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The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations

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It is entirely proper to view with sympathy the plight of the battered and bruised minority shareholder in a closely held corporation,[1] and the problem of "oppression" in such enterprises has been the subject of considerable commentary.[2] Not all minority shareholders are abused, however, and differences between participants in corporate ventures frequently are resolved on a day-to-day basis, even in the face of an imbalance of power. In these situations, the common objective of maximizing a return on the capital and services invested binds together individuals with potentially conflicting interests and facilitates the resolution of differences.[3] In addition to oppressed minority shareholders, therefore, there are presumably many participants who are satisfied with their roles as minority shareholders.

Between the two extremes of the abused and the satisfied shareholder there exists a third kind of minority participant—the individual who is generally dissatisfied with some aspect of his or her role in the business but who has not been the victim of misconduct by those in control. The causes of the dissatisfaction and the extent to which they can be articulated will, of course, vary. For example, dissatisfaction may stem from a difference of opinion concerning a basic policy or policies, from a personality conflict or other breakdown in the relationship with a coowner,[4] from concern with conditions in the business or industry or from a perception that there are preferable sources

1. For a discussion of the definition of a close corporation, see *infra* text accompanying notes 209-16.
2. The classic work in the field is F. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS (1975). For a discussion of oppression as a ground for corporate dissolution, see *infra* text accompanying notes 120-80.
3. *Cf.* Heymann, *The Problem of Coordination: Bargaining and Rules,* 86 HARV. L. REV. 797, 822 (1973) ("Since coordinated actions to obtain outcomes of benefit to all parties often depend upon trust, each actor who wants to be a participant in, and thus beneficiary of, such cooperative schemes in the long run and on a number of separable occasions has an important stake in creating and preserving a reputation as a trustworthy party.").
4. For a consideration of the development of such problems in a family

for the investment of capital or labor.[5] Whatever the reason, a shareholder may become dissatisfied and may lack the ability to remove the source of his or her concern. Further, because of the difficulty of selling a minority interest in a closely held corporation,[6] the dissatisfied shareholder may be without a means of escape and therefore "trapped" in an unhappy investment situation. The plight of this individual—admittedly less sympathetic than that of the "oppressed" minority shareholder but nevertheless worthy of consideration—has received little attention.[7]

Even less consideration has been given to the position of the dissatisfied participant in the general partnership. This neglect is largely attributable to two factors. First, the source of partnership law—the Uniform Partnership Act (U.P.A.)—protects the position of all partners not only by insuring each the right to participate in the management of the business[8] but also by providing an escape mechanism in the event that unhappy relationships develop. This latter result is accomplished by making the partnership relationship dissolvable upon the express will of any of the partners,[9] a principle which provides an important distinction between the partnership and the corporation.[10] This principle of free dissolvability and the deference

business, see Levinson, *Conflicts that Plague Family Business,* 49 HARV. BUS. REV. 90 (1971).

5. The dissatisfaction may also stem from heavy-handed conduct by those in control which is not deemed sufficiently "oppressive" to justify relief. For a discussion of oppression as a basis for relief, see *infra* text accompanying notes 120-80.

6. The difficulty of selling minority interests in a close corporation is well recognized, and the problem may be compounded by restrictions on the transferability of shares. *See generally* F. O'NEAL, *supra* note 2, § 2.15.

7. This may be because the problem of oppression has not yet been effectively addressed. It has been suggested that the two most significant areas of needed reform in the treatment of close corporations are the need for flexibility in internal management, and the need to protect minority shareholders from oppression. *See* Bradley, *A Comparative Assessment of the California Close Corporation Provisions and a Proposal for Protecting Individual Participants,* 9 LOY. L.A.L. REV. 865, 865-67 (1976). *See also* O'Neal, *Close Corporations: Existing Legislation and Recommended Reform,* 33 BUS. LAW. 873, 881 (1978) ("As minority participants in a close corporation may not anticipate dissension or oppression, and indeed may be unaware of their vulnerability, they frequently fail to bargain for adequate protection against mistreatment."). On the subject of oppression, see *infra* text accompanying notes 120-80.

8. UNIF. PARTNERSHIP ACT § 18(e) (1914). (This act will hereinafter be referred to as the U.P.A., and all references will be to the 1914 text.) Each partner has the right to participate in the management of the business "subject to any agreement between them." *See infra* note 220.

9. U.P.A. § 31(1)(b), (2). *See infra* text accompanying notes 27-45.

10. For a consideration of the permanence of the relationship among shareholders, see *infra* text accompanying notes 110-200.

paid by the U.P.A. to the right of the partners to vary by agreement its otherwise applicable provisions[11] apparently provide a flexible and sane approach to the regulation of relationships among coventurers. Indeed, the U.P.A. is sufficiently respected in this regard that it is frequently offered as a model for the reform of the law applicable to close corporations.[12] Thus, one reason for the lack of attention focused upon the problems of the dissatisfied partner may be the perception that a problem does not in fact exist.

A second factor is that the study of partnership law as an academic discipline has been significantly neglected, at least when compared with the attention devoted to the problems affecting close corporations.[13] The difficulties inherent in applying a unified approach to the problems of publicly held and closely held corporations have been well chronicled,[14] and recent years have seen a significant development of the law applicable to close corporations.[15] Partnership law has not received anything approaching the critical attention devoted to corporate law. Although the relative neglect of partnership law is in part justified by the paucity of reported appellate litigation,[16] it is unfortunate since the U.P.A., a uniform act which has re-

11. *See infra* text accompanying notes 33-34.

12. *See infra* text accompanying notes 204-08.

13. *See* D. FESSLER, ALTERNATIVES TO INCORPORATION FOR PERSONS IN QUEST OF PROFIT xvii (1980); Mechem, *How to Include Partnership in a Crowded Curriculum*, 6 J. LEGAL EDUC. 549, 549 (1954).

14. *See infra* notes 204, 208.

15. A number of states have enacted special close corporation legislation. Some have done so in a separate, integrated close corporation section, subchapter, or chapter. *See, e.g.,* ALA. CODE §§ 10-2A-300 to -313 (1980); ARIZ. REV. STAT. ANN. §§ 10-201 to -218 (1977); DEL. CODE ANN. tit. 8, §§ 341-356 (1974 & Supp. 1980); ILL. ANN. STAT. ch. 32, §§ 1201-1216 (Smith-Hurd Supp. 1981); KAN. STAT. ANN. §§ 17-7201 to -7216 (1981); MD. CORPS. & ASS'NS CODE ANN. §§ 4-101 to -603 (1975 & Supp. 1981); PA. STAT. ANN. tit. 15, §§ 1371-1386 (Purdon Supp. 1982); R.I. GEN. LAWS § 7-1.1-.51 (1969); TEX. BUS. CORP. ACT ANN. arts. 12.01-12.54 (Vernon Supp. 1981). Others accord recognition to close corporations within the context of nonintegrated corporation codes. *See, e.g.,* CAL. CORP. CODE §§ 300, 1800(b)(5) (West 1977 & Supp. 1982); FLA. STAT. ANN. § 607.107 (West 1977); GA. CODE ANN. § 22-611 (1977); MICH. COMP. LAWS ANN. §§ 450.1463, .1466 (1973 & Supp. 1982); N.J. STAT. ANN. §§ 14A:5-21, 14A:12-7(1)(c) (West 1969 & Supp. 1981); N.Y. BUS. CORP. LAW §§ 620, 1104-a (McKinney 1963 & Supp. 1981); N.C. GEN. STAT. § 55-73 (1975); S.C. CODE ANN. §§ 33-11-220, 33-21-130 (Law. Co-op. 1976 & Supp. 1982); TENN. CODE ANN. § 48-714 (1979). Courts have also recognized the special character of these enterprises. *See, e.g.,* Galler v. Galler, 32 Ill. 2d 16, 27-28, 203 N.E.2d 577, 583-84 (1964), *appeal dismissed*, 69 Ill. App. 2d 397, 217 N.E.2d 111 (1966), *modified*, 21 Ill. App. 3d 811, 316 N.E.2d 114 (1974); Donahue v. Rodd Electrotype Co., 367 Mass. 578, 585-86, 328 N.E.2d 505, 511 (1975).

16. The relative infrequency of such reported litigation does not suggest an absence of problems in the area. D. FESSLER, *supra* note 13, at xvii.

mained unchanged for almost seventy years,[17] is thought by many to contain the solutions to a number of problems affecting the relationships among shareholders in close corporations.[18] The U.P.A.'s treatment of the dissatisfied partner therefore warrants a thorough analysis, not only for its own sake, but also to determine whether it may also provide an appropriate model for dealing with the problem of the dissatisfied but nonoppressed minority shareholder.

It is the purpose of this Article to examine the position of the dissatisfied minority participant in both the general partnership[19] and the close corporation.[20] The central theme of the analysis is the terminability of the business relationship by such a participant in the absence of misconduct on the part of those in control. The Article assumes the existence of a well managed[21] and solvent,[22] as opposed to a failing, business enterprise. If the venture is in the corporate form, those in control have not displayed the type of oppressive or abusive conduct which will justify relief in most jurisdictions.[23] It will also be assumed that the participant is without power in the enterprise to assert a position of control[24] and has not con-

17. *See generally* Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617 (1915). The U.P.A., which represents the culmination of more than twelve years of effort, was approved by The National Congress of Commissioners on Uniform State Laws in 1914. *Id.* at 620. It has been substantially adopted in 48 states, the District of Columbia, Guam, and the Virgin Islands. *See* 6 U.L.A. 1 (West Supp. 1981).

18. *See infra* text accompanying notes 204-08.

19. A discussion of limited partnerships is beyond the scope of this Article. Joint ventures are for most purposes treated as the equivalents of general partnerships and will be considered as such in the analysis. *See generally* D. FESSLER, *supra* note 13, at 191-97.

20. For a consideration of the difficulties encountered in defining a close corporation, see *infra* text accompanying notes 209-16.

21. In many jurisdictions, misapplication or waste of corporate assets will be a basis for relief. *See, e.g.*, MODEL BUSINESS CORP. ACT § 97(a)(4) (1980), *infra* note 127.

22. Solvent is used here in a broad sense to refer to a reasonably successful enterprise. Insolvency in the sense of inability to satisfy obligations is a ground for involuntary dissolution in some states. *See, e.g.*, LA. REV. STAT. ANN. § 12:143A (West 1969); OKLA. STAT. ANN. tit. 18, § 1.195(1) (West 1951).

23. The individual may nevertheless perceive that he or she has been the victim of oppressive conduct, and at least one court has taken an extremely broad view of the concept of "oppression." *See infra* text accompanying notes 157-66. The portion of this Article dealing with close corporations, however, is devoted primarily to the position of the shareholder who is dissatisfied but is unable to establish the type of misconduct which under traditional standards will justify relief. Admittedly, the line between oppression and dissatisfaction may be fine.

24. A controlling faction may consist of a single shareholder or several, and control may lie in the hands of holders of less than the majority of the stock.

tracted in advance concerning important policies or the allocation of control within the venture. The position of this minority participant, in short, is that of an outsider to the "control group,"[25] and his or her objective will be presumed to be a withdrawal from the relationship and a liquidation of the investment.[26]

Part I of the Article considers the extent to which the "typical" partnership is, as many may believe, truly an easily dissolved and therefore impermanent relationship. The analysis emphasizes the impact under the U.P.A. of a preexisting agreement—express or implied—concerning the duration of the partnership and the extent to which such an agreement may serve to stabilize the relationship among the participants.

Attention shifts to the close corporation in Part II. The ability of a dissatisfied minority participant to withdraw funds by means of a forced dissolution of a solvent, responsibly managed close corporation in most jurisdictions is nonexistent in the absence of misconduct by those in control. Misconduct justifying relief—typically referred to as "oppression"—may be an evolving concept, however, and in some cases has been approached from the more neutral perspective of the effect of a given action on the minority participant rather than the intent of those who are exercising control. This approach, which de-

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See Note, *Standards of Management Conduct in Close Corporation: A Transactional Approach,* 33 STAN. L. REV. 1141, 1141 n.3 (1981).

25. This status is more clearly defined in a close corporation than a partnership because even minority partners have significant rights of participation in the affairs of a partnership. For example, a minority partner has equal rights in the management and conduct of the partnership business, U.P.A. § 18, and access to information concerning the partnership, U.P.A. § 20. In addition, partners are accountable to each other as fiduciaries, U.P.A. § 21. *See infra* note 220.

26. This Article is concerned principally with the ability of a participant to withdraw from the venture. Objectives may, of course, vary. In certain circumstances, the individual may be willing to remain a participant in the venture if certain things which he views as objectionable are changed. If the changes are not forthcoming, the participant is prepared to liquidate the investment. To the extent that such an action is viewed by the other participants as undesirable, the dissatisfied participant may attempt to use this bargaining leverage to secure a change in policy that he or she is otherwise organizationally powerless to effect. Another type of dissatisfied minority is one who wishes to "freeze-out" some or all of the other participants. The participant with this objective has control of a resource essential to the operation of the venture and views the other participants as parasites who are not making critical or irreplaceable contributions. The objective of this type of dissatisfied participant, therefore, is to terminate the relationship with the coventurers without affecting his or her ability to continue the business. *See generally* Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem,* 63 VA. L. REV. 1, 27 (1977).

fines oppression in terms of the frustration of reasonable expectations of the minority, will be questioned, not because expectations are irrelevant but rather because they are incorrectly applied to the fault-based concept of oppression.

Part III addresses in more detail the question of whether the dissatisfied minority stockholder should be given the power to compel a dissolution of the enterprise as a means of providing liquidity for his or her investment. The partnership-close corporation analogy is examined in order to establish that the partnership model, though instructive, is not a proper basis for the reform of corporate law. The analysis concludes by proposing criteria for granting relief to the dissatisfied minority shareholder based upon a denial of that participant's reasonable expectations.

I. PERMANENCE AND THE RELATIONSHIP AMONG PARTNERS

A. The Power to Dissolve a Partnership

An analysis of the position of the dissatisfied partner must begin with an examination of the extent to which the U.P.A. treats the partnership relationship as one of permanence. Section 31 of the U.P.A. sets forth its basic principle concerning the permanence of the partnership relationship with succinctness which should be the envy of any draftsperson. A dissolution of the partnership, according to this section, may be caused "by the express will of any partner."[27] Thus, the U.P.A. starts from the proposition that a partner has the power to dissolve the partnership relationship at any time, with or without proper cause and without regard to any existing agreement concerning dissolution.[28]

Because of the ease with which a partnership may be dissolved, a dissatisfied partner, at least in theory, will not be

27. *See* U.P.A. § 31(1)(b), (2). This principle predates the U.P.A. *See* J. Story, Commentaries on the Law of Partnership § 269 (1841). Story indicates that "[t]he same rule equally prevails in the Roman law," and "[t]his also is the clear result of the French law . . . under ordinary circumstances." *Id.* § 270 (citation omitted).

28. A dissolution does not in and of itself terminate the partnership, which continues until the affairs of the partnership are concluded. *See* U.P.A. § 30. Normally, the partner seeking to terminate the relationship has the right to have the assets of the partnership liquidated. *See* U.P.A. § 38(1). The right to compel a liquidation, however, may be affected if the dissolution is "wrongful." *See* U.P.A. § 38(2)(b); *infra* text accompanying notes 38-45.

"trapped" in an unsatisfactory business relationship.[29] The justification for the U.P.A.'s position in this regard is that a partnership is both an agency and a personal relationship, and an individual should not be forced to remain in such a situation against his or her will.[30] Because a partner's personal assets are potentially put at risk for the obligations arising out of the partnership relationship,[31] the U.P.A. treats the reasons for withdrawing[32] and the impact that withdrawal will have on the other participants as irrelevant to the question of whether the power to dissolve may be exercised. It is enough that the participant wants to terminate the relationship.

The power of a participant to dissolve a partnership should not be overstated, however, for it is limited to the termination of the existing relationship among the coventurers. The fate of the business and the economic consequences of the act of dissolution depend upon whether the exercise of that *power* was coupled with the *right* to so act.

B. The Right to Dissolve a Partnership

The principle that a partnership represents a fragile relationship terminable at the will of any of its participants is tempered by a competing precept, underlying much of the U.P.A., that supports the right of partners to arrange their affairs as they deem fit.[33] The respect accorded by the U.P.A. to agree-

29. *See generally* Bromberg, *Partnership Dissolution—Causes, Consequences, and Cures,* 43 Tex. L. Rev. 631 (1965).

30. The official comment to U.P.A. § 31 indicates:

> The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in doing so he breaks a contract, should, it is submitted, be recognized.

Occasional decisions demonstrate a lack of familiarity with this principle. In Williams v. Terebinski, 24 Ohio Misc. 531, 261 N.E.2d 920 (1970), for example, the court concluded that notice of dissolution by the defendant "was no more than an expression on the part of [defendant] of his desire to have the partnership dissolved, which required under the circumstances plaintiff's consent to such dissolution." *Id.* at 57, 261 N.E.2d at 923.

31. *See generally* H. Reuschlein & W. Gregory, Handbook on the Law of Agency and Partnership §§ 194-207 (1979).

32. *See, e.g.,* Campbell v. Miller, 274 N.C. 143, 150, 161 S.E.2d 546, 551 (1968). *But see infra* text accompanying notes 87-99.

33. For example, U.P.A. § 18 is a provision of considerable importance because it sets forth the broad rights and duties of the partners in relation to the partnership. This section, however, is "subject to any agreement" between the parties. Several other U.P.A. sections are qualified in a similar fashion. *See, e.g.,* U.P.A. §§ 8, 9, 19, 25, 27, 37, 40, 42, 43.

ments between the partners[34] may have a significant impact on the ability of a partner to dissolve an unsatisfactory relationship with coventurers by imposing unacceptable consequences on a person prematurely dissolving the partnership.

1. *The Agreement as to Duration*

The existence of an agreement concerning the duration of a partnership stands in apparent conflict with the principle that a partnership may be dissolved by the express will of any of its partners. Section 31(1) of the U.P.A. contemplates just such an agreement by providing, in part, that dissolution may be caused "without violation of the agreement" between the partners,

> (a) By the termination of the *definite term* or *particular undertaking* specified in the *agreement*, [or]
>
> (b) By the express will of any partner when no *definite term* or *particular undertaking is specified*.[35]

A strong policy favoring the right of parties to arrange their affairs as they desire would render it impossible, or at least very difficult, for a dissatisfied partner to dissolve a relationship in contravention of an agreement establishing a partnership term.[36] This partnership law does not do, for just as the U.P.A. supports the right of individuals to supplant its provisions by private agreement, so too it will not force an individual to remain in a partnership against his or her will. Section 31(2) makes this clear by permitting the dissolution of a partnership by the express will of a partner even if that dissolution is "[i]n contravention of the agreements between the partners." The compromise between these two potentially conflicting principles—the right to agree as to a term or undertaking and the power to dissolve the relationship—is found in the consequences under the U.P.A. of a "wrongful" dissolution.[37]

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34. The U.P.A.'s deference to agreements between partners has had an important influence on the reform of close corporation law. *See infra* note 208.

35. U.P.A. § 31(1)(a), (b) (emphasis added). The agreement may also attempt to cover the consequences of a dissolution, in which case the agreement will govern. *See, e.g.,* Gibson v. Angros, 30 Colo. App. 95, 103, 491 P.2d 87, 91 (1971); Adams v. Jarvis, 23 Wis. 2d 453, 458, 127 N.W.2d 400, 403 (1964). On the subject of partnership continuation agreements, see generally Bromberg, *supra* note 29, at 653-59; Fuller, *Partnership Agreements for Continuation of an Enterprise After the Death of a Partner,* 50 YALE L.J. 202 (1940); Note, *Partnership Continuation Agreements,* 72 HARV. L. REV. 1302 (1959).

36. An alternative to the approach taken by the U.P.A. would be to prohibit the dissolution of a partnership without a showing of good cause.

37. *See* U.P.A. § 38(2).

a. The "Wrongful" Dissolution

Although a minority partner, through a mere expression of will, has the power to dissolve the partnership at any time, the consequences of such an action depend upon whether the dissolution is "wrongful," a concept which the U.P.A. treats as largely equivalent to "in contravention of the partnership agreement."[38] Thus, a dissolution in violation of a partnership agreement specifying a term or undertaking, though effective, is wrongful.

There are three principal consequences of a "wrongful" dis-

38. "In contravention" language appears in U.P.A. §§ 31(2), 38(1), and 38(2). Section 31(2) provides that dissolution is caused "[i]n 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." Section 38 provides, in part:

> (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. . . .
>
> (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 paragraph (1) of this section, and
>
> II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.
>
> (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 (2a II) of this section, and in like manner indemnify him against all present or future partnership liabilities.
>
> (c) A partner who has caused the dissolution wrongfully shall have:
>
> I. If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2a II), of this section,
>
> II. If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners 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.

In addition, the partnership agreement may permit dissolution at any time but impose a non-competition clause on the withdrawing partner. *See, e.g.,* Fuller v. Brough, 159 Colo. 147, 154, 411 P.2d 18, 21 (1966).

solution, all of which are economic and each of which will vary in seriousness depending upon the particular circumstances involved. First, the partner causing a wrongful dissolution of the partnership will be liable to the remaining partners for damages which occur as a result of the dissolution.[39] Second, if the remaining partners wish to continue the business,[40] they may do so and thereby avoid liquidation.[41] This second consequence may also have the important results of precluding any use of partnership property by the wrongfully dissolving partner[42] and enabling the remaining partners effectively to

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39. U.P.A. § 38(2)(a)II. The settlement of the withdrawing partner's account may be reduced by the amount of these damages. U.P.A. § 38(2)(b). Although a complete discussion of the measure of damages is beyond the scope of this Article, it should be noted that a surprisingly small number of cases have provided guidance as to the manner in which damages will be calculated under such circumstances. Perhaps the most extensive discussion is found in Gherman v. Colburn, 72 Cal. App. 3d 544, 561-65, 140 Cal. Rptr. 330, 341-43 (1977). *See also* James v. Herbert, 149 Cal. App. 2d 741, 749, 309 P.2d 91, 96 (1957) ("Where, without fault on his part, one party to a contract who is willing to perform is prevented from doing so by the other party, the primary measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance and the anticipated profits which he would have derived from performance. . . . Damages consisting of the loss of anticipated profits need not be established with certainty."). If the innocent partners exercise their right to continue the business, they may forfeit any claim which they have for destruction of the business, although they can recover for damage to it. *See* A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 75 at 428 n.78 (1968). *Cf.* Beck, *Formalizing the Farm Partnership,* 54 NEB. L. REV. 558, 564 (1975) (suggesting that partners may wish to provide for an "exacting measure of damages in the formalized partnership agreement").

40. If the affairs of the partnership are to be concluded, a partner wrongfully causing the dissolution has no right to participate in the winding up of partnership affairs. *See* U.P.A. § 37.

41. Certain conditions are imposed by § 38(2)(b) under such circumstances to protect the interests of the partner "wrongfully" causing the dissolution. The partners may continue the business and possess the partnership assets by either settling the withdrawing partner's account or posting a bond securing his interest. Further, the remaining partners must indemnify the withdrawing partner against present and future partnership liabilities.

The liquidation right is also unavailable in at least two other circumstances. The first is if the dissolution occurs because of the expulsion of a partner which is "bonafide under the partnership agreement." U.P.A. § 38(1). *See generally* Note, *The Expulsion Clause in a Partnership Agreement: A Pre-Planned Dissolution,* 13 U.C.D. L. REV. 868 (1980). The use of an expulsion clause in a partnership agreement is said to be rare. *See* Bromberg, *supra* note 29, at 653. The second situation in which the liquidation right is not available is when there has been an agreement to the contrary. *See* U.P.A. § 38(1). Although additional exceptions to the liquidation right have been recognized at equity, one commentator has observed that "[t]hey cannot be relied on for planning purposes." Bromberg, *supra* note 29, at 651 n.122. The soundness of such equitable exceptions is questionable. *See infra* note 104.

42. U.P.A. § 38(2)(b).

purchase the interest of the withdrawing partner.[43] Third, if the remaining partners do not liquidate the assets but instead continue the business, the settlement of the dissolving partner's account may be at a discount, for it need not include his or her proportionate share of the goodwill[44] of the partnership.[45] Thus, the partner wrongfully causing the dissolution is

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43. *See supra* note 41.

44. U.P.A. § 38(2)(c)II. This assumes that the business is continued by the remaining partners. No attempt will be made in this Article to define or explore in depth the nature of "goodwill." The following is an aged but still useful definition:

> This good-will may be . . . described to be the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

J. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP § 991, at 169-70 (6th ed. 1868). *Cf.* CAL. CIV. PROC. CODE § 1263.510(b) (West 1982) ("'[G]oodwill' consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage."); CAL. BUS. & PROF. CODE § 14100 (West 1964) ("The 'good will' of a business is the expectation of continued public patronage."). It may be easier to define than apply the concept, and one commentator has suggested that it is "so elusive that a cynic may wonder whether it serves any purpose beyond the padding of one partner's claim against another." A. BROMBERG, *supra* note 39, § 84 at 477. For discussions of the application of the concept of goodwill to partnerships, see *id.* § 84; H. REUSCHLEIN & W. GREGORY, *supra* note 31, §§ 224-226. Some courts distinguish between individual and partnership goodwill. *See infra* note 95. The problems of identifying, valuing, and treating goodwill and related assets are not limited to partnerships. *See, e.g.,* Bergman, *The Valuation of Goodwill,* 53 L.A.B.J. 87 (1977); Bruch, *The Definition and Division of Marital Property in California: Toward Parity and Simplicity,* 33 HASTINGS L.J. 769, 810-21 (1982).

45. The "all or nothing" approach which the U.P.A. takes to the disposition of goodwill after a wrongful dissolution may produce harsh results when the goodwill component of the business is substantial. *See, e.g.,* Drashner v. Sorenson, 75 S.D. 247, 63 N.W.2d 255 (S.D. 1954) (where goodwill was the most valuable asset of the business). The forfeiture of goodwill under such circumstances has been rationalized as a proper sanction against one who acts wrongfully. *Id.* at 254, 63 N.W.2d at 259. This cannot, however, be an adequate explanation, since the forfeiture is not permitted unless the remaining partners continue the business. U.P.A. § 38(2)(c)II. If the business is not continued and the assets are liquidated, goodwill, to the extent realized upon the liquidation, is shared by all partners, including the one who has caused the wrongful dissolution. *See* U.P.A. 38(2)(c)I.

A number of arguments may be offered in support of the "all or nothing" position of the U.P.A. with respect to goodwill and the distinction which it draws between continuing and liquidating a business. First, the value of goodwill is difficult for a court to determine; standing alone, however, this argument is less than compelling in light of the willingness of courts, taxpayers, and the government to deal with similar valuation problems in other contexts. *See, e.g.,* Bergman, *supra* note 44, at 87. Second, the U.P.A. approach facilitates the conable to sever the relationship with his or her coventurers, but only at what in a given situation may be an unacceptable cost.

b. Equitable Dissolution of the Fixed Term Partnership

Under certain circumstances the dissatisfied partner may be able to terminate the relationship despite the existence of an agreement specifying a term or undertaking and nevertheless avoid a wrongful dissolution. Such a result may be accomplished by obtaining an equitable decree of dissolution under section 32(1) of the U.P.A., which defines the grounds for such relief as follows:

> (a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,
> (b) A partner becomes in any other way incapable of performing his part of the partnership contract,
> (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,
> (d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,
> (e) The business of the partnership can only be carried on at a loss,
> (f) Other circumstances render a dissolution equitable.

