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## Fiduciary Duties and Dissolution in the Closely Held Business

Harvey Gelb

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## FIDUCIARY DUTIES AND DISSOLUTION IN THE CLOSELY HELD BUSINESS

*Harvey Gelb\**

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The law has promoted ethical behavior even in the field of business. A great example occurs in the application of fiduciary principles to agents, partners, directors, and officers. Perhaps the best-known judicial example is Chief Judge Cardozo's ringing endorsement of the application of fiduciary principles in *Meinhard v. Salmon*, portions of which appear in this article.<sup>1</sup> The infusion of ethical principles, such as fiduciary duties, into judicial rulings is nothing new and something for which we should be grateful. It is a matter of good morals and good law that people who depend on each other,

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1. 164 N.E. 545 (N.Y. 1928). See *infra* notes 8, 107, and accompanying text.

or upon others, and people in relationships of trust and confidence, should be able to evoke fiduciary principles to protect themselves. Yet there have been efforts to downgrade or limit fiduciary duties. Two examples of such efforts appear in the bevy of statutes passed to enable directors to avoid fiduciary responsibility for carelessness in handling a corporation's affairs,<sup>2</sup> and in provisions of the Uniform Partnership Act, which reduce and allow for the reduction of fiduciary duties.<sup>3</sup> In light of the recent highly publicized business scandals, the need for ethical principles conditioning behavior in the business world must be perceived as most compelling. In a country so devoted to law and the resolution of problems through legal tribunals, it serves that need for courts to support at least to some extent ethical principles in business cases. People then cannot say to themselves or to others that an act may be committed simply because it is not illegal. If a person who depends on another should be able to depend on the other being loyal or careful, then the existence and vitality of fiduciary responsibilities legally requiring loyalty and care should be well guarded. The impairment of such responsibilities should be undertaken only with the greatest caution and reluctance. The world of business should be infused with ethical principles of fiduciary duty backed by law and applied by courts.

In this article there are some examples of Cardozo's principles being carried forward and expanded in the small business area; the area of closely held business. It is important that fiduciary principles of loyalty and care be utilized to safeguard investments of money and time. Nevertheless, there is more to this issue than concern for economic considerations. There is the great personal and psychological hurt felt by those who have been wronged by their fiduciary allies in their business relationships. The law should take this into account. This article considers two avenues for the relief of close corporation shareholders who have been wronged: 1) the use of fiduciary principles such as those of Cardozo by courts and; 2) the use of dissolution statutes to help those in business that are oppressed by others in control.

## I. BREACH OF FIDUCIARY DUTY CASES

### A. *Massachusetts*

The Supreme Judicial Court of Massachusetts held in *Donahue v. Rodd Electrotype Company*, "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."<sup>4</sup> Referring to past decisions defining the standard of the duty of partners as "utmost good faith and loyalty," the court stated that close corporation shareholders must discharge manage-

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2. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (2002).

3. See *infra* notes 124-29 and accompanying text.

4. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515 (Mass. 1975).

ment and shareholder responsibilities in conformity with this strict good faith standard.<sup>5</sup> The court said: "They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other shareholders and to the corporation."<sup>6</sup> The Massachusetts court further described the close corporation stockholder duty by pointing to the strict Cardozo partnership standard as follows:

The more rigorous duty of partners and participants in a joint adventure, here extended to stockholders in a close corporation, was described by then Chief Judge Cardozo of the New York Court of Appeals in *Meinhard v. Salmon*: "Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary duties . . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."<sup>7</sup>

The enunciation of the *Donahue* principle occurred in a situation where Harry Rodd and three of his children owned 200 shares of the corporation involved in the case and Joseph Donahue's widow, Euphemia, and son owned the remaining 50 shares.<sup>8</sup> The Donahues learned that the corporation had purchased Harry's shares for \$800.00 per share. They offered their shares to the corporation on the terms given to Harry, but the offer was rejected.<sup>9</sup> The widow Donahue brought suit against the directors of the corporation and the corporation itself seeking to rescind the purchase of Harry's shares and to compel Harry to repay the purchase price of the shares together with interest.<sup>10</sup>

After announcing the application of Cardozo's partnership fiduciary duty rule to the stockholders in a close corporation, the court took the position that "if the stockholder whose shares were purchased [is] a member of the controlling group [of the corporation], the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price."<sup>11</sup> The court held that in any case where controlling stockholders have exercised their power to deny the minority an equal opportunity in stock purchases, the

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5. *Id.* (citation omitted).

6. *Id.*

7. *Id.* at 516 (citation omitted) (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).

8. *Id.* at 509.

9. *Id.* at 510-11.

10. *Id.* at 508.

11. *Id.* at 518.

minority should be entitled to appropriate relief.<sup>12</sup> The court saw the strict standard of duty as plainly applicable to the stockholders in the *Donahue* case.<sup>13</sup> The court referred to two forms of suitable relief, leaving it to the judge below to enter an appropriate judgment: either Harry should repay money received with interest to the corporation in exchange for his shares or the corporation should purchase all of plaintiff's shares for the same price without interest.<sup>14</sup>

What moved the Massachusetts court to announce sweeping responsibilities for shareholders of a close corporation akin to the partnership fiduciary duties owed to one another? The court pointed to the characteristics of a close corporation as one, typified by a small number of stockholders, no ready market for their stock and substantial majority stockholder participation in the management, direction, and operations of the corporation.<sup>15</sup> In these characteristics, the court saw a striking resemblance to a partnership.<sup>16</sup> The court pointed to the use of the corporate form to give majority shareholders an opportunity to oppress or disadvantage minority shareholders, citing specifically "freeze-outs" as something that might be employed with the following possibilities:

The squeezers . . . may refuse to declare dividends; they may drain off the corporation's earnings in the form of exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, or in the form of high rent by the corporation for property leased from majority shareholders . . . ; they may deprive minority shareholders of corporate offices and of employment by the company . . .

<sup>17</sup>

The court referred to a number of additional factors including the following. In the absence of judicial assistance against attempted freeze-outs by majority shareholders, minority shareholders cut off from corporate revenues must suffer their losses or seek a buyer for their shares.<sup>18</sup> While in a large public corporation the stock of a minority shareholder could be sold in order to extricate invested capital, such a market is not available for shares of the close corporation.<sup>19</sup> In a partnership, a partner may cause dissolution if abused by his fellow partners and recover his share of partnership assets and accumulated profits while the stockholder of a close corporation may

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12. *Id.* at 519.

13. *Id.*

14. *Id.* at 520-21.

15. *Id.* at 511.

16. *Id.* at 512.

17. *Id.* at 513.

18. *Id.* at 514.

19. *Id.*

only do so by complying “with the rigorous terms of the applicable chapter of the General Laws.”<sup>20</sup> Thus in the close corporation minority stockholders may feel compelled to sell their shares to the majority at inadequate prices.<sup>21</sup>

It was in response to such concerns that the court enunciated the principle in *Donahue* that stockholders in a close corporation owed one another substantially the same fiduciary duty in the operation of the enterprise that partners owed to one another.<sup>22</sup>

In the following year, 1976, the Massachusetts Supreme Judicial Court was faced with a case where the plaintiff, Wilkes, a minority shareholder of Springside Nursing Home, Inc., sought a declaratory judgment against other shareholders and the corporation.<sup>23</sup> The original four shareholders, which included Wilkes, set up their corporation with equality in their ownership and the understandings, at the time of incorporation, that each would be a director and participate actively in the management and decision making involved in operating the corporation, and “that, corporate resources permitting, each would receive money from the corporation in equal amounts as long as each assumed an active and ongoing responsibility for carrying a portion of the burdens necessary to operate the business.”<sup>24</sup> They divided the work and revenues on an equal basis for a period of years. This division of revenue continued after a new person purchased the shares of one of the original shareholders; the new shareholder was also elected a director of the corporation.<sup>25</sup> After strains developed in the personal relations among the shareholders, Wilkes lost his salary and his position as director and officer of the corporation.<sup>26</sup> There was no indication that Wilkes had failed in the performance of his duties.<sup>27</sup> The court also pointed out, with no evident impact on the case, that the bylaws of the corporation provided that the directors, subject to shareholder approval, had the power to fix the salaries of officers and employees, but that this power had not been exercised formally until Wilkes was cut off, and that all payments from the venture, until that time, had resulted from “informal but unanimous approval of all parties concerned.”<sup>28</sup>

Pointing to the *Donahue* principle and to the reasons underlying it, the court said that “[t]he distinction between the majority action in *Donahue* and the majority action in [the *Wilkes*] case [was] more one of form than of

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20. *Id.*

21. *Id.* at 515.

22. *Id.*

23. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 659 (Mass. 1976).

24. *Id.* at 660.

