. REV. 129, 137 (1980).

¹⁰⁹ See note 29 and accompanying text *supra*.

¹¹⁰ N.Y. BUS. CORP. LAW § 1106(a) (McKinney 1963).

¹¹¹ *Id.* § 1106(c). Section 1106(c) also calls for service of the order to show cause upon the state tax commission, the corporation, and any other person named in the complaining shareholder's petition. A copy of the order must be published, at least once in each of the three weeks preceding the hearing on the petition, in one or more newspapers of general circulation in the county in which the corporate office is located. *Id.* § 1106(b). Additionally,

the uncomfortable position of having to notify corporate creditors of the corporation's potential demise, may desire to stay the proceedings before the potentially damaging information is directly communicated to these individuals. Section 1118 permits this option notwithstanding the controlling interest's inability to reach a voluntary purchase arrangement with the complaining shareholders.

Thus, sections 1104-a and 1118 provide minority shareholders a statutory right to petition for dissolution while balancing the interests of other participants in the venture. Nonetheless, the distinct possibility remains that, notwithstanding the legislative intent that the remedy of dissolution should exist, courts may be reluctant to decree dissolution.¹¹² A court presented with evidence of illegal or fraudulent conduct, or of looting, waste, or diversion of corporate assets by those in control of the corporation could be expected to employ the dissolution remedy, as it had in the past, to redress the wrong committed.¹¹³ Conversely, allegations solely of oppressive conduct might lead a court to deny relief on grounds similar to those expressed prior to the statutory enactment. Notwithstanding the potential for judicial restraint, the position of minority shareholders was substantially enhanced by the initial judicial interpretation of oppressive conduct as used in section 1104-a.

Reasonable Expectations: In re Topper

Prior to the enactment of sections 1104-a and 1118, various jurisdictions had permitted dissolution in order to redress oppressive conduct.¹¹⁴ In this context, however, courts grappled with the problem of defining oppression.¹¹⁵ While no one definition had

a copy of the order and the petition are to be filed, within 10 days after the order is entered, with the county clerk for the county in which the corporate office is located. *Id.* § 1106(d). A court may place the burden of publication, service, and filing upon the corporation. *Id.* § 1106(e).

The potential burdens that may befall the corporation and those in control of the corporation when confronted with a section 1104-a proceeding may be gleaned from a sample form of an order to show cause. 1B BENDER'S FORMS, N.Y. BUS. CORP. LAW § 1106, Form 1, ¶ 2 & 4 (1979).

¹¹² See Schaeftler, *1979 Survey of New York Law—Corporations*, 31 SYRACUSE L. REV. 129, 137 (1980).

¹¹³ See notes 51-84 and accompanying text *supra*.

¹¹⁴ See note 87 *supra*.

¹¹⁵ See Comment, *Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies*, 47 MISS. L.J. 476, 477 (1976), wherein the author noted that in defining oppressive conduct "courts have . . . [not provided] concrete definitions encompassing par-

been used with consistency, several commentators suggested that the reasonable expectations of the participating shareholders should be significant in determining whether oppression had occurred.¹¹⁶ For example, an investor's intention to become an active participant in the company might constitute a basis for dissolution if such intent was thwarted by the controlling interests.¹¹⁷ Accordingly, judicial reluctance to protect minority shareholders could be overcome "even though fraud, bad faith or, for that matter, clear unreasonableness on the part of the directors" could not be established.¹¹⁸

As Professor F. Hodge O'Neal has noted, the highly personal relationship of the shareholders in a close corporation justifies dissolution whenever those in control disappoint the minority shareholders' reasonable expectations.¹¹⁹ Failure to provide such a remedy for the shareholder who unexpectedly has been denied future employment and who faces the likelihood of minimal or no return on his investment would condone the majority's use of the minority's investment for its sole benefit.¹²⁰ Moreover, should the court

particular acts or a series of acts but rather have formulated sweeping abstract generalizations." *Id.* As might be expected, the author further noted that such generalizations are of minimal aid in establishing what particular facts lead to a determination of the existence of oppression for dissolution purposes. *Id.* at 478. For attempts at a definition of "oppression," see *Central Standard Life Ins. Co. v. Davis*, 10 Ill. 2d 566, 573-74, 141 N.E.2d 45, 50 (1957) and *White v. Perkins*, 213 Va. 129, 134, 189 S.E.2d 315, 319-20 (1972).

¹¹⁶ The most notable proponent of a reasonable expectations standard is Professor F. Hodge O'Neal. See F. O'NEAL, *supra* note 9, § 7.15; O'Neal, *supra* note 16, at 885-88. The concept was previously considered in *Afterman*, *supra* note 16, at 1063-65.

¹¹⁷ In considering oppressive conduct and dissolution under section 210 of the English Companies Act of 1948, one author noted:

Oppression under section 210 is probably best defined in terms of the reasonable expectations of the minority shareholders in the particular circumstances at hand. While these expectations will vary, such an approach permits courts to take account of all factors relevant to a given transaction or course of conduct by the controllers.

Afterman, *supra* note 16, at 1063-64.

¹¹⁸ O'Neal, *supra* note 16, at 884.

¹¹⁹ *Id.* at 886.

¹²⁰ Professor O'Neal set forth the following example of an instance when dissolution should be appropriate:

If a person gives up employment with an established national or multinational company to "go in business for himself" and takes virtually all of his savings and buys a minority interest in a close corporation which he and a few friends are forming and in which they contemplate that each one of the shareholders will be an officer or key employee and share in the control; if the business continues for a number of years with each shareholder serving as a director, working for the company, drawing a salary, and having a voice in business decisions, obviously it is

justify the majority's acts by referring to statutory enabling provisions, certificates of incorporation, or bylaws, or by deeming minority participation to be a "contract" with fellow shareholders, the court, in effect, would be enforcing a one-sided and unconscionable arrangement.¹²¹ Accordingly, Professor O'Neal concludes that the reasonable expectations of all the shareholders constitute "the most reliable guide to a just solution of a dispute among shareholders" in a close corporation.¹²²

The adoption of section 1104-a carried with it the potential to thrust Professor O'Neal's theory upon a New York court. In *In re Topper*,¹²³ the Supreme Court, New York County, reacted to the initial opportunity to interpret section 1104-a by fully embracing the reasonable expectations approach to oppression.¹²⁴ By so hold-

unjust to permit majority shareholders to oust the minority shareholder from the directorate and cause the corporation to discharge him from employment, especially if the corporation is paying no dividends, as is usually the case.

Id. at 887.

¹²¹ *Id.* at 886-88.

¹²² *Id.* at 886. It should be noted that since true negotiations among the parties are most prevalent in the formation of the venture, emphasis on the resultant early expectations should be of primary significance for a court.

¹²³ 107 Misc. 2d 25, 433 N.Y.S.2d 359 (Sup. Ct. N.Y. County 1980).

¹²⁴ Reasonable expectations as a guide to the existence of oppressive conduct had previously been used in *Exadaktilos v. Cinnaminson Realty Co.*, 167 N.J. Super. 141, 153-56, 400 A.2d 554, 560-62 (1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (1980). In *Exadaktilos*, the plaintiff obtained a 20% interest in a restaurant business as a gift from his father-in-law. The facts indicated that the gift was made so that the plaintiff could learn the restaurant business and eventually take part in management. Thereafter, the plaintiff was discharged from employment with the corporation for apparent cause. Upon his discharge, the plaintiff began a proceeding to dissolve the corporation on the grounds of oppressive conduct practiced upon the minority by those in control of the corporation. See N.J. STAT. ANN. § 14A:12-7 (West Supp. 1981). In determining whether oppressive conduct was present, the court noted:

The special circumstances, arrangements and personal relationships that frequently underly the formation of close corporations generate certain expectations among the shareholders concerning their respective roles in corporate affairs, including management and earnings. These expectations preclude the drawing of any conclusions about the impact of a particular course of corporate conduct on a shareholder without taking into consideration the role that he is expected to play. Accordingly, a court must determine initially the understanding of the parties in this regard. Armed with this information, the court can then decide whether the controlling shareholders have acted in a fashion that is contrary to this understanding or in the language of the statute, "have acted oppressively . . . toward one or more minority shareholders."

167 N.J. Super. at 154-55, 400 A.2d at 561. In this particular instance, however, the existence of disappointed expectations did not establish oppressive conduct by those in control of the corporation. The court found that the plaintiff's opportunity for employment with the corporation was lost through no fault of the controlling interests but rather as the result of

ing, the court no doubt sent tremors through majority shareholders who until then felt relatively secure in their treatment of the minority.

The petitioner in *Topper* fell almost squarely within Professor O'Neal's concept of an oppressed minority shareholder. Together with two other participants, the petitioner agreed to become a one-third shareholder in each of two corporations operating separate pharmacies. Additionally, he expected to become actively involved in the management of the businesses, and relying upon his expectations, terminated his existing employment of 25 years, moved his family from Florida to New York, invested his life savings in the venture, executed personal guarantees of a corporate lease extension, and delivered certain promissory notes to finance the acquisition of part of his stock from another participant.¹²⁵ The participants entered into various shareholder agreements relating to the ventures. The court noted, however, that the agreements did not specify the petitioner's expectations or specifically set forth the terms of his employment.¹²⁶ Nonetheless, the petitioner was recognized as having been the most active participant in the venture.¹²⁷

Less than 1 year after the formation of the corporations, the allegedly oppressive conduct took place. Acting in their capacities as directors, the other two shareholders joined forces to discharge the petitioner as an employee, to terminate his salary, to remove him as a corporate officer and as signatory to corporate bank accounts, and to change the locks on the corporate offices. As one might have expected, the corporations were not paying dividends, and thus the petitioner's termination removed all opportunity for a return on his investment.¹²⁸ Despite their actions, the controlling shareholders argued that the petitioner's ownership interest had not been harmed since he remained a one-third owner of the corporations. Moreover, the shareholders contended that because they

the plaintiff's unsatisfactory conduct. Moreover, the plaintiff's expectation of participation in management was defeated by his failure to meet a condition precedent to such participation. *Id.* at 156, 400 A.2d at 561-62.