These grounds are noteworthy in two respects. First, three of the grounds—lunacy, incapacity, and likelihood of loss—and perhaps a fourth—other circumstances which render a dissolution equitable[46]—do not require some form of misconduct by another partner.[47] Second, the grounds do not depend upon

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tinuation of the partnership business by potentially lowering the amount which must be paid in settlement of the dissolving partner's account. Third, it is generally assumed that all or a substantial portion of the goodwill will not be realized in the event of a liquidation of assets, *see infra* note 147, and the fact that the remaining partners intend to continue the business is a mere fortuity that should not accrue to the benefit of the dissolving partner.

46. This latter ground does not appear to have developed as a strong, independent basis for dissolution.

47. Because misconduct as a basis for partnership dissolution is not the concern of this Article, no attempt will be made to review the nature of actions which will justify relief under U.P.A. § 32(1). For a general treatment of the matter, see A. BROMBERG, *supra* note 39, § 78. For representative decisions indicating that relief will not be granted lightly under these sections, see Fuller v. Brough, 159 Colo. 147, 153, 411 P.2d 18, 21 (1966) (describing standard for relief as follows: "[G]ross misconduct, want of good faith, wilful neglect of partnership obligations, and such other causes as are productive of serious and permanent injury to the partnership, or which render it impracticable to carry on the partnership business. . . . [A] court of equity will not dissolve an existing partnership for trifling causes or temporary grievances involving no permanent mischief."); Potter v. Brown, 328 Pa. 554, 561, 195 A. 901, 904 (1938) ("Differences and discord should be settled by the partners themselves by the application of mutual forebearance rather than by bills in equity for dissolution."); Lunn v.

control status within the partnership. A dissatisfied partner, therefore, may be entitled to relief even though the partner whose status or actions are complained of is also a minority partner and therefore not part of the "control" group.

Obtaining an equitable decree of dissolution protects the dissatisfied partner from the consequences of a wrongful dissolution. It may also be possible for the dissatisfied partner to assert that the actions of the other partners were such that they should be treated as having wrongfully dissolved the partnership.[48] This argument, if successful, would permit the withdrawing partner to continue the business, possess the partnership assets, utilize the partnership goodwill, and recover damages from the culpable partners. Whether one can consider any dissolution other than a dissolution by the express will of a partner pursuant to section 31(2) to be "wrongful" and thus subject to the consequences outlined in section 38 is not clear, however. While logic and policy considerations would require that this be answered in the affirmative, sections 31, 32, and 38 of the U.P.A. raise a considerable amount of uncertainty on the subject.[49]

Kaiser, 76 S.D. 52, 54, 72 N.W.2d 312, 314 (1955) ("[P]ersonal animosity . . . existing between the parties did not detract from the successful conduct of the business."). Failure to properly account or fully disclose the state of partnership affairs, on the other hand, is sometimes asserted with success as a ground for dissolution. *See, e.g.,* Owen v. Cohen, 19 Cal. 2d 147, 152, 119 P.2d 713, 715-16 (1941) (although it acknowledged that "trifling and minor differences which involve no permanent mischief will not authorize a court to decree a dissolution," the court granted relief because the circumstances of the business required cooperation and added: "It is not only large affairs which produce trouble. The continuance of overbearing and vexatious petty treatment of one partner by another frequently is more serious in its disruptive character than would be larger differences which would be discussed and settled."); Olivet v. Frischling, 104 Cal. App. 3d 831, 843, 164 Cal. Rptr. 87, 93 (1980) (dicta indicating that a partner who agrees to give his personal attention to the partnership business and who engages in activities preventing him from giving the business the attention it needs will have "breached his implicit agreement to refrain from undermining the partnership's best interests," and the remaining partners will be entitled to equitable dissolution under either ground (d) or (f)); Ferrick v. Barry, 320 Mass. 217, 221, 68 N.E.2d 690, 694 (1946) (dissolution granted on the "impracticable to do business" ground because "while [the accused partner] was not dishonest in his dealings with the partnership business, his mannerisms manifested an assumption of preeminence in the firm; he was reluctant and slow in making full disclosure of his doings to his partners; he was wanting in spontaneous candor; he was indiscreet and created natural suspicion and distrust in the minds of his partners.").

48. *See* Bromberg, *supra* note 29, at 638.

49. The uncertainty arises from the use of the terms "wrongful" and "in contravention of the agreement" in U.P.A. §§ 31, and 38. Section 38 establishes the rights of the partners upon dissolution and varies these rights depending upon whether the dissolution is caused "in contravention of the agreement."

2. *The Implication of Agreements Concerning Partnership Duration*

a. Informality in the Establishment of a Partnership

Formalities are not required to form a general partnership. In this regard, partnerships are very much unlike corporations. No written contract or document need be drafted or filed to form a partnership, and if there exists "an association of two or more persons to carry on as co-owners a business for profit," there is a partnership.[50] It is therefore not necessary that the individuals intended to establish the legal relationship known as a partnership or that they were aware of the legal consequences of establishing such a relationship.[51] Not surprisingly, whether a partnership relationship exists under a given set of facts may not be susceptible of an easy resolution.[52] At its extreme, the consequences of this lack of formalism can be seen

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See supra note 38. In discussing the relative rights of the parties when dissolution is in contravention of the partnership agreement, § 38(2) distinguishes the rights of the partners who have caused the dissolution "wrongfully" from those who have not, thereby implying that the only wrongful dissolutions are those which are in contravention of an agreement. When read in combination with § 31(2), which provides, apparently in a definitional sense, that dissolution is caused "[i]n 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 anytime," it may be concluded that a dissolution is only wrongful when it is caused by the express will of a partner pursuant to § 31(2) as opposed to a judicial decree under § 32.

Resolution of this interpretive question is not necessary to permit a treatment of the issues presented in this Article, and it would appear that this is an area which merits further scholarly attention. It is not unreasonable to observe at this point, however, that an interpretation of the U.P.A. which may be more sensible than the one outlined above is that dissolutions which are wrongful for purposes of § 38 are those which are accomplished either by the express will of a partner pursuant to § 31(2) or by decree where there has been a finding of fault under §§ 32(c) or (d). A course of conduct which prejudices the continued operation of the business or which makes it impracticable to carry on the business in partnership with the individual may, like a willful or persistent breach of the partnership agreement, be viewed as conduct which causes a dissolution "in contravention of the partnership agreement" for purposes of § 38 if "agreement" is viewed in a broad sense to include implied convenants to cooperate and act in good faith rather than in a manner which will prejudice the partnership business. For a brief discussion of this issue, see A. BROMBERG, *supra* note 39, § 75(d) at 430. *See also* Vangel v. Vangel, 116 Cal. App. 2d 615, 625-26, 254 P.2d 919, 925-26 (1953), *aff'd in part, rev'd in part,* 45 Cal. 2d 804, 291 P.2d 25 (1955); Drashner v. Sorenson, 75 S.D. 247, 252, 63 N.W.2d 255, 259 (1954).

50. This is the definition provided in § 6(1) of the U.P.A.

51. *See infra* note 53.

52. "[T]here is one matter connected with partnership which legislation cannot make certain. By no human ingenuity would a Partnership Act which does not abolish common law partnerships enable the person who reads it to tell in every supposable case whether there is or is not a partnership." Lewis, *supra* note 17, at 621.

in those partnerships which, from the point of view of those unfortunate individuals later determined to be partners, were created accidentally.[53]

Requiring a measure of formalism in the creation of a relationship does not insure that the parties will engage in what is perhaps best referred to as "business planning."[54] The absence of any degree of formality, however, certainly decreases the

53. Howard Gault & Son, Inc. v. First Nat'l Bank, 541 S.W.2d 235 (Tex. Civ. App. 1976) is illustrative. Plaintiff corporation and Thomas entered into an agreement whereby Thomas would farm land, one portion of which plaintiff owned and another portion of which plaintiff and Thomas co-leased from a third party. As rent for using plaintiff's land, Thomas would pay plaintiff a share of the crop. The agreement also provided for an equal sharing of all losses and all net revenues, rents and proceeds after the payment of the land rent by Thomas. It expressly stated, however, that the parties were not engaged as partners but instead as landlord and tenant. In subsequent litigation the court, while noting that § 7 of the U.P.A. provides that a partnership will not be inferred when profits are received as rent to a landlord, nonetheless held that other elements of the agreement established a partnership, despite the parties' express intention to the contrary:

> The statement . . . that the farming operation was not a partnership is not conclusive on the question of partnership. It is the intent to do the things that constitute a partnership that determines that the relationship exists between the parties, and if they intend to do a thing which in law constitutes a partnership, they are partners whether their expressed purpose was to create or avoid the relationship.

Id. at 237.

Singleton v. Fuller, 118 Cal. App. 2d 733, 259 P.2d 687 (1953) is also instructive. In this case the court found that a creditor was a partner in the business and therefore jointly liable for its debts, despite an express agreement that the relationship was not a partnership but that of debtor-creditor. While acknowledging that the payment of debts out of profits does not alone raise the inference of a partnership, the court found sufficient participation in the business by the appellant to establish a partnership.

In Beverly v. McCullick, 211 Kan. 87, 505 P.2d 624 (1973), defendants agreed to manage a cattle auction business for plaintiff, then formed a corporation through which capital was advanced and profits and losses were shared. Plaintiff successfully charged defendants with breach of contract not to compete and with conspiracy to destroy plaintiff's business. Defendants sought to limit recovery to loss of rents by claiming only a landlord-tenant relationship had existed. The court, however, found a partnership had arisen. As a result, the action was in tort, not contract, for breach of the fiduciary duty owed to a partner, and defendants were liable as well for diminution of the value of plaintiff's business facility and $100,000 in punitive damages. *See also* Associated Piping & Eng'g Co. v. Jones, 17 Cal. App. 2d 107, 110-111, 61 P.2d 536, 538 (1936) (The parties' "intention in this respect is immaterial . . . if the contract by its terms establishes a partnership between the parties, even the expressed intent that it should not be so classed would be of no avail."); Martin v. Peyton, 246 N.Y. 213, 218, 158 N.E. 77, 78 (1927) ("Mere words will not blind us to realities. Statements that no partnership is intended are not conclusive.").

54. *See, e.g.*, Fessler, *The Fate of Closely Held Business Associations: The Debatable Wisdom of "Incorporation,"* 13 U.C.D. L. REV. 473, 483-84 n.22 (1980) ("Perhaps it is appropriate that the lack of considered reasoning that is often behind the decision to incorporate can now be matched by an absence of particularized drafting in the crucial process of incorporation.").

likelihood of such planning. Under such circumstances, the parties are less likely to consult legal counsel or even take the opportunity to discuss and reach understandings concerning the relative rights and responsibilities of each.[55] The U.P.A. accomodates this potential lack of planning by providing a series of rules to govern the relationships among partners in cases where the parties have not reached agreements in advance. The rules so provided are generally suppletory, however, and the U.P.A. drafters happily withdraw the Act's norms in favor of agreements concluded among the partners.

One of the more ironic features of the U.P.A. is that while it shows great deference to an agreement among the partners it at no time defines what it means by "agreement." Naturally, the ideal situation is one in which the parties, with the assistance of legal counsel, have developed a comprehensive written document embodying the series of agreements which will govern their relationship. Between the comprehensive written agreement and the unplanned partnership governed by U.P.A. rules lie a variety of relations among partners based to some degree on unwritten understandings. Problems of proof and the statute of frauds aside,[56] there appears to be no reason why courts should not accord respect to such informal agreements. Acceptance of this premise does not, however, answer the question of how readily courts should infer an implied partnership agreement regarding a "definite term" or a "particular undertaking." The more easily courts infer such an agreement, the more likely it is that "premature" dissolution of a partnership will be wrongful, absent an equitable decree of dissolution.

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55. The mere act of consulting an attorney at the incorporation stage may be viewed as an act of distrust. For an account of a lawyer advising individuals not to go into business together if they feel a need to have binding agreements to resolve differences in advance, see Hetherington, *Special Characteristics, Problems, and Needs of the Close Corporation,* 1969 U. ILL. L.F. 1, 16 n.65. *Cf.* Worcester, *The Drafting of Partnership Agreements,* 63 HARV. L. REV. 985, 986 (1950) ("Since a partnership is an extremely intimate relationship, perhaps the greatest potential problem is the risk of future disagreement among those who start out with the highest mutual regard."). The absence of planning at the formation stage is a problem for both corporations and partnerships. *See generally* Dykstra, *Molding the Utah Corporation: Survey and Commentary,* 7 UTAH L. REV. 1 (1960); Hetherington, *supra,* at 15-19; O'Neal, *Close Corporation Legislation: A Survey and an Evaluation,* 1972 DUKE L. J. 867, 889. *Cf.* Note, *Mandatory Arbitration as a Remedy for Intra-Close Corporate Disputes,* 56 VA. L. REV. 271, 276 (1970) ("Planning for irreconcilable disagreement may itself strain the mutual trust upon which the business collaboration is founded.").

56. A consideration of the impact of the statute of frauds on the unwritten partnership agreement is beyond the scope of this Article. *See generally* A. BROMBERG, *supra* note 39, § 23 at 110-13, § 39 at 224-27.

By increasing the probability of adverse consequences for the dissolving partner, this result in turn would increase the stability of partnerships.

b. The Implied Agreement Not to Dissolve a Partnership

Although the U.P.A. does not define the critical term "agreement," section 31 provides that dissolution may be caused, without violation of the agreement among the parties, "[b]y the termination of the *definite* term or *particular* undertaking *specified in the agreement*"[57] and "[b]y the express will of any partner when no *definite* term or *particular* undertaking is *specified*."[58] Section 31 thus suggests that the type of agreement which will alter the U.P.A. policy of dissolvability without sanctions must be one which clearly sets forth the duration of the partnership.[59] At the very least, this provision of the U.P.A. cannot be said to encourage the implication of terms or undertakings.

(1) *The Implied Definite Term or Particular Undertaking*

A number of courts have shown a willingness to infer partnership terms or undertakings from facts that would not seem to be contemplated by the rather precise language of section 31. This lack of adherence to statutory language is understandable, however, in light of the informality with which partnerships can be created. While it would be of great assistance if the parties would reduce to writing their understandings concerning the relative rights and obligations of each, the failure to develop such a document does not mean that mutually accepted understandings and expectations do not exist. Thus, to construe the language of section 31 literally and recognize only undisputed and exact agreements concerning the duration of the relationship would introduce an element of formality uncharacteristic of both the U.P.A. and the environment in which a substantial number of partnerships are created. The problems in this connection should be more in the nature of proof than of concept.

57. U.P.A. § 31(1)(a) (emphasis added).

58. U.P.A. § 31(1)(b) (emphasis added).

59. Not dispositive but worthy of note is one dictionary definition of "specified" as a matter "that is or has been definitely or specifically mentioned, determined, fixed or settled." THE OXFORD ENGLISH DICTIONARY 549 (10th ed. 1961).

(2) *Testing the Limits of Implication*

Although in some circumstances it may be reasonable to infer an agreement concerning partnership duration, a number of courts have displayed a willingness to find such agreements on the basis of facts best described as weak. The effect of such an approach is particularly severe where the court not only implies the existence of such an agreement but also determines that the term established by the implied agreement is one of substantial duration.

A series of California cases exhibits a clear progression from a reasonable, if arguable, implication of an agreement concerning duration, to an implication based on facts so weak that virtually any partnership would be susceptible to an inference of an implied agreement regarding duration.[60]

In *Bates v. McTammany,*[61] two individuals formed a partnership for the purpose of operating a radio station. The federal license necessary to operate the station was renewable every six months and was nontransferable; the value of the license, therefore, would be lost in the event of a dissolution of the partnership. The principal issue presented was whether this partnership was for a particular undertaking in light of the importance of the license in the operation of the business. Whether there existed an agreement concerning the duration of the partnership was subject to resolution in one of three ways. The first, rejected both at trial and on appeal, was that this was not a partnership for a specified term or particular undertaking and was therefore terminable at will. In the alternative, the duration issue could have been resolved by concluding that the partnership was formed for a definite term which coincided with the term of the federal license—that is, six months, without regard to renewals. This alternative, which was not addressed in the opinion, would have permitted the treatment of the partnership term as a series of successive terms, each of which coincided with the renewal term of the radio license; the partnership could then have been dissolved without violation of the agreement at the end of any of the six month periods.

60. The California cases were selected because they represent the clearest line developing the concept of implied agreements concerning partnership duration. In addition, Zeibak v. Nasser, 12 Cal. 2d 1, 82 P.2d 375 (1938), and Page v. Page, 55 Cal. 2d 192, 359 P.2d 41, 10 Cal. Rptr. 643 (1961), discussed in the succeeding section, are important in their own right. *See* D. FESSLER, *supra* note 13, at 153-65. For additional cases implying terms as to duration, see *infra* notes 77-79. For cases refusing to imply such terms, see *infra* note 85.

61. 10 Cal. 2d 697, 76 P.2d 513 (1938).

Instead of following either of these two approaches, the court sustained the finding of the trial judge that the partnership was one for a definite undertaking for "so long as the federal license therefor could be procured."[62] This conclusion, which focuses on the renewability of an intangible partnership asset,[63] results in an undertaking for a period which is both vague and of potentially significant length.[64]

That the California Supreme Court would be willing to reach far to find implied terms or undertakings was demonstrated even more clearly in *Zeibak v. Nasser*.[65] In *Zeibak,* four individuals and one corporation formed a venture having as its purpose the acquisition of a business. The principal assets of the business consisted of ownership and leasehold interests in various theatres. The parties intended to acquire these assets as partners and immediately thereafter form a corporation for the management of the business. Plaintiff Zeibak was an important source of capital for the venture, and, accordingly, was to own a one-half interest. The parties commenced the venture and acquired the assets on the basis of an agreement, perhaps best described as preliminary, calling for the formation of a corporation to operate the theatres.[66] The agreement also provided that "definite understandings shall also be had" concerning disbursement of funds, general policies, and the manner and extent to which Zeibak would participate in the operation of the corporation.[67]

Almost from the beginning, differences arose between

62. *Id.* at 700, 76 P.2d at 515.

63. This approach would appear to be equally applicable to leases, franchises, supply contracts, and similar arrangements.

64. Regrettably, the facts supporting the finding of such a lengthy term were not disclosed by the court. While it is not clear that the determination rested on implied rather than express oral understandings, *Bates* was subsequently cited by the California Supreme Court in a manner suggesting that it was based on implied understandings. *See* Zeibak v. Nasser, 12 Cal. 2d 1, 13, 82 P.2d 375, 381 (1938). An earlier California decision had also found an implied partnership term. *See* Mervyn Inv. Co. v. Biber, 184 Cal. 636, 641-42, 194 P. 1037, 1039 (1921).

65. 12 Cal. 2d 1, 82 P.2d 375 (1938).

66. *Id.* at 4, 82 P.2d at 377. The document was curiously entitled "Memorandum of Understanding Reached and to be Reached." For reasons that are not clear, one of the partners did not sign the Memorandum. He did sign a separate agreement providing that management and control of the business would be entrusted to the same partners identified for this purpose in the Memorandum. This separate agreement was apparently not executed by Zeibak. The failure of the partner to sign the first Memorandum, and the apparent failure of Zeibak to sign the second agreement, were not treated as significant in the Court's analysis.

67. *Id.*

Zeibak and the partners active in the management of the enterprise.[68] These differences, which included disputes over management policies and the relative rights of the partners, were never resolved. Contrary to the original agreement, the business was operated as a partnership rather than a corporation. In addition, the "definite understandings" contemplated by the preliminary agreement were never forthcoming, although negotiations continued for nearly a year following the execution of the preliminary agreement.[69] Throughout this period, Zeibak was kept well informed concerning the operation of the business, but he was never permitted to participate in its management. Although the business prospered, Zeibak was not content with his passive role in the venture and initiated an action seeking dissolution of the partnership and an accounting. The remaining partners—anxious to continue the highly profitable business—argued that Zeibak had caused the wrongful dissolution of the partnership.[70] They asserted, therefore, that Zeibak was liable in damages for the dissolution, and that they should be permitted to possess partnership assets and continue the operation of the business upon the payment to Zeibak of an amount equal to his share of the value of the business, excluding goodwill.

The pivotal issues in this controversy were whether the partnership was for an undertaking and whether Zeibak had caused its premature dissolution.[71] As in *Bates*, there were no written agreements between the parties defining the term or undertaking of the partnership. Indeed, it was clear that the parties intended for the *initial* partnership to have the limited

68. *Id.* at 5, 82 P.2d at 377.

69. Approximately eight months after the execution of the Memorandum, the parties came close to reconciling their differences. Draft agreements were executed, but they were not exchanged because of last-minute attempts by Zeibak to gain additional concessions. The court found this "a violation of the duty he owed his fellow partners of cooperating with them to effectuate the purposes for which all had joined." *Id.* at 9, 82 P.2d at 379.

70. The remaining partners presented three grounds for this argument: (1) Zeibak had refused to cooperate in carrying on the partnership; (2) Zeibak had not complied with the terms of the oral undertaking pursuant to which the venture was established; and (3) Zeibak had asserted rights and made demands not contemplated by that same oral understanding. *Id.* at 6, 82 P.2d at 378.

71. The court viewed the dissolution as caused by the exercise of the lower court's equitable powers as opposed to the express will of any of the partners. *Id.* at 16, 82 P.2d at 382. The equitable dissolution by the lower court was apparently based on what it viewed as wrongful conduct by plaintiff Zeibak. For a discussion of this approach to wrongful dissolutions, see *supra* note 49.

function of acquiring the assets.[72]

The California Supreme Court, however, had little difficulty in concluding that this was not a partnership terminable at will. The court reasoned that "[n]otwithstanding the fact that the trial court found the venture was not entered into for any specific period of time, but was to end . . . upon the formation of a corporation, this was never done, and the parties voluntarily continued their status as joint venturers . . . ."[73] Thus, the failure of any of the partners to dissolve the partnership at some ill-defined point after the non-occurrence of an event—the failure to form a corporation—was sufficient to warrant a conclusion that *new* implied understandings concerning the operation of the venture and its duration had been reached.[74]

The significance of the finding of an implied undertaking increases in proportion to the length of that undertaking. The court's view in *Zeibak* of the duration for which this partnership was to have existed, however, is less than clear. Without extensive analysis, it concluded that the life of the partnership was coextensive with the duration of the theatre leases.[75] In

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72. Zeibak would then have been a fifty percent stockholder rather than a partner. Although the preliminary agreement indicated that Zeibak would not be involved in the management of the corporation, it also provided that his role in the operation of the business had not yet been the subject of an agreement. In addition, it showed a lack of agreement on such basic matters as "disbursement of funds" and "general policies." *See supra* text accompanying note 67.

73. 12 Cal. 2d at 12, 82 P.2d at 381. The court's approach in *Zeibak* appears to have been influenced by Zimmerman v. Harding, 227 U.S. 489 (1913). At issue in *Zimmerman* was the term of a partnership formed under Puerto Rican law. The Puerto Rican statute, however, did not reflect the approach eventually taken by the U.P.A. Instead, it provided that:

> The dissolution of the partnership by the will or withdrawal of one of the partners shall only take place when a term for its duration has not been fixed, *or if this term does not appear from the nature of the business.* CIVIL CODE § 1607 (1902) (current version at P.R. LAWS ANN. tit. 31, § 4396 (1980)) (emphasis added).

Thus, the statute presented in *Zimmerman* expressly contemplated the implication of a term based on "the nature of the business." The California statute, on the other hand, provided for dissolution "[b]y the express will of any partner when no definite term or particular undertaking is specified." 12 Cal. 2d at 13, 82 P.2d at 381. The *Zimmerman* decision, therefore, provided no support for the analysis undertaken by the court in *Zeibak*. *Zimmerman* continues to be misread. *See, e.g.,* 68th St. Apartments, Inc. v. Lauricella, 142 N.J. Super. 546, 562, 362 A.2d 78, 87 (1976).

74. These same understandings were supposedly reached notwithstanding the existence of differences between Zeibak and his partners "practically from the date of purchase of the business to the time of the filing of the complaint." 12 Cal. 2d at 5, 82 P.2d at 377.

75. "[T]he term of the venture, *at least impliedly*, was of similar duration as the term of the leases under which the theatres were operated." 12 Cal. 2d at 13, 82 P.2d at 381 (emphasis added).

basing its conclusion in this regard on *Bates*, the Court leaves open the possibility that the term would be extended further to the extent that the leases were renewable or, perhaps, renegotiable. *Zeibak*, like *Bates*, demonstrates the vagueness inherent in utilizing arrangements with third parties to establish the existence and define the duration of a partnership term or undertaking.

A further development of this approach to the implication of an extended partnership term on the basis of partnership obligations or contracts is found in yet another decision of the California Supreme Court, *Owen v. Cohen*:[76]

> Defendant's objection to the finding that the partnership was one at will is fully justified by the uncontradicted evidence that the partners at the inception of their undertaking agreed that all obligations incurred by the partnership, including the money advanced by plaintiff, were to be paid out of the profits of the business. While the term of the partnership was *not expressly fixed, it must be presumed* from this agreement that the parties intended the relation should continue until the obligations were liquidated in the manner mutually contemplated.[77]

The analysis employed in *Owen* has rather extraordinary implications, and it is difficult to find a point of distinction between the facts of that case and any partnership in which debt is incurred. The approach developed by *Bates* and *Zeibak* and carried to its logical extreme in *Owen* could render the partnership that is terminable at will without imposition of sanctions on the dissolving partner a rarity. This line of cases, therefore, will encourage stabilized partnership relationships.

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76. 19 Cal. 2d 147, 119 P.2d 713 (1941).

77. 19 Cal. 2d at 150, 119 P.2d at 715 (emphasis added). A subsequent decision of the California Supreme Court implied that the critical factor in *Owen* was the loan by one partner of funds to the partnership. *See* Page v. Page, 55 Cal. 2d 192, 195, 359 P.2d 41, 43, 10 Cal. Rptr. 643, 645 (1961). *See also* Drashner v. Sorenson, 75 S.D. 247, 63 N.W.2d 255 (1954). Curiously, the *Owen* opinion cited neither *Bates* nor *Zeibak*, relying instead upon an earlier decision, Mervyn Inv. Co. v. Biber, 184 Cal. 637, 194 P. 1037 (1921). Additional decisions have also found implied terms. *See, e.g.,* Shannon v. Hudson, 161 Cal. App. 2d 44, 48, 325 P.2d 1022, 1025 (1958) (until partnership property could be disposed of on favorable terms); Vangel v. Vangel, 116 Cal. App. 2d 615, 626, 254 P.2d 919, 926 (1953), *aff'd in part, rev'd in part*, 45 Cal. 2d 804, 291 P.2d 25 (1955) (until partners could recoup a loan); Meherin v. Meherin, 93 Cal. App. 2d 459, 464, 209 P.2d 36, 39 (1949) (insurance brokerage partnership term implied from the period of the brokerage license, a lease, and the joint obligations of the partners to perform continuous services under insurance policies running from one to five years); Pemberton v. Ladue Realty & Constr. Co., 237 Mo. App. 971, 982, 180 S.W.2d 766, 771 (1944) (until lots in subdivision were sold).

