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Comments

Avoiding a Minority Shareholder Oppression Claim in a Close Corporation in Missouri: The Impact of the New Close Corporation Statutes

I. SCOPE OF COMMENT

The 85th General Assembly of the Missouri Legislature made major revisions to Missouri's corporation law during its 1990 second regular session.¹ Included in these revisions was a new section devoted solely to "statutory close corporations."² This section is patterned after the statutory close corporations section of the Revised Model Business Corporation Act of 1984 (RMBCA).³

Major revisions were made to Missouri's corporation laws in 1990 since many people, particularly corporate attorneys, felt that the corporation laws were outdated and in need of a significant overhaul.⁴ One area which many people felt needed improvement was the standard of care required of officers and directors.⁵ The Missouri Bar Committee on Corporations, Banking and Business Law created a subcommittee in 1986 to search for suitable revisions to the corporation laws.⁶ This subcommittee chose the RMBCA as a model for the new revisions for a number of reasons.⁷ The close corporation section

1. See generally Act of July 13, 1990, H.B. No. 1432, No. 182, 1990 Mo. Legis. Serv. 1310-47 (Vernon) (codified as amended at MO. REV. STAT. §§ 351-59 (Supp. 1990)).

2. See MO. REV. STAT. §§ 351.750-.865 (Supp. 1990). The Missouri corporation statutes had not previously contained an integrated section pertaining solely to close corporations. See *id.* §§ 351-359 (1986).

3. The statutory close corporation section of the RMBCA is now codified in the Model Business Corporation Act [hereinafter MBCA]. See 4 MODEL STATUTORY CORP. ACT ANN., Model Statutory Close Corp. Supp., §§ 1-55 (3d ed. 1990) [hereinafter referred to as MODEL ACT].

4. See Final Report of the House Interim Committee to Study Missouri Corporation Laws 4 (Mar. 1990).

5. *Id.* at 4-5.

6. *Id.* at 5.

7. *Id.*

of the RMBCA was appealing to the legislature because it permitted close corporations to "act more like partnerships, rather than large, publicly-held corporations, while at the same time retaining the limited liability of a corporation."⁸ The intent of the legislature in adopting the close corporation section, therefore, was to increase the standard of care between officers, directors and shareholders in a close corporation to that duty owed between partners in a partnership.

This Comment will focus on methods of avoiding a minority shareholder oppression claim in a close corporation in Missouri. Emphasis will be placed on both close corporations created by the new statutes and "closely held" corporations as defined by case law.⁹ Officers, directors, and majority shareholders are all subject to oppression claims¹⁰ and discussion will be aimed at protecting all such parties from these types of claims.¹¹ This

8. *Id.* at 7.

9. A "closely held" corporation within the scope of this Comment is defined as a close corporation that is not formed in compliance with a close corporation statute. In other words, a "closely held" corporation is one that is judicially defined, as opposed to statutorily defined. F. O'NEAL & R. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 1:01 (2d ed. 1985). Further discussion of the definitions of the two types of close corporations and the differences between the two can be found in Section II of this Comment. See *infra* notes 42-69 and accompanying text.

10. The liability of these three classes of persons stems from the traditional power structure of the close corporation in which the majority shareholders control the corporation:

As a general proposition, a corporation operates under the principle of majority rule: the holders of a majority of the shares with voting power control the corporation. Persons holding a majority of the voting shares have the power to elect all the directors, or in cases of cumulative voting, at least a majority of the board. In turn, the board of directors usually acts by majority vote; and, as a rule, directors are responsive to the wishes of shareholders who elected them. Indeed, in most closely held corporations, majority shareholders elect themselves and their relatives to all or most of the positions on the board.

Under this pattern of corporate control, majority interests can deprive minority interests of any effective voice in the operation of the business. Further, the danger is always present that majority shareholders will use their power to further their own interests to the detriment of minority shareholders.

F. O'NEAL & R. THOMPSON, *supra* note 9, § 1:02.

11. While this Comment is aimed at preventing minority shareholder oppression claims from the viewpoint of those in control of a close corporation, the material can be useful to minority shareholders in identifying the types of oppression normally seen in a close corporation setting.

Comment utilizes four different types of sources to determine what constitutes minority shareholder oppression in a close corporation.

