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## Florida Corporation Law: Propose Statutory Relief for Oppressed Minority Shareholders in Florida

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## NOTE

### FLORIDA CORPORATION LAW: PROPOSED STATUTORY RELIEF FOR OPPRESSED MINORITY SHAREHOLDERS IN FLORIDA

*Jeffrey M. McFarland* \*

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#### I. INTRODUCTION

Judicial and legislative recognition of oppression of minority shareholders by the controlling shareholders is nothing new.<sup>1</sup> Minority shareholders in a close corporation face a unique dilemma.<sup>2</sup> As a general prin-

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\* Dedicated to Ms. Anne Titshaw for the fundamentals and to L.B. for the "push in the back."

1. See 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 9.26, at 111 (3d ed. 1992) [hereinafter O'NEAL, CLOSE CORPORATIONS]. Both Illinois and Pennsylvania included oppression as a ground for statutory relief as early as 1933. 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 7.13, at 79 (2d ed. 1991) [hereinafter O'NEAL, OPPRESSION]. The United Kingdom even included oppression in the Companies Act of 1948. *Id.*

2. See ROBERT C. CLARK, CORPORATE LAW § 18.4.1, at 785-86 (1986); O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 8.07, at 65. See generally *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 511-15 (Mass. 1975) (providing a brief overview of close corporations). The term close corporation has been given a number of different meanings. *Id.* at 511. The *Donahue* court said a close corporation has the following characteristics: "(1) a small number of stockholders; (2) no ready market for

principle, the majority shareholders govern the corporation.<sup>3</sup> Unlike the minority shareholders of a publicly-traded corporation, disgruntled minority shareholders of a close corporation have no ready market for their shares.<sup>4</sup> Thus, the controlling shareholders have the opportunity to exploit the minority by preventing minority interests from having a say in the operation of the enterprise.<sup>5</sup> Alternatively, the majority may deprive the minority of employment in the corporation, leaving the majority with the minority's capital, but conferring no return on the minority's investment.<sup>6</sup>

the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation." *Id.* The Statutory Close Corporation Supplement to the Model Business Corporation Act says a corporation must have 50 or fewer shareholders to qualify for close corporation status. MODEL STATUTORY CLOSE CORP. SUPPLEMENT § 3(b) (1984).

3. F. HODGE O'NEAL & JORDAN DERWIN, DUKE UNIVERSITY, EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES—"SQUEEZE-OUTS" IN SMALL ENTERPRISES § 1.03 (1961).

4. *Donahue*, 328 N.E.2d at 514; CLARK, *supra* note 2, § 18.4.1, at 785-86; O'NEAL & DERWIN, *supra* note 3, § 2.15; *see also* O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 8.07, at 63 (explaining that shareholders in a close corporation do not have a ready market in which they may sell their shares).

5. *See* O'NEAL & DERWIN, *supra* note 3, § 3.05; O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 8.07, at 63.

6. O'NEAL & DERWIN, *supra* note 3, § 3.05. The oppression scenario described assumes no dividends are paid and is only one of many ways the majority can exploit the minority. *See* O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 8.07, at 64. Denial of employment or cancellation of dividends are generally considered indirect means of "squeezing-out" the minority. *See, e.g.*, *Alaska Plastics v. Coppock*, 621 P.2d 270, 277-78 (Alaska 1980) (diversion of corporate funds); *Wilkes v. Springside Nursing Home*, 353 N.E.2d 657, 659 (Mass. 1976) (removal of minority shareholder from payroll); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 671 (Mich. 1919) (withholding of dividends); O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 8.07, at 63-64. Note that at the time of the *Ford* decision, Ford Motor Company was a close corporation not the large corporate entity it is today. Brent Nicholson, *The Fiduciary Duty of Close Corporation Shareholders: A Call for Legislation*, 30 AM. BUS. L.J. 513, 515 (1992).

A Virginia case provides a good example of a combination of indirect squeeze-out techniques. In *White v. Perkins*, 189 S.E.2d 315 (Va. 1972), plaintiff and defendant formed a Subchapter S Corporation with plaintiff owning 45% and defendant owning 55%. *Id.* at 317. Plaintiff was the only employee of the company and received a weekly salary. *Id.* at 317-18. Plaintiff asked defendant to declare dividends to the shareholders because plaintiff was paying federal taxes on money he was not receiving. *Id.* at 318. Upon a refusal to pay dividends, plaintiff requested that defendant buy-out plaintiff's shares. *Id.* Defendant refused and then terminated plaintiff's employment when plaintiff instituted a lawsuit. *Id.* at 318-19. The court affirmed the trial court's finding that defendant's conduct was oppressive and remanded the case for a determination of whether dissolution was appropriate. *Id.* at 320.

More direct means are also available to the majority when attempting to squeeze-out the minority. The majority may approve a merger with a plan to ultimately "cash out" the minority. *Matteson v. Ziebarth*, 242 P.2d 1025, 1035-36 (Wash. 1952). In addition, the majority may approve a sale of the corporation's assets to the majority at a price below actual value. *Abelow v. Midstates Oil Corp.*, 189 A.2d 675, 678-79 (Del. 1963). After the sale, the original corporation may be dissolved to eliminate the minority. *Id.* This note will address only the more indirect variety of squeeze-out described in the text. Under Florida Statutes, minority shareholders are more adequately protected when the majority uses a direct variety of squeeze-out. *See, e.g.*, FLA. STAT. § 607.1302 (1993) (granting dissent and appraisal rights to shareholders after consummation of a plan of merger or sale of assets). *See generally* O'NEAL & DERWIN, *supra* note 3 (providing an exhaustive examination of various squeeze-out

Minority shareholders traditionally had only one remedy—to sell their shares to the majority at a depressed price, leaving the majority in control and the minority excluded from their investment.<sup>7</sup>

Exploitation of minority shareholders has prompted various judicial remedies designed to even the playing field.<sup>8</sup> In addition, most states have legislation that permits a minority shareholder to effectively redress his grievances through dissolution proceedings or some other relief.<sup>9</sup> However, despite the fact that Florida is one of the most popular states in which to incorporate,<sup>10</sup> the Florida legislature has not made “oppression” a ground for statutory relief.

This note analyzes the current remedies available to minority shareholders under Florida law and identifies the gap left by the absence of a statutory remedy for oppression. Part II of the note traces the development of judicial and legislative remedies in other jurisdictions and compares them with Florida’s development. Part III explores the problem with the Florida legislature’s decision to omit oppression as a statutory ground for relief. Finally, part IV proposes a number of solutions that would eliminate some of the Florida legislature’s concerns, yet still provide oppressed minority shareholders with adequate relief.

## II. HISTORY AND DEVELOPMENT OF REMEDIES FOR OPPRESSED MINORITY SHAREHOLDERS

### A. *Nonstatutory Judicial Relief*

Before the widespread adoption of statutory relief for oppressed minority shareholders, the courts differed in their treatment of the problem and the remedies they provided.<sup>11</sup> Courts originally viewed dissolution as

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techniques).

7. *Donahue*, 328 N.E.2d at 515.

8. See O’NEAL, *OPPRESSION*, *supra* note 1, § 7.10, at 66.

9. O’NEAL, *OPPRESSION*, *supra* note 1, § 7.13, at 79; Marilyn B. Cane, *Oppressive Conduct: Should It Be Grounds for Judicial Dissolution?—Judicial Dissolution Response*, FLA. B. BUS. L. SEC., Q. REP., Dec. 1993, at 20, 20; see also MICH. COMP. LAWS ANN. § 450.1489 (West 1990) (stating that a shareholder of a close corporation can seek relief from acts that are “willfully unfair and oppressive” to the shareholder); MINN. STAT. ANN. § 302A.751 subd. 1.(b)(2) (West Supp. 1994) (acting “in a manner unfairly prejudicial toward one or more shareholders”).

10. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 539, tbl. 862 (113th ed. 1993). The number of businesses that incorporated in Florida between 1988 and 1991 represents the highest total of any state over that time period. See *id.*; BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATE AND METROPOLITAN AREA DATA BOOK 1991, at 258 (1991). For the years 1986-1991, new business incorporations in Florida represented approximately 12% of all new business incorporations in the United States. See BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, 1993 FLORIDA STATISTICAL ABSTRACT 685, tbl. 24.78 (27th ed. 1993).