(3) *A Second Look at Implied Terms*

Given the informality with which partnerships may be created, it is not unreasonable in some situations to permit the implication of understandings concerning the duration of the term or undertaking. As a general proposition, however, the likelihood that the parties intended a term lessens as the length of the term increases. From all appearances, the *Bates-Zeibak-Owen* line of cases ignores this probability. The burden of establishing a substantial term should be on the partners not seeking dissolution, and, as the duration of the purported term increases, so should the difficulty of carrying the burden. For example, it should not be a difficult burden to establish an undertaking in a partnership formed for the purpose of developing and selling real property,[78] while the burden should be much more difficult to carry if the assertion is of a significant undertaking in connection with the development and management of that same property.[79]

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78. *See, e.g.,* Pemberton v. Ladue Realty & Constr. Co., 237 Mo. App. 971, 180 S.W.2d 766 (1944). *Cf.* Klein v. Greenberg, 461 F. Supp. 653, 655 (M.D.N.C. 1978) (plaintiff demonstrated strong likelihood of success on the merits in an action for a wrongful dissolution of partnership to publish specific books); 68th St. Apartments, Inc. v. Lauricella, 142 N.J. Super. 546, 562, 362 A.2d 78, 87 (1976), *aff'd* 150 N.J. Super. 47, 374 A.2d 1222 (1977) (a curious case applying partnership principles to a close corporation and concluding that the term of the venture was until completion of a building). *See also* Hardin v. Robinson, 178 App. Div. 724, 729, 162 N.Y.S. 531, 534 (1916), *aff'd* 223 N.Y. 651, 119 N.E. 1047 (1918) ("[W]here a partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished.").

79. Consider, for example, the awkwardness of the analysis presented in Shannon v. Hudson, 161 Cal. App. 2d 44, 325 P.2d 1022 (1958), where the court concluded that a venture formed to build and operate a motel was not terminable at will but was to continue until the motel could be sold on terms agreeable to all partners:

> Plaintiff contends that the court erred in finding that 'the purpose of the joint venture was the acquisition of real property . . . and the building, furnishing and equipping and the operation of a twelve-unit motel until a sale of said motel could be effected at a profit.' She asserts that there is nothing in the record which indicates that the parties intended not to sell the motel until they could recover a profit thereby. She argues that this finding would have the parties retain the property indefinitely because continued operation at a loss would make it impossible ever to sell the property at a profit. Plaintiff has misconceived the meaning of the finding. It merely states the obvious objective of the parties to make a profit when they sold the property. There can be no doubt that their *purpose* was to operate the motel to facilitate their selling it at a profit. Plaintiff has placed undue emphasis on the words 'at a profit.' Obviously if it appears that continued losses are inevitable and that the parties will likely be unable to sell the motel at a profit, then their primary purpose must be abandoned and the property must be sold at any reasonable price that can be obtained. The finding is clearly without error. (Emphasis in original).

There is some evidence that the inclination of the California courts to imply terms or undertakings has been suspended, if not terminated. In *Page v. Page*,[80] the California Supreme Court considered whether a linen supply business formed on the basis of oral understandings was a partnership for a term.[81] Although the trial court found a term coextensive with the period required to enable repayment of partnership indebtedness, the supreme court held that this finding was without support in the evidence:

> [D]efendant failed to prove *any facts* from which an agreement to continue the partnership for a term may be implied. The understanding to which defendant testified was *no more than a common hope* that the partnership earnings would pay for all the necessary expenses. Such a *hope* does not establish even by implication a definite term or particular undertaking . . . .
>
> All partnerships are ordinarily entered into with the *hope* that they will be profitable, *but that alone* does not make them all partnerships for a term and obligate the partners to continue in the partnership until all of the losses over a period of many years have been recovered.[82]

It is likely that the typical partnership is inaugurated with the partners' hope that their relationship will continue for an extended period and will be profitable to all parties concerned;[83] the court's refusal to equate this common hope with an agreement supplanting the terms of the U.P.A. is sensible.[84] In this connection, *Page* represents a perhaps more cautious approach to the implication of terms concerning the duration of a venture,[85] and thus may undermine the earlier decisions in

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Id. at 48, 325 P.2d at 1025. *See also* Williams v. Terebinski, 24 Ohio Misc. 53, 55, 261 N.E.2d 920, 922 (1970) (since the purpose of the partnership was to acquire a cemetary and sell the lots, the term coincided with the period necessary to accomplish this purpose, which might be "many years in excess of five years.").

80. 55 Cal. 2d 192, 359 P.2d 41, 10 Cal. Rptr. 643 (1961).

81. *See infra* text accompanying note 87.

82. 55 Cal. 2d at 196, 359 P.2d at 43-44, 10 Cal. Rptr. at 645-46 (emphasis added).

83. In addition, contracts, loans, licenses, or leases of more than a short duration are not uncommon. In fact, the absence of all of these in an ongoing business may be a rarity.

84. *Cf.* Girard Bank v. Haley, 460 Pa. 237, 244, 332 A.2d 443, 447 (1975) ("Leasing property, like many other trades or businesses, involves entering into a business relationship which may continue indefinitely; there is nothing 'particular' about it.").

85. A number of other courts have refused to imply partnership terms or undertakings. *See, e.g.,* Johnson v. Kennedy, 350 Mass. 294, 298, 214 N.E.2d 276, 278 (1966) (no term can be implied from an unexecuted written agreement specifying a 25-year term, where the oral agreement creating the partnership specified no fixed term); Seufert v. Gille, 230 Mo. 453, 480, 131 S.W. 102, 109 (1910) (that a partnership has incurred debts and charged its assets for their payment does not justify implication of a term to continue the partnership until its debts are paid, since debts may be paid after dissolution); Frey v. Hauke,

Bates, Zeibak and *Owen*.[86]

3. *The Permanent Terminable At Will Partnership*

While the California Supreme Court in *Page* showed a sensible reluctance to infer, on the basis of weak facts, agreements concerning the term or undertaking of a partnership, dicta in the opinion raises the possibility of another type of implied agreement that may substantially affect the dissolvability of a partnership which might otherwise be considered terminable at will. The partnership in *Page* had shown losses for a number of years but was beginning to turn a profit.[87] The future of the business was bright. Plaintiff, who was apparently the partner most familiar with and involved in the management of the business, obtained a judgment declaring that the partnership was terminable at will. In response to the other partner's concern that the plaintiff's intentions were to dissolve the partnership

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171 Neb. 852, 864-65, 108 N.W.2d 228, 235 (1961) (court refused to imply a definite term merely from the incursion of debts); Netburn v. Fischman, 81 Misc.2d 117, 118, 364 N.Y.S.2d 727, 729 (1975) (no term can be implied from a partnership agreement providing for termination by mutual consent); Malmuth v. Schneider, 18 A.D.2d 1030, 1030, 238 N.Y.S.2d 986, 987 (1963) (partnership agreement which provided for the continuing performance by the parties so long as the agreement should be in effect, but contained no express provision for its duration, was not for a definite term); Campbell v. Miller, 274 N.C. 143, 150, 161 S.E.2d 546, 551 (1968) (lease of property to partnership by certain partners "for as long as we wanted it" consistent with conclusion that partnership terminable at will); Nicholes v. Hunt, 273 Or. 255, 262, 541 P.2d 820, 824 (1975) (that the plaintiff partner was obligated to make seven annual payments on the balance of his capital contribution did not negate a conclusion that the partnership was terminable at will).

86. *Page* may be distinguishable from *Bates* and *Zeibak*, neither of which was cited in *Page* and each of which involved legal arrangements pursuant to which a third party conferred rights upon the partnership. Such a relationship with a third party was not present in *Page*, where the major creditor was a corporation owned by the plaintiff partners. The corporation held a $47,000 demand note, and it could be argued that if this had been a term note, the result in *Page* would have been different. In addition, the court in *Page* found evidence in the record that there were no understandings concerning the term of the partnership in the event of losses. 55 Cal. 2d at 194, 359 P.2d at 43, 10 Cal. Rptr. at 645. The partnership was burdened with losses for a number of years, although it had recently turned profitable, and the establishment of Vandenberg Air Force Base in the vicinity was a promising development. *Id. Page* rather unconvincingly distinguished *Owen* by noting that it was a case in which "the partners borrowed substantial amounts of money to launch the enterprise and there was an understanding that the loans would be repaid from partnership profits." *Id.* at 195, 359 P.2d at 43, 10 Cal. Rptr. at 645.

87. For the first eight years of its operation, the partnership was unsuccessful. The court indicated that there was no showing in the record that this improved profit position was more than temporary. The recent establishment of Vandenberg Air Force Base in the vicinity, 55 Cal. 2d at 196, 359 P.2d at 44, 10 Cal. Rptr. at 646, however, may suggest a contrary conclusion.

and continue the business alone, however, the court issued this strong warning to the plaintiff:

> [P]laintiff has the power to dissolve the partnership by express notice to the defendant. If, however, it is proved that plaintiff acted in bad faith and violated his fiduciary duties by attempting to appropriate to his own use the *new prosperity of the partnership* without adequate compensation to his co-partner, *the dissolution would be wrongful* and the plaintiff would be liable [to his partner because of the wrongful dissolution] for violation of the *implied agreement* not to exclude defendant *wrongfully* from the partnership business opportunity.[88]

This analysis is, at best, unclear. It has long been recognized that the fiduciary relationship among partners requires that they act toward each other with the utmost "good faith and loyalty."[89] Thus, the failure of the plaintiff in *Page* to account for some element of the partnership's goodwill after the dissolution would represent a breach of the fiduciary duty he owed to the defendant.[90] *Page,* however, has introduced a new con-

88. *Id.* at 197-98, 359 P.2d at 45, 10 Cal. Rptr. at 647 (emphasis added). The court applied the corporate terminology of "freeze out" to describe this tactic. *Id.* at 197, 359 P.2d at 44, 10 Cal. Rptr. at 646. For a pre-U.P.A. case somewhat in accord with the *Page* approach, see Trigg v. Shelton, 249 S.W. 209, 215-16 (Comm. App. Tex. 1923). *See also* Howell v. Bowden, 368 S.W.2d 842, 848 (Tex. Civ. App. 1963).

89. *See generally* A. BROMBERG, *supra* note 39, § 68; D. FESSLER, *supra* note 13, at 96-121; Note, *Fiduciary Duties of Partners,* 48 IOWA L. REV. 902 (1963).

90. U.P.A. § 21(1) provides that: "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners *from any transaction connected with the* formation, conduct, or *liquidation* of the partnership or from any use by him of its property." (Emphasis added.) It is thus clear that the fiduciary relationship extends through the liquidation process. *See also* Vai v. Bank of Am. Nat'l Trust & Savings Ass'n, 56 Cal. 2d 329, 339, 364 P.2d 247, 253, 15 Cal. Rptr. 71, 77 (1961); Laux v. Freed, 53 Cal. 2d 512, 522, 348 P.2d 873, 878, 2 Cal. Rptr. 265, 270 (1960); Woodruff v. Bryant, 558 S.W.2d 535, 542 (Tex. Civ. App. 1977). *But see* Babray v. Carlino, 2 Ill. App. 3d 241, 251, 276 N.E.2d 435, 442 (1971) (fiduciary relationship ends at dissolution and during the winding up process the parties may deal with each other on an arms-length basis). If, for example, plaintiff partner in *Page* sells the partnership name after the dissolution, the proceeds resulting from the sale must be shared with defendant. Goodwill cannot be disposed of prior to the dissolution without unanimous consent. U.P.A. § 9(3)(b). Similarly, if plaintiff personally uses the partnership name, *see, e.g.,* Estate of Spingarn, 5 Misc. 36, 38-39, 159 N.Y.S.2d 532, 534-35 (1956), or advertises that the business is being continued with only a name change, *see, e.g.,* Miller v. Hall, 65 Cal. App. 2d 200, 202, 150 P.2d 287, 288 (1944), he may be accountable to the defendant for such use. Although arriving at a satisfactory definition of goodwill is difficult, *see supra* note 44, the principle that goodwill is a partnership asset for which each partner is accountable is clear.

Compare with *Page* the recent decision of the Tennessee Supreme Court in Cude v. Couche, 588 S.W.2d 554, 555-56 (Tenn. 1979). In that case, a sharply divided court found that the dissolution of a partnership was not in breach of any fiduciary duty even though the dissolving partner owned the building in which the business was based, announced that it would not be leased to anyone desiring to continue the business, purchased the assets of the business cept—the "new prosperity of the partnership"—an appropriation of which would be wrongful. Whether "new prosperity" is analogous to goodwill, specific partnership opportunities, or some other traditional concept is not clear, and the phrase is not to be found in either the U.P.A. or common law partnership decisions.

The truly extraordinary aspect of the *Page* dictum, however, is not its use of the term "new prosperity" but rather its treatment of the concept "wrongful," a term of art under the U.P.A. A literal reading of the U.P.A. may support a conclusion that a "wrongful" dissolution can be accomplished only by the express will of a partner pursuant to section 31(2) prior to the expiration of the partnership term or undertaking.[91] A more sensible interpretation, however, would also permit the imposition of section 38 sanctions on a partner who has not expressly dissolved the partnership but whose misconduct has nevertheless resulted in the granting of an equitable decree of dissolution to another partner under section 32.[92] The *Page* dictum carries this one very significant step further, for it raises the possibility that dissolution of a partnership by the express will of a partner pursuant to section 31(1) may be wrongful even though the partnership is not one for a definite term or undertaking[93] and therefore might ordinarily be considered terminable at will.[94]

The test for the wrongfulness of a dissolution offered in *Page* is whether the dissolving partner acted in good faith. Although this suggests that the inquiry becomes one of intent at the time of dissolution, the *Page* dictum indicates that the resolution of this issue will turn on the question of whether the "new prosperity" was actually appropriated, a determination which cannot be made at the time of dissolution. Presumably,

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through an undisclosed agent, and continued the business. A strong dissent indicated that the dissolving partner "appropriated to his own use and benefit the goodwill of a going business, for which the most elementary principles of equity and fair play demand that he pay just and reasonable compensation." 588 S.W.2d at 557.

91. *See supra* note 49.

92. *See* A. BROMBERG, *supra* note 39, § 75 at 430. *See also supra* note 49.

93. The California Supreme Court in *Page* held that the partnership was terminable at will. 55 Cal. 2d at 196, 359 P.2d at 43-44, 10 Cal. Rptr. at 645-46.

94. One commentator who has advocated a broad view of "wrongful," *see supra* note 49, has also observed that "[w]hen the right [to dissolve the partnership] exists, it would seem that there is no liability for its exercise, whatever the motive and whatever the injurious consequences to co-partners who have neglected to protect themselves by an agreement to continue for a definite term." A. BROMBERG, *supra* note 39, § 74 at 422.

such an "appropriation" may be found upon a subsequent judicial determination that the settlement of the weaker partner's account was, in retrospect, unfair.[95] Having established at some point after the fact that the dissolution was "wrongful," the defendant in *Page* would then be able to recover the value of the partnership assets "appropriated" by the plaintiff and activate the "wrongful" dissolution sanctions provided by section 38(2) of the U.P.A. He could, for example, assert the right to continue the business and possess the partnership assets.[96] Additional capital needed for this new operation would be generated from a revised settlement of the partnership accounts, for plaintiff, as the partner causing the wrongful dissolution, would be deprived of his right to share in the goodwill of the partnership, *all* of which would now accrue to the defendant. To complete this rather dramatic turn of events, the defendant could then recover from plaintiff any damages which he incurred as a result of the wrongful dissolution of the partnership.

It is unclear whether the use of the term "wrongful" in the

95. The dissolution will probably result in either a liquidation of assets or a negotiated settlement of accounts. It is widely recognized that a liquidation of assets is an ineffective means of recognizing the full going concern value of a business. *See infra* note 147. It is likely to be even less effective if the plaintiff in *Page* is the only bidder. In a negotiated settlement, the unsatisfactory nature of the liquidation alternative gives bargaining leverage to the plaintiff. The question then becomes whether the mere existence of what the court perceives to be a deficiency in the amount realized by defendant as a result of either a liquidation or negotiated settlement, when combined with the operation of a similar business by the plaintiff after the dissolution, will establish the existence of an "appropriation" by the plaintiff and thereby render the dissolution "wrongful." If so, then the plaintiff in *Page* could only proceed at his peril. The problem is compounded enormously by the difficulty of arriving at a satisfactory definition and valuation of goodwill and identifying the goodwill attributable to the partners individually and therefore not part of the goodwill of the partnership. A number of cases have distinguished goodwill which may be attributable to the skill or reputation of a particular partner and have not treated it as a partnership asset. *See, e.g.,* Lyon v. Lyon, 246 Cal. App. 2d 519, 524, 54 Cal. Rptr. 829, 831-32 (1966); Cook v. Lauten, 1 Ill. App. 2d 255, 260-61, 117 N.E.2d 414, 416 (1954); Siddall v. Keating, 8 A.D.2d 44, 47, 185 N.Y.S.2d 630, 632-33 (1959). *But see* Brown v. Allied Corrugated Box Co., 91 Cal. App. 3d 477, 488, 154 Cal. Rptr. 170, 177 (1979) (addressing a similar issue in the context of a close corporation and concluding that the clientele of a shareholder-salesman was a corporate and not a personal asset).

96. Given the dependence of the defendant in *Page* on the plaintiff, this may not appear to be a significant threat to the plaintiff unless it is realized that the business may be continued by the defendant in a new venture with a third party. *See* U.P.A. § 38(2)(b), which provides, in part, that "[t]he 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 . . . ." (Emphasis added).

Page dictum was loose or deliberate: if loose, then the court was doing nothing more than reminding plaintiff that, as a fiduciary, he was accountable for partnership assets; if deliberate, the result contemplated is harsh and conducive to litigation requiring retroactive analyses of motives behind dissolutions.[97] The approach suggested in *Page* is best described as anomalous, for it creates the possibility of the terminable at will partnership which cannot be dissolved with any degree of certainty concerning the consequences of that dissolution.[98] After *Page,* any partner dissolving such a partnership runs the risk that if he or she continues in the same line of business the dissolution will later be found to have involved a wrongful appropriation of some element of the "new prosperity" of the business. The consequences of such a determination could be, as outlined above, severe and unnecessary in light of the requirement that each partner is accountable to the partnership for use or conversion of partnership assets.[99] *Page,* therefore, may serve to stabilize partnership relationships by rendering the consequences of dissolutions uncertain.

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97. It has been suggested that *Page* may be an invitation to blackmail. *See* D. FESSLER, *supra* note 13, at 156. Additional evidence that the *Page* dictum is without support in the U.P.A. is demonstrated by a lack of certainty concerning the term of the partnership which could then be formed by the defendant partner in order to continue the business. U.P.A. § 38(2)(b) provides that the right to continue a wrongfully dissolved partnership continues for the "agreed term" of the former partnership. In light of the fact that it held the partnership was not for a term or undertaking, how would the *Page* court define the term of the new partnership? An infinite term would seem inconsistent with the express provision of § 38(2)(b). No term would mean that the business could not be continued by defendant partner and, therefore, plaintiff partner would not be deprived of his interest in the goodwill. This latter alternative would leave plaintiff liable to defendant partner for damages resulting from the wrongful dissolution, a liability which the *Page* court could find includes defendant partner's share of the new prosperity of the business. The fairness of such a result is debatable, particularly in light of the fact that the partnership was one terminable at will, but the tortuous analysis required to reach it indicates the extent to which the *Page* court's reading of the U.P.A. is unsound. *But see* A. BROMBERG, *supra* note 39, § 75 at 429-30: "If literally read, the Act might permit the innocent partners to continue the business only for the 'agreed term' of the partnership. The more reasonable interpretation, giving effect to all parts of the statute, is that the innocent partners may continue the business either indefinitely (by paying the dissolver for his interest) or, at their option, for the agreed term (by properly securing him)." Unfortunately, there is no specification by this commentator of the other parts of the statute which undermine the result reached when the U.P.A. is "literally read," at least with respect to a partnership which is conceded to be terminable at will.

98. The admonition in *Page* is largely limited to situations in which the same or a related business is continued by the dissolving partner.

99. *See supra* note 90. One of the unfortunate aspects of the *Page* dictum is that it failed to distinguish between individual and partnership goodwill. *See supra* note 95.

There is no evidence in the reported decisions that the dictum in *Page* has been applied to a partnership terminable at will. For example, in *Nicholes v. Hunt,*[100] a 1975 decision of the Oregon Supreme Court, two partners were engaged in the business of manufacturing and selling lead shot for shotgun shells. As in *Page,* the success of the business rested largely on the efforts of one of the partners, in this case, the defendant. The partnership business was a successor to the defendant's earlier sole proprietorship, and although the two participants were to be equal partners, there was apparently an understanding that the defendant would make all major decisions.[101] Eventually, the defendant dissolved the partnership and continued to operate the business, arguing that plaintiff had failed to devote his full time to the business and had refused to follow defendant's instructions.[102]

A *Page*-type analysis would have required a rigorous review of whether an implied agreement not to "wrongfully" exclude plaintiff from the business existed, whether the defendant acted in good faith, and whether the plaintiff was adequately compensated for his interest. The court, however, rejected the argument, based on *Page*, that the dissolution was wrongful: "*Assuming that there was such a duty of good faith* in this case, the evidence proves that defendant acted in good faith and did not act in contravention of the oral partnership at will."[103] Thus, the defendant not only was able to dissolve this highly profitable partnership, but as a result of one of the more questionable aspects of the decision was also permitted to avoid liquidation and continue the business by paying the plaintiff the value of his interest.[104] *Nicholes,* as an opinion

100. 273 Or. 255, 541 P.2d 820 (1975).

101. *Id.* at 263, 541 P.2d at 824.

102. Defendant presumably based his assumption that plaintiff had waived his § 18(e) "equal rights in the management and conduct of the partnership business" upon the understanding that major decisions would be made by the defendant. After the dissolution, the defendant continued to maintain proper records of all transactions, assets, and profits. *Id.* at 261, 541 P.2d at 823.

103. *Id.* at 263-64, 541 P.2d at 824 (emphasis added).

104. The *Nicholes* court's rejection of the defendant's request that the assets of the partnership be liquidated was incorrect. A partner's right to compel a liquidation of assets, except in limited circumstances, is clear. U.P.A. § 38(1) permits any partner to require the application of partnership property to discharge the partnership debts, with "the surplus applied to pay *in cash* the net amount owing to the respective partners." *See* Lewis, *supra* note 17, at 629. The rule has been questioned by one commentator, who suggested that the likely loss of value as a result of the liquidation is just enough "to require every partnership to look to the ways of denying or restricting the liquidation right." Bromberg, *supra* note 29, at 648. These might include an agreement as to the

which tolerates and perhaps encourages the elimination of weaker partners, avoids the stabilizing tendency of *Page*.

Although slight differences in their facts may provide some basis for distinction,[105] the *Page* dictum and the analysis in *Nicholes* are fundamentally irreconcilable. The *Nicholes* treatment of the wrongful dissolution issue would appear to be the sounder of the two approaches. If a partnership is terminable at will, it is at best a continuously temporary arrangement because of the intention of the parties. The assumption that there exists an implied agreement that a partner will not dissolve the partnership and continue in business alone normally is not warranted in the case of a partnership formed without a definite term or for a particular undertaking.[106] Although the *Page* dictum would attempt to minimize the inequities present when a stronger partner "keeps" the weaker partner for only such period of time as the partnership is incurring losses, it undermines the very sensible approach of the U.P.A. that partnerships are dissolvable without sanctions absent an agreement which makes such a dissolution premature. The flexible approach evidenced by the U.P.A. carries with it a responsibility, and parties desiring to establish a partnership term or undertaking, in turn, have the obligation to reach a clear understanding on this point. The weaker partner in *Page* could have bargained for a definite term, but he did not. Fairness under such circumstances does not require the stronger partner to continue to carry the weaker partner indefinitely.

C. An Evaluation of the Plight of the Dissatisfied Partner Under the U.P.A.

The above discussion demonstrates that not all partnerships are, in a practical sense, freely dissolvable. The power accorded by the U.P.A. to each partner to dissolve a partner-

term, a continuation agreement, or an expulsion clause. *See supra* note 41. The *Nicholes* court is not the only court to use equitable powers to restrict the liquidation right. *See, e.g.*, Rinke v. Rinke, 330 Mich. 615, 628, 48 N.W.2d 201, 207 (1951); Greg v. Bernards, 250 Or. 258, 258-59, 443 P.2d 166, 167 (1968). Such a result seems inappropriate in light of the clear language of § 38(1) and the corresponding freedom given to the parties to vary by agreement the applicability of this section of the U.P.A.

105. For example, the *Nicholes* partnership was not subject to a sustained period of financial losses and represented the continuation of a business previously operated by the defendant, the stronger partner. 273 Or. at 259-60, 541 P.2d at 822.

106. This is subject to the requirements that a liquidation of partnership assets must normally follow a dissolution and that a partner must account for partnership goodwill. *See supra* note 90.

ship will enable a dissatisfied partner to terminate the relationship among the participants, but the fate of the business itself and the economic consequences of the act of dissolution must be viewed as matters separate from the simple power to dissolve the partnership.

The characterization of a dissolution as "wrongful" is obviously a critical determination, and the dissatisfied partner must address the important question of whether a dissolution would be premature because of the existence of an agreement concerning partnership duration. Faced with such an agreement, the partner who wishes to dissolve the relationship prematurely must either obtain an equitable decree of dissolution on one of the limited grounds set forth in section 32 of the U.P.A. or suffer the consequences of wrongfully dissolving the partnership. The threat of these consequences, including damages, reduced account valuation to reflect loss of goodwill, and a continuation of the business and possession of the property for this purpose by the remaining partners, may act as significant disincentives to dissolution which tend to stabilize the partnership.

The absence of an express agreement establishing a duration for the venture should not lull the dissatisfied partner into a false sense of security, and the possibility that a term or undertaking will be implied must be considered by anyone who wishes to dissolve a partnership. This may indeed be a lonely task, since the extent to which legal counsel can assist in resolving a factual question of this nature is limited. The willingness of some courts to imply duration agreements not only increases the number of dissolutions which will be treated as wrongful but also introduces an additional element of uncertainty into the dissolution process.[107] Both of these results may be expected to have a further stabilizing effect on the partnership.

107. The dissatisfied partner may, in this situation, seek a declaratory judgment that the partnership is not one for a definite term or particular undertaking. *See, e.g.,* Page v. Page, 55 Cal. 2d 192, 193, 359 P.2d 41, 42 (1961); Adams v. Jarvis, 23 Wis. 2d 452, 453, 127 N.W.2d 400, 401 (1964). In addition to the time and expense involved in seeking such a determination, this alternative may be questionable from a strategic point of view, since the process of raising the question may increase the likelihood of an adverse determination. It is interesting in this connection to note the position of the dissatisfied stronger partner in *Page*. An abundance of caution convinced this individual to seek a declaratory judgment that the partnership was not for an implied term. Although he was successful on appeal in this endeavor, the dictum in the opinion must have increased his anxiety level. *See supra* text accompanying notes 87-99.