25. *Id.*

26. *Id.* at 661.

27. *Id.*

28. *Id.* at 661 n.10.

substance."<sup>29</sup> Still the court felt it important to set forth some restraints on *Donahue*:

Nevertheless, we are concerned that untempered application of the strict good faith standard enunciated in *Donahue* to cases such as the one before us will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned. The majority, concededly, have certain right to what has been termed "selfish ownership" in the corporation which should be balanced against the concept of their fiduciary obligation to the minority.<sup>30</sup>

The court imposed a two-prong test in cases where minority stockholders allege "a breach of the strict good faith duty owed them by the majority."<sup>31</sup> Under that test it must first be "asked whether the controlling group can demonstrate a legitimate business purpose for its action."<sup>32</sup> The court paid homage to the right of the controlling group to have room to maneuver in establishing business policy and to "have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees."<sup>33</sup>

The second prong follows so that where a business purpose is advanced by the majority, "it is open to minority stockholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest."<sup>34</sup> It would be for the courts then to, "weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative."<sup>35</sup>

The court found that the majority did not show a legitimate business purpose for severing Wilkes from the payroll or refusing to reelect him as a salaried officer and director, and concluded that the majority action was "a designed 'freeze-out' for which no legitimate business purpose [was] suggested."<sup>36</sup> (The freeze-out inference arose from the fact that the controlling

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29. *Id.* at 663.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 664.

shareholders offered to buy Wilkes' shares for a price, which one of them admittedly would not have accepted for his own shares.)<sup>37</sup>

By way of further explanation, the court pointed to several factors bearing upon the content of the duty owed to Wilkes by his associates:

At a minimum, the duty of utmost good faith and loyalty would demand that the majority consider that their action was in disregard of a long-standing policy of the stockholders that each would be a director of the corporation and that employment with the corporation would go hand in hand with stock ownership; that Wilkes was one of the four originators of the nursing home venture; and that Wilkes, like the others, had invested his capital and time for more than fifteen years with the expectation that he would continue to participate in corporate decisions. Most important is the plain fact that the cutting off of Wilkes' salary, together with the fact that the corporation never declared a dividend assured that Wilkes would receive no return at all from the corporation.<sup>38</sup>

A more recent case, *Merola v. Exergen Corporation*, sheds further light on the Massachusetts approach to fiduciary duty in close corporation cases.<sup>39</sup> The Exergen Corporation (Exergen) was formed in May 1980.<sup>40</sup> Its majority shareholder and founder Pompei owned 60% of its shares and actively participated in and controlled its management with the power to elect and change its board of directors.<sup>41</sup> Plaintiff began working for Exergen on a part-time basis and later accepted fulltime employment with the understanding that, if he worked for Exergen and invested in Exergen stock, he would have the opportunity to become a major shareholder and to continue employment.<sup>42</sup> He began fulltime employment with Exergen and made periodic purchases of its shares.<sup>43</sup> After he was terminated as an employee, plaintiff brought suit in which he alleged that Pompei, as majority shareholder, violated his fiduciary obligation to him by terminating his employment without cause.<sup>44</sup> The trial judge found a breach of fiduciary duty by Pompei, that he was terminated for no legitimate business purpose, and that he had suffered damages in lost wages.<sup>45</sup>

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37. *Id.* n.14.

38. *Id.* at 664 (citation omitted).

39. 668 N.E. 2d 351 (Mass. 1996).

40. *Id.* at 352.

41. *Id.* at 353.

42. *Id.*

43. *Id.*

44. *Id.* at 352.

45. *Id.* at 353.



The Massachusetts Supreme Court agreed with the lower court that Exergen was a close corporation and that stockholders in such a corporation owe one another a fiduciary duty of "utmost good faith and loyalty."<sup>46</sup> Nevertheless, the court found against Merola. In deciding whether there was a breach of the *Donahue* duty, the court referred to the *Wilkes* position that the majority interest must have a large measure of discretion regarding dividends, mergers, consolidations, the salaries of corporate officers, the dismissal of directors with or without cause, and the hiring and firing of corporate employees.<sup>47</sup> In distinguishing *Wilkes* from *Merola*, the court pointed to the existence in *Wilkes* of the "policy and practice" to divide available corporate resources "equally by way of salaries to the shareholders who all participated in the operation of the enterprise."<sup>48</sup> The distinction in *Merola* was that plaintiff invested in the stock of Exergen with the reasonable expectation of continued employment, but with "no general policy regarding stock ownership and employment" and "no evidence that any other shareholders had expectations of continuing employment because they purchased stock."<sup>49</sup> It was further pointed out that when the plaintiff did sell his stock back to the corporation, he received a significant return on his capital investment independent of the salary he received as an employee.<sup>50</sup>

The courts' analysis was that there was "no breach of the fiduciary duty by the majority shareholder to a minority shareholder" and that even though "there was no legitimate business purpose for the termination of the plaintiff, neither was the termination for the financial gain of Pompei or contrary to established public policy."<sup>51</sup> In an important passage, the court said:

Not every discharge of an at-will employee of a close corporation who happens to own stock in the corporation gives rise to a successful breach of fiduciary duty claim. The plaintiff was terminated in accordance with his employment contract and fairly compensated for his stock. He failed to establish a sufficient basis for a breach of fiduciary duty claim under the principles of *Donahue* . . . .<sup>52</sup>

It appears, therefore, that before a minority stockholder-employee claim would be eligible for the application of the two prong *Wilkes* test, the court will look to see if there is a basis for a breach of fiduciary duty claim, and that the failure to show: 1) a general policy regarding stock ownership

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46. *Id.* at 353 (quoting *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515 (Mass. 1975)).

47. *Id.* at 354 (quoting *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976)).

48. *Id.* at 354 (citing *Wilkes*, 353 N.E.2d at 660).

49. *Id.* at 354.

50. *Id.*

51. *Id.* at 354-55.

52. *Id.* at 355.

and employment, or 2) evidence that stockholders have expectations of continuing employment because they purchased stock, would be very significant in determining whether *Donahue* and *Wilkes* apply.

In light of the myriad situations in which a person may become a shareholder-employee, and the well established employment-at-will doctrine, looking for a general policy or reasonable expectations provides one convenient way to consider the existence and content of fiduciary duties in shareholder employment termination cases. Moreover, employment agreement provisions may contribute to that analysis, although not necessarily be conclusive in justifying terminations even if their language purports to do so. This is because language purporting to waive fiduciary duties may cause public policy problems. Thus, strong respect for fiduciary duties may prevent or discourage an interpretation of language that would impair such duties.<sup>53</sup>

In *Smith v. Atlantic Properties, Inc.*, a Massachusetts appeals court developed the *Donahue* principle even further.<sup>54</sup> Dr. Wolfson and three other persons were shareholders of a corporation, whose articles of organization and bylaws included a provision giving veto power over corporate decisions to any of the four original shareholders.<sup>55</sup> Wolfson's refusal to vote in favor of dividends resulted in penalty tax assessments by the Internal Revenue Service.<sup>56</sup> There were findings that his refusal to vote for "dividends was . . . caused more by his dislike for other stockholders and his desire to avoid additional tax payments than . . . by any genuine desire to undertake a program" to improve corporate property.<sup>57</sup> Finding that the minority, under the veto provision, became an ad hoc controlling interest, the court noted that the veto provision was not challenged as unauthorized by statute, pointed to a statutory intention to provide flexibility in corporate arrangements and methods to protect minority shareholders from being oppressed, and stated "if the device is used reasonably, there may be no strong public policy considerations against its use."<sup>58</sup> However, the court raised the question of the extent to which such a veto power may be exercised by its holder "without a violation of the 'fiduciary duty' referred to in the *Donahue* case as modified in the *Wilkes* case."<sup>59</sup> Turning to *Wilkes*, the court found that judicial intervention must involve "a weighing of the business interests advanced as reasons" for the action by the controlling group and by the rival

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53. See *infra* notes 54-64 and accompanying text.

54. *Smith v. Atlantic Properties, Inc.*, 422 N.E.2d 798 (Mass. App. Ct. 1981).

55. *Id.* at 799.

56. *Id.* at 800.

57. *Id.*

58. *Id.* at 802.