11. O’NEAL, *OPPRESSION*, *supra* note 1, § 7.10.

beyond their powers.<sup>12</sup> But a 1933 Michigan case, *Flemming v. Heffner & Flemming*,<sup>13</sup> likened a close corporation to a partnership and used the court's equity power to dissolve the entity.<sup>14</sup> In *Flemming*, the controlling shareholders deprived the minority of participation in the management and control of the business.<sup>15</sup> While acknowledging that courts generally do not have the power to wind up corporations, the *Flemming* court found that an exception applies where circumstances have made it impossible to carry out the corporate purposes.<sup>16</sup>

Similarly, in *Leibert v. Clapp*<sup>17</sup> the Court of Appeals of New York used its equity power to dissolve a corporation despite the absence of statutory authority to do so.<sup>18</sup> The plaintiffs in *Leibert* complained that the controlling shareholders were continuing the corporation solely for their own benefit at the expense of the plaintiffs.<sup>19</sup> The plaintiffs alleged that the majority's actions were designed solely to force the minority to sell its interest at a deflated value.<sup>20</sup> Under the New York statute, shareholders could bring a derivative action only to compel dissolution.<sup>21</sup> However, the *Leibert* court stated that the persistent abuses by the majority shareholders made it inappropriate to restrict the minority to multiple, costly, and difficult derivative actions.<sup>22</sup>

Cases such as *Flemming* and *Leibert* paved the way for statutory relief for oppressed shareholders seeking dissolution of a corporation. But some courts now view their statutory remedies as exclusive.<sup>23</sup> Thus, in states

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12. *People ex rel. Daniels v. District Court*, 80 P. 908, 911-12 (Colo. 1905) (noting the limitation that in the absence of a permissive statute courts of equity have no power to appoint a receiver).

13. 248 N.W. 900 (Mich. 1933).

14. *Id.* at 902. Some commentators and courts have rejected this partnership analogy. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 241, 243 (1991) (expressing concern that traditional corporate norms will break down if a minority shareholder can withdraw his capital at will).

Judge Easterbrook also has expressed his dislike of the partnership analogy in opinions he has authored for the Seventh Circuit. *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 384 (7th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991). In *Bagdon*, Judge Easterbrook wrote "[w]hether to incorporate entails a choice of many formalities. Commercial rules should be predictable; this objective is best served by treating corporations as what they are, allowing the investors . . . to vary the rules by contract. . . ." *Id.*

15. *Flemming*, 248 N.W. at 901.

16. *Id.* at 902. The trial court described the corporate affairs as being in a "chaotic condition." *Id.* The Supreme Court of Michigan agreed, recognizing that the object of a corporation is to advance the pecuniary gain of its stockholders. *Id.* The *Flemming* court stated that when the dissension reaches a level at which it is impossible for the corporation to obtain the object of increasing profits of stockholders, the court may use its equity power to wind up the affairs of the corporation. *Id.*

17. 196 N.E.2d 540 (N.Y. 1963).

18. *See id.* at 541.

19. *Id.* at 542.

20. *Id.*

21. *See id.* at 543.

22. *Id.*

23. *See Central Standard Life Ins. Co. v. Davis*, 141 N.E.2d 45, 49 (Ill. 1957) (maintaining that

which omit oppression as a statutory ground for dissolution, shareholders succeed in dissolving the corporation only if they meet one of the enumerated statutory criteria. In effect, a court's equitable authority to grant relief outside the bounds of the statute has been eroded in some jurisdictions.<sup>24</sup>

### B. Statutory Relief in Other Jurisdictions

In 1933, Illinois and Pennsylvania became the first states to directly address the problems faced by minority shareholders in a close corporation.<sup>25</sup> Each state included oppression as a ground for dissolution in its corporation statutes.<sup>26</sup> These state statutes set the stage for the oppression provision in the American Bar Association (ABA) and the American Law Institute Model Business Corporation Act (MBCA),<sup>27</sup> first suggested to the state legislatures in 1950.

In 1984, the ABA issued the Revised Model Business Corporation Act (RMBCA)<sup>28</sup> which moved the oppression provision to the Involuntary Dissolution section of the Act.<sup>29</sup> Section 14.30 of the RMBCA provides in relevant part:

The [name or describe court or courts] may dissolve a corporation:

.....

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the authority of courts of equity to order dissolution is limited by corporate statutes). *Contra* Lewis v. Jones, 483 N.Y.S.2d 868, 869 (N.Y. App. Div. 1985) (following *Leibert* in allowing the plaintiff to seek common law dissolution).

24. See *Central Standard*, 141 N.E.2d at 49. At a minimum, nonstatutory dissolution has become rare. See O'NEAL, *OPPRESSION*, *supra* note 1, § 7.10. Professors Hetherington and Dooley found that by 1977, only four such nonstatutory dissolution cases existed. J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 8 (1977). The cases cited in the Hetherington and Dooley article are: *Bellevue Gardens, Inc. v. Hill*, 297 F.2d 185 (D.C. Cir. 1961); *Tansey v. Oil Producing Royalties, Inc.*, 133 A.2d 141 (Del. Ch. 1957); *Levant v. Kowal*, 86 N.W.2d 336 (Mich. 1957); and *Leibert*, 196 N.E.2d at 540. *Id.* at 8 n.14. Since 1977, only *Bellevue Gardens* has been followed. See *Lyman v. Spain*, 774 F.2d 495, 497-98 (D.C. Cir. 1985).

25. Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 709 (1993). Prior to the enactment of the Illinois and Pennsylvania statutes, California had a provision allowing dissolution on grounds of "abuse of authority, or persistent unfairness toward minority shareholders." *Id.* at 709 n.67 (quoting CAL. CIV. CODE § 404 (Deering 1931)). The California legislature eliminated the provision two years later. *Id.*

26. *Id.*

27. MODEL BUSINESS CORP. ACT § 97 (1969). Section 97 provided: "The \_\_\_\_\_ courts shall have full power to liquidate the assets and business of a corporation: (a) In an action by a shareholder when it is established: . . . (2) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; . . ." MODEL BUSINESS CORP. ACT § 97 (1969). Section 97 also listed deadlock, misapplication of corporate assets, and waste as grounds for liquidation. MODEL BUSINESS CORP. ACT § 97(a)(1), (3)-(4) (1969).

28. REVISED MODEL BUSINESS CORP. ACT (1984).

29. REVISED MODEL BUSINESS CORP. ACT § 14.30 (1984).

(2) in a proceeding by a shareholder if it is established that:

. . . .

(ii) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, *oppressive*, or fraudulent;. . . .<sup>30</sup>

The official comment to section 14.30 made clear that judicial dissolution was permissive and that a court could decline to order dissolution at its discretion.<sup>31</sup> By 1993, a majority of states included oppression as a ground for judicial dissolution<sup>32</sup> and still others included similar language.<sup>33</sup>

However, even in states which adopted the MBCA, RMBCA, or similar provisions, minority shareholders faced significant impediments to receiving relief under the statutes. Taking the official comment to heart, many courts still viewed dissolution "as a drastic remedy."<sup>34</sup> That view, combined with the absence of a definition of oppression in the statutes, has resulted in somewhat narrow interpretations of what constitutes oppression.<sup>35</sup> Thus, while the courts and legislatures recognized the problems facing minority shareholders in close corporations, they were hesitant to go too far.

In construing the statutes, some courts have maintained that dissolution is appropriate only if the corporation is near insolvency.<sup>36</sup> Most courts, however, have adopted somewhat broader definitions of oppression.<sup>37</sup> For example, in *Central Standard Life Insurance Co. v. Davis*,<sup>38</sup> the Illinois Supreme Court showed its willingness to expand the

30. *Id.* (brackets in original) (emphasis added). Like its counterpart in the MBCA, the RMBCA also includes deadlock, misapplication of corporate assets, and waste as grounds for dissolution. REVISED MODEL BUSINESS CORP. ACT § 14.30(2)(i), (iv) (1984).