Further, if the dissolving partner is going to continue in the same or a similar line of business, the admonition in *Page* concerning an implied agreement not to wrongfully exclude a fellow partner cannot be ignored. Although the *Page* dictum has not been widely embraced, neither has it been rejected, and the unsettled question of the extent to which the *decision* to dissolve a terminable at will relationship is subject to a "good faith" requirement may be yet another disincentive to dissolution.

Finally, even if there is certainty that the dissolution is not wrongful, the likely economic consequences of a liquidation of partnership assets may significantly discourage the dissatisfied partner.[108] The potential loss of some or all of the going concern value of a business as a result of a liquidation of its assets may convince the dissatisfied partner that the supposed escape mechanism provided by the U.P.A. is unsatisfactory.[109] Such a perception may, in turn, make it less likely that the partnership will be dissolved. The partnership relationship, in short, may be stabilized.

II. PERMANENCE AND THE RELATIONSHIP AMONG SHAREHOLDERS

Just as the partnership is, on the surface, a fragile and temporary relationship, the corporation is, on the surface, a strong and permanent form of business organization.[110] As was ob-

108. *See infra* note 147. The authorities cited therein pertain primarily to the liquidation of the assets of a corporation as part of its dissolution, but the principles have equal applicability to the liquidation of partnership assets. Some courts have incorrectly concluded that the liquidation right is subject to general equitable considerations. *See supra* note 104.

109. The threat that a significant part of the value of the business will not be realized upon a liquidation of assets may be of concern to all of the partners. In some situations, such a threat may be used by the dissatisfied partner as a means of arriving at a settlement of his or her account not involving a liquidation of the venture's assets. The other partners, however, may not consider the prospect of liquidation a threat. For example, they may view themselves as the likely purchasers at a liquidation sale, which would accord them the opportunity to, in effect, acquire the interest of the dissatisfied partner at a bargain price. The business may be one particularly dependent upon the skills of the remaining partners and they may believe that the sale of the partnership assets would not preclude them from the continued exercise of their skills. Thus, to the extent that the dissatisfied partner is not able to utilize the threat of liquidation, and the threat thereby becomes one to the dissatisfied partner, who may feel that the dissolution mechanism provided by the U.P.A. is less than satisfactory.

110. Continuity of life is frequently viewed as one of the advantages of the corporate form of organization. *See, e.g.,* H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 97 (1970); N. LATTIN, THE LAW

served in Part I of this Article, however, the common view of the partnership as an easily terminable relationship is overly simplistic, and a corresponding generalization that a corporation is "permanent" suffers from a similar limitation. Corporate permanence in any absolute sense is a myth. A corporation cannot survive sustained economic losses, and the death or withdrawal of a key shareholder or even an important employee from a close corporation will frequently mark the termination of the entity as a viable economic enterprise.[111] In its reliance on the identity and performance of its owner-managers, the close corporation in this sense may bear greater resemblance to the partnership than to the publicly held corporation.[112]

Corporation codes tolerate but do not mandate the permanence of corporations. All jurisdictions have statutory provisions establishing procedures and grounds for dissolving a corporation,[113] and voluntary dissolution[114] of even a prosperous business may generally be accomplished after the vote of a requisite percentage of shares.[115] A close corporation, there-

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OF CORPORATIONS 13-16 (1971); C. ROHRLICH, ORGANIZING CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 2.34 (5th ed. 1975). For a discussion of some of the advantages of permanence, see *infra* text accompanying notes 236-41.

111. *Cf.* A. BROMBERG, *supra* note 39, § 23B at 131 ("It is quite true that the *legal form* of a corporation continues unchanged by events like deaths or transfers of stock. But these events may be just as destructive of the *business* of a corporation as of a partnership.") (emphasis in original).

112. This statement must be qualified because of the vagueness of the concept "close corporation." *See infra* text accompanying notes 209-16.

113. *See* F. O'NEAL, *supra* note 2, § 9.28. On the subject of corporate dissolutions generally, see N. LATTIN, *supra* note 110, §§ 175-186; F. O'NEAL, *supra* note 2, §§ 9.28-9.31; J. TINGLE, THE STOCKHOLDER'S REMEDY OF CORPORATE DISSOLUTION (1959).

114. When applied to corporations, the meaning of "dissolution" may vary in different jurisdictions. The following discussion is illustrative:

> Under the New York and Delaware corporation codes, "dissolution" is the event which starts termination on its way; a certificate of dissolution is filed promptly after the shareholders' decision to dissolve. After dissolution comes liquidation, which may take years.
>
> In contrast, the Model Act treats "dissolution" as the culmination of the long process, which begins with a resolution of "intent to dissolve," or a judicial order to liquidate. . . .

A. CONARD, CORPORATIONS IN PERSPECTIVE 234-35 (1976).

In this Article, "corporate dissolution" is used in its broad sense to include both a termination of corporate existence and a liquidation of corporate assets. The distinction between corporate and partnership dissolution should also be recognized. In the latter situation, dissolution refers to a change in the relationship among the partners and might not be followed by a liquidation if, for example, the act of dissolution was wrongful.

115. Votes commonly required for dissolution are fifty percent, *see, e.g.*, CAL. CORP. CODE § 1900 (West 1977), a majority, *see, e.g.*, DEL. CODE ANN. tit. 8, § 275 (1975); MODEL BUSINESS CORP. ACT § 84 (1980), and two-thirds, *see, e.g.*,

fore, has permanence only as long as the required number of shareholders desire to maintain the enterprise.[116] Since the type of participant with which this analysis is concerned is not a member of the controlling coalition of the corporation, however, the voluntary dissolution statutes[117] do little more for this individual than highlight the disparity which exists between controlling and minority positions in close corporations.[118] The

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N.Y. BUS. CORP. LAW § 1001 (McKinney 1963). In addition, it is not unusual for a state officer or creditors to have statutory authorization to seek dissolution or liquidation. *See, e.g.,* MODEL BUSINESS CORP. ACT §§ 94, 97(b) (1980).

116. There is an indication from some courts that the power to cause a dissolution is not absolute but must be exercised in good faith. *See, e.g.,* In re Security Finance Co., 49 Cal. 2d 370, 377, 317 P.2d 1, 5 (1957) ("There is nothing sacred in the life of a corporation that transcends the interests of its shareholders, but because dissolution falls with such finality on those interests, above all corporate powers it is subject to equitable limitations." *See also* Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), *modified*, 136 F.2d 876 (1943), *cert. denied* 316 U.S. 675 (1942); Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 123 N.E. 148 (1919). Compare with this line of cases the *Page* decision, discussed *supra* in text accompanying notes 80-99, suggesting that the right to terminate a terminable at will partnership is subject to good faith limitations, a breach of which would not prevent the dissolution but would result in the imposition of the U.P.A.'s sanctions for a wrongful dissolution.

117. Related to and often followed by voluntary dissolution is the sale of all or a substantial portion of the assets of the corporation. *See generally* F. O'NEAL, *supra* note 2, § 4.08. Although at common law this typically required the unanimous consent of the shareholders, virtually every state now permits such an action upon the approval of a specified percentage of the shares outstanding. The trend has been to reduce the percentage required. *Id.* For example, the Model Act has reduced the percentage from two-thirds, MODEL BUSINESS CORP. ACT § 72 (1953), to a majority, MODEL BUSINESS CORP. ACT § 79(c) (1980).

118. Further, the essentially unmarketable character of minority interests in close corporations does nothing to improve the position of the dissatisfied minority shareholder. Consider the following comment: "In a small business [the free transferability of interests] may be more theoretical than real. For example, what if a small stockholder in a closely held company wants to convert his investment to cash? Who is there to buy it?" W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 22 (1980). *See also* F. O'NEAL, *supra* note 2, § 2.15. Some courts have treated this as a prominent factor in according separate judicial treatment to close corporations. *See, e.g.,* Galler v. Galler, 32 Ill. 2d 16, 203 N.E.2d 577 (1964), *appeal dismissed*, Ill. App. 2d 397, 217 N.E.2d 111 (1966), *modified*, Ill. App. 3d 811, 316 N.E.2d 114 (1974) (recognizing the validity of a shareholders' agreement); Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (1975) (applying partnership fiduciary principles to the close corporation). The problem is compounded by the common practice of restricting the transferability of shares in a close corporation. *See generally* F. O'NEAL, 2 CLOSE CORPORATIONS: LAW AND PRACTICE §§ 7.02-7.29 (2d ed. 1971); Andre, *Restrictions on the Transfer of Shares: A Search for a Public Policy,* 53 TUL. L. REV. 776 (1979); Gregory, *Stock Transfer Restrictions in Close Corporations,* 1978 S. ILL. U.L.J. 477.

Free transferability, if truly available, would assist minority shareholders in three ways. First, if the controlling shareholders wish to avoid the involvement of a new participant in the business, either because they value the continued participation of the dissatisfied minority shareholder or because they are position of the minority shareholder therefore differs significantly from that of a partner, who always has the power under the U.P.A. to dissolve his or her relationship with coventurers.[119] Nevertheless, there are limited circumstances in which a minority shareholder can force the involuntary dissolution of a close corporation. Two of these may have relevance to the present inquiry.

A. ABILITY OF A DISSATISFIED MINORITY SHAREHOLDER TO OBTAIN RELIEF BASED UPON THE MISCONDUCT OF THOSE IN CONTROL

Historically, a minority shareholder has been without the power to compel a dissolution of either the corporate entity or the relationship among shareholders, and early decisions displayed a reluctance to offer relief even in the face of abusive conduct by those in control of the corporation.[120] Courts of equity, however, eventually began to provide relief in the form of a corporate dissolution upon any one of several grounds,[121] including abandonment of corporate functions,[122] failure to achieve corporate objectives,[123] deadlock and dissension among directors or shareholders preventing the successful conduct of

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uneasy over the identity of the new shareholder, they have an incentive to remove the source of dissatisfaction for the minority shareholder. In this case, the possibility of free transferability becomes negotiating leverage for the dissatisfied shareholder, the existence of which may promote the reaching of consensus. Second, the liquidity of the investment may provide the participant with a sense of security that he or she will not be subject to oppression or a squeeze-out by those in control. Liquidity, in short, minimizes the possibility of exploitation. *Cf.* Hetherington & Dooley, *supra* note 26, at 5 ("The exploitative power of the majority arises from the exercise of the traditional managerial prerogatives in a situation in which the minority suffers from a complete and near permanent loss of liquidity."). Finally, if the interest is freely transferable for fair value, the minority shareholder has been provided with an escape mechanism should his or her level of dissatisfaction become intolerably high.

119. *See supra* text accompanying notes 27-32.

120. "Until fifty years ago, the uniformly accepted principle was that, in the absence of statute, a court has no power to decree the winding-up of a corporation at the suit of a minority stockholder." 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, 220 (1940). *See also* J. TINGLE, *supra* note 113, at 25-32.

121. *See generally* Hornstein, *supra* note 120, at 230-38. *See also* Comment, *Oppression as a Statutory Ground for Corporate Dissolution,* 1965 DUKE L.J. 128.

122. *See, e.g.,* Briggs v. Traders' Co., 145 F. 254 (C.C.N.D. W. Va. 1906); Cairns v. Bethea, 211 Ala. 635, 101 So. 587 (1924); Lind v. Johnson, 183 Minn. 239, 236 N.W. 317 (1931).

123. *See, e.g.,* Jones v. Henderson, 210 Ala. 614, 98 So. 878 (1924); Edison v. Fleckenstein Pump Co., 249 Mich. 234, 228 N.W. 705 (1930).

the corporate business,[124] and, most significant for purposes of the present analysis, illegal, fraudulent, or oppressive conduct on the part of those in control of the corporation.[125]

Oppression as a basis for relief is noteworthy for it permits a penetration of the traditional myth that only a harm to the corporate entity need be recompensed and therefore recognizes that minority shareholders can also be the victims of abusive conduct. The theory that wrongful conduct by those in control may serve as a basis for the involuntary dissolution of a corporation has received widespread legislative acceptance.[126] Particularly important in this regard have been the provisions of

124. *See, e.g.,* Bowen v. Bowen-Romer Flour Mills Corp., 114 Kan. 95, 217 P. 301 (1923); *In re* Diamond Fuel Co., 13 Ch. D. 400 (Ch. App. 1879). *See also* Hornstein, *supra* note 120, at 231 ("Deadlock, which appears by the decided cases to have occurred only in corporations having few stockholders, implies dissension due to equal division, and therefore does not involve problems of protection for the minority. It is significant, however, as a field of intracorporate conflict in which the courts have realized they must intervene.").

125. *See, e.g.,* Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817 (4th Cir. 1933), *cert. denied*, 290 U.S. 675 (1933); Henry v. Ide, 208 Ala. 33, 93 So. 860 (1922); Holden v. Lashley-Cox Land Co., 316 Mich. 478, 25 N.W.2d 590 (1947); Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N.W. 218 (1892); Green v. National Advertising & Amusement Co., 137 Minn. 65, 162 N.W. 1056 (1917); Bilby v. Morton, 119 Okla. 15, 247 Pac. 384 (1926); Goodwin v. von Cotzhausen, 171 Wis. 351, 177 N.W. 618 (1920). *See generally* Hornstein, *supra* note 120, at 231-34; Comment, *supra* note 121, at 129-35.

126. There is a conflict on the extent to which involuntary dissolution statutes preempt general equitable powers and discretion. A few courts have held that a court has no discretion concerning whether to order dissolution upon establishment of a statutory ground for dissolution. *See, e.g.,* Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960); Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 184 N.E.2d 792 (1962); Strong v. Fromm Lab., Inc., 273 Wis. 159, 77 N.W.2d 389 (1956) (while suggesting that the remedy was automatic the appellate court remanded to the trial court to devise a buy-out plan, a nonstatutory remedy). The Model Act is phrased permissively, granting to the court "full power to liquidate the assets and business of a corporation" upon the showing of a ground for dissolution. MODEL BUSINESS CORP. ACT. § 97 (1980). A number of courts have indicated that dissolution is a remedy within the discretion of the courts even if a statutory ground for dissolution has been established. *See, e.g.,* Stumpf v. Stumpf & Sons, Inc., 47 Cal. App. 3d 230, 235, 120 Cal. Rptr. 671, 674 (1975) ("involuntary dissolution is not an automatic remedy but, rather, a matter for the court's discretion"); Kirtz v. Grossman, 463 S.W.2d 541, 545 (Mo. Ct. App. 1971) (judicial liquidation is "permissive" even after a finding of oppression); Jackson v. Nicolai-Neppach Co., 219 Or. 560, 572, 348 P.2d 9, 21 (1959) ("[T]he plaintiff has not only the burden of proof to establish jurisdictional facts . . . but the further burden of proving equitable grounds for dissolution."). Some statutes make this explicit. *See, e.g.,* N.Y. BUS. CORP. LAW § 1104-a (McKinney Supp. 1981). *See also* Hornstein, *supra* note 120, at 245. Further, courts not infrequently view the fashioning of a remedy other than dissolution as within their discretion. One of the more explicit outlines of alternative remedies is found in Baker v. Commercial Body Builders, Inc., 264 Or. 614, 507 P.2d 387 (1973) (the ten remedies identified by the court are listed *infra* in note 149).

the Model Business Corporation Act (the "Model Act"), which include as grounds for dissolution "illegal, oppressive or fraudulent" acts by those in control of the corporation.[127] A substantial number of jurisdictions have now incorporated the

127. The grounds for involuntary dissolution in the Model Act are as follows:

> The . . . courts shall have a 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; or
> (2) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or
> (3) That the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or
> (4) That the corporate assets are being misapplied or wasted.

MODEL BUSINESS CORP. ACT § 97(a)(1)-(4) (1980).

Oppression as a statutory ground for involuntary dissolution first appeared in Illinois in 1933. *See* Central Standard Life Ins. Co. v. Davis, 10 Ill. 2d 566, 572, 141 N.E.2d 45, 49 (1957). Deadlock as a ground for dissolution is beyond the scope of this Article, although it should be noted that at least one court has raised the issue of the relationship between deadlock and oppression. *See* Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960). *See also* Israels, *The Sacred Cow of Corporate Existence—Problems of Deadlock and Dissolution,* 19 U. CHI. L. REV. 778 (1952); Comment, *Deadlock and Dissolution in the Close Corporation: Has the Sacred Cow Been Butchered?,* 58 NEB. L. REV. 791 (1979). In a few jurisdictions, dissension is a ground for dissolution, although it is sometimes related to deadlock. *See, e.g.,* CAL. CORP. CODE § 1800(b)(3) (West 1977) ("There is internal dissension and two or more factions of shareholders in the corporation are so deadlocked that its business can no longer be conducted with advantage to its shareholders . . . ."); N.Y. BUS. CORP. LAW § 1104(a)(3) (McKinney 1963) (restricted to suit by holders of one-half of all outstanding shares). *But cf.* ARIZ. REV. STAT. ANN. § 10-215(1)(c) (1977) (investors in a close corporation are "so divided respecting the management of the business" that irreparable injury is threatened or the business cannot be conducted to the advantage of the investors generally); ILL. ANN. STAT. ch. 32, § 1214(3) (Smith-Hurd Supp. 1981) (internal dissension in a close corporation such that "the business and affairs can no longer be conducted in the best interests of the shareholders"); MD. CORP. & ASS'NS CODE ANN. § 4-602(a) (1975) (internal dissension among stockholders in a close corporation such that the business cannot be conducted to the advantage of the stockholders generally); TENN. CODE ANN. § 48-1008(1)(iv) (1979) (internal dissension and two or more factions of shareholders are "so divided that dissolution would be beneficial to the shareholders"). Dissension has not developed as a significant ground for dissolution and will not be treated in this Article, although it may be of some assistance to the dissatisfied shareholder, particularly if relief will be granted for dissension in the absence of deadlock. *See generally* Comment, *supra* note 121, at 132 n.22; Comment, *Dissolution at Suit of a Minority Stockholder,* 41 MICH. L. REV. 714, 720 (1943).

A consideration of misapplication or waste of corporate assets as a ground for dissolution is beyond the scope of this Article. In certain circumstances, this ground may be a basis for relief for the dissatisfied shareholder.

"dissolution for oppression" provision of the Model Act verbatim or with only minor variations,[128] and several others permit dissolution upon the related grounds of abuse or unfairness to shareholders.[129] The principle that a minority shareholder should be entitled to relief upon a showing of serious misconduct by those in control finds further support in the Proposed Statutory Close Corporation Supplement to the Model Business Corporation Act (the "Proposed Model Act Supplement"),[130] which would authorize several types of relief other than dissolution upon a showing that those in control of the corporation have acted in a manner which is "illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner."[131] The flexible approach to remedies evidenced in the Proposed Model Act Supplement, including a buy out of the minority

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128. *See, e.g.,* ALA. CODE § 10-2A-195(a)(1)(b) (1980); ALASKA STAT. § 10.05.540(2) (1968); ARK. STAT. ANN. § 64-908(a)(2) (1980); COLO. REV. STAT. § 7-8-113(2)(a) (Supp. 1981); IDAHO CODE § 30-1-97(a)(2) (1980) (also requires a showing of irreparable injury); ILL. ANN. STAT. ch. 32 § 157.86(a)(3) (Smith-Hurd Supp. 1981); IOWA CODE ANN. § 496A.94(1)(c) (West Supp. 1981); MD. CORPS. & ASS'NS CODE ANN. § 3-413(b)(2) (1975); MICH. COMP. LAWS ANN. § 21.450.1825(1) (1973) ("willfully unfair and oppressive"); MISS. CODE ANN. § 79-3-193(a)(2) (1973); MO. ANN. STAT. § 351.485.1(1)(b) (Vernon 1966); MONT. CODE ANN. § 35-1-921(1)(a)(ii) (1981); NEB. REV. STAT. § 21-2096(1)(b) (1977); N.J. STAT. ANN. § 14A:12-7(1)(c) (West Supp. 1981) (for corporations with 25 or less shareholders if the directors or those in control have "acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly"); N.M. STAT. ANN. § 53-16-16(A)(1)(b) (1978); N.Y. BUS. CORP. LAW § 1104-a(a)(1) (McKinney Supp. 1981) (applies to holders of 20 percent or more of the shares of a close corporation); N.D. CENT. CODE § 10-21-16(1)(b) (1976); OR. REV. STAT. § 57.595(1)(a)(B) (1981); PA. STAT. ANN. tit. 15, § 2107(A)(2) (Purdon 1967); R.I. GEN. LAWS § 7-1.1-90(a)(2) (1970); S.C. CODE ANN. § 33-21-150(a)(4) (Law. Co-op. Supp. 1982) ("oppressive or unfairly prejudicial" actions); S.D. COMP. LAWS ANN. § 47-7-34(2) (1967); UTAH CODE ANN. § 16-10-92(a)(2) (1973); VT. STAT. ANN. tit. 11 § 2067(a)(1)(B) (1973); WASH REV. CODE ANN. § 23A.28.170(1)(b) (1969); W. VA. CODE § 31-1-41(a)(2) (1982); WYO. STAT. ANN. § 17-1-614(a)(i)(B) (1977).

129. *See infra* note 134. In addition, Connecticut provides as one ground for dissolution "any good and sufficient reason," CONN. GEN. STAT. ANN. § 33-382(b)(1)(v) (West Supp. 1981), although this has been interpreted restrictively. *Compare* Bator v. United Sausage Co., 138 Conn. 18, 22, 81 A.2d 442, 444 (1951) (dissension not sufficient to justify relief unless it renders it impossible to conduct corporate affairs) *with* Krall v. Krall, 141 Conn. 325, 335, 106 A.2d 165, 169 (1954) (granting relief where deadlock had existed for more than a decade).

130. The Proposed Model Act Supplement is contained in *Report of the Committee on Corporate Laws*, Section of Corporation, Banking and Business Law, American Bar Association, *reprinted in* 37 BUS. LAW. 269 (1981).

131. Section 16(a) of the Proposed Model Act Supplement provides:

> (a) Any shareholder of record, the beneficial owner of shares held by a nominee, or the holder of voting trust certificates of a statutory close corporation may file a petition in the [ ] court for relief on the grounds that:
>
> (1) The directors or those in control of the corporation have or will have acted in a manner that is illegal, oppressive, fraudulent, or

shareholder's interest at "fair value,"[132] is consistent with that

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> unfairly prejudicial to the petitioner, whether in his capacity as a shareholder, director, officer, or employee of the corporation; or
>
> (2) The directors or those in control of the corporation are so divided respecting the management of the corporation's affairs that the votes required for action cannot be obtained and the shareholders are unable to break the deadlock, with the consequence either that the corporation is suffering or will suffer irreparable injury or that the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally; or
>
> (3) Conditions exist that would be grounds for involuntary dissolution of the corporation.

Proposed Model Act Supplement, *supra* note 130, § 16(a). The relief available under § 16 includes: cancelling, altering or enjoining an act of the corporation; directing or prohibiting an act of the corporation, officers, directors, shareholders, or other parties to the action; cancelling or altering a provision of the articles or bylaws; removing or designating an officer or director; ordering an accounting; appointing a custodian or provisional director; or ordering the payment of dividends. In the event that none of the above forms of relief is appropriate, § 16(b)(9) authorizes the court to order a dissolution unless the "corporation or one or more of the remaining shareholders has purchased all of the shares of another shareholder at their fair value by a designated date." Failing all of the above, the court may order a dissolution if any of the traditional Model Act grounds have been proven. *See supra* note 127. Section 16(a)(1) also authorizes the award of "damages to any aggrieved party in addition to or in lieu of any other relief granted."

132. Dissolution will result if the buy-out is not effected by the corporation or one or more of the remaining shareholders. Proposed Model Act Supplement, *supra* note 130, § 16(b)(9). Valuation is determined by the court

> considering the going concern value of the corporation, any agreement among some or all of the shareholders fixing a price or specifying a formula for determining the value of the corporation's shares for any purpose, the recommendations of any appraisers appointed by the court, any legal constraints on the ability of the corporation to acquire the shares to be purchased, and other relevant evidence.

Proposed Model Act Supplement, *supra* note 130, § 16(d)(1). The valuation based upon going concern value is noteworthy, for it may result in a figure higher than that which the dissatisfied shareholder would receive if the assets are liquidated. Compare with this approach that taken by the California statute, which also would permit the avoidance of dissolution through a buy-out but bases the valuation on "the liquidation value but taking into account the possibility, if any, of sale of the entire business as a going concern in a liquidation." CAL. CORP. CODE § 2000(a) (West 1977). *See generally* 2 H. MARSH, MARSH'S CALIFORNIA CORPORATION LAW § 20.22 (1981).

California would appear to be unique in its emphasis on liquidation value. A number of other states have adopted statutory buy-out provisions within involuntary dissolution frameworks. Most permit under certain circumstances the corporation or the other shareholders to purchase the shares of the petitioner as a means of avoiding an involuntary dissolution. The details of these provisions and their method of establishing valuation vary widely. *See, e.g.*, CONN. GEN. STAT. ANN. § 33-384 (West Supp. 1981) (valuation determined as of the day prior to the date on which the dissolution petition filed and without regard to the filing of the petition, thus mandating something other than a liquidation value); MD. CORPS. & ASS'NS CODE ANN. § 4-603 (1975) (valuation determined as of the day prior to the filing of the petition, using methods pursuant to which shareholders dissenting from a merger, consolidation, or transfer of assets may have their shares valued); MINN. STAT. ANN. § 302A.751 subd. 2

currently taken in a minority of states.[133]

(West Supp. 1981) (valuation on the basis of methods used for shareholders asserting appraisal rights in the event of a merger or consolidation); N.J. STAT. ANN. § 14A:12-7(8) (West Supp. 1981) (using appraisal techniques employed when shareholders dissent from a merger, to the extent applicable, although the court may make any adjustments it deems equitable if the petition for involuntary dissolution was based upon fraud, illegality, mismanagement, abuse of authority, oppression or unfairness); N.Y. BUS. CORP. LAW § 1118 (McKinney Supp. 1981) (valuation as of the day prior to the filing of the petition and without regard to the effect of the filing); W. VA. CODE § 31-1-134 (1982) (establishes procedures but no guidelines for determining "fair cash value"). Although the buy-out privilege is normally elective, the language of some statutes would appear to permit a court-directed buy-out even against the will or the corporation or the other shareholders. *See, e.g.,* MICH. COMP. LAWS ANN. § 450.1825(2)(d) (1973) (permitting the court to order a "[p]urchase at their fair value of shares of a shareholder, either by the corporation or by the officers, directors or other shareholders responsible for the wrongful acts"); N.C. GEN. STAT. § 55-125.1 ("fair value to be determined in accordance with such procedures as the court may provide"); S.C. CODE ANN. § 33-21-155 (Law. Co-op. Supp. 1982) (provides for court order that shares be purchased at "fair value" but does not indicate how this is to be determined).

133. *E.g.,* CAL. CORP. CODE § 1804 (West 1977); MICH. COMP. LAWS ANN. § 450.1825(2) (1974); N.C. GEN. STAT. § 55-125.1 (1975); S.C. CODE ANN. § 33-21-155 (Supp. 1982). *See generally* F. O'NEAL, *supra* note 2, § 9.14.

