Chapter 7 Dissension in the Closely Held Corporation

SYNOPSIS

Synopsis

7.01 Oppression

Oppression

[A] Overview: The Minority Shareholder's Plight

In a publicly held corporation, a shareholder is typically a passive investor who neither contributes labor to the corporation nor takes part in management responsibilities. A shareholder in a publicly held corporation simply invests money and hopes to receive a return on that money through dividend payments and/or sale of the company's stock at an appreciated value.[1] By contrast, in a closely held corporation, a shareholder typically expects an active participatory role in the company, usually through employment and a meaningful role in management.[2] A shareholder in a closely held corporation also invests money in the venture and, like all shareholders, he hopes to receive a return on that money.[2.1] By definition, however, a closely held

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[1] *See, e.g.*, Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 560 (N.J. Super. Ct. Law Div. 1979) ("Large corporations are usually formed as a means of attracting capital through the sale of stock to investors, with no expectation of participation in corporate management or employment. Profit is expected through the payment of dividends or sale of stock at an appreciated value.").

A dividend is a distribution of a corporation's profits to its shareholders. Dividends are normally paid on an equivalent per-share basis to owners of the same class of stock (e.g., a corporation might declare a dividend of $1.00 per share on all shares of its Class A stock). *See* note 56 and accompanying text.

[2] *See, e.g.*, McCallum v. Rosen's Diversified, Inc., 153 F.3d 701, 703 (8th Cir. 1998) (observing that "[o]ftentimes, a shareholder's reasonable expectations include a significant voice in management and an opportunity to work"); Franks v. Franks, 944 N.W.2d 388, 401 (Mich. Ct. App. 2019) ("As this Court has recognized, the shareholders of a closely held corporation frequently expect to obtain pecuniary benefits from their shares by working for the corporation or participating in its management, rather than by selling the shares."); Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990) ("[T]he primary expectations of minority shareholders include an active voice in management of the corporation and input as an employee."); Parker v. Parker, 2016 N.J. Super. Unpub. LEXIS 2720, at *25 (Ch. Div. Dec. 22, 2016) (stating that shareholder expectations "include the security of long-term employment and financial return, a voice in the operation and management of the business and in the formulation of plans for future development"); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561 (N.J. Super. Ct. Law Div. 1979) ("Unlike their counterparts in large corporations, [minority shareholders in closely held corporations] may expect to participate in management or to influence operations, directly or indirectly, formally or informally. Furthermore, there generally is an expectation on the part of some participants that their interest is to be recognized in the form of a salary derived from employment with the corporation." (citation omitted)); Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1319 (N.Y. 1989) (Hancock, J., dissenting) ("A person who … buys a minority interest in a close corporation does so not only in the hope of enjoying an increase in value of his stake in the business but for the assurance of employment in the business in a managerial position."); Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987) ("[I]t is generally understood that, in addition to supplying capital and labor to a contemplated enterprise and expecting a fair return, parties comprising the ownership of a close corporation expect to be actively involved in its management and operation."); *see also* Graydog Internet, Inc. v. Giller, 406 P.3d 45, 55 (Or. 2017) ("And, often, minority shareholders in closely held corporations are actively engaged in the business as directors, officers, or employees. That involvement in the firm can make them more vulnerable to abuse by the shareholder majority; it also means that shareholder disputes can result in 'serious harm' to the enterprise."); Sections 7.01[C][1] (discussing interference with employment as a common act of oppression), 7.01[C][2] (discussing interference with management participation as a common act of oppression).

[2.1] *See, e.g.*, Baur v. Baur Farms, Inc., 832 N.W.2d 663, 673 (Iowa 2013) ("We read these statutory provisions as extensions of the principle that every shareholder may reasonably expect to share proportionally in a corporation's gains. When this reasonable expectation is frustrated, a shareholder-corporation lacks an active market for its stock.[3] Thus, any investment return is normally provided by employment compensation and dividends, rather than by sales of stock at an appreciated value.[4]

Conventional corporate law norms of majority rule and centralized control can lead to serious problems for a minority investor in a closely held corporation. Traditionally, most

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oppression claim may arise."); Matter of Digeser v. Flach, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015) (mentioning "petitioner's reasonable expectation of deriving at least some economic benefit from his stock ownership"); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 397 (Or. 1973) ("It is also true that the Bakers, as stockholders, had a legitimate interest in the participation in profits earned by the corporation."); *see also* Baur v. Baur Farms, Inc., 832 N.W.2d 663, 671 (Iowa 2013) ("Courts applying the reasonable expectations standard have granted relief when the effect of a majority shareholder's conduct is to deprive a minority shareholder of any return on shareholder equity."); Hanley v. Hanley, 2019 N.Y. Misc. LEXIS 3177, at *24–*25 (N.Y. Sup. Ct. June 13, 2019) ("A finding of oppression 'may be based on the complaining shareholder's frustrated expectations in such matters as … a share in the profits … of the corporation, such that [he or] she feels that the other shareholders have deprived [him or] her of a reasonable return on [his or] her investment.' "); note 216 (discussing general reasonable expectations); *cf.* Hanley v. Hanley, 2019 N.Y. Misc. LEXIS 3177, at *25–*27 (N.Y. Sup. Ct. June 13, 2019) ("Defendants argue that plaintiff's claim of minority oppression is disingenuous in light of their offer to purchase his minority interest in CDL School for $11.25 million, a 7,400% return on plaintiff's original investment … . [C]ontrary to defendants' contention, there is no persuasive basis to conclude that plaintiff's reasonable expectations concerning his ownership interest in CDL School are derived from an expected percentage return on his original investment.").

[3] *See, e.g.*, Johnson v. Gibbs Wire & Steel Co., Inc., 2011 Conn. Super. LEXIS 1369 (Conn. Super. Ct. May 31, 2011) ("There is no public market for [the close corporation's] stock, however, and this [oppression] lawsuit would likely never have been filed if there was."); Haag Trucking Co. v. Haag, 896 N.E.2d 1207, 1215 (Ind. Ct. App. 2008) ("A close corporation is one which typically has few shareholders and whose shares are not generally traded in the securities market"); Baur v. Baur Farms, Inc., 832 N.W.2d 663, 676 (Iowa 2013) ("Because BFI is a closely held corporation, Jack has no access to an active market in its shares that might allow his realization of a return on his equity position."); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514 (Mass. 1975) ("In a large public corporation, the oppressed or dissident minority stockholder could sell his stock in order to extricate some of his invested capital. By definition, this market is not available for shares in the close corporation."); Brenner v. Berkowitz, 634 A.2d 1019, 1027 (N.J. 1993); Parker v. Parker, 2016 N.J. Super. Unpub. LEXIS 2720, at *71 (Ch. Div. Dec. 22, 2016); Bostock v. High Tech Elevator Ind., 616 A.2d 1314, 1320 (N.J. Super. Ct. App. Div. 1992); Graydog Internet, Inc. v. Giller, 406 P.3d 45, 55 (Or. 2017) ("Because shareholders in close corporations, by definition, lack a ready market for their shares, dissatisfied minority shareholders may be unable to sell their shares 'without suffering serious financial loss.' "); Ritchie v. Rupe, 443 S.W.3d 856, 871 (Tex. 2014) ("But difficulty in—and sometimes even the impossibility of—selling one's shares is a characteristic intrinsic to ownership of a closely held corporation, the shares of which are not publicly traded."); *id.* at 878 ("By definition, a 'closely held' corporation is owned by a small number of shareholders whose shares are not publicly traded." (footnote omitted)); McLaughlin v. Schenck, 220 P.3d 146, 155 (Utah 2009); *see also* Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 703 (1993) ("[T]he economic reality of no public market deprives investors in close corporations of the same liquidity and ability to adapt available to investors in public corporations."); *cf.* Koshy v. Sachdev, 81 N.E.3d 722, 731 (Mass. 2017) (noting that "in closely held corporations, the lack of a ready market for a shareholder's stock, and the greater likelihood that a shareholder is reliant on the corporation for a salary, tends to increase the potential for deadlock and accompanying oppressive tactics").

[4] *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("The minority stockholder typically depends on his salary as the principal return on his investment … ."); Bonavita v. Corbo, 692 A.2d 119, 124, 126 (N.J. Super. Ct. Ch. Div. 1996); Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1319 (N.Y. 1989) (Hancock, J., dissenting); Section 7.01[C][4] (discussing dividends).

corporate power is centralized in the hands of a board of directors.[5] The directors set policy, elect officers, and supervise the normal operation of the corporation. Because directors are elected by shareholder vote, the board of a closely held corporation is typically controlled by the shareholder (or shareholders) holding a majority of the voting power. Through this control of the board, a majority shareholder (or majority group)[6] has the ability to take unjustified actions that are harmful to a minority shareholder's interests.[7] Such actions are usually designed to restrict (or deny altogether) the minority's financial and participatory rights, and they are often referred to as "freeze-out" or "squeeze-out" actions that "oppress" a minority shareholder.[8] Common freeze-out

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[5] *See, e.g.*, DEL. CODE tit. 8, § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors … ."); TEX. BUS. ORGS. CODE § 21.401(a); Section 2.01[A][2] (discussing the board of directors).

[6] The terms "majority shareholder" and "minority shareholder" are often used "to distinguish those shareholders who possess the actual power to control the operations of the firm from those who do not." 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, 5 n.7 (1977). The term "controlling shareholder" is also usedto refer to the shareholder (or group of shareholders) who possesses the actual power to control the operations of the firm. *See* Section 6.07[A] (defining a "controlling shareholder"); *see also* Section 7.01[D][1][a][i] (discussing shareholders who combine to form a majority or controlling group).

[7] *See, e.g.*, Bostock v. High Tech Elevator Indus., 616 A.2d 1314, 1320 (N.J. Super. Ct. App. Div. 1992) ("[B]ased upon its voting power, the majority is able to dictate to the minority the manner in which the [closely held] corporation is run." (internal quotation omitted)); Meiselman v. Meiselman, 307 S.E.2d 551, 558 (N.C. 1983) ("[W]hen the personal relationships among the participants break down, the majority shareholder, because of his greater voting power, is in a position to terminate the minority shareholder's employment and to exclude him from participation in management decisions."); Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 267 (S.C. 2001) ("This unequal balance of power often leads to a 'squeeze out' or 'freeze out' of the minority by the majority shareholders." (footnote omitted)); McLaughlin v. Schenck, 220 P.3d 146, 156 (Utah 2009) (observing that a minority shareholder in a closely held shareholder is left "with no remedy for the abuses and oppression that may result due to the small number of shareholders, the frequency of familial and other personal relationships, and the likelihood that majority shareholders control the board in close corporations"); *see also* Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. Ct. App. 1976) ("In the instant case [a group of four shareholders], acting in concert, control a majority of the outstanding stock, though no single shareholder owns 51 percent. Because this control carries the power to destroy or impair the interests of minority owners, the law imposes equitable limitations on the rights of dominant shareholders to act in their own self-interest."); Section 7.01[C] (describing common acts of oppression); *cf.* Baur v. Baur Farms, Inc., 832 N.W.2d 663, 676 (Iowa 2013) ("As a minority shareholder, Jack also lacks voting power to force the board of directors to set a book value that is reasonably related to the fair value of the company's assets.").

Along with majority or controlling shareholders, directors and officers may also have the ability to take unjustified actions that are harmful to a minority shareholder's interests. As a result, most oppression statutes allow shareholders to bring actions against "directors or those in control." *See* Section 7.01[D][1][b]; *cf.* Bontempo v. Lare, 119 A.3d 791, 804 (Md. 2015) ("The statute does not define 'oppressive' acts, although it is a term commonly used to describe adverse treatment of minority shareholders in a closely-held corporation by those who wield power within the company.").

[8] The term "freeze-out" is often used synonymously with the term "squeeze-out." Both terms refer to conduct that is designed to deny a shareholder his participatory rights in the business, his financial rights in the business, or, most often, both sets of rights. *Cf.* McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012) ("Squeeze-outs, sometimes called freeze-outs, are actions taken by the controlling shareholders to deprive a minority shareholder of his interest in the business or a fair return on his investment."); Haag Trucking Co. v. Haag, 896 N.E.2d 1207, 1217 (Ind. Ct. App. 2008) ("A freeze-out is the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority

techniques include the termination of a minority shareholder's employment, the removal of a minority shareholder from the board of directors, the denial of access to information, the refusal to declare dividends, and the siphoning off of corporate earnings to the majority shareholder.[9]

Quite often, these tactics are used in combination. For example, rather than declaring dividends, closely held corporations often distribute their earnings to shareholders in the form of salary and other employment-related compensation. (Reasonable employment compensation is tax deductible to a corporation as a business expense, while dividend payments are not).[10] In a

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shareholders from the corporation or reduce the minority shareholders' voting power or claims on corporate assets to relative insignificance."); Jochimsen v. Wapsi Hunting Club, Inc., 803 N.W.2d 672, *7 (Iowa Ct. App. 2011) ("A freeze-out occurs when controlling members deny a minority member his or her rightful interest in the corporation."); Bontempo v. Lare, 119 A.3d 791, 804 (Md. 2015) ("The statute does not define 'oppressive' acts, although it is a term commonly used to describe adverse treatment of minority shareholders in a closely-held corporation by those who wield power within the company."); Vontz v. Miller, 111 N.E.3d 452, 460 (Ohio Ct. App. 2016) ("This abuse or oppression includes a 'squeeze-out' or 'freeze-out'—the 'manipulative use of corporate control to eliminate minority shareholders, or to reduce their share of voting power or percentage of ownership assets, or otherwise unfairly deprive them of advantages or opportunities to which they are entitled.' ").

[9] *See, e.g.*, Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984) ("Tactics employed against a minority shareholder to effect a squeeze out can take on many forms including generally oppressive conduct, the withholding of dividends, restricting or precluding employment in the corporation, paying excessive salaries to majority stockholders, withholding information relating to the operation of the corporation, appropriation of corporate assets, denying dissenting shareholders appraisal rights, failure to hold meetings and excluding the minority from a meaningful role in the corporate decisionmaking."); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 (Mass. 1975); Ritchie v. Rupe, 443 S.W.3d 856, 879 (Tex. 2014) ("Those in control of a closely held corporation may use various 'squeeze-out' or 'freeze-out' tactics to deprive minority shareholders of benefits, to misappropriate those benefits for themselves, or to induce minority shareholders to relinquish their ownership for less than it is otherwise worth. The types of conduct most commonly associated with such tactics include (1) denial of access to corporate books and records, (2) withholding payment of, or declining to declare, dividends, (3) termination of a minority shareholder's employment, (4) misapplication of corporate funds and diversion of corporate opportunities for personal purposes, and (5) manipulation of stock values."); *see also* Pappas v. Fotinos, 911 N.Y.S.2d 694 (Sup. Ct. 2010) ("Oppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, or where an employee/shareholder is discharged without cause and, thus, is deprived of his or her salary or when corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment."); Section 7.01[C] (describing common acts of oppression).

[10] When calculating its taxable income, a closely held corporation can deduct reasonable salaries paid to its employees to decrease the amount of income tax that the company pays. *See* 26 U.S.C. § 162(a)(1) (stating that "a reasonable allowance for salaries or other compensation for personal services actually rendered" is deductible). A closely held corporation cannot, however, deduct any dividends paid to its shareholders. As a consequence, corporate income paid as dividends is subject to double taxation—once as business income at the corporate level, and once as personal income at the shareholder level. *See, e.g.*, *In re* White, 429 B.R. 201, 207–08 (Bankr. S.D. Tex. 2010) (explaining the concept of double taxation). As a result of the tax-disadvantaged nature of dividends, many closely held corporations forego "true" dividends and instead provide a return to shareholders via salary and other employment-related benefits. *See, e.g.*, Matter of Digeser v. Flach, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015) ("Respondent also argues that petitioner cannot claim a reasonable expectation of receiving dividends from [the corporation], since the corporation had no history of paying dividends. The parties did, however, have a long-standing custom and practice of distributing *de facto* dividends to the two shareholders in the form of 'bonuses' and other compensation."); Landorf v. Glottstein, 500 N.Y.S.2d 494, 499 (Sup. Ct. 1986) (stating that, in a closely held corporation,

closely held corporation where dividends are not paid, therefore, a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on his investment as well as any input into the management of the business.[11] Such conduct often culminates with a majority proposal to purchase the shares of the minority owner at an unfairly low price.[12] In short, this denial of financial and participatory rights is at the core of many lawsuits alleging that the majority used his control in an abusive or "oppressive" fashion against a minority shareholder.

In a publicly held corporation, a minority shareholder can largely escape these abuses of power by selling his shares into the market and by correspondingly recovering the value of his investment. This ability to liquidate provides some protection to investors in publicly held corporations from the conduct of those in control.[13] In a closely held corporation, however, the

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"dividends are often provided by means of salaries to shareholders"); Hirschkorn v. Severson, 319 N.W.2d 475, 477 (N.D. 1982) (The corporation "paid no dividends. … Rather, the corporate directors distributed the profits via salary increases, bonuses, and benefits. …"); note 4 and accompanying text (noting that investment return is often provided by employment compensation); *see also* Section 2.01[A][5][b] (discussing Subchapter S corporations). It should be noted that the impact of the double tax is ameliorated by the fact that qualifying dividends (as well as long-term capital gains) are presently taxed at a 15 percent rate, which is lower than the highest rates applicable to salary and other forms of ordinary income. Unless extended, the current 15 percent rate is set to expire at the end of 2010.

[11] *See, e.g.*, Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987) ("Balvik was ultimately fired as an employee of the corporation, thus destroying the primary mode of return on his investment. Any slim hope of gaining a return on his investment and remaining involved in the operation of the business was dashed when Sylvester removed Balvik as a director and officer of the corporation."); note 73 (observing that in closely held corporations that distribute profits via employment compensation rather than dividends, firing a shareholder is akin to cancelling his shares).

[12] *See, e.g.*, Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) ("Majority 'freeze-out' schemes which withhold dividends are designed to compel the minority to relinquish stock at inadequate prices. When the minority stockholder agrees to sell out at less than fair value, the majority has won." (citations omitted)); Thompson, *supra* note 3, at 703–04 (noting that in a classic freeze-out, "the majority first denies the minority shareholder any return and then proposes to buy the shares at a very low price"); *see also* Section 7.01[C][7] (discussing forced sales of the minority's holdings).

[13] *See* note 3 (noting that a market can provide protection). In a publicly held corporation, the presence of a well-functioning market also exerts some discipline on those in control:

> … Market restraints are most visible and workable in the case of publicly held corporations. If management is inefficient, indulges its own preferences, or otherwise acts contrary to shareholder interests, dissatisfied shareholders will sell their shares and move to more attractive investment opportunities. As more shareholders express their dissatisfaction by selling, the market price of the company's shares will decline to the point where existing management is exposed to the risk of being displaced through a corporate takeover. … The mere threat of displacement, whether or not realized, is a powerful incentive for managers of publicly held corporations to promote their shareholders' interests so as to keep the price of the company's shares as high and their own positions as secure as possible.

Hetherington & Dooley, *supra* note 6, at 39–40 (footnote omitted); *see, e.g.*, Rosenfield v. Metals Selling Corp., 643 A.2d 1253, 1262 n.18 (Conn. 1994) ("The market for minority shareholder's investment is effectively trapped, as there is no ready market for the stock of a closely held corporation.[14] In fact, often the only potential purchaser of a minority's shares is the oppressive majority himself (or the corporation controlled by the oppressive majority).[15] As

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corporate control serves to constrain managers' conduct that does not maximize shareholder wealth. It therefore serves to align the interests of managers more closely with the interests of shareholders in publicly traded corporations. The market for corporate control does not affect, however, the incentives of managers of closely held corporations.").

[14] *See* note 3 and accompanying text (discussing the lack of a market).

[15] *See, e.g.*, Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984) (A shareholder "challenging the majority in a close corporation finds himself on the horns of a dilemma, he can neither profitably leave nor safely stay with the corporation. In reality, the only prospective buyer turns out to be the majority shareholder."). Indeed, outsiders are rarely interested in a minority ownership position in a closely held corporation, as a minority ownership position lacks sufficient voting power to control the operations of the firm. *See, e.g.*, Hetherington & Dooley, *supra* note 6, at 5 n.7 (defining a "minority" shareholder as a shareholder who does not "possess the actual power to control the operations of the firm"). As a result, a minority interest is far less appealing (as well as less valuable) to outside investors. *See, e.g.*, Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) ("No outsider would knowingly assume the position of the disadvantaged minority [in a closely held corporation]. The outsider would have the same difficulties."); Raynolds v. Diamond Mills Paper Co., 60 A. 941, 945 (N.J. Ch. 1905) ("In the case of [closely held] corporations of this class[,] sales of stock outside the small coterie of officers and managers are generally hard to make, excepting upon disadvantageous terms."). When a company has a track record of oppressive majority conduct, a minority interest is even less attractive. *See, e.g.*, Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984); Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987) (noting the "natural reluctance of potential investors to purchase a noncontrolling interest in a close corporation that has been marked by dissension").

Moreover, because all closely held shares lack the liquidity that a ready securities market would provide, outside investors tend to be less interested in closely held stock, at least in comparison to easily-traded public corporation stock. *See, e.g.*, SHANNON P. PRATT, ROBERT F. REILLY, & ROBERT P. SCHWEIHS, VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES 334 (3d ed. 1996) [hereinafter Valuing a Business] ("[T]he universe of realistically potential buyers for most closely held minority ownership securities is an infinitesimally small fraction of the universe of potential buyers for publicly traded securities."). As one noted valuation authority observed:

> The market for securities in the United States is the most liquid market for any kind of property anywhere in the world. This is one of the major reasons companies are able to raise investment capital from both institutional and individual investors: the ability to liquidate the investment immediately, at little cost, and with virtual certainty as to realization of the widely publicized market price. Empirical evidence demonstrates that investors are willing to pay a high premium for this level of liquidity, or, conversely, extract a high discount relative to actively traded securities for stocks or other investment interests that lack this high degree of liquidity.

Id. at 333; *see, e.g.*, Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285, 291 (Minn. 2000) ("[S]hares in a closely held corporation cannot be sold as readily as shares in a corporation with securities traded over an exchange or in an established market and therefore investors tend to pay less, and sometimes significantly less, for such mentioned, these parties will usually offer an amount that is significantly below the fair value of the minority's shares—if they choose to make an offer at all.[16] Thus, a minority investor in a closely held corporation is in a vulnerable position,[17] as he cannot escape oppressive majority conduct by selling into a well-developed market.

A market is, of course, only one way to cash out of a company. Even without a market for a company's shares, a minority shareholder could still recover the value of his investment if he could force the corporation (or the majority shareholder) to purchase his shares on demand.[18] No state's corporation law, however, provides such a right. Without an explicit buyout provision in a stockholders' agreement or a company's organizational documents, corporate shareholders have no right to compel a redemption of their holdings.[19]

Dissolution of a company can also provide liquidity to business owners by requiring the sale of the company and by allocating to each owner his proportionate share of the company's sale value (after the claims of creditors have been satisfied).[20] If a minority shareholder in a

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shares.").

In short, an effort to escape abusive majority conduct by selling shares is unlikely to be successful for a minority investor in a closely held corporation. The lack of an active securities market for the stock and the relative undesirability of a minority position combine to make it difficult to sell the shares. *See generally* Section 8.02[B][3] (discussing discounts associated with the purchase of closely held corporation stock).

[16] *See* note 12 and accompanying text (discussing "lowball" offers).

[17] *See, e.g.*, Walensky v. Jonathan Royce Int'l, Inc., 624 A.2d 613, 615 (N.J. Super. Ct. App. Div. 1993) ("The interest owned by a minority shareholder in a closely held corporation is often a precarious one. In fact, it has been characterized by this court as being one of 'acute vulnerability.' " (quoting Bostock v. High Tech. Elevator Indus., 616 A.2d 1314, 1314 (N.J. Super. Ct. App. Div. 1992))); Graydog Internet, Inc. v. Giller, 406 P.3d 45, 56–57 (Or. 2017) ("A distinguishing characteristic of closely held corporations is the vulnerability of their minority shareholders to oppression and mistreatment by the shareholder majority, such as by restricting the minority shareholder's participation in corporate governance, limiting access to corporate assets, managing the corporation for the benefit of the majority shareholder, or seeking to eliminate the minority's ownership interest, usually without fair payment.").

[18] *See, e.g.*, Hetherington & Dooley, *supra* note 6, at 1–6 (proposing that shareholders of closely held corporations be given a right to a mandatory buyout of their shares upon demand).

[19] *See, e.g.*, Goode v. Ryan, 489 N.E.2d 1001, 1004 (Mass. 1986) ("In the absence of an agreement among shareholders or between the corporation and the shareholder, or a provision in the corporation's articles of organization or by-laws, neither the corporation nor a majority of shareholders is under any obligation to purchase the shares of minority shareholders when minority shareholders wish to dispose of their interest in the corporation."); *see also* Blaustein v. Lord Baltimore Capital Corp., 84 A.3d 954, 958 (Del. 2014) ("Under common law, the directors of a closely held corporation have no general fiduciary duty to repurchase the stock of a minority stockholder. An investor must rely on contractual protections if liquidity is a matter of concern. Blaustein has no inherent right to sell her stock to the company at 'full value,' or any other price."); Koshy v. Sachdev, 81 N.E.3d 722, 735 (Mass. 2017) ("Absent an agreement establishing such obligations, a shareholder in a close corporation does not owe a fiduciary duty to a fellow shareholder in purchasing the other's shares in the corporation."); Whitehorn v. Whitehorn Farms, Inc., 195 P.3d 836, 842 (Mont. 2008) (rejecting a minority shareholder's argument that the corporation is obligated to purchase his shares: "The articles of incorporation do not mandate such a purchase, and [the minority] fails to point to any authority that requires a corporation to repurchase the shares of a shareholder merely because the shareholder wants out of the corporation.").

