THE SHAREHOLDERS' AGREEMENT: A CONTRACTUAL ALTERNATIVE TO OPPRESSION AS A GROUND FOR DISSOLUTION

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I. INTRODUCTION

Historically, Florida has never given minority shareholders the statutory power to involuntarily dissolve[1] close corporations for oppression. However, thirty-seven states outside of Florida codify this remedy.[2] These jurisdictions usually define oppression as the frustration of a shareholder's reasonable expectations[3] or, alternatively, as harsh, burdensome, or wrongful conduct directed at a minority shareholder.[4] The Business Law Section of the Florida Bar is considering an amendment to the Florida Business Corporation Act[5] that would change Florida's current law and give shareholders in corporations of thirty-five or fewer shareholders this power.[6]

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1. Dissolving a corporation results in the termination of the corporation's legal existence and its corporate franchise. 16A WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7966 (rev. vol. 1988). See *infra* notes 42–50 and accompanying text for a specific discussion of Florida's dissolution process.

The term "involuntary" signifies that the dissolution was not initiated or ratified by a corporation's directors or shareholders. BLACK'S LAW DICTIONARY 473 (6th ed. 1990). There are two types of involuntary dissolution in Florida: administrative and judicial. FLA. STAT. § 607.1420 (1993); 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430). This Comment addresses only judicial dissolution. See *infra* notes 37–41 and accompanying text for the circumstances under which Florida permits judicial dissolution.

2. Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 709 n.70 (1993).

3. *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984); Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983).

4. Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 394 (Or. 1973).

5. FLA. STAT. ch. 607 (1993). For the present state of Florida's judicial dissolution statutes, see *id*. §§ 607.1430–.01433, *amended by* 1994 Fla. Sess. Law Serv. 327 (West).

6. *Oppressive Conduct: Should It Be Grounds for Judicial Dissolution?*, Q. REP. (The Fla. Bar Business Law Section, Tallahassee, Fla.), Dec. 1993, at 20 [hereinafter *Oppressive Conduct*]. The proposed oppression statute would read:

> 607.1430 Grounds for judicial dissolution
>
> A circuit court may dissolve a corporation . . .
>
> (3) In a proceeding by a shareholder or group of shareholders in a corporation having 35 or fewer shareholders, if it is established that:
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> (b) The directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is illegal, oppressive, or fraudulent . . . .

See Proposed Draft Amendment to Florida Statutes, Chapter 607, The Business Law

The significance of the considered oppression amendment is that involuntary dissolution is not the most effective remedy or preventive device for shareholder oppression cases. Involuntary dissolution reduces a complaining shareholder's net recovery. The shareholder loses the business's going-concern value and the total amount of capital that could otherwise be invested in another venture. Moreover, the term "oppression" is vague and susceptible to inconsistent interpretations. What may constitute oppressive conduct in one court may not in another.

This Comment first defines a close corporation and identifies its unique characteristics. Then, Part III defines a "squeeze-out," the most common form of shareholder oppression, and discusses why squeeze-outs occur in the close corporation setting. Part III also explores how courts in other jurisdictions define the term oppression. Next, Part IV of this Comment examines Florida's current law regarding the involuntary dissolution of solvent corporations. Part V then evaluates the effectiveness of oppression statutes in other states.

This Comment concludes that involuntary dissolution is inefficient as a shareholder's remedy for oppression and suggests that a more economic alternative is the shareholders' agreement. A shareholders' agreement is a contract executed either between all shareholders in a corporation or between a shareholder and the corporation itself.[7] This Comment therefore proposes that shareholders in close corporations should contractually protect themselves against oppressive conduct when they incorporate the business or purchase its shares.

Section Executive Council Meeting 7.F.1 (Sept. 9, 1993) (on file with the *Stetson Law Review*). The Business Law Section has not approved this proposed draft amendment. Compare 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(3)(b)) for Florida's current judicial dissolution statute.

Interestingly, minority shareholders in Florida are not demanding this change to the Florida Statutes. The charge for change is coming from academics. *Cf.* J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 60 (1977) (noting that minority shareholders generally do not solicit the enactment of oppression statutes).

7. *See* 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 9:03–:04 (2d ed. 1985).

II. CLOSE CORPORATION DEFINED

A close corporation is a corporation with a small number of shareholders whose shares are not publicly traded on a securities market.[8] The shareholders in the business are generally known to one another by way of family relation or friendship.[9] Furthermore, shareholders in close corporations usually participate in the management of the corporation as directors, officers, or employees.[10] This participation or employment provides shareholders with a return on their investment.[11]

However, absent a public market for the trading of corporate shares, shareholders in close corporations cannot easily remove their investment.[12] Shareholders must maintain their investment in the corporation until other investors offer to purchase the shares.[13] Astute investors are not usually willing to purchase shares in a close corporation if controlling shareholders have mistreated minority investors.[14]

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8. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 1.08 (3d ed. 1991). Florida's proposed oppression statute applies to "companies with 35 or fewer shareholders." *Oppressive Conduct*, *supra* note 6, at 20; *cf.* DEL. CODE ANN. tit. 8, § 342(a) (1993) (defining a close corporation as a business with 30 or fewer shareholders issuing non-public stock).

9. 1 O'NEAL & THOMPSON, *supra* note 8, §§ 1.05, 1.08.

10. 1 *id*. § 1.08.

11. 1 *id*. Investment returns are disbursed in the form of "salaries, bonuses and retirement benefits." 1 *id*. For a more detailed explanation of payment schemes suitable for close corporations, see 1 O'NEAL & THOMPSON, *supra* note 7, § 2:05; 2 O'NEAL & THOMPSON, *supra* note 7, § 8:17.

12. David L. Dickson, *The Florida Close Corporation Act: An Experiment That Failed*, 21 U. MIAMI L. REV. 842, 842 (1967). Because close corporations do not list their stock on a public market, there is "no readily discernible market value" for close corporation shares. Corlett, Killian, Hardeman, McIntosh & Levi, P.A. v. Merritt, 478 So. 2d 828, 831 (Fla. Dist. Ct. App. 1985), *rev. denied*, 488 So. 2d 68 (Fla. 1986).

13. Dickson, *supra* note 12, at 842.

14. *See* Kay v. Key West Dev. Co., 72 So. 2d 786, 788 (Fla. 1954).

III. MAJORITY OPPRESSION

A. Squeeze-outs

The absence of a public market for the sale of corporate stock in the close corporation setting, when combined with "the corporate norms of centralized control and majority rule," occasionally results in the unfair treatment of minority shareholders.[15] The most common form of unfair treatment of minority shareholders is the squeeze-out.[16] In a squeeze-out, controlling shareholders typically withhold dividends, compensate themselves excessively, or terminate a minority shareholder's employment with the corporation.[17] These actions deny minority shareholders income if they are unable to veto or override the implementation of such policies.[18] The resulting effect precludes minority shareholders from obtaining an adequate return on their investment.[19]

B. Legislative Reaction

A majority of state legislatures responded to the squeeze-out dilemma by giving shareholders the power to bring dissolution proceedings against their corporations.[20] Currently, thirty-seven states

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15. Thompson, *supra* note 2, at 703.

16. *See* 1 O'NEAL & THOMPSON, *supra* note 7, § 3:02. The term "squeeze-out" is frequently used interchangeably with "freeze-out." BLACK'S LAW DICTIONARY 1403 (6th ed. 1990). For an in-depth discussion of squeeze-out techniques, see generally 1 O'NEAL & THOMPSON, *supra* note 7, §§ 3:02–:20.

17. 1 O'NEAL & THOMPSON, *supra* note 7, § 3:02. As a result of tax advantages, controlling shareholders employed in close corporations generally prefer generous compensation in lieu of dividends. F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 122 (1987). On the other hand, minority shareholders typically favor low salaries and large dividends. *Id*.

18. *See* 1 O'NEAL & THOMPSON, *supra* note 7, § 3:02 & n.1.

19. Thompson, *supra* note 2, at 703. The unfair treatment of minority shareholders is usually attributable to selfishness, greed, personality conflicts, marital disharmony, or family squabbles between the minority and controlling shareholders. O'Neal, *supra* note 17, at 122. See generally 1 O'NEAL & THOMPSON, *supra* note 7, §§ 2:01–:20, for a detailed explanation of the causes of majority mistreatment of minority investors.

20. *See* Thompson, *supra* note 2, at 708. The first American court to fashion judicial dissolution as a shareholder's remedy did so in the absence of statutory authority. JAMES O. TINGLE, THE STOCKHOLDER'S REMEDY OF CORPORATE DISSOLUTION 32 (1959) (citing Miner v. Belle Isle Ice Co., 53 N.W. 218, 224 (Mich. 1892) (dissolving a corporation for oppression under the court's "inherent equitable power")).

codify this power and allow shareholders to involuntarily dissolve corporations for oppression or other exploitative behavior.[21] Of these states, thirty-one include the word "oppressive" in their statute,[22] four authorize dissolution for behavior that treats shareholders unfairly,[23] and two permit dissolution simply to protect the rights and interests of minority shareholders.[24]

On the other hand, twelve states and the District of Columbia do not statutorily authorize dissolution for oppression, unfair behavior, or the protection of minority shareholders.[25] Among this group of thirteen, six jurisdictions allow dissolution only when shareholders or directors are deadlocked in the management of their corporation.[26] Four states permit dissolution for illegal or fraudulent

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21. Thompson, *supra* note 2, at 709 n.70.

22. *Id*; *see* ALA. CODE § 10-2A-195(a)(1)(b) (1987); ARK. CODE ANN. § 4-27-1430(2)(ii) (Michie 1991); COLO. REV. STAT. ANN. § 7-8-113(2)(a) (West 1990); GA. CODE ANN. § 14-2-940(a)(1) (1989); IDAHO CODE § 30-1-97(a)(2) (1980); ILL. ANN. STAT. ch. 805, para. 5/12.50(b)(2) (Smith-Hurd 1993); IOWA CODE ANN. § 490.1430(2)(b) (West 1991); MD. CODE ANN. CORPS. & ASS'NS § 3-413(b)(2) (1993); MICH. COMP. LAWS ANN. § 450.1489(1) (West 1990); MISS. CODE ANN. § 79-4-14.30(2)(ii) (Supp. 1993); MO. ANN. STAT. § 351.494(2)(b) (Vernon 1991); MONT. CODE ANN. § 35-1-938(2)(b) (1993); NEB. REV. STAT. § 21-2096(1)(b) (1991); N.H. REV. STAT. ANN. § 293-A:98(I)(a)(2) (1987); N.J. STAT. ANN. § 14A:12-7(1)(c) (West Supp. 1994); N.M. STAT. ANN. § 53-16-16(A)(1)(b) (Michie 1993); N.Y. BUS. CORP. LAW § 1104-a(a)(1) (McKinney 1986) (requiring petitioning shareholders to own 20% or more stock); OR. REV. STAT. § 60.661(2)(b) (1988); PA. STAT. ANN. tit. 15, § 1981(a)(1) (1994); R.I. GEN. LAWS § 7-1.1-90(1)(B) (1992); S.C. CODE ANN. § 33-14-300(2)(ii) (Law. Co-op. 1990); S.D. CODIFIED LAWS ANN. § 47-7-34(2) (1991); TENN. CODE ANN. § 48-24-301(2)(B) (Supp. 1993); TEX. CORPS. & ASS'NS CODE ANN. § 7.05(A)(1)(c) (West 1980); UTAH CODE ANN. § 16-10a-1430(2)(b) (Supp. 1994); VT. STAT. ANN. tit. 11A, § 14.30(2)(B) (Supp. 1993); VA. CODE ANN. § 13.1-747(1)(b) (Michie 1993); WASH. REV. CODE ANN. § 23B.14.300(2)(b) (West Supp. 1994); W. VA. CODE § 31-1-41(a)(2) (1980); WIS. STAT. ANN. § 180.1430(2)(B) (West 1992); WYO. STAT. § 17-16-1430(a)(ii)(B) (1989); *see also* REVISED MODEL BUSINESS CORP. ACT § 14.30(2)(ii)(B) (1993); MODEL STATUTORY CLOSE CORP. SUPPLEMENT § 40(a)(1) (1992).

23. Thompson, *supra* note 2, at 710 n.70; *see* ALASKA STAT. § 10.06.628(a)(2), (b)(4) (1989) (allowing dissolution for "persistent unfairness" towards any shareholder and requiring the petitioning party to own at least one-third of the corporation's outstanding shares); CAL. CORP. CODE § 1800(a)(2), (b)(4) (West 1990) (containing similar language as Alaska's statute); MINN. STAT. ANN. § 302A.751(b)(2) (West 1994) (allowing dissolution for conduct which unfairly prejudices a shareholder with regard to his position as a shareholder, director, officer, or employee of the corporation); N.D. CENT. CODE § 10-19.1-115(1)(b)(2) (Supp. 1994) (containing similar language as Minnesota's statute).

24. Thompson, *supra* note 2, at 710 n.70; *see* CONN. GEN. STAT. ANN. § 33-382(b)(v) (West 1987) (allowing dissolution for "any good and sufficient reason"); N.C. GEN. STAT. § 55-14-30(2)(ii) (1990) (allowing dissolution "for the protection of the rights or interests of the complaining shareholder").

25. Thompson, *supra* note 2, at 710 n.70.

26. *Id*; *see* ARIZ. REV. STAT. ANN. § 10-097(A)(1)(a)–(b) (1990); D.C. CODE ANN. § 29-

conduct.[27] Lastly, three states, most notably Delaware, do not allow minority shareholders to dissolve corporations for any reason.[28]

C. Judicial Interpretation of Oppression Statutes

One of the earliest cases interpreting oppression was *Baker v. Commercial Body Builders, Inc.*[29] In *Baker*, the court defined oppression as:

> [B]urdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visual 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.[30]

The *Baker* court noted, however, that mere anticipation of future misconduct by shareholders does not constitute oppression.[31]

In contrast to the *Baker* court's analysis, which focused on the actions of controlling shareholders,[32] other courts' analyses center on

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390(a)(3)–(4) (1991); IND. CODE ANN. § 23-1-47-1(2)(A)–(B) (West 1989); LA. REV. STAT. ANN. § 12:143(5) (West 1969 & Supp. 1994) (additionally allowing dissolution for the commission of *ultra vires* acts by the corporation in § 12:143(7)); MASS. ANN. LAWS ch. 156B, § 99(b)(1)–(2) (Law. Co-op. 1979) (requiring petitioning shareholder to own at least 40% of the corporation's stock); OHIO REV. CODE ANN. § 1701.91(4) (Baldwin 1992).