31. REVISED MODEL BUSINESS CORP. ACT § 14.30(2)(ii) cmt. 2b (1984). The comment states:

The application of these grounds for dissolution to specific circumstances obviously involves judicial discretion in the application of a general standard to concrete circumstances. The court should be cautious in the application of these grounds so as to limit them to genuine abuse rather than instances of acceptable tactics in a power struggle for control of a corporation.

*Id.*

32. Thompson, *supra* note 25, at 709. Thirty-one states use the term "oppression." *Id.* at 709 n.70.

33. *Id.* Six states used language roughly equivalent to oppression. *Id.*

34. *Gidwitz v. Lanzit Corrugated Box Co.*, 170 N.E.2d 131, 138 (Ill. 1960); Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 440 (1990).

35. See Murdock, *supra* note 34, at 459-60.

36. *People ex rel Daniels v. District Court*, 80 P. 908, 911 (Colo. 1905).

37. O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 9.29, at 132-33.

38. 141 N.E.2d 45 (Ill. 1957).

definition of oppression.<sup>39</sup> The minority shareholders complained that cumulative preferred dividends were in arrears for twenty-one years and that the corporation would never be profitable enough to meet the \$1 million owed.<sup>40</sup> The *Central Standard* court stated that oppression need not connote “an essential inference of imminent disaster.”<sup>41</sup> Oppression can include a continuing course of conduct in which the majority takes advantage of the minority.<sup>42</sup> The *Central Standard* court also rejected the defendant’s argument that, under the statute, oppression is synonymous with fraud and illegality.<sup>43</sup> Three years later, the same court reaffirmed its definition of oppression,<sup>44</sup> but issued a reminder that corporate dissolution is still a drastic remedy.<sup>45</sup>

Currently, courts tend to follow a limited number of definitional approaches in actions for oppression.<sup>46</sup> Some courts define the term as “burdensome, harsh and wrongful conduct” and a “visible departure from the standards of fair dealing.”<sup>47</sup> Others link their definition of oppression to the fiduciary duty owed by the controlling shareholders to the minority.<sup>48</sup> Alternatively, courts rely on the “reasonable expectations” of the shareholders.<sup>49</sup> Because these definitions often overlap, conduct in a particular case might meet all the definitional approaches.<sup>50</sup>

When defining oppression, many courts seem to lean toward the link with fiduciary responsibilities of controlling shareholders.<sup>51</sup> In *Donahue v. Rodd Electrotype Co.*,<sup>52</sup> the Massachusetts Supreme Judicial Court no-

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39. *Id.* at 49-50.

40. *Id.* at 47.

41. *Id.* at 50.

42. *Id.*

43. *Id.*; *Compton v. Paul K. Harding Realty Co.*, 285 N.E.2d 574, 581 (Ill. App. Ct. 1972).

44. *Gidwitz*, 170 N.E.2d at 138.

45. *Id.* However, the court found oppression in the cumulative acts and continuing nature of the defendants’ conduct. *Id.* Thus, the plaintiff was entitled to the statutory remedy of dissolution. *Id.*

46. O’NEAL, CLOSE CORPORATIONS, *supra* note 1, § 9.29, at 142-43.

47. *Fix v. Fix Material Co.*, 538 S.W.2d 351, 358 (Mo. Ct. App. 1976) (citing *White v. Perkins*, 189 S.E.2d 315 (Va. 1972)).

48. *Baker v. Commercial Body Builders*, 507 P.2d 387, 394 (Or. 1973); *see also Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 518 (Mass. 1975) (controlling group may not utilize its control to obtain special advantages and disproportionate benefits).

49. J.C. Bruno, “Reasonable Expectations”—A Primer on an Oppressive Standard, (Part 1 of 2), 71 MICH. B.J. 434, 434-35 (May 1992) (shareholder entitled to enforce certain expectations including a voice in management and a return on investment). *See also, e.g., In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (N.Y. 1984) (using expectations as a means of identifying and measuring conduct alleged to be oppressive); *Meiselman v. Meiselman*, 307 S.E.2d 551, 563 (N.C. 1983) (complaining that a shareholder’s “rights or interests” include the shareholder’s “reasonable expectations” in the corporation).

50. O’NEAL, CLOSE CORPORATIONS, *supra* note 1, § 9.29, at 132-33.

51. *See supra* text accompanying note 48.

52. 328 N.E.2d 505 (Mass. 1975).



tably articulated the fiduciary duty owed by controlling shareholders to the other shareholders of a close corporation.<sup>53</sup> The court used a partnership analogy and said that the relationship among the stockholders in a close corporation must be governed by "trust, confidence and absolute loyalty."<sup>54</sup> As a result, the corporation could not repurchase the shares of a retiring majority shareholder without offering a pro rata repurchase to the other shareholders.<sup>55</sup>

The *Donahue* case was not based on a statute, but courts have used it as a starting point from which to define oppression under the statutes. In *Baker v. Commercial Body Builders*,<sup>56</sup> the controlling shareholder terminated the minority shareholder's employment and then increased his own salary.<sup>57</sup> Essentially, the controlling shareholder treated the corporation as if it were his private property.<sup>58</sup>

The *Baker* court stated that what constitutes oppressive conduct is closely related to the good faith and fair dealing owed to the minority shareholder.<sup>59</sup> Thus, "operation of the business for the sole benefit of the majority of the stockholders, to the detriment of the minority stockholders, would constitute . . . 'oppressive' conduct" and would warrant dissolution.<sup>60</sup> However, the court pointed out that it would not consider a single breach of fiduciary duty oppressive to the extent that dissolution would be warranted, unless the breach was extremely serious in nature.<sup>61</sup>

Another definition, determining oppression based on the reasonable expectations of minority shareholders, is gaining favor in some jurisdictions.<sup>62</sup> The Court of Appeals of New York summed up the reasonable expectations concept as follows:

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53. *Id.* at 515.

54. *Id.* at 512. The court cited with approval Judge Cardozo's famous explanation of fiduciary duty. *Id.* at 516. In *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928), Judge Cardozo said:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

*Id.* at 546.

55. *Donahue*, 328 N.E.2d at 518.

56. 507 P.2d 387 (Or. 1973).

57. *Id.* at 390-91.

58. *Id.* at 396.

59. *Id.* at 394.

60. *Id.*

61. *Id.* Because of this position, the court refused to grant dissolution. *Id.* at 398. The court acknowledged that some of the majority's acts were oppressive, but noted that because the oppressive conduct had been discontinued, the acts were not serious enough to warrant dissolution. *Id.* The court also denied other relief after spelling out 10 possible alternatives to dissolution. *Id.* at 395-96.

62. See O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 9.29, at 132; Bruno, *supra* note 49, at 434.

“A shareholder who reasonably expected that ownership in the corporation would entitle him . . . to a job, a share of corporate earnings, [or] a place in corporate management . . . would be oppressed . . . when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.”<sup>63</sup>

The New York court used this explanation to define the meaning of the term “oppressive” in its involuntary dissolution statute.<sup>64</sup> Still other jurisdictions have replaced the term “oppressive” in the statutes with reasonable expectations language.<sup>65</sup> Obviously, whether judicially defining the term oppressive, or including a definition in the statutes, an examination of a minority shareholder’s reasonable expectations expands the chances of obtaining effective relief.<sup>66</sup>

### C. Florida’s Relief for Minority Shareholders

Like many jurisdictions, the Florida courts traditionally have viewed dissolution as an extreme remedy.<sup>67</sup> In 1936, the Florida Supreme Court stated that dissolution is not warranted unless the corporation has practically discontinued all business or is no longer capable of carrying out corporate functions.<sup>68</sup> Twenty years later, the court’s attitude had not changed much. In *Jones v. Harvey*,<sup>69</sup> the Florida Supreme Court said it would not grant dissolution where the corporation is a going concern and solvent unless there is fraud, double-dealing, or misapplication of corporate assets.<sup>70</sup> In addition, the Florida courts have rejected the argument that close corporations are analogous to partnerships.<sup>71</sup> As the Florida Supreme Court stated, “[a]pparently it is only when dissension arises that the respondents become dissatisfied with their position as stockholders.”<sup>72</sup>

63. *Kemp & Beatley*, 473 N.E.2d at 1179.