[20] *See, e.g.*, Brenner v. Berkowitz, 634 A.2d 1019, 1031 (N.J. 1993) ("In the case of dissolution, a

closely held corporation had the right to compel dissolution, a mechanism for recovering the value of the invested capital would exist. In the closely held corporation setting, however, a minority shareholder has no default right to dissolve a corporation by "express will"—i.e., voluntary dissolution usually requires the assent of at least a majority of the outstanding voting stock of a corporation.[21] For an oppressed minority shareholder, therefore, voluntary dissolution rights are largely unhelpful.

In short, when a majority shareholder in a closely held corporation exercises his control in an oppressive fashion against a minority shareholder, the minority has little ability to exit the situation.

[B] Traditional Legal Obstacles to Relief

[1] The Norm of Majority Rule

Despite the lack of exit rights in a closely held corporation, the oppression problem (as well as the need for an oppression doctrine) would not exist if a minority shareholder could block harmful majority decisions. Traditional corporate law, however, defaults to norms of majority rule and centralized control—norms that leave a minority investor unable to veto most decisions that affect his financial and participatory interests. As mentioned, corporate power is typically centralized in the hands of a board of directors.[22] The board is responsible for setting policy, electing officers, and supervising the normal operation of the corporation, and it ordinarily acts by majority vote of the directors.[23] As a consequence, the person with the ability to control the majority of the board has effective control over the decisions of the corporation—including employment, management, and dividend decisions that can significantly affect a minority shareholder's ownership position.[24]

Directors are elected by shareholder vote.[25] The majority shareholder, by definition, has the voting power to elect a majority (and possibly all) of the directors.[26] Because directors tend to

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distribution [of assets] results in the termination of the corporation's business, with its assets being proportionately distributed to the stockholders."); Section 8.02[A] (discussing dissolution).

[21] *See, e.g.*, Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193, 200 (1988) ("In most states a majority vote of outstanding shares is required to voluntarily dissolve a corporation, but in a significant number of states, a two-thirds vote is required for this fundamental corporate change."); Hetherington & Dooley, *supra* note 6, at 3; Section 8.02[A] (discussing dissolution).

[22] *See* Section 2.01[A][2].

[23] *See* Section 2.01[A][2] (discussing the board of directors).

[24] *See* notes 5–9 and accompanying text (discussing the majority shareholder's control); *cf.* Thompson, *supra* note 21, at 194 ("The typical corporation statute … centralized most corporate power in the hands of the board of directors, including decisions particularly important to minority investors in a small enterprise, such as employment, salary, and dividends.").

[25] *See, e.g.*, DEL. CODE tit. 8, § 216(iii); TEX. BUS. ORGS. CODE §§ 21.359(a), 21.405; Section 2.01[A][2] (discussing the board of directors).

[26] *See, e.g.*, Thompson, *supra* note 21, at 194, 195 n.2 (noting that "[h]olders of a majority of the voting shares could elect all or most of the board," and observing that "[c]umulative voting, if applicable in a particular state or corporation, provides minority shareholders with the possibility of board representation but still leaves them in a minority position on the board"); *see also* Section 3.07[B] (discussing straight voting of directors).

be responsive to the desires of the shareholders who elected them, the majority shareholder's power to elect a majority of the board effectively gives him the power to control the board.[27] Even if a minority shareholder serves on the board of directors, he cannot block decisions supported by the majority shareholder, as the majority can typically secure the requisite majority vote of the board members to override the minority's wishes.

One way for a minority shareholder to avoid the norm of majority rule is to contract around it. For example, before committing his capital to a venture, a minority shareholder might insist on a bylaw provision calling for board decisions to be made by a greater-than-majority vote.[28] Alternatively, a minority shareholder might require a shareholders' agreement that commits the board to a specified course of action.[29] Historically, however, corporate law prohibited any contractual arrangements that deviated from the majority rule and centralized control norms.[30] Although these prohibitions may be circumvented through appropriate planning,[31] shareholders in closely held corporations typically fail to engage in advance planning and fail to contract for protection from dissension.[32] The default norm of majority rule, therefore, is still the governing principle for many (if not most) closely held corporations. Because that norm gives a majority shareholder control over the decisions of the corporation—including decisions that can severely harm a minority investor—it is a factor that contributes to the creation of the oppression problem itself.[33]

[27] In fact, in many closely held corporations, the board of directors is largely (if not solely) comprised of the majority shareholder and his family members or friends.

[28] *See, e.g.*, Benintendi v. Kenton Hotel, 60 N.E.2d 829, 830 (N.Y. 1945) (involving a bylaw requiring that "no action should be taken by the directors except by unanimous vote of all of them"); *see also* Section 3.07[B] (discussing supermajority provisions). For a board-level unanimity or similar supermajority provision to be effective, of course, the minority shareholder needs to ensure that he (or his representative) will always have a position on the board of directors.

[29] *See, e.g.*, McQuade v. Stoneham, 189 N.E. 234, 235–36 (N.Y. 1934) (involving a shareholders' agreement that set the salaries of the officers and that specified the identity of the corporation's directors and officers); *see also* Section 3.05 (discussing shareholders' agreements that constrain the board).

[30] *See* Sections 3.05, 3.07 (discussing the historical prohibitions on certain contractual arrangements between shareholders).

[31] *See* Sections 3.05, 3.07.

[32] *See* Section 7.01[E][1].

[33] *See, e.g.*, Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984) ("The acute vulnerability of minority shareholders in the closely-held corporation is well recognized. … Because of its controlling interest, the majority is able to dictate to the minority the manner in which the corporation shall be run."); Meiselman v. Meiselman, 307 S.E.2d 551, 558 (N.C. 1983) ("In other words, when the personal relationships among the participants break down, the majority shareholder, because of his greater voting power, is in a position to terminate the minority shareholder's employment and to exclude him from participation in management decisions."); *see also* Franklin A. Gevurtz, *Squeeze-Outs and Freeze-Outs in Limited Liability Companies*, 73 WASH. U. L.Q. 497, 504 (1995) ("In the corporate context, the majority of the board generally has the power to decide whether to distribute dividends, who shall be the officers or even employees of the corporation, and what compensation officers and employees shall receive. It is this power which provides the ammunition for a squeeze-out." (footnotes omitted)); Thompson, *supra* note 21, at 199 (stating that "centralized power and majority rule create a likely potential for abuse of minority shareholders").

[2] The Business Judgment Rule and Other Limitations of Traditional Fiduciary Duty Principles

Even with the norm of majority rule, the potential harm from oppressive conduct would be minimized if judicial oversight offered adequate protection to the minority shareholder. After all, directors, officers, and controlling shareholders owe fiduciary duties to the corporation that ostensibly constrain abusive exercises of control.[34] The actual protection offered by traditional fiduciary duty principles, however, is significantly limited by the business judgment rule. In operation, the business judgment rule largely shields a manager from liability so long as the manager's decision was made (1) in good faith, (2) on an informed basis, and (3) with no conflicts of interest.[35] Under the rule, courts review the substantive business decisions of those in control with considerable deference and with a correspondingly minimal amount of scrutiny.[36] As a consequence, majority shareholder decisions involving employment, management, or dividend matters—internal decisions that form the core of many shareholder oppression disputes—are largely insulated from judicial oversight.[37] Because of the deference to majority decision-making associated with the business judgment rule, traditional fiduciary duty principles tend to offer inadequate protection to an oppressed shareholder in a closely held corporation. Indeed, some courts have explicitly acknowledged that certain decisions in closely held corporations call for more judicial scrutiny than conventional business judgment rule deference.[38]

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[34] *See, e.g.*, Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 721 (5th Cir. 1984) (directors); Schautteet v. Chester State Bank, 707 F. Supp. 885, 888 (E.D. Tex. 1988) (officers and directors); *id.* at 889 (majority shareholder); Hoggett v. Brown, 971 S.W.2d 472, 488 n.13 (Tex. App. 1997) (majority shareholder); Sections 6.01–6.03 (discussing the fiduciary duties of directors and officers), 6.07 (discussing the fiduciary duties of controlling shareholders).

[35] *See* Section 6.02[C][1] (discussing the business judgment rule).

[36] *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 93 (1991) ("Statements of the [business judgment] rule vary; its terms are far less important than the fact that there is a specially deferential approach."); Thompson, *supra* note 21, at 195 (describing the business judgment rule as "a doctrine which embodies a broad judicial deference to the corporation's board of directors to determine business policy and to conduct corporate affairs"); *id.* (noting that "courts hesitate to substitute their judgment on complicated questions of business policy for that of the elected managers of the business and have limited the scope of judicial review which they are willing to undertake"); Section 6.02[C][1] (discussing the business judgment rule); *see also* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) ("A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose."); Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 809 (Sup. Ct. 1976) (granting defendants' motion to dismiss on business judgment rule grounds).

[37] *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("[C]ourts fairly consistently have been disinclined to interfere in those facets of internal corporate operations, such as the selection and retention or dismissal of officers, directors or employees, which essentially involve management decisions subject to the principle of majority control."); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 (Mass. 1975) (The plaintiff "will find difficulty in challenging dividend or employment policies. Such policies are considered to be within the judgment of the directors." (footnote omitted)); *see also* Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 NOTRE DAME L. REV. 456, 469 (1985) ("The declaration of dividends is always at the discretion of the board of directors. The business judgment rule protects such a decision." (footnote omitted)); *id.* at 477 ("The hiring, firing, and compensation of employees are ultimately board decisions and have always qualified as management decisions protected by the business judgment rule.").

[38] *See, e.g.*, Smith v. Atlantic Props., Inc., 422 N.E.2d 798, 801, 804 (Mass. App. Ct. 1981) (stating, in a closely held corporation dispute, that the judgment "necessarily disregards the general judicial reluctance to

interfere with a corporation's dividend policy ordinarily based upon the business judgment of its directors"); Fox v. 7L Bar Ranch Co., 645 P.2d 929, 935 (Mont. 1982) ("When it is also considered that in close corporations dividend withholding may be used by controlling shareholders to force out minority shareholders, the traditional judicial restraint in interfering with corporate dividend policy cannot be justified." (internal quotation omitted)); Grato v. Grato, 639 A.2d 390, 396 (N.J. Super. Ct. App. Div. 1994) ("[J]udicial consideration of a claim of majority oppression or freeze-out in a closely held corporation is guided by considerations broader than those espoused in defendants' version of the 'business judgment rule' "); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561 (N.J. Super. Ct. Law Div. 1979) ("[T]he statutory language embodies a legislative determination that freeze-out maneuvers in close corporations constitute an abuse of corporate power. Traditional principles of corporate law, such as the business judgment rule, have failed to curb this abuse. Consequently, actions of close corporations that conform with these principles cannot be immune from scrutiny."); *see also* Georgeson v. DuPage Surgical Consultants, Ltd., 2007 U.S. Dist. LEXIS 20801 (N.D. Ill. Mar. 22, 2007) (rejecting the defendants' argument that, "as a matter of law, their conduct was not oppressive because it was protected by the business judgment rule" because "the presumption that normally shields defendants for their business decisions does not apply if the plaintiff presents evidence of fraud, bad faith, or self-dealing," and observing that the evidence, "if true, would establish that the defendants acted in their own self-interest when they refused to compensate [the minority shareholder] for his shares and denied him the other compensation to which he contends he is entitled"); McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012) ("Even if the business judgment rule applies, it is possible for courts to find such [squeeze-out] actions harmful if the end result could have been achieved with less injury to the minority shareholder."); Franks v. Franks, 944 N.W.2d 388, 405 (Mich. Ct. App. 2019) ("Under MCL 450.1489(1) and MCL 450.1489(3), the Legislature identified acts by directors or persons of a corporation that are inherently wrongful and would warrant court intervention. Accordingly, a shareholder necessarily overcomes the business-judgment rule by presenting evidence to establish the elements of a claim under the shareholder-oppression statute because that statute identifies wrongful conduct and provides a remedy for it."); Viener v. Jacobs, 834 A.2d 546, 557 (Pa. Super. Ct. 2003) ("The crux of this case is Viener's contention that he was 'frozen out' of meaningful participation in the governance of the corporation that he co-founded as a result of the complaints he had with respect to inappropriate business practices by NGN that were authorized by Jacobs and assented to by Rush that led to the eventual decline of the NGN and its affiliates. Therefore, the 'business judgment rule' would not insulate Jacobs (and Rush) from liability in this case, because the issue is the prevention of a shareholder-director's participation in the governance of a closely held corporation, as opposed to the power of the corporation to manage its property and conduct its business affairs. As such, judicial determination of this issue requires an analysis of the equitable relationship between Viener and Jacobs and, therefore, does not implicate matters left to the business judgment of NGN's corporate officers or directors."); *cf.* *In re* Mandel, 2011 Bankr. LEXIS 3829 (Bankr. E.D. Tex. Sept. 30, 2011) (discussing the shareholder oppression doctrine and noting that the "corporation's conduct must not be protected by the business judgment rule"); *In re* White, 429 B.R. 201, 213 (Bankr. S.D. Tex. 2010) (same); Parker v. Parker, 2016 N.J. Super. Unpub. LEXIS 2720, at *24 (Ch. Div. Dec. 22, 2016) ("In close corporations the scope of the court's inquiry as to what can be considered oppressive conduct is broader than traditional corporate law rules."); Ritchie v. Rupe, 339 S.W.3d 275, 295–96 (Tex. App. 2011) ("The business judgment rule protects a corporation's directors from personal liability to shareholders for their actions in operating the corporation unless their actions are ultra vires or tainted by fraud. However, this is not a derivative suit for breach of the duty of care owed to the corporation. Further, the directors of RIC [the corporation] were not held personally liable for the shareholder oppression; nor were the directors or those controlling the corporation directed to buy the Stock themselves. Instead, the trial court's judgment ordered them as directors of RIC … to cause RIC to redeem the Stock. Accordingly, the business judgment rule has no application in this case." (citation omitted)), *rev'd*, 443 S.W.3d 856 (Tex. 2014). *But see* MJC Ventures LLC v. Detroit Trading Co., 2:19-cv-13707, 2020 U.S. Dist. LEXIS 113545, at *10–11 (E.D. Mich. June 30, 2020) ("Plaintiffs' allegation that Defendants also engaged in shareholder oppression by refusing to declare dividends 'despite Detroit Trading's ability to do so' is further foreclosed by Michigan's business judgment rule. Under that rule, courts generally refrain from substituting their judgment for that of directors when it comes to dividend policies, absent evidence of fraud or bad faith. … The mere allegation that Detroit Trading's Board *could have* declared dividends, even when taken as true, does not warrant a finding that it was shareholder oppression for the Board not to do so. There is no allegation, plausible or not, that the Board's decision was motivated by fraud or bad faith—conditions courts have considered prerequisite for interfering with a company's decision not to declare dividends."); Brenner v. Berkowitz, 634 A.2d 1019, 1033 (N.J. 1993) (noting, in a closely held corporation dispute, that "the court is hesitant to overturn the corporation's valued exercise of its business judgment," and observing that the "Chancery Division properly concluded that it could not second-guess the corporation's exercise of its business-judgment"); Sipko v. Koger, Inc., 2011 N.J. Super. Unpub. LEXIS 1258 (May 16, 2011) ("A minority shareholder's expectations must be balanced against the corporation's ability to exercise its business judgment to run its business effectively."); Ritchie v. Rupe, 443 S.W.3d 856, 869 (Tex. 2014) ("We therefore reject the court of appeals' conclusion that the business judgment rule 'has no application in this case.' Instead, we agree with the … conclusion that conduct is oppressive only if it is inconsistent with the honest exercise of business judgment and discretion by the board of directors." (citation omitted) (internal quotation omitted)); Willis v. Bydalek, 997 S.W.2d 798, 801 (Tex. App. 1999) ("Courts must exercise caution in determining what shows oppressive conduct. The minority shareholder's reasonable expectations must be balanced against the corporation's need to exercise its business judgment and run its business efficiently. Therefore, despite the existence of the minority-majority fiduciary duty, a corporation's officers and directors are still afforded a rather broad latitude in conducting corporate affairs." (citations omitted)).

Even if a court does not explicitly repudiate the deference of the business judgment rule, the application of the oppression doctrine implicitly conveys such a repudiation. After all, the oppression doctrine is premised on the notion that decisions about seemingly routine matters (e.g., employment, management, and dividend decisions) can be part of a minority shareholder freeze-out. *Cf.* Hollis v. Hill, 232 F.3d 460, 467 (5th Cir. 2000) ("In the context of a closely held corporation, many classic business judgment decisions can also have a substantial and adverse [e]ffect on the 'minority's' interest as shareholder."). As a result, the doctrine recognizes that such decisions require more than a mere surface inquiry into the majority's conduct. Indeed, the fact that courts applying the oppression doctrine are subjecting the majority's actions to "reasonable expectations" inquiries or "legitimate business purpose"/ no "less harmful alternative" analyses suggests that courts are doing more than simply asking whether a majority decision can be attributed to a rational business purpose. *See, e.g.*, Gerring Props. Inc. v. Gerring, 2020 Minn. App. Unpub. LEXIS 964, at *5, 12–13 (Minn. Ct. App. Dec. 21, 2020) (concluding that the district court did not abuse its discretion in finding unfairly prejudicial conduct based on a termination of employment, even though there was evidence that Martin (the terminated employee) had engaged in misconduct, because of the presence of a mixed motive for the termination: "Although the district court found that Martin's conduct supported some cause for his termination, it also found that appellants' motives in the terminations included improper considerations. … After weighing the circumstances and equities, the district court concluded that 'the mixed motivations supports a finding that the termination violated [Martin's] reasonable expectations as an employee in violation of Minn. Stat. § 302A.751.' "); Ritchie v. Rupe, 339 S.W.3d 275, 296 (Tex. App. 2011) (rejecting the defendants' asserted business purpose for their conduct (the need to minimize the possibility of litigation) on the grounds that there were other means by which the corporation could protect itself from litigation that were less harmful to the minority, and stating that "we cannot conclude [that] the corporation's desire to avoid any possibility of litigation outweighed [the plaintiff's] general reasonable expectation"), *rev'd*, 443 S.W.3d 856 (Tex. 2014); *see also* Sections 6.02[C][1] (discussing the business judgment rule), 7.01[D][1][a]–[b] (discussing fiduciary duty and dissolution-based oppression doctrines).

When courts suggest that a rejection of business judgment rule deference is warranted, they are presumably contemplating majority decisions that impact the rights of individual shareholders. For more general decisions, such as the choice of one business opportunity over another, courts should typically defer to the majority's prerogatives. *Cf.* James D. Cox, *Equal Treatment for Shareholders: An Essay*, 19 CARDOZO L. REV. 615, 631 (1997) ("Though great flexibility should be accorded managers on matters related to the conduct of the corporation's business, this is not necessarily the case regarding decisions that impact the relative rights of owners' interests in the firm. The former is more clearly the type of business activity which is best lodged with the firm's managers; the latter is not." (footnote omitted)).

The protection offered to oppressed shareholders by traditional fiduciary duty principles is also limited, at least to some extent, by the conventional notion that fiduciary duties run to the corporation (or to the shareholders collectively), but do not run to individual shareholders.[39]

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[39] *See, e.g.*, Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 721 (5th Cir. 1984) (observing that "directors' duties of loyalty and care run to the corporation, not to individual shareholders or even to a majority of the shareholders"); Schautteet v. Chester State Bank, 707 F. Supp. 885, 888 (E.D. Tex. 1988) ("Officers and directors owe fiduciary duties only to the corporation. Therefore, [a minority shareholder] has no individual fiduciary right to enforce against any officer or director of [the company]." (citations omitted)); *id.* at 889 (noting that "most abuses of majority control constitute breaches of the fiduciary duties the majority owes to the corporation, just as officers and directors owe fiduciary duties solely to the corporation"); Ritchie v. Rupe, 443 S.W.3d 856, 885 n.53 (Tex. 2014) ("But a corporate officer or director's duty is to the corporation and its shareholders collectively, not any individual shareholder or subgroup of shareholders, even if that subgroup represents a majority of the ownership."); Guerra v. Guerra, 2011 Tex. App. LEXIS 6730 (Aug. 24, 2011) ("An officer or director owes a duty to the corporation, not to individual shareholders, unless some contract or special relationship exists between them separate from the corporate relationship."); Cotten v. Weatherford Bancshares, Inc., 187 S.W.3d 687, 698 (Tex. App. 2006); Redmon v. Griffith, 202 S.W.3d 225, 233, 237 (Tex. App. 2006); Hoggett v. Brown, 971 S.W.2d 472, 488 (Tex. App. 1997) ("A director's fiduciary duty runs only to the corporation, not to individual shareholders or even to a majority of the shareholders."); *id.* at 488 n.13 (stating that "a majority shareholder's fiduciary duty ordinarily runs to the corporation"); Faour v. Faour, 789 S.W.2d 620, 621–22 (Tex. App. 1990) ("A corporate officer owes a fiduciary duty to the shareholders collectively, i.e. the corporation, but he does not occupy a fiduciary relationship with an *individual* shareholder, unless some contract or special relationship exists between them in addition to the corporate relationship."); McLaughlin v. Schenck, 220 P.3d 146, 153 (Utah 2009) ("Under the revised business code, directors and officers are required to carry out their corporate duties in good faith, with prudent care, and in the best interest of the corporation. These corporate duties have been interpreted to coincide with the common law understanding that officers and directors owe these duties to the corporation and shareholders collectively, not individually." (citation omitted)); Lynch v. Patterson, 701 P.2d 1126, 1136 (Wyo. 1985) ("The duty of the directors … is a duty to the corporation and not a duty to the stockholder instituting the action."); Hetherington & Dooley, *supra* note 6, at 12 & n.30 (mentioning the traditional view that duties run "solely between the majority and the corporation," and observing that the "notion that the fiduciary obligations of management run only to the corporation provides the minority in close corporations virtually no protection against oppression and exploitation by the control group"); *see also* MJC Ventures LLC v. Detroit Trading Co., 2:19-cv-13707, 2020 U.S. Dist. LEXIS 113545, at *13 (E.D. Mich. June 30, 2020) ("As fiduciaries, the Directors certainly had a responsibility to act in the interest of their shareholders—and Campbell and MJC claim to be shareholders. But the Board of Directors had no fiduciary duty to act in the best interest of Campbell and MJC alone, while possibly acting to the detriment of the corporation or the remaining majority of its shareholders—which had approved the removal of Campbell and the election of the new Board."); Section 6.01 (citing cases for the proposition that, under traditional doctrine, directors and officers owe fiduciary duties to the corporation itself but not to individual shareholders). *But cf.* Allen v. Devon Energy Holdings, L.L.C., 2011 Tex. App. LEXIS 5854 & n.26 (July 28, 2011) (involving an agreement indicating that a duty of loyalty was owed to "the company or its members," and rejecting the argument that the phrase "or its members" referred "to the owners collectively, and therefore is only describing the duty to the limited liability company itself" because this "interpretation makes this phrase superfluous because the duty to the [company] is stated in the same sentence").

It should be noted that the assertion that fiduciary duties do not conventionally run to an individual shareholder is somewhat of a debatable proposition. In the controlling shareholder context, a number of judicial decisions speak of a duty owed by the majority to the minority. *See, e.g.*, S. Pac. Co. v. Bogert, 250 U.S. 483, 487–88 (1919) (noting that the "majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority"); *In re* Reading Co., 711 F.2d 509, 512–13, 520 (3d Cir. 1983) (concluding, in a lawsuit by a minority shareholder (Reading Company) for breach of fiduciary duty, that "neither the directors nor the majority shareholders of [the corporation] have breached their fiduciary duty

Consequently, a minority shareholder can have difficulty challenging, for example, a termination of employment or a removal from management on traditional fiduciary duty grounds, as a court usually requires that harm to the corporation—rather than harm merely to the minority shareholder—be shown.[40]

[3] The Employment at Will Doctrine

Many shareholder oppression disputes involve the termination of a minority shareholder's employment.[41] When such terminations are challenged, the "employment at will" doctrine is often asserted as a barrier to relief. In general, the employment at will doctrine provides an employer with the discretion to terminate an employee with or without just cause, so long as there is no agreement requiring cause-based terminations or specifying the term of employment.[42] The doctrine is often justified on the ground that an employer needs unimpeded discretion to manage

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to Reading"); Riblet Prods. Corp. v. Nagy, 683 A.2d 37, 40 (Del. 1996) ("To be sure, the Majority Stockholders may well owe fiduciary duties to Nagy [a single shareholder] as a minority stockholder."); Yiannatsis v. Stephanis, 653 A.2d 275, 279 & n.3, 280 (Del. 1995) (noting that Demos and Stella were controlling shareholders of the corporation and that John was a minority shareholder, and stating that "Demos and Stella had a fiduciary duty to [John] as an individual as well as their fiduciary duty to the corporation"); *see also* note 131 (citing cases suggesting that a director or officer owes a fiduciary duty to an individual shareholder).

[40] *See* Hetherington & Dooley, *supra* note 6, at 12 ("[C]ourts undoubtedly … have been influenced by traditional common law attitudes emphasizing … proof of harm to the corporation as distinguished from the interests of individual shareholders."); *cf.* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 & n.14 (Mass. 1975) (noting, while discussing traditional fiduciary duty principles, that "in practice, the plaintiff will find difficulty in challenging dividend or employment policies," and observing that it "would be difficult for the plaintiff in the instant case to establish breach of a fiduciary duty *owed to the corporation*, as indicated by the finding of the trial judge").
Similarly, even if a minority shareholder can overcome the business judgment rule and invoke the entire fairness standard, the issue is usually framed as whether the actions were fair to the corporation rather than the minority shareholder. *See* Sections 6.02[C][1] (discussing the business judgment rule), 6.03[B][2][b][iii] (discussing the entire fairness standard); *cf.* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 508, 519–20 (Mass. 1975) (concluding that a corporation's repurchase of the shares of the controlling investor was oppressive, even though the repurchase was found by the trial judge to be fair to the corporation).

