2020 Symposium on Corporate Oppression Actions

Program Materials

WAYNE STATE
Law School

BUSINESS LAW SECTION

WAYNE STATE UNIVERSITY LAW SCHOOL
JOURNAL OF BUSINESS LAW

Wayne State University Law School
Spencer M. Partrich Auditorium
January 15, 2020

Order of Events

Cocktails and Appetizers – 5:30

First Speaker – 6:00

Symposium Presenters
(in order of presentation)

Mark C. Rossman – Rossman Saxe, P.C. (introductory remarks)

Professor Douglas Moll – University of Houston Law Center

E. Powell Miller – The Miller Firm

Daniel Quick – Dickinson Wright

Bernard Fuhs – Butzel Long

Hon. Lita Popke – Wayne County Circuit Business Court

Questions from the Audience and Interruptions are Invited

Portrait Of A Corporate Oppression Action[1]

Brief Overview of Fact Pattern

Set forth hereafter is a lengthy set of entirely hypothetical facts, and related exhibits, which illustrate the interesting and complex world of corporate oppression. In the interest of brevity, the following consists of a brief overview of the material facts set forth therein.

- Jimmy's Addiction, Grammy-winning alternative rock band, was formed 25 years ago and consists of four band members/partners – Jimmy, Robert, John, and J.P.

- Around 2005, three business entities were formed and incorporated under Michigan law, serving as the band's tripartite corporate structure, and referred to as the Original Partnership Umbrella (or "OPU").

    - Jimmy's Addiction, Inc. (creative elements)
    - Sound Corp. (production elements)
    - Song Swan, LLC (distribution and publishing elements)

- The band is actively negotiating a $1 billion transaction with ABC Music Corp.

- Once the band achieved success, J.P.'s father, Spencer Perth, a shrewd and notorious business litigation attorney, took interest in the group and purported to "represent the band," taking credit for the deal, and appointing himself as General Counsel and as "legal Manager, just for legal technicalities on corporate paper."

- Now, Spencer Perth is claiming to possess an ownership interest in these business entities (i.e. 26% in Song Swan and 21% in each of the other OPU entities), relying on the following evidence:

    - Receipt of K-1 distributions (5% profit share, paid quarterly);
    - Signed Option Agreement (with J.P. only); and
    - Statutory partner status in the OPU.

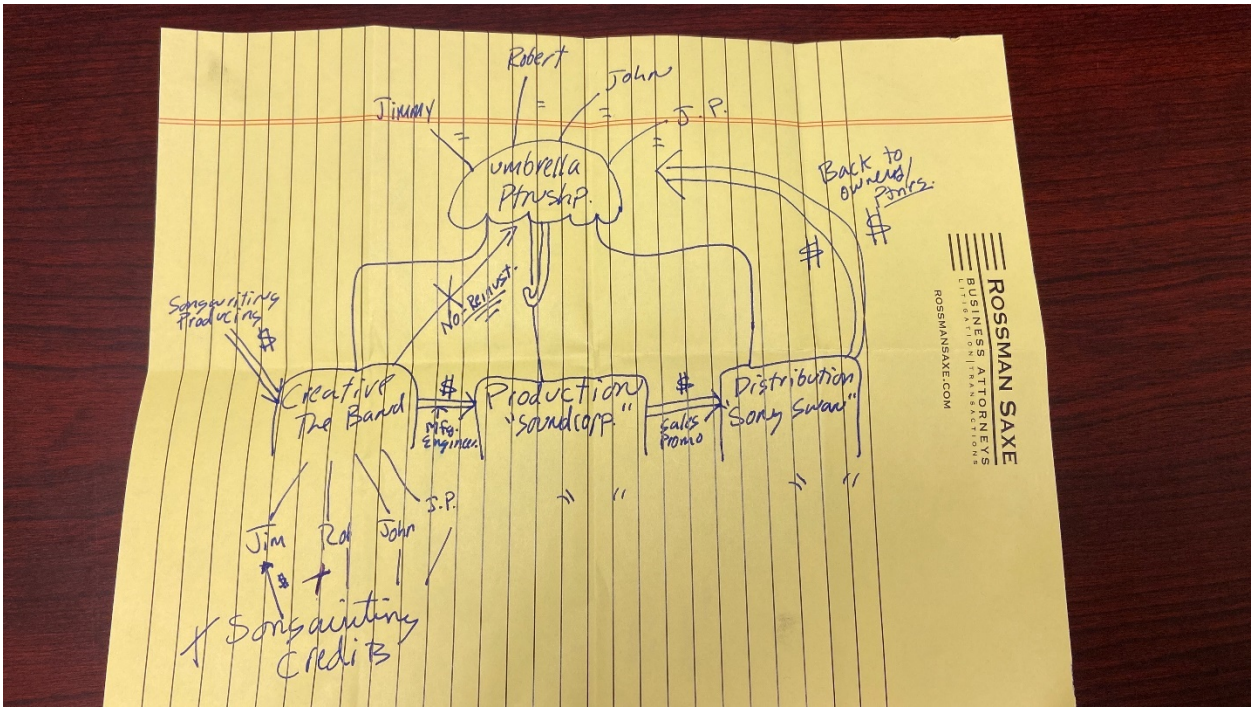
- Spencer Perth is also threatening to file a declaratory action to be judicially declared an owner, send a lien letter to ABC Music Corp. (which could kill the deal), issue deposition notices to related parties, and make statutory demands for corporate books and records.

- With the ABC deal on the line, each party's respective rights in question, and plenty of dirt to throw around, the Parties have lawyered up, raising a myriad of legal questions and issues that require resolution.

[1] ©publishing313

Not-So-Brief Fact Pattern

Jimmy Gilmore, Robert Waters, John Mason and J.P. Wright, II have, for a number of years, shared equal ownership interests in a music and media business involving three separate and distinct corporate bodies under an "umbrella holding company and original partnership,"[2] as they and their attorneys have referred to the collective of businesses in documents and in representations to third parties. One piece of evidence that everyone is interpreting in different ways is the following schematic, which J.P. sketched out at a lawyer's office years earlier when the company was in the midst of a restructuring and expansion into new markets beyond the creative element alone:



When Jimmy, Robert, John and J.P. started playing and creating music together, they never expected that, one day, now, they would be very seriously threatening lawsuits against each other involving various claims for, *inter alia*, fiduciary breach, fraud of various kinds, breach of partnership, accounting, breach of contract, unjust enrichment, receivership, dissolution, misappropriation and embezzlement, extortion . . . and, of course, the favored claim of the owner (or putative owner, in some cases) of a close corporation who has been disadvantaged by some heavy handed and unfair controlling fiduciary: **'corporate oppression.'**

The owners of the corporate enterprises at issue in this case had joined forces approximately 25 years ago in connection with the formation of an alternative rock band, which

[2] The original, unwritten partnership arrangement of everyone working and sharing profits equally is now referred to as the "Original Partnership Umbrella" or, if you prefer confusing acronyms that sound funny when they're pronounced, "OPU."

they ultimately called Jimmy's Addiction. In the beginning, they did not have or hold any corporate or partnership documentation between them, and, in the stead of corporate governance, they moved forward with each other upon a trusting handshake, sharing all of the burdens and benefits of the enterprise in equal proportionate shares, considering themselves equal partners, entitled to equal sharing in the profits, with "bonus dividends" to be allotted based on songwriting credits, which credits were often a bone of contention among them.[3]

Although it would have made things much more straightforward in terms of how to separate and allocate their ownership interests, there was never any formal abrogation or renunciation of this co-equal, organically arising partnership arrangement, and so the statutory partnership arrangement still arguably remains intact and often conflicts with the specific corporate governance of the various entities, as discussed below, giving rise to a myriad of legal questions of whether the old common law fiduciary obligations of partnership (now codified in Michigan[4]) govern the collection of businesses at issue as a whole, or whether the individual corporate governance of the actually incorporated and formed corporate entities control the analysis, and we are limited to application of the corporate governance actually enacted in writing. This concept helps and hurts different parties in the analysis before us. By way of example, the partnership concept enables someone not on the corporate governance to gain a foothold to ownership, and, as discussed below, when that person is as disreputable as Spencer Perth Wright, it can become a very frightening and dangerous matter.

Success came to the band quite quickly after they formed. They secured a record deal and commenced touring nationally within a year, and then globally shortly thereafter as the opening act for Jeff Buckley throughout Europe. After that, they churned out three albums which went platinum. Unfortunately, the great success that they found in the early years of the band did not translate into substantial financial benefits to the bandmates, due principally to a crooked manager and inept accountant, both of whom were fired long ago. Thus, despite platinum albums and lucrative tours, the band was essentially broke due to millions of dollars in "costs not actually incurred" which were found on the books and uncovered by an audit of the band's finances.

Though it could never be proven, almost everyone pointed a finger at the manager, Monte Che, who seemed to live a far more lavish a lifestyle than his salary could have sustained, and who happened to be the cousin of drummer, Robert Waters, which fact raised suspicions as to whether they acted in concert with one another to defalcate monies from the enterprise. For years, Waters's relation to the band's former manager has been the proverbial elephant in the room – everyone suspected something untoward, but they could not prove it. Though this misappropriation occurred well outside of any applicable statute of limitations, it would most certainly be investigated in

[3] In fact, Jimmy now claims he has been deprived of songwriting credits in the millions of dollars since the beginning of the enterprise, and that certain of his bandmates fraudulently concealed a scheme to deprive him of this money and hide his entitlements. His bandmates countered that they fraudulently concealed nothing, and, instead, it was Jimmy's abuse of narcotics that affected his memory and caused him to become so totally uninterested and unengaged in any part of the business other than songwriting, partying, booze and drugs that he would be unable to remember anything even if it had been disclosed to him.

[4] See Exhibit 1, Rossman, Frey, *Partnership and the Fiduciary Component*, Mich. Bar J. December 2008 for analysis of how a statutory partnership can arise in Michigan when you least expect and least want it!
Link to article: https://www.rossmansaxe.com/assets/pdf/bar-journal-2008.pdf

discovery. Jimmy and John were particularly suspicious, which divided the band in two factions, with Robert and J.P. aligning against Jimmy and John both creatively and in terms of the power struggle within the organization, which created numerous instances of deadlock, with the most recent material event of deadlock currently preventing the band from closing on a deal to sell the non-creative elements to a third party.

At the time when this financial devastation occurred, the future seemed bleak, but the consequent restructuring of the band's corporate operations, combined with the incentive to generate output ultimately resulted in great success. Initially, the band was able to weather the storm, because it was still able to write hit songs and continue to win Grammys. With the threat of financial ruin upon them, and the deep debt into which they had fallen, they were motivated more than ever to turn out hit songs and so they turned away from the alternative, hard-rock genre and into the larger mainstream, where they started writing bubble gum songs for pop stars – the kind of songs they would have despised years earlier, but which now earned them a lot of money. This, in turn, generated the revenue that fueled the creation and the growth of the new production and distribution branches of the business, which the new management and their attorneys had put into place to increase the return on the band's creative output and so that they could more effectively branch out into writing, producing and distributing music for not only themselves, but other artists, thereby increasing the platform for their product. Put another way, the consultants implemented various new "profit centers" in the business.

Structurally, in order to capture production and distribution revenue that was previously flowing out to third party vendors, the new management team organized a tri-partite corporate structure, breaking the enterprise up into three business entities, with one focusing on the creative element (Jimmy's Addiction, Inc., a Michigan corporation), one on production (Sound Corp., a Michigan corporation), and one on distribution and publishing (Song Swan, LLC, a Michigan limited liability company). Each band member owned an equal ¼ share of each separate business, and the corporate governance of each entity provided for a basic majority rule system of governance within each company, with certain important decisions requiring a supermajority. As stated, the band members remained committed to the concept of the Original Partnership Umbrella, or OPU, as discussed above and evidenced by J.P.'s schematic drawing of the corporate structure.

When the boys decided to leave the University of Michigan and hit the road with their instruments, their parents were not what you might call supportive. Jimmy and Robert were pre-med. John was in the school of architecture. Junior was in law school, following in the footsteps of his father, Spencer Perth Wright.[5] Needless to say, their parents had other aspirations for their children. But when the money started rolling in, they changed their tune.

J.P.'s father, Spencer Perth took a particular interest in the business when it started making serious profits. Spencer Perth was a shrewd and notorious business litigation attorney who got involved in the band's operations after the corporate restructuring, when the prospect of great wealth for his son (and him) was apparent. Though he was not responsible for the restructuring, he purported to "represent the band" in connection with the deal that was negotiated and put

[5] Wright the elder insisted on being called by his first and middle names together, Spencer Perth. If anyone called him just Spencer, he would not respond, or say he could not hear them speaking.

together by other lawyers hired by the management team. With the band not really paying much attention, and spending most of their time on the Sunset Strip drinking and carousing, he was able to convince them that the deal was actually his brain-child, the other lawyers and management team were only getting in the way, and that he should therefore be General Counsel of all operations and legal "Manager, just for legal technicalities on the corporate paper." As such, when the final corporate paper on the restructuring was executed in 2005, he took operative control of the companies, firing the management team and accountant and replacing them with his friends and business connections, thus exercising dominion over the books, records, and overall business dealings and contracts of the band and the related entities.

Within a few years of the establishment of this corporate structure, the business grew exponentially, with each arm of the business grossing, on average, in excess of $100 million per year. The group, along with a large team of employees and executives, engineered and distributed not only their own material, but they were able to sign dozens of other groups. With a niche in producing music for digital distribution in the early 2000s, they were able to capture a substantial segment of the internet / digital market, which was very profitable, because they did not have to carry the overhead of manufacturing and distributing music the conventional way, in the form of cassettes, compact discs, and vinyl records. They became pioneers in this new musical format, and they capitalized handsomely.

Though they once wrote, sang and produced fun hit songs of love, joy and psychedelic adventure, the song is now over and their collective sensibility is being driven by a toxic combination of power, greed, fear and loathing at a time when the business is under contract to be sold to a third-party purchaser, ABC Music Corp., who, needless to say, is refusing to close the deal without a resolution of the disputes among the ownership and threatening to pull the plug on the approximately $1 billion transaction if the boys can't figure out a way to see eye to eye and get along with one another.

The question of whether Spencer Perth holds an ownership interest in any or all of the corporate entities, and the OPU, because, as stated, he is claiming to be a 26% owner of Song Swan, and 21% in each of the other entities falling under the OPU, Jimmy's Addiction, Inc. and Song Corp. He cites as evidence the fact that he was receiving K-1 (ownership) distributions, had a signed Option Agreement, and is a statutory partner in the OPU.

Though Spencer Perth adamantly opposed his son's decision to quit law school, when Junior started out-earning him he was more than happy to help himself to a 5% profit share paid out of the UPO at the end of every quarter, which action, among others, he now contends, renders him an ownership-partner in the enterprise, even though he is not listed as a member or shareholder on any corporate governance documents. In fact, though he certainly was not in the band, Spencer Perth would tell people, in public, and even in the context of negotiations and corporate transactions, that he was an owner-partner in the overall venture – a "part of the band, behind the scenes" he would say. Not wanting to embarrass the man for overstepping his bounds, nobody would disagree with his statements, and they acknowledged on several occasions that he was a "partner" in the business.

Spencer Perth contends that the ownership interest and distribution rights that go along with that "as a fair fee in exchange for my legal services, as agreed to by everyone," as he would remark from time to time in email correspondence and in conversation with the accountant and bookkeeper. There is a strong disagreement over whether these 5% profit distributions were owner distributions or compensation for services rendered, or some combination of both. Spencer Perth contends that he took great risk representing the band at a time when its future was uncertain and he abandoned the work of high paying clients at his prestigious law firm, and, as such, everyone agreed, he claims, it would be fair if he took a modest 5% share of the profits on a quarterly basis, and that the distribution be tied to ownership. Furthermore, each year, the company accountant, who was a friend of Spencer Perth and acted at his direction, issued a K-1 to Spencer Perth out of Song Swan, LLC, reflecting the 5% distribution and ownership interest. As further evidence of his otherwise undocumented ownership interest, he contends, is an "Option Agreement" for 21% of each business, which he and J.P. signed and filed away years ago, and which he has now signed and claims an option entitlement to *an additional* 21% of each company, making him 26% in Song Swan and, thus, with his son, the Wrights, between them, would hold a controlling majority over a vast portion of this music empire.

Whether Spencer Perth owns these shares of the business is of substantial import not only as it pertains to his purported distribution rights in connection with the ABC Music Corp. deal, but also because it tips the balance in favor of the majority-minority alignment between the fiduciary partners in Song Swan, which would vest him and his son with great power within the corporate structure. With Jimmy and John squarely aligned against Robert and J.P. on all corporate issues, if Spencer Perth establishes just a 5% ownership in any one or all of the businesses, he could tip the majority in his favor by aligning it with his son's and Robert's interest, initiating aggressive corporate action against and to the exclusion of the minority, including changing the make-up of the Board of Directors and management of the companies, as well as the terms of the ABC Music Corp. deal.

Accordingly, Spencer Perth, though not an owner on any corporate paper, is nonetheless threatening to file a declaratory action in equity to have himself judicially declared a 5% owner, send a lien letter to ABC Music Corp. (which act may kill the deal), and issue deposition notices to people who would very strongly prefer to not be placed under oath, for a variety of reasons. Even though his ownership is not definitive, he has already issued statutory demand letters for the corporate books, financials and an accounting of the various corporate entities within the music enterprise, responses to which are overdue and which fact Spencer Perth is claiming constitutes an act of oppression under *Madugula v Taub*, the Michigan Supreme Court case which holds that a shareholder has an entitlement to corporate data in its native format upon statutory demand. With the corporate books and accounting very much in shambles, it is almost impossible to comply with these demands.

Litigation would have great consequences, even beyond the threat it poses to the ABC Music Corp. deal. Indeed, it was recently discovered that someone on behalf of the band gave the business's lender, Segar Bank, false financial statements in connection with a $250 million line of credit to Sound Corp., which was used to finance the expansion of the production arm of the business. The Bank's loan covenants required the provision of financial statements, signed by two of the partners, bi-annually. The statements that were provided *appear to be* signed by Jimmy and

John, although they have no recollection of doing so and contend that the signatures were forged. Everyone is deeply concerned, because the Company's second independent auditor has determined that the financial statements were false and grossly overstated the financial wherewithal of the company in order to remain in covenant. If litigation is commenced, it will constitute a default under the loan documents, and the Bank will call in the loan and start asking questions that nobody could answer without implicating themselves in a conspiracy to commit bank fraud. They would likely have to take the Fifth Amendment (which never looks good) on these issues. At this point, it is somewhat irrelevant who perpetrated this fraud upon the Bank, because the evidence would be construed to establish a conspiracy to defraud, and as Spencer Perth pointed out in recent correspondence along with a verbal settlement demand at a meeting between all parties, it could result in criminal racketeering charges against everyone in the band if it were brought to the attention of the prosecutor's office. Jimmy and John are deciding whether to provide this information to the prosecutors and come clean with the Bank.

In order to keep this, and other matters confidential, there has been talk of moving the matter to private mediation/arbitration to avoid the publicity of a dispute amongst the partnership and because the bank covenants require disclosure of any "litigation involving the Company." Each side is weighing the pros and cons of arbitration, and there is a question of whether an arbitrator holds authority to order remedies under the Michigan oppression statutes, which, by their terms, only authorize the "circuit court" to "make an order" providing relief thereunder.

Spencer Perth accidentally copied Jimmy on an email last year which may constitute evidence of an intent to oppress Jimmy and John. Specifically, he emailed an article to Robert and J.P. which he saw on a chamber of commerce website outlining the "7 Steps" in an oppressive scheme:

> Robert, John – does this look familiar? I found it researching potential liability online per what we discussed at the Black Lotus last week. I think we're on about step 5 and they're none the wiser! 😊
>
> Step 1: Establish majority ownership.
>
> Step 2: Assume sole managerial control.
>
> Step 3: Control books, records, and finances.
>
> Step 4: Undermine and demoralize minority owner.
>
> Step 5: Divert company assets to self or other businesses.
>
> Step 6: Terminate benefits of minority (employment, distributions, etc.).
>
> Step 7: Force litigation.