27. Thompson, *supra* note 2, at 710 n.70; *see* HAW. REV. STAT. § 415-97(1)(B) (1993) (providing additionally for dissolution in § 415-97(1)(A), (C) for deadlock of directors and shareholders and in § 415-97(D) for misapplication or waste of corporate assets); KY. REV. STAT. ANN. § 271B.14-300(2)(b) (Michie/Bobbs-Merrill 1989) (providing dissolution also for director and shareholder deadlock in § 271B.14-300(2)(a), (c)); ME. REV. STAT. ANN. tit. 13-A, § 1115(1)(D) (West 1981) (containing similar language in tit. 13-A § 1115(1)(A)–(C), (E)); *cf.* NEV. REV. STAT. ANN. § 78.650(1)(b) (Michie 1994) (additionally allowing dissolution in § 78.650(1)(b)–(c) for (1) collusion, gross mismanagement, malfeasance, or misfeasance of directors or those in control; and (2) for waste of corporate assets in § 78.650(1)(e)).

28. Thompson, *supra* note 2, at 711 n.70. *See generally* DEL. CODE ANN. tit. 8 (1991) (authorizing dissolution in § 273(a) only if a corporation's shares are divided equally between two shareholders and those shareholders are deadlocked); KAN. STAT. ANN. (1988) (containing similar language in § 17-6804(d)); OKLA. STAT. ANN. tit. 18 (West 1986) (containing similar language in § 1094(A)).

29. 507 P.2d 387 (Or. 1973).

30. *Id.* at 393 (citations omitted).

31. *Id.* at 394. However, Florida's proposed oppression statute provides a cause of action for anticipated oppressive conduct. See *supra* note 6 for proposed oppression statute.

32. *Baker*, 507 P.2d at 393–94; *see* WILLIAM L. CARY & MELVIN A. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 341 (6th ed. 1988).

how this conduct affects minority investors.[33] In the case of *In re Kemp & Beatley, Inc.*, the New York Court of Appeals held that oppression occurs when a "minority shareholder['s] . . . reasonable expectations in undertaking [a] venture have been frustrated" so that the shareholder is denied an "adequate means of recovering his or her investment."[34] The court in *Kemp & Beatley* noted that these "reasonable expectations" must be objectively communicated to the controlling shareholders.[35] Disappointment of one's "subjective hopes and desires," the court explained, is insufficient to reach a level of oppression.[36]

IV. INVOLUNTARY DISSOLUTION IN FLORIDA

A. Statutory Authority

Florida statutory law permits a shareholder to involuntarily dissolve a corporation in only four instances.[37] Section 607.1430(2)(a) of the Florida Statutes authorizes shareholders to seek judicial dissolution, regardless of the number of shareholders in the corporation, if the directors are deadlocked and unable to reach an agreement concerning the governance of the corporation's affairs, "and irreparable injury to the corporation is threatened or being suffered."[38] Similarly, section 607.1430(2)(b) authorizes dis

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33. *See, e.g., In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984); Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983); *see also* CARY & EISENBERG, *supra* note 33, at 341. For further discussion on judicial interpretations of oppression statutes, see Thompson, *supra* note 2, at 707–16.

34. *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1180 (N.Y. 1984).

35. *Id*. at 1179; *see* Polikoff v. Dole & Clark Bldg. Corp., 184 N.E.2d 792, 796 (Ill. App. Ct. 1962) (noting that failure of an enterprise to realize a profit in the long run may eventually frustrate an investor's reasonable expectations and warrant dissolution).

36. *Kemp & Beatley*, 473 N.E.2d at 1179; *see* Meiselman v. Meiselman, 307 S.E.2d 551, 563 (N.C. 1983) (including in North Carolina's definition of oppression an investor's reasonable expectations formed at the onset of the investment — subject to change over time — and the relationships of all investors in the corporation).

37. *See* 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(2)–(3)). Section 607.1430 also allows the Department of Legal Affairs and a corporation's creditors to bring involuntarily dissolution proceedings against corporations. *Id*. (to be codified at FLA. STAT. § 607.1430(1), (4)).

38. *Id*. (to be codified at FLA. STAT. § 607.1430(2)(a)); *see* Freedman v. Fox, 67 So. 2d 692, 692–93 (Fla. 1953) (denying petition for judicial dissolution of hotel in a deadlock action, where relations among shareholders owning equal shares were strained because defendant refused to repair a television set, offended guests by playing cards, refused to host Christmas parties, and delegated duties to his family); Wofford v. Wofford, 176 So.

solution when deadlocked directors are unable to fill vacant board seats.[39] However, for corporations comprised of thirty-five or fewer shareholders, a shareholder may additionally seek dissolution when the corporation's assets have been "misapplied or wasted, causing material injury to the corporation,"[40] or when the "directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent."[41]

When a judicial dissolution action is instigated, a court may immediately issue an injunction or "appoint a receiver or custodian pendente lite . . . to preserve the corporate assets . . . until a full hearing [is] held."[42] After holding the hearing, if the court approves the appointment of a custodian, the court may direct the custodian to replace the board of directors and manage the corporation's affairs to the benefit of its shareholders and creditors.[43] Alternatively, if a receiver is appointed, the court may authorize the receiver to

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499, 506 (Fla. 1937) (appointing receiver to sell corporate property and divide proceeds for shareholder deadlock and dissension under court's inherent equity power); Chase v. Turner, 560 So. 2d 1317, 1318 (Fla. Dist. Ct. App. 1990) (affirming dissolution of corporation for shareholder impasse); Bartlett v. Caines, 363 So. 2d 574, 575 (Fla. Dist. Ct. App. 1978) (holding that shareholder dissension is insufficient to partition assets of "solvent, viable corporation," even if it is losing money); McLeod v. Ryan-McLeod, Inc., 206 So. 2d 16, 16 (Fla. Dist. Ct. App. 1968) (noting that trial court dissolved corporation under "deadlock" statute); *cf*. Kay v. Key West Dev. Co., 72 So. 2d 786, 788–89 (Fla. 1954) (denying dissolution of corporation for deadlock, but piercing the corporate veil to divide corporation's assets, leaving corporate entity intact). For discussion of what constitutes "irreparable injury," see 2 MICHAEL W. GORDON, FLORIDA CORPORATIONS MANUAL § 27.03, at 11 (1994).

39. 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(2)(b)); *see* Hebert v. Royal Enters., 259 So. 2d 750 (Fla. Dist. Ct. App. 1972) (refusing request for dissolution for failure to elect directors where corporation's stock was not evenly divided between two opposing factions).

40. 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(3)(a)). Prior to June 2, 1994, shareholders could involuntarily dissolve their corporation for the misapplication or waste of corporate assets, regardless of the number of shareholders in the corporation or whether material injury was caused. *See* FLA. STAT. § 607.1430(2)(c) (1993); *cf*. McAllister Hotel, Inc. v. Schatzberg, 40 So. 2d 201, 204 (Fla. 1949) (denying dissolution for shareholder's misapplication of corporate assets where shareholder's actions were not sufficiently egregious). For a discussion of *McAllister Hotel*, see *infra* text accompanying notes 70–81.

41. 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(3)(b)).

42. FLA. STAT. § 607.1431(3) (1993) (amended 1994). Receivers and custodians pendente lite are temporary guardians of the corporation's assets and usually do not conduct any corporate business unless so directed by the court. *Id*.

43. *Id*. § 607.1432(1), (3)(b).

wind up the corporation and liquidate or dispose of its assets.[44] If thereafter, the court determines that either the corporation is deadlocked,[45] the corporate assets have been misapplied or wasted,[46] or a director or controlling shareholder has acted illegally or fraudulently,[47] the court may then "enter a judgment dissolving the corporation."[48] The judgment of dissolution requires the court to wind up

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44. *Id*. § 607.1432(1), (3)(a)(1)–(2); *see* 2 GORDON, *supra* note 38, § 27.03, at 22; *see also* Robert L. Mellen III & Charles T. Brumback, Jr., *Termination of the Corporate Existence*, *in* CORPORATE LAW 4.14–.15 (1981). For discussion of Florida's winding up and liquidation process, see *infra* note 49. Note that a receiver can wind up and liquidate a corporation as directed by the court under § 607.1432(1) prior to the entry of a judgment of dissolution under § 607.1433(2). *Compare* FLA. STAT. § 607.1432(1), (3)(a)(1)–(2) (1993) *with id*. § 607.1433(2). See *infra* notes 45–49 and accompanying text for the circumstance where the winding up and liquidation process occurs after dissolution.

45. 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(2)(a)–(b)).

46. *Id*. (to be codified at FLA. STAT. § 607.1430(3)(a)).

47. *Id*. (to be codified at FLA. STAT. § 607.1430(3)(b)).

48. FLA. STAT. § 607.1433(1) (1993); *see* 2 GORDON, *supra* note 38, § 27.03, at 22. As of June 2, 1994, courts may "upon a showing of sufficient merit" order the appointment of a receiver or custodian pendente lite or a provisional director in lieu of dissolution. 1994 Fla. Sess. Law Serv. 327 § 9 (West) (to be codified at FLA. STAT. § 607.1434(1), (2)). For a discussion of receivers and custodians pendente lite, see *supra* note 42. The provisional director serves as an additional director for the corporation, exercising the same powers as would an elected director. *Id*. § 10 (to be codified at FLA. STAT. § 607.1435(1)). The provisional director is usually less intrusive than a custodian. *See* Proposed Amendment to Florida Statutes, Chapter 607, The Business Law Section Executive Council Meeting 7.F.7 (Sept. 9, 1993) (on file with the *Stetson Law Review*). See *supra* text accompanying note 43 for the powers of a custodian.

As other forms of alternative relief, courts may also order the purchase of the complaining investor's shares or, "upon proof of good cause," grant any other equitable remedy deemed necessary. 1994 Fla. Sess. Law Serv. 327 § 9 (West) (to be codified at FLA. STAT. § 607.1434(3)–(4)). See *infra* note 60 for a discussion of other remedies available to courts sitting in equity. As to the buyout provision, courts cannot order a buyout unless the corporation or its remaining shareholders agree to purchase the petitioning shareholder's stock. *See generally* 1994 Fla. Sess. Law Serv. 327 § 11 (West) (to be codified at FLA. STAT. § 607.1436). Moreover, the corporation and its shareholders have an absolute right to purchase the shares because the petitioning shareholder may not discontinue the dissolution action or "otherwise dispose of [the] shares" within 90 days from the commencement of the dissolution action. *Id*. (to be codified at FLA. STAT. § 607.1436(2)); *see* REVISED MODEL BUSINESS CORP. ACT § 14.34 cmt. 2 (1993) (noting that "[t]he petitioner becomes irrevocably committed to sell his shares").

If the parties to the dissolution action cannot agree upon the fair value of the stock, the court itself may determine the fair market value. 1994 Fla. Sess. Law Serv. 327 § 11 (West) (to be codified at FLA. STAT. § 607.1436(4)). Once the buyout is ordered, the petitioning shareholder loses all rights previously held as a shareholder, except such rights necessary to collect the purchase price of the shares. *Id*. (to be codified at FLA. STAT. § 607.1436(6)). For a discussion of the probability of a statutory buyout, see *infra* notes 108–09.

and liquidate the corporation's business concerns, terminate the corporation's legal existence, and extinguish its corporate franchise.[49] Although the corporation's legal existence is terminated, it is left intact only for the purpose of carrying on the winding up and liquidation process, where legal proceedings such as creditor suits may be brought against the corporation.[50]

B. Involuntary Dissolution as an Equitable Remedy

In addition to the four statutory provisions providing for shareholder dissolution actions, shareholders may seek to have a corporation wound up, liquidated, and dissolved in a court of equity.[51] In *Mills Development Corp. v. Shipp & Head, Inc.*, the Florida Supreme Court held that a court of equity can wind up and liquidate a corporation if the corporate assets are in danger of being mismanaged or lost due to the "mismanagement, collusion, or fraud" of controlling shareholders.[52] The *Mills* court qualified this rule with the requirement that such winding up and liquidation is only appropriate if the corporation has ceased conducting most of its business or is unable to function or attain the purpose for which it was chartered.[53] The *Mills* court further held that a court of equity may require offending shareholders to make an accounting[54] to the minority shareholders

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49. FLA. STAT. §§ 607.1405(1), (4), 607.1433(2) (1993). The process of winding up and liquidating a corporation in Florida includes the collection and disposal of the corporation's assets, the discharge of corporate liabilities, the distribution of corporate property among shareholders, and any "other act necessary to wind up and liquidate business and affairs." *Id.* § 607.1405(1)(a)–(e).

50. *Id.* §§ 607.1405(1), 607.1405(2)(e)–(g), 607.1406.

51. For an exposition of Florida case law similar to that presented within this subpart, see 2 GORDON, *supra* note 38, § 27.03, at 12–20.

52. Mills Development Corp. v. Shipp & Head, Inc., 171 So. 533, 534 (Fla. 1936), *cert. denied*, 305 U.S. 658 (1938). In *Mills*, the controlling shareholders refused to honor a contract that promised minority investors employment and ownership of 49% of the corporation's stock. *Id.* at 533. The court ordered the corporation to issue the stock, enabling the minority shareholders to gain their promised stake and employment in the corporation. *Id.* at 533–34.