[41] *See* Section 7.01[C][1] (discussing majority interference with the minority's employment, and citing oppression cases involving the termination of a minority shareholder's employment).

[42] *See, e.g.*, *In re* White, 429 B.R. 201, 205 (Bankr. S.D. Tex. 2010) ("Under the at-will employment doctrine, an employer may generally terminate an at-will employee without fear of legal repercussions for a good reason, a bad reason, or no reason at all."); Bontempo v. Lare, 119 A.3d 791, 803 (Md. 2015) ("There is a presumption in Maryland law that an employment relationship is 'at-will'—*i.e.,* terminable by either party at any time, with or without cause. This Court recently referred to this presumption as 'one of our most venerated common law precepts.' Nothing in that doctrine, however, precludes parties from contracting otherwise, either by specifying a clear duration of employment or by spelling out reasons for termination, such as 'just cause.' " (citation omitted)); Burk v. K-Mart Corp., 770 P.2d 24, 26 (Okla. 1989) ("The classic statement of the at-will rule was that an employer may discharge an employee for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."); 1 Mark A. Rothstein et al., Employment Law § 1.4, at 13 (1994) ("The doctrine of employment at will prescribed that an employee without a contract for a fixed term could be hired or fired for any reason or no reason at all.").
Of course, if an individual is employed under a contract for a definite term, the employee "may not be fired before the expiration of the term except for cause (or material breach), unless the contract provides otherwise." 2 Rothstein et al., *supra*, § 9.2, at 237.

its workforce and to remain competitive.[43] As a result of the employment at will doctrine, courts largely avoid inquiring into the propriety of an employee's discharge, and employer decisions to terminate are typically upheld.

The employment at will doctrine remained virtually intact in this country until 1959. That year, the California Court of Appeals recognized a cause of action for wrongful discharge when a union business representative was terminated for refusing his employer's instruction to commit perjury at a state legislative committee hearing.[44] Following this decision, the enactment of major civil rights legislation in the 1960s further limited the employer's discretion to terminate employees at will.[45] In subsequent years, state courts continued to erode the employment at will doctrine,[46] and commentators continued to denounce it.[47] Employees used a variety of legal theories to challenge the propriety of terminations, and three major exceptions to the at-will doctrine gradually emerged: (1) breach of an express or implied agreement, including representations made in employee handbooks;[48] (2) discharge in violation of public policy;[49] and

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[43] *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1041 (Ariz. 1985); Hunt v. IBM Mid. Am. Employees Fed. Credit Union, 384 N.W.2d 853, 858–59 (Minn. 1986); *see also* Ritchie v. Rupe, 443 S.W.3d 856, 886 (Tex. 2014) ("We need not address the policy reasons for our commitment to at-will employment in detail here, but we note that we have consistently recognized that it benefits both employees, by allowing them to change employers freely as they deem best, and employers, by allowing them to make employment decision as they deem best, without second-guessing by courts and juries.").

[44] *See* Petermann v. Teamsters Local 396, 344 P.2d 25, 27 (Cal. Ct. App. 1959). *Petermann* has been referred to as the "first major judicial crack in the employment at will rule." 2 Rothstein et al., *supra* note 42, § 9.1, at 232.

[45] *See* 2 Rothstein et al., *supra* note 42, § 9.1, at 232; *see, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623, 631, 633(a) (1982) (prohibiting discrimination based upon age); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994) (prohibiting discrimination based upon race, color, religion, sex, and national origin).

[46] *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (prohibiting a discharge for filing a workers' compensation claim); Monge v. Beebe Rubber Co., 316 A.2d 549, 551–52 (N.H. 1974) (prohibiting a discharge for refusing to date a supervisor); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (prohibiting a discharge for serving on a jury).

[47] *See, e.g.*, Lawrence E. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976). *But see* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (arguing in favor of the at-will doctrine); Edward B. Rock & Michael L. Wachter, *The Enforcement of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996) (same).

[48] The ability to terminate an employee for any reason under the at-will doctrine may be altered by an agreement that the relationship will continue for some fixed period of time or by an agreement that the employee will not be terminated without cause. *See, e.g.*, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 924 (Ct. App. 1981); 1 Rothstein et al., *supra* note 42, § 2.27, at 135. In general, however, there is a strong presumption in favor of an employment at will relationship unless there is clear evidence of a contrary agreement. *See, e.g.*, Priebe v. O'Malley, 623 N.E.2d 573, 576 (Ohio Ct. App. 1993). Nevertheless, some courts have implied terms of an employment contract, especially terms that deal with job security, from the conduct and dealings of the parties. *See, e.g.*, *Pugh*, 171 Cal. Rptr. at 925–26. *See generally* 2 Rothstein et al., *supra* note 42, § 9.5, at 254–56 (describing contracts implied from conduct). Some courts have even applied the doctrine of promissory estoppel to overcome the at-will rule. *See, e.g.*, Humphreys v. Bellaire Corp., 966 F.2d 1037, 1041 (6th Cir. 1992); Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371, 378 (Minn. Ct. App. 1984); *see also* 1 Rothstein et al., *supra* note 42, § 2.27, at 140 ("The effect of promissory estoppel is often to create for-cause employment. …"). Finally, most state supreme courts have

(3) breach of the implied covenant of good faith and fair dealing.[50]

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decided that representations in employment manuals can also create an implied employment contract. *See, e.g.*, Hoffmann-La Roche, Inc. v. Campbell, 512 So. 2d 725, 733 (Ala. 1987); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980). *See generally* 2 Rothstein et al., *supra* note 42, § 9.3, at 238–50 (discussing employment manuals).

Before an express or implied agreement that limits the at-will doctrine is recognized, the employee typically must establish specific and definite language by the employer that can be enforced. *See generally* 2 Rothstein et al., *supra* note 42, § 9.4, at 250–54 (discussing oral contracts and the need for the employer's language to be sufficiently clear and definite); 1 Rothstein et al., *supra* note 42, § 2.27, at 140 (noting that even a promissory estoppel claim generally requires specific language indicating an unambiguous promise). Ultimately, the language relied upon by the employee "must be more than mere expressions of optimistic hopes for a long relationship; [the language] must be clear and unequivocal enough to overcome the presumption that employment is at will." 2 Rothstein et al., *supra* note 42, § 9.4, at 251; *see, e.g.*, Kunz v. UFCW Local 876, 5 F.3d 1006, 1008, 1011 (6th Cir. 1993) (concluding that a union representative's assurance that a new union employee would have a job "for as long as [she] wanted it" was insufficient to overcome the at-will rule); Ruud v. Great Plains Supply, Inc., 526 N.W.2d 369, 370, 372 (Minn. 1995) (concluding that statements such as "good employees are taken care of," even in the context of discussions about becoming a store manager, were not sufficiently definite to establish a contract of continued employment); Taylor v. National Life Ins. Co., 652 A.2d 466, 469, 473 (Vt. 1993) (concluding that statements such as a company was a "stable employer" and that if an employee "did [his] job … [he] could expect … to stay there" merely expressed hope for a long-term relationship rather than creating an enforceable promise of lifetime employment).

Some courts also require the employee to establish the existence of "additional" or "independent" consideration beyond the mere provision of labor before an agreement limiting the at-will doctrine will be recognized. *See, e.g.*, Cunningham v. 4-D Tool Co., 451 N.W.2d 514, 515 (Mich. Ct. App. 1989); Bussard v. College of St. Thomas, Inc., 200 N.W.2d 155, 161 (Minn. 1972) (concluding that plaintiff "purchased" permanent employment with his pledge of a gift of stock to the employer-college). In general, services and obligations associated with commencing new employment, such as moving to another city, resigning from a former job, or foregoing other employment, will not suffice as additional consideration to overcome the at-will rule. *See, e.g.*, Ohio Table Pad Co. v. Hogan, 424 N.E.2d 144, 146 (Ind. Ct. App. 1981); Heinritz v. Lawrence Univ., 535 N.W.2d 81, 83 (Wis. Ct. App. 1995); 1 Rothstein et al., *supra* note 42, § 2.27, at 137–38. In the employment handbook context, however, most courts have abandoned the additional consideration requirement. *See* 2 Rothstein et al., *supra* note 42, § 9.4, at 251; *id.* § 9.3, at 240.

[49] The public policy exception to employment at will provides that an employee may not be discharged for a reason that is contrary to public policy. *See, e.g.*, Gantt v. Sentry Ins., 824 P.2d 680, 687 (Cal. Ct. App. 1992) ("[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy."). Most of the cases involving the public policy exception can generally be grouped as follows: (1) refusing to perform unlawful acts; (2) asserting rights under state or federal law; (3) reporting illegal activity; and (4) performing a civic duty. *See* Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 744–47 (1991). Almost every state recognizes the public policy exception in some form or fashion. *See* 2 Rothstein et al., *supra* note 42, § 9.9, at 266–67 ("Every state except Alabama, Florida, Georgia, Louisiana, New York, and Rhode Island, recognizes the public policy exception to the employment at will rule in one form or another." (footnotes omitted)). It is important to understand, however, that the public policy exception does not give employees the right to be terminated only for cause; instead, it merely prohibits termination of an employee on grounds that violate public policy. *See id.* at 267.

[50] An implied covenant of good faith and fair dealing applicable to all contracts has been widely recognized in general contract law for quite some time. *See, e.g.*, U.C.C. § 1-304; Restatement (Second) of Contracts § 205. The covenant mandates that "neither party do anything that will injure the right of the other to receive the benefits of their agreement." Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1038 (Ariz. 1985). In the employment context, however, courts tend to disfavor the covenant of good faith and fair dealing "primarily on the theory that the doctrine of employment at will, under which an employer can

Despite the emergence of exceptions to the at-will doctrine, employment at will remains the presumptive employment relationship in this country.[51] The traditional exceptions provide no guarantee of relief and, for most employees, the at-will doctrine is still a force to be reckoned with when seeking relief for the termination of employment. Nevertheless, depending upon the circumstances, a shareholder arguing that his termination was oppressive may be able to avoid the at-will doctrine through one of the traditional exceptions. For example, in *Mroz v. Hoaloha Na Eha, Inc.*,[52] a terminated shareholder brought an action for breach of fiduciary duty. The defendants argued that "under Hawaii's at-will employment doctrine an employee can be fired for any reason or for no reason at all."[53] The court disagreed, citing the public policy exception:

> … However, the at-will employment doctrine is subject to a public policy exception. *See Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982).
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> In [*Parnar*], the Supreme Court of Hawaii explained:
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> Because the courts are a proper forum for modification of the judicially created at-will doctrine, it is appropriate that we correct inequities resulting from harsh application of the doctrine by recognizing its inapplicability in a narrow class of cases … . We therefore hold that an employer may be held liable in tort where his discharge of an employee violates a clear mandate of public policy. In determining whether a clear mandate of public

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discharge an employee for any reason, even a bad one, is inherently inconsistent with an implied covenant of good faith and fair dealing." MARK A. ROTHSTEIN & LANCE LIEBMAN, CASES AND MATERIALS ON EMPLOYMENT LAW 931 (3d ed. 1994); *see, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 400 n.39 (Cal. 1988) (en banc) (noting that if an implied covenant was applicable, "all at-will contracts would be transmuted into contracts requiring good cause for termination, and [California's statutory employment at will provision] would be eviscerated"); Gallagher v. Lambert, 549 N.E.2d 136, 141 (N.Y. 1989) (Kaye, J., dissenting) (noting that the implied covenant of good faith and fair dealing "does not apply to at-will employment relationships, as it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination" (internal quotation omitted)). Indeed, commentators indicate that the covenant has not gained widespread acceptance in the employment context. *See* Peck, *supra* note 49, at 739 ("[C]ourts in eighteen states indicate that they will not recognize the covenant of good faith and fair dealing in employment contracts, whereas only twelve states indicate that they will recognize the covenant.").
When the covenant is applied to the employment context, it generally does not create job security through a "just cause" or "good cause" requirement. Instead, it is used to prevent employers from depriving employees of previously earned benefits. *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1040 (Ariz. 1985) (recognizing an implied covenant but noting that it does not require a "good cause" termination: "The covenant does not protect the employee from a 'no cause' termination because tenure was never a benefit inherent in the at-will agreement."); *id.* ("The covenant does protect an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee."); 2 Rothstein et al., *supra* note 42, § 9.6, at 257.

[51] *See, e.g.*, Arizona Employment Protection Act of 1996, ARIZ. REV. STAT. §§ 12-541, 23-1501, 41-1461 (codifying the common-law employment at will rule, narrowing the public policy exception to employment at will, and limiting the nature and scope of claims and remedies available to discharged employees); Montgomery County Hosp. Dist. v. Brown, 965 S.W.2d 501, 502 (Tex. 1998) (reaffirming the employment at will doctrine and concluding that oral assurances of job security fail to overcome the at-will rule).

[52] 410 F. Supp. 2d 919 (D. Haw. 2005).

[53] *Mroz*, 410 F. Supp. 2d at 935.

> policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior *judicial decisions* may also establish the relevant public policy.
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> The Majority argues that Butler [a minority shareholder] has failed to allege that a clear mandate of public policy has been violated by the termination of his employment. The Supreme Court of Hawaii has held that "fiduciary principles govern [ ] the relationship between controlling and minority shareholders." *Perl v. IU Int'l. Corp.*, 61 Haw. 622, 607 P.2d 1036, 1046 (1980). The Supreme Court of Hawaii has also held that "the relation of directors to the corporations they represent is a fiduciary one." *Hawaiian Intn'l Finances, Inc. v. Pablo*, 53 Haw. 149, 488 P.2d 1172, 1175 (1971). Butler has alleged that in terminating his employment, the Majority breached their fiduciary duties as partners (Count 1) and as majority shareholders, officers, and directors (Count 2). In so doing, Butler has alleged a violation of public policy sufficient to overcome the at-will employment doctrine.[54]

Even if a terminated shareholder cannot establish a traditional exception to the employment at will doctrine, the doctrine may not be applicable to an oppression claim premised wholly or partially on a termination of employment. When employment is the vehicle for distributing the profits of the venture, for example, the termination of a shareholder's employment results in the shareholder being excluded from the payment of dividends.[55]

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[54] *Mroz*, 410 F. Supp. 2d at 935–36 (citations omitted). Aside from the public policy exception, one can imagine circumstances where the conduct of the founding investors or the representations of the controlling shareholders give rise to an implied agreement for continued employment. *Cf.* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925–26 (Ct. App. 1981) (listing "actions or communications by the employer reflecting assurances of continued employment" and "the personnel policies or practices of the employer" as relevant factors in determining whether an implied-in-fact promise for continued employment exists). In addition, a shareholder's capital contribution would seem to suffice as additional consideration beyond the mere provision of labor services. *See, e.g.*, Gigax v. Repka, 615 N.E.2d 644, 650 (Ohio Ct. App. 1992) (Grady, J., concurring) ("I would hold that the $70,000 in equity contributions made to the corporation by Gigax [a shareholder-employee] constitute consideration for his employment in addition to the services he provided, taking the relationship outside the 'at-will' definition."). At the very least, a promissory estoppel claim would seem to be a possibility when representations regarding employment have been made. *See* note 48 and accompanying text (discussing implied agreements and promissory estoppel).

[55] *See, e.g.*, Nagy v. Riblet Prods. Corp., 79 F.3d 572, 577 (7th Cir. 1996) ("Many closely held firms endeavor to show no profits (to minimize their taxes) and to distribute the real economic returns of the business to the investors as salary. When firms are organized in this way, *firing an employee is little different from canceling his shares*." (emphasis added)); Landorf v. Glottstein, 500 N.Y.S.2d 494, 499 (Sup. Ct. 1986) ("In a close corporation, since dividends are often provided by means of salaries to shareholders, loss of salary may be the functional equivalent of the denial of participation in dividends."); *see also* Ritchie v. Rupe, 443 S.W.3d 856, 885 (Tex. 2014) ("A minority shareholder's loss of employment with a closely held corporation can be particularly harmful because a job and its salary are often the sole means by which shareholders receive a return on their investment in the corporation."); Ritchie v. Rupe, 339 S.W.3d 275 (Tex. App. 2011) ("For example, if in a particular closely held corporation the corporate earnings are distributed in the form of salary and employment benefits rather than dividends, continued

Corporate law does not permit such a non-uniform declaration of dividends (assuming that the shareholders own the same class of stock),[56] and the employment at will doctrine would not change that result.[57] Stated more generally, one can argue that the employment at will doctrine is inapplicable to oppression claims when the plaintiff shareholder has an investment interest in his job—i.e., when the plaintiff shareholder can prove that the loss of his job harms him as a shareholder (and not just as an employee) by denying him some aspect of his reasonably expected return.[58] Perhaps this explains why numerous courts have granted oppression-based relief to

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employment could be a general reasonable expectation of all shareholders because employment is the means by which they share in the corporation's earnings."), *rev'd*, 443 S.W.3d 856 (Tex. 2014).

[56] *See, e.g.*, Cratty v. Peoria Law Library Ass'n, 76 N.E. 707, 708 (Ill. 1906) ("Dividends among stockholders of the same class must always be equal and without discrimination … ."); Toner v. Baltimore Envelope Co., 498 A.2d 642, 645 (Md. 1985) ("We have said that a corporation in making a dividend … has no power to discriminate between its stockholders [of the same class]." (internal quotation omitted) (brackets in original)); note 96 and accompanying text (discussing non-uniform declarations of dividends); *see also In re* Reading Co., 711 F.2d 509, 519 (3d Cir. 1983) (noting that "ordinarily … dividends must be apportioned among the shareholders pro rata to their several holdings"); *In re* Sealand Corp. Shareholders Litig., 642 A.2d 792, 799 (Del. Ch. 1993) (noting the "uncontroversial proposition" that "all shares of the same type, series, or class are, by definition, equal"); *id.* at 799 n.10 ("It has long been acknowledged that absent an express agreement or statute to the contrary, all shares of stock are equal. Flowing from that premise is the rule that all shares of the same class or series are equally entitled to share in the profits of the corporation and in the distribution of its assets on liquidation." (citations omitted)).

[57] While the employment at will doctrine might permit the stockholder's termination, it would not permit denying the terminated stockholder his proportionate share of any dividend payments. More accurately, the employment at will doctrine simply does notaddress the propriety of excluding a stockholder from his proportionate share of dividend payments. Corporate law, however, would not permit such an exclusion. *See* note 56 and accompanying text (indicating that non-uniform dividend declarations are impermissible). Thus, although the at-will doctrine might permit the stockholder's termination, the corporation would have to use some other mechanism to provide the discharged stockholder with his share of any dividend payments. *Cf.* Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1020–22 (Sup. Ct. 1984) (acknowledging that the corporation distributed all of its income in the form of salary rather than dividends, and concluding, with respect to a justifiably-terminated minority shareholder, that the other shareholders need not allow [the terminated minority] to return to employment with the corporation, but they must [through dividends or a buyout of his shares] allow him to share in the profits"); Sawyer v. Curt & Co., Nos. C7-90-2040, C9-1991 Minn. App. LEXIS 117 (Feb. 12, 1991), *vacated by*, Sawyer v. Curt & Co., 1991 Minn. LEXIS 842 (Aug. 2, 1991) ("We believe [that] when those in control of a closely held corporation terminate the employment of a moving shareholder, a good faith effort must be made to buy-out the shareholder at a fair price or [to] adjust the income distribution mechanism to insure the shareholder an equitable investment return.").

[58] *See* Section 7.01[C][1] (discussing the relationship between stock ownership and employment in the closely held corporation). As one of the authors has observed:

> … [T]he proper scope of employment at will is limited to discharge-related harms suffered in an *employee* capacity. There is room, therefore, for a conception of oppression as a close corporation doctrine that focuses upon harms, whether from discharge or otherwise, suffered in a *shareholder* capacity. When harms from termination have occurred, the at-will doctrine refuses to recognize an *employment* interest in the job. The recognition of a potential *investment* interest in the job, however, is a different issue that falls outside of the legitimate coverage of the at-will rule.
>
> Put differently … oppression should be viewed as a doctrine that

terminated minority shareholders—often without any mention of the employment at will doctrine or its traditional exceptions.[59] In fact, some courts explicitly reject employment law relief for a

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> protects the fair value of a close corporation shareholder's investment. To the extent that employment in a close corporation may be a component of that investment, the investment model of oppression may indirectly protect the job as well. But this corporate law protection of employment should only be present when a job is proven to be part of a shareholder-employee's investment. …

Douglas K. Moll, *Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517, 520–21; *see also* Hollis v. Hill, 232 F.3d 460, 470–71 (5th Cir. 2000) ("The opinions make clear, however, that shareholders do not enjoy fiduciary-rooted entitlements to their jobs. Such a result would clearly interfere with the doctrine of employment-at-will. Rather, the courts have limited relief to instances in which the shareholder has been harmed as a shareholder. The fiduciary duty in the close corporation context, as in the context of public corporations, appropriately is viewed as a protection of the shareholder's investment. The precise nature of an investment in a close corporation often is not clear, particularly when the shareholder is also an employee. It is therefore important to distinguish investors who obtain their return on investment through benefits provided to them as employees from employees who happen also to be investors." (footnotes omitted)); *cf.* Merola v. Exergen Corp., 668 N.E.2d 351, 354 (Mass. 1996) (acknowledging the employment at will rule but noting that "the termination of a minority shareholder's employment may present a situation where the majority interest has breached its fiduciary duty to the minority interest"); Robinson v. Langenbach, 599 S.W.3d 167, 176–77 (Mo. 2020) ("The defendants urge this Court to find Ms. Robinson had no claim for breach of fiduciary duty because she really just sued for wrongful termination, and, as an at-will employee, she had no right to continued employment just because she was a shareholder. They assert to hold otherwise is an expansion of and is inconsistent with Missouri employment law. The defendants misunderstand the nature of Ms. Robinson's claim. Her claim is not an employment claim, and she does not assert the company could not fire her. Indeed, were it an employment claim, she would have brought it against her employer, Perma-Jack, for lost wages or reinstatement. She did not. Ms. Robinson instead brought a claim for breach of fiduciary duty against the defendants in their roles as her fellow directors and as controlling shareholders. To the extent the defendants assert she should have brought her claim against Perma-Jack and could not bring it as an individual action against them, they are mistaken."). *See generally* Moll, *supra*, at 536–68 (arguing that the shareholder oppression doctrine can protect employment in the closely held corporation without intruding into the legitimate coverage of the employment at will rule).

[59] *See, e.g.*, McCallum v. Rosen's Diversified, Inc., 153 F.3d 701, 702–04 (8th Cir. 1998); O'Donnel v. Marine Repair, 530 F. Supp. 1199, 1203, 1208 (S.D.N.Y. 1982); Notzke v. Art Gallery, Inc., 405 N.E.2d 839, 841–43 (Ill. App. Ct. 1980); Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662–63 (Mass. 1976); Sawyer v. Curt & Co., Nos. C7-90-2040, C9-1991 Minn. App. LEXIS 117 (Feb. 12, 1991), *vacated by*, Sawyer v. Curt & Co., 1991 Minn. LEXIS 842 (Aug. 2, 1991); *In re* Burack, 524 N.Y.S.2d 457, 460 (App. Div. 1988); *In re* Topper, 433 N.Y.S.2d 359, 362 (Sup. Ct. 1980); Balvik v. Sylvester, 411 N.W.2d 383, 384–85 (N.D. 1987); Duncan v. Lichtenberger, 671 S.W.2d 948, 950, 953 (Tex. App. 1984);

terminated shareholder, but nonetheless grant oppression-based relief.[60]

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note 74 and accompanying text (noting that the termination of a minority shareholder's employment has contributed to a finding of oppression in numerous judicial decisions); *see also* Hughes v. Sego Int'l Ltd., 469 A.2d 74, 77–78 (N.J. Super. Ct. App. Div. 1983) (noting that the lower court's finding "that the termination of [a minority shareholder's] employment … constitutes oppressive conduct" was not challenged on appeal; no mention of the employment at will doctrine or its exceptions); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) (failing to mention the employment at will doctrine or its exceptions, but stating that a "shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job … would be oppressed in a very real sense when others in the corporation seek to defeat those expectations. …"); *In re* Rambusch, 533 N.Y.S.2d 423, 424–25 (App. Div. 1988) (noting that oppression refers to conduct that substantially defeats the reasonable expectations of minority shareholders, and concluding that a shareholder-employee raised an arguable case of oppression based upon his termination after thirty-six years of employment; no mention of the employment at will doctrine or its exceptions); *cf.* Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990) ("In a closely held corporation the nature of the employment of a shareholder may create a reasonable expectation by the employee-owner that his employment is not terminable at will."); Ambar v. Devington Tech., Ltd., 2009 N.Y. Misc. LEXIS 5553 (Oct. 16, 2009) (rejecting an argument that petitioner's at-will employee status conclusively established a defenseto petitioner's oppression action); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 266 & n.4 (Tex. App. 2012) (noting that "Texas law does not recognize a minority shareholder's right to continued employment without an employment contract," stating that "absent an employment contract, an expectation of continued employment at a certain level of compensation cannot be considered objectively reasonable," but also observing that "we are not concluding that a reduction in compensation can never, under any circumstances, constitute shareholder oppression"); Willis v. Bydalek, 997 S.W.2d 798, 802–03 (Tex. App. 1999) (noting that "Texas law does not recognize a minority shareholder's right to continued employment without an employment contract" and that "[e]xpectations of continued employment that are contrary to well settled law cannot be considered objectively reasonable," but concluding that "[w]e are not holding that firing an at-will employee who is a minority shareholder can never, under any circumstances, constitute shareholder oppression; we simply hold that under these particular facts, it does not").