This email constitutes very strong circumstantial, if not direct evidence, of a premeditated scheme to oppress by a lawyer and in concert with fiduciaries of the business.[6]

There is no question that Spencer Perth absolutely and unequivocally "controlled" the entities during his tenure as "general counsel" and self-professed "partner." He had access to the books. He told people what to do. They did it. He signed contracts in the name of the businesses without consulting the bandmates or requesting their permission. He booked shows. He directed monetary distributions to the ownership (including himself). When he started working for and with the band, they discussed and agreed that the band's strengths were in the creative and production side, and, while he would assist and contribute to the businesses in that regard, he would be principally and almost solely responsible for the distribution component of the business, which, it just so happens, is the most lucrative, provides the greatest returns, and constitutes a very substantial percentage of the value in the pending, ABC Music Corp. deal, which is becoming more tenuous by the day. In fact, ABC Music Corp. would purchase only the distribution arm, if push came to shove.

In considering their potential claims against Spencer Perth, their lawyers have advised that while he definitely has "control" over Song Swan, LLC, the distribution arm, it is questionable whether he would be a liable party in an oppression claim under the LLC oppression statute, which only makes "managers or members in control" liable parties. Too bad for Jimmy and John that the distribution arm wasn't a corporation because, for some strange reason, the corporation oppression statute is broader in this regard, providing very generally that "those in control" – shareholder or otherwise – can be potential liable parties, even as their control is not premised in ownership, specific title or fiduciary position. Though it would have been nice to subject Spencer Perth to the broad discretion of an oppression claim afforded to a trial court judge, who would no doubt find his conduct in this regard repugnant and possibly "willfully unfair and oppressive" under the oppression statute, they may have to live with their common law claims for fraud, embezzlement, conversion, and the like, which may prove sufficient, but which all present a host of evidentiary burdens which the oppression statutes do not necessarily carry.

Jimmy is presently in a very precarious situation and is very litigation averse. In fact, he has proposed giving away the farm and agreeing to vest majority control with Robert, J.P. and Spencer Perth. John is adamantly against Jimmy's position in this regard. Everyone knows why Jimmy is so nervous about a public litigation, and they are exploiting it against him in different ways. Jimmy would be the first to admit that he would not want the specific details of his intimate relationship with an intern being published into the record, with details not previously known being disclosed and relevant in terms of his conduct as a fiduciary. Also, if this case blows up, Jimmy's wife will be a witness, which could create an awkward situation, given the allegations that have been lodged by the intern.

Jimmy's wife would undoubtedly be a relevant witness, because she and Jimmy, unbeknownst to the other band members, formed a limited liability company called The Last Bullet, LLC, and they used the LLC to purchase the publishing rights to a work of fiction by the

[6] See Press Release, attached hereto as Exhibit 2, and publicly available online: https://www.troychamber.com/rossman-saxe-p-c-attorneys-recover-840000-share-value-partner-hotel-business/

same name and then auction the movie rights and royalties off for a high seven figure sum, which they kept for themselves. A copy of the purchased work is attached hereto as Exhibit 3. There is a serious question concerning whether this pursuit constitutes a usurpation of corporate opportunity as against the publishing distribution arm, Song Swan, and so, rest assured, Spencer Perth and his son are exploiting this element like no other. Though the publication and royalty rights did not pertain to music, the other members of the band are reserving their rights to challenge it as being sufficiently in line with the business of the distribution arm generally. In one of the many meetings that have been held (and recorded by Robert, unbeknownst to the others), Spencer Perth explained that the establishment of this "secret entity" would constitute a corporate usurpation and that the gains generated by the enterprise should be disgorged. He had a right to disclose this "business opportunity" before pursuing it under the *Production Finishing* precedent.

Another matter that would be investigated in the event of litigation would be the unauthorized use of spy cameras by Robert and J.P. at the urging of Spencer Perth to secure evidence of their bandmates' conversations and actions of infidelity and narcotics to be used against them at a later date. Though the investigating faction most certainly procured damning evidence in the form of these videos, the material is actually being used against them, because there is this criminal statute in Michigan which prohibits the unauthorized visual recording of people in such situations. As such, nobody wins if these recordings come out, and it could even land certain people in jail and on a sex offender website. Jimmy and John have been weighing how to advance the threats of criminal liability, without crossing over into the realm of criminal extortion, now that they have downloaded and preserved the digital recordings from Robert's personal computer, which computer was purchased with band money, of course.

There is a peculiar provision in the corporate governance of all three entities, providing that a capital call can be made "upon the resolution of any member/shareholder." This is odd, as conventional wisdom would have the capital call requiring something closer to unanimity than simply the resolution of any member in the company. Though a capital call had never been issued over the history of the company, this provision is now coming into focus, as Jimmy and John have issued a capital call in Song Swan, indicating that the company is in need of a substantial contribution "to implement capital improvements so as to maintain the value of the business in connection with the delayed ABC Music Corp. deal," adding that "it is the actions and inactions of Robert, J.P. and Spencer Perth, in conspiracy with one another to secure rights and entitlements to which they are not entitled, and in an illegal manner, necessitating the above described capital call." One of the notices was issued to Spencer Perth, not conceding he is an owner of the business, but out of "courtesy" because he is "contending" to be an owner, and Jimmy and John desire everything to be "out in the open." This puts Spencer Perth in a precarious situation, because, on the one hand, if he does not contribute, the corporate governance draconianly provides that ownership interest is forfeited. Yet, on the other hand, is he willing to contribute a substantial sum (which he does not have) just to be able to argue that he did not forfeit the Units in the company right after he convinces a trial judge that he had them in the first place, even though he is not on the corporate governance, which, by the way, he was involved in drafting.

Another bone of contention between the parties involves a vinyl record pressing business called Third Stone Records, Inc. Jimmy and John bought into this business in the early 2000s when not only vinyl, but even compact discs were on their way out in favor of digitally downloadable music, which is what Song Swan specialized and made a ton of money in. So, when Jimmy and John raised the concept of purchasing a controlling interest in this vinyl pressing company, Robert, J.P. and Spencer Perth laughed it off as the stupidest idea on Earth. Well, they are not laughing now, because, with the revival of vinyl records as a very popular "throwback" or "vintage" thing, the company is generating substantial profits, in that it has cornered a large majority of the national market for this product. They are reprinting thousands and thousands of different albums being re-released almost daily, and with the economies of scale that they created in their pressing systems over the last decade and a half, their profit margin is very strong. Spencer Perth has indicated that he has advised his son and Robert that they maintain an ownership interest in this investment under the "Original Partnership Umbrella," because it is undoubtedly in the same line of business as the partnership.

One such band whose material Third Stone Records was putting on vinyl was, yes, you guessed it, Jimmy's Addiction. They reissued all of their music on vinyl over a 2 year period with special releases, generating tens of millions of dollars in revenue, the very vast majority of which did not make into the band's coffers, because the "pressing charges" ate up 90% of the revenues. These interested transactions are coming under close scrutiny now, because the terms were not reviewed by any disinterested persons or formally approved or ratified in the corporate book, though there will be testimony of a discussion in which everyone agreed that Jimmy and John can "keep all that f***in money in that stupid record business." The discussion was not documented, because there was no paper and pen available in the back of a party bus in Los Angeles as they talked over their 5th bottle of aged Dom Perignon, with several witnesses present whose names the band cannot remember.

That night in the party bus, incidentally, ended with Jimmy punching the band's road manager in the face at an after-hours bar that was owned by the band, resulting in not only litigation against the band, but also criminal prosecution for the fight and obstruction of justice (they lied to the police about the incident), as well as drug possession. In addition, Liquor Control revoked the bar's liquor license due to after-hours drinking and a physical assault by an owner who was on the Liquor License. It is likely this conduct falls within the penumbra of "illegal" conduct inimical to the close corporation that is prohibited by the statute.

One principal concern that the parties have at the present time is document preservation and tolling of the statute of limitations, and, amidst the acrimony and substantive negotiations, there have been discussions concerning how all parties can rest assured that evidence is not being destroyed and that the delay in commencing lawsuits will penalize them in a statute of limitations analysis, because many of the allegations go back several years, and, though the Michigan Supreme Court held in *Frank v. Linkner* that claims for oppression may be tolled by fraudulent concealment, it is a time consuming and costly argument to prove in open court.

The band's spending has always been an issue, and it is fair to say that they are all certainly guilty of exorbitance in their habits. They each had a company AMX Black Card, which they used heavily. Jimmy set spending records on this card, exceeding his band by several hundred thousand dollars. Spencer Perth also had a card, which was authorized by J.P., and he regularly ran the balance north of a hundred thousand on "entertainment and company expenses" on an annual basis. Review of the charges shows that everyone who had the card was using it for personal expenses. To date, the accountants have not booked these personal charges as income, and with the filing of overdue taxes due, it is becoming a significant point of contention.

As stated, the corporate governance on this business is in shambles. Since Spencer Perth took over as General Counsel, there were no formal corporate meetings, no votes, no disclosures, and little more than the annual corporate filings with the State of Michigan and unilateral consents and resolutions being executed by various of the ownership against the other.

Several offers have been made back and forth as to how the matter can be resolved, and the delay is really becoming a problem for Jimmy and John, because they are running out of money, fast. They lived more lavishly than the other members of the band, who, along with Spencer Perth, together have quite a stockpile of cash to litigate the matter if need be and refrain from receiving their distributions and dividends, as the case may be. Jimmy and John are at the point where they are having to liquidate assets in order to pay their bills, selling off real estate, cars, jewelry, and memorabilia. Robert and J.P. are refusing to approve any distributions (upon the advice of Spencer Perth), leaving Jimmy and John to live off of their paltry salaries of approximately $250,000. Starving them cash-wise, Robert and J.P. have put them in a very precarious situation in which they might have to accept a separation arrangement that deprives them of substantial cash reserves. This is an age-old manner of oppression, as noted by one of the preeminent scholars in this field of law, F. Hodge O'Neil, who wrote in the Wayne Law Review many years ago as follows:

> *The simplest and most frequently used squeeze-out technique is the withholding of dividends.* Sometimes the approach by majority shareholders is blunt. They simply say to a minority shareholder: "You might as well sell out. As long as you are in the company we're not going to declare any dividends." This is neither artful nor the wise course of action from the "squeezor's" point of view. Quite often the approach is more subtle. The majority may say to the minority: "Our company's machinery is old; it needs to be replaced. Furthermore, we've got to expand; we've got to set aside reserves for 'a rainy day' when business is not as good as it is now. We can't afford to declare dividends. If you need money now, you'd better sell out and invest in something else. We wish we could give you dividends, but in this company dividend prospects are dim for the next ten years."[7]

[7] F. Hodge O'Neal, "Problems of Minority Shareholders in Michigan Close Corporations," Wayne Law Review, Vol 14, No. 3, pg. 732 (1969)("The oppression of minority shareholders and 'squeeze plays' designed to eliminate them from the business are serious problems in close corporations. Even in a family company discord is common. *As a*

Needless to say, the bandmates (who are still actually working and playing together, believe it or not) have lawyered up.

Jimmy hired E. Powell Miller, Esq. of The Miller Firm, whose long track record of trial and arbitration victories should deeply concern everyone in the room.[8]

Robert hired Daniel Quick, Esq.[9] whose knowledge of this area of law is second to none, and who hails from the powerhouse law firm of Dickinson Wright.

John hired Bernard Fuhs, Esq.[10] from Butzel Long, whose personality, charisma, and basketball abilities are rivaled only by his ferocity in litigation.

J.P. is being represented, of course, by his father, Spencer Perth, who has engaged Professor Douglas Moll[11] from the University of Houston Law Center as pre-litigation and negotiation advisor and Mark Rossman, Esq. as their litigation counsel.

All the lawyers have their work cut out for them!

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matter of fact, dissension and squeeze plays occur more often in family corporations than in other close corporations." Citing *Stott Realty Co v Orloff*, 262 Mich 375 (1933); *Wabunga Land Co v Schwanbeck*, 245 Mich 505 (1929) (emphasis added).

[8] See Exhibit 4.
[9] See Exhibits 5 & 6:

Quick, *Unmoored: How Minority Shareholder Oppression Litigation Has Gone Too Far*, SRR Guest Article, May 2015. Link to article: https://www.dickinson-wright.com/~/media/Files/News/2015/05/unmooredhow-minority-shareholder-oppression-litigation.pdf

Quick, Pawlowski, *The Tyranny of the Minority and The Need to Reign in Minority Shareholder Oppression Litigation*, The Litigation Newsletter, Winter 2013.
Link to article: https://higherlogicdownload.s3.amazonaws.com/MICHBAR/71986430-937d-41f0-884d-bdb221b1ff80/UploadedImages/pdfs/newsletter/winter2013.pdf

[10] See Exhibit 7.

[11] Professor Moll is a leading scholar in the field of corporate abuse and oppression. See Exhibits 8 & 9. All of his scholarly articles can be found at the following link: http://ssrn.com/author=190549

EXHIBIT 1

Partnership and the Fiduciary Component

Duties, Obligations, Rights, and Remedies

By Mark C. Rossman and Brendan H. Frey

> Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.
>
> —J. Benjamin Cardozo[1]

The standards for establishing a partnership may reasonably be viewed as somewhat relaxed. In fact, neither a written nor even an oral agreement is required to create a partnership. Moreover, a partnership may exist independent of the parties' intent, and a partnership can be found even when the parties expressly did not intend to form a partnership.

Given the broad definition in Michigan of what constitutes a "partnership," the partnership penumbra is applied to a wide array of factual scenarios in the caselaw and should be considered by the business law practitioner when someone has been wronged by another member of a business enterprise. If a partnership is not desired at the onset of a business relationship, one must be careful not only to appropriately define the relationship in agreements, but also to conduct the business affairs so as not to permit a finding of a partnership should litigation arise.

The consideration of a partnership claim in litigation is particularly important when the elements of a contract claim or business tort may be lacking. For instance, your client may have had an understanding with another person to equally divide the proceeds of a business endeavor, but there was no written contract between them and they now disagree on what their intentions were. There may be evidence that the parties appeared to be equals in running the business, but your client's business "partner" is paying himself an inordinate amount of the profits as purported salary or claiming certain of the business's assets as his own, preferring himself over your client. Another example may be that a business that two people founded and grew into a profitable enterprise is sold and one partner claims a much greater portion of the proceeds.

Fast Facts

Under *Byker v Mannes,* a partnership can be found to exist even if the parties did not intend to form a partnership.

Even after *Byker,* recent decisions show that some courts still give weight to the parties' intent to form, or not form, a partnership.

The fiduciary duties among partners are strict and require the utmost good faith and honesty.

Without clear agreements defining who is entitled to what, or what the parties' respective roles in the enterprise are, claims based on contract or tort theories will present some challenges that may ultimately leave the aggrieved party without a remedy. Claims based on the Uniform Partnership Act can be particularly valuable when the elements of traditional contract or business tort claims may be difficult to establish. Once established, the partnership gives rise to very strict fiduciary duties, the breach of which triggers significant remedies available to the aggrieved partner.

A Partnership Can Arise Even When There is No Intent

The concept of a partnership is statutorily defined in Michigan. Michigan's Uniform Partnership Act (Partnership Act)[2] provides that "[a] partnership is an association of 2 or more persons…to carry on as co-owners a business for profit[.]"[3] In *Byker v Mannes,* the Michigan Supreme Court held that even absent the intent to create a partnership, a partnership can nonetheless arise.[4] Thus, the analysis is not one of subjective intent to form a partnership. Rather, it is of the parties' objectively manifested conduct toward one another with respect to the parties' business, and whether such conduct meets the statutory definition of a partnership.

In deciding whether a partnership exists, courts are directed by the caselaw to engage in a broad, intensely factual review of "all the attendant circumstances," and no single factor in the analysis will be conclusive.[5] For example, even a signed partnership agreement is not conclusive proof that a partnership existed.[6] Similarly, registering a business as a partnership merely creates a presumption that there is a partnership.[7]

In *Byker,* the Supreme Court held that a partnership may underlie a corporate entity's business affairs and stand independent of formal shareholder relationships within the corporate entity.[8] In some cases, this holding will undercut a defense asserted pursuant to MCL 449.6(2), which provides that "any association formed under any other statute of this state…is not a partnership[.]" The plaintiff and the defendant in *Byker,* to facilitate investments for their partnership, created separate corporate entities and individual partnerships in which they were shareholders for the purpose of operating each separate entity.[9] The defendant took the position that the formalized shareholder relationships established by the separate entities defined the nature of his obligations to the plaintiff and, therefore, he could have no liability under the Partnership Act. The Court disagreed and held that there was a "general"[10] partnership underlying all of the separate corporate entities. Despite the existence of the parties' well-defined relationships in the separate entities, the Partnership Act applied with full force in *Byker,* and the Court clarified that the focus of any intent analysis, as one factor out of many, is only "on whether the parties intended to carry on as co-owners a business for profit" and not "on whether the parties intended to form a partnership."[11]

Even After *Byker,* Partnership Intent Still Plays a Role in the Analysis

Despite the declaration in *Byker* that intent to form a partnership is irrelevant, recent appellate decisions illustrate that some courts still hold the intent factor in high esteem. In *Gunnett v Brooks,* a 2007 unpublished decision, the Court of Appeals affirmed a trial court's holding that no partnership was formed, focusing on the fact that "the evidence presented at trial supported the trial court's finding that neither plaintiff nor defendant intended to form a partnership when they signed the umbrella distribution agreement."[12] In holding as such, the Court noted, "[i]n considering whether a partnership exists, the intention of the parties is of prime importance."[13] While the Court of Appeals went on to apply the *Byker* analysis and held that the various indicia of a partnership was lacking, it is clear that the intent of both parties to not form a partnership was an important factor in the analysis.[14]

Similarly, in the 2007 published decision of *Kay Investment Co, LLC v Brody Realty No 1, LLC,* the Court of Appeals, in a 2–1 decision, held that the intent of the parties as embodied in a "joint venture agreement" supported the finding that the parties did not form a partnership.[15] In finding a joint venture and rejecting the partnership claim, the Court of Appeals cited to the fact that the parties' agreement "does not contain language that suggests the formation of a partnership," as it "does not contain the word 'partnership.'"[16] In his dissent, Judge Schuette sharply criticized and characterized the majority's opinion as a departure from the mandates of the Michigan Supreme Court in *Byker.*[17] He wrote that *Byker* "clearly outlined the differences between individuals' subjective intent and their conduct in a business relationship," as was articulated by Justice Cooley, who was quoted extensively in *Byker:*

> It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable.[18]

While both the *Kay Investment* and *Gunnett* decisions also analyzed several of the non-subjective partnership factors enunciated by the Partnership Act, these recent decisions show that intent to form, or not form, a partnership will not always be disregarded by the courts.

What Kind of Conduct Gives Rise to a Finding of a Partnership?

In establishing whether a partnership exists, several factors are delineated by the Partnership Act and by caselaw. In Michigan, indications of a partnership may include any of the following:

- The sharing of profits (this constitutes prima facie evidence of a partnership)[19]
- A party rendering services while also possessing rights of management, such as the authority to enter into contracts[20]
- The use of the term "partner" by the parties[21]
- The belief of third parties that they were dealing with a partnership[22]
- The contribution of experience "in more than an advisory or consulting capacity"[23]
- The contribution of "capital, consisting of money, merchandise, et cetera, or credit, skill, or labor"[24]

Factors that may cut against the finding of a partnership include any of the following:

- Tax returns that do not list the business as a partnership[25]
- Title to property involved in the operation of the partnership that is not in the partnership's name[26]
- All business contracts in the name of the party denying the existence of a partnership[27]
- No agreement to share losses[28]
- Receivable checks payable to the party denying the existence of a partnership[29]
- No partnership bank account[30]
- No filed statutory certificate[31]

As these non-exhaustive lists illustrate, most breach-of-partnership disputes will be fact-intensive in terms of establishing whether a partnership exists.

