2007

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Article

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"It was all to be done in thirds. I was to get 1/3 for doing the typing, and she was to get 1/3 for doing the editing, and he was to get 1/3 for writing the novel.

"We were going to divide the royalties three ways. We all shook hands on the deal, each knowing what we were supposed to do, the path before us, the gate at the end.

"I was made a 1/3 partner because I had the typewriter."[1]

"This was the beginning of a process when each of Conklin and Perdue made allegations against the other, both in the nature of causing harm to CPI and in the nature of breaching fiduciary duties to each other. The business divorce had begun in earnest and eventually found its way, as most divorces do, into the hands of a judge for resolution of issues colored much more by emotion than economic or business reality."[2]

Disputes involving closely held businesses come in primarily two varieties. When, as is often the case, the business fails, creditors bring lawsuits seeking to pierce the corporate veil in an attempt to reach the assets of the business owners.[3] When the business does well, on the other hand, minority owners often accuse those in control of seeking ways to keep a bigger slice of the profit pie and of squeezing or freezing out minority owners.[4] These latter disputes are often categorized under the rubric of minority shareholder oppression; and attempts to deal with them by statute and judicial decision are as old as corporate law.[5] Moreover, they are not unique to business in the

1. Richard Brautigan, *1/3, 1/3, 1/3*, *in* AMERICAN SHORT STORY MASTERPIECES 71, 71 (Raymond Carver & Tom Jenks eds., 1987).

2. Conklin v. Perdue, No. 990335BLS, 2002 WL 31421763, at *5 (Super. Ct. Mass. Sept. 17, 2002).

3. *See* John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners' Limited Liability Protection*, 75 WASH. L. REV. 147, 149–50 (2000) (discussing creditors' attempts to pierce the corporate veil to reach an owner's assets).

4. *See, e.g.*, John H. Matheson & Brent A. Olson, *Corporate Cooperation, Relationship Management, and the Trialogical Imperative for Corporate Law*, 78 MINN. L. REV. 1443, 1461 (1994) ("[The] traditional shareholder primacy model" includes the right of a corporation's majority shareholders "to control its destiny, determine its fundamental policies, and decide whether to make fundamental changes in corporate policy and practice."); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 IOWA J. CORP. L. 277, 310–22 (1998) (tracing the history of shareholder oppression cases).

5. Smith, *supra* note 4, at 310.

United States; rather, they are part of the fabric of modern business organization law on a global scale.[6]

The source of this oppression, majority rule in corporate governance, arose in response to the problem of oppression by a *minority*: Early corporation statutes required unanimity for major decisions, permitting a holdout minority owner to extract a windfall for consent to a mutually beneficial proposed action.[7] Legislatures responded by permitting corporations to make fundamental decisions with less than unanimity.[8] Further legal refinements, like the business judgment rule and the doctrine of independent legal significance, permitted corporations to act more decisively even in the face of shareholder dissent.[9] The unhappy shareholder has two main options: sell the shares on the market or, when provided by statute, petition for dissent and appraisal rights. But when a majority shareholder in a closely held corporation uses these same powers to "freeze out" the minority by, inter alia, (lawfully) voting him off the board and by (lawfully) eliminating dividends, the minority shareholder has no effective remedy. No one will buy the shares, and statutory appraisal rights are not triggered.

Virtually every state recognizes, at least in some way, that the individual who becomes an owner by joining an entrepreneurial or development-stage enterprise finds herself in a position profoundly different from the investor who buys shares of Microsoft through a broker.[10] The closely held corporation, by definition, has relatively few shareholders,[11] meaning that *eve-*

6. *See, e.g.*, A.J. BOYLE, MINORITY SHAREHOLDERS' REMEDIES 38–59, 90–118 (2002) (discussing English company law governing minority shareholders' remedies from historical, theoretical, and comparative perspectives); Cindy A. Schipani & Junhai Liu, *Corporate Governance in China: Then & Now*, 2002 COLUM. BUS. L. REV. 1, 36–38 (2002) (noting the severity of minority shareholder oppression in China).

7. *See* Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1, 11–14 (1995) (providing a concise discussion of early corporation statutes in the present context).

8. *Id.*

9. *See generally* 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 3.3 (rev. 2d ed. 2005 & Supp. 2006) (explaining that majority control and business judgment rule principles embedded in corporation statutes severely limit the options of a minority shareholder).

10. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 511 (Mass. 1975) (outlining some of the reasons why owning stock in a closely held corporation differs from owning stock in a large and publicly traded corporation).

11. *Id.* ("[A] close corporation [is] typified by . . . a small number of stockholders.").

ryone knows everyone. These business relationships often begin with little or no pre-planning for an eventual (if not inevitable) breakup. Adding to the potential for conflict, the majority and minority shareholders frequently participate in the corporation's management.[12] Finally, there is no ready market for the shares.[13] So when disagreements reach a boil, they cannot be resolved by placing a sell order with a broker.

Yet even if most courts and commentators can agree that closely held corporations *are* different, they have struggled to articulate how these differences should alter the rules of engagement in disputes between minority and majority shareholders. Those who argue that the permissive rules governing large corporations should also apply to closely held corporations often contend, in essence, that the oppression "cure" is worse than the disease.[14] Those in favor of greater judicial intervention contend that shareholders in closely held corporations are, in essence, partners in an ongoing economic and social relationship, and that the unique nature of the closely held corporation requires special remedies when one owner acts inconsistently with the interests or expectations of another.[15]

12. *Id.* There are other good reasons for differentiating the close corporation shareholder from his public counterparts. The minority owner generally expects to draw a salary, which is often a de facto dividend. Also, minority shareholders can face unusual and burdensome tax consequences if the corporation is a subchapter S corporation, since the flow-through nature of the entity requires the minority shareholder to pay taxes on his pro rata income even if he is fired from his job and receives no dividends from the corporation.

13. *Id.*

14. *See* Dennis S. Karjala, *An Analysis of Close Corporation Legislation in the United States*, 21 ARIZ. ST. L.J. 663, 663 (1989) ("[T]he case against special statutes to protect close corporation shareholders is even stronger than it was ten years ago."); Timothy J. Storm, *Remedies for Oppression of Non-Controlling Shareholders in Illinois Closely-Held Corporations: An Idea Whose Time Has Gone*, 33 LOY. U. CHI. L.J. 379, 380 (2002) ("[T]he costs of oppression theory substantially outweigh the demonstrated benefits."); Bryn Vaaler, *Scrap the Minnesota Business Corporation Act!*, 28 WM. MITCHELL L. REV. 1365, 1374–75 (2002). *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 228–43 (1991) (discussing the differences between closely held corporations and publicly held corporations).

15. *See, e.g.*, Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993) ("Traditional corporate norms, oriented as they are toward publicly held corporations, proved unsuitable for close corporations. Within a closely held enterprise, a more intimate and intense relationship exists between capital and labor. There is no market for the corporation's shares and no separation of function between those who provide the capital and those who manage the enterprise.").

A true legislative and judicial patchwork has emerged. Each state has a unique regime for addressing minority shareholder oppression in closely held businesses—a surprising state of affairs for such an important area of corporate law. This phenomenon is exacerbated by the development and use of the limited liability company—that is, the problem of oppression is one involving the closely held *businesses*, not just closely held *corporations*.[16] Any resolution of the conundrum should be applicable across business entity types.[17]

We contend that the development of this area of law involves a desire by courts and legislatures to provide an exit strategy for minority owners in closely held businesses. While most states have concluded that a buyout of the minority owner's interest by the company (or the majority owner) is the preferred solution, there is discordance as to the bases for granting that desired remedy. That is, there is evolution and divergence over the factual and legal predicates to providing liquidity to the minority owner.

The Appendix highlights these conclusions. We undertook a completely independent and exhaustive state-by-state analysis of the statutes and case law of minority oppression to determine the underlying circumstances and the nature of the relief granted by courts and legislatures. The Appendix, labeled "Shareholder Oppression Standards and Remedies," includes the most important aspects of our fifty-state survey. For each jurisdiction, the Appendix reports the type of statute, the stan-

16. *See* Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883 *passim* (2005) [hereinafter Moll, *Minority Oppression & the LLC*] (explaining that many closely held businesses are not close corporations but limited liability corporations and concluding that the problems of minority oppression exist in both structures).

17. While this Article focuses on disputes involving the closely held businesses in whatever form, there is a pressing need for a broader application and rationalization of law across the various business entity forms. *See* Harry J. Haynsworth, *The Unified Business Organizations Code: The Next Generation*, 29 DEL. J. CORP. L. 83, 90 (2004) ("'The law of business organizations has thus become a hodge-podge of unwieldy, illogical, and even irrational legislation and decisions bristling with incoherence and inconsistencies. Bursting at the seams, the fabric of business organizational law currently blanketing the nation has become a variegated quilt of legal passwords.' I concur in this assessment. If anything, the situation is worse today than it was in 1996. I also concur with the authors' conclusion that '[f]undamental reform of business organization law is both imperative and inevitable.'" (alteration in original) (footnotes omitted) (quoting John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1, 3 (1996))).

dard of liability, whether a buyout is permitted, and the context for the buyout remedy.

We conclude that states have been grappling uneasily with establishing a way to provide relief in the form of a buyout exit for the minority business owner. Constrained by the traditional common law concept that a remedy should only follow where a wrong has been committed, the states have been haplessly mired in the task of determining the proper bases upon which to grant this separation remedy. One solution to this morass is a model statute that provides liquidity to the disgruntled minority owner without the wasteful and acrimonious litigation attendant to resolution of such disputes today. The goal of this Article is to develop and defend this solution.

Part I discusses the state of the law of closely held corporation disputes. Importantly, the law has both evolved and converged. Evolution has taken place in an attempt to define the bases for relief for the minority business owner. Convergence has occurred in lawmakers' attempts to provide a liquidity-based remedy. The flailing tail of potential predicates for relief has been wagging the dog of desired remedial results. Part II examines why the current resolutions are inadequate and proposes a statutory reform model. Part II also addresses some possible concerns about the proposed statutory solution and provides the context for states to move forward to adopt the model statute as part of their business organization law.

I. THE REQUIREMENTS AND REMEDIES FOR MINORITY OPPRESSION: EVOLUTION AND CONVERGENCE

Development of the cause of action for minority business owner oppression can be divided roughly into three groups of states. First, some states have developed relief for minority oppression as a matter of common law jurisprudence. This development differs only slightly from many other state legislatures that have followed the Model Business Corporation Act (MBCA)[18] in adopting minimalist statutory language that simply permits relief when a shareholder acts in an oppressive manner.[19] In general, however, the legislatures in these MBCA-

18. *See* MODEL BUS. CORP. ACT § 14.30(2)(ii) (2002), *available at* http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf (providing that a shareholder may petition for dissolution when "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent").

19. Nine states have dissolution statutes that do not use the word oppres-

influenced states have not attempted to define what constitutes oppressive conduct or to set out what range of remedies is available, leaving those vexing questions to the courts and common law.[20] Second, a few state legislatures have adopted what might we might loosely term "comprehensive statutes"—legislative fiats that establish a cause of action for minority business owner oppression and, in broad strokes, describe the behavior that triggers such a cause of action.[21] Finally, the Delaware Supreme Court, a bellwether of corporate law, has declined to create a judicially imposed doctrine of shareholder oppression for closely held corporations, stating that it is the legislature's role to create such a policy.[22]

With the exception of Delaware and the few states[23] that appear to follow Delaware's hands-off approach, the varied state regimes have begun to converge over the past quarter century.[24] First, the majority rule is now that closely held corporation shareholders owe fiduciary duties directly to one another,[25] and that a breach of these duties results in actionable

sion but still permit at least some kind of minority shareholder action. *See infra* Appendix. The two broad subgroups within this category are those that permit dissolution on a showing of "illegality" and "fraud," designated in the Appendix as "I&F," and those that permit dissolution only for deadlock. Three additional states have dissolution statutes that create no cause of action for a minority shareholder. *See id.*

20. For ease of reference, this Article generally refers to both groups as "common law states." For obvious reasons, the term is not ideal. Many of these states are "statutory" to the extent that oppression is specifically enumerated as a ground for dissolution. The statutes involved, however, are so barebones as to require judicial elaboration and explanation akin to development of common law doctrine. These states are therefore classified with those states whose doctrinal development of the oppression concept and its remedies is purely a judicial common law creation.

21. For purposes of this Article, these jurisdictions are called "statutory states." *See, e.g.*, N.J. STAT. ANN. § 14A:12-1(1)(a), (c) (West 2003) (providing ways in which a corporation may be dissolved).

22. *See* Nixon v. Blackwell, 626 A.2d 1366, 1377 (Del. 1993).

23. Like Delaware, Kansas and Oklahoma provide no statutory grounds for dissolution except where the corporation has two shareholders, each of whom owns fifty percent of the shares. *See* Thompson, *supra* note 15, at 711 n.70; *infra* Appendix.

24. *But see* Karjala, *supra* note 14, at 701–02 (arguing that close-corporation regimes are a "motley array" and that uniformity is unlikely because no "'Delaware' of close corporation law" has emerged).

25. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 512 (Mass. 1975) ("Just as in a partnership, the relationship among the stockholders must be one of trust, confidence and absolute loyalty if the enterprise is to succeed."); James M. Van Vliet Jr. & Mark D. Snider, *The Evolving Fiduciary Duty Solution for Shareholders Caught in a Closely Held Corporation Trap*, 18

conduct, usually described as minority oppression. Second, an increasing number of states have adopted the view that the majority shareholder has oppressed the minority when the majority's actions violate the minority shareholder's "reasonable expectations"[26]—the broadest definition of oppression, focusing not on the actions of the majority shareholder but on the expectations held by the minority shareholder when he or she became an owner.[27] Finally, most states now permit courts to impose remedies less drastic than dissolution—a trend that favors minority shareholders.[28]

According to our survey, a total of twenty states apply the reasonable expectations standard,[29] and one additional state[30] uses reasonable expectations as a factor. Twelve states have adopted a fiduciary duty approach that, for the most part, is expansive and could be employed to reach the same result as the reasonable expectations standard.[31] A buyout of the com-

N. ILL. U. L. REV. 239, 251–52 (1998) (stating that an emergent general rule imposes heightened duties on a close-corporation shareholder). *But see* Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 381–82 & nn.19–20 (2004) (recognizing that fiduciary duties in close corporations are the majority rule and that many states have not squarely addressed the issue).

26. *See infra* Appendix; *see also, e.g.*, Berreman v. W. Publ'g Co., 615 N.W.2d 362, 374 (Minn. 2000).

27. How much more protection does a shareholder get under the reasonable expectations model than under the fiduciary duty approach? That is an important but probably unanswerable question. *See* Vaaler, *supra* note 14, at 1405–06 (arguing that plaintiffs need only state a claim under the most liberal theory; if the claim meets the most permissive theory of liability, the court may never reach the merits on the more narrow standard). One would expect that "reasonable expectations" are most likely triggered when employment is terminated, but termination can also represent a breach of the majority's fiduciary duty. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663–64 (Mass. 1976).

28. 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS § 9:30 (2004) ("The most dramatic change in legislative and judicial thinking on solutions for close corporation problems is reflected in the increased popularity of a buyout as a remedy for deadlock or dissension. Legislative or judicial support for this remedy *now exists in most states*, although the criteria for its use are not uniform." (emphasis added)). As a practical matter, less drastic remedies make it easier for courts to find that oppression has occurred. *See infra* Part II.B.

29. *See infra* Appendix.

30. Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 264 (S.C. 2001) (creating a standard where reasonable expectations are only a factor); *see also infra* Appendix at "South Carolina."

31. *See infra* Appendix. *But see* Fought v. Morris, 543 So. 2d 167, 170 (Miss. 1989) (requiring the majority to be "intrinsically fair" to the minority);

plaining shareholder's shares is also the rule in eighty percent of the states: about forty states provide this remedy, either through statute or through common law.[32]

Convergence, however, is not uniformity. While states may be converging around two or three important principles, they have not settled on a single approach or even a handful of approaches. Importantly, the State of Delaware appears to be charting a different course, suggesting that the typical pattern in corporate law—where Delaware leads and most other states coalesce around that standard—has broken down. Moreover, all of these shareholder disputes are intensely fact-driven (and, of course, equitable in nature). The difference between the competing standards of liability is not entirely clear. While a complete review of the development of shareholder oppression doctrine exceeds the scope of this Article, some background is necessary to understand why states have developed such varied (yet remedially convergent) regimes.

A. THE STATUTORY APPROACH

1. Expanding the Definition of Oppression

In the mid-1970s and early 1980s, several states, most notably New Jersey, enacted statutes that attempted to codify a cause of action for shareholder oppression. While these states were (correctly) described as trailblazers, they were not the first to make oppression a statutory predicate for dissolution. Illinois and Pennsylvania established oppression as a ground for dissolution in their statutes in 1933.[33] These early statutory efforts, however, did not define oppression or enumerate all the potential remedies, leaving large gaps for courts to fill.[34] Thus, the effort by the New Jersey legislature to draft a broad statute to govern shareholder oppression, while not exactly new, *was* novel in its scope. And while only a handful of states directly

infra Appendix at "Mississippi."

32. *See infra* Appendix.

33. *See* Cent. Standard Life Ins. Co. v. Davis, 141 N.E.2d 45, 49 (Ill. 1957) (describing the state's early law); Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 455 (1990) (discussing the development of minority shareholder remedies in Illinois, among other jurisdictions); Thompson, *supra* note 15, at 709–11, 713 n.84 (discussing the early development of oppression in state statutes and noting that California law used the term "persistent unfairness" from 1931 to 1933).

34. *See* Thompson, *supra* note 15, at 711.

followed New Jersey's lead to adopt expansive statutes,[35] the legislation nevertheless has proven highly influential. The New Jersey legislation added momentum to the idea that minority shareholders in closely held corporations require special protections beyond those afforded to shareholders in larger corporations.

The 1972 amendments to the New Jersey General Corporations Act included several noteworthy provisions.[36] First, the amendments broadened the court's available remedies beyond dissolution. This expansion was a necessary precondition to active judicial intervention in shareholder disputes since many judges are unwilling to wield the harsh weapon of dissolution.[37] Second, the statute created a special set of rules for a closely held corporation—defined as a corporation with twenty-five or fewer shareholders—resulting in a bright-line rule meant to prevent abusive strike suits against publicly traded corporations.[38] The statute also clarified that courts may order dissolution of a closely held corporation on a finding of something less than oppression. Actions that are merely unfair can also trigger remedies.[39] Finally, courts may determine that the majority shareholders' actions are unfair if they are unfair toward the minority owner in any of four roles she may play within the corporation: shareholder, director, officer, or employee.[40] According to the Commissioners' Comments,

> These additional words reflect the fact that in a closely held corporation oppressive conduct often takes the form of freezing-out a minority shareholder by removing him from his various offices or by substantially diminishing his power or compensation; in the absence of

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35. *See infra* notes 42–60 and accompanying text.

36.

> The Superior Court . . . may appoint a custodian, appoint a provisional director, order a sale of the corporation's stock as provided below, or enter a judgment dissolving the corporation, upon proof that . . . in the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.

New Jersey Business Corporation Act, ch. 366, 1973 N.J. Laws 964, 1037 (codified at N.J. STAT. ANN. § 14A:12-7(1)(c) (West 2003)).

37. *See* N.J. STAT. ANN. § 14A:12-7 cmt. (1972 Amendments).

38. *See id.*

39. *Id.* § 14A:12-7(1)(c).

40. *Id*.

> such language, the courts might feel constrained to look exclusively to direct injury to the shareholder's stock interest.[41]

Hence, the new statute decidedly shifted the scales in favor of unhappy minority shareholders.

Three years later, the California legislature amended its General Corporation Law to explicitly give shareholders in closely held corporations, defined as having thirty-five or fewer shareholders, legal grounds to dissolve the corporation.[42] Under the statute, the court may dissolve a corporation when "[t]hose in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness towards any shareholders."[43] The statute generally limits the power to bring a dissolution action to members of the board and to shareholders holding at least one-third of the corporation's stock, but waives those limitations for closely held corporation shareholders:[44] grounds for dissolution exist when, "[i]n the case of any corporation with 35 or fewer shareholders. . . . , liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders."[45] As the Legislative Committee Comment explained:

> Authority to initiate a proceeding for involuntary dissolution is expanded and expressly includes *any shareholder*, of record or beneficial, of a close corporation. The grounds to justify an involuntary dissolution include, in the case of a corporation with 35 or fewer shareholders, that such action is reasonably necessary to protect the interests of the initiating party.[46]

Neither statute expressly adopted the permissive "reasonable expectations" doctrine as a constraint on oppressive behavior. The California Court of Appeals subsequently rebuffed an invitation to construe the statute as encompassing the "reasonable expectations" of the minority shareholder.[47] New Jersey

41. *Id.* cmt. (1972 Amendments) (citing ERNEST L. FOLK, REVIEW OF THE DELAWARE CORPORATION LAW 344 (1968)).

42. Act effective Jan. 1, 1977, ch. 683, 1975 Cal. Stat. 1514, 1597–98 (codified as amended at CAL. CORP. CODE § 1800(b)(5) (West 1990)).

43. CAL. CORP. CODE § 1800(b)(4).

44. *See id.* § 1800(a)(2) (providing shareholders the ability to involuntarily dissolve a corporation if they have one-third of the total outstanding shares, one-third of the outstanding common shares and equity of the corporation, or if they are shareholders in a close corporation).

45. *Id.* § 1800(b)(5).

46. *Id.* § 1800 cmt. (emphasis added).

47. Bauer v. Bauer, 54 Cal. Rptr. 2d 377, 382 (Ct. App. 1996) ("Nothing in subdivision (b)(4) would make a cause of action for dissolution turn on the mi-

courts, by contrast, have concluded that a violation of its statute can be found when the majority shareholders of a closely held corporation defeat the reasonable expectations of the minority shareholder.[48] Under either regime, however, minority shareholders in a closely held corporation enjoy a much lower threshold for prevailing against the majority shareholders than they had previously.[49] These statutes in turn influenced other states that enacted similar legislation.

In 1981, Minnesota adopted a new business corporations act[50] that included a dissolution provision patterned in part on the New Jersey statute.[51] The first version was intended to assist minority shareholders; in subsequent amendments over the following two years, the legislature made the statute still more favorable to this ownership group. It lowered the threshold for court intervention from "persistently unfair" behavior to merely "unfairly prejudicial" behavior—a change intended to broaden the law.[52] It also added language stating that courts, in considering whether to grant equitable relief to a shareholder of a closely held corporation, should consider the "reasonable expectations of the shareholders."[53] In 1985, North Dakota passed an

nority shareholders' 'reasonable expectations.'").

48. Brenner v. Berkowitz, 634 A.2d 1019, 1029 (N.J. 1993) ("Courts also should consider whether the misconduct thwarts the minority shareholder's reasonable expectations of his or her role in the corporation."); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561 (N.J. Super. Ct. Law Div. 1979) (applying the reasonable expectations doctrine).

49. CAL. CORP. CODE § 1800 cmt. ("[T]his section states a relatively broad ground for involuntary dissolution proceedings. [The provision] is limited to corporations with 35 or fewer shareholders . . . ."). The different outcomes in California and New Jersey might be explained by differences in the statutory language. *Compare* § 1800(b)(4) (using specific language of "persistent unfairness"), *with* N.J. STAT. ANN. § 14A:12-7(1)(c) (West 2003) (using broader language of "oppressively or unfairly").

50. Minnesota Business Corporations Act, ch. 270, 1981 Minn. Laws 1141, 1213 (codified as amended at MINN. STAT. § 302A.751 (2004)).

51. MINN. STAT. ANN. § 302A.751 & note (West 2004) (observing that the subdivision permitting the court to order a share buyout was "derived from a . . . provision in the New Jersey law") (Reporter's Notes—1981).

52. MINN. STAT. ANN. § 302A.751 note (Reporter's Notes—1982 to 1984).

> This is a more liberal rule than "persistently unfair," which required repeated adverse results before a shareholder could sue. Now only one instance is required. Moreover, the law now takes into account the treatment of the shareholder in ways outside traditional shareholder rights, i.e., the right to ownership. That is, it includes, for example, the discharge of a shareholder-employee as a ground, if that discharge was "unfairly prejudicial."

Id.

53. MINN. STAT. § 302A.751, subdiv. 3a. The wording of this section was

involuntary dissolution statute[54] that has provisions similar to those in the New Jersey and Minnesota statutes.[55] Like Minnesota's law, the North Dakota statute requires courts to consider the "reasonable expectations of the shareholders."[56] In 1988, Alaska passed its own expanded dissolution statute.[57] Though the statute does not require the courts to consider the reasonable expectations of the shareholders,[58] the Alaska Supreme Court had already given its approval of the reasonable expectations approach in defining oppression under a predecessor statute.[59] Oregon joined this list in 2001 by amending its corporate statute.[60]

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later altered. *See infra* note 74.

54. North Dakota Business Corporation Act, ch. 147, § 3, 1985 N.D. Laws 411–13 (codified as amended at N.D. CENT. CODE § 10-19.1-115 (2005)).

55. *See* N.D. CENT. CODE § 10-19.1-115(1)(b)(3) (permitting dissolution in an action by a shareholder when "[t]he directors or those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders or directors of a corporation that is not a publicly held corporation or as officers or employees of a closely held corporation").

56. *Id.* § 10-19.1-115(4).

57. Act of June 17, 1988, ch. 166, § 1, 1988 Alaska Sess. Laws 105–07 (codified as amended at ALASKA STAT. § 10.06.628 (2004)).

58. *See* ALASKA STAT. § 10.06.628(b)(5) (permitting dissolution for corporations with thirty-five or fewer shareholders when "liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders").

59. Stefano v. Coppock, 705 P.2d 443, 446 n.3 (Alaska 1985).

60. In 1999, an Oregon attorney who was a party to a bitter, intra-family business dispute submitted a proposal to legislators to expand the rights of minority shareholders in close corporations. Under the proposed legislation, a minority shareholder would have a cause of action if his or her reasonable expectations were frustrated. Jeff Garrett, Comment, *The Reasonable Expectation Doctrine and Senate Bill 546: Toward a Bright-Line Rule for Corporate Oppression in Close Corporations*, 36 WILLAMETTE L. REV. 361, 361–63 (2000) (providing an overview of the dispute and the associated legal issues); *see also* OR. REV. STAT. § 60.952(2) (2003) (setting out remedies for shareholders of a close corporation); Naito v. Naito, 35 P.3d 1068, 1070–77 (Or. Ct. App. 2001) (describing the facts of the case that prompted the legislation).