[60] *See, e.g.*, Orchard v. Covelli, 590 F. Supp. 1548, 1556, 1558 (W.D. Pa. 1984) (rejecting a shareholder-employee's wrongful discharge claim (1) by noting that there was "no evidence of the existence of a contract for employment, oral or written," (2) by stating that the "position as stockholder and officer of the corporation gave … no position of tenured employment," and (3) by citing the at-will doctrine, but granting oppression-based relief by concluding that the termination was part of a breach of fiduciary duty); W & W Equip. Co. v. Mink, 568 N.E.2d 564, 574, 577–78 (Ind. Ct. App. 1991) (granting oppression-based relief to a shareholder who was terminated from employment and rejecting the argument that the at-will doctrine excused the termination: "As a general rule, employment relationships in Indiana are terminable at the will of either party. … The trial court did not allow [the shareholder] a cause of action for wrongful termination, however. It simply found that aspects of the way [the shareholder] was terminated were dishonest, thus causing a breach of the fiduciary duty owed to him." (citation omitted)); *cf.* Quinn v. Cardiovascular Physicians, P.C., 326 S.E.2d 460, 462–65 (Ga. 1985) (finding that a terminated shareholder was employed at will and was lawfully discharged without cause, but concluding that breaches of fiduciary duty may have occurred when the controlling shareholders paid themselves high salaries and bonuses after the discharge); Merola v. Exergen Corp., 668 N.E.2d 351, 354 (Mass. 1996) (acknowledging the employment at will rule but noting that "the termination of a minority shareholder's employment may present a situation where the majority interest has breached its fiduciary duty to the minority interest"); Landorf v. Glottstein, 500 N.Y.S.2d 494, 499 (Sup. Ct. 1986) (noting that a discharged shareholder was subject to termination without cause pursuant to the at-will doctrine, but concluding that the termination may have given rise to a breach of fiduciary duty); Redmon v. Griffith, 202 S.W.3d 225, 238 (Tex. App. 2006) (stating that "[t]he possibility exists that the firing of an at-will employee who is a minority shareholder can constitute shareholder oppression").

[C] Common Acts of Oppression

[0] Overview

Lawsuits alleging shareholder oppression typically involve the controlling shareholder (or the controlling group)[61] interfering with the minority's financial rights (e.g., failing to pay salary or dividends to the minority) and participatory rights (e.g., excluding the minority from the board of directors or restricting access to company information). Conflict of interest transactions involving the controlling shareholder may also accompany such interference, and the overall course of conduct often culminates in an attempt to force the minority to relinquish his stock at an unfairly low price.[61.1] Not all of these elements need to be present, however, for a court to find that oppressive conduct has occurred. Any one of the elements may, by itself, be sufficiently compelling to a court.[62] Moreover, other unfair conduct by the controlling shareholder may lead to an oppression finding.

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[61] The term "controlling shareholder," like the term "majority shareholder," refers to the shareholder (or group of shareholders) who possesses the actual power to control the operations of the firm. *See* note 6 and accompanying text (defining "majority shareholder," "minority shareholder," and "controlling shareholder").

Lawsuits alleging shareholder oppression may also involve inappropriate conduct by directors and officers. Indeed, most oppression statutes allow shareholders to bring actions against "directors or those in control." *See* Section 7.01[D][1][b].

[61.1] *See, e.g.*, Allen v. Devon Energy Holdings, L.L.C., 2011 Tex. App. LEXIS 5854 (July 28, 2011) (stating that the "typical wrongdoing in shareholder oppression cases" involves terminating employment, denying access to company books and records, wrongfully withholding dividends, wasting corporate funds, paying excessive compensation, locking the minority out of the corporate offices, or squeezing the minority out of the company); *see also* Pappas v. Fotinos, 911 N.Y.S.2d 694 (Sup. Ct. 2010) ("Oppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, or where an employee/shareholder is discharged without cause and, thus, is deprived of his or her salary or when corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment.").

[62] *See, e.g.*, Schimke v. Liquid Dustlayer, Inc., 2009 Mich. App. LEXIS 1954 (Sept. 24, 2009) ("Thus, 'willfully unfair and oppressive conduct' [under the Michigan oppression statute] may be established by proof of *either* (1) a continuing course of conduct, (2) *a significant action*, or (3) a series of actions. Accordingly, a single significant action that substantially interferes with a shareholder's interests as a shareholder is sufficient to support a cause of action under § 489."); Brenner v. Berkowitz, 634 A.2d 1019, 1033–34 (N.J. 1993) (finding oppression based solely on the removal of the minority from the board of directors); *cf.* Redmon v. Griffith, 202 S.W.3d 225, 234 n.3 (Tex. App. 2006) ("Because any one of a variety of activities or conduct can give rise to shareholder oppression, the fact that there may be a lack of evidence to support the existence of one such activity does not defeat the claim so long as there is evidence to support that another such instance of conduct occurred."). *But see* Kaplan v. First Hartford Corp., 484 F. Supp. 2d 131, 148–51 (D. Me. 2007) (listing various acts of misconduct by the controlling shareholder, stating that "[n]o one of these actions alone would meet the oppression standard for a shareholder dissolution suit—each has its own remedy," and concluding that "it is the *pattern* of abusive conduct that establishes oppression"); *id.* at 151 ("The Maine oppression statute should relieve minority shareholders, facing a pattern of abusive conduct, from having to file a new lawsuit for each individual instance."); Hayes v. Olmsted & Assocs., Inc., 21 P.3d 178, 182 (Or. Ct. App. 2001) ("Moreover, the existence of one or more badges of oppression in isolation does not necessarily justify relief. Instead, we examine the pattern of conduct of those in control and the effect of that conduct on the minority to determine whether, in sum, they show oppression.").

[1] Interfering with Employment

Many shareholder oppression disputes involve the termination of a minority shareholder's employment.[63] The potentially oppressive nature of such conduct is tied to the close relationship between stock ownership and employment in closely held ventures. For a shareholder-employee in a publicly held corporation, the economic interest in stock ownership and the corresponding interest in employment are largely separate. As a shareholder, the shareholder-employee's interest is the same as all other stockholders—i.e., an expected return on investment is sought that adequately compensates for the risk of investing in the enterprise. By contrast, a shareholder-employee's interest in his job is some function of the personal satisfaction that the job brings and the level of monetary compensation and other benefits that the job provides. If the shareholder-employee is satisfied with his job, but comes to believe that the stock in his employer is a poor investment, he can simply sell his stock. If the shareholder-employee is terminated, but continues to believe that the stock is a good investment, he may continue to hold his former employer's shares. Retaining or relinquishing the employment position usually has no effect on the risk-return calculation that determines whether the employer's stock is a good (or bad) investment.

In the closely held context, however, the economic aspects of stock ownership and employment are often intertwined. In fact, for many investors in closely held corporations, the decision to commit capital to a venture is driven in significant part by the benefits of employment.[64] After all, many closely held corporations are small start-up businesses that face a high risk of failure.[65] Because of the uncertainty surrounding whether the business will have any

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[63] *See, e.g.*, Kiriakides v. Atlas Food Sys. & Servs., Inc., 527 S.E.2d 371, 387 (S.C. Ct. App. 2000) (noting the "ubiquitous pattern of other [oppression] cases in which a minority shareholder's employment is terminated from a company, salary and benefits cease, and the shareholder is deprived of participation in management"); notes 59–60, 74 and accompanying text (citing oppression cases involving the termination of a minority shareholder's employment); *see also* Section 7.01[B][3] (discussing the employment at will doctrine).

[64] *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("A guaranty of employment with the corporation may have been one of the basic reason(s) why a minority owner has invested capital in the firm." (internal quotation omitted)); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1178 (N.Y. 1984) ("As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation." (internal quotation omitted)); *In re* Wiedy's Furniture Clearance Ctr. Co., 487 N.Y.S.2d 901, 903 (App. Div. 1985) ("Although the exact amount of the capital contribution is disputed, petitioner utilized his own funds in getting this new venture underway, not simply as an investment, but to provide employment and a future for himself."); Naito v. Naito, 35 P.3d 1068, 1072 (Or. Ct. App. 2001) ("Employment with the corporation was, as a practical matter, the only way that shareholders could receive any immediate benefit from their shares."); Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L.Q. 1099, 1110 (1999) (noting that a shareholder in a closely held corporation "often invests for the purpose of having a job"); note 2 and accompanying text (discussing expectations of employment); *cf.* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514 (Mass. 1975) ("Typically, the minority shareholder in a close corporation has a substantial percentage of his personal assets invested in the corporation. The stockholder may have anticipated that his salary from his position with the company would be his livelihood." (citation omitted)); Muellenberg v. Bikon Corp., 669 A.2d 1382, 1385 (N.J. 1996) (noting that participation in the business is the "principal source of employment and income" for many closely held corporation shareholders); *Kemp*, 473 N.E.2d at 1178 (noting that a shareholder's "participation in [a closely held] corporation is often his principal or sole source of income").

[65] *See, e.g.*, MICHAEL E. GERBER, THE E-MYTH REVISITED: WHY MOST SMALL BUSINESSES DON'T WORK AND WHAT TO DO ABOUT IT 2 (1995). As Gerber observes:

earnings at all, let alone earnings growth or consistency,[66] the shareholder's initial decision to invest is often based primarily on the definitive benefits of employment, rather than on the speculative possibilities of earnings growth.[67] Indeed, compared to similar employment in other contexts, a job in a closely held corporation is frequently associated with a higher salary,[68] a prestigious management position,[69] and intangible benefits stemming from working for oneself.[70] As one of the authors has observed:

> … In a closely held corporation, a shareholder-employee has interests in his job and stock that are often economically

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> Businesses start and fail in the United States at an increasingly staggering rate. Every year, over a million people in this country start a business of some sort. Statistics tell us that by the end of the first year at least 40 percent of them will be out of business. Within five years, more than 80 percent of them … will have failed … . [M]ore than 80 percent of the small businesses that survive the first five years fail in the second five.

Id.; *see also* Ragazzo, *supra* note 64, at 19 ("Small businesses are exceedingly risky enterprises with high failure rates.").

[66] *Cf.* Gerber, *supra* note 65, at 2 (noting that "hundreds of thousands of people every year … pour their energy and capital—and life—into starting a small business and fail," and stating that "many others … struggle along for years simply trying to survive").

[67] *See* note 64 and accompanying text (discussing the role of employment in motivating a decision to invest in a closely held corporation).

[68] This assertion, of course, assumes a comparison between similar jobs in businesses at similar stages of development. *See, e.g.*, Valuing a Business, *supra* note 15, at 121 ("It is not uncommon to find an owner/manager of a successful closely held company earning a greater amount in annual compensation than the amount an equivalent nonowner employee would earn as compensation."); Ragazzo, *supra* note 64, at 1109–10; *see also* Bonavita v. Corbo, 692 A.2d 119, 124 (N.J. Super. Ct. Ch. Div. 1996) ("[W]hile there is no claim that the [closely held corporation] salaries are excessive, neither was there a showing that if the 'inside' employment were terminated those family members could earn as much elsewhere."); Nelson v. Martin, 958 S.W.2d 643, 644 (Tenn. 1997) (noting that the annual compensation of a shareholder-employee of a commercial printing business "was in excess of $250,000").

[69] *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 659–60 & n.9 (Mass. 1976) (observing that all of the participants in a closely held corporation were directors of the company and that the offices of president, treasurer, and clerk were held by each of the participants over the years); Straka v. Arcara Zucarelli Lenda & Assocs. CPAs, P.C., 92 N.Y.S.3d 567, 570 (Sup. Ct. 2019) ("Straka formed the corporation along with David A. Arcara, Jon V. Zucarelli, and Donald J. Lenda. Each was an officer, director and 25 % shareholder in the new venture … . Arcara served as President, with Zucarelli as Vice President, Lenda as Treasurer and Straka as Secretary."); Balvik v. Sylvester, 411 N.W.2d 383, 384 (N.D. 1987) (noting that both participants in a closely held corporation were directors of the company and observing that one shareholder-employee served as the president while the other served as the vice-president).

[70] *See, e.g.*, Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1319 (N.Y. 1989) (Hancock, J., dissenting) (noting "the challenge, the independence, the prestige, the feeling of achievement, and the other intangible benefits of being part of the management of a successfully run small company"); *see also* Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 290–91 (1990) (noting that ownership in a closely held corporation includes "the social status and challenge of operating one's own company and the satisfaction of providing employment to one's children"); *id.* at 319 n.212 (mentioning the "loss of satisfaction and other qualitative perks associated with operating a business").

> intertwined. Holding stock in a closely held corporation, viewed purely as an investment decision, seems almost irrational from an economic perspective. Small businesses are exceedingly risky enterprises with high failure rates. To compensate fairly for this level of risk, the expected return would also have to be disproportionately large. Moreover, many investors in small businesses invest a significant portion of their life savings in the business. This practice defeats their ability to diversify their investment portfolios and exposes them to company- and industry-specific risk. As a result, investors in closely held corporations would seem well advised to trust their capital to diversified mutual funds rather than a small corporation.
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> If investors in closely held corporations are economically rational, it can only be because such investments have compensating benefits not available to investors in publicly held corporations. In many cases, a shareholder in a closely held corporation expects to receive such compensating benefits through employment. The shareholder may invest for the purpose of having a job that produces higher compensation than could be garnered through employment by third parties. Even if the employee-shareholder's compensation is no higher than his next best alternative, an investment in a closely held corporation may still be justified because the ability to keep his job may be more stable and certain. Additionally, the employee may simply derive satisfaction from working in a business that he himself takes a substantial part in managing.
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> . …
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> Thus, a shareholder in a closely held corporation often has a significant investment interest in his job. He often invests for the purpose of having a job, and the salary and other benefits he receives are conceived to be part of the return on his investment … . After discharge, the minority is relegated to the corporation's expected returns to justify the risk of its investment capital. As discussed above, these returns are unlikely to be satisfactory on their own.[71]

The close relationship between stock ownership and employment in closely held corporations is also revealed by a common method of distributing profits in such ventures. Many closely held corporations prefer to distribute their profits via salary and other employment-related benefits because, unlike dividends, salary and other employment-related payments are tax-deductible to the corporation.[72] In many closely held corporations, therefore, the only way to receive a financial return on investment is through employment. When a shareholder is terminated from employment in such organizations, it is the functional equivalent of cancelling

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[71] *Ragazzo*, *supra* note 64, at 1109–10.

[72] *See* Section 7.01[C][5] (discussing de facto dividends); note 10 and accompanying text (discussing the tax incentive to distribute profits as compensation rather than as dividends).

his shares.[73]

In short, employment is quite important to the typical shareholder in a closely held corporation. Not surprisingly, the termination of a minority shareholder's employment has contributed to a finding of oppression in numerous judicial decisions.[74]

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[73] *See* note 55 and accompanying text.

[74] *See, e.g.*, McCallum v. Rosen's Diversified, Inc., 153 F.3d 701, 702–04 (8th Cir. 1998); Orchard v. Covelli, 590 F. Supp. 1548, 1556, 1558 (W.D. Pa. 1984); O'Donnel v. Marine Repair Servs., Inc., 530 F. Supp. 1199, 1203, 1208 (S.D.N.Y. 1982); Notzke v. Art Gallery, Inc., 405 N.E.2d 839, 841–43 (Ill. App. Ct. 1980); W & W Equip. Co. v. Mink, 568 N.E.2d 564, 569, 577–78 (Ind. Ct. App. 1991); Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 661–63 (Mass. 1976); Gerring Props. Inc. v. Gerring, 2020 Minn. App. Unpub. LEXIS 964, at *12–13 (Minn. Ct. App. Dec. 21, 2020) ("Because the district court made detailed findings of fact and conclusions of law regarding the circumstances of Martin's termination that are supported by the record, including Martin's own failure to comply with board directives and why his termination constituted unfairly prejudicial conduct, the district court did not abuse its discretion in finding unfairly prejudicial conduct."); Pedro v. Pedro, 489 N.W.2d 798, 800–02 (Minn. Ct. App. 1992); Sawyer v. Curt & Co., Nos. C7-90-2040, C9-1991 Minn. App. LEXIS 117 (Feb. 12, 1991), *vacated by*, Sawyer v. Curt & Co., 1991 Minn. LEXIS 842 (Aug. 2, 1991); Robinson v. Langenbach, 2019 Mo. App. LEXIS 603, at *28 (Mo. Ct. App. Apr. 23, 2019) (concluding that a trial court's finding that a minority shareholder's termination was oppressive was "reasonable and cannot be said to be against the weight of the evidence"); Hughes v. Sego Int'l Ltd., 469 A.2d 74, 77–78 (N.J. Super. Ct. App. Div. 1983); *In re* Burack, 524 N.Y.S.2d 457, 460 (App. Div. 1988); *In re* Rambusch, 533 N.Y.S.2d 423, 424–25 (App. Div. 1988); Matter of Digeser v. Flach, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015); *In re* Topper, 433 N.Y.S.2d 359, 362 (Sup. Ct. 1980); Balvik v. Sylvester, 411 N.W.2d 383, 384–85 (N.D. 1987); Redmon v. Griffith, 202 S.W.3d 225, 239 (Tex. App. 2006) (noting that the minority shareholders alleged that they were wrongfully terminated from employment and that such terminations amounted to shareholder oppression, and concluding that the minority shareholders "have made sufficient allegations to demonstrate standing to proceed for wrongful termination within the confines of their shareholder oppression claim"); *id.* at 238 (stating that the "possibility exists that the firing of an at-will employee who is a minority shareholder can constitute shareholder oppression"); Gonzalez v. Greyhound Lines, Inc., 181 S.W.3d 386, 392 (Tex. App. 2005) (noting that the alleged oppressive acts included "wrongfully terminating Appellants from their management positions and … fraudulently mismanaging [the corporation] to their detriment"); Duncan v. Lichtenberger, 671 S.W.2d 948, 950, 953 (Tex. App. 1984); notes 59–60 and accompanying text; *see also In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) ("A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job … would be oppressed in a very real sense when others in the corporation seek to defeat those expectations … ."); Kassab v. Kasab, No. 711061/15, 2017 N.Y. Misc. LEXIS 2905, 2017 WL 3324804, at *10 (N.Y. Sup. Ct. Aug. 3, 2017) ("A finding of oppression also 'may be based on the complaining shareholder's frustrated expectations in such matters as continued employment or a share in the profits and management of the corporation, such that [he or] she feels that the other shareholders have deprived [him or] her of a reasonable return on [his or] her investment' "); Matter of Digeser v. Flach, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015) ("A finding of oppression also 'may be based on the complaining shareholder's frustrated expectations in such matters as continued employment or a share in the profits and management of the corporation, such that [he or] she feels that the other shareholders have deprived [him or] her of a reasonable return on [his or] her investment.' " (internal quotation omitted)); *id.* ("The Court is satisfied that respondent's conduct in denying petitioner continued employment, freezing him out of the management and affairs of [the corporation] and denying him at least a proportionate share of the corporation's profits all served to defeat legitimate expectations of the petitioner that were objectively reasonable and central to petitioner's long-standing participation in the venture."); Pappas v. Fotinos, 911 N.Y.S.2d 694 (Sup. Ct. 2010) ("Oppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, or where an employee/shareholder is discharged without cause and, thus, is deprived of

his or her salary or when corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment."); Graydog Internet, Inc. v. Giller, 406 P.3d 45, 55 (Or. 2017) ("And, often, minority shareholders in closely held corporations are actively engaged in the business as directors, officers, or employees. That involvement in the firm can make them more vulnerable to abuse by the shareholder majority; it also means that shareholder disputes can result in 'serious harm' to the enterprise."); *cf.* Quinn v. Cardiovascular Physicians, P.C., 326 S.E.2d 460, 462–65 (Ga. 1985) (finding that a terminated shareholder was lawfully discharged without cause, but concluding that breaches of fiduciary duty may have occurred when the controlling shareholders paid themselves high salaries and bonuses after the discharge); Merola v. Exergen Corp., 668 N.E.2d 351, 354 (Mass. 1996) (acknowledging the employment at will rule but noting that "the termination of a minority shareholder's employment may present a situation where the majority interest has breached its fiduciary duty to the minority interest"); Landorf v. Glottstein, 500 N.Y.S.2d 494, 499 (Sup. Ct. 1986) (noting that a discharged shareholder was subject to termination without cause pursuant to the employment at will doctrine, but concluding that the termination may have given rise to a breach of fiduciary duty); McLaughlin v. Schenck, 220 P.3d 146, 158 n.5 (Utah 2009) ("The district court found that [the corporation], not Schenck [the majority shareholder], terminated McLaughlin's [the minority shareholder's] employment, and therefore, Schenck was not liable for any damages caused by terminating McLaughlin. This was incorrect. Schenck terminated McLaughlin as the president of [the corporation] and is liable if in doing so he breached a fiduciary duty, including his duty to discharge both his management and stockholder responsibilities in conformity with this strict good faith standard." (internal quotation omitted)).

In *Franchino v. Franchino*, 687 N.W.2d 620 (Mich. Ct. App. 2004), the court failed to recognize that a termination of employment could result in harm to a minority shareholder's investment. The court noted that the Michigan oppression statute defined "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." *Id.* at 627. The plaintiff had argued that "his removal from the board of directors and from his employment at [the corporation] constituted oppression of his rights as a shareholder because he received the bulk of his share of the corporate profits through his salary and expected to participate in [the corporation's] management." *Id.* After observing that some state oppression statutes explicitly protect shareholders in their capacities as shareholders, directors, officers, or employees, *see id.* at 628, the court concluded that the Michigan statute could not be given that broader interpretation:

> By contrast, Michigan's statute neither explicitly protects minority shareholders' interests as employees or directors, nor is it silent on the issue. Rather, the Legislature amended the statute to explicitly state that minority shareholders could bring suit for oppression only for conduct that "substantially interferes with the interests of the shareholder *as a shareholder*." MCL 450.1489(3) (emphasis added). To construe the statute in a way that allows plaintiff to sue for oppression of his interests as an employee and director would ignore the Legislature's decision to insert the phrase "as a shareholder" and render the phrase nugatory, which is contrary to a fundamental rule of statutory construction. Accordingly, we hold that the trial court correctly concluded that MCL 450.1489(3) does not allow shareholders to recover for harm suffered in their capacity as employees or board members.

Id. at 629 (citations omitted); *see id.* at 623 ("We conclude that MCL 450.1489 does not protect a shareholder from removal from the corporate board or guarantee his employment with the corporation. MCL 450.1489 only protects a shareholder's interest as a shareholder. Defendant's decision to fire plaintiff and remove him from the board of directors did not affect plaintiff's interests as a shareholder under MCL 450.1489."); *see* *also* MJC Ventures LLC v. Detroit Trading Co., 2:19-cv-13707, 2020 U.S. Dist. LEXIS 113545, at *11–12 (E.D. Mich. June 30, 2020) ("The Court is additionally persuaded by Defendants' argument that Plaintiffs cannot state a claim for shareholder oppression because they are not claiming to have suffered injury in their *capacity as shareholders*, but rather in Campbell's case as former officer and director and in MJC's case, a former business partner. … Plaintiffs … appear to take issue with Defendants' conduct largely in the context of Campbell's longstanding corporate leadership of Detroit Trading and the consulting work he has historically been compensated for via his company, MJC. But 'exclusion from corporate governance is not recognized as minority oppression under this statute.' Nor does Mich. Comp. Laws § 450.1489 permit shareholders to recover for harm suffered in their capacity as employees or board members.").

It should be noted that the Michigan statute at issue in *Franchino* was amended in 2006 to read, in relevant part, as follows: "As used in this section, 'willfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." MICH. STAT. § 450.1489(3).

For additional cases where the termination of a minority shareholder's employment did not result in a finding of oppression, see, for example, Merola v. Exergen Corp., 668 N.E.2d 351, 352, 354–55 (Mass. 1996); Willis v. Bydalek, 997 S.W.2d 798, 800–02 (Tex. App. 1999). *See also* *Merola*, 668 N.E.2d at 355 ("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."); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 266 (Tex. App. 2012) (stating that "Texas law does not recognize a minority shareholder's right to continued employment without an employment contract," and noting that "absent an employment contract, an expectation of continued employment at a certain level of compensation cannot be considered objectively reasonable"); Section 7.01[E][2] (citing cases where contracts permitted the termination of a shareholder's employment); *cf.* Haag Trucking Co. v. Haag, 896 N.E.2d 1207, 1217 (Ind. Ct. App. 2008) (stating that the fact that a minority shareholder resigned rather than being "voted or forced out of his position as Secretary/Treasurer" was evidence tending to show that the shareholder was not frozen out); Boatright v. A&H Technologies, Inc., 296 So. 3d 687, 694, 697 (Miss. 2020) (involving a majority shareholder (Chester) who removed the wife (Kelley) of the minority shareholder (William) from her officer position: "Concerning the freeze-out claim, the chancellor clearly erred when he found that Chester engaged in a freeze out of Kelley as well as William. Because Kelley is not a shareholder, she could not be frozen out. And Chester owed her no duties based on ownership interest in A&H. So we reverse and render the chancellor's freeze-out ruling to the extent it found Kelley too had been frozen out. That said, the evidence shows that both men derived a significant amount of compensation as owners through the employment income of their wives. Thus, there was no reversible error in the chancellor's considering Chester's actions toward Kelley as evidence of Chester's freeze

[2] Interfering with Management Participation

Denying a minority shareholder his participatory rights in the venture, such as by removing the minority from his officer and director positions in the company, is a fairly common act of oppression.[75] Although management participation is largely unimportant to investors in publicly held corporations, such participation is often vital to investors in closely held ventures.

A shareholder in a publicly held corporation typically plays a passive role in the management of the company. The vast majority of public corporation shareholders hold no director or officer positions with their respective firms. Corporation statutes do provide shareholders with the right to elect and remove directors,[76] as well as the right to vote on extraordinary matters (e.g., mergers, sales of assets).[77] Outside of these contexts, however, shareholders have little say in the management and day-to-day operation of the corporation.