The Fiduciary Duties are Expansive and Strict

Michigan courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity, requiring the full and honest disclosure of information to one another.[32] The Court in *Band v Livonia Assoc* held that "[e]ach partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs."[33] Partners also have a right to access partnership books and a right to an account of partnership affairs.[34]

Several holdings in Michigan jurisprudence have defined the type of conduct that constitutes a breach of these duties. For example, partners are prohibited from engaging in competing businesses without accounting to co-partners.[35] Partners breach their fiduciary duties when they exclude the other partner from working in the partnership and earning a salary, or by operating the business without the other partner's consent.[36] The fiduciary obligation requires partners to fully disclose partnership affairs and obtain consent of the partners before conveying partnership property to themselves.[37] Disclosure of material facts to some partners but not others is a fiduciary breach.[38]

Absent an agreement to operate the partnership for an express term or to terminate the partnership after a particular undertaking, partners dissatisfied with the status quo can dissolve the partnership at will.[39] However, dissolution of the partnership alone does not immediately end the partnership, and fiduciary duties remain until a winding-up phase is complete and the partnership's assets are distributed.[40]

The Remedies for a Breach

Even when there is an agreement establishing an express term for the partnership, a partner who has been wronged by another partner's breach of fiduciary duties may petition the court for a decree of dissolution.[41] Dissolution must be ordered if the court finds that the breach of fiduciary duties prejudicially affects the continuation of the partnership or if it is not reasonably practicable to carry on the partnership.[42] In addition to the dissolution of the partnership, under MCL 449.38(2)(a)(II), an aggrieved partner is entitled to damages against each partner who wrongfully

"If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners."

caused the dissolution.[43] The aggrieved partner's damages remedy is for him or her to be made economically whole.[44] Put another way, the remedy consists of "placing the wronged partners in the economic position that they would have enjoyed but for the breach."[45] Exemplary damages are not available for a breach of a fiduciary duty claim in the context of a partnership, because the fiduciary duties are held to arise from the partnership "contract," which is implied under the Partnership Act.[46]

Conclusion

The possibility of a partnership claim may be based on myriad facts and circumstances and should not be overlooked by the business law practitioner, either in litigating business disputes or in explicitly defining in agreements the parties' expectations and duties. To avoid partnership standards of accountability and disclosure in a business enterprise, participants should ensure that organizational documents clearly disclaim the existence of a partnership, and they should conduct their business affairs in such a manner as to avoid any presumption of a partnership. On the other hand, when one faction of a business is aggrieved by the conduct of the other, the Partnership Act may give rise to a viable claim. ■

Mark C. Rossman is a partner in the law firm of Mantese and Rossman, P.C., in Troy (www.manteseandrossman.com). He concentrates his practice in complex commercial and business litigation, shareholder and partnership disputes, business transactions, and distressed loan workouts and related litigation. He has previously written about the role of fiduciary duties in the context of reinsurance contracts (86 Mich BJ 5 (May 2007)). In 2007, he was profiled in Lawyers Weekly *as one of Michigan's "Up and Coming Lawyers."*

Brendan H. Frey is an associate with Mantese and Rossman, P.C., concentrating in complex commercial and business litigation and shareholder and partnership disputes. He graduated cum laude from Wayne State University Law School in 2007, where he earned a Silver Key Certificate and was president of the Environmental Law Society. Mr. Frey earned his undergraduate degree from the University of Michigan (BA, 2002).

FOOTNOTES

1. *Meinhard v Salmon,* 249 NY 458, 464 (1928) (emphasis added); see also *Band v Livonia Assoc,* 176 Mich App 95, 113; 439 NW2d 285 (1989), citing 59A Am Jur 2d, Partnership, § 420, p 453 ("The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs.").
2. MCL 449.1 *et seq.*
3. MCL 449.6(1).
4. *Byker v Mannes,* 465 Mich 637, 653; 641 NW2d 210 (2002).
5. *Hynansky v Vietri,* unpublished opinion of the Court of Chancery of Delaware, issued August 7, 2003 (Docket No. 14645-NC), p 6 (holding based on a Delaware statute with language identical to Michigan's Uniform Partnership Act).
6. *Hynansky, supra.*
7. *Miller v City Bank & Trust Co, N A,* 82 Mich App 120; 266 NW2d 687 (1978).
8. *Byker, supra* at 641–642.
9. *Id.* at 639.
10. The Court of Appeals deemed it a "general" or "super" partnership. The Michigan Supreme Court removed the modifiers and simply referred to the business relationship as a partnership.
11. *Byker, supra* at 653 n 9.
12. *Gunnett v Brooks,* unpublished opinion per curiam of the Court of Appeals, issued January 18, 2007 (Docket No. 263838), p 3.
13. *Id.,* citing *Lobato v Paulino,* 304 Mich 668, 670–671; 8 NW2d 873 (1943).
14. *Id.* at 4.
15. *Kay Investment Co, LLC v Brody Realty No 1, LLC,* 273 Mich App 432, 443; 731 NW2d 777 (2007).
16. *Id.* at 443.
17. *Id.* at 446–447.
18. *Id.* at 447, citing *Byker v Mannes,* 465 Mich 637, 648–649, 641 NW2d 210 (2002), quoting *Beecher v Bush,* 45 Mich 188, 193–194; 7 NW 785 (1881).
19. MCL 449.7(4); *Falkner v Falkner,* 24 Mich App 633, 643; 180 NW2d 491 (1970); *Lobato v Paulino,* 304 Mich 668, 670–671; 8 NW2d 873 (1943); *Klein v Kirschbaum,* 240 Mich 368; 215 NW 289 (1927); 137 ALR 33.
20. *Falkner, supra* at 642–644; 137 ALR at 64; *Runo v Rothschild,* 219 Mich 560; 189 NW 183 (1922).
21. *Falkner, supra* at 642–644; 137 ALR at 86.
22. *Falkner, supra* at 642–644; 137 ALR at 79.
23. *Shacket Developments, Inc v Labana,* unpublished opinion per curiam of the Court of Appeals, issued February 28, 2003 (Docket No. 237232), p 2.
24. *Michigan Employment Security Comm v Crane,* 334 Mich 411, 416; 54 NW2d 616 (1952).
25. *Miller, supra.*
26. *Id.*
27. *Moore v Du Bard,* 318 Mich 578; 29 NW2d 94 (1947).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Penner v De Nike,* 288 Mich 488; 285 NW 33 (1939).
33. *Band, supra* at 113–114.
34. MCL 449.19 and 449.22.
35. *Johnson v Ironside,* 249 Mich 35; 227 NW 732 (1929).
36. *Yager v Howard,* unpublished opinion per curiam of the Court of Appeals, issued August 2, 2007 (Docket No. 269120), p 2.
37. MCL 449.20 and 449.21(1); *Carto v Underwood Prop,* unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 272747), pp 4–5.
38. *Band, supra* at 113–114.
39. MCL 449.31; *Fall v Loudon,* unpublished opinion per curiam of the Court of Appeals, issued February 12, 2008 (Docket No. 275519), p 3, n 2.
40. MCL 449.30, 449.37, 449.38, and 449.40; *Fall, supra* at 3, n 4, citing *Howe v Webert,* 332 Mich 84, 95; 50 NW2d 75 (1952); *Brooks v Rose,* 191 Mich App 565, 570–571; 478 NW2d 731 (1991), citing *Gilroy v Conway,* 151 Mich App 628, 637; 391 NW2d 419 (1986).
41. MCL 449.32; *Band, supra* at 114.
42. MCL 449.32; *Band, supra.*
43. MCL 449.38(2)(a)(II); *Brooks, supra* at 570–571.
44. *Gilroy v Conway,* 151 Mich App 628, 637; 391 NW2d 419 (1986), citing MCL 449.21.
45. *Gilroy, supra* at 637–638, citing *Lynn v Arehart,* 231 Mich 144; 203 NW 834 (1925); *Penner v De Nike,* 288 Mich 488; 285 NW 33 (1939); *Van Stee v Ransford,* 346 Mich 116; 77 NW2d 346 (1956).
46. *Gilroy, supra* at 637 ("There is no tortious conduct here existing independent of the breach of the partnership contract.").

EXHIBIT 2

Rossman Saxe, P.C. Attorneys Recover $840,000 In Share Value For Partner In Hotel Business

July 28th, 2017 by admin
Posted in Member Press Release
Tags: Law

The Troy law firm of Rossman Saxe, P.C. (rossmansaxe.com) was recently featured in Michigan Lawyer's Weekly for an $840,000 settlement it achieved on behalf of a minority shareholder who was frozen out of a hotel business. The trial team in the case of Moyle v. Moyle, Montcalm County Circuit, Court Number 2016 -21511- CZ, consisted of Rossman Saxe attorneys Mark C. Rossman, Brian M. Saxe, and Maxwell J. Goss, and also Bryan Reeder of the Grand Rapids law firm of Plachta Murhpy & Associates (pmalawpc.com). The facts of the case painted a classic portrait of corporate oppression.

The plaintiff, the minority member of a hotel business in southwest Michigan, brought suit against the majority ownership faction of the company for corporate oppression and other business torts. The plaintiff alleged that the defendants abused their majority control by freezing him out of business operations and terminating distributions notwithstanding ample cash reserves.

Prior to filing suit, plaintiff's counsel engaged in due diligence with statutory demands for corporate documents and by noticing and conducting a transcribed member meeting. The defendants' shortcomings in responding to the demands and failing to appear at the member meeting supported the allegations pled in the complaint.

In prosecuting the case, the attorneys for the minority-member plaintiff structured their proofs according to a seven-step theory of corporate oppression. They focused their testimonial and documentary discovery on proving the core components manifest in virtually every scheme of corporate oppression:

Step 1: Establish majority ownership.

Step 2: Assume sole managerial control.

Step 3: Control books, records, and finances.

Step 4: Undermine and demoralize minority owner.

Step 5: Divert company assets to self or other businesses.

Step 6: Terminate benefits of minority (employment, distributions, etc).

Step 7: Force litigation.

Heading into facilitation, the plaintiff's attorneys were trial ready with proofs and demonstratives mapping out the particulars of the case. Evidence gathered in discovery revealed that the defendants acceded to majority ownership without paying for their units; usurped sole managerial control upon a fallacious premise; ran all the books through a related entity's bookkeeper and accountant and withheld information from the plaintiff; marginalized and repeatedly insulted the plaintiff; funneled corporate monies to their other business; terminated the employment of the plaintiff and his wife without good cause; ended distributions while stockpiling cash and triggering S-corporation tax burdens; and, lastly, refused to pay fair value for the plaintiff's interest in the company, thus forcing the litigation.

At facilitation, the majority owners agreed to purchase the plaintiff-minority's one-third share in the company for $840,000. This amount was nearly 3 times the buy-out offered before the case was filed.

« Previous Entry Next Entry »

EXHIBIT 3

2nd Place

SHORT-STORY CONTEST WINNER

The Last Bullet

By Mark C. Rossman

It was a miserable winter morning when they shackled Henry in the sheriff's van and prepared to escort him in through the back entrance of the jailhouse. When he stepped down from the vehicle, the slushy saltwater puddles in the potholed driveway soaked through the shoes he had polished for his sentencing, freezing his toes. His worn-out gray suit offered little protection to his thin body against the polar vortex that had swept down from the North, so he was thankful for the two overweight guards at his side, blocking the wind.

They escorted Henry inside and reluctantly performed the intake procedures. Though he had killed a man—in cold blood, no less—they knew he presented no threat. A guard ordered him to take off his clothes for the obligatory body search, but stopped him at his undergarments and did not lay a hand on him.

Henry crammed the clothes he would never wear again into a plastic bucket and handed it to the mustached guard sitting behind a high counter. He knew the guard from years earlier, when he used to visit his clients in the jailhouse. He stood in the middle of the room shivering as the guards inventoried and logged his belongings.

The guard with the mustache asked Henry to identify the items in his wallet and place them into a clear plastic bag. He cooperated. There were worn-out pictures of his children when they were still young. Wrinkled business cards. A small brass Star of David that his mother told him to always carry. A $5 bill. Other things an old man would accumulate in his wallet.

The last item was his soon-to-be-revoked bar card. Henry stopped and stared down at the blue-and-white plastic card, which proved he was admitted to practice law. Like almost all licenses, the bar card has a number on it identifying the holder. In the universe of Michigan lawyers, this is called a "P number," for the simple reason that it always begins with the letter P.

When the State Bar first started assigning P numbers in 1974, Henry was uneasy with the practice. He sarcastically protested by announcing himself in court not by name, but by his P number only. Up until his very last appearance in a court of law, he would say, "May it please the court, P number twenty-five double seven three appearing on behalf of the defendant, your honor."

The guard with the mustache shook him out of his reverie. "Okay, come on now, Henry, let's move it along. Is that it for the wallet?"

"Numbers," Henry mumbled. "They gave my father a number."

"Whatchu talkin' 'bout Henry? Move it along," ordered an impatient guard.

"Number twenty-eight eighty-nine, tattooed on his left forearm, right here," he said, pointing to the inside of his own arm. "They couldn't revoke that number," Henry scowled as he tossed his bar card up on the counter. "Not until the flesh rotted from his bones."

The guards finished their work in silence and escorted him to cell 382, where he would await transport to a more permanent and secure prison in the Upper Peninsula.

As a criminal defense lawyer, Henry had heard a lot of cell doors slam shut over the years. It sounded a bit different this time.

* * *

Years before he became a defendant himself, when he was in the prime of his practice, Henry was high on the list of attorneys who received appointments to represent criminal defendants who could not afford a lawyer. He knew several of the appointing judges well. He drank with them on alternate Fridays at the Red Coat Tavern on Woodward.

Henry and these judges had an understanding that he would get all the capital cases he could handle. In these cases, he did not consider it his job to win, but to make sure that his clients had the benefit of their constitutional protections—a fair trial, due process. Having held these ideals in such high regard, his handling of the Oskar Breyer matter was quite a surprise to those who knew him. And even to those who didn't know him.

As time passed, the people whom Henry knew down at the courthouse became fewer and fewer, and eventually the appointments stopped coming. Once in a while, he'd get a call to defend a petty criminal or a drunk-driving charge. After a while, though, when he saw the court's number on the caller ID, he would ignore it.

* * *

As his practice declined, Henry would nonetheless shine his shoes and put on his suit to go down to the courthouse to chat up clerks and watch the proceedings, with the hope that he could find someone who needed a lawyer. After a few years of this, Henry's optimism waned and the ordeal became more depressing than anything else. Thus, it became Henry's habit to spend his afternoons alone in his kitchen reading the paper and sending e-mails to his grandchildren.

One afternoon, after reading the paper several times over, he was surprised by a knock at his back door. Nobody had visited him for quite some time, so the rapping on the door startled him. Henry was pleased to find the white-haired Judge Taylor standing on the porch in his overcoat and hat. Judge Taylor was known for running a very informal court back in the day, and Henry enjoyed practicing before him as much as he enjoyed drinking with him at the Red Coat.

> Henry waited until late that night to visit his client down at the jailhouse. He knew his old friend, Jack, still worked the night shift and would let Henry in after hours and without all the formalities of being searched.

They greeted each other warmly, and Henry invited him in for coffee. After some small talk, they settled in at the table.

"So what brings you out here, Jim?"

"A few weeks ago, they asked me to sit as a visiting judge on a criminal docket for some new judge who took a leave of absence for his wife's baby. Can you believe that?"

"Never heard of that before."

"Times certainly have changed, I'll tell you that. I guess they always do."

"What do they call that anyway, *paternity* leave?"

They laughed.

"It was good for me, Henry. It got me out of the house and back on the bench for a few weeks, so that judge can take all the paternity leave he wants. Fine by me."

"So what's keeping you busy up there? Anything good?"

"Well, things got interesting this morning."

"Tell me," Henry said, leaning forward.

"I'm sitting there listening to all the rigmarole—parole violations, pleas, sentencing, things like that—and then they bring in this old guy, older than us, in his 90s. I'm thinking to myself, 'What the hell did this poor bastard do?'"

Judge Taylor gulped his coffee.

"So, Henry, it turns out he's a Nazi war criminal by the name of Oskar Breyer."

"What? Why is he in county lockup? Did you say *Oskar Breyer*? Are you sure?" Henry quizzed the judge.

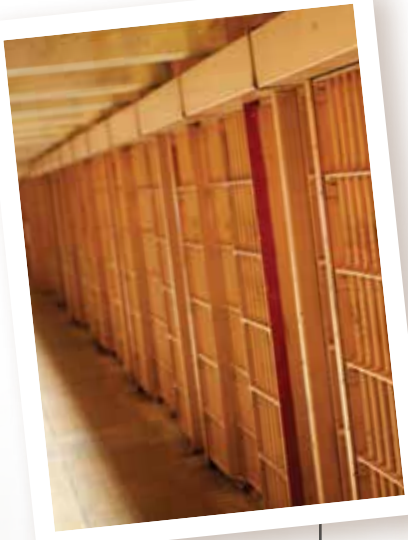
"Yes, it's strange. They found him living in a nursing home in north Oakland County, actually collecting Social Security, if you can believe it. Sounds like they're not sure what to do with him for now, so the county's been asked to hold him pending a decision about wherever he's gonna go. They're still trying to sort it out, just for a day or two, they say. For now, though, he asked for a lawyer and since he's in county lockup, I gotta appoint one. Probably not much to do. Just hold his hand for a while 'til he gets shipped out."

"Who are you going to appoint?"

"That's where you come in. You up for it?"

Henry would not decline this appointment, that's for sure.

* * *



Henry waited until late that night to visit his client down at the jailhouse. He knew that his old friend, Jack, still worked the night shift and would let Henry in after hours and without all the formalities of being searched.

The heat in Henry's car did not work very well, and he could see his breath as he drove over the familiar roads to the jail. He listened to AM news for any updates on the story concerning Oskar Breyer. Being that it was late at night, it was the same story that Henry had already heard several times over earlier that day.

> *Oskar Breyer, 93, accused Nazi war criminal found in Oakland County nursing home and expected to be charged with crimes against humanity once extradited…stay tuned to WWJ for updates.*

Henry parked his car behind the jailhouse and walked through the fresh snow to the back entrance.

He knocked on the locked doors, and after a few minutes, a young guard appeared. Henry asked for Jack, explaining that he was an old friend from when he used to come down to the jail a lot to visit clients and he'd like to see him for a few minutes. Irritated, the young guard reluctantly got on his radio and called Jack, who came down immediately. He was excited to see his old friend.

"Henry, it's been forever. What are you doing here?"

"Hey ya, Jack, good to see you. It has been some time." They shook hands in a familiar way, and Jack told the young guard that he could go back on break.

"Geez, so what brings you down here tonight? Looks like you mean business. Got your suit on, shoes all shined up, your briefcase and all. What's the deal?"

"The deal is that I've been appointed to represent one Oskar Breyer," Henry said very seriously.

"Oskar Breyer. You don't say? They say the guy's a Nazi. Some group who goes out hunting those guys down after all these years caught him. What's gonna happen to him?"

"Well, we'll just have to see now, won't we?" Henry sardonically replied.

"You always got the tough ones. Come on, let's go, I'll take you up there. He's cooling his jets up in cell block 10. That's where we put the strange ones."

Jack led him around the metal detectors, notwithstanding the overhead sign that required everyone, even lawyers, to submit to a search. They walked together down a long, dimly lit brick hallway, rode up an elevator, and then passed through doors with multiple locks. After walking down another hallway with burned-out lightbulbs, they arrived at cell number 382.

Jack rapped his baton over the bars, startling the old inmate, who was lying prostrate on the simple bed in the corner of the cell, awaiting a fate that was beyond his control.

"Henry Satouchny, meet Oskar Breyer. Mr. Breyer, your lawyer," Jack introduced the men as he opened the door.

Henry walked in and sat down on a metal chair.

"Jack, thanks, I think I'm all set. I can handle it from here. Can we have a bit of privacy?"

"Okay, for sure, then I'll leave you be, and just holler when you're ready to come out. I'll be down the hall," Jack said as he slammed the door shut, locking the two men inside the cell.

Oskar Breyer sat up and examined Henry through his round spectacles, which slid down to the tip of his pointy nose. The man was tall and strong, just as his father had described him, and though old, he appeared in good health. As Henry situated himself at the table, he was the first to speak.

"You understand, Mr. Breyer, I am your lawyer, and so anything we discuss is in the strictest confidence. It does not go beyond you and me. You do understand that, correct?" Henry said sternly, as if he were beginning a cross-examination.