59. *Id.* at 802 (internal citation omitted) (referring to *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 511-17 (Mass. 1975), as modified by *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 662-64 (Mass. 1976)).

persons or group.<sup>60</sup> The court found that the trial judge was justified in finding Wolfson's conduct beyond what was reasonable.<sup>61</sup> The court said, "[W]hatever may have been the reason for Dr. Wolfson's refusal to declare dividends (even if in any particular year he may have gained slight, if any, tax advantage from withholding dividends) we think that he recklessly ran serious and unjustified risks of precisely the penalty taxes eventually assessed, risks which were inconsistent with any reasonable interpretation of a duty of 'utmost good faith and loyalty.'"<sup>62</sup>

Included in a footnote in *Smith* is the court's recognition of the difficulties of applying the *Donahue* standard to devices similar to the veto provision designed to protect the interests of a minority shareholder.<sup>63</sup> The court said: "This seems to us a difficult area of the law best developed on a case by case basis."<sup>64</sup>

Two very important propositions emerge from the *Smith* approach: (1) that even the parties' advance planning for protection may run afoul of the *Donahue* standard; and (2) that this may be the case even when there is statutory authority for the kind of advance planning undertaken in this case. When the fiduciary principle of *Donahue* will be held to trump arrangements made by the parties in advance is, as the court indicates, a difficult area of the law. Several lines of analysis would seem to support the *Smith* result. With respect to contract language subject to a possible "anti-fiduciary intent" interpretation: a) the language should need to be quite clear before a contractual intent to impair fiduciary duty is found and b) there is a public interest in invalidating provisions that eliminate the fiduciary duty of loyalty, that the co-owners of businesses owe each other. It strains the imagination beyond rational bounds to assume that any party really intended to sanction another's unfair behavior toward himself or herself.

### B. New York

In sharp contrast to the Massachusetts line of cases, there is New York authority rejecting broad partnership fiduciary principles for close corporation shareholders. According to the facts that emerge from the court's opinion in *Ingle v. Glamore Motor Sales, Inc.*, plaintiff Ingle in 1964 became a sales manager for Glamore Motor Sales, Inc., whose sole shareholder at the time was James Glamore.<sup>65</sup> The court agreed with the lower courts "that Ingle did not sufficiently present facts raising a triable issue" as to an

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60. *Id.* at 802 (citing *Wilkes*, 353 N.E.2d at 662-64).

61. *Id.* at 803.

62. *Id.*

63. *Id.* at 803 n.10.

64. *Id.*

65. *Ingle v. Glamore Motor Sales, Inc.*, 535 N.E.2d 1311, 1312 (N.Y. 1989).

“oral or written agreement fixing employment of a definite duration.”<sup>66</sup> In 1966, Glamore and Ingle entered a shareholders agreement providing for the acquisition of shares by Ingle initially and by option with the further provision that Glamore could repurchase all of Ingle’s stock if the latter “shall cease to be an employee of the Corporation *for any reason*.”<sup>67</sup> Ingle purchased additional shares pursuant to his option and the parties executed a new shareholders agreement containing the same repurchase provision.<sup>68</sup> In 1982, the corporation issued additional shares of stock to James Glamore and his two sons, and the three Glamores and Ingle entered into a third agreement.<sup>69</sup> It contained a repurchase provision as follows:

*Termination of employment.* In the event that any Stockholder shall *cease to be an employee of the Corporation for any reason*, Glamore shall have the option, for a period of 30 days after such termination of employment, to purchase all of the shares of stock then owned by such Stockholder.<sup>70</sup>

In 1983, “Ingle was voted out of his corporate posts and fired from employment as operating manager of the business.”<sup>71</sup> Glamore also exercised “the repurchase-upon-termination-of-employment option and paid Ingle \$96,000.00 for his 40 shares.”<sup>72</sup> Ingle contended “that as a minority shareholder of a closely held corporation, employed without the benefit of a contract containing a durational employment protection . . . he [was] nevertheless entitled by reason of his minority shareholder status to a fiduciary – rooted protection against being fired.”<sup>73</sup>

While the court’s line of reasoning is somewhat difficult to fully ascertain from its opinion, the following propositions may represent the thrust of it: 1) the common law employment at will doctrine would allow the corporation to discharge Ingle; 2) there was no modification of Ingle’s agreement that would alter his employment at will status; 3) there is no reason why an appeal to general fiduciary law should permit evasion of contractual obligations; 4) the repurchase agreement even reinforces application of the employment at will doctrine because it expressly confirms the lack of protection against discharge of an at-will employee; and 5) the court also makes the general statement that “[n]o duty of loyalty and good faith akin to that between partners, precluding termination except for cause, arises among

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66. *Id.* at 1313.

67. *Id.* at 1312.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1312-13.

those operating a business in the corporate form who 'have only the rights, duties and obligations of stockholders' and not those of partners."<sup>74</sup>

The court also placed some significance on the fact that Ingle never asserted that he was underpaid for his shares and he accepted payment from Glamore without reservation.<sup>75</sup> The court stated that "[w]e have no occasion to address issues involved in cases where the minority shareholders may be discharged solely to avoid assertion of the legal rights afforded to them under [state statutory and common business corporation law] . . . ."<sup>76</sup>

If the court had given sanction to the possible existence of fiduciary duties among the shareholders, then its analysis might have considered whether the intent of the repurchase contract should be interpreted in light of fiduciary duty, or whether contractual obligations of good faith and fair dealing would be more relevant in light of the parties' relationship as co-owners with fiduciary duties, or whether the contract clause legally could be held to waive fiduciary duties. Somewhere along the line, the court may also have considered the content and application of fiduciary duties in light of an analysis such as that used in the Massachusetts cases.<sup>77</sup> Thus, under *Wilkes* and *Merola* an expectations or general policy inquiry may have been relevant in determining if a fiduciary duty was forsaken, and under *Smith* the reasonableness of the behavior of the controlling shareholder might have been at issue.

In a subsequent case, the Court of Appeals of New York further eroded the significance of fiduciary duty in the close corporation context.<sup>78</sup> The plaintiff Gallagher had purchased stock in the defendant close corporation giving him an 8.5 percent interest, which was subject to a mandatory buy-back provision.<sup>79</sup> Gallagher was an employee of the corporation and, under the mandatory buy-back provision, if his employment ended "before January 31, 1985, the stock would return to the corporation for book value," but "[a]fter that date, the formula for the buy-back price was keyed to the company's earnings."<sup>80</sup> On January 10, 1985, the corporation fired the plaintiff and he did not contest the firing.<sup>81</sup> "[H]e demanded payment for his shares calculated on the post-January 31, 1985 buy-back formula," but the corporation refused.<sup>82</sup> Plaintiff's case was "based on an alleged departure from a fiduciary duty of fair dealing existing independently of the employment and arising from [his] simultaneous relationship as a minority share-

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74. *Id.* at 1313-14 (citation omitted).

75. *Id.* at 1314.

76. *Id.*

77. See *supra* notes 23-64 and accompanying text.

78. *Gallagher v. Lambert*, 549 N.E.2d 136 (N.Y. 1989).

79. *Id.* at 136.

80. *Id.* at 136-37.

81. *Id.* at 137.

82. *Id.*

holder in the corporation.”<sup>83</sup> He claimed entitlement to the higher price because of a premature “bad faith” termination of his at-will employment because he said that the sole purpose of his being fired at the time was to acquire his stock at a lower buy-back price formula.<sup>84</sup> The court did not really grapple with the issue of whether the plaintiff was owed some special fiduciary duty but instead submerged any duty in the terms of the agreement itself saying:

These agreements define the scope of the relevant fiduciary duty and supply certainty of obligation to each side. They should not be undone simply upon an allegation of unfairness. This would destroy their very purpose, which is to provide a certain formula by which to value stock in the future.<sup>85</sup>

The court simply and rigidly applied the terms of the agreement to trump any fiduciary duty that might exist. Without delving into the facts of this case in order to determine the merits of plaintiff’s arguments that a fiduciary duty really existed, or considering possible arguments utilizing contract theories, the court’s position seems notable for its willingness to allow a contract provision to obliterate fiduciary duties and perhaps even contract duties of good faith and fair dealing.<sup>86</sup>

### C. *New Mexico*

A recent New Mexico case approved of the principle that shareholders in closely held corporations owe each other a fiduciary duty similar to that of partners.<sup>87</sup> There were five shareholders in a New Mexico professional corporation engaged in the practice of law.<sup>88</sup> Gallegos owned 50% of the stock, Walta owned 25%, and three other shareholders owned the balance.<sup>89</sup> After some friction between Gallegos and Walta, the former circulated a memo to the “four other shareholders, including Walta, proposing that [the corporation] purchase their stock, leaving Gallegos as sole shareholder” or that the other shareholders purchase Gallegos’ stock with Gallegos leaving the firm.<sup>90</sup> The terms of the proposal called for the stock to be surrendered with its value determined in accordance with the corporate bylaws as of the end of the calendar year.<sup>91</sup> The “bylaws distinguished be-

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83. *Id.*

84. *Id.*

85. *Id.* at 137-38 (citation omitted).

86. *Id.* at 138. The majority opinion makes no mention of the duties of good faith and fair dealing except in stating the plaintiff’s allegations. *Id.* at 137.