53. *Id.* at 534; *see* Tampa Waterworks Co. v. Wood, 121 So. 789 (Fla. 1929) (appointing receiver to wind up and distribute assets on behalf of minority shareholder where officer's legal representative wasted and mismanaged corporate assets during voluntary liquidation of corporation that discontinued its business); Edenfield v. Crisp, 186 So. 2d 545 (Fla. Dist. Ct. App. 1966) (upholding appointment of receiver for inactive corporation where controlling shareholders committed fraud and mismanaged corporation to detriment of minority shareholders).

54. An accounting of interests usually means that controlling shareholders must

of "their legal rights and interests" in the corporation and its assets, or at the request of a minority shareholder, appoint a receiver.[55]

The Florida Supreme Court next addressed the issue of judicial dissolution in *News-Journal Corp. v. Gore*.[56] In *Gore*, a minority shareholder petitioned a court of equity for the liquidation of a corporation because the corporation's majority shareholders compensated themselves excessively.[57] Applying the *Mills* rule, the supreme court reversed the chancellor's order liquidating the corporation's assets.[58] The *Gore* court held that solvent corporations can be dissolved only when the corporation cannot function because of the fraudulent activities or the misappropriation of funds by those in charge.[59] The court reasoned that minority shareholders are adequately protected from corporate mismanagement by means less drastic than dissolution.[60] Therefore, the court enjoined the control-

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return wrongfully squandered monies to minority investors or to the corporation itself. *See* News-Journal Corp. v. Gore, 2 So. 2d 741 (Fla. 1941) (ordering a controlling shareholder to repay the corporation all monies wrongfully taken); Chase v. Turner, 560 So. 2d 1317, 1318, 1321 (Fla. Dist. Ct. App. 1990) (affirming an order of accounting to a shareholder of $22,354.90 in damages for shareholder's loss of income, dividends, and profits).

55. *Mills*, 171 So. at 534; *see* Le Mire v. Galloway, 177 So. 283 (Fla. 1937) (authorizing receiver to order an accounting from controlling shareholders who defrauded and squeezed-out minority shareholder); Continental Nat'l Bldg. & Loan Ass'n v. Miller, 33 So. 404 (Fla. 1902) (appointing receiver to manage corporation where controlling shareholders misappropriated funds from corporation and mismanaged it into insolvency); *cf.* Stone v. Holly Hill Fruit Prods., Inc., 56 F.2d 553, 554 (5th Cir. 1932) (denying appointment of receiver and injunctive relief where minority shareholder did not first seek amends from board of directors).

56. 2 So. 2d 741 (Fla. 1941).

57. *Id.* at 743, 746. The court noted that the shareholder's salaries were grossly "out of proportion to the services rendered." *Id.* at 743. The majority shareholders in *Gore* also usurped a corporate opportunity by purchasing for themselves real property occupied and used by the corporation. *Id.* at 744. As to the real property, the supreme court affirmed the chancellor's order placing the property in trust for the corporation. *Id.* This usurpation, however, was not a factor in the chancellor's decision to liquidate the company. *Id.* at 745–46.

58. *Id.* at 746.

59. *Id.* at 745–46 (quoting Mills Dev. Corp. v. Shipp & Head, Inc., 171 So. 533, 534 (Fla. 1936), *cert. denied*, 305 U.S. 658 (1938)).

60. *Id.* at 745. Other forms of judicial relief protecting minority shareholders include accounting to the corporation of misappropriated monies, annulling "corporate acts" prejudicing minority shareholders, rescinding stock options which dilute minority interests, and ordering payment of damages. Thompson, *supra* note 2, at 725–26. For a listing of similar alternative remedies, see Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395–96 (Or. 1973).

Florida courts additionally allow minority shareholders to sue majority sharehold-

ling shareholders from collecting future salaries and ordered an accounting to the corporation of all amounts paid in excess of a reasonable salary.[61]

The case of *Finn Bondholders, Inc. v. Dukes*[62] further illustrates the Florida judiciary's reluctance to order dissolution. In *Finn Bondholders*, minority shareholders sued a controlling shareholder[63] for mismanaging their corporation and for improperly diverting corporate funds.[64] Applying the *Mills* rule, the Florida Supreme Court denied the minority shareholders' petition for receivership, liquidation, and dissolution.[65] The controlling shareholder's misconduct was not so egregious as to require dissolution.[66] The court found no evidence of fraud; nor had the corporate purpose been frustrated.[67] The *Finn Bondholders* court noted, nonetheless, that if shareholders "have substantial reason to question the manner of operation of the corporation, the court will always be ready to hear them."[68]

The Florida Supreme Court partially modified the *Mills* rule three years later in *McAllister Hotel, Inc. v. Schatzberg*.[69] In *McAllister Hotel*, minority shareholders sought corporate dissolution

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ers derivatively and directly for breach of fiduciary duty. *See* Granicz v. Morse, 603 So. 2d 103, 104 (Fla. Dist. Ct. App.), *rev. denied*, 613 So. 2d 7 (Fla. 1992) (acknowledging that controlling shareholders have a fiduciary duty to refrain from controlling corporation to the disadvantage of minority investors); Donofrio v. Matassini, 503 So. 2d 1278, 1279–82 (Fla. Dist. Ct. App. 1987) (allowing shareholder to bring a direct suit against corporate directors for terminating her employment and colluding to deprive her of a return on her investment); Tillis v. United Parts, Inc., 395 So. 2d 618, 619 (Fla. Dist. Ct. App. 1981) (giving minority shareholders a cause of action for breach of fiduciary duty where majority shareholders improperly disbursed dividends to themselves alone); Biltmore Motor Corp. v. Roque, 291 So. 2d 114, 115 (Fla. Dist. Ct. App. 1974) (revoking a new issue of stock to majority shareholders that diluted minority's interest where stock issuance violated majority's fiduciary duty owed to minority); Karnegis v. Lazzo, 243 So. 2d 642, 643 (Fla. Dist. Ct. App. 1971) (providing direct cause of action for minority where majority allegedly compensated themselves excessively); Hackley v. Oltz, 105 So. 2d 20, 22–23 (Fla. Dist. Ct. App. 1958) (allowing derivative action on behalf of minority shareholders where majority allegedly paid themselves excessive salaries and bonuses).

61. *Gore*, 2 So. 2d at 746.

62. 26 So. 2d 802 (Fla. 1946).

63. The controlling shareholder also held the corporate offices of director and president. *Id*. at 802.

64. *Id*. at 803. Specifically, the controlling shareholder disbursed corporate funds to other corporations owned by him and his family. *Id*.

65. *Id*. at 804.

66. *Id*.

67. *Id*.

68. *Id*.

69. 40 So. 2d 201 (Fla. 1949).

because a controlling shareholder drew a $300,000 salary for services valued at $36,000 and used "his power and dominance to `freeze' the complaining stockholders out of the corporation by fraudulent and illegal absorption of corporate funds."[70] The chancellor in the lower court ruled in favor of the minority stockholders and appointed a receiver to wind up and liquidate the corporation's assets.[71] The Florida Supreme Court reversed, ruling that other equitable remedies short of receivership would equally protect the minority shareholders.[72] The court recommended that the chancellor enjoin the excessive compensation payments and wrongful disbursements.[73]

The *McAllister Hotel* court's decision against corporate dissolution rested on a two-step analysis considering both the conduct and solvency of the controlling shareholder.[74] First, the court held that dissolution is only appropriate where a majority shareholder imminently endangers the corporate assets or seriously threatens the corporate existence through actual fraud or "mismanagement amounting to fraud upon the rights of a minority stockholder."[75] Applying this test, a variation of the *Mills* test, the court denied dissolution because the majority shareholder simply misapplied and wrongfully squandered corporate profits.[76] This conduct, though

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70. *Id*. at 203–04.

71. *Id*. at 202–03.

72. *Id*. at 202, 204; *see* Jones v. Harvey, 82 So. 2d 371, 372 (Fla. 1955) (stating that "the power to appoint a receiver for a corporation should be exercised only where exigencies demand it and no other protection to applicants can be devised by the court"); Recarey v. Rader, 320 So. 2d 28, 30 (Fla. Dist. Ct. App. 1975) (holding that the appointment of a receiver is a "last-resort remedy," utilized only when no other viable remedy exists); *cf*. Stone v. Holly Hill Fruit Prods., Inc., 56 F.2d 553, 554 (5th Cir. 1932) (denying injunctive relief where officers drew excessive salaries and mismanaged firm because minority shareholders had not first sought amends from the corporation's board of directors and shareholders). For other forms of judicial relief, see *supra* note 60.

73. *McAllister Hotel*, 40 So. 2d at 204.

74. *See id*. at 203.

75. *Id*.; *see* Conlee Constr. Co. v. Krause, 192 So. 2d 330 (Fla. Dist. Ct. App. 1966) (remanding petition for dissolution to determine possible existence of fraud or mismanagement which imminently endangered minority shareholder's rights); *cf*. 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(3)(a)) (requiring "material injury" before dissolution is allowed for the misapplication or waste of corporate assets); Insurance Management, Inc. v. McLeod, 194 So. 2d 16, 17 (Fla. Dist. Ct. App. 1966) (noting that appointment of a receiver depends upon the "facts and circumstances of [a] particular case").

76. *McAllister Hotel*, 40 So. 2d at 204.

wrongful, did not evidence mismanagement.[77]

The second prong of the *McAllister Hotel* analysis evaluated the solvency of the offending shareholder.[78] Absent fraud or mismanagement amounting to fraud, the supreme court held that a corporation can be dissolved only if the offending shareholder is insolvent.[79] Applying this new test, the court denied dissolution because the culpable shareholder was "fabulously wealthy."[80] The court noted that dissolution would have been appropriate had this shareholder been insolvent.[81]

The *McAllister Hotel* two-step analysis was subsequently applied in *Jones v. Harvey*.[82] In *Harvey*, a minority investor sought relief from the alleged misconduct of two majority shareholders.[83] The petitioning shareholder claimed that the majority shareholders mismanaged the company by hiring incompetent employees and allowing these employees to drink, steal, and gamble on the business's premises.[84] This oversight, the minority shareholder claimed, reduced corporate profits and jeopardized the business's liquor licenses.[85] Therefore, the minority shareholder requested that the court appoint a receiver to dissolve the corporation and liquidate its assets.[86]

The *Harvey* court quashed the chancellor's order placing the

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77. *See id*.

78. *See id*. at 203.

79. *Id*. at 203–04; *see* Strong v. Broward County Kennel Club, Inc., 65 F. Supp. 407, 410 (S.D. Fla. 1946) (denying petition for dissolution where complaint alleged no fraud or mismanagement and offending shareholder was solvent); Papazian v. Kulhanjian, 78 So. 2d 85, 85 (Fla. 1955) (denying appointment of receiver where no "fraud, insolvency, mismanagement, or other *meritorious considerations*" were proven) (emphasis added); Conlee Constr. Co. v. Krause, 192 So. 2d 330, 331–32 (Fla. Dist. Ct. App. 1966) (reversing order appointing receiver to wind up corporation for protection of minority stockholder's rights where petitioning shareholder made no allegation of insolvency nor presented any evidence of mismanagement); *see also* Deauville Corp. v. Blount, 25 So. 2d 812, 813 (Fla. 1946) (denying minority shareholder's petition for dissolution of a trust in absence of fraud and where controlling shareholder was solvent); *cf*. Armour Fertilizer Works v. First Nat'l Bank, 100 So. 362, 365 (Fla. 1924) (holding that insolvency of a controlling shareholder is not by itself sufficient to justify appointment of a receiver).

80. *McAllister Hotel*, 40 So. 2d at 204.

81. *Id*.

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

83. *Id*. at 371–72.

84. *Id*. at 371.

85. *Id*.

86. *Id*. at 372.

corporation in receivership and halted the liquidation and dissolution proceedings.[87] The Florida Supreme Court reasoned that such remedies were unnecessary because there was no evidence of fraud or self-dealing.[88] Applying the second prong of the *McAllister Hotel* test, the court denied the requested relief because the controlling shareholders were solvent.[89]

Lastly, Florida's courts have refused to judicially dissolve corporations for squeeze-outs.[90] In *Keck v. Schumacher*, a widow assumed her deceased husband's positions as a director and officer of his corporation.[91] Unhappy with the widow's performance, the corporation's remaining shareholders voted her out of office.[92] This left the widow without income.[93] Consequently, the widow instigated a dissolution and liquidation action against the corporation.[94] Florida's Second District Court of Appeal denied the petition for dissolution of the corporation and the liquidation of its assets.[95] The court found that the majority's conduct, though improper, was not so egregious as to require dissolution.[96] The court granted no other relief since the widow did not seek another remedy.[97]

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87. *Id*.

88. *See id*.

89. *Id*.

90. *See* Chase v. Turner, 560 So. 2d 1317, 1319–20 (Fla. Dist. Ct. App. 1990). In *Chase*, a shareholder successfully dissolved his corporation under Florida's deadlock statute. *Id*. at 1318. The shareholder additionally received an award of $22,354.90 for loss of income, dividends, and profits in the corporation. *Id*. at 1318–19. The court remedied the squeeze-out by requiring an accounting. *Id*. at 1318–20; *see* Le Mire v. Galloway, 177 So. 283 (Fla. 1937) (authorizing receiver to order an accounting from controlling shareholders who defrauded and squeezed-out minority shareholder); *see also* Kredian v. BCK Land, Inc., 145 So. 2d 550, 550 (Fla. Dist. Ct. App. 1962) (denying claim for dissolution where controlling shareholder allegedly attempted to squeeze out a minority investor by issuing new stock, absent a showing that this conduct actually mismanaged the corporation); *cf.* McAllister Hotel, Inc. v. Schatzberg, 40 So. 2d 201, 204 (Fla. 1949) (recommending that a freeze-out be cured by injunctive relief).

91. Keck v. Schumacher, 198 So. 2d 39, 41 (Fla. Dist. Ct. App.), *cert. denied*, 204 So. 2d 210 (Fla. 1967).

92. *Id*.

93. *Id*.