¹²⁵ 107 Misc. 2d at 27, 433 N.Y.S.2d at 361-62. After his discharge the petitioner failed to make a payment due on the promissory notes. As a result, the petitioner was sued on the note by one of the other shareholders in the venture. *Id.*, 433 N.Y.S.2d at 361.

¹²⁶ *Id.* at 26-27, 433 N.Y.S.2d at 361.

¹²⁷ *Id.* at 27, 433 N.Y.S.2d at 362. Notably, one of the other shareholders was compared to a silent partner.

¹²⁸ Prior to his discharge, the petitioner's salary had risen, in 1 year, from \$30,000 to \$75,000. *Id.*

had discharged the petitioner justifiably, their conduct could not result in a statutory dissolution based upon allegations of oppressive conduct.¹²⁹

Initially, the court considered an acceptable definition for the term "oppressive" as used in section 1104-a. Recognizing the dearth of legislative history surrounding the enactment of the statute, the court nonetheless observed that the sponsors of the legislation were influenced by Professor O'Neal's writings, particularly his formulation of the reasonable expectations test for majority oppression.¹³⁰ Furthermore, the court noted the similarity and special nature of the relationship between shareholders in a close corporation and partners in a partnership.¹³¹ More specifically, the court posited that minority shareholders in a close corporation typically expect to participate in management and operations and anticipate that a return on their investment may take the form of salary derived from their employment by the corporation. While these expectations may not be formalized in the corporate charter, bylaws, or shareholder agreements, the court stated that they may constitute the parties' bargain for purposes of determining the existence of oppressive conduct.¹³² Since the shareholders' understandings at the time of formation of the corporations were undisputed, the court concluded that the majority's actions harmed the petitioner's reasonable expectations, constituted a freeze out of the petitioner's interest in the business, and thus were oppressive within the meaning of section 1104-a.

In addition to equating damaged expectations to oppressive conduct, the court made several noteworthy observations. First, the court commented that oppressive conduct is not synonymous with illegal or fraudulent conduct, but could be established by actions which are burdensome, harsh, or merciless.¹³³ Also, observed

¹²⁹ *Id.* at 26, 433 N.Y.S.2d at 361.

¹³⁰ *Id.* at 31-32, 433 N.Y.S.2d at 364.

¹³¹ *Id.* at 32-33, 433 N.Y.S.2d at 364 (citing *Nelkin v. H.J.R. Realty Corp.*, 25 N.Y.2d 543, 552, 255 N.E.2d 713, 718, 307 N.Y.S.2d 454, 461 (1969), discussed in text accompanying notes 74-79 *supra*); *Weiss v. Gordon*, 32 App. Div. 2d 279, 281, 301 N.Y.S.2d 839, 842 (1st Dep't 1969); *In re Voluntary Dissolution of Pivot Punch & Die Corp.*, 15 Misc. 2d 713, 716, 182 N.Y.S.2d 459, 463 (Sup. Ct. Erie County), *modified*, 9 App. Div. 2d 861, 193 N.Y.S.2d 34 (4th Dep't 1959).

¹³² 107 Misc. 2d at 33-34, 433 N.Y.S.2d at 365.

¹³³ *Id.* at 34, 433 N.Y.S.2d at 365. In this regard, the court noted the employment by American courts of the English definition of oppressive conduct as "burdensome, harsh and wrongful conduct" or "a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members." *Id.* (quoting *Scottish Corp. Wholesale Inc. v. Meyer*,

the court, an examination of oppressive conduct should not be confined merely to the effect of the conduct on the petitioner in his role as shareholder.¹³⁴ Indeed, the court interpreted section 1104-a(b)(2), which directs the judiciary to consider protection of the "rights and interests" of the petitioner,¹³⁵ as encompassing *all* aspects of the original expectations of the aggrieved shareholder. Of possibly greater significance, the court, without elaboration, found that the justification for the discharge of the petitioner was irrelevant.¹³⁶ Accordingly, a court adopting the *Topper* rationale need not concern itself with allegations of wrongdoing by the petitioner except insofar as such wrongdoing might have an indirect effect on the valuation of the petitioner's ownership interests for purposes of a section 1118 buy-out election.

Armed with *Topper's* liberal interpretation of section 1104-a, minority shareholders could be expected to display a willingness to use the section to redress their grievances. In fact, shortly after *Topper*, the same court in *In re Beshar*¹³⁷ considered and denied a motion to dismiss a section 1104-a petition on the ground that it failed to state a cause of action. *Beshar* involved a dispute that had raged for some 23 years. In 1957, petitioner, the owner of approximately thirty percent of the stock of a family-owned corporation, was discharged for alleged good cause. Thereafter, he instituted several lawsuits primarily directed at obtaining information as to the financial condition and affairs of the corporation. His efforts, however, were resisted due to his involvement in a competing business and alleged lack of good faith. During the period subsequent to petitioner's ouster, he was excluded from participation in corporate affairs and received no financial remuneration from the corporation in the form of salary or other benefits. The majority

[1959] 3 All E.R. 66, 86). See also *Domus Realty Corp. v. 3440 Realty Co.*, 179 Misc. 749, 754-55, 40 N.Y.S.2d 69, 73 (Sup. Ct. N.Y. County), *aff'd*, 266 App. Div. 725, 41 N.Y.S.2d 940 (1st Dep't 1943).

¹³⁴ 107 Misc. 2d at 34, 433 N.Y.S.2d at 365.

¹³⁵ See N.Y. BUS. CORP. LAW § 1104-a(b)(2) (McKinney Supp. 1981).

¹³⁶ The court stated:

Whether the controlling shareholders discharged petitioner for cause or in their good business judgment is irrelevant. The Court finds that the undisputed understanding of the parties was such at the time of the formation of the corporations that the respondents' actions have severely damaged petitioner's reasonable expectations and constitute a freeze-out of petitioner's interest; consequently, they are deemed to be "oppressive" within the statutory framework.

107 Misc. 2d at 28, 433 N.Y.S.2d at 362.

¹³⁷ N.Y.L.J., Feb. 18, 1981, at 6, col. 1 (Sup. Ct. N.Y. County).

shareholders totally controlled the board of directors and no dividends were paid on the corporation's stock. In sum, petitioner's interest in the corporation had been "effectively rendered meaningless."¹³⁸

Undaunted by the years of frustrated efforts to protect his ownership interest, and free of his former interest in the alleged competing business,¹³⁹ the petitioner sought dissolution of the corporation on grounds of (1) waste and looting of corporate assets by those in control¹⁴⁰ and (2) illegal, fraudulent and oppressive acts toward the petitioner by officers and directors.¹⁴¹ In moving for dismissal, the respondents argued that the petitioner's allegations were baseless. The *Beshar* court, however, noted that serious questions existed as to whether the respondents deliberately attempted to freeze out the petitioner from participation in corporate profits. Moreover, issues of oppressive conduct and looting of assets were sharply contested by the parties and were not capable of summary determination. Accordingly, the respondents' motion was denied and the corporation was directed to comply with the disclosure provisions of section 1106 of the BCL.¹⁴²

In reaching its decision, the *Beshar* court placed substantial emphasis on the allegation of oppressive conduct. After favorably citing *Topper*, the court commented that the most difficult aspect of applying section 1104-a is arriving at a definition for oppression. While noting that oppression may exist in the absence of mismanagement or misapplication of funds, the court recognized that oppression previously had been judicially defined to encompass a lack of fair dealing and probity.¹⁴³ Presumably as an illustration of oppression, the court further noted that the removal of a minority

¹³⁸ *Id.*

¹³⁹ At the time of the suit, the petitioner's status as an alleged competitor was not in issue. Petitioner had retired and had disposed of his business either through sale or transfer to his son. *Id.*

¹⁴⁰ The allegations of waste and looting centered on payment of excessive salaries to the majority shareholders, a contract to pay \$20,000 upon the death or retirement of one of the majority shareholders, and improper adjustments of income, expenses, inventories, and financial records of the corporation by the majority shareholders. *Id.* at 6, col. 2.

¹⁴¹ The petitioner alleged that corporate earnings had been understated in order to avoid dividend payments to him, that he had been frustrated in his efforts as a shareholder to obtain meaningful corporate financial information, and that improper record keeping and accounting practices had been resorted to in order to prevent him from sharing in corporate profits. *Id.*

¹⁴² *Id.* at 6, col. 3; see notes 110-111 and accompanying text *supra*.

¹⁴³ N.Y.L.J., Feb. 18, 1981, at 6, col. 3.

shareholder from office, employment, and access to information constituted examples of freeze-out techniques.