First, Missouri case law prior to the enactment of this section will be analyzed.¹² Missouri courts had taken into account the special problems involved with close corporations and were applying different rules to close corporations before the new corporation section was enacted.¹³ Ideally, Missouri courts in the future merely will harmonize their prior results with the new statutes.¹⁴

Second, since Missouri's new close corporation section is patterned after the RMBCA, the case law of other states that have adopted the RMBCA close corporation sections also will be analyzed. Currently, Georgia,¹⁵ South Carolina¹⁶ and Wisconsin¹⁷ have adopted this section of the RMBCA.¹⁸ The Missouri Legislature's concern for protecting minority shareholders in close corporations surely parallels these three states.¹⁹

Along these same lines, any state which has made the effort to incorporate into its corporation laws an integrated close corporation statute shows a concern for protecting minority shareholders.²⁰ Many of these integrated

12. This integrated close corporation section was enacted on July 13, 1990. See *supra* note 1.

13. See, e.g., *Delahoussaye v. Newhard*, 785 S.W.2d 609 (Mo. Ct. App. 1990); *Herbik v. Rand*, 732 S.W.2d 232, 234-35 (Mo. Ct. App. 1987).

14. The new statutes should not effectively change any of the prior case law in Missouri pertaining to "closely held" corporations. A discussion of the reasons for this assertion can be found in Section III of this Comment. See *infra* notes 70-75 and accompanying text.

15. See GA. CODE ANN. §§ 22-901 to -950 (1990).

16. See S.C. CODE §§ 33-18-101 to -18-500 (Law. Co-op. 1990).

17. See WIS. STAT. ANN. § 180.995 (West Supp. 1990).

18. This list of states was compiled as of November 14, 1989. See MODEL ACT, *supra* note 3, commentary at 1868-69.

19. Arguably, any state legislature which adopts an integrated close corporation section has similar legislative intentions to those of the Missouri Legislature when it enacted this statute. It is this writer's opinion that the intentions of a state legislature which adopted the RMBCA almost verbatim are even more similar to the intentions of the Missouri Legislature which also adopted the RMBCA almost verbatim.

20. Thirteen other states had adopted integrated close corporation statutes as of November 14, 1989: Alabama, Arizona, California, Delaware, Illinois, Kansas, Maryland, Nevada, Ohio, Pennsylvania, Rhode Island, Texas, and Wyoming. See MODEL ACT, *supra* note 3, commentary at 1868-69.

statutes resemble the RMBCA section.²¹ Case law from these states should also be helpful.

Third, the modern trends in minority shareholder oppression cases are an important area of the law which must be analyzed. This analysis is important because most modern corporation scholars feel that the law is shifting to allow more successful oppression claims by minority shareholders.²² Ground-breaking decisions concerning the duties between shareholders in close corporations are occurring with more frequency and should enable us to predict possible future trends in this area of corporation law.²³

Finally, written works by modern legal scholars in corporation law are analyzed. One of the most influential scholars in this area is Professor F. Hodge O'Neal.²⁴ Professor O'Neal and Professor Robert B. Thompson²⁵ wrote a two-volume treatise entitled *O'Neal's Close Corporations*²⁶ and another two-volume treatise entitled *O'Neal's Oppression of Minority Shareholders*.²⁷ Both of these treatises are relied upon heavily for information contained in this Comment.

The first thing one must do before attempting to define what constitutes minority shareholder oppression in a close corporation is to define fully a close corporation. Whether a corporation is a close corporation under the statute or under the judicial definition of a closely held corporation may make a difference in an oppression claim. Section II of this Comment defines a

21. Compare MODEL ACT, *supra* note 3, with ALA. CODE §§ 10-2A-300 to -2A-313 (1987); ARIZ. REV. STAT. ANN. §§ 10-201 to -218 (1990); CAL. CORP. CODE § 158 (West 1990); DEL. CODE ANN. tit. 8, §§ 341-56 (1983 and Supp. 1990); ILL. ANN. STAT. ch. 32, paras. 1201-16 (Smith-Hurd Supp. 1990); KAN. STAT. ANN. §§ 17-7201 to -7216 (1988); MD. CORPS. & ASS'NS CODE ANN. §§ 4-101 to -603 (1985 & Supp. 1990); NEV. REV. STAT. §§ 78A.010-.200 (1989); OHIO REV. CODE ANN. § 1701.591 (Anderson Supp. 1989); 15 PA. CONS. STAT. ANN. §§ 2301-37 (Purdon Supp. 1990); R.I. GEN. LAWS § 7-1.1-51 (1987); TEX. BUS. CORP. ACT ANN. arts. 12.01-.54 (Vernon 1990); WYO. STAT. §§ 17-17-101 to -17-151 (1989).