94. *Id*.

95. *Id*. at 43.

96. *Id*. The widow also sought dissolution and division of the corporation's assets under an "agreement" that provided for the liquidation of the corporation upon any shareholder's death. *Id*. at 42. Interpreting the "express intent of the parties," the court held that the "agreement" was merely an advisory document rather than a binding contract. *Id*.

97. *See id*. at 41, 43.

In this situation, the court might have awarded damages to the widow had she either brought a direct action for breach of fiduciary duty or sought relief under the court's inherent equitable power. The damages could have reflected a sum equal to the fair market value of the widow's interest in the corporation or a sum comparable to the salary she would have received as a director and officer.[98]

In review, Florida case law gives minority shareholders the power to petition a court for the winding up, dissolution, and liquidation of a corporation, as well as the appointment of a receiver when controlling shareholders commit fraud or mismanage a corporation in a fraudulent manner. However, such conduct must imminently endanger the corporate assets or seriously threaten the corporate existence. For conduct that is wrongful but not so egregious as to constitute fraud or mismanagement amounting to fraud, courts entertain dissolution actions only if the offending shareholders are insolvent. Florida courts, nonetheless, rarely order the dissolution or liquidation of a solvent corporation for majority conduct that prejudices minority shareholders.[99] In most if not all instances, oppressive behavior has been remedied through the use of equitable relief.

V. EFFECTIVENESS OF INVOLUNTARY DISSOLUTION

A. The Advantages

Advocates of a statutory right to dissolve close corporations for oppression advance numerous reasons in support of such a statute.

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98. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 664–65 (Mass. 1976) (awarding damages to minority shareholder in a freeze-out action commensurate to unjust enrichment of controlling shareholders and salaries minority would have received as an officer and director); *see also* Chase v. Turner, 560 So. 2d 1317, 1318 (Fla. Dist. Ct. App. 1990) (affirming trial court's award of monetary damages for shareholder's loss of income, dividends, and profits). For a listing of other forms of judicial relief that protects minority shareholders, see *supra* note 60.

99. *See supra* notes 52–97 and accompanying text. Only one appellate court has published an opinion approving of the judicial dissolution of a solvent corporation for a majority shareholder's mistreatment of a minority shareholder. Search of LEXIS, States library, Florida file (Aug. 7, 1994); *see* Levy v. Gourmet Masters, Inc., 214 So. 2d 82 (Fla. Dist. Ct. App. 1968). In *Levy*, the chancellor ordered a corporation's assets liquidated because the controlling shareholder attempted to deprive a minority investor of his rights by improperly amending the corporate charter. *Id*. at 83. The court, however, set aside the liquidation because the controlling shareholder committed fraud in the administration of the sale. *Id*. at 84.

First, they contend that oppression statutes allow minority shareholders to recover their investment in their corporations if they are squeezed-out; subjected to harsh, burdensome, or wrongful conduct; or have their reasonable expectations frustrated.[100] Second, proponents suggest that dissolution statutes deter controlling shareholders from engaging in unreasonable behavior.[101] Specifically, they argue that the minority shareholder's threat of corporate dissolution decreases the likelihood that other shareholders will engage in squeeze-outs.[102]

Proponents further suggest that many shareholders in close corporation are " `little people,' unsophisticated in business and financial matters."[103] These shareholders may lack access to the counsel of competent business lawyers.[104] Without legal advice, these investors are unable to contractually protect themselves against oppressive conduct and squeeze-outs.[105] Oppression statutes, therefore, serve as consumer protection for the unsophisticated investor. If investors are incapable of protecting their investment, the court does it for them.

Furthermore, proponents insist that dissolution rarely occurs in situations where shareholders simply wish to withdraw their capital

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100. *See* Marilyn B. Cane, *Oppressive Conduct: Should It Be Grounds for Judicial Dissolution?*, THE Q. REP. (The Fla. Bar Business Law Section, Tallahassee, Fla.), Dec. 1993, at 20–21; Thompson, *supra* note 2, at 707–14; *see also* Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 85–86 (1987).

101. John S. Martel, *Protecting the Interests of Minority Shareholders*, *in* MINORITY STOCKHOLDER RIGHTS: CORPORATE PLANNING AND LITIGATION STRATEGY 235, 250–52 (John S. Martel ed., 1978); *see* Cane, *supra* note 100, at 21; *see also* Haynsworth, *supra* note 100, at 85–93; Thompson, *supra* note 2, at 707–26.

102. Martel, *supra* note 101, at 50–52; *see* Cane, *supra* note 100, at 21; *see also* Haynsworth, *supra* note 100, at 85–93; Thompson, *supra* note 2, at 707–26.

103. *See In re* Topper, 433 N.Y.S.2d 359, 365 (App. Div. 1980) (citations omitted); Cane, *supra* note 100, at 21.

104. Cane, *supra* note 100, at 20–21. If the shareholders decide to hire one attorney to draft their shareholders' agreement, the attorney should disclose all potential conflicts of interest which may arise in the joint representation. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:02. The better practice is to have each participant represented by a different attorney. *Id.*; *see* Brennan v. Ruffner, No. 93-0151, 1994 Fla. App. LEXIS 7400, at *6–*7 (July 27, 1994) (noting that Florida lawyers can represent both a corporation and its shareholders in drafting shareholders' agreements if the attorney believes no conflict exists, but recognizing that there is "an inherent conflict of interest between the rights of the individual shareholder and the corporation").

105. Cane, *supra* note 100, at 21. See *infra* text accompanying notes 184–262 for discussion of minority protection via the shareholders' agreement.

and invest it elsewhere.[106] Similarly, supporters assert that disagreements over corporate policies seldom influence courts to order dissolution.[107] Quantitatively, one advocate has found that courts refuse to order corporate dissolution approximately seventy-three percent of the time.[108] Empirical studies also reveal that courts order buyouts in lieu of dissolution more frequently than in the past.[109] Nonetheless, as a deterrent to frivolous litigation, proponents suggest that oppression statutes should provide for the recovery of attorney fees by the defendant shareholders, in the event a bad faith dissolution action is unsuccessful.[110]

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106. Cane, *supra* note 100, at 21; Thompson, *supra* note 2, at 715.

107. Cane, *supra* note 100, at 21; Thompson, *supra* note 2, at 715.

108. From 1984 to 1985, Professor Harry J. Haynsworth found that in 20 states codifying the dissolution action for oppression, courts ordered dissolution only 27% of the time. Haynsworth, *supra* note 100, at 51–53. As to the residual 73%, courts ordered buyouts 54% of the time and equitable or no relief 19% of the time. *Id*. at 51–53.

Notably, the Florida Statutes, which do not authorize dissolution for oppressive conduct, allow courts to order buyouts of complaining investors' shares. *See* 1994 Fla. Sess. Law Serv. 327 §§ 9, 11 (West) (to be codified at FLA. STAT. §§ 607.1434(3), 607.1436). For a discussion of judicially ordered buyouts in Florida, see *supra* note 48.

109. Professor Haynsworth compared his study, which found that buyouts occurred 54% of the time, to one conducted by Professors J.A.C. Hetherington and Michael P. Dooley from 1960 to 1976. Haynsworth, *supra* note 100, at 53–54. In Professors Hetherington and Dooley's survey, buyouts occurred 5.6% of the time and dissolution occurred 29.6% of the time. *Id*. at 54 (citing J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 62 app. at 70–75 (1977)); *see* Thompson, *supra* note 2, at 708, 718 (noting that the use of buyouts by courts as an alternative to dissolution has increased in popularity).

Interestingly, Professors Hetherington and Dooley found in their survey that courts were less inclined to order dissolution in cases where complaining shareholders owned small interests in the corporation. Hetherington & Dooley, *supra* note 6, at 31–32. Professor Charles W. Murdock, who analyzed Hetherington and Dooley's study, concluded that shareholders with the least amount of leverage in a corporation were "the least likely to obtain relief." 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, 445 (1990).

110. Cane, *supra* note 100, at 21; Martel, *supra* note 101, at 253. Deterrence can further be accomplished by requiring the petitioning shareholder to post security bonds for the payment of attorney fees. *Id*. The Florida Business Corporation Act currently provides for the recovery of attorney fees by any party to an involuntary dissolution action if an opposing party has acted "arbitrarily, frivolously, vexatiously, or not in good faith." 1994 Fla. Sess. Law Serv. 327 § 8 (West) (to be codified at FLA. STAT. § 607.1431(4)). Prior to this amendment, courts awarded attorney fees under their inherent equity power. *See* Chase v. Turner, 560 So. 2d 1317, 1320 (Fla. Dist. Ct. App. 1990) (awarding attorney fees in action where shareholder successfully dissolved corporation for deadlock and recovered monetary damages for squeeze-out). See *infra* note 162 for criti-

Lastly, and most importantly, advocates of oppression statutes believe that the private interests of minority shareholders "outweigh society's interests in the preservation of corporations."[111] Potential economic injury to the corporation's employees and shareholders, as well as to the general public, is subordinated to the rights of an oppressed few.[112]

B. An Inadequate Remedy

1. Vagueness

Perhaps the most common criticism of oppression statutes is that the term "oppression" is vague and subject to differing interpretations.[113] The ambiguity of oppression is best exemplified by the two different definitions of oppression found in *Baker v. Commercial Body Builders, Inc.*[114] and *In re Kemp & Beatley, Inc.*[115] In *Baker*, the court defined oppression as the "burdensome, harsh and wrongful conduct" of controlling shareholders.[116] In contrast, the court in *Kemp & Beatley* defined oppression as the frustration of a minority investor's "reasonable expectations."[117] This dichotomy is further illustrated by each court's analysis. The *Baker* court focused on the conduct of controlling shareholders,[118] while the *Kemp & Beatley* court examined how this conduct affected minority investors.[119]

Additionally, the terms "oppression" and "reasonable expectations" are vague because they are inconstant. In *Meiselman v. Meiselman*, the North Carolina Supreme Court noted in its defini-

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cism of the effectiveness of attorney fees provisions as a deterrent of frivolous judicial dissolution proceedings.

111. Robert J. Eckert & David R. Wellens, *A Comparison of the Close Corporation Statutes of Delaware, Florida and New York*, 23 U. MIAMI L. REV. 515, 529 (1969).

112. *See infra* text accompanying notes 138–56; *cf. In re* Radom & Neidorff, Inc., 119 N.E.2d 563, 565 (N.Y. 1954) (noting that dissolution is usually granted where it benefits stockholders and causes little harm to the public).

113. *See* Hetherington & Dooley, *supra* note 6, at 12; *cf.* Cane, *supra* note 100, at 20.

114. 507 P.2d 387 (Or. 1973).

115. 473 N.E.2d 1173 (N.Y. 1984).

116. *Baker*, 507 P.2d at 393 (quoting Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128, 134); *see supra* text accompanying note 30.

117. *Kemp & Beatley*, 473 N.E.2d at 1180; *supra* text accompanying note 34–36.

118. *See Baker*, 507 P.2d at 393; *supra* text accompanying note 32.

119. *See Kemp & Beatley*, 473 N.E.2d at 1180; *supra* text accompanying notes 33–34.

tion of oppression that reasonable expectations are susceptible to change over time.[120] The *Meiselman* court also noted that an investor's reasonable expectations should reflect the relationships of all investors in a corporation.[121] Under this analysis, the reasonable expectations test logically applies to shares received by inheritance[122] or gift.[123] Unfortunately, dissension arises when the reasonable expectations of a founder of a business differ from the reasonable expectations of those who are generations removed.[124] This dissension exacerbates when heirs refuse to work for the corporation.[125]

With regard to the application of the reasonable expectations analysis to heirs, jurisdictions diverge over whether a testator's intent should influence the application of the test to an heir. In *Ferber v. American Lamp Corp.*, the Pennsylvania Supreme Court held that a testator's intent is a factor in determining the reasonable expectations of a recipient of inherited shares.[126] However, in *Gimpel v. Bolstein*, a New York court held that the reasonable expectations test does not apply to an heir "two generations removed" from the original investor.[127] Hence, as the composition of a corporation's investors change over time, the reasonable expectations of each investor likewise vary.

This uncertainty as to what constitutes oppression is further illustrated by the decisions of the Illinois Supreme Court. This court has held that the term "oppression" is neither synonymous with illegal or fraudulent conduct nor necessarily denotative of misman-

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120. 307 S.E.2d 551, 563 (N.C. 1983).

121. *Id*.

122. *See* Fox v. 7L Bar Ranch Co., 645 P.2d 929, 936 (Mont. 1982) (noting that heir had reasonable expectation in corporate stock inherited from parent); *In re* Smith, 546 N.Y.S.2d 382 (App. Div. 1989) (applying reasonable expectations test to descendant who inherited shares from parent); *see also* 2 O'NEAL & THOMPSON, *supra* note 7, § 7:15, at 91–92, 95 n.33.

123. *See In re* Schlachter, 546 N.Y.S.2d 891 (App. Div. 1989) (applying reasonable expectations test to shares received by gift); *see also* 2 O'NEAL & THOMPSON, *supra* note 7, § 7:15, at 91–92, 95 n.33.

124. *See* 1 O'NEAL & THOMPSON, *supra* note 8, § 2:03 (discussing the plight of the "inactive shareholder").

125. 1 *id*.

126. Ferber v. American Lamp Corp., 469 A.2d 1046, 1050 (Pa. 1983); *see* 2 O'NEAL & THOMPSON, *supra* note 7, § 7:15, at 91–92, 96 n.34.

127. Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1019 (App. Div. 1984); *see* 2 O'NEAL & THOMPSON, *supra* note 7, § 7:15, at 91–92, 96 n.34.

agement in the corporation or misapplication of assets.[128] However, in other instances, the Illinois Supreme Court has found that excessive executive salaries[129] and the misapplication of assets[130] constitute oppression. Consequently, as this illustrates, there is no universal bright-line test to define what oppression is. Corporate mismanagement or misapplication of assets may constitute oppression in some cases, but not in others.