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out of William."); Brenner v. Berkowitz, 634 A.2d 1019, 1033 (N.J. 1993) (rejecting a shareholder's argument that it was oppressive for the corporation to terminate the employment of her son and daughter-in-law); Argo Data, 380 S.W.3d at 258, 266 ("To the extent that Shagrithaya [the 47 percent shareholder and founder] specifically expected to be paid an equivalent salary to Martin [the 53 percent shareholder and founder] as they built the company together, and this expectation was central to his decision to join ARGO [the corporation] as a shareholder, his expectation was met for the first twenty-five years that he worked at the company. To the extent Shagrithaya expected, however, to maintain a level of compensation equal to Martin's indefinitely regardless of circumstances or his position in the company, we conclude that, without an agreement pertaining to compensation, such an expectation was not reasonable."); Allchin v. Chemic, Inc., 2002 Tex. App. LEXIS 5125 (July 18, 2002) (not designated for publication) (stating that an "employee who voluntarily leaves the employment of the corporation presents a less persuasive case for concluding the majority shareholders oppressed him"). For a discussion of the employment at will rule and its relationship to the shareholder oppression doctrine, see Section 7.01[B][3].

[75] *See, e.g.*, Kiriakides v. Atlas Food Sys. & Servs., Inc., 527 S.E.2d 371, 387 (S.C. Ct. App. 2000) (noting the "ubiquitous pattern of other [oppression] cases in which a minority shareholder's employment is terminated from a company, salary and benefits cease, and the shareholder is deprived of participation in management"); note 80 and accompanying text (citing cases); *see also* Pappas v. Fotinos, 911 N.Y.S.2d 694 (Sup. Ct. 2010) ("Oppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, or where an employee/shareholder is discharged without cause and, thus, is deprived of his or her salary or when corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment.").

[76] *See, e.g.*, DEL. CODE tit. 8, §§ 141(k) (removal of directors), 216 (election of directors); N.Y. BUS. CORP. LAW §§ 614(a), 703(a) (election of directors); 706 (removal of directors); Section 2.01[A][2] (discussing the board of directors).

[77] *See, e.g.*, DEL. CODE tit. 8, §§ 109(a) (shareholder vote on amending the bylaws); 242(b)(1) (shareholder vote on amending the certificate of incorporation); 251(c) (shareholder vote on mergers); 271(a) (shareholder vote on sales of all or substantially all assets); 275(b) (shareholder vote on voluntary dissolutions); N.Y. BUS. CORP. LAW §§ 803(a) (shareholder vote on amending the certificate of incorporation); 601(a) (shareholder vote on amending the bylaws); 903 (shareholder vote on mergers); 909 (shareholder vote on certain sales of assets); 1001 (shareholder vote on voluntary dissolutions); Section 2.01[A][2] (mentioning the voting rights of shareholders).

In contrast to the typical passive role of shareholders in publicly held corporations, shareholders in closely held corporations commonly expect to participate actively in the venture's management and operations.[78] Such shareholders usually expect to be directors and senior executives of the company, and they ordinarily would not have invested otherwise. The rationale for such expectations has been explained as follows:

> … [I]nvestors are also motivated to commit capital to a close corporation because of their desire for management participation as a director or officer of the company. Aside from the prestige and other intangibles associated with holding a director or officer position, a management role also presents an opportunity to effectively monitor the shareholder's investment.
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> Within a close corporation, such a monitoring ability is vitally important. After all, close corporation shareholders often invest a substantial portion of their life savings in the company and, as a consequence, they need some way of protecting their investment. Unfortunately, a mere shareholder has no say in routine corporate decisionmaking. Moreover, although shareholders have the statutory right to inspect a company's books and records with a proper purpose, that right is easily hindered by a majority shareholder intent on obstructing such an inspection. As a consequence, mere shareholders often lack both a voice in the company's decisionmaking process as well as access to information about the company's affairs. Because management has the ability to make corporate decisions and has access to corporate information, however, a management role provides a direct opportunity for a shareholder to effectively participate in and monitor the company's activities. Ideally, such an opportunity allows the shareholder to try and steer the business away from investment-threatening decisions.
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> Because of the importance of a monitoring ability in a close corporation, shareholders in such ventures expect that their investments entitle them to an active management role in the company … .[79]

Thus, a participatory role in management is important to the typical shareholder in a closely held corporation. When the controlling shareholder interferes with such a participatory role, the interference is often cited by courts as a factor that contributes to a finding of oppression.[80]

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[78] *See* note 2 and accompanying text.

[79] Douglas K. Moll, *Reasonable Expectations v. Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 B.C. L. REV. 989, 1015–16 (2001) (footnotes omitted).

[80] *See, e.g.*, McCallum v. Rosen's Diversified, Inc., 153 F.3d 701, 702–04 (8th Cir. 1998); Reserve Solutions Inc. v. Vernaglia, 438 F. Supp. 2d 280, 290 (S.D.N.Y. 2006); Minor v. Albright, 2001 U.S. Dist. LEXIS 19436 (N.D. Ill. Nov. 28, 2001); O'Donnel v. Marine Repair Servs., Inc., 530 F. Supp. 1199, 1203, 1208 (S.D.N.Y. 1982); W & W Equipment Co. v. Mink, 568 N.E.2d 564, 569, 577–78 (Ind. Ct. App. 1991); Brodie v. Jordan, 857 N.E.2d 1076, 1080 (Mass. 2006); Wilkes v. Springside Nursing Home, Inc.,

353 N.E.2d 657, 661–63 (Mass. 1976); Sawyer v. Curt & Co., 1991 Minn. App. LEXIS 117 (Feb. 12, 1991), *vacated by* Sawyer v. Curt & Co., 1991 Minn. LEXIS 842 (Minn. Aug. 2, 1991); Brenner v. Berkowitz, 634 A.2d 1019, 1024, 1033–34 (N.J. 1993); Hanley v. Hanley, 901348-19, 2019 WL 2509224, at *9 (N.Y. Sup. Ct. June 13, 2019); *In re* Topper, 433 N.Y.S.2d 359, 362 (Sup. Ct. 1980); Balvik v. Sylvester, 411 N.W.2d 383, 384–85, 388 (N.D. 1987); Gonzalez v. Greyhound Lines, Inc., 181 S.W.3d 386, 392 (Tex. App. 2005) (noting that the alleged oppressive acts included "wrongfully terminating Appellants from their management positions and … fraudulently mismanaging [the corporation] to their detriment"); *see also* Leslie v. Boston Software Collaborative, Inc., 2002 Mass. Super. LEXIS 57 (Feb. 12, 2002) (noting that "there was no demonstrated need to force [a minority shareholder] off the board of directors and thereby cut off his access and knowledge about the day-to-day affairs of the company," and ordering that the minority "be reinstated as a full voting member of the [corporation's] board of directors so that he may be as fully aware as that position reasonably permits about the management and operation of [the corporation], and so that he may constructively participate in that management insofar as a director may properly do so"); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) ("A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations … ."); Kassab v. Kasab, No. 711061/15, 2017 N.Y. Misc. LEXIS 2905, 2017 WL 3324804, at *10 (N.Y. Sup. Ct. Aug. 3, 2017) (stating that "[o]ppression may be found where the minority shareholder is excluded from the operation of the corporation"); Matter of Digeser v. Flach, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015) ("The Court finds that … respondent caused petitioner to be excluded from [the corporation] in almost every respect. Petitioner was removed from the board of directors, dismissed as corporate secretary, and given notice that his employment would be terminated. … The Court is satisfied that respondent's conduct in denying petitioner continued employment [and] freezing him out of the management and affairs of [the corporation] … all served to defeat legitimate expectations of the petitioner that were objectively reasonable and central to petitioner's long-standing participation in the venture."); Graydog Internet, Inc. v. Giller, 406 P.3d 45, 55 (Or. 2017) ("And, often, minority shareholders in closely held corporations are actively engaged in the business as directors, officers, or employees. That involvement in the firm can make them more vulnerable to abuse by the shareholder majority; it also means that shareholder disputes can result in 'serious harm' to the enterprise."). *But see* Haag Trucking Co. v. Haag, 896 N.E.2d 1207, 1217 (Ind. Ct. App. 2008) (stating that the fact that a minority shareholder resigned rather than being "voted or forced out of his position as Secretary/Treasurer" was evidence tending to show that the shareholder was not frozen out); Whitehorn v. Whitehorn Farms, Inc., 195 P.3d 836, 843–44 (Mont. 2008) (concluding that a shareholder who converted corporate property was justifiably removed as an officer, but also stating that "[a]ny expectation regarding his right to participate in the management has not been violated because he can, and has, participated as a shareholder in nominating and electing directors [and] he has been encouraged to do so by the Corporation"); Parker v. Parker, 2016 N.J. Super. Unpub. LEXIS 2720, at *56–57 (Ch. Div. Dec. 22, 2016) (rejecting "Defendant's claim that he was prevented from sharing in the decision making process of PIP as shareholder oppression": "Evidence has shown that both parties allowed each company to largely operate separately. Neither participated in the management of other party's company in any meaningful way for the better part of twenty-five years. Based upon this pattern of conduct, the court does not find that Defendant's reasonable expectation had been violated. Defendant cannot ignore PIP, effectively using it merely as a source of funds for years, then upon the commencement of this action, demand the right to participate in its management on his own terms.").

In *Franchino v. Franchino*, 687 N.W.2d 620 (Mich. Ct. App. 2004), the court failed to recognize that a denial of management participation could result in harm to a minority shareholder's investment. The court noted that the Michigan oppression statute defined "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." *Id.* at 627. The plaintiff had argued that "his removal from the board of directors and from his employment at [the corporation] constituted oppression of his rights as a shareholder because he received the bulk of his share of the corporate profits through his salary and expected to participate in [the corporation's] management." *Id.* After observing that some state oppression statutes explicitly protect shareholders in their capacities as shareholders, directors, officers, or employees,

[3] Interfering with Information Rights

Interference with the minority's participatory role in management is closely related to interference with the minority's access to information. Shareholders in both closely held and publicly held corporations desire information about a company's operations and financial performance. Corporation statutes generally provide that a shareholder can inspect a corporation's

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see id. at 628, the court concluded that the Michigan statute could not be given that broader interpretation:

> By contrast, Michigan's statute neither explicitly protects minority shareholders' interests as employees or directors, nor is it silent on the issue. Rather, the Legislature amended the statute to explicitly state that minority shareholders could bring suit for oppression only for conduct that "substantially interferes with the interests of the shareholder *as a shareholder*." MCL 450.1489(3) (emphasis added). To construe the statute in a way that allows plaintiff to sue for oppression of his interests as an employee and director would ignore the Legislature's decision to insert the phrase "as a shareholder" and render the phrase nugatory, which is contrary to a fundamental rule of statutory construction. Accordingly, we hold that the trial court correctly concluded that MCL 450.1489(3) does not allow shareholders to recover for harm suffered in their capacity as employees or board members.

Id. at 629 (citations omitted); *see id.* at 623 ("We conclude that MCL 450.1489 does not protect a shareholder from removal from the corporate board or guarantee his employment with the corporation. MCL 450.1489 only protects a shareholder's interest as a shareholder. Defendant's decision to fire plaintiff and remove him from the board of directors did not affect plaintiff's interests as a shareholder under MCL 450.1489."); *see also* MJC Ventures LLC v. Detroit Trading Co., 2:19-cv-13707, 2020 U.S. Dist. LEXIS 113545, at *11–12 (E.D. Mich. June 30, 2020) ("The Court is additionally persuaded by Defendants' argument that Plaintiffs cannot state a claim for shareholder oppression because they are not claiming to have suffered injury in their *capacity as shareholders*, but rather in Campbell's case as former officer and director and in MJC's case, a former business partner. … Plaintiffs … appear to take issue with Defendants' conduct largely in the context of Campbell's longstanding corporate leadership of Detroit Trading and the consulting work he has historically been compensated for via his company, MJC. But 'exclusion from corporate governance is not recognized as minority oppression under this statute.' Nor does Mich. Comp. Laws § 450.1489 permit shareholders to recover for harm suffered in their capacity as employees or board members.").
It should be noted that the Michigan statute at issue in Franchino was amended in 2006 to read, in relevant part, as follows: "As used in this section, 'willfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." MICH. STAT. § 450.1489(3).

books and records with a proper purpose.[81] Moreover, in publicly held corporations, federal disclosure requirements provide a wealth of information about a company's operations and performance.[82]

In closely held corporations, oppressive conduct often involves the denial of access to information.[83] Denying or restricting a minority shareholder's access to corporate records makes

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[81] *See, e.g.*, DEL. CODE tit. 8, § 220(b); N.Y. BUS. CORP. LAW § 624; *see also* Cotten v. Weatherford Bancshares, Inc., 187 S.W.3d 687, 697 (Tex. App. 2006) (concluding that a preferred shareholder had the statutory right to inspect documents of his corporation and of direct and indirect subsidiaries of his corporation: "Cotten, a preferred shareholder in WBI, is an equitable owner of First Weatherford Bancshares because WBI is the owner of all the stock in First Weatherford Bancshares. Cotten, therefore, is also an equitable owner of the Bank because First Weatherford Bancshares is the owner of 99.3 percent of the Bank. Thus, Cotten has a statutory right to inspect documents of WBI, First Weatherford Bancshares, and the Bank.").

[82] *See, e.g.*, 15 U.S.C. § 78a, Securities Exch. Act of 1934 § 13(a) (requiring periodic disclosures); 17 C.F.R. § 240.01, Rules 13a-1 (requiring annual reports), 13a-11 (requiring "current reports" in specified circumstances on Form 8-K), 13a-13 (requiring quarterly reports). Some state statutes also mandate periodic disclosures for all corporations, including closely held companies. *See, e.g.*, ALA. CODE § 10-2B-16.20(a) (requiring a corporation to "furnish [to] its shareholders annual financial statements … that include a balance sheet … an income statement … and a statement of changes in shareholders' equity for the year … ."); FLA. STAT. § 607.1620(1) (substantially the same, although noting that the disclosure requirement may be "modified by resolution of the shareholders within 120 days of the close of each fiscal year").

[83] *See, e.g.*, Manbourne, Inc. v. Conrad, 796 F.2d 884, 886, 889–90 (7th Cir. 1986) (concluding that directors breached their fiduciary duty to a stockholder by denying his rights as a shareholder, including his right to inspect the corporation's records and stockholder list); Kaplan v. First Hartford Corp., 484 F. Supp. 2d 131, 148, 151–52 (D. Me. 2007) (finding oppression based in part on the denial of a minority shareholder's "legitimate request for a stockholder list"); Brodie v. Jordan, 857 N.E.2d 1076, 1080 (Mass. 2006) (noting that the trial court's finding of oppression was based in part on "denying [the plaintiff] access to company information"); Baker v. Baker, 2011 Neb. App. LEXIS 108 (Aug. 9, 2011) (affirming that the majority shareholder's "failure to provide financial statements to plaintiffs … fails to comply with [Nebraska's statutory requirement that corporations provide their shareholders with annual financial statements] and creates an issue of fact as to whether defendants have engaged in oppressive conduct"); Leech v. Leech, 762 A.2d 718, 720 (Pa. Super. Ct. 2000) (affirming the appointment of a custodian as a result of oppressive conduct, including interference with the appellee's access to information); ARC Mfg. Co. v. Konrad, 467 A.2d 1133, 1135, 1137–38 (Pa. Super. Ct. 1983) (affirming the appointment of a custodian based on various acts of misconduct by two shareholder-directors, including their attempts to "exclude [a minority shareholder] entirely from access to the business records of the corporation and from participation in meaningful decisions involving the corporate affairs"); Cardiac Perfusion Servs. v. Hughes, 380 S.W.3d 198, 201 (Tex. App. 2012) (finding oppression based in part on a jury finding that a 90 percent shareholder "refused to let [the 10 percent shareholder] examine [the company's] books and records"); *see also* Bulacher v. Enowa, L.L.C., 2010 U.S. Dist. LEXIS 27784 (N.D. Tex. Mar. 23, 2010) (concluding that allegations that the termination of a minority shareholder "was intended to, among other things, prohibit his access to critical financial and/or business information related to the company" were, along with other allegations, sufficient to state a claim for shareholder oppression under Texas law); *In re* Trockman, 2012 Tex. App. LEXIS 1341 (Feb. 21, 2012) (stating that Texas courts have "acknowledged that within those [oppression] categories can fall conduct resulting in the denial of access to corporate records, or in the denial of voting privileges"); Ritchie v. Rupe, 339 S.W.3d 275 (Tex. App. 2011) (noting that the trial court concluded that the appellants acted oppressively by, among other actions, "causing [the corporation] to withhold corporate books and records" from the plaintiff minority shareholder), *rev'd*, 443 S.W.3d 856 (Tex. 2014); Gibney v. Culver, 2008 Tex. App. LEXIS 2954 (Apr. 24, 2008) ("Gibney alleged throughout the trial and on appeal that Roy maliciously or wrongfully denied him access to the books and records of

Micro-Blend. If true, this action would most certainly be construed as 'burdensome, harsh, or wrongful conduct; a lack of probity and fair dealing in the company's affairs to the prejudice of some members; or a visible departure from the standards of fair dealing and a violation of fair play on which each shareholder is entitled to rely.' " (citation omitted)); Redmon v. Griffith, 202 S.W.3d 225, 236 (Tex. App. 2006) ("Evidence concerning the use of corporate funds to pay personal expenses combined with evidence that [plaintiff] was denied access to information concerning the financial condition of the corporation sufficiently creates a material fact issue concerning whether there was a lack of probity and fair dealing in the company's affairs to the prejudice of the [plaintiffs] or otherwise, a visible departure from the standards of fair dealing, and a violation of fair play on which minority shareholders like the [plaintiffs] were entitled to rely."); *cf.* McCallum v. Rosen's Diversified, Inc., 153 F.3d 701, 703–04 (8th Cir. 1998) (granting a petition for a buyout that alleged, among other grounds, that a minority shareholder had been "denied … access to company books, records, and financial information"); Leslie v. Boston Software Collaborative, Inc., 2002 Mass. Super. LEXIS 57 (Feb. 12, 2002) (noting that "there was no demonstrated need to force [a minority shareholder] off the board of directors and thereby cut off his access and knowledge about the day-to-day affairs of the company"); Duncan v. Lichtenberger, 671 S.W.2d 948, 950–51 (Tex. App. 1984) (involving a majority shareholder who prevented minority shareholders from returning to the corporation's premises and who subsequently failed to notify them of any shareholders' meetings or directors' meetings). *But see* Parker v. Parker, 2016 N.J. Super. Unpub. LEXIS 2720, at *52 (Ch. Div. Dec. 22, 2016) ("Defendant alleges that he was oppressed because he was denied access to the books and records of PIP and was additionally denied access to employees by Plaintiff. Defendant has characterized Plaintiff's actions as an attempt to intentionally and systematically keep information from him and ridicule him in front of PIP employees. The court does not find that Plaintiff systematically kept information from Defendant, rather for a vast majority of the past twenty-five years the parties were content with allowing each brother to independently run their business. This is not shareholder oppression as both brothers agreed to the arrangement."); *id.* at 56 ("A controlling shareholder in a close corporation has an expectation of access to documents, records and employees but Defendant's methods when he was seeking information about PIP and the DreamWorks agreement went far beyond reasonable.").

A shareholder's information rights are even stronger if the shareholder also serves on the board of directors. *See, e.g.*, Kalisman v. Friedman, 2013 Del. Ch. LEXIS 100 (Apr. 17, 2013) ("A director's right to information is essentially unfettered in nature. The right includes equal access to board information. A company cannot pick and choose which directors will receive [which] information.") (internal quotations omitted); *id.* at *4–5 ("The director's right to information extends to privileged material. As a general rule, a corporation cannot assert the privilege to deny a director access to legal advice furnished to the board during the director's tenure. … [A] board or a committee can withhold privileged information once sufficient adversity exists between the director and the corporation such that the director could no longer have a reasonable expectation that he was a client of the board's counsel.") (internal quotation omitted); *id.* at *5 ("Fear that a director may abuse his position as a director and make information available to persons hostile to the [c]orporation or otherwise not entitled to it does not provide grounds for the corporation to refuse to provide the information." (internal quotation omitted)); *id.* at *6 ("The defendants also argue that Kalisman [a director] will share the information with [a shareholder]. When a director serves as the designee of a stockholder on the board, and when it is understood that the director acts as the stockholder's representative, then the stockholder is generally entitled to the same information as the director."); *see also* Gilmore v. Turvo, Inc., C.A. No. 2019-0472-JRS, 2019 Del. Ch. LEXIS 316, 2019 WL 3937606, at *2-3 (Del. Ch. Aug. 19, 2019) ("As a general matter, a Delaware corporation 'cannot assert the privilege to deny a director access to legal advice furnished to the board during the director's tenure.' … But there is an important condition to Mr. Gilmore's [a director's] purported entitlement: that Latham's legal advice be 'furnished *to the board*.' … In each of the decisions Mr. Gilmore cites in support of his claim that he is entitled to access otherwise privileged information, the courts made clear in the privilege analysis that the counsel from whom privileged information was sought represented the board. In other words, the courts made clear that the director seeking the privileged information had a reasonable expectation that the attorney(s) in question were representing all members of the board. Mr. Gilmore fails to make that showing here." (footnotes omitted)); Schnatter v. Papa John's International, Inc., 2019 Del. Ch. LEXIS 18, at *31–*32 (Del. Ch. Jan. 15, 2019) ("[T]here are fundamental differences between inspection demands made by it more difficult for the minority to determine, for example, whether the corporation can pay reasonable dividends, or whether the controlling shareholder is receiving excessive compensation or other benefits. Further, denying access to financial records makes it difficult for the minority to accurately value his stock in the event that the controlling shareholder (or a third party) offers to purchase the minority's shares.

[4] Suppressing Dividends

The suppression of dividends is a common act of oppression in closely held corporations.[84] In a publicly held corporation, the value of an investor's stockholdings is largely unaffected by dividend decisions. Economic theory suggests that any decision to retain earnings within the company rather than to pay dividends will have a positive effect on the overall value of the firm—an effect which translates into an increase in the value of the company's shares. Assuming that retained funds are reinvested at the firm's cost of capital,[85] the theory suggests that a minority shareholder of a publicly held corporation is largely indifferent as to whether dividends are declared or not (ignoring taxes and transaction costs).[86] If a dividend of one dollar

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stockholders and those made by directors. A stockholder seeking to inspect books and records (other than a stock ledger or list of stockholders) not only bears the burden of proving that her demand is proper, *i.e.*, reasonably related to her interests as a stockholder, but also must demonstrate that the documents she seeks are '*necessary and essential* to satisfy [her] stated purpose.' … By contrast, a director 'who has a proper purpose is entitled to virtually unfettered access to the books and records of the corporation,' and it is the corporation's burden to prove that the director's purpose is improper, *i.e.*, not 'reasonably related to the director's position as a director.' "); *id.* at *36 (" 'If [a director's] inspection of [a corporation's] records is to effectuate its purpose of enabling him to determine whether management wrongdoing has occurred, his access to [the corporation's] records must necessarily be broad and unrestricted.' At the same time, even a director 'must direct the Court to specific books and records related to the [director's] proper purpose. Without such direction, the Court is unable to direct production of an appropriate set of documents, and unwilling to burden the corporation to search for the same.' "); *id.* at *44 ("It is well-established under Delaware law that, subject to certain recognized limitations, a 'director's right to information extends to privileged material.' "). *See generally id.* at *44 (discussing numerous issues related to a director's demand to inspect company books and records, including whether directors have to produce their text messages and private emails relating to the issues in contention, the impact of a director filing a plenary action before a final ruling in the director's § 220 case, and whether a director should be required to sign a confidentiality agreement as a condition to obtaining records).

[84] *See* note 93 and accompanying text (citing cases).

[85] *See generally* Douglas K. Moll, *Shareholder Oppression & Dividend Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841, 894–99 (2003) (discussing a firm's cost of capital); *id.* at 897 (observing that a particular company's cost of capital "signifies the minimum return on financial capital that shareholders demand for the risk of investing in that company's line of business," and similarly noting that "it is the return that shareholders could get themselves, on a risk-adjusted basis, by investing elsewhere").

[86] The theory, often referred to as the "irrelevance proposition," is developed in a classic article by Merton H. Miller & Frank Modigliani, *Dividend Policy, Growth, and Valuation of Shares*, 34 J. BUS. 411 (1961). The irrelevance proposition states that a dollar of retained earnings "adds a dollar to the value of the enterprise and, if reinvested at the company's current rate of return, is worth the same to investors whether paid out to them for reinvestment or retained by management for reinvestment." Victor Brudney, *Dividends, Discretion, and Disclosure*, 66 VA. L. REV. 85, 87 n.4 (1980); *id.* at 87 (stating that the irrelevance proposition assumes "a world in which information flows freely and that is free of taxes, transaction costs, and institutional imperfections").