"Yes, I understand that. Thank you for coming. Someone must have been spreading slander about me, for this morning I was arrested, though I had done nothing wrong. What is your name again, mister? What did he say it was, I am sorry?"

"Satouchny."

"Yes, Satouchny. Sometimes I have trouble remembering my own name, so forgive me. What is this is all about? It is like a dream. It is like I don't even exist right now. What is happening?"

Henry did not answer his question. "Since, sir, we have an attorney-client privilege, you can tell me what happened with no fear of repercussion from me, and I will give you one chance to do so."

The man raised his eyebrows, confused.

Henry calmly removed a worn black-and-white picture from his shirt pocket and handed it to Oskar Breyer. The man in the picture had a shaved head and was wearing striped prison garb. He held up a small placard with the number 2889 on it and was looking away from the camera.

"Look closely at that picture. Examine it, sir, and tell me what you see."

"I see a man…he looks like a prisoner. I do not know who it is, though."

"That's my father, and he knew you, Mr. Breyer."

"Oh, he did? Well I don't recall him, though my memory is not so good. Please forgive me."

"He damn well recalled you. In fact, he knew you very well. And you knew him. Look closer, sir. Look at it!" Henry yelled, frightening the man.

"I do not recall that man in the picture. I do not, I tell you again."

"He told me about you, Mr. Breyer."

The old man shook his head and looked at the floor. He said nothing. Then Henry broke the silence by slamming a holstered pistol against the county-issued metal table.

"Well, perhaps you recognize that," Henry demanded.

"A pistol?" Breyer nervously replied. "And why do you have it?"

"It is a Luger, is it not?" Henry asked, pushing it toward him. "Remove the gun from its holster," Henry ordered.

Breyer complied, unsnapping the leather holster and removing the gun slowly. His hands were shaking, but he handled the gun with some degree of familiarity.

"I have never held a gun before, let alone this one," the old man said as he looked it over.

"Mr. Breyer, please closely inspect the handle of this gun and you will see that there are three numbers there—a three and a two and a four. Do you see that?"

The man looked confused.

"Do it!" Henry yelled.

"Everything okay down there?" Jack called out from down the hall.

"Yes, fine, Jack," replied Henry. "The old boy is just a tad hard of hearing, if you know what I mean."

"That's what my wife says," Jack hollered back, laughing.

Oskar Breyer looked closely at the pistol, raising his glasses, and then reluctantly confirmed, "Yes, I do see those numbers."

"They are serial numbers. Every Nazi-issued Luger has them, correct? Do you recognize those numbers?"

"No, I don't, and I can't listen to this anymore. I don't know what you're talking about, sir."

"Oh, you'll listen, sir. Look here at the leather holster. Do you see the letters etched on it? What are they? Read them."

"Yes, I see them. An O and a B?"

Oskar Breyer was quivering and pale.

"Mr. Breyer, those are *your* initials, O and B. And so I ask you again, sir, is this your Luger, the one you used when you were a guard at Dachau, in Upper Bavaria, southern Germany?"

"No, you are gravely mistaken. I never owned a gun in my life. I have never even been in Germany."

"Mr. Breyer, is it not true that on April 29, 1945, you were preparing to shoot my father, Levon Satouchny, in the back of the head, as you had dozens of men before him that day, before the Americans came?"

"I do not understand."

Henry ignored him and continued. "But you did not shoot him because the camp was liberated at that very moment, and like a coward you threw your gun to the ground and scampered off into the woods.

"And they never found you, until now. Until now, sir, as you sit here across from the son of the man who could never forget you, whose dreams you haunted, who was a good man, and who, before he died, gave me this pistol and told me about you and what you had done."

"Then do as you must do," the old man replied.

Henry pulled back the hammer on the gun, never taking his eyes off the old man.

"Oskar Breyer, you had one bullet left in the chamber on that day, and, you see, it is still here to this day," Henry said, showing him the chamber. "It was this bullet that you intended to put into my father's head, and which, sir, I will now put into yours."

Henry pressed the barrel of the Luger hard upon the old man's forehead and used the last bullet that gun ever fired.

* * *

"Oscar Breyer, you had one bullet left in the chamber on that day, and, you see, it is still here to this day," Henry said, showing him the chamber. "It was this bullet that you intended to put into my father's head, and which, sir, I will now put into yours."

Through the time he was sentenced, Henry was allowed out on a modest bond. Notwithstanding the murder charge, the prosecutors were comfortable in giving him time to get his affairs in order. There was no trial, and Henry refused the young court-appointed lawyer selected by the judge. He entered a guilty plea to a charge of first-degree murder. Calling it a "crime of passion," the prosecutor had only charged him with second-degree murder, and even offered voluntary manslaughter. Henry refused the deal and said he would force a trial unless the charge was murder in the first degree. It was first-degree murder that Oskar Breyer deserved, and it is what he got, Henry told the prosecutors.

At his sentencing, he walked up to the podium in his old gray suit and shiny shoes and put his appearance on the record one last time.

"P number twenty-five double seven three appearing on behalf of the defendant, myself, and also on behalf of my father, number twenty-eight eighty-nine, your Honor." ■

Mark C. Rossman is an experienced business litigation and transactional attorney in Troy. Earlier this year, after 14 years of practice, Mark formed his own law firm, Rossman Law, PC (www.rossmanlawpc.com). He also started a local publishing company called publishing313 (www.publishing313.com), with the aim of publishing Detroit-area fiction and poetry. He is married to his beautiful wife, Alana, and together they have three awesome children, Owen, Connor, and Gracie.

EXHIBIT 4

Powell Miller

Unbeaten Trial Record Is Impressive, But Positive Impact Is Ultimate Goal

by Elizabeth Davies

ROCHESTER — Some say 13 is an unlucky number. For E. Powell Miller, it's anything but.

Miller, of Rochester's **Miller Law**, has won 13 consecutive jury trials and recovered more than $2 billion on behalf of his clients. Of his cases, three class-action suits resulted in the class receiving a 100 percent cash recovery.

In the more than 20 years since he opened his firm, Miller actually has never lost a trial.

He attributes that winning streak, in part, to being selective about the cases he takes on.

"We're not interested in a class action that doesn't have a lot of merit," he says. "I'm particularly good at assessing the strengths and weaknesses of a case, and being confident in that decision."

And, he never stops pressing on.

"He got a nickname as a kid — he was called Persistent Powell," recalls his father, labor union lawyer Bruce Miller. "He got the nickname because he went on a hike and he was sick and got a fever, but he insisted on wearing his backpack and still finished it. He has always stuck to his guns."

He's been called on by various Fortune 500 companies across the country due to his expertise in litigation. He repeatedly was named one of the top 10 lawyers in Michigan by Super Lawyers Magazine. Three times, he was named Lawyer of the Year by Best Lawyers.

"He's extremely creative and extremely articulate," Bruce Miller says. "He can take complex issues and make them understandable."

For Powell Miller, his role in class-action lawsuits is not just about money. He looks for cases that help people who otherwise have no means of redress. He's proud that one of his cases indirectly led the Federal Drug Administration to ban ephedrine in dietary supplements. He's glad that 35,000 families were warned about carbon monoxide risks because of his work.

"It's a way to do my part to make the world a better place," he says.

Learning From Dad

As a kid, Powell's first paycheck came from his dad's firm. He remembers his first job, dusting the books in his dad's legal library for 25 cents an hour. He then worked as a runner and messenger for the firm, and eventually became a law clerk.

There was little doubt Miller had what it took to be a top litigator. He was a debate team star throughout high school and college, winning the Harvard University National Debate Tournament when he was just a college freshman. He also appeared in a special international debating exhibition against the Oxford Debating Union of Great Britain.

"I was very fortunate to be able to travel to different cities and compete at high levels," he says.

Perhaps surprisingly, after completing his studies at Georgetown University and graduating third in his law school class at Wayne State University, Miller did not return to the firm of his youth. Rather than take a job at his father's firm, he joined Detroit's Honigman Miller Schwartz and Cohn instead. He made partner just four years later.

"I wanted to rise or fall on my own merit," he says.

And rise he has.

Still, with an accomplished career under his belt, Miller continues to value his father's opinion and is apt to turn to him for legal advice.

But the best lessons he learned from his father ended up having nothing to do with intricacies of the law.

"Loyalty, extremely hard work and absolute integrity" are the traits his father impressed on him, Miller says.

Those are the same virtues he tries to pass along to younger lawyers at his firm. Developing a new generation of high-performing, high-integrity lawyers is one of the most rewarding things he does.

"There's great joy in seeing young lawyers right out of law school become outstanding attorneys and people," he says, emphasizing hard work above shortcuts.

"We're going to out-work our opponent, we're going to out-think our opponent, we're going to out-strategize our opponent," he tells young lawyers. "Have an absolutely dogged determination to get the best result possible without crossing the line. We hit above the belt as hard as we can."

Starting From Scratch

In 1993, at age 32, Miller left his firm, downsized his house, sold his car and decided to forgo a salary for a year so he could build a law firm from the ground up.

"I thought he could make it," Bruce Miller says of his son. "I always had confidence in his abilities and his persistence. The kid doesn't know how to lose. With that kind of record and the personality he has…I knew it was a scary thing, but if anyone could do it, he would."

Powell Miller envisioned a place where the voiceless could find representation, where the community was a safer and healthier place because of the work he did. His goal was to make a meaningful difference. Beyond that, he wanted to enjoy his work. And somewhere further down the list, he was motivated to earn a paycheck again.

"I had a great experience, and I got an amazing education (at Honigman Miller)," he says. "But I wanted to do something more than cases that were corporation versus corporation. I wanted to bring cases that otherwise no one else might bring."

In those early years, from 1993 to 1996, Miller took on three cases that turned the tide for his young firm. One dealt with securities fraud and two were consumer class action suits. All three cases were successful.

"Going three for three on those cases gave me the capital and confidence to really go after this," he says.

Today, Miller Law employs 24 full-time and seven part-time lawyers. It recently was named a Best Law Firm for 2017 by U.S. News & World Report. And its lawyers regularly are given top legal accolades within their fields.

These days, while he focuses heavily on trials, Miller makes a point of doing a little bit of everything in his firm. He writes briefs (often the first draft), conducts intake interviews and meets with clients. In the fall, he worked on a case that settled for $42 million just weeks before trial. He represented more than 20,000 nurses and alleged that their employers had worked together to keep their wages down.

But the best part — the most satisfying payment for his hours of work — is the thrill of victory.

"There's nothing more exciting than a jury trial, and having the jury return their verdict," he says. "In many cases, the other side told me my case was worthless. It's very satisfying when someone doesn't believe in you and you prove them wrong."

Despite his reputation as a go-to Detroit litigator, Miller hasn't forgotten the uncertainty of his early years.

"Whenever a case ends, you have to find another case to replace it," he says. "Thankfully, as our reputation grew, our phone kept ringing. But I never take that for granted."

Off the Clock

When he's not at work, Miller enjoys spending time with his wife, Karol, an engineer and teacher. Between them, they have six children ranging in age from 20 years old down to twin 15-year-olds.

Karol has proven over the years to be a great sounding board for Miller as he prepares for trial.

"She's extremely helpful to me," he says. "She helps me with my opening statement and gives me great feedback."

Miller is co-president of the Detroit Chapter of the Federal Bar Association Antitrust Section. He is on the executive committee for the Wayne State University Law School Board of Visitors and has worked as a co-chair of the American Bar Association Procedures subcommittee on class actions and multi-district litigation. He is a regular speaker on securities litigation at the University of Michigan School of Law and speaks at continuing legal education seminars on securities fraud class actions. He is a master member of the Oakland County Bar Association Inns of Court.

In the community, Miller supports the Detroit Urban Debate League, which works to create debate programs in under-served high schools. He is also involved with the University of Detroit Jesuit High School and Academy, the Joe Niekro Foundation and Charlotte's Wings.

He's a passionate collector of sports and political memorabilia, including prized items such as an original letter from George Washington and one of Babe Ruth's baseball bats. The die-hard Detroit Tigers fan has thousands of baseball cards and a particular interest in vintage cards — some of which have million-dollar values. His office houses baseballs, bats, postcards and a signed Michael Jordan basketball.

At age 55, Miller continues to look toward the future and seek out new ways to take on cases that he believes will improve the lives of people around him.

"I want to continue to make a positive impact on the world in some way," he says. ■

EXHIBIT 5

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Guest Article

Unmoored: How Minority Shareholder Oppression Litigation Has Gone Too Far

Daniel D. Quick – Dickinson Wright PLLC – dquick@dickinsonwright.com

This article further discusses the topic of shareholder oppression which was previously highlighted in a Spring 2014 SRR Journal article, "Shareholder Oppression, Fiduciary Duty, and Partnership Litigation in Closely Held Companies", written by Gerard Mantese.

Introduction

Much has been written suggesting the ready availability of the cause of action of "minority shareholder oppression" based upon any number of potential acts.[1] While typically noting there is no single standard for oppression across the country, there often are crucial distinctions between the laws of various states (and holdings in particular cases) which are broad-brushed in order to make generalized conclusions; all of which suggest an oppression remedy for all minority shareholders who "believe" they are victims.[2]

There is deceptive truth in the overall buoyant tone of such articles and their suggestion of judicial remedies ripe for the picking for any oppressed-feeling minority shareholder. At least with certain jurisdictions, the rise of minority shareholder oppression statutes and lawsuits cannot be denied. Twenty-five years ago, Professor F. Hodge O'Neal, ever an advocate for the minority shareholder, complained loudly about and cataloged various oppressive techniques.[3] Yet the predominate tools for addressing those issues—such as shareholder derivative suits or fiduciary duty claims—were existing causes of actions (albeit sometimes with newfangled paradigms, like "reasonable expectations") and, as such, provided various protections to the majority, such as derivative demand requirements and the business judgment rule.

The worm began to turn with the adoption of the 1984 Revised Uniform Business Corporation Act, and its Close Corporation Supplement, in to the statutes of several states (with a few states adopting statutes even before then). That provision accelerated states' recognition of the "close corporation,"[4] which was recognized as operating more as a partnership than a corporation. As noted by academics, "Much of the clamor for special close corporation legislation appears to be a reaction to heavy-handed decisions in cases in which courts denied oppressed minority shareholders equitable relief such as the dissolution of the corporation."[5] Soon, another solution arose: minority shareholder oppression statutes.

These statutes departed from the Model Act and expressly gave courts latitude to order a host of remedies for oppressive acts.

[1] Gerard Mantese & David Hansma, Shareholder Oppression, Fiduciary Duty, and Partnership Litigation in Closely Held Companies, SRR Journal Spring 2014 (available at http://www.srr.com/article/shareholder-oppression-fiduciary-duty-and-partnership-litigation-closely-held-companies#sthash.h9OGKsLM.dpuf).

[2] For example, the Mantese article concludes by stating that termination of a minority shareholder's employment from a closely held corporation "is likely to constitute oppression," but no case so holds and one of the footnoted cases held this quite opposite opinion: "We recognize that there are times when a majority shareholder may terminate a minority shareholder with impunity." *Knights' Piping, Inc. v. Knight*, 123 So. 3d 451, 459 (Miss. Ct. App. 2012).

[3] See, e.g., F. Hodge O'Neal, Oppression of Minority Shareholders: Protecting Minority Rights, 35 Clev. St. L. Rev. 121 (1987).

[4] For the evolution and early history of close corporation statutes, see Dennis Karjala, *An Analysis Of Close Corporation Legislation In The United States*, 21 Ariz. St. L.J. 663 (Fall 1989).

[5] *Id.*

For example, in Michigan, "willfully unfair or oppressive conduct" gave the court flexibility to do anything from dissolve the company to order a buyout to reform the bylaws.[6]

As it stands today, courts—using close corporation statutes, minority shareholder oppression statutes, and common law fiduciary duty theories—have greatly broadened the litigation options available to a minority shareholder. And boy have minority shareholders stepped up to the plate. Take Michigan, for example: in the first 11 years of the minority shareholder oppression statute, six appellate cases referenced it. In the next 10 years: 46.

So in one sense, the horn blowing and bell ringing announcing the malleable oppression remedy is accurate in so much as aggressive parties and aggressive lawyers are pushing the bounds of the law in various jurisdictions. But one should not take such zealous advocacy as simply an objective statement on the expansion of the law. Indeed, we've all been here before. The 1980s saw the high water mark of the shareholder derivative action (its subsequent decline not unrelated to the rise of minority shareholder oppression statutes and remedies). As courts and parties endured those waves of litigation, it was recognized that "derivative actions brought by minority shareholders could, if unrestrained, undermine the basic principle of corporate governance that the decisions of a corporation … should be made by the board of directors … "[7] Moreover, shareholder claims were recognized as often being brought for harassment purposes, and/or "more with a view to obtaining a settlement resulting in fees to the plaintiff's attorney than to righting a wrong to the corporation (the so-called 'strike suit')."[8] In response, states passed derivative demand requirements and imposed business judgment rule protection to the decisions of the majority.

The current wave of minority shareholder oppression litigation is arguably starting to create a similar backlash. Consider Texas; in 1988, the Texas Court of Appeals held in *Davis v. Sheerin* that minority shareholders in close corporations are entitled to a buyout of their shares if they are "oppressed" by the majority shareholders.[9] The *Davis* court acknowledged that minority shareholders in close corporations are particularly vulnerable to oppression, as they cannot freely exit an enterprise in the same manner as a member of a partnership or a shareholder of a public corporation.[10] As noted by one commentator, "The test set out in *Davis*—which has rightly been described as 'seminal'—became the prevailing approach in Texas, influenced case law in a number of other states, and earned a prime place in black-letter corporations law."[11] In June 2014, the Texas Supreme Court flatly overruled *Davis* and gutted the cause of action for shareholder oppression in Texas in *Ritchie v. Rupe*. The decision has been met with mouths agape across the nation, and it is beyond the scope of this article to dissect the opinion. But it is not wild speculation to query whether the decision comes, having watched the lower courts struggle to apply numerous amorphous standards for "oppression" without consistency or success, as a ringing indictment of the cause of action and its impact on both litigants and courts.

The status of civil litigation in this country generally is at a crossroads. The Federal Rules of Civil Procedure are being revised in an attempt to reign in out-of-control discovery, which has been the bane of litigants and courts, and to formally introduce the concept of "proportionality." Is there any room for "proportionality" when it comes to shareholder rights?

Regardless of how one views the issue normatively, history suggests that the oppression remedy has, to a certain extent, gone beyond its intended and worthy purposes. When adopted, it was not designed to constitute a litigation gun in the hand of every minority shareholder, yet that is what it has become in some jurisdictions. Surely there are truly oppressed shareholders (whatever definition one might employ) in need of judicial relief. But the sense is that the vagueness of the law combined with the lax and expensive civil litigation system has combined to provide minority shareholders with a means for extortion and strike suits just as were seen by courts with shareholder litigation in the 1970s and 1980s. With the benefit of avoiding the procedural and substantive hurdles of derivative actions, coupled with ill-defined standards for what constitutes oppression, a single shareholder can now sue the company and all of its executives *personally* and likely force them through invasive and expensive litigation before there is a real chance of a court addressing a dispositive motion. The result is that a shareholder pleading oppression stands little risk of dismissal on the basis of an initial motion, meaning that he can thus engage in broad, expansive discovery, with its attendant distractions to management, before a post-discovery motion for summary disposition can be heard. Even then, courts construing the statute have most often found such murkiness in the statutory definitions that factual issues are found to exist, leading to trial.

What has been lost in the evolution of the oppression claim is the balance that has always existed in corporate law. Perhaps the ruling in Texas is simply the loudest reaction to date to an area of the law governed by fuzzy standards, expensive discovery, and inconsistent legal opinions. While perhaps not a panacea, one solution is immediately available: strict statutory interpretation.