22. See generally F. O'NEAL & R. THOMPSON, *supra* note 9, § 1:05; Berger, *Statutory Close or Closely Held Corporation?*, 11 PAC. L.J. 699 (1980); Kutcher, *Freezeouts of Minority Shareholders in Closely-Held Corporations*, 25 LA. B.J. 123 (1977).

23. See, e.g., *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 848-49, 353 N.E.2d 657, 661 (1976).

24. Professor O'Neal teaches law at Washington University in St. Louis, Mo. He is a member of the Missouri, Georgia and Louisiana Bars.

25. Professor Thompson also teaches law at Washington University. He is a member of the Missouri and Georgia Bars.

26. F. O'NEAL & R. THOMPSON, *O'NEAL'S CLOSE CORPORATIONS* (3d ed. 1988).

27. F. O'NEAL & R. THOMPSON, *supra* note 9.

close corporation both statutorily and judicially and discusses the possible differences between the two.²⁸

After understanding the definition of a close corporation, one must understand the fiduciary duty owed to a minority shareholder in a close corporation. All cases of minority shareholder oppression are based upon a breach of fiduciary duty.²⁹ Section III of this Comment will analyze this fiduciary duty.³⁰

An oppression claim by a minority shareholder can stem from a myriad of fact situations. Whether minority shareholder oppression exists will depend upon the circumstances of each case.³¹ Consequently, any article on methods to avoid a minority shareholder oppression claim will have two problems. It cannot be all-inclusive on every possible type of oppression on the one hand, and it must err on the side of cautiousness on the other hand. This Comment is geared as a "preventive law" article and as such will err on the side of cautiousness. With these thoughts in mind, Section IV will analyze eight major areas of minority shareholder oppression:

(1) shareholders' expectations of a declared dividend or a continued salary;³²

(2) the requirement that there be legitimate business purposes for any corporate actions that are not outweighed by any legitimate objectives which are less harmful to the minority shareholders;³³

(3) diversion of corporate funds for the personal use of the directors, officers or majority shareholders;³⁴

(4) voluntary disclosure of any germane facts which may affect the value of the shareholders' stock;³⁵

(5) loans of corporate funds to officers, directors or majority shareholders;³⁶

(6) issuance of new shares of stock, recapitalization and changes in the stated capital of the corporation;³⁷

28. See *infra* notes 42-69 and accompanying text.

29. See generally Annotation, *What Amounts to "Oppressive" Conduct Under Statute Authorizing Dissolution of Corporation at Suit of Minority Shareholders*, 56 A.L.R.3D 358 (1974).

30. See *infra* notes 70-75 and accompanying text.

31. *Herbik*, 732 S.W.2d at 234.

32. See *infra* notes 77-117 and accompanying text.

33. See *infra* notes 118-39 and accompanying text.

34. See *infra* notes 140-67 and accompanying text.

35. See *infra* notes 168-97 and accompanying text.

36. See *infra* notes 198-211 and accompanying text.

37. See *infra* notes 212-23 and accompanying text.

(7) usurpation of a business opportunity of the corporation;³⁸

and

(8) general treatment of minority shareholders.³⁹

This Comment will be summarized in Section V by a list of suggestions to avoid a minority shareholder oppression claim in a close corporation in Missouri.⁴⁰ This list should be a helpful tool for practicing attorneys in preventing a minority shareholder oppression claim before it occurs. Copies of this list also could be handed out to close corporation clients as part of the practice of "preventive law." Professor O'Neal has stated that the study of minority shareholder oppression aids a corporate lawyer in practicing preventive law in two ways:

First, . . . it enables a lawyer representing persons entering business enterprises to take effective steps when the business is being organized or before trouble develops to guard the interests of his clients. Perhaps equally important, . . . [such a study] should enable businessmen and women, lawyers, and other business advisers to remove in advance some of the conflicts of interest, sources of tension, and other possible causes of squeeze-outs, and to set up measures for solving whatever disputes do arise.⁴¹

II. STATUTORY CLOSE CORPORATION V. CLOSELY HELD CORPORATION

The statutory definition of a close corporation under Missouri's new close corporation section contains two requirements. First, "[a] statutory close corporation is a corporation whose articles of incorporation contain a statement that the corporation is a statutory close corporation."⁴² Second, a statutory close corporation must have "fifty or fewer shareholders."⁴³ Additional provisions of the statute provide the different rules for corporations electing to become statutory close corporations as opposed to general or public corporations.⁴⁴ For purposes of the definition of a statutory close corporation, the fifty-shareholder limit and the intent of the corporation as evidenced by a reference in the articles of incorporation are the two important factors.