Similar confusion as to the definition of oppression would arise in Florida if an oppression statute is adopted. First, in *McAllister Hotel, Inc. v. Schatzberg*, the Florida Supreme Court held that a court of equity can dissolve a corporation if a controlling shareholder imminently endangers the corporation or seriously threatens its corporate existence through fraud or mismanagement amounting to fraud.[131] However, the court noted that wrongful conduct that merely "misapplies" corporate assets is not sufficiently culpable to warrant dissolution.[132] Section 607.1430(3)(a) of the Florida Statutes, nevertheless, allows judicial dissolution for misapplication or waste of corporate assets if such action causes material injury to the corporation.[133] In light of these distinctions, courts will increasingly become unable to draw a line between fraudulent and wrongful conduct as well as distinguish between the misapplication of corporate assets that causes material injury to the corporation and misapplication that is not sufficiently culpable.

Second, shareholders in Florida would be able to bring oppression actions if they merely "reasonably expected" directors or those in control of a corporation to act in an oppressive manner.[134] Giv

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128. *See* Gidwitz v. Lanzit Corrugated Box Co., 170 N.E.2d 131, 138 (Ill. 1960); Central Standard Life Ins. Co. v. Davis, 141 N.E.2d 45, 50 (Ill. 1957); *see also* Murdock, *supra* note 109, at 456.

129. *See* Gray v. Hall, 295 N.E.2d 506, 509 (Ill. 1973); *see also* Murdock, *supra* note 109, at 457.

130. *See* Ross v. 311 North Cent. Ave. Bldg. Corp., 264 N.E.2d 406, 411–13 (Ill. 1970); *see also* Murdock, *supra* note 109, at 457.

131. McAllister Hotel, Inc. v. Schatzberg, 40 So. 2d 201, 204 (Fla. 1949); *see supra* text accompanying notes 70–81.

132. *McAllister Hotel*, 40 So. 2d at 204; *see supra* text accompanying notes 76–77.

133. *See* 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(3)(a)). Since the legislature enacted § 607.1430(3)(a) after the *McAllister Hotel* decision, the statute controls, unless the court is sitting in equity. *See* 2 GORDON, *supra* note 38, § 27.03, at 22 n.81 (stating that "statutory compliance is not required" for courts in equity).

134. See *supra* note 6 for proposed oppression statute. Recall that one of the earliest

en the vagueness of the term oppression, courts will find it extremely difficult to define "reasonably expected" oppression — egregious conduct that has not yet occurred.

Lastly, the vagueness of the term "oppression" is illustrated in the recent analyses of two commentators. One commentator suggests that the reasonable expectation analysis should consider ethics, business purpose, non-shareholder employees, public health or safety, and other social responsibilities.[135] Another commentator suggests that dissolution laws governing close corporations should foster "caring" among shareholders.[136] This "caring," the commentator notes, should permit shareholders to attend "to their own needs and desires" as well as to other shareholders' "needs and desires."[137] Thus, these proposed modifications of the reasonable expectations test, which may vary with changing political and social climates, demonstrate that the test is inconstant.

2. Economic Costs

Another concern associated with judicial dissolution are its high economic costs.[138] Principally, dissolution involves a "permanent loss of going-concern value[]."[139] A pro rata distribution of a corporation's

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courts interpreting oppression, *Baker v. Commercial Body Builders, Inc.*, noted that mere anticipation of future shareholder misconduct does not constitute oppression. *See supra* text accompanying note 31. Divergence over whether future oppressive conduct constitutes oppression illustrates the term's vagueness and inconstancy.

135. Sandra K. Miller, *Should the Definition of Oppressive Conduct by Majority Shareholders Exclude a Consideration of Ethical Conduct and Business Purpose?*, 97 DICK. L. REV. 227, 234–36 (1993). Professor Miller has noted that an "unduly expansive interpretation of the reasonable expectation test could inhibit legitimate business decisions and operate as an injustice to the majority who in good faith attempts to define the parameters of its bargain with the minority." Sandra K. Miller, *A Note on the Definition of Oppressive Conduct by Majority Shareholders: How Can the Reasonable Expectation Standard Be Reasonably Applied in Pennsylvania?*, 12 J.L. & COM. 51, 78 (1992) [hereinafter Miller, *Pennsylvania*].

136. Terry A. O'Neill, *Self Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646, 708 (1992). Professor O'Neill has suggested that close corporation law should more closely resemble partnership law, so that shareholders have the power to dissolve corporations at will. *Id*. at 697, 702.

137. *Id*.

138. Shelby D. Green, *"Reasonable Expectations" Define Board Power to Liquidate a Solvent Close Corporation in Bankruptcy*, 41 DRAKE L. REV. 421, 445 (1992).

139. Robert S. McLean, Comment, *Minority Shareholders' Rights in the Close Corporation Under the New North Carolina Business Corporation Act*, 68 N.C. L. REV. 1109,

assets provides the shareholder with an asset's "dead" value, a lower value than could be obtained if the asset had been sold as part of a going business.[140] This loss of a corporation's going-concern value diminishes the total amount of capital the shareholder could reinvest in other enterprises.[141] Legal costs and attorney fees further reduce the investor's net recovery.[142] Interestingly, these legal costs associated with dissolution are higher than the costs of hiring a competent lawyer to draft a shareholders' agreement to avoid oppression.[143]

Additionally, successful dissolution proceedings adversely affect parties who are not directly involved in the litigation. Employees of the corporation lose jobs when the corporation's assets are liquidated and distributed piecemeal.[144] Suppliers to the corporation also lose a valued customer.[145] Further, the prices of consumer goods may increase due to the loss of a competitor in the market.[146]

Moreover, if the mismanagement of the corporation has decreased the business's value, dissolution "place[s] oppressed shareholders in a worse position than the continuation of business with a change in management."[147] The market price for a corporation that is poorly managed or has failed to earn a profit is far less than the market price of well-managed and profitable enterprises.[148] On the other hand, a court's refusal to order dissolution weakens the minor-

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1112 (1990) (quoting Earnest L. Folk, III, *Revisiting the North Carolina Corporation Law: The Robinson Treatise Reviewed and the Statute Reconsidered*, 43 N.C. L. REV. 768, 868–71 (1965)); *see* Green, *supra* note 138, at 445.

140. Murdock, *supra* note 109, at 447, 451–52.

141. Green, *supra* note 138, at 445 n.138.

142. Hetherington & Dooley, *supra* note 6, at 28.

143. O'Neal, *supra* note 17, at 124; *see* McAllister Hotel, Inc. v. Schatzberg, 40 So. 2d 201, 204 (Fla. 1949) (noting that the costs connected with a dissolution of a corporation are exceedingly high); Tampa Waterworks Co. v. Hazard, 174 So. 403 (Fla. 1936) (holding a $35,000 fee paid to receiver and receiver's attorney not excessive); *see also* Tabsch v. Nojaim, 548 So. 2d 851, 852 (Fla. Dist. Ct. App. 1989) (administering equitable relief in lieu of receivership when it is more economical).

144. *See* 2 GORDON, *supra* note 38, § 27.03, at 20; Hetherington & Dooley, *supra* note 6, at 28. *But cf.* Murdock, *supra* note 109, at 447 (concluding that involuntary dissolution has no impact on whether a business will continue under new ownership).

145. *See* 2 GORDON, *supra* note 38, § 27.03, at 20; Hetherington & Dooley, *supra* note 6, at 28.

146. *See* Hetherington & Dooley, *supra* note 6, at 28.

147. Rosalie W. O'Brien, *Business and Corporate Law*, 25 U. RICH. L. REV. 627, 645 (1991).

148. *See id.*

ity's ability to demand a buyout of their shares by the corporation.[149] Controlling shareholders would be, therefore, less inclined to purchase the minority's shares if the minority previously failed to persuade a court that the majority's behavior was sufficiently egregious to warrant dissolution.[150]

As to the actual judicial sale of a corporation, an artificially low bid may be tendered if the only bidder in an auction is the offending shareholder.[151] A receiver appointed to liquidate the corporation may be inclined to sell the corporation to the controlling shareholders at any price they offer.[152] For example, in the case of *In re Radom & Neidorff, Inc.*, a controlling shareholder threatened to dissolve a corporation and purchase it at a price below its fair market value if one of the shareholders did not tender her shares.[153] The court, however, denied the petition for dissolution because it obviously did not benefit all stockholders in the corporation.[154]

Thus, the aforementioned ramifications of corporate dissolution indicate that dissolution is not the best solution for the problem of minority shareholder oppression. In effect, dissolution actions serve mainly to force buyouts and valuations of petitioning shareholders' capital.[155] A more efficient and less expensive alternative for removing a minority's investment is available to the minority investor.[156]

3. Potential Abuse

The existence of the statutory right to dissolve a profitable corporation for oppression could also be abused by shareholders.[157] First, Florida's shareholder dissolution statute, section

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149. Hetherington & Dooley, *supra* note 6, at 28.

150. *See id*.

151. *Id*.

152. Murdock, *supra* note 109, at 452.

153. *In re* Radom & Neidorff, Inc., 119 N.E.2d 563, 564 (N.Y. 1954).

154. *Id*. at 564–65; *see* Murdock, *supra* note 109, at 449.

155. Hetherington & Dooley, *supra* note 6, at 34.

156. *Cf. id*. at 6, 35, 50 (concluding that "involuntary dissolution . . . is costly and ineffectual," but suggesting as a solution to the oppression dilemma that minority shareholders be given an on-going statutory right to demand a buyout of their shares for any reason). See *supra* note 60 for alternative forms of judicial relief. For discussion of contractual protection of minority shareholders, see *infra* text accompanying notes 184–262.

157. Charles M. Elson, *Oppressive Conduct: Should It Be Grounds for Judicial Dissolution?*, THE Q. REP. (The Fla. Bar Business Law Section, Tallahassee, Fla.), Dec. 1993, at 20.

607.1430(2)–(3), requires no minimum level of stock ownership for the commencement of dissolution actions.[158] Therefore, a shareholder owning one share could theoretically petition a court for corporate dissolution. Second, the dissolution option gives shrewd minority stockholders "an open-ended `club'" to intimidate controlling shareholders and increase the minority's bargaining power.[159] Threatening controlling shareholders with an involuntary dissolution action could coerce majority shareholders into purchasing the minority's shares at a premium in order to avoid the threatened dissolution action.[160] Conversely, controlling shareholders may threaten minority stockholders with a dissolution action to coax a minority into selling out prematurely.[161] These potential abuses attendant to involuntary dissolution statutes thusly interfere with the corporate principle of majority rule.[162]

4. Interference with the Business Judgment Rule

Oppression statutes additionally interfere with the operation of the business judgment rule.[163] Business decisions that pass scrutiny under the business judgment rule could be in some instances held to

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158. *See* 1994 Fla. Sess. Law Serv. 327 § 7 (West) (to be codified at FLA. STAT. § 607.1430(2)-(3)). In contrast, New York requires a petitioning shareholder to own at least 20% of the corporation's outstanding shares. N.Y. BUS. CORP. LAW § 1104-a(a)(1) (McKinney 1986).

159. Elson, *supra* note 157, at 20.

160. *See id*.

161. See *supra* text accompanying notes 153–54 for discussion of *In re* Radom & Neidorff, Inc., 119 N.E.2d 563, 564 (N.Y. 1954), where a majority shareholder threatened a minority investor with a dissolution action in an effort to force the minority to sell her shares for less than fair market value.

162. *See* Green, *supra* note 138, at 449; *see also* Elson, *supra* note 157, at 20 (noting that oppression statutes could also interfere with shareholders' agreements). Advocates of an oppression statute propose that such abuse could be deterred by allowing defendant shareholders to recover attorney fees for frivolous actions. *See* authorities cited *supra* note 108. However, if the shareholder's goal is to obtain a buyout, the risk of having to pay attorney fees may be small in comparison to the benefit that can be gained from the return of capital. For a discussion of Florida's statutory buyout provisions, see *supra* note 48.

163. Florida's business judgment rule is codified in § 607.0830 of the Florida Statutes. Section 607.0830 requires directors to discharge their duties in good faith, "[w]ith the care [of] an ordinarily prudent person . . . under similar circumstances" and "[i]n a manner he reasonably believes to be in the best interests of the corporation." FLA. STAT. § 607.0830(1) (1993). Directors acting in this manner are "not liable for any action taken as a director." *Id*. § 607.0830(5).

frustrate a shareholder's reasonable expectations. For example, in New York,[164] the court in *In re Topper* held that employee/shareholders maintain a reasonable expectation of profit even if they are discharged from employment with their corporation for cause.[165] In *Gimpel v. Bolstein*, another New York court held that a shareholder/employee, terminated for embezzling corporate funds, was entitled to receive a fair return on his investment in the corporation.[166] The *Gimpel* court determined that the majority would not be acting in a fair manner if it failed to repurchase the employee's shares or pay him dividends.[167]

Keck v. Schumacher,[168] a Florida case, depicts a similar, but unsuccessful, challenge to the business judgment rule. In *Keck*, a widow assumed her deceased husband's position as a director and officer of a corporation.[169] The corporation's board paid her a salary equivalent to that of other directors.[170] However, since she was untrained for the assumption of these duties, the remaining shareholders voted the widow out of office.[171] In order to make up for her lost income, the widow instigated a dissolution and liquidation action.[172] The Second District Court of Appeal denied the petition.[173] The court found that the majority's conduct was not sufficiently culpable to require dissolution.[174]

Had an oppression statute protecting an investor's reasonable expectations been in effect at the time of the *Keck* decision, the outcome would have been different. The termination of the widow's

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164. New York's business judgment rule is codified in N.Y. BUS. CORP. LAW § 717 (McKinney 1994). See Murdock, *supra* note 109, at 465–68 for a more in-depth discussion of the conflict between New York's business judgment rule and its dissolution statute.

165. *In re* Topper, 433 N.Y.S.2d 359, 362 (App. Div. 1980).

166. Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1017, 1020 (App. Div. 1984). Ironically, this individual had the power to instigate involuntary dissolution proceedings against the very corporation from which he embezzled. *Id*. at 1016–17.

167. *Id*. at 1022. Applying the *Baker* court's definition of oppressive conduct — that which is "burdensome, harsh, and wrongful" — the *Gimpel* court labeled the majority's conduct unfair because the shareholders agreed to disburse income through employment salaries instead of dividends. *Id*. at 1020. See *supra* text accompanying notes 29–32 for a discussion of the oppression analysis in *Baker v. Commercial Body Builders, Inc.*

168. 198 So. 2d 39 (Fla. Dist. Ct. App.), *cert. denied,* 204 So. 2d 210 (Fla. 1967).

169. *Id*. at 41.

170. *Id*.

171. *Id*.

172. *Id*.

173. *Id*. at 43.

174. *Id*.

employment frustrated her reasonable expectations of obtaining a return on her husband's stock. Faced with this frustration, the court might have ordered dissolution and possibly liquidation, even though the board's decision complied with the required standards of the business judgment rule.[175]

The *Topper*, *Gimpel*, and *Keck* decisions demonstrate how oppression statutes hinder the exercise of legitimate business decisions.[176] These decisions relegate courts to second guessing board actions. The net effect of an oppression statute will therefore decrease corporate productivity and encourage directors to make litigation-averse decisions instead of rational ones.

5. Decreased Judicial Efficiency

Finally, the enactment of an oppression statute in Florida will decrease judicial efficiency. Courts will expend valuable resources determining which party is at fault.[177] Moreover, courts will be forced to distinguish between bad bargains and actual oppressive conduct.[178] Historically, courts in Florida have refused to substi

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175. At the time of the *Keck* decision, the court could not have ordered a buyout of the widow's shares. *See* Corlett, Killian, Hardeman, McIntosh & Levi, P.A. v. Merritt, 478 So. 2d 828, 831 (Fla. Dist. Ct. App. 1985) (holding that in the absence of statutory authority, a buyout may only be ordered if a corporate charter or shareholder agreement provides for such action), *rev. denied*, 488 So. 2d 68 (Fla. 1986). However, under Florida's new shareholder buyout provision, the court could have alternatively ordered a buyout of the widow's shares. *See* 1994 Fla. Sess. Law Serv. 327 §§ 9, 11 (West) (to be codified at FLA. STAT. §§ 607.1434(3), 607.1436). See *supra* note 48 for a discussion of shareholder buyouts. For other equitable remedies the *Keck* court could have used to recompense the widow, see *supra* text accompanying note 98.

176. *See* Memorandum from David S. Felman, Chairman, Corporations & Securities Committee, The Florida Bar 2 (Oct. 28, 1993) (on file with the *Stetson Law Review*). Mr. Felman has suggested to the Florida Bar's Corporations and Securities Committee that if an oppression statute is enacted in Florida, actions of majority shareholders that comport with Florida's business judgment rule should be immune from oppression proceedings. *Id*. For Florida's business judgment rule, see *supra* note 163. Attorneys in New York are considering amending their statutes to provide similar immunity for controlling shareholders. *See* Memorandum from Richard E. Miller et al., Kurzman, Karelsen & Frank 4 (Jan. 21, 1992) (on file with the *Stetson Law Review*).

177. *See* Hetherington & Dooley, *supra* note 6, at 35. If a court orders a buyout of the minority's interest in lieu of dissolution, the court could also expend time valuing the investor's shares. *See* 1994 Fla. Sess. Law Serv. 327 § 11 (West) (to be codified at FLA. STAT. § 607.1436(4)). For a discussion of the complexities in judicial valuations of minority interests, see Murdock, *supra* note 109, at 471–89.

178. *See* Miller, *Pennsylvania*, *supra* note 135, at 77; *see also* Simpson v. Young, 369 So. 2d 376, 376–77 (Fla. Dist. Ct. App. 1979) (noting that a court may not substitute its

tute their own judgment for that of shareholders[179] or relieve shareholders from contractually bad bargains.[180] Consequently, no involuntary dissolution case regarding the oppression of minority shareholders has reached Florida's appellate level since 1975.[181] Furthermore, case law indicates that equitable relief is the most appropriate and effective remedy for redressing the wrongs inflicted upon minority shareholders.[182] This remedy is available to minority shareholders under a court's inherent equitable power.

In review, the addition of an oppression statute to section 607.1430 of the Florida Statutes is unnecessary. Such an addition will bestow upon the judiciary the role of a paternalistic protector of unsophisticated investors.[183] Although judicial protection is appropriate for unwary individuals in products liability cases or where fraud is perpetuated upon innocent parties, it is not appropriate where someone merely frustrates the reasonable expectations of another or treats that individual unfairly. Safeguarding shareholders who are not capable of protecting themselves in arm's length transactions imposes costs on individuals other than inept shareholders. The affected group includes other shareholders, employees of the corporation, and the general public. If the oppression of minority shareholders is to be avoided, the avoidance must originate from the source who bears the risk of losing their investment — the minority shareholder.

VI. CONTRACTUAL PROTECTION

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own judgment for that of a shareholder, nor may it relieve that shareholder from a bad bargain).

179. Yates Ranch Oil & Royalties v. Jones, 100 F.2d 419 (5th Cir. 1938); Strong v. Broward County Kennel Club, 65 F. Supp. 407, 409 (S.D. Fla. 1946); Simpson v. Young, 369 So. 2d 376, 376–77 (Fla. Dist. Ct. App. 1979); *see* Dukes v. Finn Bondholders, Inc., 26 So. 2d 802, 804–05 (Fla. 1946).

180. *Simpson*, 369 So. 2d at 376–77; *cf*. Mann v. Price, 434 So. 2d 943 (Fla. Dist. Ct. App. 1983) (construing contract in accordance with "the intention of the parties").

181. Search of LEXIS, States library, Florida file (Aug. 7, 1994). The last decision was Recarey v. Rader, 320 So. 2d 28 (Fla. Dist. Ct. App. 1975). In *Recarey*, the Third District Court of Appeal denied the appointment of a receiver even though a corporate officer mismanaged the corporation and unjustly enriched himself. *Id*. at 29–30. The absence of cases regarding judicial dissolution for oppressive behavior at Florida's appellate level negates any need for change to the Florida Statutes.

182. *See supra* notes 52–98 and accompanying text.

183. *See* Hetherington & Dooley, *supra* note 6, at 16.

A. Florida's Shareholders' Agreement Statute

Shareholders caught in a squeeze-out or an oppression dilemma usually either want to withdraw their capital from the corporation or alter the balance of power within the corporation itself because of policy disputes.[184] Both of these options can be achieved without judicial dissolution.[185] The most economical alternative is the shareholders' agreement.[186] Shareholders' agreements deter oppressive conduct,[187] reduce shareholder disputes,[188] and decrease litigation.[189] Among all of the statutes in the Florida Business Corporation Act, section 607.0732, enacted in 1993,[190] specifically provides investors in corporations with one hundred or fewer shareholders the right to contractually protect themselves against oppressive behavior in the governance of their corporation.[191]

First, section 607.0732 allows shareholders to "restrict the dis-

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184. *Id*. at 27, 29. A shareholder may also use a dissolution action as a club to threaten other shareholders into selling out to him. *See supra* notes 153–62 and accompanying text.

185. *See* Hetherington & Dooley, *supra* note 6, at 27.

186. *See* Elson, *supra* note 157, at 20; *see also* 2 O'NEAL & THOMPSON, *supra* note 7, at § 9:05 (citing Alex Elson, *Shareholders' Agreements: A Shield for Minority Shareholders of Close Corporations*, 22 BUS. LAW. 449, 451 (1967) for the proposition that the "well-drawn" shareholders' agreement is "[t]he best protection that can be extended a client"). See generally Hetherington & Dooley, *supra* note 6, for a criticism of contractual protection of oppressed minority shareholders.

187. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:05 n.4 (quoting Letter from Donald S. Day, Buffalo, N.Y., Sept. 24, 1959).

188. For discussion on how shareholders' agreements reduce dissension, see *infra* text accompanying notes 209–62. Surprisingly, one commentator has concluded that shareholders' agreements may actually increase deadlock and dissension in close corporations. Thompson, *supra* note 2, at 705. Professor Thompson cited investors' and lawyers' inability to anticipate every corporate dispute as the cause of this possible deadlock and dissension. *Id*.

189. For discussion of how shareholders' agreements decrease litigation, see *infra* text accompanying notes 209–62. Unfortunately, the enforcement of shareholders' agreements may give rise to voluminous litigation. *See* Hetherington & Dooley, *supra* note 6, at 16 n.42. Nevertheless, litigation concerning arm's length transactions is preferred over situations in which shareholders seek judicial protection because of inadequate bargaining.

190. *See* 1993 Fla. Laws ch. 93-281, § 20, 2640 (codified as amended in 1994 Fla. Sess. Law Serv. 327 § 2 (West)).

191. FLA. STAT. § 607.0732(1) (1993) (amended 1994). Section 607.0732 was modeled after the REVISED MODEL BUSINESS CORP. ACT § 7.32 (1993). See *infra* notes 210–12, 246, 249 for other statutes in the Florida Business Corporation Act that afford contractual protection to shareholders.

cretion or powers of [their] board of directors."[192] Second, the statute permits shareholders to contractually agree to the distribution of corporate earnings, even if not proportional to shares individually owned.[193] Third, it allows shareholders to predetermine who shall serve as directors or officers in the corporation as well as set their terms of office and method of selection and removal.[194] Shareholders may also enter into any arrangement concerning the employment of "any shareholder, director, officer, or employee of the corporation."[195] Additionally, section 607.0732 allows shareholders to contractually agree to any "transfer or use of [corporate] property" between these individuals and the corporation.[196]

The newly enacted section 607.0732 further enables shareholders to contractually govern "the exercise or division of voting power by the shareholders and directors."[197] Such an agreement may also provide for the utilization of weighted voting rights and director proxies.[198] Similarly, shareholders may transfer to any person the authority to manage the corporation or to resolve intracorporate disputes regarding shareholder or director deadlock.[199] The statute also authorizes shareholders to provide for the voluntary dissolution

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192. FLA. STAT. § 607.0732(1)(a) (1993) (amended 1994); *see* Clark v. Dodge, 199 N.E. 641 (N.Y. 1936) (upholding contract sterilizing the board by promising director salary and job where parties to agreement held all shares in the corporation); *cf.* McQuade v. Stoneham, 189 N.E. 234 (N.Y. 1934) (annulling a shareholders' agreement sterilizing board of directors where not all shareholders in the corporation were parties to contract). A board sterilization agreement restricts the power and discretion of the directors to run the affairs of the corporation. *See* Manson v. Curtis, 119 N.E. 559, 561–62 (N.Y. 1918). Any such sterilization agreement under § 607.0732 of the Florida Statutes relieves the sterilized directors of liability but imposes such liability on the persons with whom the corporate powers are vested. FLA. STAT. § 607.0732(5) (1993) (amended 1994). See *infra* text accompanying notes 201–04 for notice requirements of sterilization agreements in Florida.

193. FLA. STAT. § 607.0732(1)(b) (1993) (amended 1994). Such agreements must conform to FLA. STAT. § 607.06401 (1993), which specifies permissive methods of dividend distribution. According to this statute, dividend payments may only be made if the insolvency test and the balance sheet test are met. *Id.* § 607.06401(3); *see* 3 GORDON, *supra* note 38, § 34.03.

194. FLA. STAT. § 607.0732(1)(c) (1993) (amended 1994).

195. *Id.* § 607.0732(1)(e).

196. *Id.*

197. *Id.* § 607.0732(1)(d).

198. *Id.*

199. *Id.* § 607.0732(1)(f).

of their corporation "at the request of one or more . . . shareholders

or upon the occurrence of a specified event or contingency."[200]

Shareholders' agreements created under section 607.0732 must be set forth in a corporation's articles of incorporation or bylaws and approved by the shareholders when the agreement is made or, alternately, "set forth in [a separate] written agreement" and signed by all persons who are shareholders at the time the agreement is made known to the corporation."[201] Moreover, to prevent potential investors from being unfairly surprised, stock certificates for the corporation must conspicuously note the existence of any shareholders' agreement.[202] If notice is not published on the stock certificate, the agreement is not invalid if the purchasing party has "knowledge of the existence of the agreement."[203] Parties purchasing without actual notice have either ninety days after discovery of the agreement or two years after the stock sale to rescind the purchase.[204]

Notably, section 607.0732 appears to be exhaustive of the types of shareholders' agreements authorized under the statute. Section 607.0732 lists specific types of shareholders' agreements which are effective, even though they may contradict other provisions in the Florida Business Corporation Act.[205] Moreover, contractual arrangements subject to this statute can continue for as long as shareholders provide. Such agreements are terminable or amendable only by agreement of all shareholders "at the time of termination or amend-

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200. *Id*. § 607.0732(1)(g).

201. 1994 Fla. Sess. Law Serv. 327 § 2 (West) (to be codified at FLA. STAT. § 607.0732(2)(a)(1)–(2)); *see* Aztec Motel, Inc. v. State *ex rel.* Faircloth, 251 So. 2d 849 (Fla. 1971) (holding that a corporate charter is a contract at law); Collins v. Collins Fruit Co., 189 So. 2d 262, 265 (Fla. Dist. Ct. App. 1966) (upholding shareholder employment contract in a close corporation where all shareholders were parties to the agreement).

One disadvantage of contractual arrangements is that courts often hold them unenforceable if the corporation fails to properly elect close corporation status. 2 O'NEAL & THOMPSON, *supra* note 7, § 10:02. Professor O'Neal blamed this imprudence on inexperienced lawyers. 2 *id*. However, there is no current provision in the Florida Statutes requiring election of close corporation status to take benefit of the shareholders' agreement statute. *See generally* FLA. STAT. § 607.0732 (1993) (amended 1994).

202. FLA. STAT. § 607.0732(3) (1993) (amended 1994).

203. *Id*.