87. *Walta v. Gallegos Law Firm, P.C.*, 40 P.3d 449, 457 (N.M. Ct. App. 2002).

88. *Id.* at 451.

89. *Id.*

90. *Id.* at 452.

91. *Id.*

tween 'vested' and 'non-vested' stock when valuing a departing stockholder's shares."<sup>92</sup> Non-vested stock would be purchased at the equivalent of the purchase price of the stock, but vested stock would receive "present book value" as of the effective date of termination.<sup>93</sup> "Present book value" resulted from subtracting the liabilities of the corporation from its assets including collectible accounts receivable in arriving at the purchase price.<sup>94</sup> Notwithstanding the different formula, Gallegos took the position that even Walta's vested shares should only be paid at the \$10.00 per share rate applicable to non-vested shares.<sup>95</sup> He admitted that in reaching this result he "omitted certain accounts receivable from the calculation because he thought they were not 'collectible accounts receivables' within the definition of present book value in the by-laws."<sup>96</sup> The jury decided that Walta's vested shares were worth considerably more than the amount proposed by Gallegos.<sup>97</sup> Gallegos did not appeal the amount of the award to Walta for the value of her stock.<sup>98</sup>

The jury also awarded punitive damages of \$100,000 against Gallegos and he did appeal that award.<sup>99</sup> Among other things he argued "that the fiduciary duty claims should not have been submitted to the jury at all because . . . there was no question he fulfilled his obligations" and also that there was "no evidence of the kind of culpable state of mind necessary to support punitive damages."<sup>100</sup> The New Mexico court referred to the *Donahue* definition of close corporation as a corporation "typified by a small number of shareholders," with "no ready market" for its stock and "substantial majority stockholder participation in the management, direction and operations of the corporation."<sup>101</sup> The court also noted *Donahue* references regarding potential abuse of minority shareholders by majority shareholders such as refusing to declare dividends and denying minority shareholders employment in the corporation, and the general rule establishing fiduciary duty owed by a non-controlling shareholder to other shareholders.<sup>102</sup> The court referred to the *Donahue* formulation "as the purest expression of the fiduciary duties owed by shareholders."<sup>103</sup>

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 453.

96. *Id.* at 453-54.

97. *Id.* at 454.

98. *Id.* at 455.

99. *Id.*

100. *Id.* at 455.

101. *Id.* at 456 (quoting from and referring to *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 511-13 (Mass. 1975)).

102. *Id.*

103. *Id.*

The court also recognized the limitations on *Donahue* imposed by *Wilkes*.<sup>104</sup> The court found that Gallegos owed Walta a fiduciary duty in his efforts to restructure a professional corporation that included the purchase of her stock and, drawing on partnership case law, held that “breach of this fiduciary duty can be asserted as an individual claim separate from the remedies available under statutory corporate law for oppressive conduct.”<sup>105</sup> The court also offered guidance respecting fiduciary duty as follows:

[I]t seems self-evident that a fiduciary duty is inconsistent with standards of conduct typically at play in arm’s-length commercial or business transactions. As Chief Judge Cardozo noted: “Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” The standard for a fiduciary, in this context, is thus higher than the duty of good faith and fair dealing imposed on all contractual relationships.

The duty between shareholders of a close corporation is similar to that owed by directors, officers, and shareholders to the corporation itself; that is, loyalty, good faith, inherent fairness, and the obligation not to profit at the expense of the corporation.

In adopting the Massachusetts approach, we are clearly aligning ourselves with the line of cases which impose a high duty of candor and good faith when majority shareholders are dealing with minority shareholders.<sup>106</sup>

The court held that as a matter of New Mexico law “a majority shareholder, as well as an officer or director of a close corporation, when purchasing the stock of a minority shareholder, has a fiduciary obligation to disclose material facts affecting the value of the stock which are known to the purchasing shareholder, officer, or director by virtue of his position, but not known to the selling shareholder.”<sup>107</sup> The court noted: “[N]ot every noncompliance with a shareholder agreement is necessarily a breach of fiduciary duty - but in appropriate circumstances may be” and “whether a breach of fiduciary duty has occurred will normally be a question of fact for the

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104. *Id.* at 457.

105. *Id.* (citation omitted).

106. *Id.* at 458 (citations omitted) (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).

107. *Id.* at 458-59.



jury.”<sup>108</sup> The court found that the record supported the jury conclusion; Gallegos had breached his fiduciary obligations to Walta regarding disclosure of material facts affecting the value of the stock and “compliance with the valuation formula set forth in the shareholder agreement, or a full and frank disclosure of any deviation from that formula and the reasons why.”<sup>109</sup>

For a variety of reasons, the court found that the jury decision in favor of the punitive damage claim was appropriate.<sup>110</sup> The court found that “a rational jury could conclude that Gallegos misrepresented his intentions with regard to restructuring of the firm and that his actions . . . were motivated by a desire to rid himself only of Walta,” that he improperly exercised his power to effect a squeeze out, that he improperly undervalued Walta’s shares, that he disclosed neither “his method of valuation” nor “the information material to a proper valuation of the shares,” that he “knowingly undervalued the amount of reasonably collectible accounts receivable,” and that he “knowingly failed to conduct himself in a manner consistent with the fiduciary duty he owed to minority shareholders, instead using . . . tactics more in keeping with arms-length transactions.”<sup>111</sup> The court said: “Viewing the evidence cumulatively in light of the fiduciary duty applicable, a rational jury could find that Gallegos’ conduct was sufficiently culpable to merit punishment.”<sup>112</sup>

#### D. Delaware Law

In *Nixon v. Blackwell*, the Delaware Supreme Court flatly rejected the idea of special, judicially created rules to protect minority stockholders of closely held Delaware corporations.<sup>113</sup> What is particularly important about this rejection is the court’s reasoning. The court felt that it should be left to the stockholder to “bargain for definitive provisions of self-ordering” under Delaware statutes and that “a stockholder intending to buy into a minority position could enter into definitive stockholder agreements providing for elaborate earnings tests, buy-out provisions, voting trusts, or other voting agreements.”<sup>114</sup> Pointing to the Delaware close corporations statute which is applicable only to companies electing its coverage and not to all closely held corporations, the court refused special relief for minority shareholders of non-electing close corporations, stating that the provisions “relating to close corporations and other statutory schemes preempt the field in their respective areas.”<sup>115</sup> The Delaware court felt that “[i]t would do violence to normal

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108. *Id.* at 459. The court noted that shareholders can agree to different fiduciary standards as long as the essence of right conduct is preserved. *Id.*

109. *Id.* at 460.

110. *Id.* at 462.

111. *Id.*

112. *Id.*

113. 626 A.2d 1366 (Del. 1993).

114. *Id.* at 1380.

115. *Id.*

corporate practice and [to its] corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted.”<sup>116</sup>

In another case, *Riblet Products Corp. v. Nagy*, the Delaware Supreme Court referred to *Wilkes* as not having been adopted in Delaware.<sup>117</sup> The plaintiff, a minority shareholder and employee of Riblet, had sued the corporation and majority shareholders in response to his termination of employment.<sup>118</sup> First heard in the Northern District of Indiana, a federal jury found for the plaintiff and against the corporation on his claim for breach of contract and against majority shareholders for breach of fiduciary duty to the plaintiff employee as minority shareholder.<sup>119</sup> While the contract verdict was for compensation, the fiduciary breach verdict held majority shareholders liable for both compensation and punitive damages.<sup>120</sup> On appeal, the Seventh Circuit Court of Appeals affirmed the contract verdict but certified the fiduciary duty question to the Delaware Supreme Court.<sup>121</sup> Finding no such duty, the Delaware Supreme Court stated “[t]hat [the] fact that Riblet is closely-held does not, for this purpose, alter the duties of stockholders *inter se* from those which prevail for publicly held corporations.”<sup>122</sup>

## II. THE IMPACT OF THE REVISED UNIFORM PARTNERSHIP ACT

In recent times, a significant number of states have adopted revisions of the Uniform Partnership Act (UPA).<sup>123</sup> The UPA contains subsections detailing fiduciary duties of loyalty and care and provides that “[t]he only fiduciary duties a partner owes to the partnership and the other partners” are set forth in those subsections.<sup>124</sup> It also establishes non-fiduciary responsibilities of good faith and fair dealing as follows:

(d) A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partner-

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116. *Id.*

117. 683 A.2d 37, 39 (Del. 1996).

118. *Id.* at 38-39.

119. *Id.* at 38 (referring to *Nagy v. Riblet Prod. Corp.*, 79 F.3d 572, 574-75 (7th Cir. 1996)).

120. *Id.*

121. *Id.*

122. *Id.* at 39 n.2, 40.