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[6] MCL 450.1989. Legislatures in other states, have done the same; see, e.g., 805 ILL. COMP. STAT. 5/12.56(a) (1983).
[7] *Daily Income Fund, Inc v. Fox*, 464 US 523, 531; 104 S Ct 831, 78 L Ed 2d 645 (1984) (citing *Hawes v. Oakland*, 104 US 450; 26 L Ed 827 (1882)).
[8] MODEL BUSINESS CORP. ACT § 7.4, Introductory Comment (1994).
[9] 754 S.W.2d 375, 381-82 (Tex. App. 1988).
[10] Id at 381. See also commentary at James Dawson, *Ritchie v. Rupe and the Future of Shareholder Oppression*, 124 Yale L.J. F. 89 (2014), http://www.yalelawjournal.org/forum/ritchie-v-rupe.
[11] Dawson, supra n. 9 (footnotes omitted).
[12] No. 11-0447, 2014 WL 2788335 (Tex. June 20, 2014).

This is, arguably, all that was being done in Texas; the Supreme Court expressly stated that it was for the legislature, not it, to craft a broad remedy for oppression if one was needed, but one could not be divined from either the common law or the current statute.

Beyond statutory interpretation, interpreting the oppression remedy in tandem with other recognized pillars of corporate law might help leave it as a tool for fighting proper oppression while squelching its potential for mayhem. The manner in which oppression has become unhinged from the rest of corporate law is exemplified by the muddled path of the shareholder oppression remedy in Michigan. Solely as a case study, consider the history and evolution of oppression litigation in Michigan.[13] Until 1989, the Michigan Business Corporation Act ("MBCA") had traditional derivative shareholder provisions with a demand requirement. This pre-suit demand requirement was designed to respect the decisions of the corporation and limit judicial interference because "[w]hether to sue or not to sue is ordinarily a matter for the business judgment of directors, just as is a decision that the corporation will make bricks instead of bottles."[14] Shareholders also had the right to bring "direct" actions. The definition of an action that is direct and not derivative has not always been crystal clear, but there was a good body of case law on the topic both in Michigan and elsewhere. Direct actions relate to injuries that have happened to the shareholder not because he or she is a shareholder, but as a result of a distinct, independent duty "owed directly to him [or her]."[15]

Michigan also had an oppression statute, but it was in the dissolution section of the act, leading courts and attorneys to believe that dissolution was the sole remedy. In 1989, the Michigan legislature adopted a formal oppression statute, MCL 450.1489, by moving that statute within the act and clarifying that courts had flexibility as to remedies. At the very same time, it also overhauled the MBCA's provisions concerning derivative actions, mandating written demand, providing mechanisms for determining whether an action is in the corporation's best interests, and allowing the court to stay or dismiss a derivative proceeding.[16]

The fact that these two steps were taken together—a careful revision of the derivative shareholder remedy and adoption of an express oppression statute—is a coupling that has not much informed subsequent judicial analysis. Rather, the oppression statute took on a life of its own, with the predictable issues of attempting to interpret what the statute actually was attempting to brand as "oppression." The terminology—conduct that is "illegal, fraudulent, or willfully unfair and oppressive to the corporation or its shareholder"—presented a host of potential interpretive issues. In 2001, the Legislature amended MCL 450.1489(3) to define "willfully unfair and oppressive conduct" as follows:

> *A continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.*[18]

Michigan courts began to be confronted with cases in which minority shareholders attempted to use § 489 to seek redress for a broad away of alleged wrongdoing. The alternative paths were highlighted by a spate of appellate cases decided in 2006. On one hand, the Michigan Court of Appeals (albeit in unpublished cases) rejected attempts to expand the scope of § 489.[19] On the other, in *Bromley v. Bromley*,[20] the U.S. District Court for the Eastern District held that shareholders pursing what would normally be considered derivative claims—they were founded upon allegations of inappropriate corporate spending, self-dealing, and general mismanagement and resulted in harm to *the corporation* rather than the shareholders—could be brought pursuant to § 489. While the court seized upon the clear statutory language of improper acts *"to the corporation or to the shareholder"* in making this ruling, commentators have rightly questioned whether the opinion went too far and whether there is a middle ground wherein traditional derivative actions are preserved but conduct over a higher threshold—"willfully unfair and oppressive"—opens the door to an oppression action.[21]

This statute's evolution led to considerable commentary in 2007.[22] Even then, the core question—what constitutes "willfully unfair and oppressive" conduct—remained largely unanswered by courts. But the flow of litigation by this point seemed clear. Since 2002, not one opinion had been issued in the Court of Appeals dealing with the direct vs. derivative distinction. Rather, a spate of lawsuits have arisen by adopting the easy end-run—oppression under §1489. Plaintiffs' lawyers have self-servingly noted that "the trend

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[13] For a more thorough analysis of Michigan law, see D. Quick & E. Pawlowski, "Tyranny of the Minority," ABA Section of Litigation (2014)(available at http://apps.americanbar.org/litigation/committees/commercial/articles/winter2014-0214-tyranny-of-minority.html).

[14] *In re Consumers Power Co*, 132 FRD 455, 465 (ED Mich 1990) (internal quotation omitted); see also *Kamen v. Kemper Fin Servs, Inc*, 500 US 90, 96; 111 S Ct 1711; 114 L Ed 2d 152 (1991) ("The purpose of the demand requirement is to 'afford the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right'" and the demand process protects "the directors' prerogative to take over the litigation or to oppose it." (internal quotation omitted)).

[15] *Michigan Nat'l Bank*, 178 Mich App at 679 (emphasis omitted).

[16] *Id.*

[17] See Moscow and Ankers, *Oppression of Minority Shareholders*, 77 Mich B J 1088 (Oct 1998).

[18] MCL 450.1489(3) (emphasis added).

[19] See, e.g., *Haarer v. Vreba-Hoff Dairy Development, LLC*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2006 (Docket No. 260001) (affirming summary disposition under MCR 2.116(C)(8) for claims arising from the financial decline and bankruptcy of a corporation); *Wojcik v. William J. McNish & McNish's Sporting Goods & Trophies Inc.*, unpublished opinion per curiam of the Court of Appeals, issued July 25, 2006) (Docket No. 267005) ("Plaintiff's claims regarding breach of an employment contract and breach of a stock purchase agreement are not interests of plaintiff as a shareholder, and therefore, are not protected by § 489.").

[20] *Bromley v. Bromley*, No. 05-71798, 2006 US Dist LEXIS 37022 (ED Mich June 7, 2006).

[21] See Hauck and Kolozsvary, *Shareholder Oppression and the Direct/Derivative Distinction*, 27 MI Bus LJ 18 (Summer 2007).

[22] See Hauck, *supra* note and Cambridge, *Minority Member Oppression*, 27 MI Bus LJ 11 (Spring 2007).

is toward a broad interpretation of what constitutes actionable conduct"—although that opinion is based upon some selective treatment of cases.[23] And while some cases have seemed to grasp the limited role of oppression in the greater constellation of the MBCA,[24] other opinions continue to create more questions than answers. For example, the line between a direct shareholder action and a derivative action was further greyed in the 2011 case of *Berger v. Katz*[25] and its less-than-clear analysis of issues were quickly seized upon by counsel to opine that § 489(3) casts a much broader net than the statutory language would infer and should be read to include general corporate mismanagement that harms the corporation, rather than injuries to rights unique to shareholders.[26]

The status of shareholder litigation generally, as told through the example of Michigan, provides a few ideas for a way forward. Both center on re-tying the oppression remedy back to its roots—statutorily (where applicable) and contextually.

First, the words of the statute must be applied. While one could disagree with the Texas Supreme Court's interpretation of that statute, the Court obviously felt it necessary to address a body of case law that had spread in numerous directions and far from the statute itself since the earlier *Davis* opinion. While legislatures could and sometimes do draft clear statutes, courts need not fabricate claims in the absence of such lawmaking. And even where courts employ common law standards, fuzzy and ill-defined concepts advance neither the cause of the truly injured shareholder nor that of the judicial system.

Second, courts should consider oppression relative to other provisions of corporate law lest the oppression statute completely subsume the co-equal derivative litigation structure. Similarly, the courts must recognize that most states' public policy values both a corporation's right to govern itself free from harassment from minority shareholders besetting the corporation with vexatious litigation as much as protection of minority shareholders against "oppression." In interpreting words like "unfair," this context is meaningful and appropriate. But what has happened, without either published or holistic guidance from the courts, is a free-for-all, where shareholders generically plead oppression and defendants are left without any threshold means to sort out cases that do not meet the statutory standard. That standard is intended to be high, not merely out of consideration of competing policy goals, but to make sure that the minority—which in the first instance is entering in to a corporate environment with known limited rights—does not wield disproportionate power over the corporation via litigation. While some courts have rejected expansive notions such as the "reasonable expectations" rubric, the absence of any other cohesive paradigm has left trial courts with simply letting cases proceed. This inaction is equivalent to taking sides given the time, burden, and expense of shareholder litigation. The statutory scheme, corporate law, and the civil litigation system all deserve more.

Daniel D. Quick is a trial attorney with Dickinson Wright PLLC in Troy, Michigan. Mr. Quick is the practice department manager for the firm's commercial litigation, antitrust & trade regulation, ADR, and sports & entertainment practice. He is a frequent lecturer and author, including co-author of *Michigan Business Torts* (ICLE) and *Trade Secrets: Protection and Remedies*, 43-2nd C.P.S. (BNA). Mr. Quick can be reached at +1.248.433.7242 or dquick@dickinsonwright.com.

[23] Mantese, Rossman & Williamson, *Shareholder and Corporate Oppression Actions*, 91 Mich B J 25 (2012).
[24] *Arevelo v. Arevelo*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2010 (Docket Nos. 285548, 286742).
[25] *Berger v. Katz*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880).
[26] Mantese, Rossman, & Williamson, *Shareholder and Corporate Oppression Actions: Fixing Liability Against Those in Control of Closely Held Corporations*, 91 Mich B J 25 (Feb 2012).

EXHIBIT 6

The Tyranny of the Minority:

The Need to Rein in Minority Shareholder Oppression Litigation

*by: Daniel D. Quick**
*Erin M. Pawlowski**

Introduction

1989 was a watershed moment for corporate law in Michigan, and particularly the topic of shareholder rights. The Michigan Business Corporation Act (MBCA) was revised to include, *inter alia,* a universal demand rule for all shareholder derivative actions, MCL 450.1493a, and movement of the minority shareholder oppression statute to its current location at MCL 450.1489 along with substantial revisions. As we approach the 25th anniversary of these amendments, courts and lawyers continue to struggle with the ramifications, resulting in a small library of literature, a multitude of court opinions (not all of which are reconcilable), as well as three revisions to the oppression statute itself.

While the die is far from cast on certain issues, what has begun to crystallize is the vitality of the minority shareholder oppression claim. Nationwide, courts and legislatures previously attempted to balance shareholder rights with the rights of the corporation by upholding the line between direct and derivative shareholder actions. When the oppression statute was revised in 1989, it was adopted simultaneously with substantial changes to the provisions governing derivative litigation, suggesting complementary actions. What has transpired, however, is not balance, but rather the dominance of the oppression cause of action.

With the benefits of avoiding the procedural and substantive hurdles of derivative actions, as well as ill-defined standards for what constitutes oppression, a single shareholder can now sue the company and all of its executives and likely force them through invasive and expensive litigation. Early efforts to rein in shareholder litigation by strict construction of the statute – exemplified by the Supreme Court's ruling in *Franchino* – were reversed by both legislative action and decreased rigor by courts. The result is that a shareholder pleading oppression stands little risk of dismissal on the basis of an initial motion, meaning that he can thus engage in broad, expansive discovery, with its attendant distractions to management, before a post-discovery motion for summary disposition can be heard. Even then, courts construing the statute have most often found such murkiness in the statutory definitions that factual issues are found to exist, leading to trial.

What has been lost in the evolution of the oppression claim is the balance that has always existed in corporate law and, indeed, within the MBCA itself. It has long been recognized that "derivative actions brought by minority shareholders could, if unrestrained, undermine the basic principle of corporate governance that the decisions of a corporation . . . should be made by the board of directors . . . ."[1] Moreover, shareholder claims are often brought for harassment purposes, and/or "more with a view to obtaining a settlement resulting in fees to the plaintiff's attorney than to righting a wrong to the corporation (the so-called 'strike suit')."[2] It was for these reasons that the derivative demand structure was adopted, with Michigan requiring demand in *every* case. But why go through all of that if you can just file a minority shareholder oppression claim?

The Michigan Legislature did not intend to create this sort of imbalance nor to condone the free reign of minority shareholder litigation. Courts

must start strictly applying the language of the statute in order to bring back in to equilibrium the (limited) rights of the shareholder with the rights of the corporation. The tools exist, and some courts have utilized them, but opinions remain inconsistent. Let this be a clarion call for a re-examination of the oppression statute and its application.

Context Matters

The history of MCL 450.1489 up to 1989 has been capably set forth previously.[3] In understanding the statute, context is important – how it fits in with other provisions of the MBCA. This too has been addressed previously in greater depth.[4] By way of summary, the MBCA grants the officers and directors of a corporation authority to carry out the corporation's most important functions and imposes upon them fundamental duties of good faith, care, and loyalty to the corporation.[5] The MBCA also provides certain statutory procedures and causes of action to redress perceived violations of those duties. For example, a shareholder seeking relief arising from the violation of the duties owed to the corporation under § 541a may bring a derivative action in the name of the corporation after the shareholder has filed a written demand upon the corporation and allowed the corporation ninety days to investigate and respond to the demand.[6] This pre-suit demand requirement is designed to respect the decisions of the corporation and limit judicial interference because "[w]hether to sue or not to sue is ordinarily a matter for the business judgment of directors, just as is a decision that the corporation will make bricks instead of bottles."[7] If displeased with the result of that investigation, under certain circumstances, the disgruntled shareholder may then initiate a derivative shareholder action under § 541a, which seeks "to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort."[8]

Shareholders also had the right to bring "direct" actions. The definition of an action which is direct and not derivative has not always been crystal clear, but there was a good body of case law on the topic both in Michigan and elsewhere. Direct actions relate to injuries that have happened to the shareholder not because he or she is a shareholder, but as a result of a distinct, independent duty "owed directly to him [or her]."[9]

Section 489 was the Michigan Legislature's response to a trend in other jurisdictions of expanding the remedies available for oppressed shareholders in closely held corporations. The reporters' comment to § 489 indicates that, although the remedies for shareholder oppression were expanded, "[t]he standard of oppression, however, has not been changed."[10]

At the same time the Legislature added § 489, it also overhauled the MBCA's provisions concerning derivative actions, including by mandating written demand, providing mechanisms for determining whether an action is in the corporation's best interests, and allowing the court to stay or dismiss a derivative proceeding.[11] Thus, in enacting § 489, the Legislature did not except closely held corporations from the stringent derivative procedures that were enacted in the same bill. The framework of the statute also upholds the principle that corporations are distinct from their owners – "where the injury to the individual results only from injury to the corporation, the injury is merely derivative and the individual does not have a right of action."[12]

The Fuzzy Evolution of "Oppression"

The scope of the oppression statute was an issue from the first day. The terminology of the standard – conduct which is "illegal, fraudulent, or willfully unfair and oppressive to the corporation or its shareholder" – presented a host of potential interpretive issues.[13] But not much litigation ensued, in part due to the 1998 opinion in *Baks* which held that the statute did not provide a direct cause of action.[14]

In 2001, the Legislature amended MCL 450.1489(3) to define "willfully unfair and oppressive conduct" as follows:

> a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.[15]

A year later, the Court of Appeals decided *Estes,*[16] effectively reversing *Baks,* holding that the statute provided for a direct cause of action, and opining at length as to the purported goals of the statute. But the new definition of "willfully unfair and oppressive conduct" provided multiple new defenses, based upon "a continuing course of conduct," a "significant action or series of actions," interference with "the interests of a shareholder as a shareholder," and exemption for conduct or actions permitted by specified written agreements. Each of these provided new hurdles for a complaining shareholder.

One of these issues – the phrase "the interests of the shareholder as a shareholder" – played out first. In *Franchino v Franchino,*[17] the Court of Appeals held that the phrase placed a limitation on the rights that were protected: "Shareholders rights are typically considered to include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends."[18] In *Franchino,* the Court of Appeals dismissed the minority shareholder's oppression claim where he failed to allege that the defendant interfered with or oppressed rights central to being a shareholder.[19]

The Michigan Legislature amended § 489 in 2006 after the *Franchino* decision to add protection for the "termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder."[20] While the amendment is a rebuke in some sense to the *Franchino* ruling, it still preserved the key language that the actions interfere with "shareholder interests."

In the wake of *Estes,* Michigan courts began to be confronted with cases in which minority shareholders attempted to use § 489 to seek redress for a broad away of alleged wrongdoing. The alternative paths were highlighted by a spate of appellate cases decided in 2006. On one hand, the Michigan Court of Appeals (albeit in unpublished cases) rejected attempts to expand the scope of § 489.[21] On the other, in *Bromley v Bromley,*[22] the U.S. District Court for the Eastern District Court held that shareholders pursing what would normally be considered derivative claims – they were founded upon allegations of inappropriate corporate spending, self-dealing, and general mismanagement and resulted in harm *to the corporation* rather than the shareholders – could be brought pursuant to § 489. While the court seized upon the clear statutory language of improper acts *"to the corporation or* to the shareholder" in making this ruling, commentators have rightly questioned whether the opinion went too far and whether there is a middle ground wherein traditional derivative actions are preserved but conduct over a higher threshold – "willfully unfair and oppressive" – opens the door to an oppression action.[23]

This statute's evolution, the apparent legislative rebuke (or limitation) of *Franchino,* and the *Bromley* decision, led to considerable commentary in 2007.[24] Even then, the core questions – what constitutes "willfully unfair and oppressive" conduct – remained largely unanswered by courts. But the flow of litigation by this point seemed clear. Since *Estes* was decided in 2002, not one opinion had been issued in the Court of Appeals dealing with the direct vs. derivative distinction. Rather, a spate of lawsuits have arisen by adopting the easy end-run – oppression under §1489. From 1993 to 2002, there were 10 decisions addressing the oppression statute in any detail; from 2002 through 2013, there have been 31 such decisions. Plaintiffs' lawyers have

self-servingly noted that "the trend is toward a broad interpretationof what constitutes actionable conduct" – although that opinion is based upon some selective treatment of cases.[25]

Part of the problem has been that most opinions are unpublished Court of Appeals opinions, thus holding no precedential value and, in some cases, limited analysis and effort to harmonize with other (unpublished) opinions. And while there certainly is a "trend" of increased use of the statute, whether there is a "trend" in judicial treatment is not as clear. In addition to the cases cited herein, consider a 2010 opinion, *Arevelo v Arevelo.*[26] There, the plaintiff alleged that the defendant committed the following "wrongful acts":

- Removing from the business premises any personal property appertaining to the business of any value, e.g., business related laptop computers with necessary software, business records, customer lists, trade journals and trade manuals.
- Inducing key employees to leave their employment.
- Destroying all good will of the business.
- Inducing key customers to do business with third parties instead of the business.
- Misappropriating all of the business assets, including customer lists, customer files and manuals relating to customer equipment.
- Engaging in conflicts of interest.
- Violating duties of good faith and fair dealing.
- Usurping business opportunities which belong to the business.
- Violating duties of loyalty and honesty to the business.
- Violating the duties proscribed and prohibited by MCL 450.1541a.
- After quitting using its credit line to obtain $21,000.00 for non-business purposes.
- After quitting charging personal expenses to the business.
- Physically assaulting Plaintiff.
- Verbally assaulting Plaintiff.
- Creating a sexually hostile environment.