64. *Id.*

65. *E.g.*, MINN. STAT. ANN. § 302A.751 (West Supp. 1994); N.D. CENT. CODE § 10-19.1-115 (Supp. 1993).

66. *See* O’NEAL, CLOSE CORPORATIONS, *supra* note 1, § 9.29, at 135. The use of the reasonable expectations standard places a handy label on the policies underlying oppression statutes. Thompson, *supra* note 25, at 721. For instance, shareholders in a close corporation often expect to take part in the management of the business. *Id.* One policy consideration in enacting oppression statutes is to relieve minority shareholders who have been squeezed-out of participation in management. *See id.*

67. *See* *Mills Dev. Corp. v. Shipp & Head, Inc.*, 171 So. 533, 534 (Fla. 1936), *cert. denied*, 305 U.S. 658 (1939).

68. *Id.* at 534.

69. 82 So. 2d 371 (Fla. 1955).

70. *Id.* at 372.

71. *Freedman v. Fox*, 67 So. 2d 692, 693 (Fla. 1953).

72. *Id.*

Thus, the early Florida court opinions seemed hesitant to use their equity powers to relieve oppressed minority shareholders.

The legislature did not come to the rescue. Florida is among the minority of states which fail to include oppression as a statutory ground for shareholder relief.<sup>73</sup> The Florida legislature declined to adopt the subsection of the MBCA dealing with oppression<sup>74</sup> when it first considered the matter in 1969.<sup>75</sup> In 1989, Florida adopted most provisions of the RMBCA into the Florida Business Corporation Act (FBCA)<sup>76</sup> but left out section 14.30 dealing with oppressive conduct.<sup>77</sup> Instead, the legislature substituted the existing Florida statute which was similar to MBCA section 97 but lacked any language of oppression.<sup>78</sup> Currently, FBCA section 607.1430 provides in relevant part:

A circuit court may dissolve a corporation:

. . . .

(2) In a proceeding by a shareholder if it is established that:

(a) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered;

(b) The shareholders are deadlocked in voting power and have failed to elect successors to directors whose terms have expired . . . ; or

(c) The corporate assets are being misapplied or wasted.<sup>79</sup>

The commentary to the FBCA states that oppression was omitted because the same provision in the MBCA was never adopted in Florida.<sup>80</sup> In addition, the legislature feared "excessive, unnecessary litigation" by a "single, dissatisfied shareholder."<sup>81</sup>

The legislature and the courts of Florida seemed content to leave the

73. See FLA. STAT. § 607.1430 (1993).

74. MODEL BUSINESS CORP. ACT § 97 (1969).

75. Commentary to the Florida Business Corporation Act, in 2 HOWARD P. ROSS, FLORIDA CORPORATIONS special app. 2, at SP2-43 (1993) [hereinafter FBCA Commentary].

76. See *id.* at SP2-1.

77. See FLA. STAT. § 607.1430 (1993).

78. *Id.* Compare FLA. STAT. § 607.274 (1988) (containing Florida statutory language as it existed before being adopted for § 607.1430) with MODEL BUSINESS CORP. ACT § 97 (1969) (containing the original language considered when Florida adopted § 607.1430).

79. FLA. STAT. § 607.1430 (1993).

80. FBCA Commentary, *supra* note 75, at SP2-43.

81. *Id.*

problem in the hands of contract and fiduciary duty theories. In *Corlett, Killian, Hardeman, McIntosh & Levi, P.A. v. Merritt*,<sup>82</sup> the court held that unmarketability of shares is not a compelling reason for judicial intervention.<sup>83</sup> To the contrary, it is a compelling reason for the parties to agree in advance on a redemption provision.<sup>84</sup> The *Corlett* court stated that the judicial system need not protect a shareholder “from his own improvidence or lack of strength” in failing to procure such a provision.<sup>85</sup> In this absence of a general recognition by the Florida courts and Florida legislature of the minority shareholder’s dilemma, oppressed shareholders who have not protected themselves contractually are left with only a potential action alleging breach of the fiduciary duty owed by the majority shareholders.

The plaintiff in *Biltmore Motor Corp. v. Roque*<sup>86</sup> proceeded on such a fiduciary theory.<sup>87</sup> The plaintiff was holder of forty percent of the corporate stock.<sup>88</sup> The defendants, directors who controlled the remaining sixty percent, attempted to purchase the plaintiff’s stock at a price far below market value.<sup>89</sup> When the plaintiff refused to sell, his employment was terminated.<sup>90</sup> Three months later, the controlling shareholders raised their salaries and purchased an additional 715 shares of newly issued stock, thus watering the plaintiff’s stock down to less than five percent.<sup>91</sup> The controlling shareholders said that the new issue of stock was designed to bolster the corporation’s credit standing and improve its ability to profitably conduct business.<sup>92</sup> The shareholder majority recognized the plaintiff’s right to purchase his pro rata share of the new issue.<sup>93</sup> Nevertheless, the plaintiff refused to exercise his rights.<sup>94</sup>

The *Biltmore Motor* court found that the controlling shareholders had entered into a scheme against the plaintiff to buy him out at less than

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82. 478 So. 2d 828 (Fla. 3d DCA 1985).

83. *Id.* at 834.

84. *Id.*; *infra* notes 110-22 and accompanying text.

85. *Corlett*, 478 So. 2d at 834. It should be noted that *Corlett* involved a professional corporation organized under Florida’s Professional Service Corporation and Limited Liability Company Act, FLA. STAT. §§ 621.01-.14 (1993). *Id.* at 829. However, § 621.13 states that the provisions of the FBCA apply to Chapter 621 corporations unless there is a conflict. FLA. STAT. § 621.13 (1993); *Corlett*, 478 So. 2d at 829 n.3.

86. 291 So. 2d 114 (Fla. 3d DCA 1974).

87. *See id.* at 115.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

market value.<sup>95</sup> The court concluded that because there was no legitimate business purpose for the controlling shareholders' actions, they breached their fiduciary duties to the plaintiff.<sup>96</sup> The court noted that while the plaintiff had refused to exercise his preemptive rights, the offer made by the majority was an " 'empty gesture.' "<sup>97</sup> The controlling shareholders knew that the plaintiff would be unwilling to contribute more capital to the enterprise when he had already been ousted from participation in the corporation.<sup>98</sup>

It is difficult to tell if the *Biltmore Motor* holding<sup>99</sup> is based on a director's fiduciary duty to the shareholders or if it is based on a controlling shareholder's duty to fellow shareholders. However, the court in *Tillis v. United Parts, Inc.*<sup>100</sup> recognized that majority stockholders have a fiduciary duty not to use their control as an advantage over the other stockholders.<sup>101</sup> In *Tillis*, the majority stockholders caused the corporation to purchase shares of stock from the majority at a price far above the value of the stock on the market.<sup>102</sup> This put the corporation in such a desperate financial position that it had to borrow \$10,000 back from the majority.<sup>103</sup> The minority shareholders claimed that, in effect, the majority had paid themselves a dividend and left the minority out of the distribution.<sup>104</sup> The *Tillis* court cited *Donahue* with approval and said that unless an equal opportunity to sell is given to the minority shareholders, the distribution of corporate assets to the majority shareholders is a breach of the majority's fiduciary duty.<sup>105</sup> However, the court noted that the facts represented a breach of fiduciary duty to the corporation as much as a breach of fiduciary duty to other shareholders.<sup>106</sup>

### III. THE INADEQUACY OF FLORIDA'S STATUTORY SCHEME

In the absence of oppression as a statutory ground for relief, a minority shareholder in Florida is left with inadequate recourse. Essentially, a

95. *Id.* at 115-16.

96. *See id.* at 115.

97. *Id.*

98. *Id.* The trial court did not order dissolution of the corporation. *See id.* Instead, it required the defendants to rescind the recapitalization and cancel the new issue of shares. *Id.*

99. *See id.* at 115-16.

100. 395 So. 2d 618 (Fla. 5th DCA 1981).

101. *Id.* at 619.

102. *Id.* at 618.

103. *Id.*

104. *Id.* at 619.

105. *Id.*; accord *Donahue*, 328 N.E.2d at 515, 518.