The controversial legislation was tabled for that session, but in 2001 the Oregon legislature adopted an expanded buyout provision for shareholders in close corporations that includes the reasonable expectations language. *See* Act of June 5, 2001, ch. 316, § 58, 2001 Or. Laws 761 (codified as amended at OR. REV. STAT. § 60.661(2)). The statute limits the traditional dissolution statute to publicly traded corporations. *See* OR. REV. STAT. § 60.661(2)(b). Shareholders in close corporations—i.e., "a corporation that does not have shares that are listed on a national securities exchange or that are regularly traded in a market maintained by one or more members of a national or affiliated securities association"—are permitted to seek remedies. *Id.* § 60.952 (providing that to determine the appropriate remedy, "the court may take into consideration

2. Expanding the Range of Remedies

In addition to providing a more expansive definition of "oppressively," the New Jersey statute contained another important innovation: the statute made clear that the state's courts can impose a range of equitable remedies when a minority shareholder proves that the majority has acted "unfairly."[61] The significance of this change cannot be underestimated. By permitting courts to provide lesser equitable remedies, especially a buyout, the New Jersey legislature made it easier for the minority shareholder to prevail on the underlying claim. Although as a theoretical matter the determination of whether a minority shareholder has been oppressed involves an inquiry separate from what remedy is appropriate, as a practical matter the harshness of the remedy inevitably plays a role in the initial finding of oppression. That is, there is a causal connection between the range of permissible remedies and the explosion of litigation initiated under the section.[62]

The Minnesota legislature was even more direct when it enacted Section 302A.751, which permits a court to dissolve the business or to "grant any equitable relief it deems just and reasonable in the circumstances."[63] The 1981 Reporter's Notes clarify that the less severe equitable remedies call for a lower standard for finding that the controlling persons

> acted fraudulently, illegally, or in a manner persistently unfair to a non-controlling shareholder. Although similar words appear in [the predecessor statute], the new provision should be interpreted in a more liberal manner. In view of the power of the court to order lesser equitable relief, the threshold of "persistent unfairness" required for a lesser remedy should be proportionately less than the stringent standards which are required, quite properly, for the ultimate relief of dissolution.[64]

Thus, the section appears to create a kind of sliding scale of op-

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the reasonable expectations of the corporation's shareholders as they existed at the time the corporation was formed and developed during the course of the shareholders' relationship with the corporation and with each other").

61. N.J. STAT. ANN. § 14A:12-7(1)(c) (2003).

62. Eileen A. Lindsay, *What Can I Do for You? Remedies for Oppressed Shareholders in New Jersey*, N.J. LAW., Aug. 2000, at 37, 37 ("Because of the availability of various forms of relief, the increase in the number of oppressed shareholder cases being brought each year has been 'phenomenal.'" (quoting Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 26 (1987))).

63. MINN. STAT. § 302A.751, subdiv. 1 (2004).

64. MINN. STAT. ANN. § 302A.751, note (West 2004) (Reporter's Notes—1981).

pression: the level of "persistent unfairness" required for a mere buyout is lower than the level of "persistent unfairness" for dissolution. One can certainly criticize this approach as adding subjectivity to an already subjective standard, but the virtue of this standard may be that it makes explicit what almost certainly happens, without explanation, in any state that permits a range of equitable remedies in addition to dissolution.

Other statutory regimes also permit remedies less drastic than dissolution when the majority shareholders oppress the minority. Alaska permits majority shareholders to avoid involuntary dissolution by purchasing the shares of the complaining shareholder.[65] In addition, Alaska has followed the line of cases in common law states by permitting a full range of equitable remedies as alternatives to dissolution.[66] California, too, has provided that majority shareholders can avoid involuntary dissolution through a buyout at fair value.[67]

3. Criticism and Development

Critics have urged that the statutory approach sets the bar too low for plaintiffs, leading to needless litigation and to unpredictable, unfair decisions.[68] The complaints are not without merit. There is certainly case law to suggest that states with a statutory scheme have expanded the meaning of oppression beyond what the legislatures had probably intended.

In Minnesota, for example, case law began to suggest that a minority shareholder who was also employed by the corporation simply could not be fired. Stated another way, it appeared from the cases that terminating a shareholder-employee was a per se breach of his or her reasonable expectations. In *Pedro v. Pedro* (*Pedro II*), the Minnesota Court of Appeals held that when two brothers in a luggage manufacturing business terminated a third brother, they breached his reasonable expectation to lifetime employment.[69] The court emphasized the unusual facts of the case: the plaintiff had been an employee for forty-five years and the majority owners fired him at the age of sixty-

65. ALASKA STAT. § 10.06.630(a) (2004).

66. *See infra* Part I.B.3.

67. CAL. CORP. CODE § 2000(a) (1990) (providing that the corporation itself has the first right to purchase the shares from the complaining shareholder).

68. *See, e.g.*, Vaaler, *supra* note 14, at 1383.

69. 489 N.W.2d 798, 802 (Minn. Ct. App. 1992).

two after he had uncovered serious accounting irregularities.[70] While the facts could have easily supported a claim of oppression triggering a buyout of the shares, the court in *Pedro II* went much further and held that the majority also violated the plaintiff's second interest as an employee, and that he could thus recover separately for lost future wages.[71] Two years later, the same court found that a terminated minority shareholder had a reasonable expectation to continued employment and was entitled to equitable relief, even though the shareholder pleaded guilty to assault while acting within the scope of his employment and, just prior to his termination, had assaulted one of the other shareholders.[72]

Corporate practitioners became concerned that a minority shareholder could never be fired, no matter how marginal his or her performance.[73] The implication of critics was clear: statutory states had gotten it wrong, and common law states had struck the narrower and more appropriate balance. Two trends have undermined the assumption that statutory states and most common law states are following starkly different paths, however.

First, legislative efforts in statutory states have narrowed somewhat the scope of the statutes. In 1994, for example, the Minnesota legislature amended Section 751 in two ways that responded to decisions like *Pedro II*: first, by making clear that the relief should be granted after considering the "reasonable expectations of *all* shareholders";[74] and second, by adding language indicating that written agreements—including buy-sell

70. *Id.* at 799–800. In addition to the long period of service, the court noted that the majority owners threatened Alfred with termination unless he agreed to ignore the discrepancy. *Id.* at 800. After his firing, the majority owners told employees that he had had a nervous breakdown. *Id.*

71. *Id.* at 803. The court of appeals rejected a claim that once the buyout of the shares was complete, the former shareholder could not have a right to lost wages. *Id.* "We believe the trial court's award of future damages for lost wages is wholly consistent with the court's broad equitable powers found in § 302A.751, subdiv. 3a and is warranted based upon its finding of a contract for lifetime employment." *Id.*

72. Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834, 836–37 (Minn. Ct. App. 1994).

73. *See* Vaaler, *supra* note 14 *passim* (criticizing several aspects of Minnesota's corporation act, particularly Section 302A.751). *But see* Philip S. Garon et al., *Challenging Delaware's Desirability as a Haven for Incorporation*, 32 WM. MITCHELL L. REV. 769, 795–98 (2006) (rejecting Vaaler's general arguments but admitting that Section 751 lacks clarity).

74. MINN. STAT. § 302A.751, subdiv. 3a (2004) (emphasis added). The previous version did not include the word "all."

agreements—should be presumed to reflect the parties' reasonable expectations.[75] In addition, Minnesota court decisions have placed further judicial limits on determinations that a termination violates the "reasonable expectations" of the shareholder. In *Gunderson v. Alliance of Computer Professionals*, the Minnesota Court of Appeals held that a plaintiff claiming that termination violated a reasonable expectation of continued employment must surmount two threshold elements and a balancing test.[76] Courts have also raised some procedural bars.[77]

Other statutory states have imposed more modest refinements and limitations. California courts, for example, declined to construe the term "persistent unfairness" as representing a breach of the reasonable expectations of the shareholder.[78] The New Jersey legislature amended its statute in 1988 to make the terms of a court-ordered buyout less onerous on the party purchasing the shares.[79] Under previous law, the buyer had to pay cash within thirty days.[80] Under the new law, the buyer can pay over a longer period of time and use cash, notes or other property.[81]

A second trend, discussed in the next section, also undermines the assumption that statutory states and common law states are still following different paths. At the same time that

75. The statute now states: "For purposes of this section, any written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between or among one or more shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements." *Id.*

76. 628 N.W.2d 173, 190–92 (Minn. Ct. App. 2001).

77. *See* Wessin v. Archives Corp., 592 N.W.2d 460, 467–68 (Minn. 1999) (holding that allegations of waste and misappropriation are injuries to the corporation and thus are derivative claims requiring the plaintiff to conform to MINN. R. CIV. P. 23.09).

78. *See supra* note 47 and accompanying text.

79. *See* N.J. STAT. ANN. § 14A:12-7 cmt. (West 2003) (Commissioners' Comments—1988 Amendments).

> The Commissioner was concerned that Section 14A:12-7 is not operating as effectively as it might to assist in the resolution of internal disputes because of the existing limitations that only a plaintiff's shares may be mandatorily purchased at fair value and that the purchase price must be paid all in cash.

Id.

80. New Jersey Business Corporation Act, ch. 94, § 69, 1988 N.J. Laws 751–55 (codified as amended at N.J. STAT. ANN. § 14A:12-7 (taking effect Dec. 1, 1988).

81. N.J. STAT. ANN. § 14A:12-7(e).

many statutory states started to impose some restrictions on the scope of the law—both through amendments and through case law—many of the common law states began to adopt fairly broad definitions of what constitutes oppression. In fact, many state courts adopted the permissive reasonable expectations model, just as states like Minnesota, New Jersey, and North Dakota have. One act by the majority shareholders that contravenes the reasonable expectations of the minority owner provides the predicate for the remedy of business separation through the buyout mechanism.

B. Common Law States

1. Expanding the Notion of Oppression

In early shareholder dispute cases, some courts responded to the complaints of minority shareholders in closely held corporations by permitting dissolution of the corporation—but only when the majority shareholder's unscrupulous behavior was particularly extreme.[82] "The traditional rule was that courts lack power to dissolve a solvent corporation absent a statute. Yet even before statutes specifically granted courts power to dissolve corporations or provide other remedies, courts recognized broad exceptions to the rule."[83] However, because dissolution is a harsh remedy, courts imposed it only when the actions of the majority were egregious—effectively barring relief for many minority shareholders.[84]

Later, courts became somewhat more sympathetic to minority claims. One commentator suggests that the changes came in "three distinct stages":

> Oppression began its life . . . primarily as a means of assuring that the drastic dissolution remedy was employed only in egregious situations in which it was truly warranted. In the second stage, the oppression concept came to be applied more as a substantive wrong that including conduct essentially amounting to breach of the controlling shareholders' fiduciary duties . . . . The analysis in the third stage focused not on the wrongful conduct of the controlling shareholder, but on whether the controlling shareholder's governance of the corporation fulfilled the non-controlling shareholder's reasonable expectations for his participation in the corporation.[85]

82. *See* Storm, *supra* note 14, at 388–89.

83. 2 O'Neal & Thompson, *supra* note 28, § 7:10.

84. *Id.* § 7:10 n.3.

85. Storm, *supra* note 14, at 388–89. The author observed that, in Illinois, the seminal cases of the first phase were decided in the mid-1950s; the second

Each new phase broadened the rights of the minority shareholder.

Courts have settled on three primary approaches.[86] First, the earliest and narrowest approach required egregious breaches on the part of the majority shareholders, sometimes requiring a showing that "corporate ruin" would likely result[87] or at least something very serious but short of corporate disaster.[88] Second, the fiduciary-duty approach generally expanded the range of behavior that could be seen as oppressive. Under this approach, courts analogized that the closely held corporation is essentially a partnership clothed in corporate form and that shareholders owe a similar duty. Since a majority shareholder could breach a partnership-type fiduciary duty without bringing the corporation to the brink of ruin, this approach broadened the earliest standard. The final standard, reasonable expectations, is broader still, focusing not on whether the acts of the majority shareholder breached a duty but rather on whether the minority shareholder's expectations were frustrated.[89]

Not all states, of course, have moved to the third and most permissive approach. What is apparent, however, is that starting in the 1970s and 1980s, states struggled to strike the right balance between the interests of minority and majority shareholders. In doing so, many states (though certainly not all) struck that balance in favor of minority shareholders.

phase can be discerned fairly clearly by 1980; and the final phase began (officially) in 1983 when legislators included "reasonable expectations" language in its state corporation law. *Id.* at 393, 405, 421.

86. *See* Douglas K. Moll, *Reasonable Expectations v. Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?*, 42 B.C. L. REV. 989, 1001–02 (2001) [hereinafter Moll, *Reasonable Expectations v. Implied-in-Fact Contracts*].

87. *See, e.g.*, Barnett v. Int'l Tennis Corp., 263 N.W.2d 908, 918 (Mich. Ct. App. 1978). Dissolution is a last resort remedy and is thus "necessary to prove exceptional circumstances before dissolution will be ordered." *Id.* "[Exceptional circumstances] include financial loss, corporate paralysis, mismanagement and deterioration of property. The ultimate test is whether corporate ruin will inevitably follow continuance of present management." *Id.* (citing Stott Realty Co. v. Orloff, 247 N.W. 698, 699 (Mich. 1933); Levent v. Kowal, 86 N.W.2d 336, 341 (Mich. 1957)).

88. *See* Cent. Standard Life Ins. Co. v. Davis, 141 N.E.2d 45, 50 (Ill. 1957) ("The word 'oppressive' does not carry an essential inference of imminent disaster; it can, we think, contemplate a continuing course of conduct.").

89. *See* Moll, *Reasonable Expectations v. Implied-in-Fact Contracts*, *supra* note 86, at 1002.