Taxes, of course, might affect a shareholder's preference for dividends versus reinvestment. Presently, qualifying dividends are taxed immediately at a 15 percent maximum rate. Long-term capital gains that are generated from profitable reinvestment are also taxed at a 15 percent maximum rate, but only when the stock is sold. This difference in timing may be significant to an investor. Moreover, if the tax rates for per share is paid, a minority shareholder is enriched by one dollar per share. If that same amount is instead retained in the company, the company's value increases by one dollar per share and, correspondingly, the value of the minority's stock increases by one dollar per share.[87] By selling the stock, the minority can capture that increase in value. The minority's wealth, in other words, increases by one dollar per share regardless of whether a payout or reinvestment decision is made, as the dollar takes the form of either a cash dividend or stock appreciation.[88]

The choice between paying dividends and reinvesting profits has much more stark economic effects in the closely held corporation. In the closely held setting, the theory of "dividend irrelevance"[89] is harder to accept, as there is no liquid market that allows for the realization of capital appreciation.[90] When funds are retained and reinvested in the company rather than paid out as dividends, the minority has little ability to capture the increased value of his shares, as it is difficult to find a willing purchaser of a minority interest in a closely held corporation.[91] For the minority shareholder to receive a return on investment, therefore, dividends are needed, as capital appreciation is difficult to realize.[92] Presumably for these reasons, the wrongful suppression of dividends is a common ground upon which the courts grant oppression relief.[93]

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dividends and capital gains become unequal in the future, that difference in rates may also be significant. (Unless extended, the current 15 percent rates for dividends and long-term capital gains are set to expire at the end of 2010). *See, e.g.*, Brudney, *supra* note 86, at 91. Finally, whereas an investor does not personally incur any transaction costs when a dividend is received, an investor does incur transaction costs (e.g., broker fees) when shares are sold to realize capital gains. *See id.* at 92 & n.19.

[87] Once again, this assumes that the retained funds are reinvested at the firm's cost of capital. *See* WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 372–73 (8th ed. 2002) (discussing a reinvestment hypothetical); notes 85–86 and accompanying text (discussing the irrelevance proposition).

[88] *See, e.g.*, Brudney, *supra* note 86, at 86–87; *see also* Daniel R. Fischel, *The Law and Economics of Dividend Policy*, 67 VA. L. REV. 699, 702 (1981) ("The irrelevance proposition assumes that once a firm's investment policy is known, shareholders are indifferent as to a dividend payout or retention.").

[89] *See* notes 86–88 and accompanying text (discussing the irrelevance proposition).

[90] *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 36, at 230–31 (noting that "the lack of an active market in shares" prohibits close corporation shareholders from creating "homemade dividends" by selling stock); note 14 and accompanying text (noting that there is no market for the stock of a closely held corporation).

[91] *See* note 15 and accompanying text (observing that outsiders are rarely interested in a minority ownership position in a closely held corporation).

[92] *See* notes 90–91 and accompanying text.

[93] *See, e.g.*, Crowley v. Communications for Hosps., Inc., 573 N.E.2d 996, 1006 (Mass. App. Ct. 1991); Miller v. Magline, Inc., 256 N.W.2d 761, 770–74 (Mich. Ct. App. 1977); Fox v. 7L Bar Ranch, 645 P.2d 929, 934–35 (Mont. 1982); Hirschkorn v. Severson, 319 N.W.2d 475, 479–80 (N.D. 1982); Naito v. Naito, 35 P.3d 1068, 1080–82 (Or. Ct. App. 2001); Patton v. Nicholas, 279 S.W.2d 848, 853–54 (Tex. 1955); *see also* Litle v. Waters, 1992 Del. Ch. LEXIS 25 (Feb. 11, 1992) ("[T]his failure to pay dividends can be especially devastating in a Subchapter S [closely held] corporation setting, as this case is, since the corporation passes its income through to its shareholders even though the corporation has not made any distributions to the shareholders."); *id.* ("Ultimately, plaintiff's allegations … set forth a classic squeeze out situation: the squeezing out of a minority shareholder by failing to pay dividends."); Franks v. Franks, 944 N.W.2d 388, 407 (Mich. Ct. App. 2019) ("In the absence of evidence to justify the $62 per share offer or to establish a legitimate business reason for refusing to pay dividends despite the company's ability to pay and historical practices, the evidence cited by plaintiffs established that defendants collectively took acts that substantially interfered with plaintiffs' interests as shareholders—their right to receive reasonable dividend payments or to sell their shares at a fair value—and that they did so with the intent to substantially interfere

with those shareholder rights."); Schimke v. Liquid Dustlayer, Inc., 2009 Mich. App. LEXIS 1954 (Sept. 24, 2009) ("[T]he evidence showed that Rademaker [the majority shareholder] offered plaintiff approximately one third of what Rademaker was demanding for his shares, and Rademaker had voting control of Liquid Dustlayer. In the meantime, Rademaker … remained steadfast in refusing to pay dividends, despite Liquid Dustlayer's substantial cash reserves, essentially preventing plaintiff from receiving any benefit whatsoever from his nearly one-third ownership of Liquid Dustlayer. The trial court did not clearly err in finding that defendants engaged in 'willfully unfair and oppressive conduct,' entitling plaintiff to relief under § 489 [the Michigan oppression statute]."); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 268 (Tex. App. 2012) ("We first note that, although [the minority shareholder] asserted 'malicious suppression of dividends' as a separate cause of action, this claim is merely a form of minority shareholder oppression and must be analyzed as such."); Cardiac Perfusion Servs. v. Hughes, 380 S.W.3d 198, 201 (Tex. App. 2012) (concluding that oppression had occurred based in part on a jury finding that the 90 percent shareholder "suppressed payment of profit distributions" to the 10 percent shareholder); Redmon v. Griffith, 202 S.W.3d 225, 235 (Tex. App. 2006) (stating that allegations of malicious suppression of dividends, using corporate funds for personal purposes, and " 'squeeze out' techniques such as diverting corporate opportunities, excessive payment of dividends … and attempts to deprive the [plaintiffs] of the fair value of their shares and of the benefits thereof" would, if true, demonstrate a claim for shareholder oppression); *cf.* Baur v. Baur Farms, Inc., 832 N.W.2d 663, 674 (Iowa 2013) ("We hold that majority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value."); *id.* ("Jack has not worked for and has drawn no salary from BFI for approximately fifty years. He—like the other BFI directors—received $5000 per year for his service as an officer and member of the corporate board prior to 1997. But in 1997, Jack was removed as an officer and the annual compensation for his service and that of the other directors was reduced to $250. Over the nearly twenty years as Jack negotiated unsuccessfully for the sale of his shares, the appraised value of BFI's assets increased between fivefold and sevenfold to approximately $6 million. BFI, however, has never paid a dividend and, given the nature of its business and the variability of its cash flow, might never do so."); Advance Marine, Inc. v. Kelley, 1991 Tex. App. LEXIS 1614 (June 27, 1991) ("While the refusal to declare dividends can certainly, in some instances, provide insight into whether minority shareholders are being oppressed, Plaintiffs provide *no* evidence or support for the proposition that they had a right—as a matter of law—to have dividends declared in this case or that [the company's] refusal to declare such dividends is actually an indication of oppression."); Whitehorn v. Whitehorn Farms, Inc., 195 P.3d 836, 842 (Mont. 2008) ("While failing to issue dividends to shareholders could be an oppressive tactic, the mere non-issuance of dividends is not oppressive in all circumstances. Here, the District Court concluded that neither Brian nor Earl had any capital investment—having received their shares as gifts—which would lead to an expectation of profits, and that [o]nly their employment by the farm caused them to receive the full benefits as employees and officers, just the same as they saw received by their father and uncle. Brian does not directly challenge the District Court's conclusion that the termination of his employment was justified and thus, without other evidence of oppressive intent, the Corporation's failure to pay dividends is insufficient to establish oppression." (internal quotation omitted)).

Disputes involving de facto dividends are relatively easy to resolve, as the appropriation of a disproportionate amount of a company's profit is clearly unlawful. *See* Section 7.01[C][5] (discussing de facto dividends); note 100. When de facto dividends are not involved, however, dividend disputes are much more complicated. For example, when a company has earned profits for a period of time without distributing them to anyone, when, if ever, should a minority shareholder be able to force a dividend? Put differently, if all shareholders are being treated equally—i.e., if no one is receiving a disproportionate amount of the company's profits—when (if ever) is it reasonable for the minority shareholder to expect a dividend? *Cf.* Baur v. Baur Farms, Inc., 832 N.W.2d 663, 671 (Iowa 2013) ("Courts applying the reasonable expectations standard have granted relief when the effect of a majority shareholder's conduct is to deprive a minority shareholder of any return on shareholder equity."); *id.* at 673 ("We read these statutory provisions as extensions of the principle that every shareholder may reasonably expect to share proportionally in a corporation's gains. When this reasonable expectation is frustrated, a shareholder-

[5] Appropriating a Disproportionate Share of the Corporation's Income; De Facto Dividends

In any corporation with a controlling stockholder, the minority shareholders are at risk that the controlling stockholder will seek to appropriate a disproportionate share of the corporation's income stream. Not surprisingly, a number of shareholder oppression disputes involve such misconduct. The disputes typically arise when the controlling stockholder is receiving de facto dividends but is denying a minority investor his proportionate share.

In the closely held setting, the most common example of improper appropriation involves the payment of excessive compensation to the controlling stockholder. As mentioned, when calculating a corporation's taxable income, the corporation can deduct reasonable compensation paid to its employees, but it cannot deduct dividends paid to its shareholders.[94] To decrease the amount of income tax that a company pays, therefore, a closely held corporation will often distribute its earnings to shareholders in the form of employment-related compensation, rather than in the form of dividends.[95] Many closely held corporations, in other words, distribute profit to shareholders not as "true" dividends but as "de facto" dividends—i.e., dividends disguised, for tax purposes, as employment-related compensation. A de facto dividend, however, is still a dividend, and, like all dividends, it should ordinarily be paid on an equivalent per-share basis.[96]

In theory, the compensation paid to an employee of a corporation should be no more than the reasonable value of the labor provided by the employee. When a corporation pays a

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oppression claim may arise."); Kassab v. Kasab, No. 711061/15, 2017 N.Y. Misc. LEXIS 2905, 2017 WL 3324804, at *10 (N.Y. Sup. Ct. Aug. 3, 2017) ("A finding of oppression also 'may be based on the complaining shareholder's frustrated expectations in such matters as … a share in the profits and management of the corporation, such that [he or] she feels that the other shareholders have deprived [him or] her of a reasonable return on [his or] her investment' "); Matter of Digeser v. Flach, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015) (mentioning "petitioner's reasonable expectation of deriving at least some economic benefit from his stock ownership"). *But see* Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 270 (Tex. App. 2012) ("With respect to general expectations, a shareholder may generally expect to share proportionately in the company's earnings, but a shareholder has no general expectation of receiving a dividend. … [A] shareholder's general reasonable expectations are limited to sharing in the company's earnings through an appreciation in the value of his shares or receiving a proportional share of any dividend the board of directors may choose to issue."). *See generally* Moll, *supra* note 85, at 893–923 (arguing that an expectation of dividends should be deemed reasonable when the majority attempts to reinvest the company's profits in projects that provide below "cost of capital" returns—i.e., projects with expected rates of return that are insufficient given their levels of risk).

[94] *See* note 10 and accompanying text (discussing the tax incentive to distribute profits as compensation rather than as dividends).

[95] *See* note 10 and accompanying text (discussing the tax incentive to distribute profits as compensation rather than as dividends).

[96] *See, e.g.*, Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 277 (Alaska 1980) ("Courts have not allowed the form of the transaction to prevent tax liability when the transaction is in substance a distribution of dividends. We think a similar analysis should apply to payments which exclude some shareholders in a closely held corporation. Such transactions should be examined to determine whether they are in fact a distribution of dividends, and if so the excluded shareholder must participate equally in the payments received by other shareholders."); Leslie v. Boston Software Collaborative, Inc., 2002 Mass. Super. LEXIS 57 (Feb. 12, 2002) ("What must not be done is to make payments only to the majority shareholders, payments having different names or styles but being in reality dividends."); note 56 and accompanying text (discussing non-uniform declarations of dividends). For a definition of "dividend," see note 1.

shareholder-employee more than the reasonable value of the employee's labor, the compensation paid actually reflects two components: (1) an amount for the value of the labor provided by the employee; and (2) an extra amount that represents a distribution of corporate profit to the shareholder—i.e., a de facto dividend.[97] So long as all of the stockholders are receiving their proportionate share of any de facto dividends, the presence of such dividends is largely unobjectionable.[98] When a controlling shareholder receives de facto dividends but fails to pay the minority investor his proportionate share, however, the controlling shareholder is paying a dividend only to himself. (This often happens when the controlling shareholder terminates the employment of a minority shareholder in a corporation where profits are distributed solely via salary).[99] As mentioned, such a non-uniform declaration of dividends is impermissible under traditional corporate law principles.[100] Similarly, a number of courts have found (or at least

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[97] *See, e.g.*, Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 277 (Alaska 1980) ("There was evidence … that the corporation paid Stefano, Gillam and Crow 'director's fees.' Gillam received a substantial salary. The corporation apparently paid some of the personal expenses of the directors' wives. Regardless of how the corporation labels these expenditures, if they were not made for the reasonable value of services rendered to the corporation, some portion of these payments might be characterized as constructive dividends."); Ferber v. Am. Lamp Corp., 469 A.2d 1046, 1049 (Pa. 1983) (distinguishing between salary payments that reflected "reasonable compensation," and "excess" salary payments that "shall be treated as profits"); *see also* Leslie v. Boston Software Collaborative, Inc., 2002 Mass. Super. LEXIS 57 (Feb. 12, 2002) ("[T]his Court concludes that the $45,000 'employee bonus' payments that [the controlling shareholders] awarded themselves … are nothing more than distributions or dividends of the kind previously made to shareholders.").
Determining whether a shareholder-employee's compensation includes a "de facto" dividend—i.e., determining whether a shareholder-employee is receiving more than the reasonable value of his labor—is a difficult task. The inquiry is functionally the same as the inquiry into the fairness or reasonableness of executive compensation. *See* Section 6.04[A] (discussing the factors considered by courts in executive compensation challenges).

[98] While perhaps unobjectionable to the shareholders, such de facto dividends are objectionable to the Internal Revenue Service. The IRS often sues to disallow the deduction of "unreasonable" amounts of compensation. *See* Sections 6.04, 6.04[A] (discussing IRS inquiries into the reasonableness of compensation). When the IRS is successful, the amount of compensation that exceeds a "reasonable" amount is treated as a dividend and is not deductible from the corporation's income.

[99] *See* note 55 and accompanying text (observing that when profits are distributed via salaries to shareholders, the loss of a salary may be the functional equivalent of the denial of participation in dividends).

[100] *See* note 56 (discussing the need to pay dividends on an equivalent per-share basis).
Indeed, at some level, disputes involving de facto dividends are relatively easy to resolve. After all, these disputes typically involve a majority shareholder who takes a disproportionate amount of the company's profit. Such conduct, simply put, is clearly unlawful, and it can be characterized as unlawful in a number of different ways—e.g., fraud on the minority investors, bad faith to the minority investors, an illegal dividend to the majority, or plain and simple theft by the majority. *See, e.g.*, Peeples, *supra* note 37, at 471 n.118 ("If only certain shareholders received dividends, the business judgment rule would not bar a court from granting relief to the excluded shareholders. … Such conduct would presumably lack the 'rational basis' required for the invocation of the business judgment rule. It would also strongly indicate [a] lack of good faith."); *see also* *In re* White, 429 B.R. 201, 214 (Bankr. S.D. Tex. 2010) ("The Court has concluded that the dividends were disguised dividends in derogation of federal tax law. In that sense, they were illegal."). Thus, keep in mind that the existence of an oppression doctrine is not needed to trigger liability in de facto dividend disputes. If dividends are being distributed in a disproportionate manner, such conduct is antithetical to the pro rata nature of a dividend and is illegal under traditional corporate law principles. The oppression doctrine may still be needed, however, for remedial purposes. *See* Sections 8.01–8.02 (discussing the remedies, including a buyout, that are typically available under the oppression doctrine.

suggested) that such a disproportionate distribution of income was oppressive.[101]

[101] *See, e.g.*, Kaplan v. First Hartford Corp., 484 F. Supp. 2d 131, 149, 151–52 (D. Me. 2007) (finding oppression based in part on improper payments to the controlling shareholder's daughters and other family members, and an excessive bonus to the controlling shareholder himself); *In re* White, 429 B.R. 201, 209–10, 213–14 (Bankr. S.D. Tex. 2010) (concluding that bonuses paid to shareholder-employees "in exactly the same proportion as share ownership" were disguised dividends that were oppressively denied to the terminated plaintiff minority shareholder); *id.* at 210 (reaching the conclusion that bonus payments paid in proportion to share ownership were disguised dividends even though (1) there were some bonuses paid to non-shareholder-employees, and (2) the shareholder-employees were paid substantially lower salaries than comparable employees at competitor firms); Alaska Plastics v. Coppock, 621 P.2d 270, 277 (Alaska 1980) ("Courts have not allowed the form of the transaction to prevent tax liability when the transaction is in substance a distribution of dividends. We think a similar analysis should apply to payments which exclude some shareholders in a closely held corporation. Such transactions should be examined to determine whether they are in fact a distribution of dividends, and if so the excluded shareholder must participate equally in the payments received by other shareholders."); Leslie v. Boston Software Collaborative, Inc., 2002 Mass. Super. LEXIS 57 (Feb. 12, 2002) ("[T]his Court concludes that the $45,000 'employee bonus' payments that [the controlling shareholders] awarded themselves … are nothing more than distributions or dividends of the kind previously made to shareholders. Consequently, Leslie [a minority shareholder] is entitled to an equal payment. … Also, hereafter any payments made to [the controlling shareholders] that are not the functional equivalent of salary for work actually performed, as opposed to net profits of [the corporation] … should be made in an equal amount, and at the same time, to Leslie."); Erdman v. Yolles, 233 N.W.2d 667, 668–69 (Mich. Ct. App. 1975) (concluding, in a dispute involving a minority shareholder who quit his employment with the company, that "profits of the corporation were distributed through salary increases and that … plaintiff was improperly denied his 1/4 share"); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1180–81 (N.Y. 1984) (observing that the corporation "had a long-standing policy of awarding de facto dividends based on stock ownership in the form of 'extra compensation bonuses,' " and concluding that it was oppressive when this policy was changed to exclude the petitioning minority shareholders: "Extra compensation was still awarded by the company. The only difference was that stock ownership was no longer a basis for the payments; it was asserted that the basis became services rendered to the corporation. 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 return on their investment through the mere recharacterization of distributions of corporate income."); Straka v. Arcara Zucarelli Lenda & Assocs. CPAs, P.C., 92 N.Y.S.3d 567, 573 (Sup. Ct. 2019) ("This court also finds that Straka's reasonable expectation for fair compensation was frustrated by the use of the earnings matrix, particularly by allocating expenses of [two employees] to all four shareholders while allocating their revenues only to [two of the four shareholders]. Also, Straka demonstrated that the earnings matrix was used to allocate corporate profits as salaries to the remaining shareholders as opposed to dividends. 'When the majority shareholders of a close corporation award *de facto* dividends to all shareholders except a class of minority shareholders, such a policy may constitute 'oppressive actions' and serve as a basis for an order made pursuant to section 1104-a of the Business Corporation Law dissolving the corporation.' "); Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1020–22 (Sup. Ct. 1984) (acknowledging that the corporation distributed all of its income in the form of salary rather than dividends, and concluding, with respect to a justifiably-terminated minority shareholder, that the "other shareholders need not allow [the minority] to return to employment with the corporation, but they must [through dividends or a buyout of his shares] allow him to share in the profits"); Ferber v. Am. Lamp Corp., 469 A.2d 1046, 1049 (Pa. 1983) ("When the trial court has determined an amount that would have been reasonable compensation for Harry, Isadore, and Joseph's services to the corporations, if amounts in excess of that amount, either in salaries or other benefits were paid, those excess amounts shall be treated as profits which were distributed to the three brothers and shall be used, along with other excess payments (i.e., auto, boat and entertainment payments which have already been determined to be non-business related), to calculate the amount which is to be distributed to Ms. Ferber as her share of profits."); Cardiac Perfusion Servs. v. Hughes, 380 S.W.3d 198, 201 (Tex. App. 2012) (finding oppression based in part on a jury finding that a 90 percent shareholder "paid himself excessive compensation from … corporate funds" and "improperly paid his family members using

[company] funds"); Davis v. Sheerin, 754 S.W.2d 375, 378, 382–83 (Tex. App. 1988) (upholding a trial court award of damages for "informal dividends" that the majority received to the exclusion of the minority); *see also* Boatright v. A&H Technologies, Inc., 296 So. 3d 687, 697–98 (Miss. 2020) ("Turning to William's [the minority shareholder's] freeze-out claim, '[i]n its most classic form, a freeze-out of the minority shareholders by the majority occurs when the majority purposefully denies the minority member from sharing proportionally in corporate earnings or gains.' On cross-appeal, Chester [the majority shareholder] argues there could be no freeze out because A&H [the corporation] awarded no corporate dividends. But the record shows, for tax purposes, A&H purposefully made no corporate income. Instead, both owners enjoyed the prosperity of A&H through both their own salaries and their wives' salaries. Thus, the chancellor reasonably concluded that, by reducing and then eliminating Kelley's [William's wife's] salary and then later not paying William, Chester had engaged in a freeze out of William."); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 268 (Tex. App. 2012) ("[I]f a minority shareholder can show that another shareholder employed by the company is receiving compensation so far in excess of what is reasonable for his position and level of responsibility that he is, in actuality, receiving a de facto dividend to the exclusion of the minority shareholder, such an act may support a finding of minority shareholder oppression."); Ritchie v. Rupe, 339 S.W.3d 275 (Tex. App. 2011) ("For example, if in a particular closely held corporation the corporate earnings are distributed in the form of salary and employment benefits rather than dividends, continued employment could be a general reasonable expectation of all shareholders because employment is the means by which they share in the corporation's earnings."), *rev'd*, 443 S.W.3d 856 (Tex. 2014); Gibney v. Culver, 2008 Tex. App. LEXIS 2954 (Apr. 24, 2008) (involving a trial court that concluded that oppression had occurred based on jury findings that the defendant had used his chief executive officer position to award excessive salaries and compensation to himself and members of his family, but reversing on insufficient evidence grounds: Plaintiff "relies solely on his listing of compensation for each individual, his own testimony that the salaries were 'shocking,' and his contention that persons within minimal credentials in Ingleside, Texas, should not make such salaries. This evidence is not enough."); *cf.* Bulacher v. Enowa, L.L.C., 2010 U.S. Dist. LEXIS 27784 (N.D. Tex. Mar. 23, 2010) (concluding that allegations that "the Defendants paid excessive bonuses and/or distributions to themselves after [the minority's] termination" were, along with other allegations, sufficient to state a claim for shareholder oppression under Texas law); McDonald v. U.S. Die Casting & Dev. Co., 541 So. 2d 1064, 1069–70 (Ala. 1989) ("As we understand McDonald's [a minority shareholder in a closely held corporation] argument, he is contending that he should be allowed to maintain an action against the corporation and to obtain at least his *proportionate one-third share* of any "constructive dividends" that were paid by the corporation, and that he has standing to sue, even though he is no longer a stockholder. … We agree."); Sawyer v. Curt & Co., 1991 Minn. App. LEXIS 117 (Feb. 12, 1991), *vacated by*, Sawyer v. Curt & Co., 1991 Minn. LEXIS 842 (Aug. 2, 1991) ("We believe [that] when those in control of a closely held corporation terminate the employment of a moving shareholder, a good faith effort must be made to buy-out the shareholder at a fair price or [to] adjust the income distribution mechanism to insure the shareholder an equitable investment return."); Brenner v. Berkowitz, 634 A.2d 1019, 1024, 1034 (N.J. 1993) (declining to find that the majority shareholder's salary, which had reached $474,206, was unreasonable, but noting that any future compensation increases might be viewed unfavorably by the court); Parker v. Parker, 2016 N.J. Super. Unpub. LEXIS 2720, at *25 (Ch. Div. Dec. 22, 2016) (stating that "[o]rdinarily, oppression by shareholders is clearly shown when they have awarded themselves excessive compensation, furnished inadequate dividends, or misapplied and wasted corporate funds" (internal quotation omitted)); Feldmeier v. Feldmeier Equip., Inc., 84 N.Y.S.3d 609, 614–15 (App. Div. 2018) ("Plaintiff further contended that the individual defendants acted in bad faith and engaged in misconduct by failing to change the method of distributing profits after plaintiff's resignation. In his affidavit, which was submitted in opposition to defendants' motion and in support of his cross motion, plaintiff averred that, while he was president, the Corporation had used bonuses as 'disguised' or 'de facto' dividends, which was fair when all shareholders were employees but was oppressive to him once he resigned and no longer received bonuses. As noted above, however, plaintiff's contention lacks merit inasmuch as other non-employee or non-officer shareholders were either never paid bonuses or received bonuses that were not commensurate with their representative shares of ownership."); *In re* O'Neill, 626 N.Y.S.2d 813, 814 (App. Div. 1995) ("The [lower] court concluded … that while [the minority

shareholder] could not expect to participate in the day-to-day operations of the corporation [after the minority's employment was terminated for a criminal conviction], he was entitled to his rights as a shareholder, and the court directed [the majority shareholder] to either alter the corporation's financial structure to commence the payment of dividends, or offer to purchase [the minority shareholder's] interest in the corporation"); Matter of Digeser v. Flach, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015) ("Respondent also argues that petitioner cannot claim a reasonable expectation of receiving dividends from [the corporation], since the corporation had no history of paying dividends. The parties did, however, have a long-standing custom and practice of distributing *de facto* dividends to the two shareholders in the form of 'bonuses' and other compensation."); Jorgensen v. Water Works, Inc., 582 N.W.2d 98, 106 (Wis. Ct. App. 1998) (finding a fact issue on whether payments made to the shareholders were "officers' compensation" or dividends). *But see* Krukemeier v. Krukemeier Mach. & Tool Co., 551 N.E.2d 885, 888–89 (Ind. Ct. App. 1990) (concluding that majority shareholders did not breach their fiduciary duty to the minority shareholder when they increased their compensation and allegedly decreased the amount of dividends paid to the minority: "Expert evidence at trial revealed Tom and Jeff [the majority shareholders] were undercompensated before 1986. Moreover, the same evidence showed the increase in their salaries after that time was reasonable and a reflection of their success in making the Company a uniquely profitable enterprise. The compensation was not unjust. Nor was it oppressive.").