204. *Id*.

205. *Id*. § 607.0732(1); *see* 1993 Fla. Laws ch. 281, at 2633 (West) (stating that § 607.0732 specifies the contents for shareholders' agreements). *But cf*. 1 GORDON, *supra* note 38, § 10.10, at 30 (opining that the statute may "incorporate considerable flexibility" with regard to share transfer restrictions). Since the Author believes that § 607.0732 is not inclusive of other types of agreements, the shareholders' agreements discussed *infra* in pp. 298–307 reference the appropriate, permissive Florida Statute when § 607.0732 is not applicable.

ment," unless otherwise agreed,[206] or when the corporation goes public.[207] Lastly, the existence of a shareholders' agreement does not "impos[e] personal liability on any shareholder," even if the contract provides that the corporation is to be treated as a partnership.[208]

Hence, the Florida Statutes, particularly section 607.0732, give shareholders in closely held corporations the power to contractually protect themselves against squeeze-outs, unexpected occurrences, and oppression. With this alternative, involuntary dissolution is unnecessary.

B. Specific Contractual Measures Affording Protection

1. Buyout Provisions

The most common forms of shareholders' agreements are the stock purchase agreement and the buy and sell agreement.[209] Under these agreements, disgruntled shareholders can arrange for either the corporation or its shareholders to purchase their shares when they wish to withdraw capital.[210] Specifically, stock purchase agreements require a corporation to purchase a withdrawing investor's shares.[211] Buy and sell agreements require the remaining shareholders to purchase the withdrawing stockholder's shares.[212]

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206. FLA. STAT. § 607.0732(2)(b) (1993) (amended 1994). Similarly, shareholders' agreements which merely direct how shareholders will vote their shares are not subject to a time limit. *Id*. § 607.0731(1). However, voting trusts — arrangements that allow a trustee to vote or act for one or more shareholders — are subject to a ten-year time limit. *Id*. § 607.0730(1)–(2).

207. *Id*. § 607.0732(4).

208. *Id*. § 607.0732(6).

209. *See* 2 O'NEAL & THOMPSON, *supra* note 7, § 9:03–:04.

210. 2 *id*.; *see* FLA. STAT. § 607.0627(1), (4)(a)–(b) (1993) (authorizing buyout provisions in "agreement[s] among shareholders . . . and between shareholders and the corporation"). Reasonable buyout provisions are upheld in Florida. Marvin E. Barkin, *Deadlock and Dissolution in Florida Closed Corporations: Litigation and Planning*, 13 U. MIAMI L. REV. 395, 418 (1959) (citing Weissman v. Lincoln Corp., 76 So. 2d 478 (Fla. 1954)).

211. 1 WILLIAM H. PAINTER, PAINTER ON CLOSE CORPORATIONS § 3.14 (3d ed. 1991); *see* FLA. STAT. § 607.0627(1), (4)(b) (1993) (authorizing shareholders' agreements to obligate corporation to purchase withdrawing shareholder's stock); *see also id*. § 607.0631(1) (allowing a corporation to acquire its own shares). For a stock purchase agreement form, see 1 GORDON, *supra* note 38, § 10.24, at 60–62.

212. 1 PAINTER, *supra* note 211, § 3.1.4; *see* FLA. STAT. § 607.0627(1), (4)(b) (1993) (authorizing shareholders' agreements to obligate "other persons" to purchase a withdrawing shareholder's stock). For a buy and sell form, see HARRY J. HAYNSWORTH, A.L.I. - A.B.A. COMM. ON CONTINUING PROFESSIONAL EDUC., ORGANIZATIONAL FORMS FOR THE CLOSELY HELD CORPORATION § 14.04, at 14-66 to 14-68 (1989).

These contractual arrangements, or buyout provisions as they are commonly known, are useful in several contexts.[213] First, they allow minority shareholders to demand a buyout of their shares when controlling shareholders act adversely to minority interests.[214] For example, if a controlling shareholder instigates a squeeze-out against a minority shareholder, the minority could invoke a buyout provision to demand that the majority purchase the minority's shares. Secondly, buyout provisions allow investors to withdraw capital from a corporation when the investor's employment with the corporation is terminated or if the individual can no longer work for the corporation.[215] This type of provision protects the shareholder who is removed from office arbitrarily or for cause.

Sensible buyout provisions also protect shareholders when the corporation or its shareholders refuse to purchase a withdrawing investor's shares. Shareholders are protected if the buyout arrangement allows the shareholder to instigate voluntary dissolution proceedings against the corporation.[216] Although voluntary dissolution has the same effect as involuntary dissolution, at least in the former

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213. A disadvantage of buyouts is that they can financially burden either the corporation or the remaining shareholders. Haynsworth, *supra*, note 100, at 30.

214. Elson, *supra* note 157, at 20.

215. *See* 2 O'NEAL & THOMPSON, *supra* note 7, § 9:03; O'Neal, *supra* note 17, at 145; *see also* Moles v. Gotti, 433 So. 2d 1380 (Fla. Dist. Ct. App. 1983) (noting existence of contract requiring a corporation to purchase a terminated employee's shares); *cf.* Corlett, Killian, Hardeman, McIntosh & Levi, P.A. v. Merritt, 478 So. 2d 828, 834 (Fla. Dist. Ct. App. 1985) ("Where an employee who purchases . . . shares for valuable consideration either lacks the foresight or the bargaining power to insist upon a redemption agreement in the event of his resignation, it is not incumbent upon the courts to protect him from his own improvidence or lack of strength."), *rev. denied*, 488 So. 2d 68 (Fla. 1986).

216. Elson, *supra* note 157, at 20. Section 607.0732 of the Florida Statutes permits shareholders agreements to provide for the dissolution of a corporation in the event of contingencies. FLA. STAT. § 607.0732(1)(g) (1993) (amended 1994); *see* Kyle v. Stewart, C.A., 360 F.2d 753 (5th Cir. 1966) (upholding written liquidation agreement signed by all stockholders); *cf.* Balcor Property Management, Inc. v. Ahronovitz, 634 So. 2d 277 (Fla. Dist. Ct. App. 1994). In *Ahronovitz*, a withdrawing shareholder instigated a civil suit against the corporation's remaining shareholders to enforce a buy and sell agreement. *Id*. at 278–79. This investor obtained a default against the corporation's shareholders. *Id*. at 279. Subsequently, these remaining shareholders conveyed the corporation's assets to another corporation. *Id*. The withdrawing investor then brought civil conspiracy and theft charges against these shareholders. *Id*. Unfortunately, the court denied the suit. *Id*. at 280. The court found that the investor did not have a property or creditor interest in the corporation's assets because he failed to turn the default into a judgment. *Id*. To protect against this type of misfortune, the investor could have recovered his capital had he inserted a voluntary dissolution clause in his shareholders' agreement.

situation all shareholders in the corporation agree that dissolution is appropriate for settling intracorporate disputes.

Buyout provisions may further provide for the valuation of the withdrawing investor's shares. Valuation clauses require investors' shares to be valued at a predetermined price or by an agreed upon method.[217] Alternatively, if the shareholders are unable to reach an agreement as to the shares' value, the contract can provide for an appraisal by an independent third party, perhaps an arbitrator.[218]

2. Restrictive Provisions

Shareholders' agreements minimize dissension in corporations if they include non-compete covenants.[219] A sound non-compete agreement prohibits shareholders from either investing in a competing business or working for it.[220] Similarly, a non-compete contract may provide a right of first refusal to limit the transferability of the corporation's shares.[221] A right of first refusal obligates the shareholder to offer his shares to the corporation or its remaining shareholders before selling the stock to others.[222] Consequently, the right of first refusal prevents the withdrawing investor's stock from being purchased by investors who do not intend to actively participate in the management of the business or those who may squeeze-

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217. See Moles v. Gotti, 433 So. 2d 1380 (Fla. Dist. Ct. App. 1983), for a contract requiring a corporation to purchase an employee's stock at fair market value if employee worked longer than five years, but in the event employee worked five years or less, shares were to be purchased at the price employee paid for the stock.

218. *See* 2 O'NEAL & THOMPSON, *supra* note 7, § 9:05; Elson, *supra* note 157, at 20.

219. *See* O'Neal, *supra* note 17, at 144.

220. *Id*; *see* FLA. STAT. § 607.0732(1)(e) (1993) (amended 1994) (allowing shareholders to modify the conditions of employment of any shareholder or employee in the corporation). See *supra* text accompanying notes 195–96 for discussion of § 607.0732(1)(e). *See also* Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623 (Fla. Dist. Ct. App. 1982) (upholding non-compete agreement as to employees, even if agreement lacks mutuality during contract's formation).

221. *See* FLA. STAT. § 607.0627(1), (4)(a) (1993) (authorizing rights of first refusal in shareholders' agreements); *see also* Weissman v. Lincoln Corp., 76 So. 2d 478, 480 (Fla. 1954) (noting that corporations may place restrictions on shareholders' stock); Hanes v. Watkins, 63 So. 2d 625, 626 (Fla. 1953) (containing shareholders' agreement providing right of first refusal to remaining shareholders); McTeague v. Treibits, 388 So. 2d 309 (Fla. Dist. Ct. App. 1980) (containing a contract providing right of first refusal to both corporation and shareholders). For a right of first refusal form, see HERBERT SCHLAGMAN, FORMS OF COMMERCIAL AGREEMENTS §§ 4-38.13 to 4-40 (1988).

222. *See* O'NEAL & THOMPSON, *supra* note 8, § 7.05, at 14.

out minority investors.[223] Stock restrictions may also require the corporation or its shareholders to purchase the withdrawing shareholder's stock.[224]

3. Minority Veto Power

Shareholders' agreements designed to prevent oppressive conduct and squeeze-outs should also contain unanimity or supermajority voting provisions.[225] These arrangements ensure that minority stockholders have a voice in the corporate decision-making process.[226] With regard to shareholder actions, such as the election of the board of directors or the amendment of articles of incorporation, unanimity and supermajority provisions provide minority shareholders with veto power over the actions of controlling shareholders.[227] As for director actions, a veto provides the minority shareholder who serves as a director a guarantee that the corporation will continue to employ him in some capacity, particularly as an officer.[228] Vetoes also prohibit corporate officers and directors from

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223. *See* O'Neal, *supra* note 17, at 144; *see also* FLA. STAT. § 607.0627(1), (4)(d) (1993) (providing that stock restrictions in shareholders' agreements may prevent the transfer of shares to designated persons).

224. *See supra* notes 209–18 and accompanying text.

225. *See* 2 O'NEAL & THOMPSON, *supra* note 7, § 9:08. FLA. STAT. § 607.0732(1)(a), (d) (1993) (amended 1994) gives shareholders the power to restrict the authority of a corporation's board of directors and modify the voting powers of shareholders and directors. *See supra* text accompanying notes 192, 197. These provisions are certainly broad enough to allow supermajority and unanimity voting. *Cf.* Blanchard v. Commonwealth Oil Co., 116 So. 2d 663 (Fla. Dist. Ct. App. 1959) (dissolving corporation where shareholders' agreement led to deadlock because minority shareholders were given equal representation on board for 10 years).

226. *See* 2 O'NEAL & THOMPSON, *supra* note 7, § 9:08.

227. 2 *id*.; *see* 1 GORDON, *supra* note 38, § 10.07. In addition to authorization under § 607.0732(a), (d) for unanimity and supermajority shareholder voting, FLA. STAT. §§ 607.0725(5), 607.0728(1) (1993) also provide for such voting arrangements. The difference between the statutes is that § 607.0732 voting provisions may be embodied in a written agreement while § 607.0725 voting requirements must be set forth in the articles of incorporation. *Compare* FLA. STAT. §§ 607.0725(5), 607.0728(1) (1993) *with id*. § 607.0732(a), (c)–(d) (amended 1994). Although minority vetoes prevent oppression, the veto must be used reasonably. *See* Smith v. Atlantic Properties, Inc., 422 N.E.2d 798 (Mass. App. Ct. 1981) (holding that unreasonable use of minority veto power can result in breach of fiduciary duties owed by minority shareholder to controlling shareholders).

228. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:08; *see* 1 GORDON, *supra* note 38, § 10.05. *See* FLA. STAT. § 607.0732(a), (d) (1993) (amended 1994) (allowing restriction and modification of director voting in shareholders' agreement); *cf. id.* § 607.0824(3) (providing for unanimity and supermajority voting by directors if provided in articles of incorpo-

changing their compensation packages unless unanimous approval is obtained.[229] Thus, unanimity and supermajority provisions prevent the majority from oppressing minority shareholders or prejudicing their interests.

4. Employment Contracts

A fourth type of shareholders' agreement which prevents oppression is the employment contract.[230] To ensure prolonged employment with the corporation, shareholders should provide in an agreement a minimum salary for themselves and a guarantee to be employed for a specified number of years.[231] An adequate term of employment in this type of contract is fifteen to twenty years.[232] For additional protection, minority shareholders can require that their salary be increased proportionally with increases in controlling

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ration or bylaws).

Another alternative guaranteeing the shareholder a position on the board is to issue the shareholder an entire class of stock and allow that class to elect a certain allotment of directors. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:08. This ensures that each class of stock within the corporation is represented by a director. 2 *id*; *see* FLA. STAT. § 607.0732(c) (1993) (amended 1994) (allowing shareholders' agreements to establish how directors will be selected); *cf. id.* § 607.0601(3)(a) (authorizing special voting rights for specific classes of stock if so provided in articles of incorporation); *id*. § 607.0804 (giving voting groups the power to elect one or more directors if so provided in articles of incorporation).

229. *See* O'Neal, *supra* note 17, at 144–45.

230. Section 607.0732(1)(e) gives shareholders the power to enter into employment contracts. FLA. STAT. § 607.0732(1)(e) (1993) (amended 1994); *see supra* text accompanying note 196; *see also* Collins v. Collins Fruit Co., 189 So. 2d 262 (Fla. Dist. Ct. App. 1966) (holding that corporations have an implied power to enter into employment contracts with shareholders for the provision of a yearly salary, length of service, and division of profits).

231. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:07. See Hanes v. Watkins, 63 So. 2d 625, 625–26 (Fla. 1953) for a shareholders' agreement providing a reasonable salary for the minority shareholder and requiring that the shareholder use "best efforts" in running the corporation in a "business-like manner." *See* Sunday v. Balari, 542 So. 2d 485 (Fla. Dist. Ct. App. 1989) (allowing action for breach of contract where shareholders' agreement promised shareholder a salary, car, and three-year term of employment).

In Florida, employment "for an indefinite term is terminable at the will of either the employee or employer," unless collateral consideration is given by the employee at the formation of a contract. Lurton v. Muldon Motor Co., 523 So. 2d 706, 708–09 (Fla. Dist. Ct. App. 1988). Collateral consideration is consideration given to the employer in addition to the employee's services. *See id*.; *see also* Chatelier v. Robertson, 118 So. 2d 241, 244 (Fla. Dist. Ct. App. 1960).

232. 1 PAINTER, *supra* note 211, § 4.1.3.

shareholders' salaries.[233] Alternatively, in lieu of a salary, the employment contract may provide for the compensation of shareholders by paying them a percentage of the corporate profits.[234]

As another precaution, shareholders may want to include in an employment arrangement a guarantee for a pension for the duration of their lives.[235] To guard against potential compensation abuses, maximum salary levels should be set to protect minority shareholders from excessive executive salaries or waste of corporate assets.[236] In the event the shareholder is wrongfully terminated from employment and the remaining shareholders draw salaries in excess of reasonable compensation, a clause in an employment contract can require that a sum of money defined as a "constructive dividend" be paid to the terminated employee.[237]

One caveat of employment contracts, however, is that they cannot be specifically enforced in Florida.[238] Therefore, an aggrieved employee's remedy lies in an action for breach of contract.[239] Hence, employees should provide for "severance pay or liquidated damages" in their contract in the event their employment is terminated.[240] Such severance pay, or golden parachutes, "avoids . . . dispute as to whether the employee was discharged for cause."[241] Lastly, employment arrangements can provide for the recovery of attorney fees or court costs by discharged employees if they have to go to court to

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233. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:07.

234. 2 *id*. FLA. STAT. § 607.0732(1)(b) (1993) (amended 1994) allows shareholders to link compensation to percentages. See *Hanes*, 63 So. 2d at 625–26, for a shareholders' agreement dividing corporate profits equally, "notwithstanding the percentage of stock owned by each [shareholder]." *See also* Ennis v. Warm Mineral Springs, Inc., 203 So. 2d 514 (Fla. Dist. Ct. App. 1967) (noting existence of shareholders' agreement providing for division of profits on percentage basis).

235. O'Neal, *supra* note 17, at 145; *see Lurton*, 523 So. 2d at 708 (noting existence of a pension plan for shareholder/employee).

236. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:12.

237. Thompson, *supra* note 2, at 725–26.

238. Sunday v. Balari, 542 So. 2d 485 (Fla. Dist. Ct. App. 1989) (denying specific enforcement of contract providing shareholder with salary, car, and three-year term of employment).

239. *Id*. at 486; *see* Mulzer v. Jacob Agay H., 426 So. 2d 1049 (Fla. Dist. Ct. App.) (noting that damages are the appropriate remedy for breach of contract claims brought against employers), *rev. denied*, 438 So. 2d 833 (Fla. 1983).

240. *Id*.

241. 1 PAINTER, *supra* note 211, § 4.1.3 n.5. For a discussion of the ethical conflicts regarding the drafting of shareholder arrangements and employee contracts by one attorney, see *supra* note 104.

compel the corporation to pay their pledged compensation.[242]

5. Compulsory Dividends

Effective shareholders' agreements which avoid squeeze-outs should also include provisions requiring the corporation to declare dividends when the corporation's source of dividends grows beyond a designated level.[243] For the corporation which regularly declares dividends, a shareholders' agreement may provide that the officers or directors draw no salary if the corporation fails to declare dividends.[244] If the controlling shareholders are withholding dividends, the contractual agreement can bestow on minority shareholders the power to then "elect a majority of the directors."[245] With increased representation on the board, the minority can check majority oppression before it occurs, ensuring that dividends are fairly distributed to all shareholders.

6. Preemptive Rights

Shareholders' agreements further check majority oppression if they contain a clause providing for the issuance of preemptive rights.[246] Issuing more stock to minority shareholders upon the hap-

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242. See Allen v. Laabs, 567 So. 2d 53, 54 (Fla. Dist. Ct. App. 1990), for an example of a clause of this nature.

243. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:06. Section 607.0732(1)(b) authorizes shareholders to contractually agree to the distribution of corporate earnings in a manner consistent with § 607.06401. FLA. STAT. § 607.0732(1)(b) (1993) (amended 1994). These disbursements do not have to be distributed according to the percentage of stock owned. *Id*. For statutory permissible dividend tests, see *supra* note 193.

244. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:06.

245. 2 *id*. § 9:06. Section 607.0732(1)(c) allows shareholders to determine who shall be their directors and their manner of selection. FLA. STAT. § 607.0732(1)(c) (1993) (amended 1994). Shareholders may also alter the shareholders' and directors' voting powers. *Id*. § 607.0732(1)(d); *see supra* text accompanying notes 194, 197–98.

246. *See* 3 GORDON, *supra* note 38, § 31.01. If the corporation is to issue preemptive rights, a clause in the articles of incorporation must state that "`the corporation elects to have preemptive rights' (or words of similar import)." FLA. STAT. § 607.0630(1)–(2) (1993). If no other details are provided, then the preemptive rights must be granted on a fair and uniform basis. *Id*. § 607.0630(2)(a). Additionally, the preemptive rights cannot be granted for director or officer compensation, issued within six months after the date of incorporation, or sold for anything except money. *Id*. § 607.0630(2)(c). However, if the articles of incorporation provide otherwise or reference a shareholder's agreement also providing otherwise, then these restrictions are not applicable. *See id*. § 607.0630(2); 3 GORDON, *supra* note 38, § 31.02, at 5. For further discussion of § 607.0630 and for a preemptive rights form, see generally 3 *id*. § 31.

pening of certain contingencies protects investors against dilution of their control or interest in the corporation.[247] For example, a preemptive right provision could allow minorities to purchase more stock if corporate earnings fall below a specified level.[248] Similarly, a preemptive right clause could force the corporation to issue minority shareholders preferred stock[249] when earnings decline, ensuring that they are first in line to receive dividends.[250] This preferred stock removes minority shareholders from some of the risks they previously faced as owners of common stock and provides them with regular income.[251] Moreover, the issuance of the preemptive right does not have to be limited to reductions in earnings; it may be granted on other agreed upon contingencies.[252]

7. Protecting Beneficiaries

Shareholders' agreements can further avoid the oppression or squeeze-out of individuals who inherit or receive as gifts corporate stock. To ensure that a corporation continues to operate as a family business, a shareholders' agreement can provide that a decedent's heir or a donor's beneficiary has the power to nominate a director to replace the bequeathing director.[253] A provision of this nature assures that heirs or beneficiaries have a voice in the management of

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247. *See* 2 O'NEAL & THOMPSON, *supra* note 7, § 9:12; *see also* Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 396 (Or. 1973) (noting existence of preemptive rights as alternative to dissolution). To be effective, preemptive rights must apply to all types of stock in the corporation. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:12.

248. Sonitrol Holding Co. v. Marceau Investissements, 607 A.2d 1177 (Del. 1992).

249. If preferred stock is to be issued, the corporation's articles of incorporation must specify the classes of shares and designate each class dissimilarly. FLA. STAT. § 607.0601(1) (1993)

250. Martel, *supra* note 101, at 199; *see* FLA. STAT. § 607.0732(b) (1993) (amended 1994) (allowing shareholders' agreements to "[g]overn[] the authorization or making of distributions"); *cf. id.* § 607.0601(3)(d) (1993) (authorizing corporations to pay dividends to owners of preferred stock prior to distribution to other classes if so provided in articles of incorporation).

251. *See* Martel, *supra* note 101, at 199.

252. *See* FLA. STAT. § 607.0630(2) (1993) (authorizing preemptive rights "to the extent the articles of incorporation provide"); *see also* 3 GORDON, *supra* note 38, § 31.02.

253. *See* Galler v. Galler, 203 N.E.2d 577, 580 (Ill. 1964); *see also* FLA. STAT. § 607.0732(c) (1993) (amended 1994) (providing that shareholders may contractually agree to the method and selection of directors). In *Galler*, two shareholders in a close corporation provided in a shareholders' agreement that upon the death of either shareholder, the decedent's wife could nominate a director to replace her husband. *Galler*, 203 N.E.2d at 580.

the decedent's corporation. Furthermore, the shareholders' agreement can require a corporation to pay designated individuals specified salaries or dividends after the death of a shareholder.[254] Such a clause provides beneficiaries with guaranteed income. Courts readily uphold these agreements as long as all shareholders in the corporation sign the agreement and there is no injury to creditors or the general public.[255] If no termination date is given, such contracts are usually binding on beneficiaries as long as one of the contracting shareholders is alive.[256]

Shareholders' agreements can also accommodate shareholders who simply wish to liquidate their investment upon death. In this situation, the prudent shareholder should ask his attorney to draft a buyout provision requiring the corporation or its remaining shareholders to purchase his shares at the time of his passing.[257]

8. Non-judicial Relief

Lastly, to prevent shareholder dissension and intracorporate disputes, shareholders' agreements can provide for the resolution of

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254. *See Galler*, 203 N.E.2d at 580–81; *see also* FLA. STAT. § 607.0732(b), (e) (1993) (amended 1994) (allowing shareholders to contractually agree to "the provision of services between the corporation and any shareholder, director, officer, or employee" as well as the authorization of corporate distributions). The shareholders in *Galler* required their corporation to pay an annual dividend of at least $50,000. *Galler*, 203 N.E.2d at 580. The Galler's shareholders' agreement further provided that upon each shareholder's death, their wives were to receive sum of money equivalent to twice the salary each shareholder received as a director. *Id*. at 581. This payment was to continue for five years. *Id*.

255. *See* FLA. STAT. § 607.0732(1)–(2)(a) (1993) (amended 1994) (authorizing shareholders' agreements so long as all shareholders in the corporation sign the agreement); *supra* note 201 and accompanying text; *see also* Collins v. Collins Fruit Co., 189 So. 2d 262, 265 (Fla. Dist. Ct. App. 1966) (upholding a shareholders' agreement where all stockholders in the corporation signed the agreement); *Galler*, 203 N.E.2d at 584.

256. *Galler*, 203 N.E.2d at 586.

257. *See* Murray Van & Storage, Inc. v. Murray, 364 So. 2d 68 (Fla. Dist. Ct. App. 1978) (holding that a shareholders' agreement directing the testamentary disposition of shareholder's stock was superior to shareholder's will also directing the disposition of such stock). For discussion of buyout provisions, see *supra* text accompanying notes 209–18. For remedies heirs may use to recover their benefactor's investment from an uncooperative corporation, see *supra* text accompanying notes 91–98. See 1 PAINTER, *supra* note 211, ch. 6, for a discussion of techniques that shareholders may use to liquidate their investment upon death or retirement. See generally ADDIS E. HULL, STOCK PURCHASE AGREEMENTS IN ESTATE PLANNING — WITH FORMS (2d ed. 1979), for forms useful in this context.

these disputes through arbitration.[258] The language of such a clause should require that "any dispute or disagreement affecting the management . . . or business policies of [the] corporation . . . which cannot be amicably resolved by the parties" must be submitted to arbitration.[259] Arbitration is most successful in settling disputes pertaining to the valuation of shareholder stock or the reasonableness of executive compensation.[260] Additionally, arbitration is usually more economical and time efficient than dissolution actions and court proceedings.[261] Arbitration is, however, less successful in resolving deep-rooted shareholder conflicts.[262]

VII. CONCLUSION

Florida case law indicates that involuntary dissolution is practically never appropriate for the protection of minority interests. Equitable relief is the most appropriate and effective remedy for redressing wrongs inflicted upon minority shareholders. However, with regard to preventing minority shareholder oppression, the single most effective and efficient tool is the shareholders' agreement. Thoughtfully designed shareholders' agreements deter oppressive conduct, reduce shareholder disputes, and decrease litigation. Shareholders' agreements further force minority shareholders, who bear the risk of losing an investment, to fend for themselves in the commercial arena. In light of this alternative, Florida's judiciary should not add to its already congested plate the role of "protector" of unsophisticated investors. Courts should not interfere with arm's

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258. 2 O'NEAL & THOMPSON, *supra* note 7, § 9:05; *see* FLA. STAT. § 607.0732(f) (1993) (amended 1994) (providing that shareholders' agreements may transfer to any person the "authority to exercise the corporate powers, including the resolution of any issue about which there exists a deadlock among directors or shareholders"); Hanes v. Watkins, 63 So. 2d 625, 626 (Fla. 1953) (noting existence of shareholders' agreement submitting to arbitration stock valuation disputes); Federated Title Insurers, Inc. v. Ward, 538 So. 2d 890 (Fla. Dist. Ct. App. 1989) (holding that arbitration provisions in shareholders' agreements are enforceable only against signatory parties to contract).

259. Hymowitz v. Drath, 567 So. 2d 540, 541 (Fla. Dist. Ct. App. 1990). In *Hymowitz*, one shareholder's misrepresentation of the corporation's goodwill value prompted another shareholder to invoke an arbitration clause to settle their differences. *Id*.

260. Haynsworth, *supra* note 100, at 29.

261. *Id*.

262. *Id*. Arbitrators cannot arbitrate disputes where shareholders seek the rescission of the very shareholders' agreement which empowers the arbitrators to intervene. *Id*. at 542.

length transactions nor relieve shareholders from contractually bad bargains. Therefore, the Florida Legislature should not enact an oppression statute.