Recently, the same court was presented with yet another opportunity to apply section 1104-a. In *In re Taines*,¹⁴⁴ Justice Lehner, who as a legislator had served as lead sponsor of the bill which led to the adoption of sections 1104-a and 1118,¹⁴⁵ considered a dissolution petition brought by a one-third owner of a photo processing business. The corporation was owned equally by three families, with a son of each family intended to be an operating employee thereof and each father expected to supervise the business.¹⁴⁶ Within one year after incorporation of the business, the petitioner and his son were removed as officers and employees. A new board of directors, excluding the petitioner and his son, was elected, and corporate employees were informed that all operations were to be conducted by members of the remaining two families.¹⁴⁷ Alleging that the majority's conduct was oppressive in that it had effectively frozen the petitioner and his son out of participation in the business, the petitioner commenced the instant proceeding.¹⁴⁸

After setting forth the applicable statutory provisions, Justice Lehner noted that the sections may represent "legislative recognition . . . that the relationship among shareholders of [close] corporations approximates that among partners."¹⁴⁹ The court further stated that the petitioning shareholder seeking dissolution under section 1104-a need only establish sufficient stock ownership and the presence of one of the grounds for dissolution specified in the statute.¹⁵⁰ Recognizing that the petitioner had chosen to base his petition upon the ground of oppressive conduct, the court cited approvingly the reasonable expectations test of Professor O'Neal and the court's decisions in *Topper* and *Beshar*.¹⁵¹ As the undisputed facts indicated that the majority had eliminated "petitioner and his son from the active operation of the [c]orporation in which they had participated, and in which they had every reasonable ex-

¹⁴⁴ 444 N.Y.S.2d 540 (Sup. Ct. N.Y. County 1981).

¹⁴⁵ *Id.* at 542-43.

¹⁴⁶ *Id.* at 541.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 543 (citing *In re Gordon & Weiss Inc.*, 32 App. Div. 2d 279, 301 N.Y.S.2d 839 (1st Dep't 1969)).

¹⁵⁰ 444 N.Y.S.2d at 543.

¹⁵¹ *Id.* The court also cited with approval *Wilkes v. Springside Nursing Home*, 370 Mass. 842, 353 N.E.2d 657 (1976).

pectation of being able to continue to participate," oppressive conduct within the meaning of section 1104-a was established.¹⁵² A stay of the proceeding was to be granted, however, in light of the corporation's offer to purchase petitioner's shares at their fair value pursuant to section 1118.¹⁵³

Through their interpretations of section 1104-a, the *Topper*, *Beshar* and *Taines* decisions have taken substantial and admirable steps toward remedying the heretofore powerless position of minority shareholders. Based upon these decisions, one may readily anticipate that continued application of the reasonable expectations test may result in an increase in dissolution litigation. Hence, renewed attention and constructive criticism relating to the mechanics of sections 1104-a and 1118 appear warranted. The following section considers the potential shortcomings of the existing statutory scheme and suggests possible means whereby these shortcomings can be corrected.

STATUTORY SHORTCOMINGS AND SUGGESTED REVISIONS

Section 1104-a

1. Defining Oppressive Actions

Legislatures of numerous jurisdictions have enacted measures explicitly empowering courts to dissolve closely held corporations upon the ground of oppressive conduct practiced upon minority interests.¹⁵⁴ The majority of these statutes, like section 1104-a of the

¹⁵² 444 N.Y.S.2d at 544.

¹⁵³ *Id.*

¹⁵⁴ See note 87 *supra*; note 166 and accompanying text *infra*. Illinois was the first jurisdiction to enact an "oppressive conduct" statute. ILL. ANN. STAT. ch. 32, § 157.86 (Smith-Hurd Supp. 1981-1982). The statute gives the circuit courts the power to liquidate a corporation in an action by a shareholder when the directors or the controlling interests act, *inter alia*, in an oppressive manner. *Id.* at § 157.86(3). The leading Illinois case on what conduct rises to the level of oppressiveness is *Central Standard Life Ins. Co. v. Davis*, 10 Ill. 2d 566, 141 N.E.2d 45 (1957). In *Central Standard*, the shareholder seeking dissolution was the owner of preferred stock on which no dividends had been paid in over 25 years. *Id.* at 568-69, 141 N.E.2d at 47. The shareholder claimed that, in light of the corporation's operating history, it would never make a sufficient profit to pay the \$1,051,800 of accumulated dividends on the preferred stock. *Id.* It was further claimed that the failure to liquidate in a situation where only the holders of the common stock could profit amounted to oppressive conduct. *Id.* at 572, 141 N.E.2d at 49. The court noted that "oppressiveness" did not necessarily imply fraud, mismanagement, or misapplication of funds. It was also stated that an "imminent disaster" was not necessary for a finding of oppressiveness and that such a finding could result from a "continuing course of conduct." *Id.* at 573-74, 141 N.E.2d at 50. The court, however, denied dissolution because the corporation showed a prospect of gain. In so

BCL, are patterned after section 97(a)(2) of the Model Business Corporation Act, which permits dissolution at the behest of a shareholder when it is established "[t]hat the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent."¹⁵⁵ In a few jurisdictions, similar statutes providing for involuntary dissolution are less specific as to the grounds warranting such action. The California and Minnesota enactments, for example, permit involuntary dissolution when the acts of those in control have been persistently unfair toward minority shareholders.¹⁵⁶ In Connecticut, dissolution may be had whenever "any good

holding, the court focused upon the increase in gross income, the possibility of a more favorable operating arrangement, and the major improvements made on the property. *Id.* at 575-76, 141 N.E.2d at 50-51.

A case in which a course of conduct was held to rise to the level of oppressive conduct is *Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488, 499, 285 N.E.2d 574, 581 (App. Ct. 1972). In *Compton*, the president of a closely held corporation did not call meetings to discuss the management with minority shareholders, responded in an arrogant manner when questioned about an increase in his salary, and reacted dilatorily to minority shareholder requests. *Id.* at 499, 285 N.E.2d at 581. In affirming an order of dissolution, the court stated that the "arbitrary, overbearing and heavy-handed course of conduct of the defendant" amounted to the practice of oppressive conduct. *Id.* at 499, 285 N.E.2d at 581.

Recently, in *Notzke v. Art Gallery, Inc.*, 84 Ill. App. 3d 294, 405 N.E.2d 839 (App. Ct. 1980), an Illinois court reiterated the position that oppressiveness can result from a course of conduct. In *Notzke*, the minority shareholder alleged conspiratorial action aimed at his control over corporate matters. *Id.* at 299, 405 N.E.2d at 843. In affirming a judgment of dissolution, the court relied on the "overbearing and heavy-handed" language of the *Compton* decision. *Id.* at 299, 405 N.E.2d at 843.

It is apparent from the above cases that the Illinois courts will not require a showing of imminent loss in order to grant a dissolution upon the ground of oppressive conduct. A course of conduct over a period of time will be sufficient. No clear guidelines, however, have been promulgated by the Illinois courts as to just what course of conduct rises to the level of oppressiveness. Indeed, the courts apparently have recognized the impracticality of setting forth such guidelines and have seemingly resolved the "oppressive conduct" issue on a case-by-case basis. Notably, for instance, the court in *Gray v. Hall*, 10 Ill. App. 3d 1030, 1034, 295 N.E.2d 506, 509 (App. Ct. 1973), observed that conduct which would be oppressive in one situation may not be oppressive in another.

¹⁵⁵ ABA-ALI MODEL BUS. CORP. ACT § 97(a)(2) (1979). The statutory basis for this section of the Model Business Corporation Act was the Illinois Business Corporation Act. ILL. ANN. STAT. ch. 32, § 157.86 (Smith-Hurd 1933) (amended 1971). See *Fix v. Fix Material Co.*, 538 S.W.2d 351, 356-57 (Mo. Ct. App. 1976).

¹⁵⁶ CAL. CORP. CODE § 1800(b)(4) (Deering 1977); MINN. STAT. ANN. § 301.49 (West 1969). California's statute provides, as one of several grounds for involuntary dissolution, that "[t]hose in control of the corporation have been guilty of or have knowingly countenanced . . . persistent unfairness toward any shareholders." CAL. CORP. CODE § 1800(b)(4) (Deering 1977). Similarly, the Minnesota statute provides:

A corporation may be dissolved by involuntary proceedings in the discretion of the court when it is made to appear:

. . . .
(3) That the directors or those in control of the corporation have been guilty of

and sufficient reason" exists.¹⁸⁷

. . . persistent unfairness toward minority shareholders.

MINN. STAT. ANN. § 301.49 (West 1969). Unfortunately, there is little guidance available as to the interpretation of "persistent unfairness." In a legislative committee comment, it was stated that one of the purposes of the California provision allowing involuntary dissolution was to "provide close corporation shareholders with a remedy in the event of hardship or in the case of oppression on the part of the management." Legislative Committee Comment (1975), reprinted in CAL. CORP. CODE § 1800, at 582 (West 1977). This statement, which employs the equally ambiguous terms "hardship" and "oppression," fails to provide any clues as to the practical application of "persistent unfairness." Moreover, the case law on this issue is sparse. In *Buss v. J.O. Martin Co.*, 241 Cal. App. 2d 123, 50 Cal. Rptr. 206 (Ct. App. 1966), the court found that there were sufficient facts to establish a right to involuntary dissolution on the grounds of persistent mismanagement and persistent unfairness. *Id.* at 135-36, 50 Cal. Rptr. at 214-15. Among the allegations which the court found were supportive of a finding of persistent unfairness were that the defendant "deprived plaintiffs of access to books and records; that he used the money of the Corporation to pay excessive salaries to himself; and that as a result of his conduct of the business the actual value of plaintiff's [sic] investment has deteriorated." *Id.* at 135, 50 Cal. Rptr. at 214. *Cf. In re Hedberg-Freidheim & Co.*, 233 Minn. 534, 537, 47 N.W.2d 424, 426 (1951) (allegation of deadlock and persistent unfairness in that the defendant consistently vetoed plaintiff's suggestion, would only speak to plaintiff at formal meetings, expressed his hostilities to corporation's employees, etc.).