123. UNIFORM PARTNERSHIP ACT (amended 1997), 6 pt. 1 U.L.A. 1 (2001) [hereinafter U.P.A. (1997)]. As of 2001, thirty states and the District of Columbia are listed as having adopted the U.P.A. (1997). See *Table of Jurisdictions Wherein Act Has Been Adopted*, 6 pt. 1 U.L.A. 1. Variations from the official text of the Act in subsection 404 are set forth on pp. 146-148 and in subsection 103 on pp. 76-78. *Id.* at 76-78, 146-148.

124. *Id.* § 404(a).

ship agreement and exercise any rights consistently with the obligation of good faith and fair dealing.<sup>125</sup>

The Commentary to the above section states in part as follows:

Subsection (d) is also new. It provides that partners have an obligation of good faith and fair dealing in the discharge of all their duties, including those arising under the Act, such as their fiduciary duties of loyalty and care, and those arising under the partnership agreement. The exercise of any rights by a partner is also subject to the obligation of good faith and fair dealing. The obligation runs to the partnership and to the other partners in all matters related to the conduct and winding up of the partnership business.

The obligation of good faith and fair dealing is a contract concept, imposed on the partners because of the consensual nature of a partnership. See Restatement (Second) of Contracts § 205 (1981). It is not characterized, in RUPA, as a fiduciary duty arising out of the partners' special relationship. Nor is it a separate and independent obligation. It is an ancillary obligation that applies whenever a partner discharges a duty or exercises a right under the partnership agreement or the Act.<sup>126</sup>

The Commentary also explains that the meaning of good faith and fair dealing is not firmly fixed but is left to judicial development in real cases.<sup>127</sup>

The extent to which the UPA will have a practical impact on duties owed by partners to each other, whether fiduciary or contractual, is not easy to determine from the language of the statute or the Commentary, and remains to be seen. As indicated earlier some courts have borrowed from fiduciary partnership concepts in formulating duties among close corporation shareholders.<sup>128</sup> How they may factor UPA provisions into their close corporation or other closely held business cases also remains to be seen.

The UPA also rejects the contractual elimination of fiduciary duties and the duty of good faith and fair dealing but allows for some contractual limitations on such duties subject to certain conditions.<sup>129</sup> To the extent that

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125. *Id.* § 404(d).

126. *Id.* § 404 cmt. 4.

127. *Id.*

128. See *supra* notes 7, 105, and accompanying text.

129. U.P.A., *supra* note 123, § 404 cmt. 1. See also *id.* § 103(b). The duties of loyalty and care set forth in subsections (b) and (c) "may not be waived or eliminated in the partnership

partners actually contract for limitations, (and there is reason to wonder how often that will happen) courts will need to define and apply the statutory language to the limitations.

### III. REFLECTIONS ON THE MINORITY SHAREHOLDER PROBLEM

Should courts ride to the rescue of minority shareholders who fail to set up agreements or mechanisms to protect themselves at the onset of a business venture? Corporate law ordinarily provides a degree of fiduciary protection to shareholders for breaches of duty by corporate directors. Directors are expected to perform their duties to the corporation and to its shareholders in a careful and loyal manner. Officers, employees, and other agents of the corporation also owe it fiduciary duties. Nevertheless, such traditional protection does not always suffice to adequately safeguard minority shareholders:

The duties of care and loyalty protect minority shareholders in closely held as well as publicly held corporations, but in the closely held context they are often an insufficient protection. For example, the discharge of a minority shareholder from corporate office might qualify for protection under the business judgment rule, and a purchase of stock from majority shareholders might not violate the duty of loyalty if the price paid for the stock was fair. The real vice of such actions lies in the fact that they treat shareholders unequally, defeat legitimate expectations of a sort found in closely but not publicly held corporations, or both.<sup>130</sup>

It is true that corporate statutes are flexible enough to permit mechanisms that protect minority shareholders if the parties reach agreement to establish them. An example of a very flexible statute applying to unanimous shareholder agreements involving nonpublic corporations is section 7.32 of the Model Business Corporation Act.<sup>131</sup> Some may argue that if sharehold-

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agreement, but the agreement may identify activities and determine standards for measuring performance of the duties, if not manifestly unreasonable." *Id.* § 404 cmt. 1.

130. MELVIN ARON EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS* 455 (8th ed. 2000).

131. MODEL BUS. CORP. ACT § 7.32 (1984).

#### Shareholder Agreements.

(a) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Act in that it:

(1) eliminates the board of directors or restricts the discretion or powers of the board of directors;

ers fail to adequately protect themselves through advance arrangements, they should not be saved by judicial imposition of fiduciary duties such as in *Wilkes*.<sup>132</sup>

However, the question posed by the Massachusetts line of cases, such as *Donahue*, *Wilkes* and their progeny, is whether shareholders of a closely held corporation owe each other a special fiduciary duty that the Massachusetts Court said was akin to a partnership fiduciary duty. A look at the reasons for incorporating closely held businesses might be helpful in forming a policy perspective regarding the merits of the Massachusetts cases. People may decide or may have decided to incorporate existing partnerships or even new businesses because of tax and limited liability considerations. It is doubtful that many partnerships are or have been transformed into corporations because of an affinity for the special rules of corporate governance. In fact, many owners of businesses may have continued to make business decisions on an informal basis and without engaging in the drama of corporate meetings.

In addition, use of the employment-at-will doctrine as in *Ingle* to bar recourse to fiduciary principles in the case of co-owners is often unreason-

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(2) governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject the limitations in section 6.40;

(3) establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(4) governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(5) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(6) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(7) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or

(8) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

*Id.*

132. See *supra* notes 114-16 and accompanying text (discussing *Nixon v. Blackwell*).

able.<sup>133</sup> Although the employment-at-will doctrine may afford a sensible and practical rule to govern many working relationships, it is not clothed in the ethical garments of fiduciary principles, and treating others fairly and kindly has strong religious and secular support. Take the typical situation in which three people enter a business together as co-owners and co-workers. It is beyond the imagination to conceive of them as plotting to use the employment-at-will doctrine against each other. It is far more likely they expect and hope to have good, honest, and fair relations with each other. Using an employment-at-will doctrine to automatically trump the fiduciary claims of the co-owners of a business seems thoroughly inappropriate. Similarly, readily interpreting contracts of co-owners to embody intent by them to waive fairness and normal decency standards seems unrealistic at best.

The Massachusetts courts were being realistic in acknowledging and assuming the similarity between close corporations and partnerships when it came to issues linked to governance, and in aiding people who became disadvantaged minority shareholders instead of remaining or becoming partners.

Moreover, respect for fiduciary principles should be promoted by the law in a society where conflicts of interest, neglect of duty, and fraud are real problems, and where good faith, honesty, loyalty, and care should not be insignificant platitudes. As tax law changed and partnership taxation grew in popularity *vis-à-vis* C-corporation taxation, lawyers turned to S-corporations, limited liability companies, and partnerships primarily to achieve tax benefits. It is probable that in most cases involving closely-held businesses, the lure of limited liability and partnership tax benefits rather than entity governance considerations were the prime factors in the choice of entity. Now in many states a simple registration can even give partnerships a limited liability characteristic in the form of a limited liability partnership.<sup>134</sup> Preference for the use of one business form over another should not sabotage duties of good faith, honesty, loyalty, and care.

Not only has the principal driving force behind the selection of many closely-held business forms not been related to modes of governance, but also clients may have rushed into incorporation or other business organization forms in order to achieve immediate tax and/or limited liability benefits and not allowed for enough time for advance planning. Furthermore, when a new corporation or entity was formed to embrace a new business or even to house an old one, clients had concerns about legal costs. Moreover, they did not always see the need for protective agreements or arrangements.

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133. See *supra* notes 65-76 and accompanying text (discussing *Ingle v. Glamore Motor Sales*).

134. See U.P.A. (1997) *supra* note 123, § 306 for Model Act version of such a provision.

In many cases, they may not have anticipated future misbehavior on the part of their business associates.

Neither clients nor their lawyers relished the prospects of incurring the delays or chilling effects of adversarial negotiations leading to the preparation of intricate legal documents. This sometimes shortsighted and sometimes necessary attitude of clients and even lawyers is reflected in the Model Rules of Professional Responsibility, which envisage one lawyer handling the formation of a new entity without any separate representation for the co-owners.<sup>135</sup>

The attitude expressed by the Delaware court in *Nixon v. Blackwell* presents some troubling concerns, and ironically, is arguably unfriendly to small businesses. The *Nixon* approach could drive entrepreneurs and their lawyers to make advance arrangements for protection of minorities, meaning that clients may incur high transaction costs and delays from time-consuming legal work prior to setting up new entities. This is not to say that such additional costs and delays may not often be for the best. Good business planning and advance arrangements are highly desirable. However, it is a big step to say that courts will turn away from minority victims of ill treatment if arrangements were not made in advance or if inadequate arrangements were made. The Massachusetts court, as in *Wilkes* and other cases, attempts to grapple with that problem, while the Delaware Court does not.