2. Embracing Reasonable Expectations

The reasonable expectations model of shareholder oppression arguably had its genesis in two common law states: Massachusetts and New York. The Supreme Judicial Court of Massachusetts in 1976 held in *Wilkes v. Springside Nursing Home, Inc.* that the controlling shareholders breached their fiduciary duty to a minority shareholder by firing him from his job for no legitimate reason.[90] While the court in *Wilkes* did not explicitly use the words "reasonable expectations," it focused much of its attention on the frustration of the minority owner's interests from the point of view of the minority shareholder. Discussing generally the fact that minority shareholders are frequently dependent on their jobs and receive constructive dividends in the form of salary, the court noted, "In sum, by terminating a minority stockholder's employment or by severing him from a position as an officer or director, the majority *effectively frustrate[d] the minority stockholder's purposes* in entering on the corporate venture and also den[ied] him an equal return on his investment."[91] Elsewhere in the opinion, the court observed that "Wilkes was one of the four originators of the nursing home venture; and that Wilkes, like the others, had invested his capital and time for more than fifteen years *with the expectation that he would continue to participate in corporate decisions*."[92] The language foreshadows the explicit reasonable expectations approach, which focuses not on the wrongful acts of the majority shareholder but rather on what the minority shareholder *thought* she had bargained for and received.

Four years later, a Supreme Court of New York explicitly applied the "reasonable expectations" approach to decide whether a corporation that owned Manhattan pharmacies should be dissolved after two shareholders ousted a third, who had moved from another state to join the business.[93] The court in *In re Topper* drew the language from a passage in a law review article by Professor F. Hodge O'Neal:

> Many participants in closely held corporations are "little people", unsophisticated in business and financial matters. Not uncommonly a participant in a closely held enterprise invests all his assets in the business *with an expectation, often reasonable under the circumstances* even in the absence of an express contract, that he will be a

90. 353 N.E.2d 657, 664–65 (Mass. 1976).

91. *Id.* at 662–63 (emphasis added).

92. *Id.* at 664 (emphasis added).

93. *In re* Topper, 433 N.Y.S.2d 359, 365 (Sup. Ct. 1980).

key employee in the company and will have a voice in business decisions.[94]

Under this approach, a court could find oppression by focusing on how the actions of the majority interfered with what the minority shareholder reasonably expected would happen when she invested in and joined the enterprise. The reasoning in *Topper* struck a chord with courts in other states. The Supreme Court of Montana in 1982, citing *Topper* and the article by Professor O'Neal, held that an "oppressive" act within the meaning of the state's dissolution statute could be interpreted by examining the reasonable expectations of the minority shareholder.[95] In 1983, the Supreme Court of North Carolina, citing the same authorities, held that reasonable expectations could be used to interpret its (broader) dissolution statute.[96]

In 1984, the Court of Appeals of New York put its stamp of approval on the "reasonable expectations" doctrine in *In re Kemp & Beatley, Inc.*[97] The state's high court, citing *Topper*, provided extensive analysis. The court explained that the 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."[98] Courts applying the reasonable expectations model "must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise."[99] The court imposed limits on the doctrine, noting that oppression does not arise simply because a party's "subjective hopes and desires" went unfulfilled. Rather, the majority behavior must "substantially defeat[] expectations that, objectively viewed, were both reasonable under the circum-

94. *Id.* at 365 (quoting F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 884 (1978)) (emphasis added).

95. Fox v. 7L Bar Ranch Co., 645 P.2d 929, 933 (Mont. 1982).

96. Meiselman v. Meiselman, 307 S.E.2d 551, 561–63 (N.C. 1983) (construing N.C. GEN. STAT. § 55-125(a)(4) (1975) (current version at N.C. GEN. STAT. § 55-14-30(2) (2005)) (permitting courts to act when "[l]iquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder")).

97. 484 N.Y.S.2d 799, 805 (1984).

98. *Id.*

99. *Id.*

stances and were central to the petitioner's decision to join the venture."[100]

The *Kemp* decision proved, in the words of one commentator, "particularly influential."[101] In some states with dissolution statutes in the mold of the Model Business Corporation Act, courts concluded that the reasonable expectations doctrine provided a useful gloss on what the term oppression meant. In 1987, for example, the Supreme Court of North Dakota cited the case approvingly and adopted its reasoning in construing the term oppression in the Model Business Corporations Act.[102] In *Davis v. Sheerin*, the Court of Appeals of Texas looked to decisions of other states, including New York, to give meaning to the term oppression as used in the Texas Business Corporation Act: "The New York court in *Wiedy's* held that oppression should be deemed to arise only when the majority's conduct substantially defeats the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture."[103] Applying the New York standard, the Texas Court of Appeals upheld the trial court's finding that the majority shareholders had engaged in oppressive conduct.[104] In the same year, the Iowa Court of Appeals reached a similar decision.[105] The New York decision, coming full circle, influenced New Jersey, the first state with a comprehensive statute.[106]

100. *Id.* The New York Court of Appeals did not cite *Meiselman*, 307 S.E.2d at 551, but both courts reached similar conclusions that mere subjective hopes are not "reasonable" expectations. *Compare In re Kemp & Beatley*, 484 N.Y.S.2d at 799, 805 ("Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled."), *with Meiselman*, 307 S.E.2d at 563 ("The key is '*reasonable*.' In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them.").

101. Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717, 717 (2002).

102. Balvik v. Sylvester, 411 N.W.2d 383, 387 (N.D. 1987). Although at the time of the decision North Dakota had adopted new, more expansive legislation, the court was applying the state's version of the Model Business Corporation Act because the corporation had not opted into the new scheme. *See id.* at 385 n.2.

103. 754 S.W.2d 375, 381 (Tex. App. 1988) (citing *In re* Wiedy's Furniture Clearance Ctr. Co., 487 N.Y.S.2d 901, 903 (App. Div. 1985)).

104. *Id.* at 383.

105. Maschmeier v. Southside Press, Ltd., 435 N.W.2d 377, 379–81 (Iowa Ct. App. 1988).

106. *See supra* note 48.

While the reasonable expectations model may not yet fully represent a majority rule, courts in at least twenty-one states have applied the language in some form.[107] Courts in several states have adopted the reasonable expectations test without "enabling" language from the statute itself; that is, courts have applied the test even when the statute only provides that dissolution is available when conduct is "oppressive."[108] Thus, Professor Moll is correct when he states that, of the three main approaches to oppression, "the 'reasonable expectations' standard garners the most approval, and courts have increasingly used it to determine whether oppressive conduct has taken place."[109]

3. Expanding the Range of Remedies

A number of common law states also followed a path parallel to the one taken by statutory states by concluding that their courts have broad powers to impose a range of equitable remedies when the majority shareholder acts oppressively. As already noted, the power to impose remedies less drastic than dissolution serves the interests of minority shareholders in a dispute.[110] When the only option is to dissolve the (often successful) corporation, with the inevitable effect on employees, customers, and suppliers, judges are likely to require a very substantial showing of oppression. If the remedy is the less-onerous buyout, courts can countenance a weaker showing of oppression. Courts in statutory states could often point to provisions in the statute for authority to take less drastic measures. Courts in many common law states, by contrast, generally

107. *See infra* Appendix.

108. The South Carolina Supreme Court, in declining to adopt the reasonable expectations test, stated that "no court has adopted the reasonable expectations test without the assistance of a statute." Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 265 (S.C. 2001) (citing Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 NOTRE DAME L. REV. 456, 505 (1985)). Assuming that a narrow dissolution statute does not qualify as "assistance of a statute," this statement is no longer true. Arkansas, Colorado, and Iowa, for example, all have narrow dissolution statutes and all have adopted the reasonable expectations test. *See infra* Appendix. Arguably, Montana, which then had (and still has) a narrow dissolution statute, applied a version of the reasonable expectations test in 1982. *See* Fox v. 7L Bar Ranch Co., 645 P.2d 929, 933–34 (Mont. 1982).

109. Moll, *Reasonable Expectations v. Implied-in-Fact Contracts*, *supra* note 86, at 1002.

110. *See supra* Part II.A.2.

have to rely on their inherent equitable powers to provide remedies like a court-ordered buyout.[111]

The Supreme Court of Oregon made clear in a 1973 case that its courts have equitable power to grant relief less drastic than dissolution after a minority shareholder proves oppression.[112] The court in *Baker v. Commercial Body Builders, Inc*. reaffirmed an earlier holding that "in a suit [under state statute] for 'oppressive' conduct consisting of a 'squeeze out' or 'freeze out' in a 'close' corporation the courts are not limited to the remedy of dissolution, but may, as an alternative, consider other appropriate equitable relief."[113] The *Baker* court offered a list of ten remedies that might be available to the successful plaintiff, including the appointment of a "special fiscal agent," the declaration of a dividend, a court-ordered buyout of the minority's share, and money damages.[114] The decision proved highly influential.

The Supreme Court of Alaska in a 1980 case said that it was "persuaded by *Baker*" that courts, using their inherent equitable powers, could impose remedies less drastic than dissolution in oppression cases.[115] The court in *Alaska Plastics* recognized that the most effective solution to the dispute would likely be liquidity for the minority shareholder—something it said could be achieved in only one of four ways: through a provision in the articles or bylaws of the corporation, through involuntary dissolution, through a right of appraisal after a fundamental corporate change, and, finally, through a court-ordered purchase after a court found a breach of fiduciary duty.[116] The dissolution remedy, the court observed, can be both limited and unfair to all parties: "Liquidation is an extreme remedy. In a sense, forced dissolution allows minority share-

111. *See, e.g.*, Bedore v. Familian, 125 P.3d 1168, 1172 (Nev. 2006) ("[C]ourts have the power to order corporate 'buy-outs even in the absence of specific statutory authority.'" (quoting Hollis v. Hill, 232 F.3d 460, 472 (5th Cir. 2000))). *But see* MODEL BUS. CORP. ACT § 14.34 (2002), *available at* http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf (permitting a buyout in lieu of dissolution).

112. Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395 (Or. 1973).

113. *Id.* at 395 (citing Browning v. C&C Plywood Corp., 434 P.2d 339, 343 (Or. 1967)).

114. *Id.* at 395–96.

115. Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 274–75 (Alaska 1980) (citing *Baker*, 507 P.2d at 396).

116. *Id.* at 274.

holders to exercise retaliatory oppression against the majority. Absent compelling circumstances, courts often are reluctant to order involuntary dissolution."[117] Thus, the Alaska Supreme Court concluded that less drastic remedies are available in cases of shareholder oppression and quoted with approval the passage in *Baker* that authorized a court-ordered buyout.[118] The Alaska Supreme Court presciently observed that "[f]rom a dissatisfied shareholder's point of view, the most successful remedy is likely to be a requirement that the corporation buy his or her shares at their fair value."[119]

Most states now permit courts to order either a full range of equitable remedies or, at the very least, a court-ordered buyout.[120] The Court of Appeals of Iowa, for example, quoted all ten of the *Baker* remedies verbatim and held that the district court correctly concluded that it could order a remedy less drastic than dissolution—in this case, an order to partially liquidate the corporation and redeem the plaintiff's shares.[121] In *Balvik v. Sylvester*, the North Dakota Supreme Court, construing the state's predecessor oppression statute, also quoted verbatim the *Baker* remedies, stating that even though the statute "mentions only dissolution as a remedy for oppressive conduct, we agree with those courts which have interpreted their similar statutory counterparts to allow alternative equitable remedies not specifically stated in the statute."[122] The decision was somewhat narrow, since North Dakota had already enacted new legislation clarifying that a court "may grant any equitable relief it deems just and reasonable in the circumstances or may dissolve a corporation."[123] But this decision, and the others like it, reaffirms the proposition that many common law states over the past three decades have embraced additional protections for minority shareholders—much like states with comprehensive statutes.

117. *Id.*

118. *Id.* at 274–75. (declining to express an opinion on whether the facts of the case established oppression and remanding the case to the trial court).

119. *Id.* at 274.

120. 2 O'NEAL & THOMPSON, *supra* note 28, §§ 9:30–:31. The authority to order buyouts in some cases is explicitly set out in statute and in other cases falls under the court's equitable powers. *See, e.g.*, *id.* § 9:30 nn.4–5 (gathering statutes).

121. Sauer v. Moffitt, 363 N.W.2d 269, 274–75 (Iowa Ct. App. 1984).

122. 411 N.W.2d 383, 388 (N.D. 1987).

123. *See id.* at 388 n.3 (quoting N.D. CENT. CODE § 10-19.1-115 (1985) (current version at N.C. GEN. STAT. § 10-19.1-115 (2005))).

Not all states have followed the reasoning in *Baker*. In *Giannotti v. Hamway*, the Virginia Supreme Court affirmed a trial court finding that the majority shareholders in a profitable nursing home venture had oppressed the minority by paying themselves outsized salaries while declaring only modest dividends.[124] The trial court ordered dissolution; on appeal, the defendants argued that a "'corporate death penalty' should not be imposed on a viable, solvent corporation."[125] The Supreme Court was unmoved: "The remedy specified by the legislature, while discretionary, is 'exclusive,' and does not permit the trial court to fashion other, apparently equitable remedies."[126] In the context of Virginia's common law on oppression, which continues to require a very high showing,[127] that decision makes sense. Since plaintiffs must make a very strong showing to prevail in an oppression claim, the remedy of dissolution is not inappropriate. But these views are in the minority. Given the wide acceptance of the *Baker* rationale (and the presence in other states of statutes that authorize a buyout), it seems unlikely that the Virginia approach will become the majority rule.[128] Indeed, it would be quite a reversal, since at this point about forty states permit buyouts either through statute or common law.

124. 387 S.E.2d 725, 733 (Va. 1990). The Virginia Supreme Court observed that between 1975 and 1985, the majority shareholders received compensation of $2,799,006 while the minority shareholder plaintiffs received $50,000 of the $132,000 in common stock dividends. *Id.* at 729. Earlier in the company's history, the plaintiffs had controlled the corporation through a voting trust, but that arrangement was lost in part because of a transaction in which two defendants received 80,000 shares to guarantee a loan to the corporation. *Id.* at 728.

125. *Id.* at 733.