It has been noted that the protection of minority shareholders would be enhanced by an expansive interpretation of "persistent unfairness." Bradley, *A Comparative Assessment of the California Close Corporation Provisions and a Proposal for Protecting Individual Participants*, 9 *LOV. L.A.L. REV.* 865, 894 (1976). Bradley believes that "[o]f special consequence would be the recognition that the majority shareholders may be acting unfairly despite the fact that they are exercising literally lawful statutory majority voting prerogatives and seemingly legitimate business judgment privileges." *Id.* Professor F. Hodge O'Neal, in writing about an analogous question, namely, the standards by which to determine whether certain corporate acts should be set aside, proposed that certain acts should give rise to an "inference of unfairness." F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS § 9.07, at 607 (1975). For example, an action which would be detrimental to a minority shareholder-plaintiff would give rise to such an inference if either:

- (1) there is no legitimate business reason for the action proposed, (2) the same legitimate business objective can be attained by an alternate plan which would not unduly prejudice the complaining shareholder, or (3) the asserted business objective is clearly secondary in importance to the majority's purpose of improving its position at the expense of minority shareholders.

Id.

¹⁸⁷ CONN. GEN. STAT. § 33-382(b) (1981). Section 33-382(b) provides:

[T]he superior court . . . may wind up the business and affairs of such corporation . . . if in [its] discretion such remedy is under the circumstances necessary or desirable in the interests of the parties involved or the corporation:

- (1) . . . when it is established that:

. . . .

- (v) any good and sufficient reason exists for the winding up of such corporation.

Id. Although this clause "may seem [to give] the court carte blanche to step into a corporate muddle whenever it cares to do so," it has not been judicially interpreted as being that broad. S. CROSS, *CORPORATION LAW IN CONNECTICUT* 459 (1972). In *Olechny v. Thadeus Kosciuszko Soc., Inc.*, 128 Conn. 534, 24 A.2d 249 (1942), the appellate court reversed the trial

Notwithstanding the manifestation of legislative intent to assure fairness to minority shareholders and protection against injury from oppressive conduct, the enactments collectively fail to set forth standards determinative of the availability of the dissolution remedy. Indeed, no statute, including section 1104-a, attempts to define what is meant by oppressive actions or conduct. Although any definition of the term may have limited utility when applied to specific factual circumstances, such definition, at minimum, would provide the board limits within which consideration of specific acts by the majority may be undertaken. Accordingly, an attempt should be made to provide guidance to the judiciary regarding those instances wherein the legislature envisioned the existence of oppression.

The failure to statutorily specify the context in which oppressive conduct exists may effectively injure both majority and minority interests in the corporation. The potential for an unduly broad judicial interpretation of oppression may infringe upon what would otherwise be freedom of corporate action. The controlling interests may unnecessarily temper their business judgment by the coercive force of fear of dissolution at a later point in time. Although it is recognized that the "availability of dissolution as a remedy for oppression is a strong deterrent to an oppressive majority,"¹⁵⁸ it is equally apparent that even innocent "[d]irectors and controlling shareholders may be forced to make their business judgments more with an eye toward avoiding a violation of that vague standard than toward serving the best interest of the corporation."¹⁵⁹ Recog-

court's holding that the facts were sufficient to constitute a "good and sufficient reason" for dissolution of the corporation. *Id.* at 537, 24 A.2d at 253. In rejecting an expansive interpretation of the clause, the court stated that "we must conclude that the legislature intended by these general words to mean other causes of the same general nature as those mentioned [fraud, collusion, waste, etc.] and such as are recognized on general equitable principles to be grounds for the appointment of receivers and dissolution of corporations." *Id.* at 539, 24 A.2d at 252 (citations omitted). See *Sheehy v. Barry*, 87 Conn. 656, 662, 89 A. 259, 262 (1914) ("[w]hat will be a good and sufficient reason must be left to the good judgment of the court"); cf. *Krall v. Krall*, 141 Conn. 325, 335, 106 A.2d 165, 169 (1954) (receiver appointed; facts furnished "good and sufficient reason").

¹⁵⁸ J. O'NEILL, *OPPRESSION IN THE CLOSE CORPORATION* 612 (1971).

¹⁵⁹ Note, *Corporate Dissolution for Illegal, Oppressive or Fraudulent Acts: The Maryland Solution*, 28 MD. L. REV. 360, 372 (1968). The availability of dissolution of the corporation upon petition by the minority shareholders may be seen as a marked disadvantage of the close corporation form of business enterprise. The courts have indicated that "actions which might not be oppressive under one set of circumstances would be oppressive under others." *Notzke v. Art Gallery, Inc.*, 84 Ill. App. 3d 294, 300, 405 N.E.2d 839, 844 (App. Ct. 1980) (citations omitted). Thus, there is a possibility of a broad interpretation of this

dition of the legislative desire to protect minority shareholders and the inherent danger of a broad judicial construction of oppression may cause directors to accede to demands of the minority to avoid the potential consequences of a dissolution proceeding. Indeed, "the absence of a precise legislative standard . . . may even permit a new variety of 'strike suit.'" ¹⁶⁰

The absence of a standard for oppressive conduct is equally problematical for the minority. The judiciary traditionally has exhibited a reluctance to intervene in internal corporate affairs.¹⁶¹ Such undue deference to the right of the majority to control corporate conduct, or judicial prejudice in favor of the continued existence of a profitable venture, may serve to prevent dissolution despite statutory authorization and minority protestations. In the absence of meaningful legislative guidance respecting the intended scope of oppression, as employed in the dissolution statutes, a court's adherence to the precepts of majority rule and business judgment may obviate the potential benefits of the legislation. Not surprisingly, the failure of the first "oppressive conduct" statute, section 210 of the English Companies Act,¹⁶² has been attributed to

ground for dissolution. In addition to a possible "chilling effect" upon the decisions of the majority shareholders, "the danger of broad judicial construction may have the further effect of discouraging new companies from selecting [the particular state] as their state of incorporation." Note, *supra*, at 362.

¹⁶⁰ Note, *supra* note 159, at 363. There is a possibility that the minority shareholders will use the petition for dissolution as a harassment technique against the majority shareholders. See Berger, *Statutory Close or Closely Held Corporation?*, 11 PAC. L.J. 699, 708 (1980) ("harassment potential and annoyance resulting from the mere access to court [of minority shareholders should be considered prior to forming a close corporation]"); Comment, *California's New General Corporation Law: Prospects for Minority Shareholders*, 7 PAC. L.J. 706, 739 (1976) (involuntary dissolution may be "a possible squeeze technique"); Recent Decisions, *Corporations: Recent Legislation Governing Involuntary Dissolution at Suit of Shareholders*, 28 CAL. L. REV. 219, 222 (1940) (possibility of "minority blackmail"). Professor F. Hodge O'Neal, downplays the possible adverse effects of involuntary dissolution upon the majority shareholders. He has reasoned that "a court should place less emphasis on the supposed harshness of dissolution as a remedy and grant dissolution upon a showing of less extensive and serious acts of fraud or oppression than courts have usually required in the past." F. O'NEAL, *supra* note 9, § 9.05, at 589 (1975).

¹⁶¹ See notes 29 & 63-84 and accompanying text *supra*.

¹⁶² As early as 1848, English law permitted winding-up orders when the court deemed such action "just and equitable." Companies Act of 1848, 11 & 12 Vict., c. 45, § 5(8). The reluctance of the courts to interfere with the internal management of a corporation and the inability of the courts to fashion relief other than winding-up, however, put the oppressed minority shareholder in a precarious position. See *MacDougall v. Gardiner*, 1 Ch. D. 13, 25 (Ch. App. 1875), wherein the court stated:

[I]f the thing complained of is a thing which in substance the majority . . . are entitled to do, or if something has been done irregularly which the majority . . .

the judiciary according unwarranted weight to the principle of majority rule.¹⁶³

To relieve these potential inequities, legislative attention should be directed toward formulating a practical statutory standard to be used by courts in intervening on the basis of oppressive conduct. Presently, the standard of oppressive actions as a ground for dissolution remains vague and elusive notwithstanding the existing statutory admonitions given to the courts, namely, that in determining whether to decree dissolution a New York court is directed to consider (1) whether liquidation is the only feasible means whereby the petitioners may obtain a fair return on their investment and (2) whether such liquidation is reasonably necessary to protect the rights and interests of the petitioners.¹⁶⁴ Curi-

are entitled to do regularly, . . . there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.

Id.; cf. *Burland v. Earle*, [1902] A.C. 83, 93 (“[i]t is an elementary principle of the law . . . that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so”). To remedy the deficiencies of the common-law relief, therefore, the Committee on Company Law Amendment in 1945 recommended an alternative remedy to winding-up in cases of oppression. Board of Trade, Report of the Committee on Company Law Amendment, CMD. No. 6659, at 30, 95 (1945). The specific recommendations are embodied in section 210 of the Companies Act of 1948, which provides in part:

(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within [§ 169(3)] of this Act, the Board of Trade, may make an application to the court by petition for an order under this section.

(2) If on any such petition the court is of the opinion—

- (a) that the company's affairs are being conducted as aforesaid; and
- (b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up;

the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

Companies Act of 1948, 11 & 12, Geo. 6, c. 38, § 210.

For a discussion on section 210, see F. O'NEAL, “SQUEEZE-OUTS” OF MINORITY SHAREHOLDERS § 9.12, at 624-36 (1975); Afterman, *supra* note 16, at 1044-47; Prentice, *Protection of Minority Shareholders Section 210 of the Companies Act 1948*, 25 CURRENT LEGAL PROB. 124 (1972); Rajak, *The Oppression of Minority Shareholders*, 35 MOD. L. REV. 156 (1972).

¹⁶³ J. O'Neill, *supra* note 158, at 581.

¹⁶⁴ N.Y. BUS. CORP. LAW § 1104-a(b) (McKinney Supp. 1981-1982). The courts, often reluctant to grant the remedy of dissolution, may consider appropriate alternative relief.

ously, it is only in the context of oppressive actions where section 1104-a can be accused of ambiguity. The grounds for dissolution premised upon illegal or fraudulent actions or looting, waste or diversion of corporate assets are readily understandable.