In keeping with the language of § 489(3) and the *Franchino* decision, the *Arevelo* Court explained that none of the listed acts affected the plaintiff's rights as a shareholder: "She does not explain how Raymond's alleged act of '[i]nducing key employees to leave their employment' or his alleged act of 'charging personal expenses to the business' affected her rights to vote at shareholder meetings, to elect directors, to adopt bylaws, to amend charters, to examine corporate books, or to receive corporate dividends."[27] The Court further explained that "[s]ome of the alleged wrongful acts, such as '[i]nducing key customers to do business with third-parties' and '[u]surping business opportunities which belong to the business' could possibly effect the *amount of* corporate dividends that [the plaintiff] received, *but the acts did not impair [the plaintiff's] right to receive dividends,"* and thus failed to state a § 489 claim.[28] In short, the *Arevalo* court confirmed that to be actionable under § 489, there must be a "connection between [a defendant's] alleged wrongful acts and the oppression of [] *shareholder* rights."[29]

While *Aravelo* suggests fidelity to the language of § 489(3), other opinions continue to create more questions than answers. For example, the line between a direct shareholder action under § 489 and a derivative action under § 541a, blurred in the *Bromley* decision, was further greyed in the 2011 case of *Berger v Katz.*[30] In that decision, the Court of Appeals affirmed the trial court's finding that the defendants engaged in willfully unfair and oppressive conduct by:

> (1) the way in which they eliminated plaintiff's salary and gave themselves raises, (2) terminating the rental payments to plaintiff that normally were made to all three directors, (3) issuing a capital call when the corporation was doing fairly well, which diluted plaintiff's stock and shares and forced plaintiff to put his own money into the corporation, and (4) engaging in other less oppressive actions with the intent to "squeeze Plaintiff out of the company rather than to give him his fair share of his investment."[31]

Some of these actions could arguably implicate rights flowing to the plaintiff by virtue of his status as a shareholder, but others, such as the majority's decision to issue a capital call, do not. The effect of the *Berger* decision remains to be seen, but it has led some commentators to opine that § 489(3) casts a much broader net than the statutory language would infer and should be read to include general corporate mismanagement that harms the corporation, rather than injuries to rights unique to shareholders.[32]

The Court of Appeals grappled with identifying shareholder interests in another recent opinion, one which might bring some clarity in the Supreme Court. In *Madugula v Taub,*[33] the trial court found a number of violations of basic shareholder rights, including the right to vote and access to books and records. However, when the defendant protested that the trial court turned a breach of a stockholder agreement in to minority shareholder oppression, the Court of Appeals clarified that this was not so, but rather that such breaches, together with other evidence, could constitute (but not necessarily was) oppression. In June of 2013, the Michigan Supreme Court granted leave to appeal and specifically ordered that the parties brief the following issues: (1) whether claims brought under MCL 450.1489 are equitable claims to be decided by a court of equity; (2) whether the provisions of a stockholder's agreement can create shareholder interests protected by MCL 450.1489; and (3) whether the plaintiff's interests as a shareholder were interfered with disproportionately by the actions of the defendant-appellant, where the plaintiff retained his corporate directorship.[34] *Madugula* is the first time the Supreme Court has granted leave in a case involving the issue of shareholder rights under § 489 and promises to bring much-needed clarity to the scope and interpretation of the statute, although the limited nature of the questions accepted for review suggests that holistic treatment might not be in the cards.

Where do we go from here?

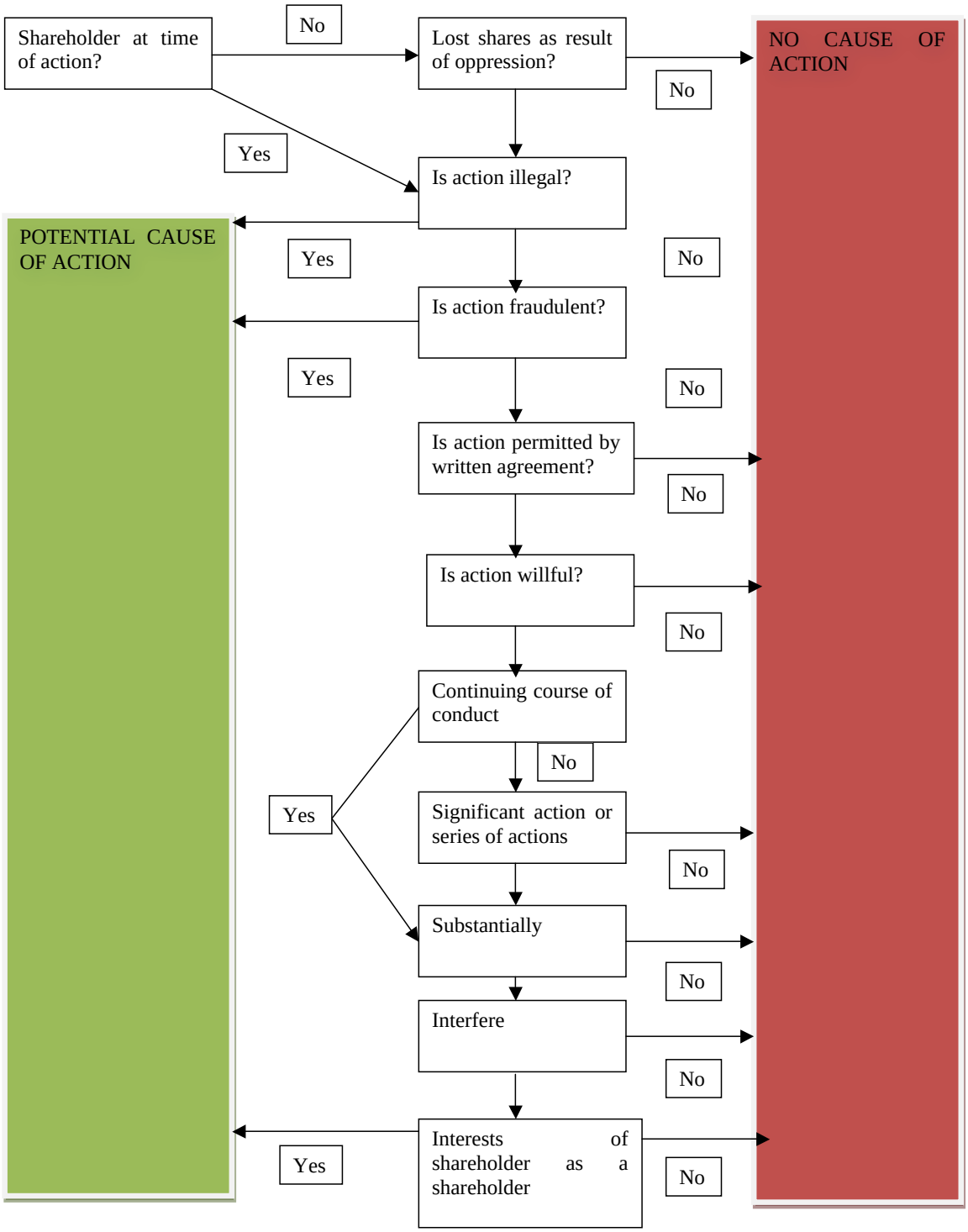
Application of the statute which preserves its textual integrity as well as its place within the MBCA requires two considerations.

First, the words of the statute must be applied. In many cases, the key terms are undefined, but a plaintiff must satisfy several requirements in order to state a claim. If this is coupled with enforcement of MCR 2.111(B)(1) – which requires the pleading of "facts . . . on which the pleader relies . . . with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend" – a plaintiff would be required to plead facts and demonstrate, at least on a threshold basis, satisfaction of the basic statutory elements. As minority oppression is arguably in the same *genus* as fraud – as evidenced by fraud within the definition as well as the "willful" requirement – arguably MCR 2.112(B)(1) applies, requiring pleading with specificity.

In any event, the distinct elements of the claim – broken out in flow chart version below – require independent treatment and analysis. Many potentially important questions lie within these definitions. This is not unfair parsing, but rather recognition that terms utilized ought to be imbued with meaning, not viewed as mere surplusage. Other torts – such as tortious interference – have a more developed body of law surrounding them, and there are unique issues with each of the words of the tort (tortious, interference, relationship/expectancy). For example, the statute requires not only interference with a shareholder right, but "substantial" interference. Can the court develop meaning to

that word in order to eliminate claims which clearly do not meet the standard before forcing the parties to engage in expensive discovery?

Second, the remedy provided by the statute must be evaluated relative to other provisions of the MBCA. Issues such as those raised in *Bromley* need careful consideration by courts so as not to cause the oppression statute to completely subsume the co-equal derivative litigation statutes. Similarly, the courts must recognize that Michigan public policy values both a corporation's right to govern itself free from harassment from minority shareholders besetting the corporation with vexatious litigation as much as protection of minority shareholders against "oppression." In interpreting words like "unfair," this context is meaningful and appropriate.[35] But what has happened, without either published or holistic guidance from the courts, is a free-for-all, where shareholders generically plead oppression and defendants are left without any threshold means to sort out cases which do not meet the statutory standard. That standard is intended to be high – not merely out of consideration of competing policy goals – but to make sure that the minority – which in the first instance is entering in to a corporate environment with known limited rights – does not wield disproportionate power over the corporation via litigation. While the courts have already rejected expansive notions such as the "reasonable expectations" rubric,[36] the absence of any other cohesive paradigm has left trial courts with simply letting cases proceed. This inaction is equivalent to taking sides given the time, burden and expense of shareholder litigation. The statutory scheme deserves more.



*Daniel D. Quick is a trial attorney with Dickinson Wright PLLC in Troy, Michigan. Mr. Quick is the practice department manager for the firm's commercial litigation, antitrust & trade regulation, ADR and sports & entertainment practice. He is a frequent lecturer and author, including co-author of Michigan Business Torts (ICLE).

*Erin M. Pawlowski is an associate with Dickinson Wright PLLC in Troy, Michigan. Ms. Pawlowski focuses her practice in commercial and business litigation.

ENDNOTES

1. *Daily Income Fund, Inc v Fox,* 464 US 523, 531; 104 S Ct 831, 78 L Ed 2d 645 (1984) (citing *Hawes v Oakland,* 104 US 450; 26 L Ed 827 (1882)).

2. Model Business Corp. Act § 7.4, Introductory Comment (1994).

3. See Moscow and Ankers, *Oppression of Minority Shareholders,* 77 Mich B J 1088 (Oct 1998).

4. See Hauck and Kolozsvary, *Shareholder Oppression and the Direct/Derivative Distinction,* 27 MI Bus LJ 18 (Summer 2007).

5. See, e.g., MCL 450.1501-450.1571; *Estes v Idea Eng'g & Fabricating, Inc,* 250 Mich App 270, 282-283; 649 NW2d 84 (2002) (explaining that duties created by MCL 450.1541a are owed to the corporation, as distinct from its shareholders).

6. See MCL 450.1493a; *Estes,* 250 Mich App at 279 ("[A] plaintiff in a § 541a action is a corporation suing for breach of a duty to the corporation or a shareholder suing derivatively on behalf of the corporation.").

7. *In re Consumers Power Co,* 132 FRD 455, 465 (ED Mich 1990) (internal quotation omitted); see also *Kamen v Kemper Fin Servs, Inc,* 500 US 90, 96; 111 S Ct 1711; 114 L Ed 2d 152 (1991) ("The purpose of the demand requirement is to 'afford the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right'" and the demand process protects "the directors' prerogative to take over the litigation or to oppose it." (internal quotation omitted)).

8. *Michigan Nat'l Bank v Mudgett,* 178 Mich App 677, 679; 444 NW2d 534 (1989); see also *Belle Isle Grill Corp v Detroit,* 256 Mich App 463, 473-474; 666 NW2d 271 (2003).

9. *Michigan Nat'l Bank,* 178 Mich App at 679 (emphasis omitted).

10. Revised Michigan Business Corporation Act: Reporter's Commentary (Aug 1989).

11. *Id.*

12. *Michigan Nat'l Bank,* 178 Mich App at 679.

13. See Moscow and Ankers, *supra* note 5.

14. *Baks v Moroun,* 227 Mich App 472, 501; 576 NW2d 413 (1998).

15. MCL 450.1489(3) (emphasis added).

16. *Estes,* 250 Mich App at 284-285.

17. *Franchino v Franchino,* 263 Mich App 172; 687 NW2d 620 (2004).

18. *Id.* at 184 (citing 12 *Fletcher Cyclopedia Corporations,* ch 58, §5717, p 22).

19. *Id.* at 184.

20. 2006 PA 68 (emphasis added).

21. See, e.g., *Haarer v Vreba-Hoff Dairy Dev, LLC,* unpublished opinion per curiam of the Court of Appeals, issued August 17, 2006 (Docket No. 260001) (affirming summary disposition under MCR 2.116(C)(8) for claims arising from the financial decline and bankruptcy of a corporation); *Wojcik v William J McNish & McNish's Sporting Goods & Trophies Inc,* unpublished opinion per curiam of the Court of Appeals, issued July 25, 2006) (Docket No. 267005) ("Plaintiff's claims regarding breach of an employment contract and breach of a stock purchase agreement are not interests of plaintiff as a shareholder, and therefore, are not protected by § 489.").

22. *Bromley v Bromley,* No. 05-71798, 2006 US Dist LEXIS 37022 (ED Mich June 7, 2006).

23. See Hauck and Kolozsvary, *supra* note 4.

24. See *supra* note 4 and Cambridge, *Minority Member Oppression,* 27 MI Bus LJ 11 (Spring 2007).

25. Mantese, Rossman & Williamson, *Shareholder and Corporate Oppression Actions,* 91 Mich B J 25 (2012).

26. *Arevelo v Arevelo,* unpublished opinion per curiam of the Court of Appeals, issued April 6, 2010 (Docket Nos. 285548, 286742) (affirming dismissal of § 489 claim under MCR 2.116(c)(8)).

27. *Id.* at *18.

28. *Id.* at *18-19 (emphasis added).

29. *Id.* at *18 (emphasis added). See also *Trapp v Vollmer,* unpublished opinion per curiam of the Court of Appeals, issued June 16, 2011 (Docket No. 297116) (affirming dismissal of an oppression claim pursuant to MCR 2.116(c)(8) where the shareholder failed to identify an "interest that accrued to plaintiff by virtue of being a shareholder.").

30. *Berger v Katz,* unpublished opinion per curiam of the Court of Appeals, issued July 28, 2011 (Docket Nos. 291663, 293880).

31. *Id.* at *12.

32. Mantese, Rossman, & Williamson, *Shareholder and Corporate Oppression Actions: Fixing Liability Against Those in Control of Closely Held Corporations,* 91 Mich B J 25 (Feb 2012).

33. *Madugula v Taub,* unpublished opinion per curiam of the Court of Appeals, issued October 25, 2012 (Docket No. 298425).

34. *Madugula v Taub,* 494 Mich 862; 831 NW2d 235 (2013).

35. See *supra,* note 3.

36. *In re Kemp & Beatley, Inc,* 64 NY2d 63; 473 NE2d 1173 (1984), cited in *Lardner v Port Huron Golf Club,* unpublished opinion per curiam of the Court of Appeals, issued August 4, 1994 (Docket Nos. 138038, 139092) ("Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.").

EXHIBIT 7

BUTZEL LONG

BERNARD J. FUHS

fuhs@butzel.com
P 313 225 7044
F 313 225 7080

DOWNLOAD VCARD >

Director

Detroit

Bernard J. Fuhs is an equity shareholder based in Butzel Long's Detroit office. He is a Vice President of Butzel Long and serves on the firm's Board of Directors. He is nationally recognized expert on non-compete and trade secret matters, having litigated and/or counseled clients on such matters in all 50 states and has presented to many national and local business and/or legal organizations regarding the same.

Mr. Fuhs also specializes in franchise litigation and serves as Chair of the firm's Franchise Specialty Team. He also has significant experience in minority shareholder oppression disputes, financial services industry disputes (including proceedings with the Financial Industry Regulatory Authority (FINRA)), real estate, sales representative matters and cannabis law (licensing and appeals). Mr. Fuhs also advises start-up and closely-held businesses, as well as sports and fitness industry members.

Mr. Fuhs has been selected as a *Business Litigation, Trade Secret and Franchise Top Lawyer* by DBusiness Magazine. He has been selected as a *Michigan Super Lawyer* (an award recognized no more than 2.5% of lawyers in Michigan) every year since 2013. Mr. Fuhs was named to Crain's Detroit Business' "40 under 40" class, which honors "the best and brightest in Southeast Michigan who have made their marks in business before age 40." Named to L. Brooks Patterson's Elite 40 Under 40 Class of 2013, which includes young thought leaders and trailblazers who live or work in Oakland County and are under the age of 40.

Mr. Fuhs also currently serves as the Co-Chair of Butzel Long's Diversity & Recruiting Committee.

Recent Case Highlights

- National litigation counsel for franchisor in the massage therapy industry, having recently obtained preliminary and permanent injunctions in the Eastern District of Michigan Federal Court against former franchisees in Florida which prohibited them from (1) using the franchisor's trademarks and (2) otherwise operating a competing entity/business in the restricted territory.

- National litigation counsel for franchisor in the fitness and stretch training industry, having recently obtained immediate cooperation agreements re: non-compete, confidentiality and trademark obligations with franchisees located in Michigan and Florida.

- On behalf of a leading global franchisor engaged in the moving industry, successfully obtained ex parte TRO, preliminary injunction, and ultimately permanent injunction against former franchisee and a direct competitor prohibiting them from operating a moving company within the restricted territory and from otherwise violating their obligations under the Franchise Agreement and related contracts.

- On behalf of a national franchisor operating an insurance sales operating system with agencies in niche insurance markets, successfully obtained permanent injunction order against former franchisee who had operated four (4) locations within Las Vegas, Nevada, which ordered her to comply with her post-termination non-compete obligations under the Franchise Agreements, and thereafter resolved the dispute resulting in the amicable transfer of the locations to the franchisor.

- Successfully defended national forklift distributor in Federal Court in Florida against claims for tortious interference with a non-compete agreement and trade secret theft under the Florida Uniform Trade Secret Act.

- On behalf of a 40-year old Michigan-based company that specializes in premium metalworking fluids, industrial cleaners and corrosion management solutions, successfully obtained a $2,400,000 judgment against a former consultant and his US and Canadian entities in Oakland County Circuit Court relative to claims for breach of contract, tortious interference action and unfair competition.

- On behalf of a leading developer of meteorology software, successfully obtained ex parte TRO, preliminary injunction, and ultimately permanent injunction against former employee and a direct competitor prohibiting them from using or disclosing client's confidential information and trade secrets, disparaging client, developing any product or providing any services involving the use of client's confidential information and trade secrets, and from infringing upon client's copyrights.

- Successfully obtained numerous injunctions on behalf of a Fortune 500 staffing services company against former employees (ranging from regional managers to recruiters) relative to their non-compete, non-solicit, non-disclosure, and trade secret violations.

Speaking Engagements and Publications

- Author, "Mich. Bill Adds to States' Trend of Limiting Noncompetes," Law360, September 13, 2019.

- Presenter, "Hiring the Competition: Proven Strategies to Acquire and Retain Top Talent While Protecting Your Company's Most Valuable Assets," Walsh College, May 2019.

- Presenter, "The Secrets to Starting a Successful Business: How to Increase Your Chances of Start-Up Success from Idea to Launch (and Beyond)," Webinar Presented by Butzel Long, January 2019.

- Author, "Calling All Frustrated Minority Shareholders: Are You Being Oppressed?" DBusiness Magazine, December 14, 2018.

- Presenter, "Protecting Your Trade Secrets and Effective Non-Compete Agreements," Butzel Long Labor & Employment Seminar, November 2018, Detroit, Michigan.

- Presenter, "Hiring the Competition: Proven Strategies to Acquire and Retain Top Talent While Protecting Your Company's Most Valuable Assets," Butzel Long Labor & Employment Seminar, November 2017, Detroit, Michigan.

- Panelist, "Reputation Protection: How to Preserve Your Company's Most Valuable Asset," Michigan Business Rap (www.businessrap.biz), September 13, 2017.

- Presenter and Contributing Author, "The Evolving Landscape for Trade Secrets, Non-Competes and Other Restrictive Covenants: Times They Are a Changin'," ABA Employment Rights & Responsibilities Committee Midwinter Meeting, March 2017, Puerto Vallarta, Mexico.

- Presenter and Contributing Author, "Strategies on Presenting (and Defending Against) Economic Damages in Employment Discrimination Cases," 34th Annual National CLE Conference, January 2017, Aspen, Colorado.

- Presenter, "Winning in Overtime: How to Save Money and Protect Your Business by Ensuring Compliance with Wage and Hour Laws," Webinar Presented by Butzel Long Franchise Specialty Team, December 2016.

- Presenter, "Death by Theft: How to Protect Your Company from Sabotage and Unfair Competition," Butzel Long Labor & Employment Seminar, November 2016, Detroit, Michigan.