Some of these states have based their statutes on Section 210 of the 1948 English Companies Act. This non-dissolution Section permitted the court to make "such order as it thinks fit" upon a showing of oppression and a finding that dissolution would be just and equitable but would "unfairly prejudice" some of the members. *See generally* L. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW 598-604 (3rd ed. 1969); F. O'NEAL, *supra* note 2, § 9.12; Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform,* 55 VA. L. REV. 1043 (1969); Rajak, *The Oppression of Minority Shareholders,* 35 MOD. L. REV. 156 (1972).

Section 210 has been replaced by § 75 of the English Companies Act of 1980, which provides:

> (1) Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
>
> (2) If in the case of any company— . . .
>
> (b) it appears to him that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, he may himself (in addition to or instead of presenting a petition for the winding-up of the company under section 35(1) of the 1967 Act) apply to the court by petition for an order under this section.
>
> (3) If the court is satisfied that a petition under this section is well founded it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> (4) Without prejudice to the generality of subsection (3) above, an order under this section may—
>
> (a) regulate the conduct of the company's affairs in the future;
>
> (b) require the company to refrain from doing or continuing an

Whether relief takes the form of dissolution, or some less "radical" remedy, the noteworthy aspect of both the Model Act and the Proposed Model Act Supplement is that relief is available only on the basis of narrowly defined grounds, including misconduct on the part of those in control. This Article will utilize the popular reference to such misconduct as "oppression."[134] Although the focus of the present discussion is on the dissatisfied but nonoppressed shareholder, brief consideration of the concept of oppression is necessary both to define the traditional parameters of relief and to determine whether the concept necessarily entails misconduct by those in control.

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act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

English Companies Act, 1980, § 75.

134. This term is common to the Model Act, the Model Act Supplement, and common law grounds for involuntary dissolution. The term has correctly been described as "nebulous." Comment, *supra* note 121, at 129. The vagueness of the term is not necessarily undesirable: "Circumstances which may give rise to 'oppression' are 'so infinitely various that it is impossible to define them with precision.' It might be added, moreover, that any attempt to define 'oppressive' would tend to reduce the flexibility of the provision." *Id.* at 140-41. To a similar effect, see *Report of the Committee on Corporate Laws, supra* note 130, at 303-04. The concept of "unfair prejudice" may be gaining popularity as a ground for relief, although the extent to which it differs from oppression is uncertain. The Proposed Model Act Supplement in § 16 includes as grounds for relief other than dissolution both oppressive and unfairly prejudicial conduct. *See supra* note 131. Thus, while oppression would be a ground for dissolution under the Model Act, *see supra* note 127, unfair prejudice would not. The recent amendments to the English Companies Act also suggest a distinction between oppression and unfair prejudice. *See supra* note 133. Previously, § 210 of that Act utilized oppression as the standard for general equitable relief. The tendency of the court to view oppression restrictively as "burdensome, harsh and wrongful" was subjected to a substantial amount of criticism. *See, e.g.,* F. O'NEAL, *supra* note 118, § 9.13. Section 75 of the English Companies Act of 1980 employs instead an "unfairly prejudicial" standard. A number of states base relief upon the related concept of unfairness, although once again the extent to which this differs from oppression is not clear. *See, e.g.,* CAL. CORP. CODE § 1800(b)(4) (West 1977) (does not refer to oppression but instead speaks of "pervasive fraud, mismanagement, or abuse of authority or persistent unfairness"); MICH. COMP. LAWS ANN. § 450.1825(1) (1973) ("willfully unfair and oppressive"); MINN. BUS. CORP. ACT § 302A.751(1)(b)(2) (1981) ("persistently unfair"); N.J. REV. STAT. § 14A:12-7(1)(c) (West Supp. 1981) (directors or those in control have "abused their authority . . . or have acted oppressively or unfairly"); S.C. CODE ANN. § 33-21-150(a)(4) (Law. Coop. 1982) ("oppressive or unfairly prejudicial").

1. *Oppression as Severe Misconduct*

Although the concept of oppression is vague, most laymen would agree that it suggests an "unjust or cruel exercise of authority or power."[135] Such a popular view of oppression is consistent with the more lengthy composite treatment adopted in *Baker v. Commercial Body Builders, Inc.*:[136]

> [Oppression is] burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.[137]

Baker represents a traditional approach[138] under which severe misconduct is required for a finding of oppression.[139] In

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135. WEBSTER'S NEW COLLEGIATE DICTIONARY 799 (1981). *See also* Central Standard Life Ins. Co. v. Davis, 10 Ill. App. 2d 245, 255, 134 N.E.2d 653, 658-59 (1956), which cites a dictionary definition of oppression as "unreasonably burdensome; unjustly severe. Tyrannical. Overpowering to spirit or senses."

136. 264 Or. 614, 507 P.2d 387 (1973).

137. *Id.* at 628, 507 P.2d at 393. The Oregon Supreme Court was utilizing a definition from Comment, *supra* note 121, at 134, which in turn was attempting to provide a composite definition based on English decisions interpreting § 210 of the English Companies Act of 1948. *See* Scottish Co-op. Wholesale Soc'y, Ltd. v. Meyer, [1958] 3 All E.R. 66, 71, 86 ("burdensome, harsh and wrongful conduct" and "a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members"); Elder v. Elder & Watson, Ltd., [1952] Sess. Cas. 49, 55 ("a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely"). *See also* White v. Perkins, 213 Va. 129, 134, 189 S.E.2d 315, 319-20 (1972).

138. *Baker* has been selected as illustrative of a traditional, restrictive view of oppression. No attempt is made here to provide a comprehensive review of the types of situations which constitute oppression and thereby justify relief under statutory or common law. *See generally* Prentice, *Protection of Minority Shareholders: Section 210 of the Companies Act 1948*, 25 CURRENT LEGAL PROBS. 124 (1972); Rajak, *supra* note 133 (discussing § 210 of the English Companies Act of 1948); Comment, *supra* note 121; Comment, *Corporate Dissolution for Illegal, Oppressive or Fraudulent Acts: The Maryland Solution*, 28 MD. L. REV. 360 (1968).

139. The standards vary, perhaps more in their semantics than in their application. *See, e.g.,* Central Standard Life Ins. Co. v. Davis, 10 Ill. App. 2d 245, 134 N.E.2d 653 (1956), where the court not only suggested that oppression is "unjustly severe" or "tyrannical" conduct but also expressed concern that a broader view of oppression would "throw every business corporation . . . open to attacks by stockholders who are dissatisfied because the corporation is not making money or even making enough money to satisfy those stockholders." *Id.* at 257, 134 N.E.2d at 659-60 (emphasis added). An apparently softer articulation of the standard is found in *Baker*, where the court nevertheless failed to find questionable conduct by those in control as sufficiently oppressive to justify relief. A court may also show great tolerance towards those in control by justifying questionable conduct as within the business judgment of the directors and officers. Illustrative of this line of reasoning is Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 36, 184 N.E.2d 792, 795 (1962):

> The Business Corporation Act has given to the courts the power to re-

Baker, the majority shareholders had discharged a minority shareholder from employment.[140] In addition, they removed the minority shareholders as directors, failed to notify them of corporate meetings, falsified corporate records to indicate that the minority shareholders had been notified of or were present at such meetings, denied them access to corporate records, and advanced corporate funds to another company in which one of the majority shareholders held an interest. With the possible and very arguable exceptions of the discharge of a minority shareholder from employment and the removal of the minority shareholders from the board,[141] the actions of those in control cannot be viewed as reasonable and fair. Whether those actions constituted the type of oppressive conduct which justified relief was another question, and the Oregon Supreme Court in *Baker* held that relief was not warranted. The court at various points attempted to define oppression through such concepts as "abuse of corporate position,"[142] "plundering"[143] and an "incorrigible" majority which "can no longer be trusted to manage [the corporation] fairly,"[144] none of which, in the court's view,

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> lieve minority shareholders from oppressive acts of the majority, but the remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one—oppression of the majority by the minority.

See also Fincher v. Claibourne Butane Co., 349 So. 2d 1014, 1019 (La. Ct. App. 1977) ("Plaintiff, as an employee, was not guaranteed indefinite employment by virtue of his status as a stockholder . . . . The power and authority of corporate management . . . was vested in the corporate board of directors and its chief executive officer. This power includes the hiring and firing of corporate employees . . . ."). *But see* Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. 141, 154, 400 A.2d 554, 561 (1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994 (1980) ("Traditional principles of corporate law, such as the business judgment rule, have failed to curb [the abuse of corporate power]. Consequently, actions of close corporations that conform with these principles cannot be immune from scrutiny.").

140. This action was justified by the majority shareholders on the ground that the minority shareholder had not made any sales and "was not doing the company any good." 264 Or. at 622, 507 P.2d at 390.

141. Many would argue that the denial of employment is a classic example of oppression regardless of whether those in control have good reasons for their action. *See, e.g.*, Prentice, *supra* note 138, at 145, *cited with approval in* F. O'NEAL, *supra* note 2, § 9.13, at 640 n.1.

142. 264 Or. at 629, 507 P.2d at 394.

143. *Id.*

144. *Id.* at 630, 507 P.2d at 394. The court also implied that it will be more difficult to establish oppression in situations involving a single act than a continuing course of conduct. *Id.* This comment has been articulated elsewhere. *See, e.g.*, Comment, *supra* note 121, at 136. *Cf.* CAL. CORP. CODE § 1800(b)(4) (West 1977) ("abuse of authority or persistent unfairness"); MINN. STAT. ANN. § 302A.751(1)(b)(2) (West Minn. Business Corp. Act Supp. 1981) (those in control have acted "in a manner persistently unfair"). This raises the interesting

was present in this controversy.[145]

The reluctance of many courts to find conduct oppressive may result from a view of dissolution as a drastic remedy to be mandated in only extreme situations involving bad faith on the part of the majority shareholders.[146] The perception of the remedy as harsh is based upon the assumption that a significant portion of the going concern value of a corporation will not be realized in a liquidation sale,[147] a problem which is com-

conceptual question of whether denial of employment is a single act or continuing course of conduct. *See also* Comment, *supra* note 138, at 368 ("[T]he statutory and common law cases clearly illustrate that dissolution will be granted only for conduct which is flagrantly improper.").

145. 264 Or. at 638, 507 P.2d at 398. The court also equated the question of oppression with "the fiduciary duty of good faith and fair dealing" owed by the majority to minority stockholders. *Id.* at 629, 507 P.2d at 394. Others have equated oppression with a breach of fiduciary duty, which is an equally vague concept. *See, e.g.,* Masinter v. Webco Co., 262 S.E.2d 433, 440 (W. Va. 1980) ("[W]e conclude that our cases involving the fiduciary duty owed by majority shareholders, officers and directors of a corporation embrace the same standard which other courts have evolved under the term 'oppressive conduct.' "). *See also* Fix v. Fix Material Co., Inc., 538 S.W.2d 351, 358 (Mo. Ct. App. 1976) (indicating that fiduciary standards may be "useful" in evaluating whether the conduct by those in control has been oppressive). The *Fix* opinion perceptively notes that a single breach of fiduciary duty will probably not be oppressive unless it is extremely serious in nature or justice requires such a classification. *Id.* Consider a rather extreme hypothetical in which a corporate officer on a single occasion uses a company automobile for personal purposes. It may be assumed that this use of corporate assets for personal gain, though minor, is a breach of fiduciary duty, and the director could be required to reimburse the corporation for the use of the automobile. The breach, however, would not appear sufficiently serious to warrant classification of the individual's conduct as "oppressive." *See also* Comment, *supra* note 121, at 132-35.

146. *See, e.g.,* Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 184 N.E.2d 792 (1962). Compare Rajak, *supra* note 133, at 167, where the commentator concluded after reviewing judicial interpretations of "oppression" under § 210 of the English Companies Act of 1948 that "[i]t is clear . . . that unless the circumstances are extreme, the courts will refuse to intervene in the internal affairs of a company whether under section 210 or any other jurisdiction."

147. There is general acceptance of the proposition that the going concern value of an enterprise is likely to exceed its liquidation value. *See, e.g.,* A. BROMBERG, *supra* note 39, § 83A, at 474; BUSINESS AND SECURITIES VALUATION 11 (G. Ovens & D. Beach ed. 1972); Z. CAVITCH, 1 BUSINESS ORGANIZATIONS WITH TAX PLANNING § 3.05, at 3-33 (1981); Comment, *supra* note 121, at 140; Comment, *supra* note 127, at 797; Comment, *Dissolution Under the California Corporations Code: A Remedy for Minority Shareholders,* 22 U.C.L.A. L. REV. 595, 609 (1975). *Cf.* 2 H. MARSH, *supra* note 132, § 20.22, at 638 ("[A] liquidation does not necessarily contemplate that the assets will be sold piecemeal and the goodwill of the business sacrificed by a termination of the business."). Because of the possibility that some significant portion of going concern value or goodwill may not be realized if the assets are liquidated, courts frequently view corporate dissolution as a "drastic," "harsh" or "last resort" remedy. *See, e.g.,* Stumpf v. Stumpf, 47 Cal. App. 3d 230, 235, 120 Cal. Rptr. 671, 674 (1975); Callier v. Callier, 61 Ill. App. 3d 1011, 1013-14; 378 N.E.2d 405, 408 (1978); Barnett v. International Tennis Corp., 80 Mich. App. 396, 417, 263 N.W.2d 908, 918 (1978); Baker v. Com-

pounded because its impact will normally be spread proportionally among all shareholders, regardless of whether they have acted wrongfully. To the extent that other remedies are available, one might expect to find less reluctance on the part of courts to determine that a given course of conduct was oppressive.[148] The availability of remedies other than dissolution, however, seemed to have no effect on the *Baker* court.[149] The refusal of the court to find appropriate any other form of relief, including such minor options as retention of jurisdiction by the lower court for the protection of the minority shareholders and issuance of an injunction prohibiting continuing acts of oppression,[150] suggests a restrictive approach to the concept of op-

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mercial Body Builders, 264 Or. 614, 628, 507 P.2d 387, 393 (1973); Masinter v. Webco Co., 262 S.E.2d 433, 438-39 (W. Va. 1980). *See also* Patton v. Nicholas, 279 S.W.2d 848, 857 (Tex. 1955) ("[W]e agree with the practically unanimous judicial opinion that liquidation of solvent going corporations should be the extreme or ultimate remedy, involving as it usually will, accentuation of the economic waste incident to many receiverships and most forced sales."); Bromberg, *supra* note 29, at 647 ("[T]he liquidation right [of a partner] will be injurious to the business in many, perhaps in most, cases.").

148. This is one of the arguments by the drafters of the Proposed Model Act Supplement. Section 16 of the Supplement provides a wide range of relief which may be ordered under circumstances indicating, among other grounds, actions which have been "oppressive" or "unfairly prejudicial" to the petitioner. *See supra* note 131. The *Report of the Committee on Corporate Laws* justifies the expanded form of relief as follows:

> The primary danger in tying relief for oppression and related conduct to dissolution is that dissolution is such a radical remedy that courts have traditionally refused to issue a dissolution order if the corporation was solvent except in extreme cases of fraudulent conduct. Moreover, even though authority may exist to grant relief other than dissolution, some courts have been reluctant to grant any relief unless the fact situation itself justifies dissolution.

Proposed Model Act Supplement, *supra* note 130, at 302.

149. The court outlined ten remedies which may represent alternatives to dissolution: (1) order dissolution at a future date to become effective only if differences are not resolved prior to that date; (2) appoint a receiver to monitor the continued operations of the business; (3) appoint a special fiscal agent to report to the court concerning the continued operation of the business and to retain jurisdiction by the court; (4) retain jurisdiction without the appointment of a special fiscal agent; (5) order an accounting; (6) issue an injunction to prohibit continuing acts of oppression; (7) order the declaration of a dividend or a distribution of capital; (8) order a buy-out of the minority's stock; (9) permit the minority to purchase additional stock; and (10) award damages. 264 Or. at 632-33, 507 P.2d at 395-96.

150. The court was influenced by the fact that the conduct complained of by the plaintiff occurred only in one year and did not continue after that year. Nevertheless, the failure to view the issuance of an injunction against further falsification of corporate records, for example, as an appropriate remedy is inexplicable. Compare with *Baker* the approach taken in Patton v. Nicholas, 279 S.W.2d 848, 854 (Tex. 1955). Although the majority's suppression of dividends was viewed as a "wrong akin to breach of trust," the court in *Patton* treated liquidation as an extreme remedy and instead ordered the payment of reason-

pression for reasons other than the apparent harshness of the dissolution remedy.

2. *Oppression as a Frustration of Reasonable Expectations*

The traditional approach to the concept of oppression typified by *Baker* focuses more on the character of the actions by those in control than it does on the impact that those actions may have on minority shareholders. This approach is consistent with a reluctance to grant relief unless the conduct of those in control is sufficiently overreaching that it warrants "punishment,"[151] and it quite naturally pays great deference to such control-enhancing doctrines as the business judgment rule[152] and the principle of majority control.[153]

A very different approach to oppression which would offer a broader basis for relief focuses not on the propriety or intent of those in control but rather on the impact of their actions upon the minority shareholders.[154] Oppression, under this approach, "is probably best defined in terms of the reasonable expectations of the minority shareholders in the particular

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able dividends. The court order included a retention of jurisdiction for five years to insure the payment of reasonable dividends in the future.

151. Even with the availability of less drastic remedies than dissolution, many courts nevertheless are reluctant to find the conduct of those in control "oppressive." *See supra* notes 135-50 and accompanying text. *Cf.* A. RUBNER, THE ENSNARED SHAREHOLDER 11 (1966) ("On the whole directors are now personally honest and manage to oppress their shareholders by strictly legal means.").

152. *See, e.g.*, Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 35-36, 184 N.E.2d 792, 795 (1962).

153. The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded.

In re Five Minute Car Wash Services Ltd., [1966] 1 W.L.R. 745, 751. Dean O'Neal has observed that, in denying relief to "squeezes," the courts usually rely on either or both the business judgment rule or the principle of majority control. *See* F. O'NEAL, *supra* note 2, § 3.03, at 59.

154. *Compare Re* Lundie Brothers Ltd., [1965] 2 All E.R. 692, 698-99 (Plowman, J., concluding that "oppression involves, I think, at least . . . [a] lack of probity or fair dealing to a member," quoting *Re* Harmer, Ltd., [1958] 3 All E.R. 689, 701 *with In re* M. Dailey & Co., Unreported (Sup. Ct. Vict. 1968), *aff'd* 43 Austl. L.J.R. 19 (1969) ("it is to be observed that [Section 186 of the Uniform Australian Companies Act of 1961] speaks of oppression in terms of its impact on the oppressed, not in terms of the intention of the oppressor."). The unreported Australian opinion was interpreting a provision of the Australian Companies Act providing relief upon a showing that the affairs of the company are being conducted in "a manner oppressive to one or more of the members." The opinion is quoted in Afterman, *supra* note 133, at 1062-63.

circumstances at hand."[155] Although the reasonable expectations approach to date has received more scholarly then judicial attention, several recent decisions have applied the analysis and may serve to stimulate further development in this area.[156] An examination of two such cases will demonstrate not only the extent to which this approach varies from the traditional line of inquiry in "oppression" cases but also the difficulties inherent in applying an analysis of expectations to the fault-based concept of oppression.

In *Topper v. Park Sheraton Pharmacy, Inc.*,[157] three individuals formed two corporations, each of which was to operate a pharmacy in a prominent New York hotel. Petitioner Topper actively participated in the venture for approximately one year,[158] during which time the business prospered. The other two shareholders, however, discharged Topper as an officer and excluded him from participation in the management of the business. Topper contended that the discharge constituted "oppressive" conduct within the meaning of the New York involuntary dissolution statute.[159] The controlling shareholders

155. Afterman, *supra* note 133, at 1063. A widely-cited student work on the subject of oppression had earlier suggested, without developing, such an analysis. *See* Comment, *supra* note 121, at 141. See also O'Neal, *supra* note 7, at 885-88, where Dean O'Neal argues in favor of a reasonable expectations analysis as an appropriate model for legislation.

The expectations of the parties at the inception of the relationship are, of course, of primary importance for this inquiry, although it has also been argued that new expectations may develop as a relationship matures and these may be relevant in determining whether the reasonable expectations of the minority have been thwarted. *See* Afterman, *supra* note 133, at 1063-64; O'Neal, *supra* note 7, at 886.

156. *See* Capitol Toyota, Inc. v. Gervin, 381 So. 2d 1038 (Miss. 1980); 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); *In re* Taines, 111 Misc. 2d 554, 444 N.Y.S.2d 540 (N.Y. Sup. Ct. 1981); Topper v. Park Sheraton Pharmacy, Inc., 107 Misc. 2d 25, 433 N.Y.S.2d 359 (N.Y. Sup. Ct. 1980). *See also* Masinter v. Webco Co., 262 S.E.2d 433 (W. Va. 1980).

157. 107 Misc. 2d 25, 433 N.Y.S.2d 359 (N.Y. Sup. Ct. 1980). *Topper* is discussed in Davidian, *Corporate Dissolution in New York: Liberalizing the Rights of Minority Shareholders,* 56 ST. JOHN'S L. REV. 24, 48-56 (1981).

158. During this time, Topper was the most active of the three shareholders. In order to participate in this enterprise, Topper quit a job which he had held in Florida for twenty-five years, moved his family to New York, and invested his life savings in the venture. 107 Misc. 2d at 26-27, 433 N.Y.S.2d at 361-62.

159. Section 1104-a of the Business Corporation Law permits a twenty percent or more shareholder of a corporation not listed on an exchange or regularly quoted in an over the counter market to seek judicial dissolution on the grounds that the directors or those in control "have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders" or that the "assets of the corporation are being looted, wasted, or diverted for non-corporate purposes." N.Y. BUS. CORP. LAW § 1104-a (McKinney 1981).

argued that there was just cause for the discharge and that their conduct was therefore not "oppressive." The court concluded:

> 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 the petitioner's interest; consequently, they are deemed to be "oppressive" within the statutory framework.[160]

The surprising aspect of this conclusion is the court's unwillingness to consider whether the discharge of petitioner had been for cause. That Topper may have been dishonest, incompetent, lazy, uncooperative, or otherwise unsuitable was deemed irrelevant. Without regard to the reasons of the controlling shareholders, the simple act of discharging Topper represented a denial of his reasonable expectations and was, therefore, "oppressive."

The important question not adequately addressed in *Topper* is the extent to which the expectations of shareholders other than the one seeking relief warrant consideration.[161] It is not unlikely that each of the three shareholders in *Topper* committed resources to the enterprise with the expectation that all of the funds would continue to be available to the business so long as it was prosperous and the decisions of those in control were made in good faith. If it is assumed for the sake of discussion that there was sufficient cause for discharging Topper and that the remaining shareholders were unable to raise sufficient funds to purchase his interest at the statutorily-mandated "fair

160. 107 Misc. 2d at 28, 433 N.Y.S.2d at 362 (emphasis added). *See also In re* Taines, 111 Misc. 2d 554, 444 N.Y.S.2d 540 (N.Y. Sup. Ct. 1981).

161. This is not inconsistent with the following statement of the test: "Oppression . . . is probably best defined in terms of the reasonable expectations of the minority shareholders in the particular circumstances at hand." Afterman, *supra* note 133, at 1063. It may be argued that the court's view of the reasons for discharge as "irrelevant" is limited to the particular facts of this case and is therefore insignificant as a matter of precedent. Support for this can be found in the court's finding of an "undisputed understanding of the parties." 107 Misc. 2d at 28, 433 N.Y.S.2d at 362. This finding is, at best, vague, and there is little information given as to the nature of the understandings of the other participants. Further, three separate shareholder agreements had been executed; none contained any references to the employment of Topper. Also unclear is the court's comment that "[t]he controlling shareholders do not deny that petitioner's expectations, not expressed in any written agreement, formed a necessary component of the corporation's formation." *Id.* at 28, 433 N.Y.S.2d at 362. Whether this statement was offered as a truism or a comment on the particular facts before the court is ambiguous.

value,"[162] the question then arises who should bear the economic consequences that may arise from a liquidation of corporate assets and the accompanying possibility that some or all of the going concern value may not be realized as a result of the liquidation.[163] Under the approach taken by the court, any negative economic consequences resulting from the dissolution would be allocated among each of the participants in proportion to their shareholdings.[164] Further, if dissolution is to be avoided by a purchase of Topper's interest, then the valuation of those shares at "fair value" would presumably be based on going concern rather than liquidation value.[165] If this is the case, Topper would receive something best described as a "windfall" at the expense of the remaining participants.[166] To the extent that it was Topper who failed to discharge his duties as originally contemplated by the parties, one may properly ask why it should not also be Topper who bears the economic consequences.

A somewhat different approach to an expectations analysis is found in *Exadaktilos v. Cinnaminson Realty Co.*[167] In this New Jersey case, the plaintiff acquired a twenty percent interest in a corporation which owned and operated a restaurant.[168]

162. Whether the oppression justified dissolution was a question not addressed by the court. It instead found that the controlling shareholders had elected to purchase Topper's interest. Section 1118(a) of the Business Corporation Law permits any shareholder not petitioning for judicial dissolution under § 1104-a to elect to purchase the shares of the petitioner. N.Y. BUS. CORP. LAW 1118(a) (McKinney 1981). If agreement cannot be reached concerning valuation, § 1118(b) permits a judicial determination of the "fair value" of the shares "as of the day prior to the date on which such petition was filed, exclusive of any element of value arising from such filing." N.Y. BUS. CORP. LAW § 1118(b) (McKinney 1981). This suggests that the full going concern value should be recognized, and the fact that less than this amount may be realized if a dissolution is ordered is presumably not an appropriate factor to consider in establishing the value of the shares. In *Topper*, the court ruled that language in affidavits filed with the court that "we have agreed to negotiate a reasonable price for the purchase of Topper's stock" constituted an election under § 1118(a). 107 Misc. 2d at 28-29, 433 N.Y.S.2d at 362. *See generally* Davidian, *supra* note 157.

163. *See supra* note 147.

164. This may also be the consequence of dissolution as a result of oppression defined in the more traditional fashion. *See supra* text accompanying notes 135-50. *But cf.* N.J. STAT. ANN. § 14A:12-7(8)(a) (West Supp. 1981) (permitting "any [sales price] adjustments deemed equitable by the court" where the buy-out occurs in a dissolution suit based upon misconduct).

165. *See supra* note 162.

166. This would equal the differences, if any, between the going concern and liquidation values of both companies.

167. 167 N.J. Super. 141, 400 A.2d 554 (1979), *aff'd*, 174 N.J. Super. 559, 414 A.2d 994 (1980).