106. *Tillis*, 395 So. 2d at 619. Like *Donahue*, the *Tillis* case was not brought on grounds of oppression. *See id.* at 618-20. So while *Tillis* may provide a theory on which to proceed, it does not directly serve as a precedent upon which minority shareholders can base a claim of oppression.

minority shareholder who feels he is suffering oppression at the hands of the controlling shareholders has three options in Florida:

(1) protect himself with contractual provisions at the start-up of the enterprise;<sup>107</sup> or

(2) proceed under the guise of one of the statutory grounds for relief;<sup>108</sup> or

(3) proceed under a breach of fiduciary duty theory.<sup>109</sup>

None of these options are adequate given the nature of the close corporation and Florida's reaction to the minority shareholder's problems.

Certainly, the best way for a minority shareholder to protect himself is through careful planning.<sup>110</sup> Contractual provisions drafted at the inception of an enterprise would eliminate most of the problems of oppressed minority shareholders.<sup>111</sup> Such provisions might include a contract for employment, a right to have a voice in decisionmaking, or the right to redeem shares under certain circumstances.<sup>112</sup> However, while these protections are available, it is simply unrealistic to expect to find them in a close corporation setting.<sup>113</sup>

Often, the few shareholders in a close corporation are friends or family going into business together.<sup>114</sup> This results in a general lack of formality as to the business arrangements.<sup>115</sup> Instead of binding agreements,

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107. See *infra* notes 110-22 and accompanying text.

108. See *infra* notes 125-29 and accompanying text.

109. See *infra* notes 130-52 and accompanying text.

110. See CLARK, *supra* note 2, § 18.4.1, at 785-86. See generally O'NEAL & DERWIN, *supra* note 3, §§ 7.01-13 (providing a detailed analysis of planning techniques designed to avoid squeeze-outs and oppression of minority shareholders). The traditional view was that shareholder agreements were void as against public policy. *McQuade v. Stoneham*, 189 N.E. 234, 236-37 (N.Y. 1934). However, in *Galler v. Galler*, 203 N.E.2d 577 (Ill. 1964), the court upheld a shareholder agreement designed to protect the salary of a shareholder. *Id.* at 586-87. The primary factors in the court's decision were that all of the shareholders were parties to the agreement, no creditors had been injured, and the public had not been injured. *Id.* In addition, the purpose of the agreement was simply to provide a type of pension. *Id.* Many statutes now provide for shareholder agreements in certain situations. See, e.g., FLA. STAT. § 607.0731 (1993); REVISED MODEL BUSINESS CORP. ACT § 7.32 (1984).

111. See CLARK, *supra* note 2, § 18.4.1, at 785-86 (arguing that careful planning and sound legal advice can mitigate the inadequacies of statutory remedies); O'NEAL & DERWIN, *supra* note 3, §§ 7.01-13; *supra* note 110.

112. O'NEAL & DERWIN, *supra* note 3, §§ 7.01-13; *supra* note 110.

113. See CLARK, *supra* note 2, § 18.4.1; O'NEAL & DERWIN, *supra* note 3, §§ 2.17-19; Cane, *supra* note 9, at 21 ("In an ideal world the drafting of shareholder agreements with buy-sell provisions would be the norm for all closely held corporations. It is not.").

114. See O'NEAL & DERWIN, *supra* note 3, § 2.10. Professors Hetherington and Dooley argue that the focus on contractual abilities of shareholders misunderstands the close corporation setting. See Hetherington & Dooley, *supra* note 24, at 2. They argue that the focus should be on the shareholders' ability to maintain a harmonious relationship because investors in a close corporation expect that the shareholders will remain in agreement over the life of the business. *Id.*

115. O'NEAL & DERWIN, *supra* note 3, § 2.10.

the participants have “understandings” about the way things will work.<sup>116</sup> Most of the understandings are either implied or in oral form, making them difficult, if not impossible, to enforce.<sup>117</sup> In addition, the arrangements as understood by the controlling shareholders may be different from those understood by the minority shareholders.<sup>118</sup>

The lack of formality in close corporations’ business arrangements also results in the parties’ failure to foresee potential problems.<sup>119</sup> At the start-up of a close corporation, there is an “atmosphere of optimism and good will which . . . obscures the possibility of future disagreements and conflicts.”<sup>120</sup> Not only do the participants often fail to protect against future dissension, they give no thought to what happens if a majority shareholder sells his interest to a third party who has a different philosophy about how the business should be handled.<sup>121</sup> Even if the incorporators have the foresight to anticipate problems, they may be reluctant to obtain legal counsel due to the extraordinary cost.<sup>122</sup> This problem is only exacerbated by the incorporators’ attraction to commercial “How To” books, allowing them to incorporate for relatively low cost. Most contain form contracts without necessary protective provisions. Thus, the expectation that shareholders in a close corporation will protect themselves contractually is not a realistic view.

Nor do the present grounds for involuntary dissolution under section 607.1430(2) provide adequate relief for the minority shareholder.<sup>123</sup> In the absence of a deadlock situation that fits subsections 2(a) and 2(b),<sup>124</sup> an oppressed minority shareholder must clothe his argument under subsection (2)(c) and allege that corporate assets are being misapplied or wasted.<sup>125</sup> This provision does not cover even the most basic of squeeze-out techniques.<sup>126</sup> If the controlling shareholders terminate the employment

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116. *Id.* § 2.17.

117. *Id.*

118. *See id.*

119. *Id.* § 2.18.

120. *Id.* § 2.19.

121. *Id.* § 2.18.

122. *Id.* § 2.19. Professor O’Neal emphasizes that when a minority shareholder retains counsel, it is important to have separate counsel from that of the business. F. Hodge O’Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 143 (1987). Professor O’Neal also issues a gentle ethical reminder about conflicts of interest to any attorney who represents both sides. *Id.*; *see also* Wilton S. Sogg & Michael L. Solomon, *The Changing Role of the Attorney with Respect to the Corporation*, 35 CLEV. ST. L. REV. 147, 160 (1987) (discussing the appropriateness of attorneys serving as directors in close corporations).

123. *See* FLA. STAT. § 607.1430(2) (1993).

124. *See* FLA. STAT. § 607.1430(2)(a)-(b) (1993).

125. FLA. STAT. § 607.1430(2)(c) (1993).

126. *See generally* O’NEAL & DERWIN, *supra* note 3 (examining various squeeze-out techniques in a close corporation setting).

of the minority shareholders and fail to distribute dividends to them, the minority shareholders are left with no return on their investment.<sup>127</sup> Their only solution is to sell their shares to the majority.<sup>128</sup> Because minority shareholders are in no position to bargain, they will receive an inadequate price for their shares.<sup>129</sup> No corporate assets have been misapplied and no corporate assets have been wasted. Consequently, the minority shareholders have no direct remedy under the Florida Statutes.

Without the availability of statutory relief, an oppressed minority shareholder is forced to rely on judicially-crafted remedies based on breaches of fiduciary duty.<sup>130</sup> Under *Tillis*, Florida has adopted the view that majority stockholders have a fiduciary duty not to utilize their controlling positions to their own advantage and to the detriment of the minority.<sup>131</sup> However, *Tillis* is a 1981 decision.<sup>132</sup> Since that time, it has been cited with approval only in the 1992 case of *Cohen v. Hattaway*.<sup>133</sup> *Cohen* involved a suit by minority shareholders alleging a breach of the majority shareholders' fiduciary duties by usurping a corporate opportunity.<sup>134</sup> While a violation of the corporate opportunity doctrine fits some definitions of oppression, in *Cohen* the plaintiff brought the lawsuit derivatively, so the recovery went to the corporation rather than to the plaintiff.<sup>135</sup>

Other than *Tillis* and *Cohen*, only *Biltmore Motor* seems to help a minority shareholder in Florida.<sup>136</sup> *Biltmore Motor* is a squeeze-out case involving termination of the minority's employment and an attempt to buy the minority out at a depressed value.<sup>137</sup> However, *Biltmore Motor* was decided in 1974 and has not been cited in another Florida state court decision.<sup>138</sup> Thus, while these three cases form the foundation of a theory upon which an oppressed minority shareholder might rely, any protection they offer such shareholders is tenuous at best.

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127. See O'NEAL & DERWIN, *supra* note 3, § 3.05, at 53; O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 8.07, at 65.