Moreover, many state legislatures have recognized the potential plight of minority shareholders and have provided for a form of relief in dissolution statutes, which will be discussed in detail below. These statutes may at least partially fill a gap when prior arrangements have not been made. Together with the protection afforded by fiduciary responsibility cases like those of Massachusetts, they provide some aid to abused minorities.

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135. MODEL RULES OF PROF'L CONDUCT R. 2.2 (2000). Under certain conditions a lawyer may act as intermediary between two clients:

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs. . . . The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

*Id.* cmt. 3.

## IV. REASONABLE EXPECTATIONS ANALYSIS

One way to analyze the question of the rights of a shareholder in terms of the *Donahue* and *Wilkes* tests is to ascertain the linkage between stock ownership and partnership expectations. In many situations, persons go or have gone into business together thinking like partners, but based on legal or accounting advice, choose a form that is not a true partnership. They may opt for a corporate or other form for tax or limited liability reasons, but not for differing perceptions on power, ownership, or sharing in the fruits of the business. If persons are or become co-owners of a business and the facts indicate that employment is contemplated as an incident of ownership (or equal division of benefits is contemplated), then involuntary termination of employment and the inability to share benefits equally with other shareholders may disappoint their reasonable expectations. On the other hand, if an individual is an employee and given the opportunity to acquire stock as an incentive to be productive or to stay with the company, her reasonable expectations may differ. One question that may then come to the forefront is whether the employment-at-will doctrine applies to such a person. If a person receives stock as a gift or as an heir of one who has been a shareholder-employee – even if her predecessor would have had reasonable expectations of employment – a question may arise as to whether the new shareholder somehow succeeds to those expectations. Or, if certain arrangements or agreements exist, they may or may not have an impact on the continuation of employment issue. The facts of *Wilkes* establish a clear link between ownership and employment for each of the shareholders. While the *Merola* case recognized that shareholders owe each other a high level of fiduciary duty, it was distinguished from *Wilkes* on the basis of its facts.

The facts of the *Donahue* case illustrate potential analytical problems. It was the husband of the widow Donahue who had a job with the company and acquired stock.<sup>136</sup> A serious question not raised in the case was whether he had reasonable expectations of being a partner or of being entitled to any special job consideration as such. The imposition of a fiduciary principle akin to that of partners in a case where persons really do not feel like partners may be the judicial way of handling the difficulties of a close corporation for the shareholder. However, it may not conform to the realities of a relationship. Even if Euphemia's husband could have claimed a job based on a notion that he was like a partner, that should not control whether Euphemia as an heir could claim one even under partnership concepts. What might have happened under partnership concepts is that the business entity would have been dissolved and her interest paid off or bought out, and the court's support for buying out her shares makes sense in that framework.

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136. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 509 (Mass. 1975). See *supra* notes 4-22 and accompanying text.



What Euphemia may be entitled to is a high level of fiduciary duty akin to that of partners on some matters, but she may not be entitled to the same level on other matters. Would Donahue reasonably have expected a family member to replace him as an employee? Would that expectation carry over to Euphemia as his replacement and lead to the application of the *Wilkes* test to a refusal to hire her? This is extremely doubtful.<sup>137</sup>

In New York, the *Ingle* court's analysis differed sharply from *Wilkes* because it rejected the idea that a duty of loyalty and good faith akin to that of partners can preclude termination of employment except for cause.<sup>138</sup> It is a sweeping rejection of a legal principle and not merely the application of that principle to the particular facts. The *Gallagher* court, on the other hand, did not rule on the scope of any fiduciary duty in the case, but rested its holding on the trumping of any fiduciary duties by the agreement which existed.<sup>139</sup>

## V. CORPORATE DISSOLUTION

Dissatisfied minority shareholders may consider dissolution an exit from distress. In *In re Kemp & Beatley, Inc.*, two dissatisfied shareholders who had been employed by the corporation for many years filed suit under a New York corporate dissolution statute.<sup>140</sup> The corporation had a long-standing policy of awarding *de facto* dividends based on stock ownership in the form of "extra compensation bonuses," and receipt of this compensation was a known incident to stock ownership.<sup>141</sup> Either shortly before or shortly after the petitioners' employment ended, the policy was changed and services rendered to the corporation became the basis of extra compensation.<sup>142</sup> The New York Court of Appeals said:

It was not unreasonable for the fact finder to have determined that this change in policy amounted to nothing less than an attempt to exclude petitioners from gaining any re-

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137. See also *infra* notes 174-88 and accompanying text. *Morrow v. Prestonwold, Inc.*, is a good example of how complicated the use of a reasonable expectations analysis can get. *Morrow v. Prestonwold, Inc.*, No. CV000445844S, 2001 Conn. Super. LEXIS 3613, at \*1 (Conn. Super. Ct. Dec. 20, 2001). In *Wilkes*, the court looked at what the parties expected from the beginning of the enterprise in a situation that involved mutuality of expectations. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 651, 664 (Mass. 1976). In *Morrow*, the court looked at the unilateral expectations of heirs as the basis for applying a dissolution statute. 2001 Conn. Super. LEXIS 3613, at \*14. Rather than apply the reasonable expectations test so awkwardly, it would be better to simply apply the alternative test for oppressive conduct, to which the *Morrow* court referred.

138. *Ingle v. Glamore Motor Sales, Inc.*, 535 N.E.2d 1311, 1314 (N.Y. 1989). See *supra* notes 65-76 and accompanying text.

139. *Gallagher v. Lambert*, 549 N.E.2d 136, 138 (N.Y. 1989).

140. 473 N.E.2d 1173, 1176 (N.Y. 1984).

141. *Id.* at 1175-76, 1180.

142. *Id.* at 1180.

turn on their investment through the mere recharacterization of distributions of corporation income. Under the circumstances of this case, there was no error in determining that this conduct constituted oppressive action within the meaning of section 1104-a of the Business Corporation Law.<sup>143</sup>

The relevant New York statute allowed “holders of at least 20% of the outstanding shares of a corporation whose stock [was] not traded on a securities market to petition for its dissolution . . . .”<sup>144</sup> Circumstances giving rise to dissolution fell into “two general classifications: mistreatment of complaining shareholders, or misappropriation of corporate assets by controlling shareholders, directors or officers.”<sup>145</sup> Three types of prohibited activity were described: illegal, fraudulent, and oppressive conduct.<sup>146</sup>

The court explained the general legislative purpose in enacting this involuntary dissolution statute, stating that “[i]t is widely understood that, in addition to supplying capital to . . . [an] enterprise and expecting a fair and equal return, parties comprising the ownership of a close corporation may expect to be actively involved in its management and operation.”<sup>147</sup> The court explained that unlike a shareholder in a public corporation “who may be simply an investor or speculator,” the close corporation shareholder

is a co-owner of the business and wants privileges and powers that go with ownership. His participation in that particular corporation is often his principal or sole source of income. As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation. He may or may not anticipate an ultimate profit from the sale of his interest, but he normally draws very little from the corporation as dividends. In his capacity as an officer or employee of the corporation, he looks to his salary for the principal return on his capital investment, because earnings of a close corporation, as is well known, are distributed in major part in salaries, bonuses and retirement benefits.<sup>148</sup>

The court recognized that shareholders have flexibility in agreeing to their expectations, but that absent such an agreement the majority will

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143. *Id.* at 1180-81.

144. *Id.* at 1177-78. New York is one of a few states to have a percentage requirement. 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S CLOSE CORPORATIONS § 9.27, at 9-159 (2nd ed. 2002).

145. *In re Kemp*, 473 N.E.2d at 1178 (citations omitted).

146. *Id.*

147. *Id.* (citation omitted).

148. *Id.* (quoting 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S CLOSE CORPORATIONS § 1.07 (2nd ed. 2002)).

have ultimate decision-making power, which may be used to destroy a stockholder's vital interests and expectations.<sup>149</sup> The court also acknowledged that "the stock of closely held corporations generally is not readily salable" and that therefore the minority shareholder has no reasonable means of extricating himself or herself.<sup>150</sup> "This predicament," said the court, "[might] fairly be considered the legislative concern underlying the [statutory] provision at issue in this case."<sup>151</sup>

Consistent with the purpose underlying the provision under review, the court discussed the definition of oppressive conduct by referring to cases defining such conduct as substantially defeating the reasonable expectations of the minority shareholders in committing their capital to the particular enterprise.<sup>152</sup> Thus, if a shareholder reasonably expected that ownership in the corporation would entitle him to a job, or a share of earnings, or a place in management, or some other form of security, he would be oppressed in a very real sense when others in the corporation seek to defeat his expectations and there exist no effective means of salvaging the investment. The court accepted the "reasonable expectations" test as a means of identifying and measuring conduct alleged to be oppressive.<sup>153</sup>

The court explained:

A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.

Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.<sup>154</sup>

The court then addressed the appropriateness of an order of dissolution in a case where oppression is found by stating that courts had flexibility to consider under the statute:

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149. *Id.* at 1178-79.

150. *Id.* at 1179.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

[W]hether “liquidation of the corporation is the only feasible means” to protect the complaining shareholder’s expectation of a fair return on his or her investment and whether dissolution “is reasonably necessary” to protect “the rights or interests of any substantial number of shareholders” not limited to those complaining. Implicit in this direction is that once oppressive conduct is found, consideration must be given to the totality of circumstances surrounding the current state of corporate affairs and relations to determine whether some remedy short of or other than dissolution constitutes a feasible means of satisfying both the petitioner’s expectations and the rights and interests of any other substantial group of shareholders.<sup>155</sup>

The court concluded that “[e]very order of dissolution . . . must be conditioned upon permitting any shareholder of the corporation to elect to purchase the complaining shareholder’s stock at fair value.”<sup>156</sup>

A “reasonable expectations” standard as applied in *Kemp* may be useful in determining if minority shareholders have been oppressed in scenarios like those of *Wilkes*, *Merola*, or *Kemp*. While the “reasonable expectations” standard has received judicial support,<sup>157</sup> it is not universally used. A South Carolina case found that its legislature did not intend a court dissolution order to be based solely upon the frustration of reasonable expectations.<sup>158</sup> The court pointed to difficulties in using the standard stating:

To examine the “reasonable expectations” of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature . . . intended such judicial interference in the business philosophies and day to day operating practices of family businesses.<sup>159</sup>

The court found that the language of the South Carolina statute, i.e. whether the majority “have acted, are acting, or will act in a manner that is

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155. *Id.* at 1180 (citations omitted) (quoting N.Y. BUS. CORP. LAW § 1104-a (Consol. 1984)).

156. *Id.* (citation omitted).

157. 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S CLOSE CORPORATIONS § 9.27 (2nd ed. 2002).

158. *Kiriakides v. Atlas Food Systems & Services, Inc.*, 541 S.E.2d 257, 265-66 (S.C. 2001).

159. *Id.* at 264.

illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder," is inconsistent with a reasonable expectations approach.<sup>160</sup> The court referred to a number of criticisms of the reasonable expectations test: "[T]hat it 'ignores the expectations of parties other than the dissatisfied shareholder,'" that it overprotects the minority's interests, that it is "based on false premises, invites fraud, and is an unnecessary invasion of the rights of the majority," and that the "vague and uncertain reasonable expectations test undermines the institution of stare decisis and fails to foster judicial accountability."<sup>161</sup>

It called oppressive and unfairly prejudicial "elastic terms whose meaning varies with the circumstances presented in a particular case," and favored "a case-by-case analysis, supplemented by various factors . . . indicative of oppressive behavior, to be the proper inquiry" under its statute.<sup>162</sup> The court expressed agreement with Professor Sandra K. Miller's "suggestion that the best approach to the statutory definition of oppressive conduct may well be a case-by-case analysis, augmented by factors or typical patterns of majority conduct which tend to be indicative of oppression, such as exclusion from management, withholding of dividends, paying excessive salaries to majority shareholders, and analogous activities."<sup>163</sup>

Although the court would allow consideration of reasonable expectations in assessing oppressive conduct, it is not to be the sole test of oppression under South Carolina Law.<sup>164</sup> The court showed concern for the minority shareholder as a victim of a freeze out.<sup>165</sup> It stated that "[s]hort of a buy-out of their shares, it is unlikely [the minority shareholders] will ever receive any benefit from their ownership interests in Atlas."<sup>166</sup> The court upheld the referee's positions that "the totality of the circumstances demonstrated that

160. *Id.* at 265.

161. *Id.* (citation omitted).

162. *Id.* at 266.

163. *Id.* at 266 n.25 (quoting Sandra K. Miller, *How Should U.K. and U.S. Minority Shareholder Remedies for Unfairly Prejudicial or Oppressive Conduct Be Reformed?*, 36 AM. BUS. L.J. 579, 585-86 (Summer 1999)).

164. *Id.* at 266 n.25. The Court of Appeals defined the terms "oppressive" and "unfairly prejudicial" in terms of five factors:

- 1) 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; or 2) A breach of the fiduciary duty of good faith and fair dealing; or 3) Whether the **reasonable expectations** of the minority shareholders have been frustrated by the actions of the majority; or 4) A lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or 5) A deprivation by majority shareholders of participation in management by minority shareholders.

*Id.* at 263 (emphasis added).

165. *Id.* at 266.

166. *Id.* at 268.

the majority acted ‘oppressively’ and ‘unfairly prejudicially [to the minority,]’” and that a buyout of the minority shares was the appropriate remedy.<sup>167</sup> To summarize, the South Carolina court indicated that under the South Carolina statute “the proper focus is not on the reasonable expectations of the minority but, rather, on the conduct of the majority” and that the inquiry should “be performed on a case-by-case basis, with an inquiry of all circumstances and examination of the many factors” and that “[u]nder the factual circumstances presented [in the case] the majority’s conduct clearly constitute[d] oppressive and unfairly prejudicial conduct entitling [the minority] to a buyout . . . .”<sup>168</sup>

In *Scott v. Trans-System, Inc.*, the Washington Supreme Court referred to two tests used to define oppressive conduct, the first test defining “oppression as a violation by the majority of the reasonable expectations of the minority.”<sup>169</sup> The court further explained that “[r]easonable expectations’ are those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture.”<sup>170</sup> Insightfully the court pointed out that “[a]pplication of the reasonable expectations test is most appropriate in situations where the complaining shareholder was one of the original participants in the venture – one who would have committed capital and resources.”<sup>171</sup>

The second test defined oppression as follows:

[B]urdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.<sup>172</sup>

Significantly the court pointed out: “These two tests are not mutually exclusive and one or both may be used in the same case” and that “Oregon’s Supreme Court has noted that oppressive conduct by the majority shareholders is closely related to the fiduciary duty of good faith and fair dealing owed by them to the minority shareholders.”<sup>173</sup>

The South Carolina test, which refused to find justification for dissolution on the basis of reasonable expectations alone, but called for examina-

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167. *Id.*

168. *Id.*

169. 64 P.3d 1, 6 (Wash. 2003).

170. *Id.* (quoting *Robblee v. Robblee*, 841 P.2d 1289, 1293 (Wash. Ct. App. 1992)).

171. *Id.*

172. *Id.* (citation omitted).

173. *Id.* (citation omitted).

tion of a variety of factors that may include reasonable expectations, may actually have the unintended result of broadening the perspective of a court in wrestling with the problem of whether a corporation should be dissolved or some other remedy granted. In some respects, sole use of a reasonable expectations test would narrow the opportunity of minority shareholders to obtain relief, but if it is not a required part of the standard then other factors may have the effect of broadening the bases of relief. Similarly, the Washington court's utilization of two different tests including reasonable expectations may also have broadened the possibilities for obtaining relief under the dissolution statute.

A Connecticut court in *Morrow v. Prestonwold, Inc.*, confronted a situation where the sole shareholder of Prestonwold, Inc., bequeathed his shares to family members.<sup>174</sup> A majority of the shares were held by one family faction (referred to as the Columbus) and a minority by another faction (referred to as the Morrows).<sup>175</sup> The Morrows brought the action for dissolution of the corporation and the appointment of the receiver to wind up and liquidate its property.<sup>176</sup> The court referred to the Connecticut statute, which allowed for dissolution if the directors or those in control of the corporation have acted in a manner that is oppressive.<sup>177</sup> Noting that neither the statute nor the commentary to the statute provided a definition of the word oppressive the court stated that “[o]ther trial courts in Connecticut . . . relied on New York law to determine if conduct is oppressive . . . .”<sup>178</sup> The court pointed to the “*Kemp* test” stating that “oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioners’ decision to join the venture.”<sup>179</sup> The court also referred to an Oregon case which said that “[t]he question of what is ‘oppressive’ conduct by those in control . . . is closely related to what we agree to be the fiduciary duty of a good faith and fair dealing owed by them” to the minority.<sup>180</sup>

The court refused to use the reasonable expectations of the testator as the basis for applying the corporate dissolution statute.<sup>181</sup> “Rather,” the court said, “it is what the majority knew or should have known to be the reasonable expectation of the Morrows when they received their inheritance

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174. *Morrow v. Prestonwold, Inc.*, No. CV000445844S, 2001 Conn. Super. LEXIS 3613, at \*1 (Conn. Super. Ct. Dec. 20, 2001).