126. *Id.* (citing White v. Perkins, 189 S.E.2d 315, 320 (Va. 1972)).

127. The court in *Giannotti* states:

> "oppressive" means conduct by corporate managers toward stockholders which departs from the standards of fair dealing and violates the principles of fair play on which persons who entrust their funds to a corporation are entitled to rely. The term does not mean that a corporate disaster may be imminent and does not necessarily mean fraudulent conduct.
>
> . . . .
>
> The term can contemplate a continuous course of conduct and includes a lack of probity in corporate affairs to the prejudice of some of its shareholders.

Id. at 730–31 (citing *White*, 189 S.E.2d at 319–20).

128. *See generally* Haynsworth, *supra* note 62, at 41 (discussing the available remedies for dealing with intra-corporate dissension).

4. The Delaware Approach

One might have thought that Delaware, usually a leader in corporate law, would have been in the vanguard in shaping the shareholder-oppression jurisprudence that arose over the past quarter century. However, it was not until 1993—twenty years after New Jersey passed its landmark statutes and seventeen years after *Donahue*—that the Delaware Supreme Court weighed in on the question of whether minority stockholders in a closely held corporation could even state a claim of oppression (much less whether that claim is satisfied by the relaxed "reasonable expectations" standard). Bucking the national trend, the court in *Nixon v. Blackwell* held in the negative.[129] To grant relief not specifically authorized by Delaware statutes would "run counter to the spirit of the doctrine of independent legal significance, and would be inappropriate judicial legislation."[130]

Neither the delay in rendering a decision nor the ultimate result should come as a complete shock, however. As Professor Robert Ragazzo has observed, the relatively long delay in addressing the hot topic can be explained in part by the fact that corporate defendants in Delaware courts are frequently publicly held, rather than closely held, corporations.[131] The substantive decision, too, makes sense in light of several factors. First, Delaware statutes do not specifically authorize involuntary dissolution on a showing of oppression, unlike most states (including New York). Second, Delaware *does* have a special section for closely held corporations in its statutes[132]—albeit a provision that requires an affirmative, opt-in decision[133] and that, by the court's admission, has not proven popular with practitioners.[134] Thus, to accept the plaintiff's invitation to rec-

129. 626 A.2d 1366, 1380 (Del. 1993).

130. *Id.* at 1380–81.

131. Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L.Q. 1099, 1101 (1999).

132. DEL. CODE ANN. tit. 8, §§ 341–56 (2001).

133. *See id.* §§ 343–44.

134. The Delaware Supreme Court quoted an influential Delaware practice guide:

> statutory close corporations have not found particular favor with practitioners. Practitioners have for the most part viewed the complex statutory provisions underlying the purportedly simplified operational procedures for close corporations as legal quicksand of uncertain depth and have adopted the view that the objectives sought by the subchapter are achievable for their clients with considerably less uncertainty by [making appropriate provisions in the charter and bylaws].

ognize a special rule for closely held corporations, the court in *Nixon* would have had to conclude that a cause of action for oppression existed in common law and that this common law claim was not preempted by Subchapter XIV of the Delaware General Corporation Law.

Moreover, as a matter of policy, the Delaware Supreme Court was no doubt aware that a cause of action for oppression generally runs counter to the doctrine of independent legal significance, since, in the typical oppression case, the majority shareholder has not violated any specific provision in the corporations statute.[135] Concluding that this doctrine does not apply in cases involving "closely held corporations" might arguably have caused some uncertainty in future cases involving publicly traded corporations. It certainly would have required clarification of what constitutes a "closely held corporation," creating doubt for large, privately held firms with many shareholders. Finally, the Delaware Supreme Court probably recognized that many purported stockholder-oppression claims—including the claim in *Nixon*—would still get close judicial review under the test for "entire fairness."[136] Typically, Delaware courts review corporate decisions under the deferential business judgment rule.[137] However, as the court in *Nixon* explained, the entire fairness test is implicated when the directors are on both sides of the transaction.[138] To satisfy entire fairness, defendants have the burden of proving both fair dealing and fair price, a demanding standard:[139] "The entire fairness analysis essentially requires 'judicial scrutiny.'"[140] Noting that the standard is often (but not always) outcome determinative, the court remanded for further consideration.[141]

Nixon v. Blackwell, 626 A.2d 1366, 1380 n.19 (Del. 1993) (alteration in original) (quoting DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 43.01 (1993)).

135. One can sense this concern when the court in *Nixon* observed that it "would be inappropriate judicial legislation . . . to fashion a special judicially-created rule for minority investors when the entity does not fall within those statutes, or when there are no negotiated special provisions in the certificate of incorporation, by-laws, or stockholder agreements." *Id.* at 1380–81.

136. *Id.* at 1376–77.

137. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

138. *Nixon*, 626 A.2d at 1376 (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983)).

139. *Id.* (quoting *Weinberger*, 457 A.2d at 711).

140. *Id.* (quoting *Weinberger*, 457 A.2d at 710).

141. *Id.* at 1381.

After *Nixon*, a minority stockholder has some protection from unfair practices by a majority stockholder, but not under the banner of oppression. Rather, the minority stockholder must argue that the suspect transaction should be judged under the entire fairness test and that, under that test, it fails. However, *Nixon* left many questions open. One question was whether a minority stockholder has a claim when the majority interferes with her role as an employee. In *Riblet Products Corp. v. Nagy*, the Delaware Supreme Court addressed the claims of Ernest Nagy, the CEO and minority stockholder of a manufacturing corporation who was fired in violation of his employment contract.[142] Nagy sued in federal district court, and a jury awarded him damages both for the breach of the employment contract with the company and for the breach of fiduciary duties the majority stockholders owed him as a minority stockholder-employee.[143] On a certified question from the Seventh Circuit Court of Appeals, the Delaware Supreme Court held that Nagy did not have a claim in his role as stockholder: "We hold that, although majority stockholders have fiduciary duties to minority stockholders *qua* stockholders, those duties are not implicated when the issue involves the rights of the minority stockholder *qua* employee under an employment contract. The duties of the corporation to the CEO are contractual."[144]

Professor Ragazzo argues that the *Nixon* and *Riblet Products* decisions are not nearly as sweeping as the language might indicate.[145] He notes that the Seventh Circuit in *Riblet Products*, in deciding to certify the question to the Delaware Supreme Court, concluded that *Nixon* did not control the question (a premise not contradicted in the state Supreme Court opinion).[146] He also argues that the *Riblet Products* decision is a narrow one.[147] The question before the court was the extent of

142. 683 A.2d 37, 38 (Del. 1996).

143. *Id.*

144. *Id.* at 37.

145. Ragazzo, *supra* note 131, at 1150–51 ("[D]espite the pronouncement in *Nixon v. Blackwell* that there are no special rules for closely held corporations, the death of special shareholder duties in Delaware corporations has been greatly exaggerated.").

146. *Id.* at 1132–33 (discussing the certification process and noting that "[t]he Seventh Circuit viewed *Ueltzhoeffer v. Fox Fire Development Co.* as the only relevant Delaware authority").

147. *Id.* at 1133 ("It is worth noting that the Delaware Supreme Court formulated an extremely narrow question.").

remedies under an existing employment contract. Thus, the Delaware Supreme Court did not need to decide what remedy might exist, if any, had he been fired without a contract.

> This is not a case of breach of fiduciary duty to Nagy *qua* stockholder. To be sure, the Majority Stockholders may well owe fiduciary duties to Nagy as a minority stockholder. But that is not the issue here. Nagy does not allege that his termination amounted to a wrongful freeze out of his stock interest in Riblet, nor does he contend that he was harmed as a stockholder by being terminated.[148]

Professor Ragazzo argues further that the narrow holdings in *Nixon* and *Riblet Products* leave the Delaware courts room to decide that the entire fairness test—which is a searching judicial examination—is triggered by more subtle freezeout methods that in other states would fall under the banner of oppression.[149] If the Delaware courts begin to apply this test to subtle freezeouts, as he urges, "the modern course of corporate law development will be reversed. Instead of the rest of the country following Delaware's lead, Delaware will have followed the nation's lead."[150]

Professor Mary Siegel, in response, argues that the Delaware Supreme Court in *Nixon* and *Riblet Products* has crafted a superior rule and that minority stockholders actually are better served by it.[151] Moreover, she notes the imposition of partnership-like duties makes it unclear when the business judgment rule does not apply, meaning that at times *minority stockholders* cannot vote in their own self interest.[152] Siegel also argues that the rule in *Donahue* is not as widely adopted as some commentators insist and that the Delaware rule will eventually become the dominant one.[153]

At this point, however, both Ragazzo and Siegel would agree that Delaware has not recognized the doctrine of oppression in closely held corporations, even if minority interests

148. *Riblet Prods. Corp.*, 683 A.2d at 40.

149. Ragazzo, *supra* note 131, at 1150 (noting that in Delaware the "[a]pplication of the entire fairness test to move subtle freeze out schemes is less clear" than in the case of an explicit freeze out merger).

150. *Id.* at 1151.

151. *See* Siegel, *supra* note 25, at 457–65 (identifying weaknesses in the protections afforded to minority shareholders in majority-rule jurisdictions).

152. *See id.* at 464 (pointing out that the imposition of fiduciary duties on all shareholders in majority-rule jurisdictions "prevents minority shareholders from acting in their own self-interest").

153. *See id.* at 467–70 (discussing recent trends toward the adoption of the minority rule and asserting that the "majority rule never actually attained that status and today represents only a thin coalition of states").

could find protection through other mechanisms. Thus, despite the careful analysis provided by Professor Siegel, it seems fair to state that the Delaware approach is outside of the mainstream.[154]

C. CONVERGENCE OF COMMON LAW AND STATUTORY STATES

Starting in the 1970s, states began to expand and explore the means to provide remedies to minority shareholders. State legislatures initiated a few experiments and gave broad authority to the courts to decide the disputes. In far more states, however, the expanded protection was judicially created because most statutes, following the MBCA, stated merely that oppressive acts could be grounds for involuntary dissolution. What evolved in many of these states was a regime that adopted far broader standards for oppression than had previously existed—often one where the reasonable expectations of the minority shareholder determined whether a breach had occurred—and that evolution allowed courts discretion and flexibility to impose a range of equitable remedies. Given that the resulting legislative and judicial standards provide very little precedential guidance to courts, decisions have been unpredictable, leading to continued debate over the proper balancing between minority and majority interests.

In this complex area of law, it is difficult to make sweeping statements. It seems fair to conclude, however, that most common law states over the past thirty years have moved to give greater weight to minority-shareholder interests and to limit the discretion of the majority shareholder in a closely held corporation. That conclusion is especially inescapable when one considers the shifts in two essential areas: the definition of oppression and the expanding menu of remedies that, as a practical matter, make it easier for judges to find oppression. In these areas, then, the common law states are more like the statutory states of California, Minnesota, and New Jersey (at least in practical application) than one might initially suspect. One could point to other indicia that would suggest that states have not moved decisively or at least uniformly. Regarding whether a minority discount or liquidity discount should be applied in

154. *But see* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 816–23 (2002) ("[It] is not clear that the Delaware and Massachusetts approaches are all that dissimilar."); Garon et al., *supra* note 73 *passim* (comparing the Minnesota Business Corporation Act to its Delaware counterpart and accompanying case law).

determining the value of the shares, for example, states have not reached a consensus.[155]

The nature and extent of the remedy for the minority shareholder is, however, only theoretical if she cannot prevail on the underlying claim of oppression, no matter how flexibly defined and interpreted. Thus, more modest definitions of oppression that encompass "unfairness" and "reasonable expectations," combined with the court-ordered buyout remedy, make it easier to clear this initial hurdle. In these areas, many states, both common law and statutory, have begun to converge around one or two relatively permissive approaches.

The prevailing view in most states is that oppression (or its statutory equivalent) can be established when the majority shareholder breaches her heightened fiduciary duties or violates the reasonable expectations of the minority shareholder.[156] Moreover, the minority shareholder in most states can seek a range of equitable relief, especially a court-ordered buyout—a factor that as a practical matter makes it easier to prevail on the underlying claim.[157] The convergence of common law and statutory states is about as complete as it can be given the constraints of civil litigation.[158] Today, then, all that is needed in many states to provide the desired remedy of business separation through the buyout mechanism is one act by the majority that contravenes the reasonable expectations of the minority owner.[159]

While critics of the emerging model can rightly point to its flaws, such as its vague standards and the nearly boundless discretion it puts in the hands of trial courts, it seems highly unlikely that the trend will be reversed in most states. Conven-

155. *See* Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 297 (2004) ("Significantly, these issues are far from settled, as there is considerable disagreement over the appropriateness of discounts in the shareholder oppression setting. Indeed, the fight over discounts is perhaps the most frequently litigated valuation issue in close corporation disputes today.").

156. *See* Siegel, *supra* note 25, at 386–87 (citing "recurring breaches of fiduciary duty" and "frustration of a shareholder's reasonable expectations" as ways to establish oppression under the majority rule in the absence of an explicit statutory definition).

157. *See, e.g.*, Lindsay, *supra* note 62, at 40–42 (discussing the buyout remedy as one type of equitable relief afforded by New Jersey courts).

158. *Cf.* Moll, *supra note* 155, at 303–04 (arguing that courts have a wide range of relief to choose from in cases of minority shareholder oppression).