168. The stock was issued for $20,000 and was apparently given to the plain-

He expected to learn the restaurant business and eventually take part in the management of the venture.[169] Unfortunately, plaintiff was unable to get along with the other employees and stockholders, and he was eventually discharged for what the court viewed as "unsatisfactory performance."[170] He then brought an action described by the court as an "oppressed shareholder" suit.[171]

Like the New York court in *Topper,* the court in *Exadaktilos* believed that the expectations of the parties should form the starting point for the analysis,[172] and, as in *Topper*, the court recognized that expectations are typically not outlined in any written agreement.[173] The *Exadaktilos* court concluded, however, that even though the discharge of the minority shareholder frustrated *his* expectations, it was not an act of oppression by those in control. The point of distinction between *Topper* and *Exadaktilos* is that the court in the latter case also considered the propriety of the actions by the controlling shareholders:

> The promise of employment was honored, the opportunity being lost through *no fault* of defendants. The parties' expectation that plaintiff

tiff by his father-in-law, who remained as the largest stockholder in the company. In addition, the plaintiff co-signed a note given by the corporation to secure a loan of $220,000, and it appears that additional capital contributions were made by the stockholders. 174 N.J. Super. at 150, 152 n.2, 400 A.2d at 558, 562 n.2.

169. Some of the other shareholders were less than enthused that plaintiff had become a participant: "There is some indication that plaintiff's opportunity was extended over the objection of the other two shareholders and it is clear that they never welcomed him as a fellow participant in the enterprise." *Id.* at 155, 400 A.2d at 561.

170. *Id.* at 155, 400 A.2d at 561. "The evidence shows that plaintiff failed to get along with employees, causing the loss of key personnel, that he quit on more than one occasion, without reason or notice, and that he was not compatible with the other principals." *Id.*

171. *Id.* at 144, 400 A.2d at 556. Section 14A:12-7(1) of the New Jersey Corporations Code outlines the grounds for involuntary dissolution or other relief. Subsection (c) sets forth the following grounds for corporations having twenty-five or fewer shareholders: "[T]he directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees." N.J. STAT. ANN. § 14A:12-7(1) (West Supp. 1981). The relief sought by the plaintiff is not specified in the opinion. Authorized remedies under section 14A:12-7 include appointment of a custodian or provisional director, dissolution, and a sale of the petitioner's stock to the electing corporation or holders of at least fifty percent of the shares.

172. 167 N.J. Super. at 154, 400 A.2d at 560. The court began its analysis of the issue of oppression by noting that the relatively few courts which have considered the question have "fail[ed] to suggest any perspective from which to judge what is oppressive or unfair." *Id.*

173. *Id.* at 155, 400 A.2d at 561.

> would at some time participate in management was likewise thwarted by plaintiff's failure to satisfy the condition precedent to participation, i.e., that he learn the business.[174]

The *Exadaktilos* decision could be viewed as nothing more than a restatement in contemporary terms of the traditional approach to oppression articulated in *Baker;* the court's analysis of the expectations of the complaining shareholder would then represent little more than "lip service" to the plight of certain minority shareholders and therefore an inconsequential part of the opinion.[175] On the other hand, the decision might be viewed as an acceptance, on a limited basis, of the reasonable expectations analysis. Arguably, *Exadaktilos* differs from *Topper* only in its analysis of the reasonableness of the expectations. In *Topper,* the court assumed that it was reasonable to have an absolute expectation of continued employment, while in *Exadaktilos* the court assumed that it was reasonable to expect continued employment only so long as the services were performed in a competent fashion and contributions were being made to the enterprise.[176] Viewed in this light, *Exadaktilos* represents a significant limitation on the reasonable expectations analysis, and as such is not likely to produce results different from those of the traditional approach to oppression.

Topper and *Exadaktilos* highlight the difficult nature of the issues presented when minority shareholders attempt to withdraw from a venture because of a frustration of their original expectations.[177] For example, if it is assumed that in *Exadaktilos* the grant of relief would have a disruptive impact on the continued operation of the business or would cause financial

174. *Id.* at 156, 400 A.2d at 562 (emphasis added).

175. In Capitol Toyota, Inc. v. Gervin, 381 So. 2d 1038 (Miss. 1980), the Mississippi Supreme Court interpreted *Exadaktilos* as a case in which relief was denied because "the complaining party's reasonable expectations had been thwarted, but not grossly so." *Id.* at 1039.

176. It is unclear what result the court would reach if the minority shareholder in *Exadaktilos* had been discharged because of business or economic conditions rather than poor performance.

177. Although this Article is concerned primarily with the ability of a dissatisfied participant to withdraw from the venture, in some situations a minority shareholder may also seek damages for the actions of those in control or declaratory relief clarifying the rights of the parties in the continuing venture. Such a case was presented in Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 353 N.E.2d 657 (1976), where a shareholder discharged from employment and removed as a director sought declaratory relief and damages rather than dissolution. In directing the award of relief to the shareholder, the Massachusetts Supreme Judicial Council held that the actions of the controlling shareholders represented an attempted "freeze-out" of the minority and therefore were a breach of the fiduciary duty which they owed to this individual. *Id.* at 853, 353 N.E.2d at 664.

hardship to the remaining shareholders, then the position of those who desire to avoid the negative impact of such relief must be viewed with some sympathy, for they also had reasonable expectations that each participant would commit not only his capital but his efforts to the development of the venture. To the extent that continuity of the business enterprise and allocation of adverse economic consequences on the basis of fault are appropriate policy objectives, these goals were achieved in *Exadaktilos* and perhaps lost in *Topper*. It is, on the other hand, appropriate to view with equal sympathy the position of the minority shareholder in *Exadaktilos*. After investing at least $20,000 in a venture in which he expected to play an active role,[178] this individual was relegated to the position of a passive investor whose return will be substantially less than the return of those who play a more active role in the operation of the business.[179] It is less than satisfactory to conclude that he has only himself to blame for his position, and that if he had been brighter, more skilled in personal relations, or blessed with the foresight to bargain for protection in advance, his capital would not be "trapped" in a venture from which he has been isolated.[180]

B. Ability of a Minority Shareholder to Obtain Relief Without Regard to Misconduct: The California and North Carolina "Rights or Interests" Standards

When misconduct is the basis for relief, the complaining minority shareholder must ordinarily point to some objectiona-

178. For this purpose, the fact that the stock was received as a gift is not relevant. It should also be noted that the plaintiff co-signed a $220,000 corporate note and apparently made additional capital contributions to the venture. *See supra* note 168.

179. As such, his return on investment would be substantially lower than that of the shareholders who played an active role in the management of the business. The court implicitly left open the possibility that relief might be granted if dividends were not paid in the future by noting that "[a]lthough it would seem too early in the life of this corporation to expect dividends, the facts on that issue are not in." 167 N.J. Super. at 156, 400 A.2d at 562.

180. Expectations may also be asserted independent of the question of oppression as a basis for relief other than dissolution. *See, e.g.,* Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850, 353 N.E.2d 657, 662-63 (1976) (where the dissatisfied shareholder sought declaratory relief and damages based upon breaches of fiduciary duty by the majority, the court held that "by terminating a minority stockholder's employment or by severing him from a position as an officer or director, the majority effectively frustrate the minority shareholder's purposes in entering on the corporate venture and also deny him an equal return on his investment.").

ble action or inaction by those in control. Although the reasonable expectations analysis could be utilized as a basis for relief *independent* of oppression,[181] when it is used as a method for defining oppression there must be some relationship between the frustration of the minority shareholder's expectations and decisions made by those in control. For example, if in *Topper* the complaining shareholder had become physically or mentally disabled and could no longer perform his duties, the grant of relief might well have turned on such an inconsequential matter as whether he was discharged from employment following the disability. If he was not terminated but instead was simply unable to report to work, it is probable that relief would have been denied because there was no act by the other shareholders which was objectionable.[182]

An entirely different and largely untapped basis for relief is found in the California[183] and North Carolina[184] statutes, which provide for dissolution or other remedies[185] upon a showing that such relief is "reasonably necessary for the protection of the rights or interests of the complaining shareholder."[186] Although relatively little litigation has developed under these statutes, the fact that the ground for relief has not been stated

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181. *See infra* text accompanying notes 242-67.

182. This conclusion is supported by the following language in *Topper*:

> The court may determine the understanding of the parties as to the role the complaining shareholder is expected to play . . . . The court can then decide whether the controlling shareholders have acted contrary to that understanding or, in the language of the statute, "have been guilty of . . . oppressive actions toward the complaining shareholders."

107 Misc.2d at 35, 433 N.Y.S.2d at 366.

183. Among the grounds for involuntary dissolution set forth in § 1800(b) of the California Corporation Code is the following: "(5) In the case of any corporation with 35 or fewer shareholders . . . liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders." CAL. CORP. CODE § 1800(b)(5) (West 1977).

184. One of the grounds for involuntary dissolution set forth in the North Carolina Business Corporation Act is if "[l]iquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder." N.C. GEN. STAT. § 55-125(a)(4) (1975).

185. Both the California, CAL. CORP. CODE § 1804 (West 1977), and North Carolina, N.C. GEN. STAT. § 55-125.1 (1975), statutes give the court broad discretion to fashion a remedy other than dissolution.

186. These statutes are to be distinguished from those which employ a broader basis for relief if it is in the interest of shareholders generally. *See, e.g.*, LA. REV. STAT. ANN. § 12:143A(3) (West 1969) ("beneficial to the interests of the shareholders"); MASS. ANN. LAWS 156B § 99 (Law. Co-op. 1979) (if deadlock and "the best interests of the shareholders will be served"); N.H. REV. STAT. ANN. § 294:97 (1978) (repealed 1981) ("reasonably necessary for the protection of the rights of stockholders or creditors"); OKLA. STAT. ANN. tit. 18, § 1.195(3) (West 1953) ("beneficial to the interest of the shareholders").

with reference to the misconduct of the controlling shareholders removes significant obstacles placed in the path of the dissatisfied but nonabused shareholder in jurisdictions which follow the Model Act or similar approaches.

The potential breadth of this standard is illustrated in the California case, *Stumpf v. C.E. Stumpf & Sons, Inc.*[187] A corporation was formed and owned in equal shares by a father and his two sons. Three years later, a management dispute developed and one of the sons "ceased to be employed"[188] by the corporation. Thereafter, he was removed as an officer of the corporation. The son made no attempt to return as a participant in the family business and received no income after his withdrawal. Although the corporation did not pay dividends, there was no evidence of "abuse of authority or . . . persistent unfairness" by the other participants toward the son after he left the business.[189] Rather than attempting a reconciliation, the dissatisfied shareholder successfully brought an action seeking the involuntary dissolution of the corporation.[190] In affirming the lower court's decree of dissolution, the court of appeal held that dissolution may be ordered "when necessary to assure fairness to minority shareholders."[191] In so ruling, the

187. 47 Cal. App. 3d 230, 120 Cal. Rptr. 671 (Ct. App. 1975). *Stumpf* is significant because it is the only California case in which the judgment rested on the rights or interests ground alone. Earlier cases relied or could have relied upon alternative grounds. *See, e.g.,* Reynolds v. Special Projects, Inc., 260 Cal. App. 2d 496, 501, 67 Cal. Rptr. 374, 377 (1968) (internal dissension resulting in deadlock); Buss v. Martin, 241 Cal. App. 2d 123, 134, 50 Cal. Rptr. 206, 214 (1966) (persistent mismanagement).

188. 47 Cal. App. 3d at 232, 120 Cal. Rptr. at 672. It is unclear whether he resigned or was discharged, although the two may often be indistinguishable in a close corporation.

189. *Id.* at 233, 120 Cal. Rptr. at 673. The court did not address the question of whether there had been an abuse of authority or persistent unfairness toward the son before he left the business. *See infra* note 193.

190. The action was brought under the predecessor to § 1800(b)(5) of the California Corporations Code, which was substantially the same as the current version except that relief on this ground was not then limited to corporations with thirty-five or fewer shareholders. CAL. CORP. CODE § 4651(f) (West 1977) (repealed 1977). It has been observed that restriction of this remedy to corporations with a limited number of shareholders was because of the "drastic" nature of the dissolution remedy. 1A H. BALLANTINE & G. STERLING, CALIFORNIA CORPORATION LAWS § 320.03. (R. Clark ed. 1981). However, it should be remembered that dissolution is not the only remedy available upon a showing of the prerequisites for relief set forth in § 1800(b)(5). *See* CAL. CORP. CODE § 1804 (West 1977).

191. 47 Cal. App. 3d at 234, 120 Cal. Rptr. at 674. The court added that the ability of the holders of fifty percent or more of the shares under then § 4658 of the Code to purchase the shares of a petitioner seeking involuntary dissolution "lessen[ed] the danger of minority abuse." *Id.* *See infra* text accompanying notes 225-231.

court seemed to be influenced by the hostility which existed among the parties and the fact that the complaining shareholder received no income from the business following his withdrawal, although the court provided no guidance as to the methodology to be employed in determining fairness.[192]

The reference to "fairness" in *Stumpf* is curious in light of the statute's wording, which seems to render irrelevant the question of fairness or any consideration of the position of the other shareholders.[193] Indeed, the statute could be construed to mean that a simple need for cash on the part of a dissatisfied shareholder would be a sufficient ground for relief.[194] Such a broad reading, however, would make dissolution a remedy available to any shareholder virtually as a matter of right and would render the other grounds for dissolution largely superfluous.[195] An alternative interpretation would be that in referring to "rights or interests of the complaining shareholder," the statutes are addressing the rights or interests of the shareholder as a participant in the enterprise. Under this interpretation, the dissolution in *Stumpf* was not granted to protect the com-

192. There is some indication that the court was not aware of the uniqueness of the provision with which it was dealing. At one point it indicated that some states have construed provisions similar to subdivision (f) and required a showing of deadlock or management misconduct before relief would be granted. The authority cited for this proposition by the court, which purportedly contained a "survey of the jurisdictions," was concerned primarily with deadlock as a ground for dissolution and did not review any statutory provisions similar to subdivision (f). *See generally* Israels, *supra* note 127.

193. "[A]buse of authority or persistent unfairness toward any shareholders" are alternative grounds for relief. *See* CAL. CORP. CODE § 1800(b)(4) (West 1977).

194. *See* H. BALLANTINE & G. STERLING, CALIFORNIA CORPORATION LAWS § 3.18 (1938).

195. This reading also raises interesting questions concerning the role and enforceability of shareholders' agreements. Note in this connection § 2000(a) of the California Corporations Code, which allows the corporation or shareholders possessing fifty percent or more of the shares to avoid dissolution by purchasing the petitioner's shares. This section permits a reduction of the amount paid to the petitioner to reflect "damages resulting if the initiation of the dissolution is a breach by [any petitioner] of an agreement with the purchasing party or parties" unless the ground specified for dissolution is § 1800(b)(4) ("pervasive fraud, mismanagement, or [misapplication or waste of property]"). CAL. CORP. CODE § 2000(a) (West 1977). It is unclear whether agreement for this purpose includes implied agreements concerning the duration of the venture. For a discussion of this issue as applied to partnership, *see supra* text accompanying notes 57-106. If there is no agreement concerning dissolution, it could be argued that the attempted dissolution nevertheless should be treated as in breach of an implied agreement if not taken in good faith. *See* Page v. Page, 55 Cal. 2d 192, 197-98, 359 P.2d 41, 45 (1961); *supra* text accompanying notes 80-99. As a matter of pleading practice, counsel representing petitioners seeking involuntary dissolution under § 1800(b)(5) would be well advised to allege the (b)(6) grounds.

plaining shareholder's need for cash or his other rights or interests unconnected with the business venture. Rather, he was entitled to a decree of dissolution because, unlike the other participants, he was not receiving significant benefits from the business and, consequently, a continuation of the business was not in his interest.[196] Under such an approach, a consideration of fairness is not wholly irrelevant, but the methodology to be employed in assessing this issue is less than clear.

Although *Stumpf* remains the only decision considering in any depth the "rights or interests" ground for relief,[197] it illustrates the potential usefulness of this standard to dissatisfied shareholders. It is perhaps particularly significant that the court in *Stumpf* chose to describe the severing of the business relationship as a situation in which the son had "ceased to be employed," treating the reason—involuntary resignation, a discharge, or something in between—as irrelevant. The question of motivation or fault has no role under the rights or interests inquiry, and it is this feature which makes the California and North Carolina[198] statutes promising sources of relief for dis-

196. Under this approach, relief might have been denied if the possibility of employment remained open to the son. He would then be on an equal footing with the other participants in the venture.

197. The North Carolina cases are of little assistance in this regard. A recent decision has indicated that the provision "vests broad equitable powers in the trial court in determining whether a corporation should be involuntarily dissolved" but provides little guidance beyond this. *See* W & H Graphics, Inc. v. Hamby, 48 N.C. App. 82, 87, 268 S.E.2d 567, 570 (1980). *See also* Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 104, 139 S.E.2d 10, 13 (1964) ("We are not required, *at this stage,* to determine to what extent the interests of other shareholders may be balanced against those of one complaining shareholder who seeks liquidation and dissolution." (emphasis added)); Royall v. Carr Lumber Company, Inc., 248 N.C. 735, 737, 105 S.E.2d 65, 67 (1958). For additional California cases involving this ground but providing little if any guidance, see Hagan v. Superior Court, 53 Cal. 2d 498, 2 Cal. Rptr. 288 (1960); Reynolds v. Special Projects, Inc., 260 Cal. App. 2d 496, 67 Cal. Rptr. 374 (1968); Buss v. Martin Co., 241 Cal. App. 2d 123, 50 Cal. Rptr. 206 (1966).

198. It may be argued that the California "rights or interests" ground is potentially more significant than that contained in the North Carolina statute. Under the North Carolina statute, the grounds for involuntary dissolution include, in addition to the rights or interests ground, only deadlock among directors or shareholders or the existence of a prior agreement entitling the complaining shareholder to compel the dissolution of the corporation. *See* N.C. GEN. STAT. § 55-125(a)(1)-(4) (1975). Thus, the "rights or interests" ground in North Carolina must also cover the more traditional oppression or wrongful conduct standard as well as mismanagement, insolvency, and corporate waste. *See generally* R. ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE § 29-12 (2d ed. 1974). Under § 1800(b)(4) of the California Corporations Code, on the other hand, protection is provided to the minority shareholder against "fraud, mismanagement or abuse of authority or persistent unfairness [or mismanagement or waste of corporate assets]," and the availability of the "rights or interests" standard in (b)(5) as a separate ground for relief provides relief to

satisfied minority shareholders.

The virtually untapped potential of these statutes as sources of power for minority shareholders is apparent; whether they are well founded as a matter of policy is another question. In permitting a court to focus solely on the rights and interests of a single shareholder, the statutes are apparently based on the assumption that the shareholders who desire to avoid dissolution may simply purchase the interest of the dissatisfied shareholder. *Stumpf* itself articulates this assumption: "A dissolution judgment does not necessarily entail a sacrifice; the majority may preserve the corporation by buying out the minority."[199] To the extent that this assumption is correct, the result reached in *Stumpf* is appealing. If, however, such funds are not available, or if they are not available on reasonable terms, or if the withdrawal of capital by the complaining shareholder has an adverse impact on the business or the personal finances of the remaining shareholders,[200] then the issue becomes whether, as a matter of policy, the minority shareholder should be able to withdraw funds or compel a dissolution of the corporation and, if so, on what terms. Like the reasonable expectations approach to defining oppression, the "rights or interests of the complaining shareholder" standard of relief has so far failed to develop a satisfactory method for balancing the competing interests and expectations of minority and majority shareholders.

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the minority shareholder even where no significant misconduct on the part of those in control is involved. Thus, the California ground is clearly expansive; the breadth of the North Carolina provision, because it must also be utilized to cover more traditional grounds for relief, is less clear.

199. 47 Cal. App. 3d at 234, 120 Cal. Rptr. at 674. A similar observation is set forth in Jordan, *The Close Corporation Provisions of the New California General Corporation Law,* 23 U.C.L.A. L. REV. 1094, 1146 (1976): "An unwilling participant in the enterprise should not be forced to continue in the absence of some good reason. The other shareholders can always continue without him; they have the right under section 2000 to prevent dissolution by purchasing his shares." *See also* N.C. GEN. STAT. § 55-125.1 (1975) (specifying the forms of relief which a court may grant other than dissolution, including an order that the corporation or other shareholders purchase the shares of any shareholder).

200. *See infra* text accompanying notes 225-31.

III. CONTINUITY OF LIFE VERSUS FREE DISSOLVABILITY: THE ACCOMMODATION OF COMPETING VALUES WITHIN THE CLOSE CORPORATION

A. The Correctness of the Partnership Analogy

Given the significant influence of partnership law on the reform of the law applicable to close corporations,[201] consideration should be given to whether the approach taken by the U.P.A. to the permanence of the enterprise is appropriate for the close corporation. For this purpose the partnership model may be summarized as resting on two propositions: (1) the relationship among partners is dissolvable at the will of any one of them even in the face of an agreement to the contrary;[202] and (2) an agreement that establishes a partnership term or undertaking may be express or implied and will have as its principal effect the assignment of economic consequences in the event of a "wrongful" dissolution.[203]

The attractiveness of partnership law as a model for the reform of close corporations law is based largely upon the perceived similarity between the two types of enterprise.[204] The

201. The attractiveness of the U.P.A. as a source for reform has not been limited to corporate law. *See, e.g.,* Weitzman, *Legal Regulation of Marriage: Tradition and Change,* 62 CAL. L. REV. 1169, 1255-58 (1974) (suggesting that the U.P.A. might serve as a model for a "Uniform Conjugal Partnership Act"). *See also* Weyrauch, *Metamorphoses of Marriage,* 13 FAM. L.Q. 415, 428-29 (1980).

202. *See supra* text accompanying notes 27-32.

203. *See supra* text accompanying notes 33-49.

204. *See, e.g.,* Helms v. Duckworth, 249 F.2d 482, 486 (D.C. Cir. 1957) ("In an intimate business venture such as this, stockholders of a close corporation occupy a position similar to that of joint adventurers and partners"); Donahue v. Rodd Electrotype Co., 367 Mass. 578, 592-93, 328 N.E.2d 505, 515 (1975) ("Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another."); 68th St. Apartments, Inc. v. Lauricella, 142 N.J. Super. 546, 549, 362 A.2d 78, 85 (1976), *aff'd,* 150 N.J. Super. 47, 48, 374 A.2d 1222, 1222 (1977) (after observing that "once corporate technisms are thus overcome, the relationship of the principals can be seen to be that of partners or coventurers," the court attempted to apply partnership dissolution principles to a close corporation); C. ROHRLICH, *supra* note 110, § 2.21 (close corporation "functionally more closely allied to the partnership than to the 'corporation' "); Bradley, *Toward a More Perfect Close Corporation—The Need for More and Improved Legislation,* 54 GEO. L.J. 1145, 1148-50 (1966) (shareholders in a close corporation wish their ventures to assume many of the characteristics of partnerships as set forth by the U.P.A.); Hetherington & Dooley, *supra* note 26, at 2 (close corporation is the "functional equivalent" of the partnership); Israels, *The Close Corporation and the Law,* 33 CORN. L.Q. 488, 491 (1948) ("[T]he participants [in a close corpora-

most common and valid point of comparison is size.[205] Because of the small number of participants in such enterprises, it is often assumed that most partners and owners of close corporations are active participants in the management of their businesses. This gives rise, or so the argument goes, to the development of relationships between the parties which are highly personal in nature. It is therefore not uncommon to see close corporations referred to as "chartered partnerships"[206] or "corporate partnerships,"[207] and the thrust of much of corporate law reform has been to free the close corporation from the traditional rigidities and formalities of the law applicable to publicly-traded enterprises.[208]

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tion] consider themselves 'partners' and seek to conduct the corporate affairs to a greater or lesser extent in the manner of a partnership," and the "objective of the participants in a close corporation is to equate the scheme of governance of their enterprise to that of a partnership").

205. In this sense size refers to the number of participants and not the scope of operations. *See* F. O'NEAL, *supra* note 118, § 1.04. Dean O'Neal notes that "[w]hile Ford 'went public' in 1955, many sizeable companies still retain most of the characteristics of a close corporation." *Id.*, § 103.

206. *See, e.g.*, Donahue v. Rodd Electrolyte Co., 367 Mass. 578, 586, 238 N.E.2d 505, 512 (1975); Ripin v. United States Woven Label Co., 205 N.Y. 442, 447, 98 N.E. 855, 856 (1912).

207. *See, e.g.*, Conway, *The New York Fiduciary Concept in Incorporated Partnerships and Joint Venturers,* 30 FORD L. REV. 297, 306 (1961); Hornstein, *Judicial Tolerance of the Incorporated Partnership,* 18 LAW & CONTEMP. PROBS. 435, 436 (1953).

208. *See* Manne, *Our Two Corporation Systems: Law and Economics,* 53 VA. L. REV. 259, 284 (1967). *See generally* F. O'NEAL, *supra* note 118, §§ 1.14(a)-1.14(b). Professor Bradley has noted: "That corporation statutes were written against the backdrop of the widely held corporation has been observed ad nauseam." Bradley, *supra* note 204, at 1145. *See also* Hetherington & Dooley, *supra* note 26, at 1 n.1 (the authors note that the trend toward legislative recognition of the close corporation may be broader than might appear from the number of states which have enacted integrated close corporation statutes because many other states have enacted statutory amendments of little relevance to the publicly held corporation and obviously intended to apply primarily to the closely held concern). For a listing of statutes recognizing close corporations, see *supra* note 15. Much of the reform accomplished to date has focused upon permitting shareholders in close corporations to reach agreements and arrange their affairs as if they were partners. *See generally* F. O'NEAL, *supra* note 118, § 5.07(a). *See also* CAL. CORP. CODE § 300(b) (West 1977) (providing that an agreement among shareholders of a close corporation will not be invalid as "an attempt to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners"). Indeed, it is now widely recognized that the shareholders' agreement is not only a significant element of business planning but is also an important method of protecting the positions of minority shareholders. No attempt will be made here to provide a representative sampling of the voluminous literature on the subject of shareholders' agreements. *See generally* F. O'NEAL, *supra* note 118, §§ 5.01-7.29. *Compare* Hetherington & Dooley, *supra* note 26, at 2 ("The emphasis on contractual arrangements reveals a fundamental misunderstanding of the nature of close corporations. Whether the parties

If it is assumed that the relationships among owners of close corporations, like those among partners, are "personal," then the logic of the official comment to section 31 of the U.P.A. may, at least superficially, also apply to close corporations:

> The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in so doing he breaks a contract, should, it is submitted, be recognized.

There are, however, a number of distinctions between close corporations and partnerships which limit the applicability of the partnership model of dissolution to the close corporation.