128. See *Donahue*, 328 N.E.2d at 515.

129. *Id.*

130. See *supra* notes 51-61, 86-106 and accompanying text.

131. *Tillis*, 395 So. 2d at 619.

132. *Id.* at 618.

133. 595 So. 2d 105, 107 (Fla. 5th DCA 1992).

134. *Id.*

135. *Id.* A plaintiff who recovers in a derivative suit is usually not adequately relieved since she remains a part of the corporation and therefore remains subject to further oppression. See *infra* notes 139-46 and accompanying text.

136. See *Biltmore Motor*, 291 So. 2d at 115-16.

137. *Id.* at 114-15.

138. A search of Shepard's Citations for Southern Reporter 2d through October of 1994 shows no Florida cases citing *Biltmore Motor*.



Even if the caselaw on shareholder fiduciary duty was stronger in Florida, actions on that ground do not afford enough protection. Breach of fiduciary duty suits are normally brought derivatively on behalf of the corporation.<sup>139</sup> Any relief granted by the court will have the corporation as its focus.<sup>140</sup> While this action may be enough in some instances, the relief granted inures to the corporation, which still remains under majority control.<sup>141</sup> The minority shareholder is still inside the corporation facing "the prospect of continued litigation and the spectre of continued animosity."<sup>142</sup> Even if a derivative suit will provide adequate relief in a particular case, the procedural restrictions on bringing the suit may be too difficult for a shareholder to overcome.<sup>143</sup>

For oppressed shareholders to obtain relief personally, they must show that their injury is separate and distinct from any injury suffered by other shareholders.<sup>144</sup> While there is some authority which supports allowing direct actions more frequently when a close corporation is involved,<sup>145</sup> the *Tillis*, *Cohen*, and *Biltmore Motor* cases were all based on derivative suits.<sup>146</sup> As these three cases appear to be the only decisions supporting a controlling shareholder's fiduciary duty in Florida, the ability of a minority shareholder to bring a direct action in Florida remains an uncertain possibility.

Assuming *arguendo* that a direct suit can be brought for breach of a

139. Thompson, *supra* note 25, at 735.

140. *Id.*

141. *Id.* at 738; *see, e.g., Wilderman v. Wilderman*, 315 A.2d 610, 613 (Del. Ch. 1974); *Murdock*, *supra* note 34, at 440.

142. *Murdock*, *supra* note 34, at 440. In addition, when the recovery inures to the corporation, it is subject to creditors and tax consequences. *Liken v. Shaffer*, 64 F. Supp. 432, 441 (N.D. Iowa 1946).

143. Thompson, *supra* note 25, at 737. For instance, the Florida Statutes require a shareholder to make demand on the board of directors to remedy the wrong before the suit can proceed. FLA. STAT. § 607.07401(2) (1993). This requires independent disinterested directors so that conflicts of interest may be avoided. FLA. STAT. § 607.07401(3)(b) (1993). It is designed to prevent "strike suits"—frivolous claims designed to benefit individual shareholders rather than the corporation itself. *See A.L.I., Proposed Final Draft*, 1992 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.02, at 632-33 (1992). The board's decision to reject demand is entitled to the business judgment rule which generally defers to management's decision in the absence of some wrongdoing. *See Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 n.10, 788-89 (Del. 1981).

Some of the procedural requirements may be less harsh in a close corporation setting. Thompson, *supra* note 25, at 737. For instance, making demand on the board is less burdensome in most close corporations because they are unlikely to have independent disinterested directors. *Id.* As a result, courts may be more likely to excuse demand. *Id.* at 738.

144. *Alario v. Miller*, 354 So. 2d 925, 926 (Fla. 2d DCA 1978); *see also Garner v. Pearson*, 374 F. Supp. 580, 585 (M.D. Fla. 1973) (noting that where injury is done directly to the subsidized corporations, the plaintiff may not sue on their own behalf; this is a derivative action under Florida law).

145. *See, e.g., Zahn v. Transamerica Corp.*, 162 F.2d 36, 47-48 (3d Cir. 1947) (permitting direct action to enforce redemptive rights); *Leibert v. Clapp*, 196 N.E.2d 540, 542 (N.Y. 1963) (permitting direct action to liquidate the corporation).

146. *Cohen*, 595 So. 2d at 107; *Tillis*, 395 So. 2d at 618; *Biltmore Motor*, 291 So. 2d at 115.

majority shareholder's fiduciary duties, the plaintiff still must work around the business judgment rule.<sup>147</sup> After its broad holding in *Donahue*, the Massachusetts court took the opportunity to cut back on a controlling shareholder's fiduciary duties in *Wilkes v. Springside Nursing Home*.<sup>148</sup> In *Wilkes*, after dissension arose between the plaintiff and the other directors, the plaintiff's salary was terminated and he was removed as a director and officer.<sup>149</sup> The *Wilkes* court recognized the fiduciary concept stated in *Donahue*, but stated that the majority had the right to show a legitimate business purpose for their actions.<sup>150</sup> Florida adopted this limitation in *Biltmore Motor*.<sup>151</sup>

While the complaining shareholders in *Biltmore Motor* and *Wilkes* were granted relief,<sup>152</sup> the business judgment rule is yet another hurdle for oppressed shareholders to clear.<sup>153</sup> The business judgment rule is so deferential to management that controlling stockholders would have little trouble justifying their actions.<sup>154</sup> For instance, the majority may attempt to squeeze out a minority shareholder by terminating his employment.<sup>155</sup>

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147. See *Wilkes v. Springside Nursing Home*, 353 N.E.2d 657, 663 (Mass. 1976) ("It must be asked whether the controlling group can demonstrate a legitimate business purpose for its action."). The American Law Institute has attempted to articulate the business judgment rule as follows:

- (c) A director or officer who makes a business judgment in good faith fulfills his duty . . . if:
  - (1) he is not interested . . . in the subject of his business judgment;
  - (2) he is informed with respect to the subject of his business judgment to the extent he reasonably believes to be appropriate under the circumstances; and
  - (3) he rationally believes that his business judgment is in the best interests of the corporation.

PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (Tentative Draft No. 4, ALI 1985). See generally Charles Hansen, *The ALI Corporate Governance Project: Of the Duty of Care and the Business Judgment Rule, A Commentary*, 41 BUS. LAW. 1237 (1986) (examining the business judgment rule's relation to the MBCA).

148. 353 N.E.2d 657, 663 (Mass. 1967).

149. *Id.* at 661.

150. *Id.* at 663. The court noted that the minority will have a chance to come back and prove that the reasons advanced by the majority "could have been achieved through an alternative course of action less harmful to the minority's interest." *Id.* There are several rationales for the existence of the business judgment rule: (1) the rule encourages competent people to serve on corporate boards; (2) the rule relieves a director's worries about "judicial second-guessing;" (3) the rule keeps courts out of complex business decisions; and (4) the rule ensures that directors control the corporation, not the shareholders. Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 MINN. L. REV. 1339, 1359-60 (1993).

151. *Biltmore Motor*, 291 So. 2d at 115. The court found no legitimate business reason for the recapitalization of the corporation. *Id.* Instead, the court found that the real purpose was to water down the minority's interest in the company. *Id.*

152. *Id.*; *Wilkes*, 353 N.E.2d at 665. Sufficient evidence was not found in either case to support the majority shareholders' claim of a legitimate business purpose.

153. See *supra* note 147.

154. See *supra* note 147.

155. *Wilkes*, 353 N.E.2d at 663.

If the majority can simply argue that the terminated minority shareholder was inefficient, had a bad attitude, or any number of things, it might avoid a breach of fiduciary duty finding and leave the minority shareholder with no relief.<sup>156</sup>

By choosing to omit statutory relief based on oppression, Florida has left minority shareholders out in the cold. An oppressed shareholder is currently presented with various options which are either unrealistic, unhelpful, or too uncertain to afford any real protection.<sup>157</sup> As a result, it is time for Florida to catch up with the majority of other jurisdictions and provide statutory relief for oppressed minority shareholders.