Accordingly, oppressive conduct should be defined and, for this purpose, it is submitted that the reasonable expectations test¹⁶⁵ be adopted either through statutory amendment or continued judicial utilization. To the extent a minority shareholder's expectations with respect to employment, offices held, and directorships are frustrated by the controlling faction, an avenue for withdrawal of his interest should be available. Defining the nature of the wrongful conduct in this manner would not only clarify the degree of abuse necessary to justify judicial intervention, but would also accurately reflect the realities intrinsic in a typical investment in a closely held corporation. Thus, the reasonable expectations concept coupled with the existing elements which are statutorily mandated to be considered by a court should ensure equitable treatment for all those concerned with the dissolution proceeding.

2. Standing to Petition for Dissolution

Section 1104-a is also troublesome because of its unduly restrictive standing requirements. Unlike similar statutes enacted in several jurisdictions,¹⁶⁶ New York's statute requires the petitioners,

This may include the appointment of a receiver, the issuance of an injunction against further oppressive conduct, or an order of an accounting. See *Fix v. Fix Material Co.*, 538 S.W.2d 351, 357 n.3 (Mo. Ct. App. 1976); *Masinter v. Webco Co.*, 262 S.E.2d 433, 441 n.12 (W. Va. 1980). The *Fix* and *Masinter* decisions enumerate ten possible equitable remedies and cite cases illustrating these remedies. In granting these alternate remedies, the courts recognize that "relief for an oppressed minority does not have to be an all-or-nothing matter; elimination of one evil should not be an occasion for the substitution of another." Note, *supra* note 8, at 425.

¹⁶⁵ See notes 114-122 and accompanying text *supra*.

¹⁶⁶ The following statutes require no specified percentage share ownership as a prerequisite to commencement of dissolution proceedings based upon oppressive conduct. ALASKA STAT. § 10.05.540 (1962 & 1980 Supp.); ARK. STAT. ANN. § 64-908 (1980); COLO. REV. STAT. § 7-26-111 (1980 Supp.); IDAHO CODE § 30-1-97 (1980); ILL. ANN. STAT. ch. 32, § 157.86 (Smith-Hurd Supp. 1981); IOWA CODE ANN. § 496A.94 (1962 & 1981-1982 Supp.); MD. CORPS. & ASS'NS CODE ANN. § 4-602 (1975); MICH. COMP. LAWS ANN. § 21.200(825)(1) (1974); MISS. CODE ANN. § 79-3-193 (1973); MO. ANN. STAT. § 351.485 (Vernon 1966); MONT. REV. CODES ANN. § 15-2290 (1947 & 1977 Supp.); NEB. REV. STAT. § 21-2096 (1977); N.J. STAT. ANN. § 14A:12-7(a) (West 1969); N.D. CENT. CODE § 10-21-16 (1976); PA. CONS. STAT. ANN. § 2107A(2) (Purdon 1967); R.I. GEN. LAWS § 7-1.1-90 (1980); S.C. CODE § 33-21-150(a)(4) (1977); S.D. CODIFIED LAWS ANN. § 47-7-34 (1967); TEX. REV. CIV. STAT. ANN. art. 7.05

in the aggregate, to satisfy a specified ownership requirement as a prerequisite to their suit. Section 1104-a authorizes commencement of a dissolution proceeding only by "[t]he holders of twenty percent or more of all outstanding shares of a corporation."¹⁸⁷ Undoubtedly, the legislature in incorporating this standing requirement intended to protect against the potential for frivolous or strike suits. Nonetheless, it is difficult to justify foreclosing the section 1104-a remedy to a ten, five, or even one percent shareholder who has been subjected to harm by the illegal, fraudulent, or oppressive actions of the majority, while providing the remedy to a twenty percent shareholder who has been victimized by identical conduct. Even assuming that there is a theoretical basis for the percentage requirement, the majority should have only minor complaint upon its deletion. Presumably, a petitioning shareholder who holds little of the corporate stock will be a prime target for a section 1118 buy-out by the corporation or the non-petitioning shareholders since, relatively speaking, the outlay for such purchase would be minimal.

The ownership requirement may be further criticized as inconsistent with the general trend to treat the close corporation in a manner akin to its partnership counterpart. The Uniform Partnership Act, as adopted in New York, provides that dissolution of a partnership may be caused at any time by the express will of any partner, regardless of the relative ownership interest of such partner.¹⁸⁸ Moreover, such dissolution at will may result even in those instances where the partner's action represents a breach of the partnership agreement.¹⁸⁹ Notwithstanding this relative freedom of action given to all partners in a dissolution context, the New York legislature has seen fit to adopt a percentage ownership requirement for purposes of section 1104-a. Curiously, there appears to be

A(1)(c) (Vernon 1980); UTAH CODE ANN. § 16-10-92 (1953 & Supp. 1981); VT. STAT. ANN. tit. 11, § 2067 (1973); VA. CODE § 13.1-94 (1978); W. VA. CODE § 31-1-41 (1975); WASH. REV. CODE § 23A.28.170 (1974); WYO. STAT. § 17-1-614 (1977).

¹⁸⁷ N.Y. BUS. CORP. LAW § 1104-a(a) (McKinney Supp. 1981-1982).

¹⁸⁸ N.Y. PARTNERSHIP LAW § 62 (McKinney 1948).

¹⁸⁹ *Id.* § 62(2) provides:

Dissolution is caused:

. . . .

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time

Id.

no overriding public policy applicable to corporate entities which requires the section 1104-a ownership approach. For example, New York has sanctioned dissolution upon the demand of any shareholder when such right is embodied in the certificate of incorporation.¹⁷⁰ Accordingly, the twenty percent ownership requirement should be removed as a prerequisite to shareholder standing under section 1104-a. Thus, any shareholder suffering the oppressive conduct of those in control of the corporation will have the ability to seek return of his financial interest in the business.

An additional, but less significant, drawback associated with section 1104-a is the requirement that the shareholders instituting the proceeding must be "entitled to vote in an election of directors."¹⁷¹ Thus, protection that would otherwise be afforded by the section is removed from holders of non-voting common and preferred stock. Assuming that these parties are able to establish that their reasonable expectations relating to the corporation have been frustrated by those in control, there is no apparent justification for treating them differently from their voting colleagues. Fortunately, this inequity should remain of more theoretical than practical concern since it is unlikely that the capital structure of the typical close corporation will include non-voting stock. Furthermore, if such stock does exist, it may be unlikely that the holders reasonably expected to actively participate in the operation and management of the business. Still, the possibility does exist that non-voting shareholders will be subjected to the abuses envisioned in section 1104-a. Consequently, it seems overly protective of the controlling interests to deny the benefits of section 1104-a to the injured solely on the basis of their non-voting status.

If the current standing requirements of section 1104-a remain intact, a further issue may arise concerning the continued ability of less than twenty-percent shareholders and non-voting shareholders to petition for involuntary dissolution on the basis of "judicial sponsorship."¹⁷² Should section 1104-a be construed as preempting

¹⁷⁰ N.Y. BUS. CORP. LAW § 1002(a) (McKinney 1963), in pertinent part, provides:

(a) The certificate of incorporation may contain a provision that any shareholder, or the holders of any specified number or proportion of shares, or of any specified number or proportion of shares of any class or series thereof, may require the dissolution of the corporation at will or upon the occurrence of a specified event.

¹⁷¹ N.Y. BUS. CORP. LAW § 1104-a(a) (McKinney Supp. 1981-1982).

¹⁷² See notes 51-84 and accompanying text *supra*. Professor Hornstein, in his commentary on the Business Corporation Law, raised the issue of whether *Leibert v. Clapp*, 13 N.Y.2d 313, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963), will be "nullified and relief barred to

the area of dissolution upon the demand of the minority, those aggrieved shareholders who do not satisfy the standing requirements of section 1104-a would be left without a dissolution remedy. Such an inequitable result surely was not envisioned by the enactment of section 1104-a. Indeed, the intent of the legislation was to enhance, not curtail, the rights of the minority.¹⁷³ Therefore, the judicial remedies created by *Leibert v. Clapp*¹⁷⁴ and its progeny should retain continued viability for those minority shareholders who lack standing to employ section 1104-a. Unfortunately, those shareholders may find little practical comfort in seeking to apply the inherent equity power of a court to decree dissolution.¹⁷⁵

3. The Wrongdoing Petitioner

An additional difficulty arising from section 1104-a is the uncertain status of a wrongdoing petitioner, that is, a minority shareholder who has been ousted from employment and managerial responsibility for cause. Presently, the BCL makes no attempt to differentiate this shareholder from any other shareholder using the remedy afforded by section 1104-a. Furthermore, the *Topper* decision deems any justification for the frustrated reasonable expectations of a shareholder to be irrelevant insofar as the applicability of section 1104-a is concerned.¹⁷⁶ Accordingly, a petitioner's right to dissolution may be unaffected by his own wrongdoing. New Jersey, however, in applying the reasonable expectations test, has proven less liberal in its view of the wrongdoer and has concluded that the wrongdoer's expectations may be frustrated by his own impropriety rather than by the acts of the majority.¹⁷⁷ In such instances, dissolution pursuant to an oppressive conduct standard has been denied.

The culpability of the petitioner should be of some concern to

a deserving shareholder who owns less than 20% of the outstanding shares." N.Y. Bus. Corp. Law app. 1, at 127-28 (McKinney Supp. 1981-1982) (Hornstein, Supplementary Analysis of Business Corporation Law).

¹⁷³ See Memorandum of Assemblyman Finneran, reprinted in [1979] N.Y. LEGIS. ANN. 143-44; note 85 *supra*.

¹⁷⁴ 13 N.Y.2d 313, 196 N.E.2d 540, 247 N.Y.S.2d 102 (1963).