In *In re* White, 429 B.R. at 209–11, the court determined that alleged bonus payments were actually de facto dividends, and it concluded that a terminated 8 percent shareholder had been excluded from those dividends. The plaintiff shareholder claimed that he was entitled to "8 percent of the total bonuses given to the shareholder-employees." *Id.* at 211. The court disagreed: "[T]he bonuses should have been characterized as dividends; as such, Four Seasons [the corporation] would have been required to pay corporate taxes on its earnings. … The total disguised dividends were $4,900,000. If the company had paid its tax burden, then the total actual dividends would have been $2,940,000 (i.e., 60 percent of the $4,900,000). White, as an 8 percent shareholder, should have received 8 percent of the $2,940,000 dividend pool, which comes to $235,200. Accordingly, the Court holds that White is entitled to $235,200 in damages." *Id.* The court acknowledged that "the other employee-shareholders received their funds without consideration of the tax burden on the corporation," but it noted that this "cannot entitle White to receive more than he would have received if the distributions were properly characterized as dividends." *Id.*

In *Matter of Digeser v. Flach*, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015), the court downplayed the significance of improper financial benefits to the shareholders on the ground that both parties had received such benefits:

> After respondent had decided to force a separation from petitioner, respondent and his attorneys and forensic auditors vigilantly scoured [the corporation's] corporate books and records to identify any personal financial benefits that petitioner may have improperly conferred upon himself or his family over the years. The testimony at trial, however, showed that both parties long had operated in a business environment in which the shareholders freely and mutually exploited their corporate ownership interests in ways that benefitted themselves and their families. Thus, while respondent complains that petitioner's son purchased a residence from the corporation for less than fair value, the proof shows that [the corporation] invested far more substantial sums in constructing a residence for respondent's son. Simply put, the record shows that a tacit agreement existed over the years between the two shareholders to use corporate funds to personally benefit the Flach and Digeser families in various ways.

A controlling stockholder can appropriate a disproportionate share of the company's earnings through other transactions as well. In general, such misconduct can occur in any transaction where the corporation is compelled to purchase or lease goods or services from the controlling shareholder (or an entity related to the controlling shareholder) on unfavorable terms. Specific examples include the controlling shareholder: (1) lending money to the corporation at excessive rates of interest; (2) leasing property or providing goods or services to the corporation at above-market rents or prices; (3) selling shares to the corporation at a price that is greater than fair value; and (4) using company funds to pay personal expenses.[102] All of these transactions are

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For a discussion of the role of the minority's fault in de facto dividend disputes, see Section 7.01[D][1][d].

[102] *See, e.g.*, Kaplan v. First Hartford Corp., 484 F. Supp. 2d 131, 150–52 (D. Me. 2007) (finding oppression based in part on the controlling shareholder "direct[ing] the transfer of monies away from [the corporation] to benefit companies that he owned outright"); Street v. Vitti, 685 F. Supp. 379, 382, 384–85 (S.D.N.Y. 1988) (finding that plaintiffs' claims for breach of fiduciary duty raised serious questions on the merits when the majority shareholder allegedly sold corporate property and failed to turn over the profits, used company credit cards for personal expenses, rented his personal condominium to the corporation, and structured corporate loans in order to obtain tax benefits for himself); *In re* Rosenbaum, 2010 Bankr. LEXIS 1509 (Bankr. E.D. Tex. May 7, 2010) (The controlling owners "induced Gage to invest in the business by misrepresenting its assets as well as their intent to use Gage's investment to grow the business. They then proceeded to furtively raid all of Cornerstone's [the corporation's] assets, leaving the minority shareholders with stock in a company that was worthless. These were purposeful actions to dilute the value of Gage's investment while employing the business and its assets solely for their own benefit. The [controlling owners'] conduct was certainly 'oppressive' inasmuch as their practice of transferring substantially all of Cornerstone's assets to themselves defeated Gage's expectations which, when objectively viewed, were both reasonable under the circumstances and central to his decision to purchase shares in Cornerstone." (citations omitted)); Hensley v. Poole, 910 So. 2d 96, 102–04 (Ala. 2005) (involving a trial court finding that rent charged to the corporation for the use of a building owned by the majority shareholder was excessive and a breach of fiduciary duty); *id.* (involving a trial court finding that the majority shareholder breached her fiduciary duty by using corporate funds to pay her personal credit card expenses); Bibo v. Jeffrey's Restaurant, 770 P.2d 290, 292 (Alaska 1989) (alleging that the corporation paid excessive fees for bookkeeping services to a company that was substantially owned by the controlling shareholders of the corporation); Baker v. Baker, No. A-10-901, 2011 Neb. App. LEXIS 108 (Aug. 9, 2011) (affirming that testimony "of a monthly payment to [the majority shareholder] without justification raise[d] a genuine issue of fact … as to whether corporate assets were improperly used to provide financial support to [the majority shareholder] without adequate consideration and without similar distributions being made to plaintiffs."); Cardiac Perfusion Servs. v. Hughes, 380 S.W.3d 198, 201 (Tex. App. 2012) (finding oppression based in part on a jury finding that a 90 percent shareholder "used [company] funds to pay his personal expenses"); Ritchie v. Rupe, 339 S.W.3d 275 (Tex. App. 2011) (noting that the trial court concluded that the appellants acted oppressively by, among other actions, "causing [the corporation] to pay some of [a director's] personal expenses"), *rev'd*, 443 S.W.3d 856 (Tex. 2014); Redmon v. Griffith, 202 S.W.3d 225, 235 (Tex. App. 2006) (stating that allegations of malicious suppression of dividends, using corporate funds for personal purposes, and " 'squeeze out' techniques such as diverting corporate opportunities, excessive payment of dividends … and attempts to deprive the [plaintiffs] of the fair value of their shares and of the benefits thereof" would, if true, demonstrate a claim for shareholder oppression); *id.* at 236 ("Evidence concerning the use of corporate funds to pay personal expenses combined with evidence that [plaintiff] was denied access to information concerning the financial condition of the corporation sufficiently creates a material fact issue concerning whether there was a lack of probity and fair dealing in the company's affairs to the prejudice of the [plaintiffs] or otherwise, a visible departure from the standards of fair dealing, and a violation of fair play on which minority shareholders like the [plaintiffs] were entitled to rely."); Davis v. Sheerin, 754 S.W.2d 375, 382 (Tex. App. 1988) (affirming a conclusion that oppressive conduct had occurred based in part on a jury finding that the

related in that they provide the controlling shareholder with an amount that exceeds the reasonable value of the consideration that the controlling shareholder provided in the transaction. In other words, these transactions provide the controlling shareholder (and, typically, only the controlling shareholder) with a distribution of corporate profit (i.e., a de facto dividend). Once again, payment of such a disproportionate dividend is impermissible.[103]

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majority shareholder had wasted corporate funds on his own attorney's fees); *cf.* Biesenbach v. Guenther, 446 F. Supp. 98, 98 (E.D. Pa. 1978) (involving a loan made by the individual directors to the corporation at a rate that was 4 percent above the prime interest rate); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 508, 510, 511 n.10 (Mass. 1975) (concluding that a controlling shareholder breached his fiduciary duty to a minority shareholder by selling his stock back to the corporation at a price substantially higher than had previously been offered to the minority shareholder for her stock, but at a price that the trial court implicitly found was fair to the corporation); Schimke v. Liquid Dustlayer, Inc., 2009 Mich. App. LEXIS 1954 (Sept. 24, 2009) ("[T]he evidence at trial showed that the proposed redemption [by the majority shareholder of his own shares] was imminent. … [T]he evidence showed that Rademaker [the majority shareholder] offered plaintiff approximately one third of what Rademaker was demanding for his shares, and Rademaker had voting control of Liquid Dustlayer. In the meantime, Rademaker … remained steadfast in refusing to pay dividends, despite Liquid Dustlayer's substantial cash reserves, essentially preventing plaintiff from receiving any benefit whatsoever from his nearly one-third ownership of Liquid Dustlayer. The trial court did not clearly err in finding that defendants engaged in 'willfully unfair and oppressive conduct,' entitling plaintiff to relief under § 489 [the Michigan oppression statute]."); Parker v. Parker, 2016 N.J. Super. Unpub. LEXIS 2720, at *25 (Ch. Div. Dec. 22, 2016) (stating that "[o]rdinarily, oppression by shareholders is clearly shown when they have awarded themselves excessive compensation, furnished inadequate dividends, or misapplied and wasted corporate funds" (internal quotation omitted)); Guerra v. Guerra, 2011 Tex. App. LEXIS 6730 (Aug. 24, 2011) (finding no oppression when a director and officer leased land to his corporation and allegedly quadrupled the prior rent because "the record demonstrates the board considered the lease agreement … during a board meeting and the board agreed to enter the lease").
In *Matter of Digeser v. Flach*, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015), the court downplayed the significance of improper financial benefits to the shareholders on the ground that both parties had received such benefits:

> After respondent had decided to force a separation from petitioner, respondent and his attorneys and forensic auditors vigilantly scoured [the corporation's] corporate books and records to identify any personal financial benefits that petitioner may have improperly conferred upon himself or his family over the years. The testimony at trial, however, showed that both parties long had operated in a business environment in which the shareholders freely and mutually exploited their corporate ownership interests in ways that benefitted themselves and their families. Thus, while respondent complains that petitioner's son purchased a residence from the corporation for less than fair value, the proof shows that [the corporation] invested far more substantial sums in constructing a residence for respondent's son. Simply put, the record shows that a tacit agreement existed over the years between the two shareholders to use corporate funds to personally benefit the Flach and Digeser families in various ways.

[103] *See* note 56 and accompanying text (discussing the need to pay dividends on an equivalent per-share basis).

[6] Engaging in Conflict of Interest Transactions

Along with directly appropriating a disproportionate share of the corporation's earnings, a controlling shareholder can engage in other conflict of interest transactions that are detrimental to both the corporation and the minority shareholders. Specific examples include the controlling shareholder: (1) using the corporation's non-cash assets, without fair compensation, for personal purposes; (2) usurping corporate opportunities; (3) borrowing money from the company at below-market rates of interest; and (4) buying or leasing property from the corporation at below-market prices.[104] These transactions do not directly transfer corporate earnings to the controlling

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[104] *See, e.g.*, Street v. Vitti, 685 F. Supp. 379, 382, 384–85 (S.D.N.Y. 1988) (finding that plaintiffs' claims for breach of fiduciary duty raised serious questions on the merits when the majority shareholder allegedly sold corporate property and failed to turn over the profits, used company credit cards for personal expenses, rented his personal condominium to the corporation, and structured corporate loans in order to obtain tax benefits for himself); *In re* Mandel, 2011 Bankr. LEXIS 3829 (Bankr. E.D. Tex. Sept. 30, 2011) ("[T]he Court finds and concludes that [an officer and director's] breaches of fiduciary duty and usurpation of White Nile's [the corporation's] business opportunities also constitute acts of shareholder oppression"); Maschmeier v. Southside Press, Ltd., 435 N.W.2d 377, 378–81 (Iowa Ct. App. 1988) (concluding that oppressive conduct had resulted, in part because the majority shareholders had leased and transferred the corporation's assets to a second corporation that the majority shareholders owned for inadequate consideration); Oberhelman v. Barnes Inv. Corp., 690 P.2d 1343, 1345, 1351 (Kan. 1984) (concluding that a majority shareholder (who was also a director and president of the corporation) breached his fiduciary duty by loaning approximately $90,000 of corporate funds to himself on what was effectively an interest-free basis); Fox v. 7L Bar Ranch Co., 645 P.2d 929, 931, 934 (Mont. 1982) (concluding that it was oppressive for controlling shareholders/directors to cause the corporation to lease its grazing lands to a related corporation at a below-market rent); Guerra v. Guerra, 2011 Tex. App. LEXIS 6730 (Aug. 24, 2011) (noting that "[d]iverting a corporate opportunity may in some circumstances constitute shareholder oppression"); Redmon v. Griffith, 202 S.W.3d 225, 235 (Tex. App. 2006) (stating that allegations of malicious suppression of dividends, using corporate funds for personal purposes, and " 'squeeze out' techniques such as diverting corporate opportunities, excessive payment of dividends … and attempts to deprive the [plaintiffs] of the fair value of their shares and of the benefits thereof" would, if true, demonstrate a claim for shareholder oppression); Christians v. Stafford, 2000 Tex. App. LEXIS 6423 (Oct. 26, 2000) (not designated for publication) (involving a trial court that found oppressive conduct based on a jury finding that the majority shareholder entered into lease agreements at less than fair value, but reversing on the grounds that insufficient evidence supported the finding); Section 6.03[C] (discussing the usurpation of corporate opportunities); *see also* Kaplan v. First Hartford Corp., 484 F. Supp. 2d 131, 136, 150–52 (D. Me. 2007) (finding oppression based in part on the controlling shareholder reducing the amount of a management fee paid to the corporation in order to benefit another company that the controlling shareholder owned); Section 6.03[B] (discussing conflict of interest transactions as breaches of the fiduciary duty of loyalty). *But see* Kaplan, 484 F. Supp. 2d at 142 (stating that if a defendant fails to prove that a conflict of interest transaction is fair, that does not necessarily satisfy the statutory grounds for dissolution, as the plaintiff "still must satisfy me that the unfairness amounts to fraud, illegality, oppression, corporate misapplication or waste").

In *Matter of Digeser v. Flach*, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015), the court downplayed the significance of improper financial benefits to the shareholders on the ground that both parties had received such benefits:

> After respondent had decided to force a separation from petitioner, respondent and his attorneys and forensic auditors vigilantly scoured [the corporation's] corporate books and records to identify any personal financial benefits that petitioner may have improperly conferred upon himself or his family over the years. The testimony at trial, however, showed that both parties long had operated in a business environment in which the

shareholder, but they have the same effect of benefitting the controlling shareholder at the expense of the corporation and the minority investors. To enrich himself, in other words, the controlling shareholder prevents the corporation from obtaining monies and benefits that it should be receiving.

[7] Forcing Sales of the Minority's Holdings

In conjunction with some or all of the forms of misconduct described above, the controlling shareholder often offers to purchase the minority's stock at a fraction of its true value. The minority, faced with the reality of no market and no other mechanism for receiving a financial return on investment, may have no choice but to accept the offer. Courts have characterized such a forced sale as a component of an oppressive course of conduct.[105]

> shareholders freely and mutually exploited their corporate ownership interests in ways that benefitted themselves and their families. Thus, while respondent complains that petitioner's son purchased a residence from the corporation for less than fair value, the proof shows that [the corporation] invested far more substantial sums in constructing a residence for respondent's son. Simply put, the record shows that a tacit agreement existed over the years between the two shareholders to use corporate funds to personally benefit the Flach and Digeser families in various ways.

The controlling shareholder's use of the corporation's cash for personal purposes is effectively a misappropriation of the corporation's income. *See* note 102 and accompanying text.

[105] *See, e.g.*, Bulacher v. Enowa, L.L.C., 2010 U.S. Dist. LEXIS 27784 (N.D. Tex. Mar. 23, 2010) (concluding that allegations that "the Defendants attempted to induce [the minority] to sign an agreement allowing [the company] to repurchase his 17 percent interest in the company at a price that was a mere fraction of its true market value" were, along with other allegations, sufficient to state a claim for shareholder oppression under Texas law); Minor v. Albright, 2001 U.S. Dist. LEXIS 19436 (N.D. Ill. Nov. 28, 2001) (concluding that plaintiffs had sufficiently alleged oppressive conduct, in part because of allegations that the controlling group "attempted to coerce [a minority shareholder] into relinquishing his shares for a nominal sum"); Litle v. Waters, 1992 Del. Ch. LEXIS 25 (Feb. 11, 1992) (concluding that plaintiff's oppression claim survived a motion to dismiss and noting that "Plaintiff makes an adequate argument that defendants violated [his] reasonable expectation … [by] alleg[ing] that the company was rich with cash and that the only reason that the company did not make dividends was to aid the [majority shareholder] to buy [the minority shareholder] out for less than fair value"); Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 664 & n.14 (Mass. 1976) (stating that "we may infer that a design to pressure Wilkes into selling his shares to the corporation at a price below their value well may have been at the heart of the majority's plan," and noting that this "inference arises from the fact that Connor, acting on behalf of the three controlling stockholders, offered to purchase Wilkes's shares for a price Connor admittedly would not have accepted for his own shares"); *see also* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) ("Majority 'freeze-out' schemes which withhold dividends are designed to compel the minority to relinquish stock at inadequate prices. When the minority stockholder agrees to sell out at less than fair value, the majority has won." (citations omitted)); Franks v. Franks, 944 N.W.2d 388, 407 (Mich. Ct. App. 2019) ("Taken together, this evidence established that defendants acted in concert to take acts that were willfully unfair and oppressive to plaintiffs as shareholders. … The evidence showed that defendants then made an extremely low offer to purchase the Class B and C shares after obtaining a report that strongly suggested that the shares were worth hundreds of dollars more per share. In the absence of evidence to justify the $62 per share offer or to establish a legitimate business reason for refusing to pay

[8] Miscellaneous Acts of Oppression

Although the above categories of conduct can be described as common acts of oppression, it is important to note that oppressive conduct can present itself in a wide variety of forms.[106]

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dividends despite the company's ability to pay and historical practices, the evidence cited by plaintiffs established that defendants collectively took acts that substantially interfered with plaintiffs' interests as shareholders—their right to receive reasonable dividend payments or to sell their shares at a fair value—and that they did so with the intent to substantially interfere with those shareholder rights."); Patton v. Nicholas, 279 S.W.2d 848, 852 (Tex. 1955) (noting the majority shareholder's suggestion that "he would not buy the stock of [the minority] for even a small fraction of its value"); N. Air Services, Inc. v. Link, 339 Wis. 2d 489, 809 N.W.2d 900, 2012 WI App 27 (Wis. Ct. App. 2012) (stating that "secretly plotting [a minority shareholder's] termination in an attempt to purchase his shares at a depressed value" is "a classic 'squeeze out' scenario"); Thompson, *supra* note 3, at 703–04 (noting that in a classic freeze-out, "the majority first denies the minority shareholder any return and then proposes to buy the shares at a very low price"); *cf.* Graydog Internet, Inc. v. Giller, 406 P.3d 45, 59 (Or. 2017) ("State law governing close corporations has as one purpose the protection of minority shareholders from oppression and mistreatment by the majority shareholder. That includes the protection of the right of a shareholder to decline to sell its shares to the corporation or another shareholder in the absence of some legal obligation to do so."); Redmon v. Griffith, 202 S.W.3d 225, 235 (Tex. App. 2006) (stating that allegations of malicious suppression of dividends, using corporate funds for personal purposes, and " 'squeeze out' techniques such as diverting corporate opportunities, excessive payment of dividends … and attempts to deprive the [plaintiffs] of the fair value of their shares and of the benefits thereof" would, if true, demonstrate a claim for shareholder oppression). *But see* Koshy v. Sachdev, 81 N.E.3d 722, 735 (Mass. 2017) (stating that "[w]ith regard to [a 50% shareholder's] 'low-ball' offer, the judge found that it was not made in bad faith"); U.S. Bank N.A. v. Cold Spring Granite Co., 802 N.W.2d 363, 380 (Minn. 2011) ("[S]hareholders may be forced out involuntarily by statute, for example, in a cash-out merger. For this reason, it is unreasonable for a shareholder to expect that their shares may never be redeemed involuntarily. Absent evidence of some other support for the belief that they would be safe from involuntary redemption of their shares, the … expectation of indefinite ownership in [the corporation] is not reasonable."); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 272 (Tex. App. 2012) ("[T]he mere offer to purchase the shares for fair market value cannot amount to oppression. … [The minority] was under no financial pressure to accept the offer and, in fact, he did not accept it. The evidence does not show, and the jury did not find, that [the majority] refused to consider having [the corporation] purchase [the minority's] shares at any other price. Instead, the evidence shows that [the minority] made no counter-offer and had no other valuations prepared. Accordingly, we conclude the jury's finding that [the majority] made a $66 million fair market value offer for [the minority's] shares does not support a finding of shareholder oppression."). Conversely, the controlling shareholder's purchase of the minority's shares at a fair price has contributed to the rejection of an oppression claim. *See, e.g.*, Merola v. Exergen Corp., 668 N.E.2d 351, 354 (Mass. 1996) (stating that the minority shareholder sold his stock back to the corporation at "a price which, after consulting with his attorney, he concluded was a fair price," and observing that "[w]ith this payment, the [minority] realized a significant return on his capital investment independent of the salary he received as an employee"); Ingle v. Glamore Motor Sales, 535 N.E.2d 1311, 1314 (N.Y. 1989) ("Notably, however, [the minority shareholder] never asserted that the $2,400 paid to him upon termination was not fairly representative of his equity interest in the corporation. He does not contend that the corporation undervalued his shares. …"); *see also* Hanley v. Hanley, 2019 N.Y. Misc. LEXIS 3177, at *30 (N.Y. Sup. Ct. June 13, 2019) ("Under BCL § 1104-a(b)(1), the denial of a petition for dissolution is appropriate if the minority shareholder 'may obtain a fair return on his [or her] investment pursuant to the buy-out provisions of the shareholder[s'] agreement.' "). *But see* Hanley v. Hanley, 2019 N.Y. Misc. LEXIS 3177, at *27 (N.Y. Sup. Ct. June 13, 2019) ("Defendants cite no authority allowing majority shareholders to use oppressive means to force a voluntary buy-out, even a reasonable one.").

[106] *See, e.g.*, Cardiac Perfusion Servs. v. Hughes, 380 S.W.3d 198, 202 (Tex. App. 2012) ("The term 'shareholder oppression' is expansive and covers 'a multitude of situations dealing with improper conduct.' "); Redmon v. Griffith, 202 S.W.3d 225, 234 & n.3 (Tex. App. 2006) (stating that "any one of a

Indeed, any action that is designed to deny a minority shareholder his financial and/or participatory rights in the corporation can be characterized as oppressive. Some examples of miscellaneous acts that might constitute oppressive conduct include the following:

• denying that a shareholder is, in fact, a shareholder of the corporation;[107]

• using fundamental corporate changes (e.g., corporate dissolutions, sales of assets, or mergers) to eliminate a shareholder from the business;[108]

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variety of activities or conduct can give rise to shareholder oppression," and similarly noting that "a claim of oppressive conduct can be independently supported by evidence of a variety of conduct"); *see also* In re Rosenbaum, 2010 Bankr. LEXIS 1509 (Bankr. E.D. Tex. May 7, 2010) (noting that "Texas courts take a broad view of the application of oppressive conduct to a closely-held corporation"); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 265 (Tex. App. 2012) (substantially the same); Ritchie v. Rupe, 339 S.W.3d 275 (Tex. App. 2011) ("The term [oppression] is expansive and covers a multitude of situations dealing with improper conduct; thus a narrow definition would be inappropriate."), *rev'd*, 443 S.W.3d 856 (Tex. 2014); *cf.* McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012) ("The majority shareholders can apply numerous means to accomplish the squeeze-out."). *But see* Allen v. Devon Energy Holdings, L.L.C., 2011 Tex. App. LEXIS 5854 (July 28, 2011) ("While [the plaintiff minority] successfully raised a fact issue as to his fraud and fiduciary duty claims, he cites no case, nor can we find one, that extends shareholder oppression to include these causes of action. Because the complained-of actions … are not similar to the previously recognized examples of shareholder oppression and [the plaintiff] cites no case allowing conduct that is fraudulent or in breach of a fiduciary duty to be the basis of a shareholder oppression claim, we hold the trial court properly granted summary judgment on this issue.").

[107] *See, e.g.*, Davis v. Sheerin, 754 S.W.2d 375, 382 (Tex. App. 1988) ("[W]e find that conspiring to deprive one of his ownership of stock in a corporation, especially when the corporate records clearly indicate such ownership, is … oppressive. … Appellant's conduct not only would substantially defeat any reasonable expectations appellee may have had … but would totally extinguish any such expectations."); *see also* Manbourne, Inc. v. Conrad, 796 F.2d 884, 886, 889–90 (7th Cir. 1986) (concluding that directors breached their fiduciary duty to a stockholder by, among other actions, refusing to list the stockholder as a shareholder of record in the corporation); *cf.* Georgeson v. DuPage Surgical Consultants, Ltd., 2007 U.S. Dist. LEXIS 20801 (N.D. Ill. Mar. 22, 2007) (noting that a shareholder alleged that when he left the business, "the defendants eliminated his shares (as reflected on corporate income tax returns which no longer listed [him] as a shareholder), and refused to compensate him for those shares," and concluding that the evidence, "if true, shows that the defendants completely denied him the incidents of ownership of his shares in [the company], and therefore the evidence is sufficient to withstand summary judgment on [his] claim of oppression"); Acoustic Innovations, Inc. v. Schafer, 976 So. 2d 1139, 1141–42 (Fla. Dist. Ct. App. 2008) (affirming a trial court finding that the plaintiff was a 50 percent shareholder in the corporation despite the defendant's contention that he (the defendant) was the sole owner); Quazzo v. 9 Charlton St. Corp., 2019 N.Y. Misc. LEXIS 142, at *13–*14 (N.Y. Sup. Ct. Jan. 10, 2019) ("Cristina fails on this record to demonstrate oppression as a matter of law. … There is authority that where a party has contributed capital or services to a corporation, oppression may be based on the very denial of a [party's] shareholder status. Here, in contrast, it is undisputed that Cristina did not commit capital to Charlton (or the other corporations), and did not have an active role in Charlton (or the other corporations). Cristina does not submit legal authority, and the court does not find, that under these circumstances, Ugo's denial of her status as a shareholder of Charlton rises to the level of oppression warranting dissolution of the corporation."); Pappas v. Fotinos, 911 N.Y.S.2d 694 (Sup. Ct. 2010) ("It is difficult to recognize a more reasonable shareholder expectation than that its interest will not be repudiated in its entirety, and that legal action would be required to compel its acknowledgment.").