159. *See id.* at 308–09 (noting that the buyout is the most common remedy for oppression as established by a breach of reasonable expectations).

ience and lack of knowledge about the arcane differences in corporation law likely will continue to lead most entrepreneurs to incorporate in their home state, rather than in Delaware, even if the local model is somewhat different.[160] And legislators, like those in Oregon, likely will continue to sympathize with the "little" shareholder who is treated harshly by the majority.[161]

II. A SIMPLE STATUTORY SOLUTION

The developmental trends of claims and remedies for minority owner oppression are fairly clear, albeit not consistent, across jurisdictions. There is a general movement toward expanding the bases for relief and a concurrent movement toward expanding the remedies available, with the buyout being the favored remedial approach. Still, however, dissatisfaction persists. One approach that has gained a foothold in many states is an opt-in statute for close corporations.[162] While it is beyond the scope of this Article to review these statutes, an opt-in statute clearly does not really solve the basic problem. First, such statutes require an affirmative act at the inception of the corporation.[163] That is, the default regime is wrongly posited.

160. The variation in state regimes, especially the difference between most states and Delaware, creates a conundrum for practitioners everywhere when considering where a client should incorporate. Certainly Professor Ragazzo is correct when he observes that Delaware does not slavishly defend majority interests. It is also true, however, that a practitioner advising the founder of a soon-to-be-created corporation on the question of where to incorporate would have to think twice before recommending incorporation in a state that recognizes reasonable expectations or fiduciary duty doctrines for liability. That is true not because her own state is out of step with the nation but because it is out of step (as most are) with the only real alternative, Delaware. One might presume that, in the competition among states for incorporations, the Delaware version will win out, providing the clarity that is clearly needed in this area of law. That presumption is misplaced. Because so many entrepreneurs incorporate without counsel and because the transaction costs of incorporating in Delaware, both real and perceived, are a barrier to others, most states will not feel pressure to conform to the Delaware model.

161. *See* Garrett, *supra* note 60, at 361–63 (reviewing how an attorney's proposal for greater minority shareholder relief in close corporations led to legislative change in Oregon).

162. *See generally* 1 O'NEAL & THOMPSON, *supra* note 9, § 1.16 ("The clear trend of recent legislation regarding close corporations has been to move beyond the indirect sanction of the 'except/subject to' clauses and to provide direct support for shareholders' agreements which intrude into director decision-making."). More than thirty states have some type of opt-in statute. *See id.* at n.13 (listing opt-in statutes by state).

163. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 343–44 (2001) (permitting close cor-

Most shareholder disputes emerge precisely because no one took this step; had the shareholders been represented by counsel, the shareholders would have certainly been advised about executing a buy-sell agreement and clearly defined employment agreements—steps that would probably avoid most subsequent litigation. Second, even these statutes do not provide what is proposed here, that is, the right of a minority shareholder to achieve separation and liquidity on demand.[164] Thus, these separate opt-in statutes, while hypothetically useful, do not solve the shareholder-oppression problem, as the plaintiff in the Delaware case of *Nixon v. Blackwell* painfully discovered.

The current panoply of claims and relief does not efficiently address the underlying problems of majority power and minority illiquidity in the closely held business. The most important problem in the current system is that the disgruntled minority owner must prove some predicate act or pattern of wrongful conduct by the majority owners to obtain relief. Whether termed oppression, breach of fiduciary duty, or frustration of reasonable expectations, the minority shareholder must prove wrongdoing.[165] As stated in this Article's introductory quota-

poration formation at inception or by amendment).

164. *See* Moll, *Minority Oppression & the LLC*, *supra* note 16, at 900.

> Despite the lack of a market and the difficulty of attracting outside purchasers, close corporation minority shareholders would still have effective exit rights if they could force the corporation (or the controlling shareholder) to purchase their shares on demand. A default buyout right would insure that a minority shareholder could recover the value of its investment and would thwart any controlling shareholder effort to confiscate the minority's capital. No state's corporation law, however, provides such a right. Without an explicit buyout provision in a stockholder's agreement or the company's organizational documents, corporate shareholders have no right to compel a redemption of their holdings.

Id. (footnotes omitted).

165. The MBCA attempts to solve the liquidity problem by providing a buyout provision that is available to the corporation or the remaining shareholders after the litigation has begun. *See* MODEL BUS. CORP. ACT § 14.34 (2002), *available at* http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf. However, the structure of the provision probably does not avoid the mud-slinging problem. First, the option of the buyout is in the hands of the corporation or the allegedly oppressing shareholders. Thus, as a practical matter, the complaining shareholder would probably need to assemble a powerful prima facie case before the corporation would cave in to his or her demands. Second, the buyout provision does not answer the difficult question of "fair value." Again, as a practical matter, the complaining shareholder may be more likely to avoid a discount on the shares if he generates a "compelling" case. Even if the matter of discounts is well-settled in the jurisdiction, the complaining shareholder has an incentive to sling mud because section 14.34(f) pro-

tions, "[t]he business divorce had begun in earnest and eventually found its way, as most divorces do, into the hands of a judge for resolution of issues colored much more by emotion than economic or business reality."[166] However, because there is no concept of no-fault divorce (or even irreconcilable differences) for business dissolutions, the mud of mistreatment allegations must be slung, and litigants (and courts) must muddle through the quagmire.

The evolution of the doctrinal law of oppression evidences a continued loosening of the requirements for courts to achieve the goal of granting a remedial divorce. Furthermore, this evolution has, similar to its marital dissolution analog, produced an ever-lowered hurdle necessary to cross to reach the desired remedial result. The ineluctable trends identified herein of loosening liability standards and acceptance of the buyout of the minority owner as the preferred remedial resolution signal a more rational approach.

One relatively simple solution would be to provide a self-executing (that is, non-judicial) separation mechanism that would operate like a statutory buy-sell agreement. In many shareholder disputes, the minority shareholder essentially seeks liquidity, but in order to get that liquidity he must also allege that the majority's conduct meets the standard of liability—an inevitably messy inquiry. Moreover, under many traditional and some modern statutes, the minority shareholder will also hold the Damocles sword of potential dissolution over the other shareholders. The majority shareholders, of course, will respond by alleging fiduciary or contractual breaches in return.

These battles are often inefficient but necessary predicates to providing the minority owner with liquidity and to determine exit-strategy value. A more efficient approach would permit in law what the parties, if they had been well advised by attorneys, may have already provided by contract: a buy-sell agreement at fair value—a kind of no-fault divorce.

vides for "reasonable fees and expenses of counsel and of any experts employed by him" if the court finds that the shareholder had "probable grounds for relief" on the oppression claim. *See id.* § 14.34(f).

166. Conklin v. Perdue, No. 990335BLS, 2002 WL 31421763, at *5 (Super. Ct. Mass. Sept. 17, 2002).

A. THE TERMS OF THE PROPOSED MODEL STATUTE

SECTION ____: [MODEL] MANDATORY BUYOUT PROVISION

Subdivision 1: Owner Buyout Right

Upon written notice to a non-publicly held company by a minority owner of a desire to sell all of the owner's interest in the company, the company shall purchase (and the owner shall sell) all of the minority owner's interest at fair market value. If the sale is in connection with the resignation or removal of the owner as a director, officer, manager, or employee of the business, then the purchase shall be at full value. In either case, the purchase shall take place within sixty (60) days of receipt of the original notice and be for cash unless, upon application by the company to a court of competent jurisdiction, the company demonstrates that payment in cash is impracticable, in which case payment shall be made upon such terms and conditions as the court in its sole discretion deems just and reasonable in the circumstances.

Subdivision 2: Company Buyout Right

Upon written notice by a non-publicly held company to a minority owner of a desire to purchase all of the minority owner's interest in the company, the owner shall sell (and the company shall purchase) all of the minority owner's interest to the company at full value. The purchase shall be for cash.

Subdivision 3: Procedure for Determining Buyout Price; Binding Effect

Determination of the value of the owner's shares under Subdivision 1 or 2 shall be made by agreement of the parties within thirty (30) days. If the company and the owner cannot agree upon the purchase price within thirty (30) days after the buyout notice is received, then within ten (10) days thereafter they shall jointly designate an appraiser. If they are unable within that ten (10) day period to agree on an appraiser, then the company and the selling owner shall each designate an appraiser and the two designated appraisers shall choose a third appraiser to conduct the appraisal. The appraiser so chosen shall thereupon as promptly as possible appraise and determine the value of the owner's interest as of the date of the buyout notice. For the purpose of making the appraisal, the appraiser shall be given access to, and may review, all relevant documents, records and information available to the company. The appraiser shall prepare and submit a written appraisal to the company and to the selling owner. The value so determined shall be the buyout price, shall be binding on both parties and shall not be subject to challenge or appeal except for fraud or illegality. All costs of conducting the appraisal shall be borne by the company. The buyout price, whenever determined, shall be paid within ten (10) days after determination.

Subdivision 4: Effect of Existing Litigation; Settlement of Claims

Any termination of an owner's interest pursuant to Subdivision 1 or 2 of this Section shall be in lieu of and in release of and settlement for all claims between the selling owner and the company, the company's other owners, directors, officers, managers, and employees related in any manner to the selling of the owner's participation in the business and any expectations related to that participation.

Subdivision 5: Effect of Existing Buyout Agreement or Litigation

A buyout pursuant to this Section cannot be pursued to the extent that there exists a valid written agreement between the company and the owner related to the owner's right to sell the owner's interests to the company or the company's right to purchase the owner's interests from the owner under the conditions identified in this Section. Such an agreement may be reflected in a contract or in the company's charter, operating agreement, bylaws, or other binding company document[, and must specify that it applies in lieu of this Section]. In those circumstances the agreement of the parties controls.

Unless otherwise agreed to in writing by the parties, this Section is inapplicable to the extent that the parties are engaged in ongoing litigation related to the relationship of the owner to the company.

Subdivision 6: Definitions

For purposes of this Section,

"Non-publicly held company" means a company that does not have a class of equity securities registered pursuant to section 12, and is not subject to section 15(d) of the Securities Exchange Act of 1934.[167]

"Full value" means the selling owner's proportionate share of the enterprise (going concern) value of the company, undiscounted for minority, marketability or other reasons.

"Fair market value" means the selling owner's proportionate share of the enterprise (going concern) value of the company, discounted, to the extent appropriate in the circumstances, for minority or marketability reasons.

"In connection with the resignation or removal" means within [six months] of the buyout notice.

"Minority owner" means a person who does not possess actual power to control the operations of the company, as usually evidenced by the size of the owner's interest.

Subdivision 7: Costs and Attorney's Fees

If a court determines that a party has acted in bad faith either to enforce or to avoid the application or effectiveness of this Section, a court may award costs and attorney's fees to the prevailing party seeking action consistent with this Section.

167. Securities Exchange Act of 1934 §§ 12, 15(d), 15 U.S.C. §§ 78*l*, 78o (2000).

B. Application and Benefits of the Statute

Under this model statute, the minority owner effectively has a "put" to the company and the company has a "call" upon the minority owner's shares. The buyout is self-executing. This reversal of the current default regime, which presumes illiquidity for the minority owner, is the revolutionary aspect of the proposal. That is, the commencement of litigation is not necessary and no showing of wrongdoing is required. The statute is intended to apply to all types of businesses, including—importantly—both corporations and limited liability companies. Moreover, the companies covered are those that have not made a public offering of stock and are not otherwise considered by the federal securities laws to be publicly held.

The model statute is designed to fill a gap where preplanning has not occurred. Therefore, if the parties have already dealt with the issues of liquidity by a valid agreement, whether embodied in a contract or in the company's formational documents, then Subdivision 5.A provides that the agreement of the parties preempts the statute.[168] Absent such an agreement, when the minority investor in a closely held business seeks liquidity and a termination of the owner-company relationship, the statute provides the exit mechanism and its terms.

The disengaging owner will be compensated according to one of two commonly used measures of value depending on his or her status with the firm prior to the buyout.[169] If the minority owner's only relation to the company is as an investor, then the buyout price will be "fair market value"—the price at which the ownership interest would change hands between a willing seller and a willing buyer when the former is not compelled to sell and the latter is not compelled to buy, both having reasonable knowledge of the relevant facts. Fair market value is adjusted appropriately to reflect any applicable marketability and

168. Statutory preclusion is only effective where the existing buy-sell agreement between the parties is valid. If the agreement itself is invalid or does not reference the rights being given up under the model statute, the model statute will apply. Similarly, if there is ongoing litigation between the parties related to the minority owner's relationship with the company, the model statute presumptively does not apply.

169. *See generally* Moll, *supra* note 155 (discussing the state of the law regarding definitions of value and discounts in shareholder oppression contexts). As to the two approaches to valuation, see *id.* at 296–97 and 310–14.

minority discounts. This "fair market value" price approximates the actual value of the shares or other ownership interests in the minority owner's possession.

If the minority owner is severing other relationships with the company, or if the company has recently severed those relationships (or severs them shortly after the buyout notice is given), then the buyout price is full value. Full value represents the minority owner's proportionate share of enterprise value. This enhanced buyout price reflects the presumed reality that the minority shareholder's other relationships to the company have some implicit value[170] or the benefit to the company of being able to sever the owner's relationship with the company with ease.

While the minority shareholder can initiate the buyout, the company is not necessarily required to pay out a substantial amount of company value without recourse. The statute provides that the buyout will be administered by the courts upon request, and courts may tell minority shareholders who want their liquidity at a particularly inopportune moment that they have to wait. The company, for example, may be permitted to buy back the shares over time.