175. *Id.* at \*1-2.

176. *Id.* at \*1.

177. *Id.* at \*7.

178. *Id.* at \*8.

179. *Id.* at \*13 (citation omitted).

180. *Id.* at \*13 (quoting *Baker v. Commercial Body Builders*, 507 P.2d 387, 394 (Ore. 1973)).

181. *Id.* at \*14.

of the stock in Prestonwold in 1975.”<sup>182</sup> The court stated: “[T]hose reasonable expectations were economic gain and participation in the management of the corporation and not to hold the land for the pleasure of the Columbis.”<sup>183</sup> Pointing to the failure of the Morrows to receive any cash return from the corporation, and their nonparticipation in active management, the court saw bases for applying the reasonable expectations test.<sup>184</sup>

However, the court also pointed to an alternative standard, like the one previously referred to,<sup>185</sup> for defining oppressive conduct, describing it “as 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.”<sup>186</sup> Pointing to the failure of the majority to disseminate information, the failure to conduct corporate affairs in a fair manner, the withholding of certain information pertaining to environmental problems and self-dealing, the court indicated that such behavior “overwhelmingly” constituted oppressive conduct.<sup>187</sup> However, because of pending environmental problems with respect to corporate property, the court decided to designate a custodian for the corporation rather than to go forward with the dissolution. The custodian was given the powers of the board of directors and officers as needed to manage corporate affairs in the best interests of the stockholders; to investigate the environmental complaints; to make recommendations to the court on disposing of corporate property; and to make other recommendations to the court that would be in the best interests of the corporation.<sup>188</sup>

In looking at these various scenarios, consideration of a variety of factors is more consistent with defining “oppressive” than simply imprisoning that word within the narrow confines of the *Kemp* formula. Flexibility in the use of the oppression standard will help courts to give relief to oppressed minorities.

## VI. THE SIGNIFICANCE OF FIDUCIARY DUTY CLAIMS

Since an aggrieved minority shareholder may be able to pursue a dissolution action and in some cases a contract action, such as where an employment agreement exists, are there adequate reasons to support the additional opportunity for such a shareholder to make claims for fiduciary breach of duty?

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182. *Id.*

183. *Id.*

184. *Id.* at \*14-16.

185. *See supra* note 172 and accompanying text.

186. *Morrow*, 2001 Conn. Super. LEXIS 3613, at \*17 (quoting *Baker*, 507 P.2d at 393).

187. *Id.* at \*22.

188. *Id.* at \*23-24.



Where fiduciary duty actions by minority shareholders against majority shareholders are judicially created, an aggrieved party seeking judicial rescue may be grudgingly or generously treated depending on the attitude of the court. A dissolution proceeding frequently involves a statutory right. Some courts may be more comfortable granting relief under a statute rather than under mere case law. This may be one reason for the New York court's seemingly cold approach to cases brought as fiduciary duty claims versus its warmer position regarding dissolution cases.<sup>189</sup>

Since a dissolution statute may prescribe the bases of the action as well as remedies, however, there may be judicial reluctance to expand either beyond the express wording of the statute. Fiduciary breach cases premised on the courts' equity power may open the door to more flexible approaches.

Furthermore, a statute like that in *Kemp* may preclude shareholders with less than a particular percentage of stock from filing for dissolution.<sup>190</sup> An aggrieved shareholder may face a different burden of proof requirement in fiduciary duty actions than in actions brought under dissolution statutes. For example, the *Wilkes* court, in evaluating breach of fiduciary duty, shifted the burden of proof to the defendant to show a legitimate business justification for action taken against the aggrieved shareholder and allowed the aggrieved shareholder to then show a less harmful alternative in rebuttal. The dissolution statute may be construed to follow a more traditional approach by keeping the burden of showing oppression on the petitioner. Still a court may decide to shift the burden once it is clear that a fiduciary breach is pleaded as the basis of an oppression claim.

The Model Business Corporation Act, sections 14.30 and 14.34, call for dissolution subject to a buyout possibility not to be exercised by the petitioner, but only by the non-petitioning corporation or shareholders.<sup>191</sup> However, an aggrieved shareholder may not wish to end her relationship with the corporation or may seek remedies more readily available in a fiduciary breach suit than in a dissolution proceeding. In addition, the *Walta* case allowed punitive damages as a remedy in a fiduciary breach proceeding.<sup>192</sup> Recall, too, that in the *Riblet* case the federal jury verdict had allowed punitive damages for breach of fiduciary duty (related to the termination of employment) against the majority shareholders.<sup>193</sup> In addition, the jury verdict

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189. Compare the differing approach of the court in *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173 (N.Y. 1984) (see *supra* notes 140-56 and accompanying text) with that of the same state court in *Ingle v. Glamore Motor Sales, Inc.*, 535 N.E.2d 1311 (N.Y. 1989) (see *supra* notes 65-76 and accompanying text).

190. *Supra* note 144 and accompanying text.

191. MODEL BUS. CORP. ACT §§ 14.30, 14.34 (1984).

192. *Walta v. Gallegos Law Firm, P.C.*, 40 P.3d 449, 461-62 (N.M. Ct. App. 2002). See *supra* notes 87-112 and accompanying text.

193. *Riblets Products Corp. v. Nagy*, 683 A.2d 37, 38 (Del. 1996). See *supra* notes 117-22 and accompanying text.

for compensatory damages was also rendered against the majority shareholders and not just the corporation.<sup>194</sup> Thus fiduciary duty claims may increase the number of defendants the plaintiff can properly pursue. Whether a court would be less likely to grant punitive damages or other remedies desirable to a petitioner in a dissolution proceeding under a dissolution statute such as the Model Business Corporation Act is not clear, although there are cases in which courts have taken a flexible view of remedies available under dissolution statutes.<sup>195</sup> In addition, the end of the relationship of a complaining shareholder to the corporation, which leads to a buyout, may occur at an inconvenient time for the corporation, the other shareholders, or the complaining shareholder. The latter may experience problems with insurance, taxes, and pensions, resulting from the termination of that relationship.

A derivative suit on behalf of the corporation may be ordered by some courts as the proper proceeding and an alternative to dissolution or a fiduciary duty claim. That is, if the court feels that the claim of wrongdoing against majority shareholders really should be considered as a wrong to the corporation, then it may require a derivative suit. Still, on occasion, even a derivative suit may lead to the personal recovery of damages by an aggrieved shareholder if that is appropriate in light of the circumstances of the case.<sup>196</sup>

It should be noted, too, that existing contract provisions might not control the rights of a petitioner shareholder in the case of a dissolution proceeding based on statutes like Model Business Corporation Act sections 14.30 and 14.34.<sup>197</sup> A shareholders contract may indicate that upon the end of a shareholder's relationship with the corporation the value of the stock being bought from the shareholder would be X. The dissolution statute gives the aggrieved shareholder an opportunity to achieve dissolution in the event of oppression and allows for a buy out by the corporation or non-petitioning shareholders as an alternative to liquidation. It may be that the method for determining share value set forth in a contract dealing with retirement or withdrawal would not cover a statutory buy out in a dissolution proceeding based on oppression.<sup>198</sup>

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194. *Id.*

195. See 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 9.35 (3rd ed. 2002).

196. Lynch v. Patterson, 701 P.2d 1126, 1130 (Wyo. 1985); See also PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §§ 7.18, 7.18(e), rptr. n.9 (American Law Institute 1992).

197. MODEL BUS. CORP. ACT §§ 14.30, 14.34 (1984).

198. See, e.g., *In re Pace Photographers, Ltd.*, 525 N.E.2d 713, 718 (N.Y. 1988). "[I]n the absence of explicit agreement [on involuntary dissolution] a shareholders' agreement fixing the terms of a sale voluntarily sought and desired by a shareholder does not equally control

Arrangements made for closely held business relationships through advance planning and contracts might prevent or resolve disputes. However, they may be inadequate or nonexistent because of clients' inability or unwillingness to incur transaction costs or suffer delays, or because of unsatisfactory lawyering, or unanticipated problems, or for other reasons. There will be times when closely held business co-owners overpowered by those in control need to have recourse to courts based on fiduciary principles and dissolution statutes. Law in support of fiduciary duty and its ethical components in such cases is desirable in the world we live in. Lawyers, legislatures, and courts need to be vigilant in the face of efforts to undermine fiduciary duties.

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when the sale is the result of claimed majority oppression or other wrongdoing – in effect, a forced buyout.” *Id.* (citation omitted).