#### IV. POSSIBLE SOLUTIONS FOR FLORIDA

The first and most obvious step for curing the defects in the FBCA is to adopt a provision making oppression a ground for relief.<sup>158</sup> The wording of RMBCA section 14.30(2)(ii) would be sufficient.<sup>159</sup> In addition to omitting oppression, the Florida legislature seemed to consider illegal or fraudulent acts by the controlling group to be as unimportant as oppressive acts.<sup>160</sup> If illegal or fraudulent acts are still considered unimportant, the legislature could leave out the words illegal and fraudulent when adopting the RMBCA subsection.

In omitting oppression as a ground for involuntary dissolution under the FBCA, the Florida legislature sought to avoid increased litigation.<sup>161</sup> The legislature seemed concerned that a single disgruntled minority shareholder could bring suit without having any valid grounds for doing so.<sup>162</sup> The legislature sought to prevent a suit brought solely on the grounds that the company was operating in a manner that, in the plaintiff's

156. *Id.* When such a business purpose is advanced by the majority shareholders, the minority shareholders may attempt to demonstrate that the same legitimate objective could be achieved through a less harmful alternative. *Id.*

157. See *supra* notes 107-56 and accompanying text.

158. At least one commentator has suggested that minority shareholders have been slighted by the various state legislatures because of a lack of lobbying power. Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 WASH. U. L.Q. 365, 393-95 (1992). This argument presumes that the majority shareholders have influence over private interest groups with substantial lobbying power.

159. REVISED MODEL BUSINESS CORP. ACT § 14.30(2)(ii) (1984); see also *supra* text accompanying note 30 (providing the text of § 14.30(2)(ii)).

160. Cane, *supra* note 9, at 20; see FBCA Commentary, *supra* note 75, at SP2-43. The commentary to the FBCA states, "Presumably, illegal activities would be grounds for dissolution by the Department of Legal Affairs under [FBCA § 607.1430(1)(a)]." *Id.*; accord FLA. STAT. § 607.1430(1)(a) (1993); REVISED MODEL BUSINESS CORP. ACT § 14.30(1)(ii) (1984).

161. FBCA Commentary, *supra* note 75, at SP2-43. Some commentators believe that dissolution is an inadequate remedy for oppressed shareholders anyway. See Hetherington & Dooley, *supra* note 24, at 9-19. In large part, the argument is that involuntary dissolution is a convoluted and inefficient way to achieve a buy-out of the minority. *Id.* at 34-35.

162. FBCA Commentary, *supra* note 75, at SP2-43.

judgment, was bad for business or bad for the stockholders.<sup>163</sup> If this is truly the legislature's primary concern, it can adopt other measures that prevent what it considers frivolous litigation.

Presumably, some controls are already in place to prevent frivolous lawsuits. The Florida Rules of Judicial Administration allow an attorney to sign a pleading only if there is "good ground to support it."<sup>164</sup> In addition, the Florida Rules of Professional Conduct prevent an attorney from bringing a frivolous proceeding.<sup>165</sup> Violations of either set of rules carry sanctions. However, if the legislature is concerned that some unwarranted suits will pass the civil procedure and ethical tests,<sup>166</sup> there are several other options at its disposal.

First, the legislature could choose to include a definition of oppression with its enactment of the RMBCA provision. This option would certainly cut down litigation because, if the majority shareholders' conduct did not fit the definition, there would be no grounds for minority shareholders to seek relief. However, this would be no solution.<sup>167</sup> If the legislature were to define oppression in the statute, it would eliminate the flexibility needed to cope with new and unforeseeable circumstances.<sup>168</sup> In other jurisdictions, flexibility has allowed the courts to define oppression somewhat narrowly to prevent frivolous lawsuits, but at the same time, protect minority shareholders.<sup>169</sup>

In Florida as in other jurisdictions, the courts should remain free to decide on a case-by-case basis what fits the statutory meaning of oppression in any particular set of facts. The legislature, simply by acknowledging the problem of oppressed minority shareholders in close corporations,

163. Courts have long endeavored to deter such cases. *See, e.g.,* *Cates v. Sparkman*, 11 S.W. 846, 850 (Tex. 1889) (denying relief to the plaintiff who could not show injury with sufficient certainty—the plaintiff actually made a profit from one tract of land involved in the allegedly oppressive transaction).

164. FLA. R. JUDICIAL ADMIN. 2.060(d).

165. FLA. RULES OF PROFESSIONAL CONDUCT 4-3.1. "A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." *Id.*

166. The comment to Rule 4-3.1 of the Florida Rules of Professional Conduct notes that the law contains ambiguities and therefore counsel should be given some leeway in advancing legal arguments. *See* FLA. RULES PROFESSIONAL CONDUCT 4-3.1 cmt. Thus, the legislature may be concerned that this leeway would permit oppressed minority shareholders to run around the ethical rules. The comment adds, however, that an action is considered frivolous under the rule if it is brought "primarily for the purpose of harassing or maliciously injuring a person." *Id.*

167. *See* O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 9.30, at 141.

168. *Id.* Courts are accustomed to interpreting the definition of words in statutes. *See* Cane, *supra* note 9, at 20. Specifically, the Florida courts have a large body of caselaw from other jurisdictions from which to define oppression. *Id.* at 21.

169. *See, e.g.,* *In re Topper*, 433 N.Y.S.2d 359, 363-66 (N.Y. Sup. Ct. 1980); *Balvik v. Sylvester*, 411 N.W.2d 383, 387 (N.D. 1987); O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 9.30, at 143-44.

would send a policy message to the courts.<sup>170</sup> The definition of oppression could then be shaped with those policy considerations in mind.<sup>171</sup> For example, given Florida's legislative concern about excessive litigation, the courts would be less likely to adopt a reasonable expectations standard because any focus on the minority shareholders' subjective impressions lends itself to greater litigation.<sup>172</sup>

A more sensible approach to limiting litigation would include a provision for the award of attorney fees to the corporation if it is dragged into a frivolous lawsuit by a minority shareholder.<sup>173</sup> The Florida legislature could enact a provision similar to section 41 of the Model Statutory Close Corporation Supplement.<sup>174</sup> While Florida has not adopted any part of the supplement, it could incorporate language from the supplement into the FBCA. Section 41(b) of the supplement provides: "If the court finds that a party to the proceeding acted arbitrarily, vexatiously, or otherwise not in good faith, it may award one or more other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding."<sup>175</sup> The provision, as written, would apply to either side in the litigation.<sup>176</sup> It could, however, be limited to the party who brings the proceeding if the legislature deems this limitation prudent. The fear of paying both their own legal fees and those of the corporation would deter minority shareholders from bringing actions that are not well-founded under the statute and relevant caselaw.

In addition to its concerns about litigation, there is some indication that the Florida legislature is interested in limiting the number of grounds available to dissolve corporations.<sup>177</sup> In the commentary to the FBCA, the legislative subcommittee indicated its belief that dissolution is an "extreme remedy."<sup>178</sup> Like the commentary to the RMBCA, the subcommittee also emphasized the discretion the courts have in granting dissolution.<sup>179</sup>

Most characterizations of dissolution as an extreme remedy result from a concern about ending the going concern value of an enterprise.<sup>180</sup> For instance, the FBCA commentary expresses a concern that dissolution will

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170. See O'NEAL, CLOSE CORPORATIONS, *supra* note 1, § 9.30, at 141.

171. See *id.* § 9.30, at 141-42.

172. See Bruno, *supra* note 49, at 434.

173. Cane, *supra* note 9, at 21.

174. MODEL STATUTORY CLOSE CORP. SUPPLEMENT § 41 (1984).

175. *Id.* § 41(b).