1. *The Definitional Problem*

This Article has assumed a point which has plagued com-

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adopt special contractual arrangements is much less important than their ability to sustain a close, harmonious relationship over time.") *with* Elson, *Shareholders Agreements, A Shield for Minority Shareholders of Close Corporations,* 22 BUS. LAW. 449, 457 (1967) ("I would emphasize that a well-drawn stockholders' agreement entered into contemporaneously with the formation of a corporation is the most effective means of protecting the minority shareholder."). The willingness to respect shareholders' agreements has recently been expanded by some courts to include implied understandings concerning reasonable expectations, the denial of which may constitute oppressive conduct by those in control of the corporation. *See supra* text accompanying notes 151-80. It has been noted that implied agreements may be accorded the status of "agreements" which alter the application of certain of the provisions of the U.P.A. *See supra* text accompanying notes 57-86. The extent to which comparable informal understandings among shareholders in a close corporation should be recognized is a question which has received comparatively little attention. Dean O'Neal has suggested that "[t]hough oral voting agreements are usually enforced if they are otherwise valid, unnecessary risks are run by failing to reduce agreements of this kind to writing." F. O'NEAL, *supra* note 118, § 5.26. *See also* Wasserman v. Rosengarden, 84 Ill. App. 3d 713, 716, 406 N.E.2d 131, 134 (1980) (an oral agreement which included understandings concerning election of officers and directors and distribution of salaries and profits "clearly was a shareholder's agreement."); 68th Street Apartments, Inc. v. Lauricella, 142 N.J. Super. 546, 362 A.2d 78 (1976), *aff'd*, 150 N.J. Super. 48, 374 A.2d 1222 (1977) (a case where the court applied in a rather curious fashion partnership principles in the context of a close corporation). It is interesting to compare these decisions with the formalism not infrequently required by statute. For example, although the California Corporations Code recognizes the enforceability of a shareholders' management agreement in a close corporation, CAL. CORP. CODE § 300(b) (West 1977), the agreement must be in writing and among all of the shareholders, CAL. CORP. CODE § 186 (West 1977). *Cf.* CAL. CORP. CODE §§ 706(a), (d) (West 1977) (validating a written voting agreement but further providing that this section does not invalidate any other agreement among shareholders which is not otherwise illegal). *See also* F. O'NEAL, *supra* note 118, § 5.26 n.5 ("Some statutes which validate written agreements clearly indicate that they are permissive only and 'shall not be interpreted to invalidate any voting agreement or any other agreement among shareholders which is otherwise not illegal.' ").

mentators, courts, and legislatures. That point concerns the definition of a close corporation.

Statutory definitions of close corporations frequently specify a maximum number of participants, although the use of such widely varying maxima as ten,[209] thirty,[210] and fifty[211] reflects a range of viewpoints on this issue. Judicial approaches to the question tend to be less precise; one landmark opinion defined a close corporation as "one in which the stock is held in a few hands, or in a few families, and wherein it is not at all, or only rarely, dealt in by buying or selling."[212]

Although no attempt will be made here to resolve this difficult issue,[213] it must nevertheless be observed that, as the definition of a close corporation expands, the analogy with the partnership becomes attenuated. For example, if a close corporation contains no more than two or three shareholders then the analogy is quite appealing when the point of reference is a partnership containing a similar number of participants. On the other hand, when a close corporation consists of, for example, fifty shareholders, one may question the extent to which the relationships among the participants in that enterprise bear a significant resemblance to those existing in a corporation or partnership consisting of only two or three members.[214] In-

209. *See, e.g.,* CAL. CORP. CODE § 158(a) (West 1977).

210. *See, e.g.,* DEL. CODE ANN., tit. 8, § 342 (1975).

211. *See, e.g.,* Proposed Model Act Supplement, *supra* note 130, at 277.

212. Galler v. Galler, 32 Ill. 2d 16, 27, 203 N.E.2d 577, 583 (1964), *appeal dismissed*, 69 Ill. App. 2d 397, 217 N.E.2d 111 (1966), *modified*, 21 Ill. App. 3d 811, 316 N.E.2d 114 (1974). *See also* Donahue v. Rodd Electrotype Co., 367 Mass. 578, 586, 328 N.E.2d 505, 511 (1975) (a close corporation is "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").

213. *See generally* F. O'NEAL, *supra* note 118, § 1.02. Dean O'Neal has suggested that a close corporation is one whose shares are not generally traded in the securities markets. *Id.* This, of course, will include some entities with a sizeable number of owners, most of whom may be passive investors. For a suggestion that a close corporation should be defined as one in which all of the stockholders are active participants in the management and conduct of the business, see C. ROHRLICH, *supra* note 110, § 2.21. Another commentator has taken a quite different view. *See* M. EISENBERG, THE STRUCTURE OF THE CORPORATION 12 (1976) ("[I]t will frequently happen even in closely held corporations that by accident or design there are some shareholders who do not wish to be active in the management of the business.").

214. If the definition of a close corporation focuses upon whether or not the shares are publicly-traded, the number of shareholders may be far in excess of fifty. Most close corporations, however, have a more limited number of participants. Professor Conard has estimated that almost ninety-five percent of corporations have ten or fewer shareholders. *See* Conard, *The Corporate Census: A Preliminary Exploration,* 63 CAL. L. REV. 440, 458-59 (1975). A study of Swed-

deed, it is reasonable to assume that the rare general partnership consisting of fifty participants will tend to adopt certain characteristics more traditionally associated with the corporation, including centralized management.[215]

The integrity of the definition of a close corporation is important in evaluating perhaps the most important characteristic of a small ownership base—the so-called "personal" relationship which is said to exist among the owners. In fact, it is the nature and comparability of this personal relationship which is said to be that characteristic of the close corporation which makes it most like the partnership.[216]

2. *Evaluating the "Personal" Nature of the Relationships*

Categorization as "personal" does little to describe the true nature of a relationship. It may, for example, be one of friendship, marriage, or professional or business association. Although it is undeniably correct that the relationship among shareholders in a corporation with two or three owners is likely to be more personal than that which exists among shareholders in a publicly held corporation, it does not follow that the relationship is necessarily as personal as that which may exist in a comparably-sized partnership. In fact, there are several reasons why differences between the legal principles governing the two forms of enterprise may facilitate, if not require, the development of closer personal relationships or dependencies among partners than among shareholders.

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ish corporations cited in this article provides evidence that, at least in Sweden, the largest percentage of corporations is at the low end of the one-to-ten spectrum. This study of the largest Swedish corporations indicates that thirty-nine percent are owned by only one shareholder and twenty-seven percent have between two and ten shareholders. *Id.* at 456 n.33 (discussing *Severiges 500 Storsta Foretag*, STOCKHOLM: EKONOMISK LITTERATUR AB (1972)).

215. The right given each partner under § 18(e) of the U.P.A. to participate in management is subject "to any agreement between them," U.P.A. § 18, and management authority may be delegated to a specific partner. *See, e.g.,* Bernstein v. Ross, 22 Mich. App. 117, 120-21, 117 N.W.2d 193, 195 (1970); Elle v. Babbitt, 259 Or. 590, 602-03, 488 P.2d 440, 445-46 (1971); McCallum v. Asbury, 238 Or. 257, 261-62, 393 P.2d 774, 776 (1964).

216. *See, e.g.,* Helms v. Duckworth, 249 F.2d 482, 486 (D.C. Cir. 1957) (referring to the close corporation as an "intimate business venture" and comparing it to a partnership); Donahue v. Rodd Electrotype Co., 367 Mass. 578, 592-93, 328 N.E.2d 505, 515 (1975) (speaking of the "trust and confidence which are essential to this scale and manner of enterprise"); Elson, *supra* note 208, at 450 ("[T]he old bromide that entering into a partnership is like entering into a marriage applies with equal force to close corporations."); Hetherington & Dooley, *supra* note 26, at 2-3 ("Typically, [partnerships and close corporations] are founded by individuals who have a virtually complete identity of interests and strong feelings of trust and confidence for one another.").

No corporation carries with it mutual agency; every partnership does.[217] The limitation of liability accorded to shareholders in a close corporation has the effect of defining the risk of each shareholder[218] as the amount of his or her investment in the enterprise;[219] the risks of the partner, on the other hand, are not defined and the ultimate legal exposure of a partner is to a large extent dependent upon the actions of his or her coventurers. No shareholder has an automatic right to participate in management; every partner does. The scheme provided by the U.P.A. for the management of a partnership is one in which each participant has a potentially significant role to play in the management of the partnership, and the ability of even a minority partner to bind the partnership in the ordinary course of business may thus give rise to a mutual dependency not present in the limited liability setting of the close corporation.[220] The corporate entity, therefore, may have something of

217. *See* U.P.A. § 9.

218. Any personal guarantees required of a shareholder would increase the risk, which will nevertheless remain defined.

219. It is interesting that the reform of close corporation law has not served as the occasion for a re-examination of the principle of limited liability. *See* Fessler, *supra* note 54.

220. Several significant distinctions between the participation rights of partners and shareholders should be recognized.

Section 18(e) of the U.P.A. provides that "[a]ll partners have equal rights in the management and conduct of the partnership business." This is subject to any agreement between the partners. *See also* U.P.A. §§ 9 ("Partner Agent of Partnership as to Partnership Business"), 10 ("Conveyance of Real Property of the Partnership"), 11 ("Partnership Bound by Admission of Partner"), 12 ("Partnership Charged with Knowledge of or Notice to Partner"), 13 ("Partnership Bound by Partner's Wrongful Act"), 14 ("Partnership Bound by Partner's Breach of Trust"), and 15 ("Nature of Partner's Liability"). *See generally* D. FESSLER, *supra* note 13, at 18-85. Historically, minority shareholders have not had a comparable right to participate in management. Because of the sharp distinction between ownership and management of corporations, the minority shareholder who is not also an officer or director has no management role whatsoever. Even if the participant is a director, he or she may constantly be outvoted on issues of importance, and as an officer, the participant's duties may be defined and subject to supervision by the board or other officers.

Further, unanimity plays an important role under the U.P.A., for some major decisions concerning the partnership may require the approval of all the partners. Section 18(h) of the U.P.A. provides that "[a]ny difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of the agreement between the parties may be done without the consent of all of the partners." This section does not specifically address decisions which are neither related to "ordinary matters" nor covered by the partnership agreement. It would appear, however, that matters outside the scope of the partnership business require unanimous consent. *See, e.g.,* A. BROMBERG, *supra* note 39, § 65 at 381-82; M. EISENBERG, *supra* note 213, at 10-11. *See also* U.P.A. § 9(3)(c) ("one or more but less than all the partners have no authority to [d]o any . . . act which would make it impossible to carry on the ordinary business of a partnership"). Unaa depersonalizing effect upon the relationship among share-

nimity requirements, on the other hand, are not common under corporate codes. *But cf.* MD. CORPS. & ASS'NS CODE ANN. § 4-601 (Michie Cum. Supp. 1981) (a consolidation, merger, share exchange, or transfer of assets of a close corporation requires unanimous shareholder approval). While some decisions may require supermajority votes of the shareholders, *see, e.g.*, TEX. BUS. CORP. ACT. ANN. art. 5.03 (Vernon 1980), VA. CODE § 13.1-70 (1978) (two-thirds shareholder vote required for merger or consolidation), the minority shareholder who does not have, alone or in concert with others, a sufficient number of shares to affect the outcome of such a vote may be disregarded. Certain major decisions however, may, activate appraisal rights for minority shareholders. *See generally* M. EISENBERG, *supra*, at 68-84; Buxbaum, *The Dissenter's Appraisal Remedy*, 23 U.C.L.A. L. REV. 1229 (1976); Manning, *The Shareholder's Appraisal Remedy: An Essay For Frank Coker*, 72 YALE L.J. 223 (1962); Note, *Valuation of Dissenter's Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453 (1966).

There also exists a distinction between the concept of majority rule in partnerships and close corporations. Majority in a partnership refers to numbers and not interests. *See* U.P.A. § 18(h) ("Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners"). It has been suggested that the U.P.A. principle "is commonly varied by leaving ordinary business decisions to a 'majority in interest.'" Comment, *Drafting Problems of Partnership Agreements*, 40 CAL. L. REV. 66, 70 (1952). The authority cited for this proposition, Worcester, *supra* note 55, at 992, however, does not support it. In a corporation, majority refers to shares rather than individuals. This was not always the case:

> That is, each shareholder was entitled to one vote if given by him in person. This was at first the rule in the East India Company, but naturally enough it soon became distasteful to the larger owners, and various changes were made at different times; . . . It soon became usual to allow the larger holder more than one vote, and it was customarily provided in the charters how many votes should belong to the owner of a given number of shares, the owner of a large number having more votes than the owner of a few, but not proportionately more.

Williston, *History of the Law of Business Corporations Before 1800 II*, 2 HARV. L. REV. 149, 156-57 (1888). Further, since management of a corporation is typically entrusted to an elected Board of Directors, the number of matters on which a shareholder vote is required is limited. The typical Board itself functions by majority vote. *See, e.g.*, MODEL BUSINESS CORP. ACT § 40 (1980).

Partners have greater access to information than shareholders. Section 19 of the U.P.A. provides that "every partner shall at all times have access to and may inspect and copy any of [the partnership books]." This right is also "subject to any agreement between the partners," and at least one court has suggested that such an agreement may be implied. *See* People v. Phillips, 207 Misc. 205, 206, 137 N.Y.S.2d 697, 699 (1955). In adopting the U.P.A., Alabama modified § 19 so that this right is available at all "reasonable times." ALA. CODE § 10-8-45 (1980). Further, § 20 of the U.P.A. provides: "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." Although this section requires the rendering of information only "on demand," it has been suggested that an affirmative duty to disclose may arise from the fiduciary duties of partners to each other. *See* A. BROMBERG, *supra* note 39, at 388. *See also* U.P.A. §§ 21 (providing that partners are accountable as fiduciaries), 22 (setting forth the circumstances under which a partner may demand a formal accounting as to partnership affairs). Shareholders, on the other hand, must generally establish a "proper purpose" in order to gain access to information concerning their corporation. *See generally* W. CARY holders, at least when compared to that which exists among partners.

3. *Formalities in the Creation of the Legal Relationships*

It is ironic, to say the least, that this most serious of business relationships, a partnership, may not only be created without the observance of any formalities, but may also be effectively established to the surprise of one or more of the participants.[221] Both the point at which the relationship is established and the existence of oral or implied understandings affecting the applicability of various provisions of the U.P.A. may be unclear. Consequently, the U.P.A. starts from the proposition that the partnership relationship, which is so easily established but which has such potentially serious economic consequences to each of the partners, may be dissolved at any time by the express will of any of the partners.[222]

Because corporations can arise only by design, the reasons for free dissolvability do not apply with the same force to close corporations. Not only are shareholders better able to define the risks involved in the venture because of their limited liability, but the mere act of incorporation requires some degree of deliberation and, hopefully, awareness by the participants of the nature of the relationship about to be established. The deliberation required for the creation of a corporation, combined with the fact that shareholder status confers neither an automatic right to participate in management nor real or ostensible powers of agency, demonstrates that the reasons which support the application of a policy of free dissolvability to partnerships do not apply with equal force to corporations.[223]

& M. EISENBERG, *supra* note 118, at 344-53; F. O'NEAL, *supra* note 2, at § 3.09-3.11; Starr and Schmidt, *Inspection Rights of Corporate Stockholders: Toward a More Effective Statutory Model,* 26 U. FLA. L. REV. 173 (1974). It has been suggested that significant practical obstacles may face the shareholder desiring information:

> It is standard corporate practice to question the motives and good faith of the applicant, although in almost all cases he will prevail. The defense is usually pro forma and not supported by the cases. The objectives are to wear down the shareholder, undermine his efforts, increase his costs, and delay any further steps he may take.

W. CARY & M. EISENBERG, *supra,* at 351-52. While such a limitation on the rights of shareholders may be justified for publicly held corporations, it has been criticized as inappropriate for closely held concerns. *See* O'Neal, *Molding the Corporate Form to Particular Business Situations: Optional Charter Clauses,* 10 VAND. L. REV. 1, 40 (1956).

221. *See supra* note 53.

222. *See supra* text accompanying notes 27-32.

223. The point is not that partnerships are fundamentally different from

B. Free Dissolution and the Close Corporation

It may be argued that, even though the analogy between close corporations and partnerships suffers from some limitations, the partnership model provides a useful method by which the interests of minority shareholders in close corporations may be protected. By giving each shareholder the right to compel a dissolution of the corporation and a liquidation of its assets, this model would provide minority interests with far greater liquidity than they now enjoy. In addition, those desiring to avoid the consequences of dissolution would have an incentive to resolve differences with the dissatisfied minority or, failing this, to negotiate a purchase of the minority's interest at fair value.[224]

The concept that corporations should be dissolvable at the will of a minority shareholder, however, rests upon at least three questionable assumptions. The first is that the remaining shareholders may easily avoid the negative or unfair consequences of a dissolution by purchasing the interest of the dissatisfied shareholder. The second is that an adjustment of either the amount payable to the withdrawing partner in the event of a buy-out or the method by which that amount is paid need not be made to reflect the premature termination of the relationship. The third is that the value of protecting the interests of minority shareholders is superior to that of continuity of corporate life and can best be served by undermining the permanence of the corporate entity.

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close corporations; rather, it is that there are sufficient distinctions to warrant careful consideration of the extent to which particular principles set forth in the U.P.A. are applicable to close corporations. Rather than relying upon the supposed comparability of close corporations and partnerships to justify the broad adoption of partnership law as a model for reform of close corporation law, consideration should be given to the subtle yet significant distinctions which exist, and are likely to continue to exist, between partnerships and close corporations. To the extent that particular provisions of the U.P.A. are also appropriate models for the reform of corporate law, it should be because the rationale for the borrowed principles applies equally to both partnerships and close corporations and not because partnerships and close corporations are thought to be identical and therefore should be governed by the same principles.

224. The most complete presentation of this theory is found in Hetherington & Dooley, *supra* note 26. *See also* Hetherington, *supra* note 55. At various points in this Article the proposal will be referred to as the free dissolvability proposal. As advanced by Professors Hetherington and Dooley, it would permit the remaining shareholders to avoid a dissolution through the purchase of the interest of the withdrawing shareholder.

1. *The Myth of the Painless Buy-Out*

The assumption that those who desire to avoid a dissolution of the corporate enterprise may easily do so by purchasing the interest of a dissatisfied minority shareholder[225] ignores a number of problems which may be encountered by those who wish to continue the venture.

There are limited sources of funds which will enable the corporation or the remaining shareholders to purchase the interest of a minority shareholder. Conceivably, either the corporation or the remaining shareholders may have sufficient liquid assets to purchase the interest. If the corporation is the purchaser, however, it is thereby deprived of the ability to útilize those funds in a fashion best suited for the needs of the business.[226] In addition, the dispersal of corporate funds to a withdrawing shareholder may render the creditors of the enterprise less secure,[227] and as a result may impair the ability of the corporation to obtain additional financing in the future.[228] If shareholders are the purchasers, they may be placed in a position of committing far greater personal resources to the enter-

225. *See, e.g.,* Stumpf v. C.E. Stumpf & Sons, Inc., 47 Cal. App. 3d 230, 120 Cal. Rptr. 671 (1975), *supra* text accompanying notes 187-200. See also Hetherington & Dooley, *supra* note 26, at 30, where it is observed that "[i]f a court orders dissolution and one party wishes to continue the business, a mutually advantageous purchase of the other's interest will result." The authors further observe that the question of financing the buy-out is "irrelevant to the analysis." *Id.* at n.80. The problems of financing the buy-out, however, should not be treated as irrelevant unless the expectations of the other participants who committed their capital to the venture and desire to continue the business are also treated as irrelevant.

226. There also may exist one or more "neutral" shareholders arguing that the expenditure of funds is not for a proper corporate purpose.

227. An additional issue is the extent to which statutory restrictions on the distribution of funds to shareholders through redemptions or dividends would, or should, affect the purchase of an unhappy shareholder's interest by the corporation. *See, e.g.,* MODEL BUSINESS CORP. ACT § 45 (1980) (distributions may not be made if they would render the corporation unable to pay its debts as they become due or the assets of the corporation would be less than the sum of its liabilities and the amount payable pursuant to any liquidation preference rights of outstanding shares). For a discussion of this issue as applied to the free dissolvability proposal, see Hetherington & Dooley, *supra* note 26, at 55-56. A "lawful" distribution may, of course, nevertheless affect the credit-worthiness of a corporation; similarly, the possibility that a "lawful" distribution to a shareholder may be made in the future may also be a matter of some concern to the creditors.

228. If the payment is to be made in installments, the corporate debt increases. In addition, payments to the withdrawing shareholder may decrease the shareholders' equity in the corporation. As the amount of debt increases in relation to the equity, a perception of increased risk in an extension of credit may result. *See generally* Baxter, *Leverage, Risk of Ruin and the Cost of Capital,* 22 J. FIN. 395 (1967).

prise than they might originally have anticipated or either reducing or terminating their participation in the venture.

The corporation or the remaining shareholders may not have sufficient liquid assets to fund the purchase. In such circumstances it may be necessary for either or both of them to attempt to obtain financing for the purchase. As recent experiences in the financial markets have demonstrated, there are no guarantees that such financing will be available.[229] Either the condition of the credit market or the perceived credit risk may make it impossible or costly to obtain financing. Even assuming that financing is available, increasing corporate or shareholder debt may make the securing of future financing more difficult or expensive.

An alternative method of funding a buy-out is to attract a new investor to the enterprise. This individual may either purchase the interest of the withdrawing shareholder directly or subscribe to additional capital stock of the corporation, allowing the corporation to utilize the proceeds to purchase the interest of the withdrawing shareholder. If such an individual can be found, however, he or she may be willing to commit funds to the venture only upon receipt of significant concessions from the controlling shareholders. Thus, any "deal" pursuant to which the shareholders initially committed their resources must now be modified because of a fellow shareholder's desire to withdraw from the venture.

Finding a satisfactory method of funding the purchase of the interest of a shareholder who demands either a dissolution or buy-out represents a serious problem. Much of the literature devoted to the use of buy-sell or cross-purchase agreements in estate planning focuses on exactly the same problem. In estate planning, however, the employment of such agreements is greatly facilitated by the availability of life insurance to fund buy-outs.[230] No comparable source exists for funding a buy-out precipitated by a dissatisfied shareholder.

Funding obstacles may to some extent be relieved by careful drafting of the terms of the buy-out. For example, one pro-

229. *See generally* Nadler, *Inflation, Commercial Lending, and America's Future,* 61 J. COMM. BANK LENDING 23 (1979).

230. *See, e.g.,* Kahn, *Mandatory Buy-Out Agreements for Stock of Closely Held Corporations,* 68 MICH. L. REV. 1 (1969); Matson, *A New Look at Business Buy-Out Agreements,* 25 PRAC. LAW. No. 5, at 43 (1979); Samuels, *Funding Partnership Buy-and-Sell Agreements with Life Insurance,* 35 TAXES 857 (1957); Sherman, *Problems of Inadequate Funding of a Buy-Sell Agreement,* 110 TR. & EST. 986 (1971); Note, *The Use of Life Insurance to Fund Agreements for Disposition of a Business Interest at Death,* 71 HARV. L. REV. 687 (1958).

posal has suggested that protection can be provided "against sudden cash drain by a provision in the proposed statute authorizing the court, upon a showing of good cause, to provide for installment payments of the purchase price for a period of time not exceeding five years."[231] Although this may provide protection against a "sudden cash drain," it still exposes the corporation or the remaining shareholders to a "sustained cash drain."

Thus, if the dissatisfied minority shareholder has the power to compel a dissolution of a close corporation, avoiding this result by means of a buy-out will often be far from painless. The question remains, however, whether the dissatisfied shareholder should be in a position to inflict this result on the other participants and, if so, whether adjustments should be made in the value of the shareholder's interest or the terms pursuant to which payment is made. These questions in turn give rise to a need to evaluate the nature of the mutual commitment made by shareholders in a close corporation.

2. *Implied Undertakings and Close Corporations*

Free dissolvability of close corporations would provide many minority shareholders with bargaining leverage that they do not now enjoy.[232] In some instances, this leverage would, of course, be nonexistent because the controlling shareholders would have both the resources and the desire to eliminate the minority shareholder from the venture. In other situations, however, the controlling shareholders might perceive the minority shareholder's threat as real and be forced to adjust their actions in order to accommodate the needs or demands of the minority shareholder. Whether a minority shareholder in this latter situation should be given negotiating leverage through the power to disrupt is perhaps best analyzed by comparison to the position of his or her counterpart in the partnership.

Although the proposal making close corporations freely dissolvable is based on partnership principles, it fails to make the important distinction, recognized by the U.P.A., between the ability to withdraw and the terms under which the withdrawal will be made.[233] The U.P.A. starts from the proposition that a partnership is freely dissolvable, but it also recognizes that

231. Hetherington & Dooley, *supra* note 26, at 51.

232. This leverage could be used to negotiate either favorable terms for the withdrawal or a change in business policies. *See supra* note 109.

233. *See supra* text accompanying notes 27-45.

partners have sometimes intended something other than a fragile relationship and in such situations the U.P.A. imposes what may be undesirable consequences on the partner who prematurely dissolves the association. Some courts have even found dissolutions wrongful because of implied, as opposed to express, partnership terms or undertakings.[234] The case for implied terms or undertakings may be even greater in the "typical" close corporation, the formation of which requires a measure of deliberation and adherence to formalities. Thus, in the case of the close corporation it is reasonable to reverse the assumptions of the U.P.A. and start from the rebuttable presumption that those who form a corporation intend that the contributions of each will remain available for the needs of the business and that no shareholder has a right to use as leverage for the purchase of his or her interest the threat of a dissolution of the corporate entity. To the extent that this reversal of assumptions is appropriate, one may question the policy of permitting an individual to treat an investment in a close corporation as if it were a mutual fund, subject to liquidation at any time without regard to the effect which this may have on the coventurers or creditors.[235]

3. *Some Benefits of Permanence*

Because of the legal effects of the partnership relationship and the ease and informality with which it can be created, any attempt to accord a significant measure of permanence to a partnership would be ill-advised as a matter of policy. Continuity of life, on the other hand, is frequently advanced as a desirable characteristic of the corporate form of organization,[236] providing benefits not available under the partnership mode of association. A number of factors may, however, serve to undermine the principle that close corporations represent permanent relationships.[237] An evaluation of the benefits of continuity of life is therefore most realistically approached by examining the problems which might arise if close corporations were rendered

234. This assumes that the business is continued by the remaining partners. *See* U.P.A. § 38; *supra* text accompanying notes 44-45.

235. The free dissolvability alternative ignores this consideration and instead treats as a paramount value the freedom to redirect resources: "[E]fficiency requires that an owner be able to redirect the use of his resources in accordance with his changing perceptions. Liquidity is thus essential to the efficient allocation of resources in the capital market, ..." Hetherington & Dooley, *supra* note 26, at 44.

236. *See supra* note 110.

237. *See supra* text accompanying notes 111-16.

more freely dissolvable than is presently the case. A consideration of some of the more desirable consequences of a measure of permanence follows.

a. Ability to Attract Financing

The financing problems of a close corporation range from securing the confidence of trade creditors extending credit in the ordinary course of business to providing a degree of psychological if not financial security to larger lenders. Because corporations are distinct debtors,[238] society encourages a measure of corporate continuity of life. If corporate funds must be used to purchase the interest of a dissatisfied minority shareholder, the stability of the debtor may be undermined and the relative risk of extending credit may increase in the eyes of the unsecured, and possibly even secured, creditors. Perhaps even more unsettling to the creditors is the prospect of dissolution followed by a liquidation of corporate assets, since there is no assurance that the amount realized from the sale of assets will be sufficient to satisfy corporate obligations. To make corporations more freely dissolvable, therefore, may affect the terms under which they are able to secure credit.

b. Ability to Attract Equity Investors

Whether free dissolvability encourages or discourages the commitment of capital or labor to closely held corporations may depend upon whether the investment in a given situation results in a controlling or a minority interest in the venture. From the point of view of a controlling shareholder, the current state of affairs approaches the ideal, for if he or she controls sufficient shares to cause a voluntary dissolution,[239] then the corporation is, from this person's perspective alone, freely dissolvable. To extend the dissolution right and thereby grant bargaining leverage to additional shareholders will subject the controlling shareholder to risks not now faced and, accordingly, may render less desirable the position of controlling shareholder in a closely held corporation. Conversely, according minority shareholders additional bargaining leverage through the right of dissolution may render minority positions in closely held corporations more attractive, although the possibility that any other shareholder may disrupt the continuity of the enter-

238. *See In re* First Nat'l Bank of Arthur, Ill., 23 F. Supp. 255, 256-57 (E.D. Ill. 1938).