¹⁷⁵ See notes 53-84 and accompanying text *supra*.

¹⁷⁶ *In re Topper*, 107 Misc. 2d 25, 28, 433 N.Y.S.2d 359, 362 (Sup. Ct. N.Y. County 1980).

¹⁷⁷ See *Exadaktilos v. Cinnaminson Realty Co.*, 167 N.J. Super. 141, 400 A.2d 554 (1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (1980). For a discussion of *Exadaktilos*, see note 124 *supra*.

a court in considering dissolution. Therefore, the approach espoused in *Topper* appears overly simplistic and inequitable to those in control of the business. Removing the dissolution remedy in toto from a wrongdoing petitioner, however, may be equally harsh. For example, the petitioner's actions, while constituting sufficient cause for his discharge, may have resulted in damage to the corporation which is minimal when translated into monetary terms. Nevertheless, if the transgression is deemed sufficient to remove the section 1104-a remedy, the petitioner may be unable to recoup any portion of his investment in the business. The silence of the New York statute on this matter is particularly perplexing in that one can assume that those in control will invariably attempt to justify their otherwise oppressive actions by alleging some wrongdoing on the part of the petitioner. A solution to the problem, balancing the liberality of the *Topper* approach with the restraint of the New Jersey courts, appears warranted.

Not surprisingly, a compromise position is suggested by recourse to the Uniform Partnership Act as adopted in New York. As previously indicated, section 62 of the New York Partnership Act states that dissolution of a partnership may be caused by the "express will of any partner at any time," notwithstanding the agreed term of the partnership as set forth in the partnership agreement.¹⁷⁸ In such an event, however, the partners who have not breached the agreement may elect to continue the business for its agreed term¹⁷⁹ or liquidate the business and proceed against the wrongdoer for damages resulting from the breach.¹⁸⁰ Should the

¹⁷⁸ N.Y. PARTNERSHIP LAW § 62 (McKinney 1948).

¹⁷⁹ Section 69(2)(b) of the New York Partnership Law provides:

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (II) of paragraph (a) of subdivision two of this section, and in like manner indemnify him against all present or future partnership liabilities.

Id. § 69(2)(b).

¹⁸⁰ Section 69(2)(a) provides:

2. When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in subdivision one of this section [*i.e.*, liquidation] and

(II) The right, as against each partner who has caused the dissolution wrongfully,

other partners continue the business, they must either pay the wrongdoing partner in cash for the value of his interest, less any damages caused to his copartners by the dissolution and without consideration of the value of the goodwill of the business, or post a court-approved bond ensuring such payment at the end of the agreed term for the business.¹⁸¹ Thus, the wrongdoing partner is able to remove, or receive security for, the value of his interest in the firm, but is penalized for the damage he has caused by improperly inflicting dissolution upon his colleagues. Additionally, the wrongdoer is prevented from sharing in the goodwill of the continuing business—a result which is equitable since, if the business had been liquidated, any goodwill would have been lost to all owners absent sale of the business in its entirety.

Application of these partnership principles to a wrongdoer in the section 1104-a context would result in equitable treatment of all concerned. Should the corporation be liquidated on a piecemeal basis, the court would be required to ascertain the damages caused to the non-petitioning shareholders by a petitioner's wrongful conduct. Admittedly, such damage may be in excess of the direct harm caused to the corporation which formed the basis for the petitioner's discharge. Also, damages may be difficult to compute in a liquidation context since they must include valuation of the non-petitioning shareholders' expectations which were frustrated due to the liquidation. Nonetheless, the court in its discretion should be able to garner a reasonable estimate of loss to the non-petitioning shareholders. Should the corporation be sold in its entirety as a going concern or be continued pursuant to a section 1118 buy-out of petitioner's shares, difficulties in valuation would exist but again should not be insurmountable. Using independent appraisals, the

to damages for breach of the agreement.

Id. § 69(2)(a).

¹⁸¹ Section 69(2)(c), in pertinent part, provides:

(c) A partner who has caused the dissolution wrongfully shall have:

.....
(II) If the business is continued under paragraph (b) of subdivision two of this section the right as against his copartners and all claiming through them in respect of their interest in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

Id. § 69(2)(c)

court would first determine the fair value of corporate assets taken individually. The court would then apply the petitioner's ownership percentage to such value to arrive at the value of the petitioner's interest in the assets. In such manner, the petitioner would not share in the goodwill or going concern value, if any, of the business. Thereafter, the court would be left to compute the damage caused to the non-petitioning shareholders by the dissolution including any damage resulting from frustration of their reasonable expectations. In a section 1118 purchase situation, one measure of the damage might be the cost to the purchasers of borrowing or using funds necessary to purchase the ownership interest of the petitioner, less any anticipated profit on the stock purchased. The eventual payment to the petitioner would equal the value of his interest, as previously determined, less the damages sustained as a result of his wrongful conduct. As the corporation, unlike a partnership, would have no fixed term, the use of a bond to secure future payment to the petitioner would not appear feasible since the time fixed for future payment would at best be arbitrary.

4. Judicial Considerations

One final comment is in order concerning the matters that a court is statutorily required to consider prior to ordering dissolution. In determining whether to proceed with dissolution, the court is to consider, among other things, whether corporate liquidation "is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment."¹⁸² Although the issue of alternatives to dissolution should be of concern to the court, it is critical that courts not continue to display their reluctance to decree dissolution by placing undue emphasis on this consideration. Moreover, while liquidation is in all probability the only means available for obtaining any return on the aggrieved minority's investment, establishing that such investment is, for example, unsaleable or incapable of returning a dividend in the future may provide the petitioner with an insurmountable evidentiary burden. It is submitted, therefore, that once the petitioner has established a basis for dissolution pursuant to section 1104-a, his burden of proof should be satisfied. To the extent that alternative means for a fair return to the petitioner may be available, it should be incumbent upon the corporation to establish their existence and

¹⁸² N.Y. Bus. Corp. Law § 1104-a(b)(1) (McKinney Supp. 1981-1982).

feasibility.

5. Proposed Solution

Having proceeded at great length to illustrate certain shortcomings within section 1104-a, it would be a dereliction to fail to set forth some proposed solution. Accordingly, it is suggested that section 1104-a be revised to read as follows:

(a) A shareholder of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940," no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, may present a petition for dissolution on one or more of the following grounds:

(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent, or oppressive actions toward the complaining shareholders;

(2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers, or those in control of the corporation.

(b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

(1) Whether feasible means in addition to liquidation are available whereby petitioners may reasonably expect to obtain a fair return on their investment; and

(2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners. For purposes of subsection (b)(1) herein, the corporation shall bear the burden of establishing the existence of alternative means whereby petitioners may reasonably expect to obtain a fair return on their investment.

(c) The court, in determining whether to proceed with involuntary dissolution pursuant to this section on the grounds of oppressive actions toward the complaining shareholders by the directors or those in control of the corporation, shall take into account:

(1) Whether, among other things, the reasonable expectations of the complaining shareholders as to employment, offices to be held, or directorships have been frustrated by the directors or those in control of the corporation; and

(2) Whether the conduct of the directors or those in control

of the corporation toward the complaining shareholders may be justified on the basis of wrongdoing on the part of the complaining shareholders, provided, however, that such wrongdoing shall not constitute a defense to involuntary dissolution pursuant to this section but shall create a right in the non-complaining shareholders, as against the wrongdoers, to damages for their loss due to such wrongful conduct.

Section 1104-a, as revised, addresses each of the problem areas previously raised—a definition for oppressive action, standing, the wrongdoing petitioner and the burden of proof as to alternatives to dissolution. The status of the wrongdoing petitioner in a section 1118 buy-out situation will be considered in the proposed revisions to that section. Hopefully, the proposed solution resolves certain issues without creating a multitude of new and more complicated concerns.

Section 1118

1. The Offer to Purchase

In an effort to balance the rights of majority and minority interests in the corporation, the legislature enacted section 1118, which permits the non-complaining shareholders or the corporation when confronted with a section 1104-a petition to force a sale of the petitioner's stock. The method enacted to effect this sale, however, appears to have created certain practical problems which may inequitably affect the minority. One of the problems resulting from the present statute can be illustrated by the following hypothetical. By an order to show cause returnable at a future date, a petitioner commences a section 1104-a proceeding.¹⁸³ Immediately prior to the return date, the petitioner receives correspondence from the corporation's counsel indicating that either the corporation or a non-complaining shareholder has elected to purchase the petitioner's stock at its fair value pursuant to section 1118. Aware of the statute, the petitioner's counsel undoubtedly will agree to an adjournment of the return date so that the parties may attempt to reach agreement as to the value of the petitioner's interest in the corporation. If such negotiations break down, as they invariably will, the statute seemingly permits two alternatives to the corpora-

¹⁸³ The order to show cause may place additional burdens upon the respondent corporation. See notes 110-111 and accompanying text *supra*.

tion and the prospective purchasers. First, the prospective purchasers may move to stay the proceedings and have the court determine the value of the petitioner's stock.¹⁸⁴ Alternatively, the corporation may litigate the merits of the petitioner's contentions under section 1104-a. If the latter course is chosen, the petitioner will have been subjected to the extended delay occasioned by the negotiations as to fair value without any additional recourse against the prospective purchasers.