- Contributing Author, "Counterclaims and Anti-SLAPP Actions: What Happens When the Tide Turns," ERR Non-Compete and Trade Secrets Sub-Committee of the ABA Section of Labor and Employment Law, March 2016

- Presenter, "Common Evidentiary Issues in Employment Litigation: What Are They, and Best Tactics to Limit Harm and Maximize the Benefit," 33rd Annual National CLE Conference, January 2016, Vail, Colorado

- Presenter, "Death by Theft: How to Protect Your Company from Sabotage and Unfair Competition While Saving a Few Bucks Along the Way," MICPA Management Information & Business Show, June 2016, Novi, Michigan

- Presenter, "Death by Theft: How to Protect Your Company from Sabotage and Unfair Competition While Saving a Few Bucks Along the Way," DBusiness and Butzel Long Webinar, August 2015, Detroit, Michigan.

- Moderator, "Navigating the World of Non-Competes," ICLE On-Demand Webcast, July 2015, Ann Arbor, Michigan.

- Organizer/Presenter, "Death by Theft: How to Protect Your Company from Sabotage and Unfair Competition While Saving a Few Bucks Along the Way," DBusiness and Butzel Long's Detroit Business Symposium, January 2015, Detroit, Michigan.

- Presenter, "Employee Sabotage?! It Happens. Be Prepared," Butzel Long Labor & Employment Seminar, November, 2014, Dearborn, Michigan.

- Presenter, "The Definitive Non-Compete Agreement," ICLE Labor & Employment Law Institute, April 2014, Plymouth, Michigan

- Presenter, "Trade Secret Protection for the Modern Employer," Butzel Long Labor & Employment Seminar, November 2013, Dearborn, Michigan

- Presenter, "Emerging Issues in Non-Competition, Non-Hire, Non-Solicit and Trade Secret Agreements with Employees and Competitors," Original Equipment Supplier Association (OESA), February 2013, Troy, Michigan

- Presenter, "#NicePeopleDOFinishLast: Protecting Your Investment, Ideas and Trade Secrets in the Social Media Age," Macomb-OU INCubator Lunch and Learn Series, December 2012, Sterling Heights, Michigan

- Moderator, "Non-Competes in the Electronic Workplace: Solicitation in the Age of Social Media," ABA Center for Continuing Legal Education, May 2012

- Contributing Author, "Non-Competes in the Electronic Workplace: Solicitation in the Age of Social Media," ERR Committee of the ABA Section of Labor and Employment Law, March 2012

- Co-author, "I Wish They All Could Be California: Why Noncompete Critics Are Singing the Wrong Song," *For The Defense - Commercial Litigation*, Defense Research Institute (DRI), March 2012

- Presenter, "*Nice People DO Finish Last: Protecting Company Trade Secrets in Today's Job Market*," Butzel Long Labor & Employment Seminar, November 2011, Dearborn, Michigan

- Presenter, "Non-Compete Agreements and Other Agreements Protecting Key Personnel," Original Equipment Supplier Association (OESA) Commercial Trends and Legal Strategy Conference, October 2011, Troy, Michigan

- Presenter, "Dealing with the Baggage that Travels with Employees Moving from One Financial Services Firm to Another. Trade Secrets, Non-Compete and Insider Trading Issues," Butzel Long Breakfast Briefing, March 2011, New York, New York

- Presenter, "Protecting Your Confidential Information and Business Relationships," Michigan Press Association Annual Convention, January 2011, Detroit, Michigan

- Co-author, "Under Attack: Why the Foes of Non-Compete Agreements Are Firing Blanks," *The Voice* - Defense Research Institute (DRI) - The Voice of the Defense Bar, Summer 2010

- Co-author, "The Evolution of Personal Jurisdiction through the Technological Advances of Our Time," *The Litigation Newsletter* - Litigation Section, State Bar of Michigan, Summer 2008

- Co-author, Michigan chapter, "Trade Secrets and Agreements Not to Compete," Defense Research Institute (DRI) Winter 2008

- Contributing Editor to *Products Liability Desk Reference: A Fifty-State Compendium*, Morton F. Daller, Editor-in-Chief (Aspen Publishers)

- Contributing Editor to *Tort Law Desk Reference: A Fifty-State Compendium*, Morton F. Daller, Editor-in-Chief (Aspen Publishers)

Recognitions

Crain's Detroit 40 under 40 Class of 2012
Dbusiness Top Lawyers in Metro Detroit, Trade Secrets 2016-2019; Franchise Law 2016-2019
Dbusiness Top Young Lawyers, 2013
Michigan Super Lawyers, 2013-2019

Memberships

State Bar of Michigan
American Bar Association - The Forum on Franchising
American Bar Association - ERR Non-Compete and Trade Secret Subcommittee
Detroit Metropolitan Bar Association
Leadership Oakland - Class XXIII
University of Detroit-Mercy School of Law Alumni Association - Board of Directors
Sheriff Oakland County PAL Program – Board of Directors
Detroit Athletic Club - Athletic Committee

Education

Mr. Fuhs is a graduate of the University of Detroit Mercy School of Law (J.D., *magna cum laude*, 2006) and the University of Detroit Mercy (B.S., *summa cum laude*, 2003). He interned for Chief Justice Maura Corrigan of the Michigan Supreme Court; he was a four year player on the Division 1 Men's Basketball team at UDM; President of the 2nd Year Class at UDM School of Law; on Law Review; a member of the Justice Frank Murphy Honor Society; and a member of Beta Gamma Sigma and Beta Alpha Psi.

Mr. Fuhs also enjoyed many honors as an undergraduate including the following: Captain of 2002/2003 UDM Division 1 Men's Basketball Team; the Wall Street Journal Award - Top Student in the UDM College of Business Administration; the Financial Executives International Award - most outstanding undergraduate student in Accounting and Finance; the Beta Alpha Psi Award - highest scholastic average in undergraduate program; member of the All Horizon League Athletic Academic Team - (2002/2003); the President's and Horizon League Honor Roll all four years; and the William Ebben Award for athletic and academic excellence. He was on the Dean's list all years attended at UDM and UDM School of Law, and received the Cavanaugh scholarship at UDM School of Law.

SERVICES

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EXHIBIT 8

Colin P. Marks
St. Mary's University School of Law

Douglas K. Moll
University of Houston Law Center

INTRODUCTION

■ ■ ■

What are business torts? The typical first-year Torts class focuses on torts that cause personal injury and property damage. While there is usually some discussion of economic losses (e.g., an accident victim's lost wages or medical expenses), the discussion of such losses is generally incidental to the primary focus on the physical harm sustained by the victim. Business torts have a different focus. Such torts often cause "pure economic loss"—i.e., economic harm without any accompanying personal injury or property damage. For example, in a fraudulent investment scheme, the victim loses money, but rarely suffers bodily harm or property damage. Think of a business tort, therefore, as tortious conduct that primarily harms a plaintiff's wallet rather than his person or things.[a]

What is unfair competition? Unfair competition is an umbrella term used to describe "an array of legal actions addressing methods of competition that improperly interfere with the legitimate commercial interests of other sellers in the marketplace." RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995) (foreword). Examples of unfair competition actions include claims for deceptive marketing, trademark infringement, and theft of trade secrets. Each of these claims seeks a remedy for conduct that allegedly constitutes an inappropriate method of competing in the marketplace. Although unfair competition is used in this book primarily as a generic term to describe the various causes of action discussed in Part Two of the book, many states retain unfair competition as a "catch-all" cause of action of its own. In other words, if a defendant inappropriately competes in a manner that has not yet been recognized by existing causes of action, a catch-all unfair competition claim could be used to challenge the conduct. *See id.* § 1(a) (allowing a plaintiff to recover for deceptive marketing, trademark infringement, appropriation of trade secrets, and for "other acts or practices . . . determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public").

Why study business torts and unfair competition together? Business torts and unfair competition are similar in a number of ways. First, like business torts, unfair competition practices generally result in pure

[a] There are, of course, exceptions. For example, if a landlord fraudulently misrepresents that an apartment complex is safe to a prospective tenant, the misrepresentation may result in personal injury if the tenant is assaulted. The misrepresentation may also result in property damage if the tenant's personal property is stolen or otherwise harmed.

economic loss. Thus, both areas provide a nice counterpoint to the personal injury and property damage coverage of a standard introductory Torts course. Second, both areas form the core of a typical non-personal injury civil litigation practice. A commercial (i.e., business) litigator, in other words, frequently handles lawsuits involving business torts and unfair competition. As a result, knowledge of these topics is essential for any litigator wishing to have a practice broader than personal injury disputes.[b] Third, business torts and unfair competition are thematically related in that both areas reflect the type of conduct that society considers permissible (and impermissible) in a business context. Their collective law regulates the conduct of business transactions and seeks to promote fairness and competition.

Because of these similarities, the line between what is considered a business tort and what is considered unfair competition is not entirely clear. Do not let this trouble you. The terms have substantial overlap[c] and, for our purposes, the distinction is not important. In this book, we divide the material into Part One on business torts and Part Two on unfair competition based on two general criteria. First, business torts are largely governed by common law, while unfair competition practices are mostly regulated by statute. In general, therefore, the material in Part One of the book focuses on causes of action whose governing principles are provided by the common law, while the material in Part Two of the book focuses on causes of action whose governing principles are provided (at least partially) by statute.[d] Second, much of the business torts material in Part One of the book is the subject of the Third Restatement of Torts, while much of the unfair competition material in Part Two of the book is the subject of the Third Restatement of Unfair Competition. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (Tentative Draft No. 1, Apr. 4, 2012); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (Tentative Draft No. 2, Apr. 7, 2014);

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[b] *Cf.* Jay M. Feinman, *Teaching Economic Torts*, 95 KY. L.J. 893, 893–94 (2006–07) ("In practice, disputes involving economic torts are expanding as a mainstay of civil litigation practice, both because of the apparently infinite capacity of businesses to engage in questionable and dispute-generating behavior and because of the entrepreneurship of lawyers as the profitability of personal injury litigation declines due to the success of the tort reform movement in contracting the rights of victims of personal injuries.").

[c] *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS § 457, at 1300 (2000) (stating that "[u]nfair competition is a general term that includes deceptive trade practices, acts such as trademark infringement, and appropriation of trade values," and noting that "[a]ll of these are torts under common law rules"). The fact that unfair competition practices were once included in the Restatement of Torts is further evidence of the overlap between business torts and unfair competition. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995) (foreword) ("The subject of unfair competition was to have been addressed in the Restatement, Second, of Torts, as it had been in the original Restatement of Torts. However, it was eventually decided that the law of unfair competition had evolved to the point that it was no longer appropriate to treat it as a subcategory of the law of Torts.").

[d] Once again, this is true "in general" and not as an absolute matter. For example, as you will learn, many state unfair competition actions are governed by common law principles and not by statute. Nevertheless, we discuss these actions in Part Two of the book.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995). Thus, the subject matter of these Restatements has guided, to some extent, the division of topics in this book.[e]

As mentioned, Part One of the book covers business torts. This Part addresses the economic loss rule between non-contracting parties (Chapter 1); misrepresentation, including fraud, negligent misrepresentation, and innocent misrepresentation (Chapter 2); tortious interference with economic relations, including intentional interference with existing contract and prospective contract (Chapter 3); breach of fiduciary duty (Chapter 4); bad faith breach of contract, including insurance (Chapter 5); and the economic loss rule between contracting parties (Chapter 6). These Chapters focus primarily on principles articulated by the Second and Third Restatements of Torts. *See* RESTATEMENT (SECOND) OF TORTS (1977); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (Tentative Draft No. 1, Apr. 4, 2012); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (Tentative Draft No. 2, Apr. 7, 2014). The American Law Institute—an association of lawyers, academics, and judges—author the Restatements and, like all Restatements, their text and comments represent an effort to capture the law as developed by the courts. Keep in mind that the Restatements are influential and are persuasive to many courts, but they are not binding.

A major theme in Part One of the book involves the boundary between the law of tort and the law of contract. Tort claims are often more attractive to plaintiffs than contract claims because of the potential for punitive and mental anguish damages in tort. Contract law generally prohibits such recoveries. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 353, 355 (1981). Tort claims between contracting parties, however, can undermine the bargain that the parties struck. As you will learn, therefore, the law has developed limitations on when contracting parties are permitted to assert tort claims against one another.

Part Two of the book covers unfair competition. This Part addresses deceptive marketing (Chapter 7); commercial disparagement, including injurious falsehood (Chapter 8); misappropriation (Chapter 9); trade secrets (Chapter 10); trademark infringement (Chapter 11); antitrust (Chapter 12); and civil RICO (Chapter 13). These Chapters focus on common law and statutory principles articulated by various sources, including (among others) the Third Restatement of Unfair Competition, the Lanham Act, the Uniform Trade Secrets Act, and the Sherman Act.

[e] A notable exception involves injurious falsehood, which is slated to be part of the Third Restatement of Torts. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (Tentative Draft No. 1, Apr. 4, 2012) (prospective table of contents). This book includes injurious falsehood in Part Two on the theory that the topic is substantially related to the unfair competition material on commercial disparagement.

See RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995); Lanham Act, 15 U.S.C. §§ 1051–1141n; UNIF. TRADE SECRETS ACT §§ 1–12 (1985); Sherman Act, 15 U.S.C. §§ 1–7.

The major themes in Part Two of the book are the virtues of competition and the role of the law in regulating competitive behavior. If competition is valued, why not encourage competition to any extent? What considerations might justify limiting the types of conduct that count as permissible competition? *See generally* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995) ("The freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system. . . . The freedom to compete necessarily contemplates the probability of harm to the commercial relations of other participants in the market. . . . Liability is imposed under this Section, and under this Restatement generally, only in connection with harm resulting from particular methods of competition determined to be unfair.").

As a final note, it is highly unlikely that your professor will have time to assign every Chapter in the book. This should not worry you, as the book has been designed to allow picking and choosing among materials. Depending upon the length of your course and the particular focus of your professor, your class may cover only some of the Chapters in Parts One and Two, or perhaps omit a Part in its entirety. Regardless of what is covered, the information should be useful to you in understanding the important role that business torts and unfair competition actions play in our civil litigation system.

EXHIBIT 9

SHAREHOLDER OPPRESSION IN TEXAS CLOSE CORPORATIONS:

MAJORITY RULE ISN'T WHAT IT USED TO BE*

*Douglas K. Moll***

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The doctrine of shareholder oppression protects the close corporation minority shareholder from the improper exercise of majority control. Although the Texas Supreme Court has not explicitly adopted the doctrine, appellate courts in Texas and in other jurisdictions have recognized and applied it in numerous decisions.[1] Because the shareholder oppression doctrine potentially alters a number of fundamental legal principles, it is critically important to be familiar with the doctrine's operation in close corporation disputes.

I. THE NATURE OF THE CLOSE CORPORATION

A close corporation is a business organization typified by a small number of stockholders, the absence of a market for the corporation's stock, and substantial shareholder participation in

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* An earlier version of this article was published in the *Texas Bar Journal*.

** Associate Professor of Law, University of Houston Law Center. B.S. 1991, University of Virginia; J.D. 1994, Harvard Law School.

1. *See infra* Part II (discussing judicial acceptance of the shareholder oppression doctrine).

the management of the corporation.[2] In the traditional public corporation, the shareholder is normally a detached investor who neither contributes labor to the corporation nor takes part in management responsibilities.[3] In a close corporation, however, shareholders "usually expect employment and a meaningful role in management, as well as a return on the money paid for [their] shares."[4] Moreover, close corporation investors are often linked by family or other personal relationships that result in a familiarity between the participants.[5]

Conventional corporate law norms of majority rule and centralized control can lead to serious problems for the close corporation minority shareholder. Traditionally, most corporate power is centralized in the hands of the board of directors.[6] In a close corporation, the board is ordinarily controlled by the shareholder or shareholders holding a majority of the voting power.[7] Through this control of the board, the majority shareholder has the ability to act in ways that are harmful to the minority shareholder's interests. Such actions are often referred to as "freeze-out" or "squeeze-out" techniques that "oppress" the close corporation minority shareholder.[8] Common freeze-out

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2. *See, e.g.*, Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 511 (Mass. 1975) (noting that these characteristics give close corporations a "distinctive nature"); *see also* TEX. BUS. CORP. ACT ANN. arts. 12.11–12.14 (Vernon 1998) (setting forth the requirements for electing statutory close corporation status in Texas).

3. *See* 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 1.08, at 31–32 (3d ed. 1996) [hereinafter CLOSE CORPORATIONS].

4. Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993); *see, e.g.*, Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990) ("[T]he primary expectations of minority shareholders include an active voice in management of the corporation and input as an employee.").

5. *See, e.g.*, Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193, 196 (1988).

6. *See* TEX. BUS. CORP. ACT ANN. art 2.31 (Vernon 1998) ("[T]he powers of a corporation shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, the board of directors of the corporation.").

7. *See, e.g.*, 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 1:02, at 3 (2d ed. 1985) [hereinafter OPPRESSION] ("Indeed, in most closely held corporations, majority shareholders elect themselves and their relatives to all or most of the positions on the board.").

8. *See* 1 OPPRESSION, *supra* note 7, § 1:01, at 3 n.2 ("The term 'freeze-out' is often used as a synonym for 'squeeze-out.'"). It has been noted that the term "squeeze-out" means "the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants." *Id.* at 1; *see also* Davis v. Sheerin, 754 S.W.2d 375, 381 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (noting that, in a close corporation, "the oppressive acts of the majority are an attempt to 'squeeze out' the minority, who do not have a ready market for the corporation's shares, but are at the mercy of the majority").

techniques include the termination of a minority shareholder's employment, the refusal to declare dividends, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder.[9] Quite often, these tactics are used in combination. For example, the close corporation investor typically looks to salary rather than dividends for a share of the business returns because the "[e]arnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits."[10] When actual dividends are not paid, therefore, a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on his investment as well as any input into the management of the business.[11]

In public corporations, minority shareholders can escape these predicaments by simply selling their shares on the market. By definition, however, there is no ready market for the stock of a close corporation.[12] Thus, close corporation shareholders can be "locked-in" to the company, yet "frozen-out" from any business returns.[13]

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9. *See* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 (Mass. 1975) (noting some of the possible freeze-out techniques); 1 OPPRESSION, *supra* note 7, §§ 3:04, 3:06, 3:07, at 13–20, 37–58.

10. Douglas K. Moll, *Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517, 523 (1999) (internal quotation omitted); *see also* 1 OPPRESSION, *supra* note 7, § 1:03, at 4–5 ("[A] close corporation, in order to avoid so-called 'double taxation,' usually pays out most of its earnings in the form of salaries rather than as dividends.").

11. *See, e.g.*, Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987) ("Balvik was ultimately fired as an employee of the corporation, thus destroying the primary mode of return on his investment. Any slim hope of gaining a return on his investment and remaining involved in the operation of the business was dashed when Sylvester removed Balvik as a director and officer of the corporation."); 1 CLOSE CORPORATIONS, *supra* note 3, § 1.15, at 89 ("An investor taking a minority investment position in a close corporation, expecting to receive a return on the investment in the form of a regular salary, would face the risk that, after a falling out among the participants, the directors would terminate the minority shareholder's employment and deprive that investor of any return on the investment in the corporation.").

12. *See, e.g., Donahue*, 328 N.E.2d at 514 ("In a large public corporation, the oppressed or dissident minority stockholder could sell his stock in order to extricate some of his invested capital. By definition, this market is not available for shares in the close corporation."); Brenner v. Berkowitz, 634 A.2d 1019, 1027 (N.J. 1993) ("[U]nlike shareholders in larger corporations, minority shareholders in a close corporation cannot readily sell their shares when they become dissatisfied with the management of the corporation.").