239. *See supra* text accompanying notes 113-16.

prise should be of concern to even a minority participant in the venture.

c. Enhanced Role for Shareholders' Agreements

Recent reform of corporate law tolerating, if not encouraging, shareholders' agreements concerning the allocation of control within and the management policies of the enterprise has borrowed heavily from the overriding principle of the U.P.A. that participants in a business venture should be in a position to arrange their affairs by agreement.[240] This increasing recognition accorded the shareholders' agreement may be undermined to a significant extent if a participant is free at any point to escape from what is perceived to be an undesirable agreement by demanding a dissolution of the corporation or a purchase of his or her interest.[241]

C. THE IMPORTANCE OF EXPECTATIONS IN A CLOSE CORPORATION

The development of the reasonable expectations analysis as a method of defining oppression has been evaluated in an earlier portion of this Article.[242] It was there suggested that the approach not only significantly departs from the fault-based oppression standard, with which there is societal experience, but also improperly ignores the expectations of participants other than the dissatisfied shareholder. Expectations of participants in a business venture should not, however, be treated as irrelevant.[243] This section will focus on the extent to which recogni-

240. *See supra* note 208. The importance of the agreement in any type of planning process is obvious, and it is somewhat ironic that the tendency of planning in the partnership context may be directed to a significant degree towards attempting to provide some measure of stability to the venture. For example, establishing a definite term or providing for a deferred pay out of a withdrawing partner's interest can each be viewed as an attempt to provide a measure of continuity of life to an otherwise fragile relationship. In general, however, partnerships lack the permanence which would give agreements among their participants anywhere near the importance that they enjoy as broad-based planning devices in the context of close corporations.

241. If free dissolvability were allowed, it would not be surprising if most agreements began to include a waiver of the dissolution right, thus rendering the privilege meaningless when the parties have reduced their understandings to writing. Professors Hetherington and Dooley would attempt to limit this result by restricting the waiver of the buy-out right to two years, thus presumably rendering it virtually impossible to contract for permanence. *See* Hetherington & Dooley, *supra* note 26, at 52.

242. *See supra* text accompanying notes 154-180.

243. Frustration of expectations may in some situations be the basis for a claim based upon breach of fiduciary duty. *See, e.g.,* Wilkes v. Springside Nurs-

tion can be given to the frustration of expectations as an *independent* basis for relief at the same time that the expectations of others and the benefits of some measure of permanence are recognized.[244] If the matter is approached as independent of the issue of misconduct, relief may be tailored to reflect the absence of wrongful conduct by those in control of the venture.

1. *Legitimizing Expectations*

An expectations-based analysis should not be used to extend relief to all types of unhappy shareholders. The dissatisfied shareholder most in need of relief but least likely to find it under most modern statutory and equitable frameworks is the one who committed labor or capital to an endeavor on the basis of certain expectations or assumptions which now appear incapable of fulfillment. It is not sufficient to tell this participant that so long as the venture is solvent and those in control do not act in an abusive or wasteful fashion, his or her capital must remain committed to a venture which may be meeting

ing Home, Inc., 370 Mass. 842, 353 N.E.2d 657 (1976) (relief sought did not include dissolution).

244. Dean O'Neal has described the importance of expectations as follows: "The reasonable expectations of the shareholders, as they exist at the inception of the enterprise, and as they develop thereafter through a course of dealing concurred in by all of them, is perhaps the most reliable guide to a just solution of a dispute among shareholders . . . ." O'Neal, *supra* note 7, at 885-87. *See also* O'Neal & Magill, *California's New Close Corporation Legislation*, 23 U.C.L.A. L. REV. 1155, 1166-69 (1976). It is unclear to what extent Dean O'Neal would provide relief solely upon the basis of a frustration of reasonable expectations or use reasonable expectations as a basis for defining the type of misconduct which in turn justifies relief. It appears, however, that he would not limit the application of an expectations analysis to defining misconduct. *See also* Ebrahimi v. Westbourne Galleries, Ltd., [1972] 2 W.L.R. 1289, [1972] 2 All E.R. 492, where the House of Commons interpreted the "just and equitable" standard for the winding up of companies under § 222 of the English Companies Act. Lord Wilberforce concluded that the removal of a minority shareholder from the Board justified this relief:

> [T]here is room in company law for recognition of the fact that behind it [a legal entity], or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which the shareholders agree to be bound . . . . The "just and equitable" provision does not . . . entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[1972] 2 W.L.R. at 1297, [1972] 2 All E.R. at 500.

only the needs of others. A satisfactory approach to the problem must be sympathetic to this individual and at the same time recognize that the other participants in the venture have not acted in a socially objectionable fashion and have a legitimate interest in minimizing any disruptive impact which may result from withdrawal of the dissatisfied shareholder. The two tasks of an expectations-based analysis must therefore be to define the circumstances under which a dissatisfied shareholder will be entitled to relief and to structure carefully the type of relief which should be available.

a. Prerequisites for Relief

Setting forth the prerequisites for relief under an expectations-based analysis is a difficult task, for the inquiry is based on subjective aspects of the original basis upon which the relationship between the participants was formed, the present state of the relationship, and the likelihood that the expectations will be realized. The following set of criteria, however, should be helpful in at least narrowing the inquiry. Except as noted, the burden should be on the dissatisfied shareholder to establish the satisfaction of each criterion. It should be emphasized that these guidelines are intended to apply only to an expectations-based analysis; the availability of relief now provided by statute or equity for such matters as oppression, deadlock, mismanagement, and failure of corporate purposes should continue to be available to minority shareholders unaffected by the proposals contained in this Article.[245]

To be entitled to relief under an expectations-based analysis, the dissatisfied shareholder should show: (1) that he or she became a participant because of a substantial expectation or set of expectations known or assumed by the other participants; (2) that the prospect that the expectation will be achieved is unlikely; and (3) that the failure to achieve the expectation was in large part beyond the control of the participant.

(1) *Substantial Expectation Accepted by Other Participants*

One of the problems of the reasonable expectations approach to the concept of oppression is that it does not consider the possibility that an individual may have had privately held expectations which were not made known to the other partici-

245. *See supra* text accompanying notes 121-33.

pants, and which had they been made known, would not have been accepted. Such a failed communication is the responsibility of the participant now asserting the expectation. Therefore, only expectations embodied in understandings, express or implied, among the participants should be recognized.

The clearest type of expectation is one which is set forth in a shareholders' agreement signed by all of the parties. In this type of situation the expectations-based analysis would not preclude the dissatisfied shareholder from pursuing whatever contractual rights he or she may have. As Dean O'Neal has indicated, however, and as the previous discussion of the tendency of some courts to imply terms in partnership agreements has affirmed, informal agreements are common in small business ventures:

> A close corporation's charter and bylaws almost never reflect the full business bargain of the participants. The participants typically enter into 'agreements' among themselves, which sometimes are reduced to writing in the form of a formal preincorporation agreement or a shareholders' agreement, but which are often oral, perhaps just vague and half-articulated understandings. Even when the participants formalize their bargain in a written shareholders' agreement, their participation in the business is often grounded on *assumptions that are not mentioned in the agreement*.[246]

That assumptions are not made explicit does not require that they be disregarded when they are accepted or assumed by the other participants. By requiring that the expectations at least be based on implicit understandings, the expectations-based analysis may be viewed as further recognition of the rights of shareholders in a close corporation to arrange their affairs by agreement.

Only substantial expectations should be accorded recognition. The classic example of what, in a given situation, may be a substantial expectation is employment. When combined with the common tendency of a close corporation not to pay dividends, the loss or denial of employment may prove to be devastating to the minority participant. The extent to which

246. O'Neal, *supra* note 7, at 886 (emphasis added). *See also* Ebrahimi v. Westbourne Galleries Ltd., [1972] 2 W.L.R. 1289, 1297, [1972] 2 All E.R. 492, 500 (quoted *supra* note 244). *Cf.* Wasserman v. Rosengarden, 84 Ill. App. 3d 713, 406 N.E.2d 131 (1980) (enforcing oral shareholders' agreement). It should be noted that the parol evidence rule may preclude certain disputes on the basis of matters not contained in an existing written agreement and render legally incompetent evidence of prior promises, agreements, or understandings. *See* Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928). *See generally* 3 A. CORBIN, CORBIN ON CONTRACTS §§ 573-96 (1960 & Supp. 1971). For a discussion of the application of the expectations-based analysis when there exists a written shareholders' agreement, see *infra* text accompanying notes 259-61.

expectations other than employment should be treated as substantial must be decided on a case-by-case basis.[247]

(2) *Unlikely Prospect of Expectation Achievement*

This criterion is largely self-explanatory. It should be noted, however, that there is no compelling reason to provide relief under the expectations-based analysis for temporary rather than permanent frustrations of expectations. Further, a court should not grant relief for failure to achieve expectations within an unreasonably short period of time.[248] It would appear appropriate to require the dissatisfied shareholder to establish prima facie the satisfaction of this condition. The burden should then shift to those opposing relief to establish that there is some significant probability that the expectation will be achieved.

247. For example, the removal of a minority shareholder as a director is frequently combined with the discharge of that individual as an officer-employee. *See generally* F. O'NEAL, *supra* note 2, § 3.06. This action affects both the right to participate in business decisions and the right to receive income for services performed for the venture. Ordinarily, it may be expected that the denial of income is more serious than the loss of the directorship, which is presumably a minority position on the board and therefore in most situations powerless to effect corporate action. To the extent that supermajority voting requirements imposed by the articles, bylaws or statutes will render the denial of the seat on the board more meaningful, the expectation that a role in management would be accorded is, of course, more substantial. Failing this, it would not appear that the denial of a right to be formally heard would, independent of a discharge from employment, typically be a substantial expectation. This is particularly true in light of the nature of the close corporation, where the denial of a powerless seat on the board does not prevent the minority shareholder from making his or her views known on a more informal basis. *Cf.* Latty, *The Close Corporation and The North Carolina Business Corporation Act*, 34 N.C.L. REV. 432, 433 (1956) ("All this structure of representative government in the typical corporation law is about as appropriate for a two-man get-together as Robert's Rules of Order.").

248. The expectations of the passive investor may create the most problems under this guideline. Obviously, an individual commits capital to a venture with the expectation that a return will be forthcoming, either through an appreciation in the value of his holdings or, more typically for a close corporation, through a distribution of corporate earnings. The problem becomes one of determining at what point it is reasonable to expect a return on capital, and to a large extent this should depend upon the assumptions and expectations of the parties which formed the basis for the venture. The issue may be somewhat easier to address when the corporation has accumulated earnings over a sustained period of time. If the corporation has declared no or only nominal dividends at the same time that it has substantially increased salaries for active shareholders, the claim of the dissatisfied passive shareholder is strengthened. The more difficult cases will come when the corporation is able to operate on a less than prosperous but solvent basis over an extended period and is unable to generate sufficient earnings to provide a return to the passive investor. At some point, the passive investor may, not unreasonably, desire a mechanism whereby previously committed capital may be withdrawn from such a venture.

(3) *Failure to Achieve Expectation Beyond the Control of the Participant*

Requiring that the dissatisfied shareholder not be responsible for the failure to achieve his or her own expectations may appear to be one of the more arguable of the prerequisites for relief. The absence of such a condition, however, would enable a dissatisfied shareholder to obtain relief by simply sabotaging the expectations. The difficulty comes not with the need for the requirement but rather with its application. The policy issues are best illustrated by the expectation which perhaps will raise the greatest problems under this requirement, that of employment. Although it should again be recognized that the lines between each may not be distinct, the circumstances of the frustration of an employment expectation may be divided for discussion purposes into two classifications: (1) the employment opportunity is denied the participant by those in control; and (2) the participant is unable to perform services for reasons other than the actions of those in control.[249]

The employment expectation may be defeated under circumstances in which the participant is willing and able to perform employment services but is not permitted to do so by those in control. The reasons for denying employment may range from an attempt to force the participant to sell his or her interest at a distress price, for which relief based on the misconduct of those in control may be available,[250] to deteriorating business conditions or declining needs for particular skills.[251]

249. A different set of considerations arises when employment is available on reasonable terms but the shareholder is unwilling to perform services. The dissatisfied shareholder who has or had the ability to cause the achievement of his or her own expectations is not a proper subject for relief under an expectations-based analysis.

250. The abrupt removal of a shareholder from employment and management has been termed a "devastatingly effective squeeze-out technique." F. O'NEAL, *supra* note 2, § 3.06 at 78. Few would deny that the denial of employment as a squeeze-out technique is "oppressive," although the problems of proof concerning the motivations of those in control may make these very difficult cases for the minority shareholder to pursue successfully. The business judgment rule together with the concept of majority rule further compound the problems for the minority shareholder. *See supra* notes 152-53. For example, in Baker v. Commercial Body Builders, Inc., 264 Or. 614, 622, 507 P.2d 387, 390 (1973), discussed *supra* text accompanying notes 136-50, the minority shareholder was discharged because he was "not doing the company any good." The minority shareholder claimed that the majority shareholder had attempted to force the minority shareholder to sell his stock or "he would get no profits from the business." This allegation was simply denied by the majority shareholder, whose conduct, in the view of the court, was not sufficiently oppressive to justify any form of relief.

251. For a suggestion that motivation may be irrelevant and the denial of

To the extent that relief is not otherwise available, denial of employment in these circumstances presents the clearest case for relief under an expectations-based analysis.

Much more difficult issues arise when the shareholder is willing but not able to perform services for the enterprise because of a limitation not apparent at the inception of the relationship. This may be for any one of a number of reasons, including lack of a required skill or intellectual capacity, a physical or mental disability, or an inability to adapt to the business. Where the assumptions upon which the employment expectation is based are subsequently proven to be erroneous, and it is beyond the power of the participant to achieve that expectation, then providing relief is preferable to requiring that the participant continue to commit funds to an enterprise from which he or she will receive little or no benefit.[252]

b. Nature of Relief

The principal goal in structuring relief under an expectations-based analysis should be to provide the dissatisfied shareholder eligible for relief with the method of liquidating his or her investment which is least disruptive to the continuation of the enterprise. Ideally, the parties will negotiate the terms of a settlement, but failing this, the terms of the purchase can only be determined through litigation or arbitration. These terms may be viewed as the price which must be paid by the remaining participants if they desire to continue the business. For this purpose, the principal matters which need to be resolved pertain to valuation and terms of payment.

(1) *Valuation*

Perhaps few determinations are as subjective as the valuation of an interest in a closely held corporation.[253] The choice

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employment is by its nature oppressive, see Topper v. Park Sheraton Pharmacy, Inc., 107 Misc. 2d 25, 433 N.Y.S. 2d 359 (1980), discussed *supra* text accompanying notes 157-66.

252. Something more than inability to get along with the other shareholders should be required in order to satisfy this criterion. *Cf.* 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); *supra* text accompanying notes 167-80.

253. A considerable amount has been written on this problem. *See, e.g.,* Lyons & Whitman, *Valuing Closely Held Corporations and Publicly Traded Securities with Limited Marketability: Approaches to Allowable Discounts from Gross Values,* 33 Bus. Law. 2213 (1978); Schreier & Joy, *Judicial Valuation of "Close" Corporation Stock: Alice in Wonderland Revisisted,* 31 Okla. L. Rev. 853 (1978); Comment, *Valuation of Shares in a Closely Held Corporation,* 47 Miss. L.J. 715 (1976).

of technique to be employed will, of course, have a substantial impact on the eventual determination.[254] In a given circumstance, for example, the highest valuation might be achieved by utilizing an earnings-based method and disregarding the fact that the interest being valued is that of a minority participant rather than a controlling shareholder.[255] While such an approach would certainly find favor with the dissatisfied shareholder, it would be unrealistic and would work a substantial hardship on the corporation or the other shareholders, who would bear the burden of what they perhaps correctly perceive to be an inflated valuation. Since the ultimate remedy which can be granted to a dissatisfied shareholder is the right to compel a dissolution of the enterprise, the valuation of the withdrawing participant's account under an expectations-based analysis should yield no more than the amount which would be realized if the dissolution was ordered. This suggests the use of a method based upon the liquidation value of corporate assets, a technique of valuation which under most circumstances can be expected to result in a lower figure than other approaches.[256]

It may be argued that utilizing the liquidation value of assets would work an unnecessary hardship on the dissatisfied shareholder and ignores the fact that the corporation is not being dissolved and therefore has a value presumably in excess of its liquidation value. Nevertheless, the continuation of the business is not attributable to the actions of the dissatisfied shareholder, who cannot reasonably ask for a greater remedy than the right to compel a dissolution of the enterprise as a method of liquidating his or her interest.

254. For a concise review of valuation techniques, see C. ROHRLICH, *supra* note 110, § 2.27.

255. "When valuing a minority interest in a private company, it is customary to allow a deduction from the fair market value to recognize the disadvantages of being a minority shareholder." BUSINESS AND SECURITIES VALUATION, *supra* note 147, at 28.

256. This assumes that a substantial portion of the going concern value would not be realized in the event of a liquidation of assets. *See supra* note 147. In their statutory free dissolvability proposal, Professors Hetherington and Dooley provide: "Fair value shall be deemed to be the liquidation value of the demanding shareholder's interest in the corporation, but taking into account the going concern value of the corporation, if any." Hetherington & Dooley, *supra* note 26, at 56. This definition of fair value is based on that offered by CAL. CORP. CODE § 2000(a) (West 1977), which permits a buy-out in certain circumstances to avoid an involuntary dissolution. California appears to be alone in the importance which it places upon liquidation value.

(2) *Terms*

The corporation and the remaining participants should be protected to the extent possible against the prospect of a significant cash drain resulting from a redemption of the dissatisfied shareholder's interest. Although some financial disruption is inevitable when relief is accorded under the expectations-based analysis, the primary objective of structuring the relief should be to enable the remaining participants, if at all possible, to continue to operate the enterprise without being crippled by extreme liquidity problems caused by the withdrawal of a shareholder. For this purpose it may be necessary to structure installment payments with a commercially reasonable rate of interest over an extended period of time.

The task of developing an installment schedule will not be easy, and the burden of establishing the need for installments and the appropriate period of time during which the payments will be made should be on those who desire to continue the business. Once a reasonable basis for the purchase of the dissatisfied shareholder's interest is developed, some method must be devised to insure that payments will be made when due. The danger here is that through the manipulation of such matters as expenses, including salaries, and corporate expansion, the remaining participants might be tempted to plead inability to make payments to the withdrawing shareholder by virtue of either the relevant statutory restrictions on the distribution of funds to shareholders[257] or, more generally, by reason of financial hardship. To protect against this possibility, the withdrawing shareholder should be entitled to an immediate decree of dissolution of the enterprise if for any reason there is a default in payments.

2. *Some Limitations on Expectations*

a. Expectations and Permanence

This Article has suggested that to accord a minority shareholder the absolute right to compel the dissolution of a close corporation would undermine many of the desirable consequences that result from some measure of permanence.[258] For example, free dissolvability would potentially discourage third party investors and lenders of capital. The expectations-based approach to relief may have a similar effect because it may por-

257. *See, e.g.*, MODEL BUSINESS CORP. ACT § 45 (1980).
258. *See supra* text accompanying notes 225-31.

tend an increased measure of financial instability. Nevertheless, it should prove far less disruptive than free dissolvability, for it not only establishes prerequisites to the availability of relief but also mandates the structuring of relief in a manner which, to the extent possible, treats as a priority the ability of the other participants to continue the enterprise.

A measure of permanence is also beneficial because it facilitates and encourages agreements among shareholders as a method of arranging the affairs of an enterprise.[259] Free dissolvability undermines such agreements by providing a convenient escape from the obligations they impose.[260] Although the expectations-based analysis is subject to the same criticism, it will tend to undermine shareholders' agreements to a lesser extent. The approach, of course, is perhaps most necessary when the participants have not had the foresight to reduce their understandings to writing. When there is an agreement, however, a number of questions may be raised concerning the role of an expectations-based analysis. If the dissatisfied shareholder alleges the frustration of an expectation not addressed in an agreement covering other aspects of substantive corporate policy, it is likely either than the expectation was not an inducement to the shareholder's participation in the venture or that there was no agreement on the matter. Under such circumstances, the expectations-based analysis would not provide relief.[261] If the expectation concerns a subject addressed in the agreement, and if the frustration of the expectation also constitutes a breach of the agreement, then at least under circumstances where all of the shareholders are parties to the agreement it may be appropriate to grant relief under the expectations-based analysis if the remedies for a breach of the agreement are inadequate. The most difficult problems will arise when the agreement covers the expectation which has been frustrated but no breach of the agreement has occurred. For example, performance under an agreement to employ a shareholder may be excused if the shareholder has suffered a disability rendering the performance of further services impossible. In this type of situation, the expectations-based analysis can be viewed as complementary to the role of the shareholders' agreement. The agreement clearly defines the expectations, and unless there is some indication that the parties

259. *See supra* note 240 and accompanying text.
260. *See supra* note 241 and accompanying text.
261. *See supra* text accompanying note 247.

intended to limit the remedies, relief could be available under the expectations-based analysis if the other conditions for relief under the approach have been satisfied.

b. Expectations and Subjectivity

It may correctly be observed that the expectations-based analysis is lacking in objective standards and places considerable responsibility on the courts. In this sense, the free dissolvability alternative is comparatively more objective and therefore easier to apply.[262]

The subjective points of concern under the expectations approach are the determination of expectations and the structuring of relief. Although both of these determinations can be expected to challenge the skill if not the patience of the judiciary, they are not significantly more difficult than the determination of such matters as oppression, unfair prejudice, fair value, or the propriety of dissolution or alternative forms of relief. Lack of objectivity is unquestionably a difficulty inherent in, but not unique to, the expectations-based analysis.

c. Expectations and Numbers

Determining the existence and mutual acceptance of expectations becomes more difficult as the number of participants increases. What may be a manageable task when only two or three participants are involved may become exceedingly difficult as the number increases.[263] Again, the integrity of the definition of a close corporation must be called into question when it is applied to enterprises owned by more than a handful of participants.[264] Like so many of the other reforms offered for close corporation law, the expectations-based analysis is most useful when applied to a venture with a very small number of participants.

d. The Evolution of Expectations

The expectations-based analysis has thus far been analyzed as one which is to be applied based on expectations formed at the time the enterprise was established. Both par-

262. The relative objectivity of the free dissolvability alternative as presented by Professors Hetherington and Dooley is perhaps its major virtue.

263. For example, the possibility of common agreement on expectations in a close corporation consisting of fifty participants is remote, and the approach may not be applicable to ventures involving more than four or five participants.

264. *See supra* text accompanying notes 209-16.

ticipants and expectations change, however, and the approach is sufficiently flexible to accommodate these developments. For example, an individual who joins a venture at a post-inception stage of its development may have substantial expectations which are accepted by the other participants. Although the element of consensus may be more difficult to establish under such circumstances, once it is substantiated the approach may be applied.[265] An individual's changing expectations are conceptually somewhat more difficult to accommodate because they may lack the element of mutual reliance or inducement which forms the basis of the expectations approach. There may be situations, however, in which the parties reevaluate their expectations and reach new understandings which provide the basis for continued participation in the venture, and under such circumstances application of the approach would be appropriate.

3. *Effectuating an Expectations-Based Analysis*

In those jurisdictions which maintain the existence of equitable jurisdiction to dissolve a corporation independent of statutory grounds for such action,[266] the expectations-based approach would provide a suitable basis for evaluating the petitions of certain dissatisfied shareholders. Indeed, the approach should be viewed as a set of guidelines for the exercise of equitable discretion. In other jurisdictions, application of the ap-

265. Ordinarily, expectations are personal and therefore would not be transferable for purposes of the approach suggested in this Article. Thus, an individual who acquires stock by gift or inheritance would not also take the expectations of the original owner. However, an individual in such a position may develop mutual expectations with the other participants which should be recognized. Where, for example, the new participant agreed to commit additional capital or labor resources to the venture, there is no reason not to apply the analysis if the other conditions required for its application are satisfied. Consider, for example, 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), discussed *supra* text accompanying notes 167-80, where the plaintiff co-signed a note and apparently made additional capital contributions. There is some indication in *Exadaktilos,* however, that the employment expectations of the plaintiff were not accepted by all of the other participants, and if this is the case, relief should not be extended under the expectations-based analysis. A particularly difficult situation may arise when a spouse inherits the stock of a former active shareholder and is relegated to the role of a passive investor. The expectations-based approach is not an appropriate method of providing relief to the spouse, for its use in this context would render it a form of automatic buy-sell arrangement mandated upon the death of a shareholder. Although the expectations-based approach is not applicable, the position of the spouse is most unfortunate and warrants further scholarly attention.

266. *See supra* note 126.

proach would require expansion of the current statutorily enumerated grounds for relief. Although the modification of these statutes would require some degree of creative drafting, the resulting improvement over the prevailing emphasis on misconduct as a prerequisite to the availability of relief justifies the effort. The thrust of the Proposed Model Act Supplement[267] is most unfortunate in this regard, for although it substantially modernizes and expands the types of relief which may be made available under the Model Act, it does not in any substantial sense overhaul the grounds for relief.

IV. CONCLUSION

There are a number of reasons why the free dissolvability thought to exist for partnerships should not extend to close corporations. The breadth of the concept of a close corporation significantly undermines the ability to draw conclusions concerning the nature of these enterprises and their comparability to partnerships. What may be true for an enterprise consisting of two or three participants will not apply with equal force as the number increases to ten, thirty, fifty, or more. There are also structural differences between the two forms of organization which make a close corporation something more than a partnership in a corporate shell. The mutual agency and unlimited liability present in a partnership require a method of terminating the business relationship. These factors are not present in the close corporation. In addition, the greater formality required to form a close corporation increases the likelihood that participants will be aware of the risks they are creating, and the need for an easy escape is therefore lessened. Furthermore, if the buy-out is the method by which the remaining participants under a free dissolvability system can avoid liquidation and continue the business, it is not painless and may undermine the economic viability of the entity, thereby prejudicing the positions of both stockholders and creditors. Finally, there are distinct benefits to some measure of permanence and it would be ill-advised to discard these in favor of a unified small business structure. This does not mean, however, that the close corporation need be a prison for the minority shareholder who finds that the expectations on the basis of which he or she has committed resources to the enterprise will not be realized. The problem, therefore, is one of accommodat-

267. *See supra* notes 130-31.

ing competing values, a task which inevitably results in the compromise of absolute principles. The expectations-based analysis suggested in this Article represents an attempt to strike such a balance.