Moreover, the statute exacts a price from the minority owner as well. If the minority owner seeks a buyout under this provision, the value of the minority shareholder's interest may be discounted. After all, the typical rationale for awarding the full value of the minority interest is predicated on the idea that an oppressing shareholder should not be permitted to benefit from his own inequitable behavior. For example, if the majority shareholder so limits the minority's investment return either by limiting dividends or by freezing the minority out of alternative compensation opportunities, such as employment, those allegedly oppressive techniques may force the minority to seek relief by way of a buyout. The majority owner, having created the reasons for the relief sought, should not additionally benefit by paying a discounted price to the exiting minority owner. Under this statute, however, there would be no allegation of oppression, hence no justification for a buyout at full value. Since

170. *Id.* at 338–45 (describing how higher buyout prices are justified because "the fair value buyout leaves the employment and management components of a close corporations shareholder's investment unprotected"). Full value also accords with what the minority shareholder would receive in a merger situation where all shares receive the same pro rata proportion and value of the merger consideration. *Id.* at 323.

this statute would not replace oppression law that has developed in each state, a shareholder could still bring a claim of oppression, but if he or she prefers a buyout, the incentive to litigate is in most cases reduced to the amount of the discount. This solution continues to serve the states' interest in having a remedy for truly egregious oppressive conduct, yet it reduces the likelihood of lawsuits in the cases that fall, as so many do, in the gray area of the law between true minority investor mistreatment and a simple falling out between previously compatible entrepreneurs.

For its part, the company has a call on the minority owner's shares. This right to buy avoids typical and sometimes complicated majority squeeze-out techniques, such as a squeeze-out merger, that majority owners often otherwise employ. The price of the call option is the payment of the full, undiscounted value in cash to the minority owner.

C. POTENTIAL ISSUES AND LIMITATIONS

One of the most important questions is how the proposed statute relates to the existing laws of closely held business disputes. First, the statute eliminates all closely held business disputes to the extent that it is applicable and employed. It is designed not only to operate outside of the judicial arena, but also to put to rest all claims between the parties. Indeed, if deemed necessary or appropriate to make this point, Subdivision 4 of the model statute could include a provision that, upon closing, the parties will provide mutual general releases.

On the other hand, the model statute as drafted is not mandatory. A minority owner could still pursue an action for oppression under the state's existing statutory or common law. Such an action may be warranted where non-monetary relief, such as an accounting or appointment of a provisional director, is the primary remedy sought. In addition, minority owners may still want to sue for relief if their contract rights as employees or managers have been abrogated and substantial non-investment related compensation is involved. To the extent that such claims do not arise from explicit contract provisions but rather from the alleged reasonable expectations of the owner/employee, the statute provides surrogate compensation in the form of a full value buyout. It is to be expected that the availability of this remedy will relieve the courts of many potentially contrived—or at least un-provable—claims based on a minority owner's purported reasonable expectations.

There may be some concern that the model statute might be used as a tactical tool. For example, a minority owner might initiate a lawsuit for oppression with the recognition that the model statute provides a fall-back minimal remedy if the lawsuit becomes too costly, too difficult, or unlikely to succeed. Alternatively the company might trigger the statutory buy out to avoid claims of fraud or breach of contract based on prior conduct. To avoid these opportunistic ploys, Subdivision 5.B of the statute presumptively precludes use of the statutory buyout mechanism to the extent that litigation by the minority owner has been commenced seeking relief for fraud, oppression, or related conduct.[171]

Additionally, the statute is not intended to, nor do its terms preclude, derivative litigation—that is, litigation brought seeking relief on behalf of the company rather than the individual shareholder. On the other hand, derivative claims usually involve messy issues of demand, futility, and special litigation committees. Owners having only derivative allegations to pursue instead may avail themselves of the exit strategy of the model statute. Of course, upon sale of their interests under the statute, their standing to pursue any derivative claims would disappear.

CONCLUSION

One of the messiest areas of current business organization law is the appropriate manner of dealing with closely held business disputes. These situations often arise from relationships that have evolved over time and may involve more than simply issues of money. Like marriages and other personal relationships, business relationships may succeed or flounder over time, sometimes resulting in irreconcilable alienation between or among the participants.

171. Of course no statute can anticipate all the potential egregious tactics that ill-willed persons may employ. For example, a company might, in violation of clear contractual obligations, terminate a minority owner's secured employment and immediately purport to exercise its call rights under the model statute in hopes of precluding the inevitable and meritorious lawsuit and securing a mandatory release from the minority owner at the price of a full value buyout. While the minority owner might accept that proposal, courts of equity are well equipped to deal with such abuses and would not be constrained to apply the model statute. Indeed, the supposed hypothetical actions outlined here should be determined to be oppressive conduct warranting relief from the operation of the model statute itself.

While existing jurisprudence has evolved to be more flexible and accommodating in these circumstances, it does not provide for an effective no-fault divorce for relationships in the closely held business. Instead, minority owners trapped in an unsuccessful relationship with an illiquid investment have to point the finger of fault and prove the oppressive conduct of the other party in order to gain the prospect of relief. This method of resolving these failed relationships is wasteful and ineffective at providing the separation most likely sought by the minority business investor.

The proposed model buyout statute would provide the necessary mechanism for effective non-judicial resolution of failed business relationships in the successful closely held business. Whether the minority owner seeks simple separation and liquidity or the majority seeks to proceed unencumbered by concerns of alleged improper conduct, either or both of these parties have an effective tool to go their separate ways. It is suggested here that business people will welcome this opportunity to resolve their conflict without the resort to costly and acrimonious litigation, all to the great benefit of both business owners and the judicial system.

APPENDIX

SHAREHOLDER OPPRESSION STANDARDS AND REMEDIES

This chart includes the most important aspects of our fifty-state survey.

"Fiduciary Duty" generally means that the majority shareholder owes some type of duty to the minority shareholders and that a breach of that duty can be grounds for a cause of action (though the scope of that duty varies greatly from state to state). The "heightened standard" is the oldest and most exacting.

The third column describes the type of dissolution statute. A "Narrow" statute is generally one that permits for involuntary dissolution by a shareholder when others have acted in an "oppressive" manner but that gives no additional legislative guidance. A statute that is "Extremely Narrow" permits shareholder actions by less than a majority but does not use the word "oppressive" or "oppression." (The parenthetical explanation gives further detail: The phrase "I&F" means that the statute permits dissolution on a showing of "illegality" and "fraud," while in the others dissolution is only permitted for "deadlock.") The statutes described as "No Minority Actions" are the narrowest and appear to give no grounds for a minority shareholder action for oppression. In states with "Expansive" statutes, the legislatures generally have attempted in define in some broad way what standard of liability is to be applied.

State	Standard of Liability	Type of Dissolution Statute	Citation	Buyout as a Remedy?	Case Law Applying Standard of Liability	Comments About Buyout
Alabama	Heightened	Narrow	ALA. CODE § 10-2B-14.30 (2006).	Yes	Fulton v. Callahan, 621 So. 2d 1235 (Ala. 1993); Abel v. Forrest Realty, Inc., 484 So. 2d 1069 (Ala. 1986).	Authorized by statute. ALA. CODE § 10-2B-14.34 (election to purchase in lieu of dissolution).
Alaska	Reasonable Expectations	Expansive	ALASKA STAT. § 10.06.628(b)(5) (2005).	Yes	*See* Stefano v. Coppock, 705 P.2d 443, 446 n.3 (Alaska 1985) (interpreting a predecessor statute).	Shareholders can avoid dissolution by purchasing shares. *See* ALASKA STAT. § 10.06.630; Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 274 (Alaska 1980) (discussing Alaska law allowing a shareholder to bring an action to liquidate corporate assets upon a showing that the acts of the directors are illegal, oppressive, or fraudulent).
Arizona	Heightened	Narrow	ARIZ. REV. STAT. ANN. § 10-1430 (2006).	Yes	King v. Coulter, 550 P.2d 623 (Ariz. 1976) (interpreting a predecessor statute).	Shareholders can avoid dissolution by purchasing shares. ARIZ. REV. STAT. ANN. § 10-1434.
Arkansas	Reasonable Expectations	Narrow	ARK. CODE ANN. § 4-26-1108 (2001).	Unclear	Smith v. Leonard, 876 S.W.2d 266, 272 (Ark. 1994), *citing with approval In re* Kemp & Beatley, Inc., 473 N.E.2d 1173 (N.Y. 1984).	*Smith* was a matter of first impression, and the court did not need to reach the question of a buyout. 876 S.W.2d at 272.

State	Standard of Liability	Type of Dissolution Statute	Citation	Buyout as a Remedy?	Case Law Applying Standard of Liability	Comments About Buyout
California	When "reasonably necessary" to protect the moving party	Expansive	CAL. CORP. CODE § 1800(b)(4) (West 1990 & Supp. 2006).	Yes	Stuparich v. Harbor Furniture Mfg., Inc., 100 Cal. Rptr. 2d 313 (Ct. App. 2000); Bauer v. Bauer, 54 Cal. Rptr. 2d 377, 382 (Ct. App. 1996) (refusing to read "reasonable expectations" into the statute).	California has an optional buy-out provision. *See* CAL. CORP. CODE § 2000 (West Supp. 2006).
Colorado	Reasonable Expectations	Narrow	COLO. REV. STAT. § 7-114-301 (2005).	Unclear	Colt v. Mt. Princeton Trout Club, Inc., 78 P.3d 1115 (Colo. Ct. App. 2003).	*See* Polk v. Hergert Land & Cattle Co., 5 P.3d 402 (Colo. Ct. App. 2000) (noting without deciding the possibility of a buyout instead of dissolution of a family farm).
Connecticut	Reasonable Expectations	Narrow	CONN. GEN. STAT. § 33-896 (2005).	Yes	Stone v. R.E.A.L. Health, P.C., No. CV98414972, 2000 WL 33158565, at *12 (Conn. Super. Ct. Nov. 15, 2000) (finding that the facts could not support a claim that the plaintiff's reasonable expectations were defeated).	The statute permits buyout in lieu of dissolution. CONN. GEN. STAT. ANN. § 33-900 (West 2006).
Delaware	None	No Minority Actions	DEL. CODE ANN. tit. 8, § 275 (2001).	No	Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993).	
Florida	Fraud & Illegality	Extremely Narrow (I&F)	FLA. STAT. § 607.1430 (2005).	Yes	*See* Cox Enter., Inc. v. News-Journal Corp., No. 604CV6980RL28KRS, 2005 WL 2675008 (M.D. Fla. Oct. 20, 2005) (finding that the facts met the statutory standard).	The statute permits buyout of the complaining shareholder. FLA. STAT. § 607.1436.

State	Standard of Liability	Type of Dissolution Statute	Citation	Buyout as a Remedy?	Case Law Applying Standard of Liability	Comments About Buyout
Georgia	Fraud & Illegality	Extremely Narrow (I&F)	GA. CODE ANN. § 14-2-1430 (2003 & Supp. 2006).	Yes for statutory close corporations. Probably for all others.	The case law defining these terms is not well developed. *See* West v. West, 825 F. Supp. 1033 (N.D. Ga. 1992) (allowing the unclean hands doctrine to prevent evaluation of the substantive question).	*See* GA. CODE ANN. § 14-2-1430 cmts. (suggesting that courts retain equitable powers to fashion remedies).
Hawaii	Fiduciary Duty	Narrow	HAW. REV. STAT. § 414-411 (2004).	Yes	*See* Mroz v. Hoaloha Na Eha, Inc., 360 F. Supp. 2d 1122, 1130–31 (D. Haw. 2005); Perl v. IU Int'l. Corp., 607 P.2d 1036, 1046 (Haw. 1980) (recognizing a fiduciary duty owed in squeeze-out merger).	The statute permits buyout of a complaining shareholder. HAW. REV. STAT. § 414-415.
Idaho	Heightened	Narrow	IDAHO CODE ANN. § 30-1-1430 (2005).	Yes	*See* Rowland v. Rowland, 633 P.2d 599, 606 (Idaho 1981).	The statute permits buyout in lieu of dissolution. IDAHO CODE ANN. § 30-1-1434.
Illinois	Reasonable Expectations	Expansive	805 ILL. COMP. STAT. ANN. 5/12.56 (West Supp. 2006).	Yes	*See* Schirmer v. Bear, 648 N.E.2d 1131, 1136 (Ill. App. Ct. 1995) (permitting buyout of shares).	805 ILL. COMP. STAT. ANN. 5/12.56.
Indiana	Fiduciary Duty	Extremely Narrow (Deadlock)	IND. CODE ANN. § 23-1-47-1 (LexisNexis 1999).	Yes	G&N Aircraft, Inc. v. Boahm, 743 N.E.2d 227, 243 (Ind. 2001); Barth v. Barth, 659 N.E.2d 559, 562–63 (Ind. 1995).	*G&N Aircraft, Inc.*, 743 N.E.2d at 244 ("[A buyout] amounts to a forced withdrawal of capital from the enterprise . . . .").
Iowa	Reasonable Expectations	Narrow	IOWA CODE ANN. § 490.1430 (West 1999).	Yes	Maschmeier v. Southside Press, Ltd., 435 N.W.2d 377, 380–81 (Iowa Ct. App. 1988).	The statute permits buyout in lieu of dissolution. IOWA CODE ANN. § 490.1434.