176. See *id.*

177. See FBCA Commentary, *supra* note 75, at SP2-43.

178. See *id.*

179. REVISED MODEL BUSINESS CORP. ACT § 14.30 cmt. 2b (1984); see FBCA Commentary, *supra* note 75, at SP2-43.

180. CLARK, *supra* note 2, § 18.4.1, at 786; Murdock, *supra* note 34, at 441.

have harmful effects on third parties such as employees of the corporation.<sup>181</sup> However, what the legislature fails to recognize is that dissolution is not synonymous with corporate death.<sup>182</sup> Generally, at liquidation the buyer will purchase not only the assets, but also the going concern value.<sup>183</sup> Additionally, the buyer is often the controlling group of shareholders accused of oppression in the first place.<sup>184</sup> The result is that “the only real change . . . will be the name on the door. No employees will be terminated, nor any goods or services lost.”<sup>185</sup>

If the legislature is concerned about a fragmented liquidation, where the assets are sold piecemeal to different buyers without purchase of the going concern value, it could adopt an approach similar to Michigan’s.<sup>186</sup> The Michigan legislature enacted section 489 of the Michigan Business Corporation Act<sup>187</sup> to include relief for “illegal, fraudulent, or willfully unfair and oppressive” conduct.<sup>188</sup> It then moved the provision from the dissolution portion of the Act to the shareholder portion of the Act.<sup>189</sup> While Florida should avoid adopting the “willfully unfair” language in the Michigan statute,<sup>190</sup> moving the provision might quiet some of the Florida legislature’s fears over destruction of going concern values.

Were the Florida legislature to enact a provision making oppression a ground for relief, it could put the provision in the shareholder section between sections 607.1301 and 607.1320.<sup>191</sup> This would place emphasis on alternative remedies instead of placing emphasis on dissolution.<sup>192</sup> The legislature would then have the option of leaving those alternative remedies to the imagination of the courts, or appending an illustrative list of alternative remedies like those provided in section 41 of the Model Statutory Close Corporation Supplement.<sup>193</sup>

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181. FBCA Commentary, *supra* note 75, at SP2-43. The concern is that upon dissolution, if “corporate death” ensues, employees will lose their jobs. *See id.*

182. CLARK, *supra* note 2, § 18.4.1, at 786-87 n.2; Murdock, *supra* note 34, at 442-43.

183. Murdock, *supra* note 34, at 442-43.

184. *Id.*

185. *Id.*

186. J.C. Bruno, “Reasonable Expectations”—A Primer on an Oppressive Standard, (Part 2 of 2), 71 MICH. B.J. 566, 568-69 (June 1992).

187. MICH. COMP. LAWS ANN. § 450.1489 (West 1990).

188. *Id.*

189. *See id.*; Bruno, *supra* note 186, at 568.

190. MICH. COMP. LAWS ANN. § 450.1489 (West 1990).

191. *See* FLA. STAT. §§ 607.1301-.1302, .1320 (1993). Section 607.1302 deals with dissenters rights and § 607.1320 provides the procedure for the exercise of dissenter’s rights. FLA. STAT. §§ 607.1302, .1320 (1993). Section 607.1301 is a definitional section. FLA. STAT. § 607.1301 (1993).

192. Bruno, *supra* note 186, at 568.

193. MODEL STATUTORY CLOSE CORP. SUPPLEMENT § 41(a) (1984). Alternatives include setting aside any action of the directors or shareholders, canceling or altering any provision in the articles of incorporation or bylaws, and an award of damages. *Id.*; *see also* Baker v. Commercial Body Builders,

As an option to putting the oppression provision in a different part of the FBCA, the legislature could adopt RMBCA section 14.34,<sup>194</sup> which provides the defendant corporation with the option to buy out the petitioning shareholder at fair value if a dissolution proceeding is brought against the corporation.<sup>195</sup> Adopting this section would prevent the destruction of any going concern value and would simultaneously reduce unnecessary litigation.<sup>196</sup> The official comment to section 14.34<sup>197</sup> states that the provision is designed to prevent abuse of the litigation process by making the minority shareholder's shares subject to a call within ninety days of the filing of the petition.<sup>198</sup> Thus the Florida legislature could kill two fears with one stone—its fear of destroying the going concern value and its fear of unnecessary litigation.

507 P.2d 387, 395-96 (Or. 1973). The alternative in § 41 that provides for the appointment of a custodian already exists as an alternative under the FBCA. FLA. STAT. § 607.1432 (1993).

194. REVISED MODEL BUSINESS CORP. ACT § 14.34 (1984).

195. REVISED MODEL BUSINESS CORP. ACT § 14.34(a) (1984). Section 14.34(a) states that in a proceeding to dissolve a corporation that does not have its shares listed on a national exchange, the corporation or the shareholders may elect to purchase the shares of the petitioning shareholder at fair value. *Id.* If the parties cannot agree on the fair value the court may determine the fair value of the shares as of the day before the petition was filed. REVISED MODEL BUSINESS CORP. ACT § 14.34(d) (1984). The section contains elaborate procedural requirements for filing and payment of fair value. REVISED MODEL BUSINESS CORP. ACT § 14.34 (1984).

The effectiveness of the buyout remedy is only as successful as the accuracy of the valuation process. Murdock, *supra* note 34, at 471. Regardless of the method of valuation used, there is an element of speculation in the process. Many jurisdictions use the "Delaware block" method to value the shares of a corporation. *See generally* Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453, 1456-71 (1966). The parties in *Francis I. duPont & Co. v. Universal City Studios*, 312 A.2d 344 (Del. Ch. 1973), estimated the future earnings, market value, and assets of the corporation. *Id.* at 346. Then, in accordance with the Delaware block method, they applied a percentage weight to each of those factors, which when multiplied by the value of the factors and added together, resulted in an approximate value of the corporation's outstanding shares. *Id.* The speculative nature of the weighting system is evidenced by the plaintiff's value (\$131.89 per share), the defendant's value (\$52.36 per share) and the appraiser's value (\$91.47 per share). *Id.* Because of the flexibility involved in weighing each factor and the inherently speculative nature of projecting earnings, market value, and asset value, the Delaware block method was abandoned in Delaware. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 712-13 (Del. 1983). However, other jurisdictions continue to use the method. *See, e.g., Piemonte v. New Boston Garden Corp.*, 387 N.E.2d 1145, 1148-49 (Mass. 1979). For an advanced discussion of ways in which valuation methods should be adjusted to more accurately reflect the minority shareholder's position in the corporation, see Murdock, *supra* note 34, at 471-88.

196. Thompson, *supra* note 25, at 723. A buyout provision would also reduce the minority shareholders' use of judicial dissolution as a tactic to gain bargaining power. Hetherington & Dooley, *supra* note 24, at 46. Professors Hetherington and Dooley have developed a long and detailed proposal for the ultimate buyout statute. *Id.* at 52-59.

197. REVISED MODEL BUSINESS CORP. ACT § 14.34 cmt. (1984).

198. REVISED MODEL BUSINESS CORP. ACT § 14.34 cmt. (1984); Hetherington & Dooley, *supra* note 24, at 58-59.

## V. CONCLUSION

Given the ways oppression statutes have been construed, enacting oppression as a statutory ground for relief is not a panacea.<sup>199</sup> However, the interpretative problems associated with the term oppression are a necessary evil to maintain the flexibility necessary to cover various factual circumstances.<sup>200</sup> There can be no doubt that some interpretations could lead to increased litigation in this area, but increased litigation is not synonymous with unnecessary litigation. Conserving judicial resources is not reason enough on its own to exclude a class of persons who should be entitled to relief under the law.<sup>201</sup> Unnecessary lawsuits can be prevented by enacting provisions for attorney fees and relating them to causes of action based on the oppression ground for relief.<sup>202</sup>

Furthermore, dissolution is not as drastic a remedy as it might first appear.<sup>203</sup> In addition to the fact that dissolution is normally discretionary with the court, in the majority of cases where dissolution has been granted there has been no termination of the going concern.<sup>204</sup> If the legislature still sees dissolution as extreme, it is free to provide for alternative relief.<sup>205</sup>

Some of the Florida legislature's concerns have merit. But Florida remains one of only thirteen states that fails to provide some type of statutory relief for minority shareholders who are treated unfairly in the close corporations setting.<sup>206</sup> Given the rapid rise of the corporate form in Florida,<sup>207</sup> it is imperative that Florida catch up with the times and add oppression to its statutory grounds for shareholder relief.

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199. *See supra* notes 35-50 and accompanying text.

200. *See supra* notes 166-71 and accompanying text.

201. Cane, *supra* note 9, at 21.

202. *See supra* notes 173-76 and accompanying text.

203. *See supra* notes 180-85 and accompanying text.

204. *See supra* notes 180-85 and accompanying text.

205. *See supra* notes 193-98 and accompanying text.

206. *See* Thompson, *supra* note 25, at 709.

207. *See supra* note 10 and accompanying text.