13. 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, 431 (1990) ("The shareholder would be 'frozen-out' of any participation in the earnings of the corporation since no dividends would be paid and no compensation would

II. THE CAUSE OF ACTION FOR SHAREHOLDER OPPRESSION

Over the years, state legislatures and courts have developed two significant avenues of relief for the "oppressed" close corporation shareholder. First, many state legislatures have amended their corporate dissolution statutes to include "oppression" by the controlling shareholder as a ground for involuntary dissolution of the corporation.[14] Moreover, when oppressive conduct has occurred, courts have authorized alternative remedies that are less drastic than dissolution (e.g., buyouts, dividend orders, receivers).[15] Second, particularly in states without an oppression-triggered dissolution statute, some courts have imposed a fiduciary duty between close corporation shareholders and have allowed an oppressed shareholder to bring a direct cause of action for breach of this duty.[16]

In Texas, the shareholder oppression precedents reflect both the statutory and the fiduciary duty developments. With respect to the statutory action for oppression, articles 7.05 and 7.06 of the Texas Business Corporation Act provide for the appointment of a receiver and the eventual possibility of liquidation when aggrieved shareholders can establish particular grounds, including "illegal, ***oppressive***, or fraudulent" conduct by "directors or those in control."[17] In *Davis v. Sheerin*, the First Court of Appeals attempted to give some meaning to this "oppressive conduct" ground by citing the following two definitions:

> [1][O]ppression should be deemed to arise only when the majority's conduct substantially defeats

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be earned. The shareholder would be 'locked-in' since his capital investment would be held by the corporation with the shareholder having neither a right to withdraw nor a ready market for sale of his shares.").

14. *See* Thompson, *supra* note 4, at 708–09 & n.70.

15. *See, e.g.*, Davis v. Sheerin, 754 S.W.2d 375, 380 (Tex. App.—Houston [1st Dist.] 1988, writ denied) ("[W]e hold that a court could order less harsh remedies [than liquidation] under . . . equity powers."); *Brenner*, 634 A.2d at 1033 ("Importantly, courts are not limited to the statutory remedies [for oppression], but have a wide array of equitable remedies available to them."); *Balvik*, 411 N.W.2d at 388–89 (listing alternative forms of relief for oppressive conduct such as appointing a receiver, granting a buyout, and ordering the declaration of a dividend); Masinter v. Webco Co., 262 S.E.2d 433, 441 & n.12 (W. Va. 1980) (listing ten possible forms of relief for oppressive conduct such as ordering the reduction of excessive salaries and issuing an injunction against further oppressive acts). *But see* Giannotti v. Hamway, 387 S.E.2d 725, 733 (Va. 1990) (stating that the dissolution remedy for oppression is "exclusive" and concluding that the trial court is not permitted "to fashion other . . . equitable remedies").

16. *See Donahue*, 328 N.E.2d at 515, 518–19; Crosby v. Beam, 548 N.E.2d 217, 221 (Ohio 1989); Thompson, *supra* note 4, at 726; *infra* notes 61–64 and accompanying text.

17. TEX. BUS. CORP. ACT ANN. arts. 7.05 – 7.06 (Vernon 1998) (emphasis added).

> the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture.
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> [2][Oppressive conduct refers to] burdensome, harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.[18]

In *Davis*, the majority shareholder refused to recognize the minority shareholder's 45% ownership interest in the corporation.[19] The majority claimed that the minority had previously relinquished his stockholdings to the majority as a gift.[20] The jury disagreed, as it found that the majority shareholder had conspired to deprive the minority shareholder of his ownership interest in the corporation.[21] Referencing the first definition of "oppressive conduct," the *Davis* court stated that the majority's actions would "not only . . . substantially defeat any reasonable expectations [the minority shareholder] may have had . . . but would totally extinguish any such expectations."[22] In addition, the jury found that the majority shareholder had breached his fiduciary duty by making profit-sharing contributions solely for his own benefit, and by wasting corporate funds on his own attorneys' fees.[23] As a result of these findings, the *Davis* court affirmed the lower court's conclusion that "oppressive conduct" had occurred.[24] After noting that a court "could order less harsh remedies" than liquidation under its "general equity powers," the *Davis* court upheld an order requiring the majority shareholder to buy out the stockholdings of the minority shareholder at a jury-determined "fair value."[25]

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18. *Davis*, 754 S.W.2d at 381–82.
19. *See id.* at 377–78.
20. *See id.* at 377.
21. *See id.* at 383.
22. *Id.* at 382.
23. *See id.*
24. *Id. at* 383.
25. *Id.* at 378, 380, 383. The *Davis* court also upheld various awards for damages, the appointment of a receiver, and an injunction prohibiting the majority shareholder

In *Willis v. Bydalek*, the First Court of Appeals again confronted a statutory action for shareholder oppression.[26] In *Willis*, a minority shareholder was fired from his employment with a close corporation. The corporation paid no dividends, but the evidence indicated that the business had always been unprofitable. In conducting its shareholder oppression analysis, the *Willis* court cited the two definitions of "oppressive conduct" that were noted in *Davis*.[27] After balancing "[the majority's] business judgment in the face of four profitless years of operation against the [minority's] reasonable expectations of participating in the business," the *Willis* court concluded that no oppressive conduct had occurred.[28] As the court stated, "we hold [that the majority] did not oppress [the minority] by firing him when (1) the jury found no wrong besides a [firing], (2) the corporation and [the majority shareholder], personally, always lost money, both before and after the [firing], and (3) the [minority shareholders] were at-will employees."[29]

As mentioned, Texas cases also allow shareholders to challenge oppressive conduct as a breach of fiduciary duty. In *Patton v. Nicholas*, T.W. Patton was the 60% owner of a close corporation.[30] The other two shareholders, J.W. Nicholas and Robert R. Parks, each owned 20% of the company's stock. The corporation continuously earned profits and the net worth of the corporation steadily increased.[31] Patton, however, refused to declare a dividend.[32] Nicholas and Parks eventually sued, alleging that Patton had committed fraud and abuse of his controlling position.[33] At trial, the jury found in part that Patton "wrongfully dominated and controlled the Board of Directors so as to prevent the declaration of dividends," and that Patton "did

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from contributing to a profit-sharing plan unless a proportionate sum was paid to the minority shareholder. *See id.* at 378, 388.

26. *See* Willis v. Bydalek, 997 S.W.2d 798, 800–01 (Tex. App.—Houston [1st Dist.] 1999, writ denied). The shareholder oppression claim in *Willis* likely derived from article 7.05 of the Texas Business Corporation Act rather than from common-law fiduciary duty notions. Indeed, although the minority shareholder alleged a claim for breach of fiduciary duty, such a claim was not submitted to the jury. *See id*. at 800. Instead, the jury granted relief to the minority shareholder on a separate claim of "wrongful lock-out"—a claim that presumably stemmed from the statutory action for shareholder oppression. *See id.* at 799, 802 n.2.

27. *See id*. at 801.

28. *Id*. at 802.

29. *Id*.

30. *See* Patton v. Nicholas, 279 S.W.2d 848, 849 (Tex. 1955).

31. See id.

32. *See id*. at 851.

33. *See id*. at 849.

this for the sole purpose of preventing Nicholas and Parks from sharing in the profits to be derived from the operation of the corporation."[34] In affirming these jury findings, the *Patton* court noted that "the malicious suppression of dividends is a wrong akin to breach of trust, for which the courts will afford a remedy."[35] The court crafted a mandatory injunction requiring the corporation to pay a reasonable dividend "at the earliest practical date" as well as in future years.[36]

In *Duncan v. Lichtenberger*, Waldron Duncan owned 60% of a close corporation that operated a night club.[37] C.F. Lichtenberger and D.M. Hogness each owned 20% of the corporation's shares. When the company began to experience financial difficulties, Duncan discharged Lichtenberger and Hogness from their corporate positions.[38] Although Duncan continued to receive management fees and officer compensation, Lichtenberger and Hogness "never received any compensation as corporate officers and no dividends were ever distributed to shareholders."[39] In response to Duncan's actions, Lichtenberger and Hogness asserted that Duncan had breached a fiduciary duty owed directly to them.[40] The jury agreed and damages were awarded to the two minority shareholders.[41] The *Duncan* court upheld the jury's findings, observing that "[t]he breach of a fiduciary duty is the type of wrong for which the courts of this State will afford a remedy."[42]

III. IMPLICATIONS OF THE SHAREHOLDER OPPRESSION DOCTRINE

A. *A Limitation on Employment at Will*

Because employment is often the vehicle for distributing the profits of a close corporation,[43] a majority shareholder's decision to terminate the employment of a minority shareholder may be considered oppressive, even if the minority shareholder can also

34. *Id*. at 852.
35. *Id*. at 854.
36. *Id*. at 857.
37. *See* Duncan v. Lichtenberger, 671 S.W.2d 948, 950 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).
38. *See id*.
39. *Id*. at 951.
40. *See id.* at 951–52.
41. *See id*. at 952 (declaring that "the jury found that a fiduciary duty had been breached, that such breach was the proximate cause of damages and that the damages could be compensated for by a set dollar amount").
42. *Id*. at 953.
43. *See supra* note 10 and accompanying text.

be characterized as an at-will employee. Indeed, numerous courts, including *Duncan*, have granted oppression-based relief to minority shareholders challenging their terminations from close corporation employment.[44] Even the First Court of Appeals noted in *Willis* that "[w]e are not holding that firing an at-will employee who is a minority shareholder can never, under any circumstances, constitute shareholder oppression; we simply hold that under these particular facts, it does not."[45] Although the *Willis* court referenced the employment at will doctrine in stating that "[e]xpectations of continued employment that are contrary to well settled law cannot be considered objectively reasonable,"[46] the court seemed to suggest that oppression liability could arise when a minority shareholder is terminated from a profitable corporation, at least to the extent that the termination precludes the minority shareholder from receiving his proportionate share of the business returns.[47]

B. *The End of Business Judgment Rule Deference*

The business judgment rule is a fundamental principle of corporate law that generally precludes courts from interfering with directors' business decisions that have been made in good faith and with ordinary care.[48] When the business judgment rule applies, judicial scrutiny of a board's substantive business decision is practically non-existent. The directors are entitled to prevail when their actions are challenged so long as they can articulate any rational business purpose for their conduct.[49] As a

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44. *See, e.g.*, *Duncan*, 671 S.W.2d at 950, 953 (involving the "firing" of two minority shareholders); Moll, *supra* note 10, at 531 n.65, 559 & n.167 (citing cases); *see also* W&W Equip. Co. v. Mink, 568 N.E.2d 564, 574 (Ind. Ct. App. 1991) (acknowledging the employment at will rule but affirming a breach of fiduciary duty finding); Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990) ("In a closely-held corporation the nature of the employment of a shareholder may create a reasonable expectation by the employee-owner that his employment is not terminable at will.").

45. Willis v. Bydalek, 997 S.W.2d 798, 802 (Tex. App.—Houston [1st Dist.] 1999, writ denied).

46. *Id*. at 803.

47. *See id*. at 802 (emphasizing that the corporation and the majority shareholder "always lost money" and distinguishing contrary authority on the grounds that they involved profitable corporations and majority shareholders who received compensation or other corporate benefits to the exclusion of the minority shareholder).

For an argument that a minority shareholder's termination could be oppressive even if (1) the corporation is unprofitable, or (2) the discharged shareholder is still receiving his proportionate share of the business returns, see Moll, *supra* note 10, at 547–51, 568.

48. *See, e.g.*, FDIC v. Wheat, 970 F.2d 124, 130–31 & n.13 (5th Cir. 1992) (applying Texas law); Cates v. Sparkman, 11 S.W. 846, 849 (Tex. 1889).

49. *See, e.g.*, *Wheat*, 970 F.2d at 130–31 & n.13 (noting that a director or officer "shall not be held liable for honest mistake of judgment if he acted with due care, in good

result of this rule, judicial interference with board decisions involving employment, management, or dividend matters is rare.[50]

As mentioned, however, the shareholder oppression doctrine recognizes that decisions about such matters by a majority-controlled board can be part of a minority shareholder freeze-out.[51] The oppression doctrine, therefore, is implicitly premised upon the notion that close corporation employment, management, and dividend decisions require more than a mere surface inquiry into the majority's conduct. Indeed, the fact that courts applying the oppression doctrine are subjecting the majority's actions to "reasonable expectations"[52] or "burdensome, harsh, and wrongful conduct"[53] standards suggests that courts are requiring majority shareholders to do more than merely articulate a rational business purpose for their decisions.[54] In fact, some courts have explicitly acknowledged that majority shareholder decisions in close corporations call for more judicial scrutiny than conventional business judgment rule deference.[55]

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faith, and in furtherance of a rational business purpose"); *see also* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) ("A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose."); Krishnan S. Chittur, *Resolving Close Corporation Conflicts: A Fresh Approach*, 10 HARV. J. L. & PUB. POL'Y 129, 154 (1987) ("So long as the controlling stockholder's conduct is not outrageous—that is, a plausible business reason can be articulated—his decisions are protected by the business judgment rule.").

50. *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("[C]ourts fairly consistently have been disinclined to interfere in those facets of internal corporate operations, such as the selection and retention or dismissal of officers, directors or employees, which essentially involve management decisions subject to the principle of majority control."); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 (Mass. 1975) ("[T]he plaintiff will find difficulty in challenging dividend or employment policies. Such policies are considered to be within the judgment of the directors." (footnote omitted)).

51. *See supra* notes 7–11 and accompanying text.

52. *See supra* text accompanying note 18.

53. *See supra* text accompanying note 18.

54. *See, e.g.*, O'Donnel v. Marine Repair Servs., 530 F. Supp. 1199, 1205–08 (S.D.N.Y. 1982) (rejecting defendants' asserted business justification as pretextual); *cf.* Zimmerman v. Bogoff, 524 N.E.2d 849, 854 (Mass. 1988) (same); *Wilkes*, 353 N.E.2d at 663–65 (concluding that the controlling shareholders' employment and management decisions were improper because there was no evidence of a legitimate business purpose for the actions).

55. *See, e.g.*, Smith v. Atlantic Properties, Inc., 422 N.E.2d 798, 801, 804 (Mass. App. Ct. 1981) (stating, in a close corporation dispute, that "[t]he judgment . . . necessarily disregards the general judicial reluctance to interfere with a corporation's dividend policy ordinarily based upon the business judgment of its directors"); Fox v. 7L Bar Ranch, 645 P.2d 929, 935 (Mont. 1982) ("When it is also considered that in close corporations dividend withholding may be used by controlling shareholders to force out minority shareholders, the traditional judicial restraint in interfering with corporate dividend policy cannot be justified." (internal quotation omitted)); Exadaktilos v. Cinnaminson Realty Co., 400 A.2d

C. *Avoidance of Derivative Requirements*

A majority shareholder's fiduciary duty ordinarily runs to the corporation and not to the individual shareholders.[56] Actions alleging breach of the majority's fiduciary duty, therefore, are typically brought as "derivative" lawsuits on behalf of the corporation.[57] In such lawsuits, the aggrieved shareholder "brings suit in the name of the corporation to redress the defendant's breach of duty to the corporation and [to] the shareholders as a whole."[58] Derivative actions can be perilous, however, as they require the plaintiff shareholder to comply with a number of procedural requirements. For example, the derivative plaintiff must typically (1) possess an ownership interest in the corporation at the time of the alleged wrong; (2) represent fairly and adequately the interests of the corporation; and (3) make a demand "with particularity" upon the corporation's board to take suitable action against the wrongdoers.[59] Failure to comply with these requirements can result in the dismissal of the lawsuit.[60]

In close corporations, however, there are precedents in Texas and in other jurisdictions involving a fiduciary duty owed by

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554, 561 (N.J. Super. Ct. Law Div. 1979) ("[T]he statutory language embodies a legislative determination that freeze-out maneuvers in close corporations constitute an abuse of corporate power. Traditional principles of corporate law, such as the business judgment rule, have failed to curb this abuse. Consequently, actions of close corporations that conform with these principles cannot be immune from scrutiny."); Grato v. Grato, 639 A.2d 390, 396 (N.J. Super. Ct. App. Div. 1994) (citing *Exadaktilos* and noting that "judicial consideration of a claim of majority oppression or freeze-out in a closely held corporation is guided by considerations broader than those espoused in defendants' version of the 'business judgment rule'"). *But see* Brenner v. Berkowitz, 634 A.2d 1019, 1033 (N.J. 1993) (noting, in a close corporation dispute, that "the court is hesitant to overturn the corporation's valued exercise of its business judgment," and observing that "[t]he Chancery Division properly concluded that it could not second-guess the corporation's exercise of its business-judgment"); Davis v. Sheerin, 754 S.W.2d 375, 382–83 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (noting that appellants had cited a case suggesting that conduct falling under the protection of the business judgment rule was "inappropriate" for a statutory oppression action (citing Texarkana College Bowl, Inc. v. Phillips, 408 S.W.2d 537, 539 (Tex. Civ. App.—Texarkana 1966, no writ))).

56. *See, e.g.*, Schautteet v. Chester State Bank, 707 F. Supp. 885, 888–89 (E.D. Tex. 1988); Hoggett v. Brown, 971 S.W.2d 472, 488 n.13 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

57. *See* Thompson, *supra* note 4, at 729–30.

58. *Id.* at 730; *see* Providential Inv. Corp. v. Dibrell, 320 S.W.2d 415, 418 (Tex. Civ. App.—Houston 1959, no writ); 3 BARBARA BADER ALDAVE, TEXAS CORPORATIONS: LAW AND PRACTICE § 122.01[2], at 122-5 (1995); *id.* § 122.02[1], at 122-9 (noting that "the cause of action belongs to the corporation" in a derivative lawsuit).

59. *See* TEX. BUS. CORP. ACT ANN. art. 5.14(B), (C) (Vernon Supp. 2000); TEX. R. CIV. P. 42 (Vernon Supp. 2000); 3 ALDAVE, *supra* note 58, § 122.02, at 122-8.1 to 122-15.

60. *See, e.g.*, Sax v. World Wide Press, Inc., 809 F.2d 610, 612–15 (9th Cir. 1987).

majority shareholders directly to minority shareholders.[61] Because this duty runs to minority shareholders individually, courts have allowed the duty to be enforced in a direct action rather than in a derivative proceeding.[62] As a consequence, minority shareholders in close corporations have been able to assert claims for breach of fiduciary duty (e.g., claims that controlling shareholders have misappropriated assets or have received excessive compensation) on their own behalf without needing to comply with the procedural hurdles accompanying a derivative lawsuit.[63] Thus, the associated risk of dismissal on these procedural grounds is eliminated. Article 5.14(L) of the Texas Business Corporation Act supports this position by noting that most of the procedural requirements for derivative suits are not applicable to a "closely held corporation," and by stating that "[i]f justice requires . . . a derivative proceeding brought by a shareholder of a closely held corporation may be treated by a court as a direct action brought by the shareholder for his own benefit . . . ."[64]

IV. Conclusion

Although it has yet to receive the blessing of the Texas Supreme Court, the shareholder oppression doctrine has a firm toehold in Texas jurisprudence. Unfortunately, the precise contours of the doctrine are fuzzy at best. What is clear, however, is that the doctrine's operation clashes with traditional employment at-will, business judgment rule, and derivative lawsuit principles, and it may significantly alter how those principles are applied. As a consequence, Texas lawyers need to familiarize themselves with the shareholder oppression doctrine. Simply put, when close corporation disputes are at issue, majority rule may no longer carry the day.

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61. *See, e.g.*, *Hoggett*, 971 S.W.2d at 488 n.13 (citing Texas cases); Alexander v. Sturkie, 909 S.W.2d 166, 170 n.2 (Tex. App.—Houston [14th Dist.] 1995, writ denied); *supra* note 16 and accompanying text; *infra* note 62.

62. *See, e.g.*, Patton v. Nicholas, 279 S.W.2d 848, 849 (Tex. 1955); Debord v. Circle Y, Inc., 951 S.W.2d 127, 133–34 (Tex. App.—Corpus Christi 1997), *rev'd on other grounds sub nom.* Stary v. DeBord, 967 S.W.2d 352, 352 (Tex. 1998); Davis v. Sheerin, 754 S.W.2d 375, 377–78 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Duncan v. Lichtenberger, 671 S.W.2d 948, 949 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *see also* Thompson, *supra* note 4, at 726–38 (citing cases). *But see* Faour v. Faour, 789 S.W.2d 620, 622–23 (Tex. App.—Texarkana 1990, writ denied) (distinguishing *Patton*, *Davis*, and *Duncan*).

63. *See, e.g.*, Thompson, *supra* note 4, at 735–37; *supra* note 62.

64. TEX. BUS. CORP. ACT ANN. art. 5.14(L) (Vernon Supp. 2000).