State	Standard of Liability	Type of Dissolution Statute	Citation	Buyout as a Remedy?	Case Law Applying Standard of Liability	Comments About Buyout
Kansas	Fiduciary Duty	No Minority Actions	KAN. STAT. ANN. § 17-6812 (1995).	Unclear	Mynatt v. Collis, 57 P.3d 513, 529 (Kan. 2002); Richards v. Bryan, 879 P.2d 638, 647–48 (Kan. Ct. App. 1994).	*See Mynatt*, 57 P.3d at 531–34 (discussing the equitable nature of set-offs in various settings).
Kentucky	Unclear	Extremely Narrow (I&F)	KY. REV. STAT. ANN. § 271B.14-300 (LexisNexis 2003).	Unclear	*See* Dingus v. Fada Serv. Co., 856 S.W.2d 45, 48–49 (Ky. Ct. App. 1993); Yeager v. Paul Semonin Co., 691 S.W.2d 227, 228–29 (Ky. Ct. App. 1985).	
Louisiana	Heightened	Extremely Narrow (Deadlock)	LA. REV. STAT. ANN. §§ 12:143, :151 (1993).	No	Streb v. Abramson-Caro Clinic, 401 So. 2d 410, 414 (La. Ct. App. 1981).	*See Streb*, 401 So. 2d at 414 ("[A]ppropriate relief for a minority stockholder in a close corporation has been given different remedies in different states . . . .").
Maine	Fiduciary Duty	Narrow	ME. REV. STAT. ANN. tit. 13-C, § 1430 (2005).	Yes	Thompson's Point, Inc. v. Safe Harbor Dev. Corp., 862 F. Supp. 594, 601 (D. Me. 1994) (applying a predecessor statute).	The statute affords the court alternate remedies. ME. REV. STAT. ANN. tit. 13-C, § 1434.
Maryland	Reasonable Expectations	Narrow	MD. CODE ANN., CORPS. & ASS'NS § 3-413 (LexisNexis 1999).	Yes	Edenbaum v. Schwarcz-Osztreicherne, 885 A.2d 365, 379–80 (Md. Ct. Spec. App. 2005).	*Edenbaum*, 885 A.2d at 380–81 (holding that equitable remedies in addition to dissolution are available).
Massachusetts	Fiduciary Duty	Extremely Narrow (Deadlock)	MASS. GEN. LAWS ANN. ch. 156D, § 14.30 (West 2005).	Yes	Merola v. Exergen Corp., 668 N.E.2d 351, 353–54 (Mass. 1996); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 518–20 (Mass. 1975).	*See* Orsi v. Sunshine Art Studios, Inc., 874 F. Supp. 471, 475–76 (D. Mass. 1995); Keeting v. Keeting, Nos. 00749, 00748, 2003 WL 23213143, at *19 (Super. Ct. Mass. Oct. 3, 2003).

State	Standard of Liability	Type of Dissolution Statute	Citation	Buyout as a Remedy?	Case Law Applying Standard of Liability	Comments About Buyout
Michigan	Willfully Unfair & Oppressive	Narrow	MICH. COMP. LAWS § 450.1489 (2002 & Supp. 2006).	Yes	Franchino v. Franchino, 687 N.W.2d 620, 627–29 (Mich. Ct. App. 2004).	Authorized by statute. MICH. COMP. LAWS § 450.1489.
Minnesota	Reasonable Expectations	Expansive	MINN. STAT. § 302A.751 (2004).	Yes	Berreman v. W. Publ'g Co., 615 N.W.2d 362, 374–75 (Minn. Ct. App. 2000).	Authorized by statute. MINN. STAT. § 302A.751, subdiv. 1.
Mississippi	Fiduciary Duty	Narrow	MISS. CODE ANN. § 79-4-14.30 (2001).	Yes	Fought v. Morris, 543 So. 2d 167, 169–72 (Miss. 1989)	MISS. CODE ANN. § 79-4-14.34 (permitting other shareholders to buy out the complaining shareholder).
Missouri	Heightened	Narrow	MO. REV. STAT. § 351.494 (2001 & Supp. 2006).	Unclear	Churchman v. Kehr, 836 S.W.2d 473, 481–83 (Mo. Ct. App. 1992).	*See* 21 W., Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858, 867 (Mo. Ct. App. 1995) (ordering a buyout of shares in a dispute arising from a real estate transaction).
Montana	Reasonable Expectations	Narrow	MONT. CODE ANN. § 35-1-938 (2005).	Yes	Fox v. 7L Bar Ranch Co., 645 P.2d 929, 932–33 (Mont. 1982).	Authorized by statute. MONT. CODE ANN. § 35-1-939.
Nebraska	Fiduciary Duty	Narrow	NEB. REV. STAT. § 21-20,162 (1997).	Yes	Sadler v. Jorad, Inc., 680 N.W.2d 165, 172–73 (Neb. 2004); Anderson v. Clemens Mobile Homes, Inc., 333 N.W.2d 900, 904–05 (Neb. 1983).	NEB. REV. STAT. § 21-20,166 (permitting other shareholders to buy out the complaining shareholder).
Nevada	Heightened	Extremely Narrow (I&F)	NEV. REV. STAT. §§ 78.585, .650 (2004).	Yes	Bedore v. Familian, 125 P.3d 1168, 1172 (Nev. 2006).	*Bedore*, 125 P.3d at 1172–72 ("[T]he district court lacked the proper basis to order a buyout.").

State	**Standard of Liability**	**Type of Dissolution Statute**	**Citation**	**Buyout as a Remedy?**	**Case Law Applying Standard of Liability**	**Comments About Buyout**
New Hamp-shire	Fiduciary Duty	Extremely Narrow (I&F)	N.H. REV. STAT. ANN. § 293-A:14.30 (1999).	Yes	*See* Durham v. Durham, 871 A.2d 41, 44 (N.H. 2005) (holding that a minority shareholder can bring a direct claim for breach of fiduciary duty).	N.H. REV. STAT. ANN. § 293-A:14.34 (permitting other shareholders to buy out the complaining shareholder).
New Jersey	Reasonable Expectations	Expansive	N.J. STAT. ANN. § 14A:12-7(1)(c) (West 2003).	Yes	Brenner v. Berkowitz, 634 A.2d 1019, 1029–30 (N.J. 1993).	Authorized by statute. *See* N.J. STAT. ANN. § 14A:12-7(1)(c).
New Mexico	Reasonable Expectations	Narrow	N.M. STAT. ANN. § 53-16-16 (West 2003).	Yes	McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 236–41 (N.M. Ct. App. 1986); *see also* Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 458–49 (N.M. Ct. App. 2001).	*See McCauley*, 724 P.2d at 236 ("An order of corporate dissolution is a drastic remedy and should be utilized sparingly, after consideration of other alternative forms of relief.")
New York	Reasonable Expectations	Narrow	N.Y. BUS. CORP. LAW § 1104-a (McKinney 2003).	Yes	*In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179–81 (N.Y. 1984).	Authorized by statute. N.Y. BUS. CORP. LAW § 1118.
North Carolina	Reasonable Expectations	Narrow (but not MBCA model)	N.C. GEN. STAT. § 55-14-30 (2005).	Yes	Meiselman v. Meiselman, 307 S.E.2d 551, 561–64 (N.C. 1983); Royals v. Piedmont Elec. Repair Co., 529 S.E.2d 515, 518–20 (N.C. Ct. App. 2000).	Authorized by statute. N.C. GEN. STAT. § 55-14-31.
North Dakota	Reasonable Expectations	Expansive	N.D. CENT. CODE § 10-19.1-115(4) (2005).	Yes	Balvik v. Sylvester, 411 N.W.2d 383, 387–88 (N.D. 1987) (construing a predecessor statute).	Broad equitable relief authorized by statute. N.D. CENT. CODE § 10-19.1-115.

State	**Standard of Liability**	**Type of Dissolution Statute**	**Citation**	**Buyout as a Remedy?**	**Case Law Applying Standard of Liability**	**Comments About Buyout**
Ohio	Fiduciary Duty	Extremely Narrow (Deadlock)	OHIO REV. CODE ANN. § 1701.91 (LexisNexis 2004).	Yes	Reynolds v. Wingers, 621 N.E.2d 1239, 1242–43 (Ohio Ct. App. 1993) (holding termination of employment was not a breach of fiduciary duty in this case); Estate of Schroer v. Stamco Supply, Inc., 482 N.E.2d 975, 979–81 (Ohio Ct. App. 1984).	*See Estate of Schroer*, 482 N.E.2d at 981 (affirming trial court's order to purchase shares).
Oklahoma	Unclear	No Minority Actions	OKLA. STAT. ANN. tit. 18, §§ 1096, 1104 (West 1999).	Unclear	*See* Sutter v. Sutter Ranching Corp., 14 P.3d 58, 62 n.18 (Okla. 2000).	
Oregon	Reasonable Expectations	Expansive	OR. REV. STAT. ANN. §§ 60.661(2)(b), 60.952 (West 2003).	Yes	*See* Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395 (Or. 1973) (construing a predecessor statute).	*See Baker*, 507 P.2d at 396 (outlining alternatives to a dissolution remedy).
Pennsylvania	Fiduciary Duty	Narrow	15 PA. CONS. STAT. § 1981 (2001).	Yes	*In re* Jones & Laughlin Steel Corp., 412 A.2d 1099, 1102–03 (Pa. 1980); Baron v. Pritzker, No. 1574 Aug. Term 2000, 2001 WL 1855054 (Pa. D.&C. Mar. 6, 2001).	Orchard v. Covelli, 590 F. Supp. 1548, 1560 (W.D. Pa. 1984) (ordering a buyout instead of the "extraordinary measure of dissolution").
Rhode Island	Reasonable Expectations	Narrow (but see new opt-in statute for close corporations)	R.I. GEN. LAWS § 7-1.2-1314 (Supp. 2005).	Yes	Hendrick v. Hendrick, 755 A.2d 784, 791 (R.I. 2000) (discussing favorably the reasonable expectations standard in construing the predecessor statute).	The statute authorizes a buyout in lieu of dissolution. R.I. GEN. LAWS § 7-1.2-1315.

State	Standard of Liability	Type of Dissolution Statute	Citation	Buyout as a Remedy?	Case Law Applying Standard of Liability	Comments About Buyout
South Carolina	Unfairly Prejudicial (reasonable expectations may be a factor)	Narrow (also for "unfairly prejudicial" conduct)	S.C. CODE ANN. § 33-14-300 (2006).	Yes	*See* Kiriakides v. Atlas Food Sys. & Servs., Inc. 541 S.E.2d 257, 263–66 (S.C. 2001).	Authorized by statute. S.C. CODE ANN. § 33-14-310.
South Dakota	Reasonable Expectations	Narrow	S.D. CODIFIED LAWS § 47-1A -1430 (Supp. 2006).	Yes	Mueller v. Cedar Shore Resort, Inc., 643 N.W.2d 56, 64 (S.D. 2002); Landstrom v. Shaver, 561 N.W.2d 138 (S.D. 1997).	The statute authorizes a buyout in lieu of dissolution. S.D. CODIFIED LAWS § 47-1A-1434.
Tennessee	Fiduciary Duty	Narrow	TENN. CODE ANN. § 48-24-301 (2002).	Yes	Hall v. Tenn. Dressed Beef Co., 957 S.W.2d 536, 541 (Tenn. 1997). *But see* Cochran v. L.V.R. & R.C., Inc., No. M2004-01382-COA-R3-CV, 2005 WL 2217067, at *4–5 (Tenn. Ct. App. Sept. 12, 2005) (applying the reasonable expectations test).	
Texas	Reasonable Expectations	Narrow	TEX. BUS. CORP. ACT ANN. art. 7.05 (Vernon 2005).	Yes	Willis v. Bydalek, 997 S.W.2d 798, 801 (Tex. App. 1999); Davis v. Sheerin, 754 S.W.2d 375, 381 (Tex. App. 1988).	*See Davis*, 754 S.W.2d at 378–79 ("An ordered 'buy-out' of stock at its fair value is an especially appropriate remedy in a closely-held corporation.").
Utah	Fiduciary Duty (emerging)	Narrow	UTAH CODE ANN. § 16-10a-1430 (2005).	Yes	Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc., 970 P.2d 1273, 1279 (Utah 1998).	The statute authorizes a buyout in lieu of dissolution. UTAH CODE ANN. § 16-10a-1434.

State	Standard of Liability	Type of Dissolution Statute	Citation	Buyout as a Remedy?	Case Law Applying Standard of Liability	Comments About Buyout
Vermont	Unclear	Narrow	VT. STAT. ANN. tit. 11A, § 14.30 (1997 & Supp. 2005).	Yes	Waller v. Am. Int'l Distrib. Corp., 706 A.2d 460, 461 (Vt. 1997) (upholding lower court determination that a freeze out was "oppressive" without discussing the legal standard).	*Waller*, 706 A.2d at 462–63 (evaluating the meaning of "fair value").
Virginia	Heightened	Narrow	VA. CODE ANN. § 13.1-747 (2006).	No	Giannotti v. Hamway, 387 S.E.2d 725, 730 (Va. 1990).	*See Giannotti*, 387 S.E.2d at 733 (holding that dissolution is the exclusive remedy under the statute).
Washington	Reasonable Expectations	Narrow	WASH. REV. CODE ANN. § 23B.14.300 (West Supp. 2006) (amended June 7, 2006).	Yes	Scott v. Trans-Sys., Inc., 64 P.3d 1 (Wash. 2003) (en banc).	*See Scott*, 64 P.3d at 9–10 (citing *Baker* remedies).
West Virginia	Fiduciary Duty	Narrow	W. VA. CODE § 31D-14-1430 (2006).	Yes	Masinter v. WEBCO Co., 262 S.E.2d 433, 440 (W.Va. 1980).	*See Masinter*, 262 S.E.2d at 441 n.12 (citing available relief from oppressive conduct). The statute authorizes buyout in lieu of dissolution. W. VA. CODE § 31D-14-1434.
Wisconsin	Reasonable Expectations	Narrow	WIS. STAT. § 180.1430 (2005).	Unclear	Jorgensen v. Water Works, Inc., 582 N.W.2d 98, (Wis. Ct. App. 1998).	*See Jorgensen*, 582 N.W.2d at 107, n.11 ("[W]e do not decide whether or under what circumstances a trial court must dissolve a corporation if a statutory ground is established.").
Wyoming	Fiduciary Duty	Narrow	WYO. STAT. ANN. § 17-16-1430 (2005).	Unclear	J Bar H, Inc. v. Johnson, 822 P.2d 849 (Wyo. 1991).	