[108] *See, e.g.*, Hensley v. Poole, 910 So. 2d 96, 100-02 (Ala. 2005) (concluding that a majority shareholder breached her fiduciary duty by dissolving the corporation and appropriating the business for herself);

• preventing the corporation from enforcing its contracts against the controlling shareholder, or otherwise breaching contracts involving shareholders;[109]

• diluting a shareholder's ownership percentage in the corporation;[110]

Section 7.01[F][1]–[2] (discussing fundamental corporate changes in the context of explicit freeze-out transactions).

[109] *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717, 722–23 (Del. 1971); Fought v. Morris, 543 So. 2d 167, 172–73 (Miss. 1989) (concluding that the breach of a Stock Redemption Agreement between the shareholders constituted a breach of fiduciary duty: "Morris' intended exclusion of Fought from the purchase of Peyton's shares was a breach of the Stock Redemption Agreement and bylaws, and, therefore, a breach of his fiduciary duty as an officer, a director and a stockholder under the good faith standard we adopt today. We hold, therefore, that Morris breached his fiduciary duty in purchasing all of Peyton's stock, contrary to the Stock Redemption Agreement."); Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 459 (N.M. Ct. App. 2001) (stating that "not every noncompliance with a shareholder agreement is necessarily a breach of fiduciary duty—but in appropriate circumstances [it] may be"); *cf.* Feldman v. Kim, 2012 Tex. App. LEXIS 153 (Jan. 10, 2012) (concluding that allegations that the controlling group (1) caused the company to stop repaying funds owed to the plaintiff minority shareholder, and (2) caused a related company to stop paying the plaintiff his share of the rent were sufficient to defeat a summary judgment motion on a shareholder oppression claim).

[110] *See, e.g.*, Manbourne, Inc. v. Conrad, 796 F.2d 884, 886, 889–90 (7th Cir. 1986) (finding that corporate directors and employees impermissibly exercised options as part of a plan to deprive a shareholder of control by reducing his ownership stake from 50.23 percent to 47.86 percent); *In re* Skyport Global Commc'ns, Inc., 2011 Bankr. LEXIS 123 (Bankr. S.D. Tex. Jan. 13, 2011) ("[T]here is a species of stock issuance for inadequate consideration that causes direct harm to shareholders as well. A diluting issuance of stock to the majority shareholder shifts voting power from the minority shareholders to the majority shareholder. When a majority shareholder compels a company to issue diluting stock, part of the voting power of the minority shareholder block is extracted and transferred from the minority to the majority. This extraction constitutes a direct harm to the minority shareholders." (citations omitted)); *id.* at *37 ("Paragraph 278 of the Petition states that the CenturyTel Defendants were involved in the issuance of stock to Balaton, a controlling entity, for inadequate consideration. This factual allegation gives rise to a direct claim and may serve as the basis for a court to conclude that oppression has occurred."); Street v. Vitti, 685 F. Supp. 379, 384 (S.D.N.Y. 1988) (stating that "[d]ilution of plaintiffs' shareholdings to less than twenty percent would eliminate their rights under New York's dissolution statute," and finding that "permitting defendant to nullify plaintiffs' statutory right, which is designed to protect minority shareholders from the unjust exercise of power by majority shareholders, would constitute irreparable harm as well" (footnote omitted)); Lange v. Lange, 520 N.W.2d 113, 120–21 (Iowa 1994) (affirming the district court's conclusion that the issuance of 2,000 additional shares of common stock was void because it "was taken for the sole purpose of obtaining control of the company"); *In re* Twin Bay Village, Inc., 60 N.Y.S.3d 560, 566 (App. Div. 2017) (stating that "we discern no basis to disturb Supreme Court's determination that petitioners' reasonable expectations were substantially defeated by respondents' oppressive actions in 2001, 2004 and 2009 inasmuch as those actions intentionally diluted and ultimately sought to extinguish petitioners' ownership interest in the corporation"); *In re* Rapoport, 487 N.Y.S.2d 376, 377–78 (App. Div. 1985) (involving a 50 percent shareholder who filed a petition for dissolution under a New York statute granting standing to the owners of 50 percent of the corporation's shares, and a subsequent issuance of one share by the corporation to a third party in order to reduce the petitioner's ownership stake to less than 50 percent: "The issuance, subsequent to the filing of the dissolution petition, of one share of stock … was null and void. It was obviously an attempt to deprive petitioner of his one-half ownership of [the corporation]."); Straka v. Arcara Zucarelli Lenda & Assocs. CPAs, P.C., 92 N.Y.S.3d 567, 573–74 (Sup. Ct. 2019) ("Finally, the action taken to add … a shareholder in January 2017, without notice to Straka [a minority owner], constituted oppressive conduct by adversely affecting Straka's share in the corporation without her knowledge or consent. Dilution of a minority shareholder's interest is permissible only when

• amending the articles of incorporation or bylaws to prejudice the rights of a shareholder or shareholder group;[111]

• threatening to engage in oppressive conduct, even if the conduct has not yet occurred;[111.1]

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the shareholder is 'given an opportunity to supply capital and thereby maintain [her] percentage in the corporation.' Any special action taken at a shareholders meeting, such as the issuance of shares or possible dilution of another shareholder's percentage of ownership in the corporation, that is not expressly stated in a notice to all shareholders, is null and void."); Farndale Co. v. Gibellini, 628 S.E.2d 15, 21–22 (N.C. Ct. App. 2006) (finding that the circumstances surrounding the issuance of shares could "support the conclusion that defendants acted to further their own interests at the expense of the interests of the minority shareholders, and thus acted in violation of their duty of good faith towards plaintiffs and their corresponding fiduciary duties," even when there was evidence that the corporation needed money, an outside valuation was procured, and preemptive rights were complied with); Section 2.11[D].

[111] *See, e.g.*, Manbourne, Inc. v. Conrad, 796 F.2d 884, 886, 890 (7th Cir. 1986) (invalidating amendments to the bylaws that, among other things, provided that the shareholders could remove a director only for cause and only upon an affirmative vote of 80 percent of the outstanding shares: "[A]lthough the act is within their authority, the directors, under the circumstances presented in this case, cannot amend the corporate by-laws for the purpose of entrenching themselves in control."); Miller v. Magline, Inc., 306 N.W.2d 533, 534–36 (Mich. Ct. App. 1981) (suggesting that amending the articles to extend the corporation's life from 30 years to an indefinite term could constitute oppressive conduct); *In re* Twin Bay Village, Inc., 60 N.Y.S.3d 560, 565–66 (App. Div. 2017) (noting that "respondents amended the corporation's bylaws to provide that a shareholder who ceased to be actively involved with the corporation, as determined by a majority of the shareholders, could be forced to sell his or her shares," and citing that conduct as part of a series of events that constituted oppression); *see also* Section 6.08 (discussing whether amending the articles to add an exculpatory provision would be considered oppressive).

[111.1] *See, e.g.*, Schimke v. Liquid Dustlayer, Inc., 2009 Mich. App. LEXIS 1954 (Sept. 24, 2009) ("Defendants also argue that they were entitled to summary disposition because the proposed redemption [by the majority shareholder of his own shares] never took place. However, § 489 [the Michigan oppression statute] does not require that an act be completed before a court may intervene. … Therefore, the fact that the contemplated redemption had not yet occurred did not entitle defendants to judgment as a matter of law."); *id.* at *4 ("Defendants argue that the proposed redemption plan was merely an inchoate dream and, therefore, was not actionable under § 489 [the Michigan oppression statute]. We disagree. The evidence presented at trial showed that Rademaker [the majority shareholder] repeatedly indicated that he wanted Liquid Dustlayer to redeem his stock and that he was not willing to redeem plaintiff's shares immediately, or at the same price. … In light of the evidence on the entire record, the trial court did not clearly err in finding that Rademaker had a well-formed imminent plan to cause Liquid Dustlayer to redeem his remaining shares of stock, but not plaintiff's shares, for $15,000 a share. As discussed previously, §§ 489(1)(c) and (d) contemplate that oppressive conduct that has not yet been completed is actionable under the statute."); *id.* ("Defendants argue that the redemption plan was mere speculation and could not support an award of damages or the trial court's decision to interfere with the officers' discretion. … As indicated, § 489 [the Michigan oppression statute] allows a court to intervene before an action is finalized."); Ballard v. Roberson, 733 S.E.2d 107, 112 (S.C. 2012) ("We find the record evinces a clear intent by Appellants to 'freeze-out' Ballard and exclude him from involvement with Warpath and from the benefits of ownership. Although we acknowledge some harm alleged is arguably prospective, the statute envisions future harm, providing that a court can find oppression where the majority 'will act' in a manner oppressive to the minority. Moreover, Ballard should not be prejudiced because he has sought to proactively protect his legal rights and did not wait for the complete evisceration of his involvement once he understood the Appellants meant to force him out of the corporation. We therefore affirm the circuit court's finding of oppression and its requirement that Appellants purchase Ballard's stock at fair market value."); *id.* at 112 n.7 ("The dissent would have us require a showing of 'imminent harm' to obtain relief

• other miscellaneous acts.[111.2]

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under section 33-14-300(2)(ii) for future oppression. While we agree with the dissent that our analysis must be undertaken with caution, we see no need to impose a further requirement of 'imminent harm' on minority shareholders seeking to protect their rights. Appellants have not asked us to engraft this requirement onto section 33-14-300(2)(ii), and the statute itself contains no such prerequisite.").

[111.2] *See, e.g.*, Kaplan v. First Hartford Corp., 484 F. Supp. 2d 131, 148–49, 151–52 (D. Me. 2007) (finding oppression based in part on misleading proxy statements that prevented shareholders from "learning and understanding the full nature of [the controlling shareholder's] conflicted dealings"); Bulacher v. Enowa, L.L.C., 2010 U.S. Dist. LEXIS 27784 (N.D. Tex. Mar. 23, 2010) (concluding that allegations that "the Defendants used prepaid consultant fees to artificially lower the company's income performance, and thereby reduce [the minority's] quarterly income-based bonuses" were, along with other allegations, sufficient to state a claim for shareholder oppression under Texas law); *In re* Mandel, 2011 Bankr. LEXIS 3829 (Bankr. E.D. Tex. Sept. 30, 2011) (concluding that an officer and director "breached his fiduciary duties to White Nile [the corporation] as well as his fiduciary duties to Thrasher (as a shareholder of White Nile)" by, among other conduct, competing with White Nile through another corporation, and stating that the "breaches of fiduciary duty … also constitute acts of shareholder oppression"); *id.* at *23 ("In addition, his conduct with respect to the formation and operation of NeXplore [a competing business], the failure to prosecute White Nile's intellectual property, the use of litigation in an attempt to prevent Thrasher from reclaiming his intellectual property, and NeXplore's development of similar intellectual property, all constitute oppressive conduct."); Madugula v. Taub, 853 N.W.2d 75, 77 (Mich. 2014) (concluding that "violations of a shareholder agreement may constitute evidence of shareholder oppression"); Boatright v. A&H Technologies, Inc., 296 So. 3d 687, 694, 697 (Miss. 2020) (involving a majority shareholder (Chester) who removed the wife (Kelley) of the minority shareholder (William) from her officer position: "Concerning the freeze-out claim, the chancellor clearly erred when he found that Chester engaged in a freeze out of Kelley as well as William. Because Kelley is not a shareholder, she could not be frozen out. And Chester owed her no duties based on ownership interest in A&H. So we reverse and render the chancellor's freeze-out ruling to the extent it found Kelley too had been frozen out. That said, the evidence shows that both men derived a significant amount of compensation as owners through the employment income of their wives. Thus, there was no reversible error in the chancellor's considering Chester's actions toward Kelley as evidence of Chester's freeze out of William."); Robinson v. Langenbach, 2019 Mo. App. LEXIS 603, at *11–*13 (Mo. Ct. App. Apr. 23, 2019) ("Implicit in Langenbach and Lanfri's [both directors] fiduciary duty to PJC and its stockholders, including Robinson, was to run PJC in accordance with its bylaws. … [Plaintiff's] claim is based in the Board's failure to comply with the bylaws, which, under controlling Missouri law, they have a fiduciary duty to the corporation and to the shareholders, including Robinson, to follow."); Baker v. Baker, 2011 Neb. App. LEXIS 108 (Aug. 9, 2011) (affirming that the majority shareholder's "failure to provide financial statements to plaintiffs … fails to comply with [Nebraska's statutory requirement that corporations provide their shareholders with annual financial statements] and creates an issue of fact as to whether defendants have engaged in oppressive conduct"); Straka v. Arcara Zucarelli Lenda & Assocs. CPAs, P.C., 92 N.Y.S.3d 567, 573 (Sup. Ct. 2019) (upholding oppression allegations by a female minority shareholder of an accounting firm based in large part on her male co-owners' toleration of offensive, demeaning, and condescending comments made primarily by a senior accountant-employee at the firm: "This court finds that Arcara, Zucarelli and Lenda [who collectively owned 75% of the corporation], and indeed, any shareholder of any corporation, should know that a female shareholder reasonably expects to be treated with equal dignity and respect as male shareholders forming the majority. Straka [a 25% minority owner] has demonstrated that she was not. The shareholders' slow and inadequate response to [a senior accountant's] demeaning behavior marginalized Straka, as did the lack of respect provided to her as the head of IT at the corporation."); Hanley v. Hanley, 2019 N.Y. Misc. LEXIS 3177, at *27 (N.Y. Sup. Ct. June 13, 2019) ("Defendants cite no authority allowing majority shareholders to use oppressive means to force a voluntary buy-out, even a reasonable one."); Matter of Digeser v. Flach, 49 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2015) (concluding that oppressive conduct had occurred based in part on the fact that "[d]uring the remainder of his employment, petitioner was denied access to his work computer and email, [and] severely restricted in his interactions with [the corporation's] customers and employees"); Vontz v. Miller, 111 N.E.3d 452, 456–57, 461 (Ohio Ct. App. 2016) (concluding that a 50% shareholder whose family controlled five of six board seats did owe a "heightened fiduciary duty" to the other 50% shareholder that was breached by purposefully refusing to attend a shareholder's meeting for the election of directors: "[T]he evidence shows that Miller exercised her influence and authority to such a degree that she in fact dominated [the corporation's] governing board. And Miller exerted her control by refusing to attend a shareholder meeting, thereby defeating the quorum requirement necessary for Vontz [the other 50% shareholder] to exercise his right to vote for new directors. By doing so, Miller ensured that none of her family members would be replaced on the board, thus securing her continued control of the corporation."); Hayes v. Olmsted & Assocs., Inc., 21 P.3d 178, 185–86 (Or. Ct. App. 2001) (finding oppression when those controlling the corporation created, in violation of the bylaws, a de facto Executive Committee that "did not observe corporate formalities," that "failed to hold regular meetings of the corporation's Board of Directors and shareholders," and that "paid [its members] bonuses that were not authorized by or reported to the Board of Directors, also in violation of the bylaws": "In short, the Executive Committee … systematically disregarded the formalities and substance of [the corporation's] organic governing documents."); *id.* at 185 ("The trial court found that plaintiff was the victim of oppression 'because minority shareholders were not given the formal and required opportunities to participate in or comment upon major changes in direction of [the corporation].' We agree."); *id.* at 182 ("A breach of fiduciary duty by those who control a closely held corporation normally constitutes oppression."); Feldman v. Kim, 2012 Tex. App. LEXIS 153 (Jan. 10, 2012) (concluding that allegations that the controlling group (1) altered the company's expense-allocation method, (2) caused the company to stop repaying funds owed to the plaintiff minority shareholder, and (3) caused a related company to stop paying the plaintiff his share of the rent were sufficient to defeat a summary judgment motion on a shareholder oppression claim); Ritchie v. Rupe, 339 S.W.3d 275 & n.9 (Tex. App. Mar. 28, 2011) (noting that the trial court concluded that appellants acted oppressively by, among other actions, "refus[ing] to cooperate with Ann's [a minority shareholder's] attempts to sell [her] Stock to a third party," "making redemption offers to Ann as trustee … that were not in accordance with [company] policy," and "making Ann a conditional offer to be on the board of directors in exchange for her not pursuing legal action against another [company] shareholder"), *rev'd*, 443 S.W.3d 856, 871 (Tex. 2014) (stating that "we conclude that the refusal … to meet with Rupe's potential buyers does not constitute an 'oppressive' action for which Rupe may obtain relief"); *id.* at *12–14 (stating that "[b]ecause a holder of unrestricted stock in a closely held corporation has a general reasonable expectation of being able to market her stock to third parties, it is also reasonable to expect that the corporation and its management (as part of the standards of fair dealing on which all shareholders are entitled to rely) will consent to a shareholder's reasonable requests for cooperation with respect to her efforts to sell the stock," and concluding that the defendant directors (and controlling group) acted oppressively "by refusing to meet or allow any officer or director of [the company] to meet with prospective purchasers of the Stock because that conduct in this case substantially defeated Ann's [a minority shareholder's] general reasonable expectation of marketing the Stock"); *id.* at *11 ("The standards of fair dealing with respect to the owner of unrestricted stock in a corporation would include a requirement that they act fairly and reasonably in connection with a shareholder's efforts to sell that stock to a third party and not adopt policies that unreasonably restrain or prohibit the sale or transfer of the stock or that deprive the owner of its fair market value."); Cotten v. Weatherford Bancshares, Inc., 187 S.W.3d 687, 700–01 (Tex. App. 2006) (concluding that directors' improper redemption of preferred shares could be oppressive). *But see* Virgil Kirchoff Revoc. Trust v. Moto, Inc., 482 S.W.3d 834, 841 (Mo. Ct. App. 2016) ("Appellants' criticisms of the valuation method chosen by the Board do not amount to a showing of oppressive conduct and Appellants have not produced any evidence demonstrating the valuation method was oppressive. The Board's alleged failure to take reasonable care in choosing a valuation method and in using 'vague' terminology to describe the resulting value is not sufficient evidence of 'oppressive' conduct."); Sipko v. Koger, Inc., No. C-393-07, 2011 N.J. Super. Unpub. LEXIS 1258 (May 16, 2011) (noting that "[m]ere disagreement or discord between the shareholders … is not sufficient to constitute oppression"); Argo Data Res. Corp. v. Shagrithaya, 380 S.W.3d 249, 267 (Tex. App. 2012) ("While [the minority shareholder] disagreed with, and voted against, the compensation levels set by the board, the inability to control board decisions is inherent in the position of a minority shareholder."); *id.* at 271 (stating that a jury finding that the majority failed to inform the minority of a retained earnings tax

[D] Protecting Against Oppression in the Absence of Contract

[0] Background

A minority shareholder who is cognizant of the risks of oppressive majority conduct could seek to protect his financial and participatory rights by contract before committing his capital to the venture.[112] Shareholder agreements, supermajority requirements, and buy-sell provisions are only some of the contractual tools that shareholders can use to strengthen their employment, dividend, exit, and other rights.[113] If the controlling shareholder or the corporation is unwilling to enter into protective contractual arrangements, the minority shareholder can simply refuse to invest in the company.

How should the law respond when minority shareholders fail to protect their financial and participatory rights by contract? Broadly speaking, courts have followed two different approaches. First, most jurisdictions have developed special common-law doctrines (often aided by statutes) that are designed to protect minority shareholders in closely held corporations from oppressive majority conduct.[113.1] In those jurisdictions that offer protection, the protection is doctrinally articulated either as a fiduciary duty that shareholders in closely held corporations owe to one another,[114] or as a right to dissolution (or other remedy) on the grounds of oppressive

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assessment by the IRS was insufficient to support a determination of oppression because the minority "makes no argument and points to no evidence showing how his interests as a shareholder were affected by either the overturned assessment or the fact that he was unaware of the assessment"); *id.* at 272 ("[T]he jury found that [the majority] failed to disclose to ARGO's [the corporation's] board of directors that he had retained a law firm to challenge the IRS tax assessment against ARGO. … ARGO as a whole benefitted from the representation through the successful challenge, and there was no showing that [the majority] obtained any personal benefit that was denied to [the minority]. Accordingly, we cannot conclude this act defeated [the minority's] expectations as a shareholder or was in any way wrongful.").

[112] *See* Chapter 3 (discussing the alteration of corporate norms by contract); *see also* Section 7.01[E][1] (discussing impediments to contracting).

[113] *See* Chapters 3–4; *see also* Ritchie v. Rupe, 443 S.W.3d 856, 871 (Tex. 2014) ("Shareholders of closely held corporations may … [enter] into shareholder agreements that contain buy-sell, first refusal, or redemption provisions that reflect their mutual expectations and agreements.").

[113.1] Although these protective oppression doctrines grew out of the problems faced by shareholders in closely held corporations, see Section 7.01[A]; *cf.* Ritchie v. Rupe, 443 S.W.3d 856, 864 n.8 (Tex. 2014) (noting that "[c]losely held corporations have unique attributes that may justify different protections under the law"), some courts have allowed the doctrines to be applied outside of the closely held corporation setting. *See, e.g.*, Kaplan v. First Hartford Corp., 484 F. Supp. 2d 131, 132 (D. Me. 2007) (allowing an oppression claim in a "publicly held, but thinly traded, Maine corporation," and stating that although "[o]ppression relief statutes were designed for closely held corporations[,] under the Maine statute, the remedy is available for publicly held corporations as well"); *id.* at 146 (noting that the corporation at issue had "about 820 shareholders and … at least a thin market for its stock"); *see also* Redmon v. Griffith, 202 S.W.3d 225, 234 (Tex. App. 2006) (stating that while "oppressive conduct is more easily found in the context of a close corporation, we are aware of no case law expressly limiting it to such a context"); Pinnacle Data Servs., Inc. v. Gillen, 104 S.W.3d 188, 191–92, 196 (Tex. App. 2003) (suggesting that the oppression doctrine applies in the LLC setting). The Texas Business Organizations Code provides for an oppression action against the "governing persons of the entity," which would appear to be applicable to most business forms. *See* TEX. BUS. ORGS. CODE § 11.404(a)(1)(C); *see also id.* § 1.002(18), (21), (35), (37) (defining "domestic entity," "entity," "governing authority," and "governing person").

[114] *See* Section 7.01[D][1][a] (discussing the fiduciary duty approach). For a chart of the approach used by each state, see Figure 7.1.

conduct by those in control.[115] Keep in mind that these special common-law doctrines are in addition to any rights that an aggrieved shareholder would have under the traditional fiduciary duty principles that apply in any corporation (e.g., restrictions on conflict of interest transactions by directors, officers, and controlling shareholders).[116]

Second, a few jurisdictions (including, notably, Delaware) have refused to develop special common-law rules to protect minority shareholders in closely held corporations.[117] In these jurisdictions, an oppressed investor can attempt to rely on traditional legal principles for protection (e.g., traditional corporate or contract law doctrines), but no additional common-law safeguards are provided.

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[115] *See* Section 7.01[D][1][b] (discussing the dissolution-for-oppression approach). For a chart of the approach used by each state, see Figure 7.1.

Despite the fact that the fiduciary duty and dissolution-for-oppression approaches are two distinct doctrines, one should keep in mind that the doctrines are similar in that they both provide special common-law protection to oppressed investors in closely held corporations. *See* note 264. Indeed, given that some courts (1) use conduct that constitutes a breach of fiduciary duty to establish oppression, and (2) use conduct that constitutes oppression to establish a breach of fiduciary duty, this similarity is particularly evident. *See* note 198 and accompanying text.

Moreover, it should be noted that some jurisdictions have precedents that reflect both the fiduciary duty and statutory dissolution-for-oppression approaches. *See, e.g.*, Georgeson v. DuPage Surgical Consultants, Ltd., 2007 U.S. Dist. LEXIS 20801 (N.D. Ill. Mar. 22, 2007) (applying Illinois law and involving a statutory oppression claim and a breach of fiduciary duty claim); *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1177 (N.Y. 1984) (involving a statutory oppression action); Kavanaugh v. Kavanaugh Knitting Co., 123 N.E. 148, 151–52 (N.Y. 1919) (involving a claim that directors/controlling shareholders breached a fiduciary duty owed to a plaintiff minority shareholder); Redmon v. Griffith, 202 S.W.3d 225, 234–35, 237 (Tex. App. 2006) (involving both a statutory oppression action and a breach of fiduciary duty action, and observing that fiduciary duties to shareholders may be created "in certain circumstances in which a majority shareholder in a closely held corporation dominates control over the business, and in closely held corporations in which the shareholders operate more as partners than in strict compliance with the corporate form"); Hoggett v. Brown, 971 S.W.2d 472, 488 n.13 (Tex. App. 1997) (noting that "a majority shareholder's fiduciary duty ordinarily runs to the corporation," but stating that "in certain limited circumstances, a majority shareholder who dominates control over the business may owe such a duty to the minority shareholder"); Davis v. Sheerin, 754 S.W.2d 375, 377–78 (Tex. App. 1988) (involving a statutory oppression action); *see also* Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 457 (N.M. Ct. App. 2001) ("And, drawing on our partnership case law, we hold that breach of this fiduciary duty can be asserted as an individual claim separate from the remedies available under our statutory corporate law for oppressive conduct."); McLaughlin v. Schenck, 220 P.3d 146, 156 (Utah 2009) (imposing a fiduciary duty between shareholders of closely held corporations in a jurisdiction with an oppression statute).

[116] *See* Chapter 6 (discussing the traditional role of fiduciary duty). That is, the special common-law doctrines do not displace any traditional shareholder rights; rather, they simply provide additional ones.

[117] *See* Section 7.01[D][2] (discussing the "no special rules" approach).