The plight of the petitioner on this score may be alleviated rather effortlessly. Since section 1118 exists for the primary benefit of those in control of the corporation and, as indicated, may work to the detriment of the aggrieved minority, the election to purchase pursuant to section 1118 should be of more permanent and lasting effect. Once made, the election should remain irrevocable so as to avoid any benefit to the majority by virtue of delay tactics. Surely, the majority, now in exclusive control of the business, will seek all avenues of delay in the hope of forcing the petitioner to accept a lesser price for his stock. This potential inequity may be avoided by indicating the irrevocable nature of the election in the statute and by providing that the petitioner, in addition to the prospective purchasers, may apply to the court for a determination of the value of his stock in the event that the parties are unable to agree voluntarily upon such value.¹⁸⁵

A further potential for unfairness lies in the statutory timing for the offer to purchase. Section 1118 permits the purchase election to be made "at any time within ninety days after the filing of [the] petition or at such later time as the court in its discretion may allow."¹⁸⁶ Thereafter, the purchase is to be effected at the fair value of petitioner's shares as of the day prior to the filing of the petition¹⁸⁷ and "upon such terms and conditions as may be approved by the court."¹⁸⁸ The difficulty with the timing of the offer

¹⁸⁴ N.Y. BUS. CORP. LAW § 1118(b) (McKinney Supp. 1981-1982).

¹⁸⁵ Permitting the petitioner to apply for determination of the value of his shares would create a procedure analogous to that used when a shareholder asserts his appraisal rights against the corporation. Pursuant to section 623 of the New York Business Corporation Law, if the corporation and a dissenting shareholder fail to agree upon the price to be paid for the shareholder's stock, the corporation may commence a proceeding to fix the fair value of the shares. Should the corporation fail to institute the proceeding, any dissenting shareholder may commence the proceeding. N.Y. BUS. CORP. LAW § 623(h) (McKinney 1963).

¹⁸⁶ N.Y. BUS. CORP. LAW § 1118(a) (McKinney Supp. 1981-1982).

¹⁸⁷ *Id.* § 1118(b).

¹⁸⁸ *Id.* § 1118(a).

relates to the ability of the prospective purchasers to elect to purchase at a point in time beyond 90 days after the petition is filed. Conceivably, the corporation could fully litigate the merits of the dissolution proceeding, lose and still elect, subject to court approval, to purchase the petitioner's stock. Hence, although the petitioner will have expended time, effort, and money to pursue the litigation, he will nonetheless be saddled with a mandatory sale of his stock.¹⁸⁹ Moreover, the price the petitioner will receive for his stock will be computed as of the day preceding the filing of his petition.¹⁹⁰ Accordingly, if the business prospers subsequent to the filing, the prospective purchaser, in effect, will have received an option to purchase the shares at the earlier, lower value. Under these circumstances, it behooves a purchaser to forego making an early election, to litigate the merits of the petitioner's claims, and thereafter to apply to the court for a statutory buy-out in the event that the petitioner is successful on the merits. In keeping with the court's traditional reluctance to order dissolution, it can be expected that the court will permit the election at such later date.

Several possibilities exist to alleviate, in whole or in part, the petitioner's problem in the event of a delayed purchase election. Using the present statutory language, the court may impose conditions for the exercise of its discretion in permitting the late election. First, when the election is made after petitioner has incurred expenses in addition to those involved in commencing the proceeding, the court may require that the purchasers reimburse the petitioner for these expenses, including reasonable attorney's fees. Second, when the business has been profitable subsequent to the commencement of the dissolution proceeding, the court may require that the offer to purchase include an element of value corresponding to what would otherwise have been the petitioner's share

¹⁸⁹ This precise situation occurred in *In re Topper*, 107 Misc. 2d 25, 433 N.Y.S.2d 359 (Sup. Ct. N.Y. County 1980). As previously discussed, the *Topper* court determined that oppressive conduct had been practiced by the controlling faction. *Id.* at 28, 433 N.Y.S.2d at 362. Nonetheless, the court considered whether the controlling shareholders had made an election to purchase the petitioner's shares pursuant to section 1118. Since these shareholders had previously agreed to negotiate, without judicial interference, a reasonable price for the petitioner's shares, the court deemed this conduct sufficient to constitute a statutory election to purchase. *Id.* at 28-29, 433 N.Y.S.2d at 362. As a result, the petitioner had been put through the expense of litigating the proceeding on the merits but was still confronted with a section 1118 forced buy-out.

¹⁹⁰ N.Y. Bus. Corp. Law § 1118(b) (McKinney Supp. 1981-1982).

of post-petition profits had the proceeding not been commenced.¹⁹¹ Assuming that these conditions are adopted by the court, any detriment to the petitioner or benefit to the purchasers occasioned by the delay in the election should be removed.

2. Valuation

A somewhat less cumbersome and more certain solution to the timing issue may be achieved by reconsidering the overall valuation method used by section 1118. As previously indicated, the value of the petitioner's shares is to be determined as of the day prior to the filing of the petition.¹⁹² As such, the valuation is patterned after the appraisal rights statutorily given, in limited circumstances, to dissenting shareholders.¹⁹³ The statute, however, provides no mechanism for compensating the petitioner who encounters a lapse of time between the filing of his petition and receipt of fair value for his shares. To date, one court has indicated that certain statutory provisions which benefit a dissenting shareholder in an appraisal context, such as the right to receive interest on the fair value of one's shares, are not directly applicable to a section 1118 situation.¹⁹⁴ Consequently, a petitioner, through no

¹⁹¹ See note 195 and accompanying text *infra*.

¹⁹² N.Y. BUS. CORP. LAW § 1118(b) (McKinney Supp. 1981-1982).

¹⁹³ In the appraisal situation, if the fair value of the dissenting shareholder's stock is not voluntarily agreed upon, the dissenting shareholder is to receive "fair value as of the close of business on the day prior to the shareholders' authorization date, excluding any appreciation or depreciation directly or indirectly induced by such corporate action on the proposal." *Id.* § 623(h)(4) (McKinney 1963). In such case, the order for the payment of value by the corporation is to include interest from the shareholders' authorization date to the date of payment. *Id.* § 623(h)(6).

¹⁹⁴ In *Fleischer v. Gift Pax, Inc.*, 79 App. Div. 2d 636, 433 N.Y.S.2d 614 (2d Dep't 1980), the petitioner argued that subsection (g) and certain provisions of subsection (h) of section 623 of the Business Corporation Law should be applicable to a section 1118 buy-out when the parties are unable to agree voluntarily as to the value of the petitioner's shares. *Id.* at 636-37, 433 N.Y.S.2d at 615. Specifically, the petitioner desired:

(1) that the corporations be required to make a *written* offer to purchase the petitioner's shares at what they believe to be the "fair value" of the shares (see Business Corporation Law, § 623, subd. [g]); (2) in the absence of a "bad faith" refusal to accept the proposed terms of sale, that the petitioner be awarded interest "at such rate as the court finds to be equitable" upon the judicially-determined fair value of his shares (see Business Corporation Law, § 623, subd. [h], par. [6]); (3) again in the absence of bad faith, that the costs and expenses of the valuation proceeding be assessed against the respondent corporation (see Business Corporation Law, § 623, subd. [h], par. [7]); and (4) that the payment of the judicially determined fair value of petitioner's shares take place within 60 days after the final determination thereof (see Business Corporation Law, § 623, subd. [h], par.

wrongdoing of his own, may be unable to recoup his investment for an extended period of time and, throughout that time, may receive no credit in the form of interest or profit sharing on such withheld investment.

A possible solution to the petitioner's dilemma can be gleaned from the existing provisions of the partnership law. When a partnership is continued notwithstanding dissolution caused by the retirement, death, or wrongdoing of a partner, the outgoing partner or his estate receives the value of his partnership interest as of the date of dissolution. In addition, however, the partner is entitled to either interest on such value to the date of payment or, at his option and in lieu of interest, "the profits attributable to the use of his right in the property of the dissolved partnership."¹⁹⁵ As a result, the outgoing partner's recovery is not limited to the value of his interest at dissolution. While his former partners get the benefit of continued use of his investment after dissolution, the outgoing partner receives compensation. By analogy to the partnership, a complaining shareholder in a section 1118 context should be afforded similar compensation while the corporation continues to use his investment. Such compensation, be it in the form of interest or post-petition profit sharing, will serve to treat the aggrieved shareholder more equitably. Moreover, the interest or profit-sharing obligation on the corporation should serve as a catalyst for an early buy-out pursuant to section 1118 and thus remove the potential inequities previously discussed in connection with a delayed election under the statute.

[8]).

Id. at 636-37, 433 N.Y.S.2d at 615. Rejecting such request, the court noted no legislative intent that the provisions of section 623 were to apply to a section 1118 buy-out. As a result, the court deemed it "better practice to refrain from judicial legislation and await further legislative action." *Id.* at 637, 433 N.Y.S.2d at 616. The court, however, did note that its decision would not prevent a court in appropriate cases from making such orders as justice requires. *Id.*

¹⁹⁵ N.Y. PARTNERSHIP LAW § 73 (McKinney 1948) provides in part:

When any partner retires . . . and the business is continued under any of the conditions set forth in . . . section sixty-nine, paragraph (b) of subdivision two [relating to the actions of a wrongdoing partner], without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership

3. The Ability to Purchase

One final problem of note centers on the persons or entities empowered to offer to purchase the petitioner's shares pursuant to section 1118. Presently, section 1118 permits the buy-out election to be exercised by either a non-complaining shareholder or the corporation itself.¹⁹⁶ To the extent that the corporation alone makes the election, the petitioner runs the risk that once the value of his shares is ascertained, the corporation may be financially incapable of proceeding with the purchase. Section 513 of the BCL provides that a corporation may repurchase its shares "out of surplus except when currently the corporation is insolvent or would thereby be made insolvent."¹⁹⁷ Accordingly, in order to purchase petitioner's stock, the corporation must, at the time of purchase, have a surplus,¹⁹⁸ be solvent, and not be rendered insolvent as a result of such purchase. Insolvency is defined as the corporation's inability to pay its debts as they become due in the usual course of its business.¹⁹⁹ This definition is synonymous with insolvency in the "equity" sense²⁰⁰ and can be characterized as an excess of current liabilities over current assets.²⁰¹

As is readily apparent, the surplus and solvency of a prospective corporate purchaser should be of critical significance to the court and the petitioner.²⁰² Conceivably, at the time of election the corporation's surplus or solvency may be marginal, and a downturn

¹⁹⁶ N.Y. BUS. CORP. LAW § 1118(a) (McKinney Supp. 1981-1982).

¹⁹⁷ *Id.* § 513(a) (McKinney 1963).

¹⁹⁸ Surplus is defined as "the excess of net assets over stated capital." *Id.* § 102(13). Net assets refers to "the amount by which the total assets exceed the total liabilities." *Id.* § 102(9). Stated capital means:

the sum of (A) the par value of all shares with par value that have been issued, (B) the amount of the consideration received for all shares without par value that have been issued, except such part of the consideration therefor as may have been allocated to surplus in a manner permitted by law, and (C) such amounts not included in clauses (A) and (B) as have been transferred to stated capital, whether upon the distribution of shares or otherwise, minus all reductions from such sums as have been effected in a manner permitted by law.

Id. § 102(12).

¹⁹⁹ *Id.* § 102(8).

²⁰⁰ *Id.* § 102, comment at 6-7.

²⁰¹ See H. HENN, LAW OF CORPORATIONS § 319, at 637 (1970).

²⁰² Unfortunately, it appears that courts have side-stepped their responsibilities in this regard. In *In re Taines*, 444 N.Y.S.2d 540 (Sup. Ct. N.Y. County 1981), the court stated: "Establishing that the [c]orporation is legally and financially able to pay the fair value of the shares under the limitations prescribed in [the Business Corporation Law] section 513 is not a condition precedent to the grant of the stay mandated by section 1118." *Id.* at 544.

in its financial condition may occur during the period in which the fair value of the petitioner's stock is being determined. If such a downturn occurs, the corporation, notwithstanding its election to purchase and any resultant stay obtained, may be statutorily unable to purchase petitioner's stock due to its lack of surplus or current insolvency or because such purchase might otherwise cause the corporation to become insolvent.²⁰³ In such a case, the petitioner, after having expended time, money, and effort in the valuation of his shares, may have no available alternative except to pursue dissolution proceedings anew with a view toward liquidation of the corporation. To the extent an individual shareholder elects to purchase the petitioner's stock, his later financial inability to perform may similarly disappoint the petitioner's expectations.

To alleviate this situation, concern should be directed to ensuring, to the extent practicable, that a purchase will occur once the statutory buy-out election is exercised. Several alternatives seem possible. First, the prospective purchaser can be required, upon grant of the stay, to post a bond or other acceptable security in an amount sufficient to secure the petitioner for the value of his shares. This approach has been adopted by one court despite the absence of express statutory authorization for such a condition under section 1118.²⁰⁴ A second alternative lies in requiring that the section 1118 election be made by both the corporation and one or more non-complaining shareholders. For the corporation to

²⁰³ See *In re Flying Mailmen Service, Inc.*, 539 F.2d 866, 869 (2d Cir. 1976); *Mantell v. Unipak Aviation Corp.*, 28 App. Div. 2d 1134, 1134, 284 N.Y.S.2d 640, 641 (2d Dep't 1967).

²⁰⁴ *In re Delinko*, N.Y.L.J., April 27, 1981 at 6, col. 2 (Sup. Ct. N.Y. County). In *Delinko*, the controlling shareholder had moved pursuant to section 1118 to purchase the petitioner's shares and an appraiser had been appointed to determine fair value. In addition, a temporary receiver of the assets and property of the corporations involved had been appointed. The controlling shareholder then moved for, among other things, an order removing the temporary receiver so that she could control the corporate assets and salvage a declining business. The petitioner opposed the motion by arguing that a grant of the desired relief would leave her with no security for the value of her shares and would provide the controlling shareholder with an opportunity to "milk" the corporations. In granting the motion, the court noted that the petitioner's sole legal concern with the corporations, at present, was to insure that there would be sufficient assets available to pay her the fair value of her shares. Accordingly, it appeared appropriate to permit the prospective purchaser to continue operating the business. Notably, however, the petitioner's concern as to security was deemed reasonable. Thus, while there was no express statutory authorization for security in such instances, the court conditioned the grant of the motion "upon condition that movant posts a bond or other acceptable security in an amount sufficient to secure petitioner for the value of her shares." *Id.* at 6, col. 3. Such condition was deemed acceptable as furthering "the intent and purpose of the statute to allow viable corporations to continue to function." *Id.*

make the initial election, one or more of the non-complaining shareholders, whose financial condition is satisfactory to the court, should be required to obligate themselves to purchase the petitioner's shares to the extent the corporation may later prove unable to do so. Similarly, for a non-complaining shareholder to make the initial election, the corporation or other non-complaining shareholders should be required to join in the purchase obligation to the extent that it is later deemed necessary. While this latter alternative will not fully secure the petitioner's position in all events, it does bolster the position of the petitioner and increase the likelihood of the anticipated purchase actually taking place.

Imposition of the foregoing conditions would be equitable and consistent with section 1118. Additionally, these conditions would afford significant protection to the petitioner by assuring that no wrongdoing relating to corporate surplus or solvency would be practiced by those in control of the corporation during the pendency of the valuation proceeding. Failure to impose the conditions will leave the petitioner in a position wherein he will have no assurance of ever receiving the fair value of his shares despite the judicial determination of value pursuant to section 1118.

4. Proposed Solution

Once again, having recounted the potential shortcomings of section 1118, it is reasonable to propose concrete statutory revisions. The changes suggested herein are designed in part to reduce the inequities inherent in the present statute as they affect both the majority and minority. Accordingly, section 1118 is proposed to be revised to read as follows:

(a) In any proceeding brought pursuant to section eleven hundred four-a of this chapter, any other shareholder or shareholders or the corporation may, at any time within ninety days after the filing of such petition or at such later time as the court in its discretion may allow, irrevocably elect to purchase the shares owned by the petitioners at their fair value and upon such terms and conditions as may be approved by the court, including the conditions of subsection (d) herein.

(b) If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court, upon the application of such prospective purchaser or purchasers or the petitioner, shall stay the proceedings brought pur-

suant to section 1104-a of this chapter and determine the fair value of the petitioner's shares in accordance with subsection (c) herein.

(c) For purpose of this section, the fair value of the petitioner's shares shall be equal to the fair value of such shares as of the day prior to the date on which the petition is filed, together with interest thereon from the date of such filing or, at the petitioner's option, in lieu of interest, the profits attributable to the petitioner's interest in the corporation from the date of such filing, provided, however, that if a petitioner shall be adjudged guilty of wrongful conduct in connection with the corporation, the value of such petitioner's shares shall be reduced by any damages caused to the corporation or other shareholders and the value of the goodwill of the business shall not be considered in ascertaining the value of such petitioner's shares.

(d) In connection with any election to purchase pursuant to this section:

(1) If such election is made beyond ninety days after the filing of the petition, the court, in its discretion, may award the petitioner his reasonable expenses incurred in the proceeding prior to such election, including reasonable attorneys' fees;

(2) For a valid election to be made by the corporation alone, a shareholder or shareholders, found satisfactory to the court, must consent to purchase the petitioner's shares at their fair value to the extent the corporation may later prove unable to do so;

(3) For a valid election to be made by a shareholder or shareholders alone, the corporation or other shareholders found satisfactory to the court must consent to purchase the petitioner's shares at their fair value to the extent the electing shareholder or shareholders may later prove unable to do so; and

(4) The court, in its discretion, may require, at any time prior to the actual purchase of petitioner's shares, the posting of a bond or other acceptable security in an amount sufficient to secure petitioner for the fair value of his shares.

Adoption of the foregoing revisions would assist the petitioner in several respects. The suggested changes incorporate the irrevocable nature of the buy-out election, the ability of the petitioner to stay the proceedings and move for a court-ordered valuation of his shares, a valuation technique permitting the petitioner to be compensated for the continued use of his investment by the corpora-

tion subsequent to the filing of the petition, and reasonable conditions designed to ensure that a purchase will follow a section 1118 election. As for the corporation and the non-complaining shareholders, the revisions attempt to compensate them to some extent where their treatment of the minority has been occasioned by the minority's own wrongful conduct. In short, the suggested changes continue the statutory attempt to consider the position of both the minority and majority in those instances where their interests may no longer be reconciled amicably.

CONCLUSION

New York, like other jurisdictions which have attempted to enhance the position of minority shareholders regarding corporate dissolution, has produced legislation which attempts to balance the competing interests of majority and minority shareholders. Like all attempts at compromise of adverse positions, the net result may be less than fully satisfactory for all parties concerned. Indeed, sections 1104-a and 1118, in fact, contain several flaws. While revisions to these sections have been suggested in this article, it would be immodest to suppose that the legislature will act expediently to adopt a revised statute. Nonetheless, the proposed revised sections may serve as food for thought for courts in attempting to deal with the vagueness and apparent inequities inherent in the present statutory scheme.

Notwithstanding their shortcomings, these sections, as interpreted and applied in *Topper* and subsequent decisions, take substantial strides toward providing a meaningful dissolution remedy to aggrieved minority shareholders. To conclude that the *Topper* interpretation of "oppressive actions" is liberal with respect to the rights of minority shareholders may well be classified as an understatement. To say that the statutes, as so interpreted, will open floodgates of litigation is at present premature. Suffice it to say that the statutes, coupled with the *Topper* interpretation of oppression, place a heretofore unavailable weapon in the limited arsenal of minority shareholders. Their addition is a welcome step in recognizing the peculiar status of shareholders in a close corporation and in considering their position in a manner analogous to partners in a partnership.