38. See *infra* notes 224-45 and accompanying text.

39. See *infra* notes 246-65 and accompanying text.

40. See *infra* notes 266-321 and accompanying text.

41. F. O'NEAL & R. THOMPSON, *supra* note 9, § 1:05.

42. MO. REV. STAT. § 351.755.1 (Supp. 1990).

43. *Id.* § 351.755.2.

44. See generally *id.* §§ 351.755-.845.

A close corporation also is defined judicially in all jurisdictions.⁴⁵ Judicially-defined close corporations are often referred to as "closely held" corporations.⁴⁶ Therefore, a close corporation which has been defined judicially and not statutorily will be labelled a closely held corporation for purposes of this Comment. Closely held corporations are not limited literally by the number of shareholders. Also, the intention of the corporation as evidenced by the articles of incorporation may be insignificant as to whether the corporation is "closely held."⁴⁷

The definition of a closely held corporation in Missouri was thoroughly discussed in *Forinash v. Daugherty*.⁴⁸ *Forinash* listed the characteristics of a closely held corporation as discussed in earlier Missouri cases and cases from other jurisdictions.⁴⁹ One Missouri court held that a corporation was closely held when its "stock was not listed upon any stock exchange" and when it "had no over-the-counter market."⁵⁰ Another court defined a closely held corporation "to be one in which the stock is owned by comparatively few persons who are active in the management of the company, and the shares are not listed on any exchange or otherwise traded in public."⁵¹ Still another Missouri case⁵² used the same definition as the Supreme Judicial Court of Massachusetts in the "groundbreaking" close corporation case, *Donahue v. Rodd Electrotype Co.*⁵³ "The Massachusetts court deemed a close corporation to be typified by (1) a small number of shareholders; (2) no ready market

45. All jurisdictions use a different standard for close corporations even if the jurisdiction does not have an integrated close corporation statute. Confirmation of this fact can be accomplished with a quick check on WESTLAW or LEXIS under the search terms "close corporation!" in the database ALLSTATES. At least one citation from each state will appear.

46. See, e.g., *Forinash v. Daugherty*, 697 S.W.2d 294, 299 (Mo. Ct. App. 1985) ("The merits of this case are controlled by the law of corporations, particularly those described as 'close' or 'closely held' corporations."). See generally *Berger*, *supra* note 22.

47. No definition of a "closely held" corporation listed in the following text and notes gives an upper limit on the possible number of shareholders. Nor does any definition refer to the intention of the corporation as evidenced from its articles of incorporation. See *infra* notes 48-60 and accompanying text.

48. 697 S.W.2d 294 (Mo. Ct. App. 1985).

49. *Id.* at 302-04.

50. *Id.* at 303 (quoting *Phelps v. Watson-Stillman Co.*, 365 Mo. 1124, 1127, 293 S.W.2d 429, 431 (1956)).

51. *Flarsheim v. Twenty Five Thirty Two Broadway Corp.*, 432 S.W.2d 245, 255 (Mo. 1968). See also *Forinash*, 697 S.W.2d at 303.

52. *Hopkins v. Hopkins*, 597 S.W.2d 702 (Mo. Ct. App. 1980).

53. 367 Mass. 578, 328 N.E.2d 505 (1975). *Donahue* is cited as one of the first cases to recognize the rights of minority shareholders in close corporations.

for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation."⁵⁴

Professor O'Neal also indicates that a closely held corporation has been defined in many different ways.⁵⁵ He lists many factors used by the courts and other legal scholars to define a closely held corporation: (1) relatively few shareholders; (2) shares are not readily traded on the market; (3) shareholders treat each other as partners; and (4) management and ownership are substantially identical.⁵⁶ O'Neal concludes, though, that the most important factor of a closely held corporation is that the corporation's "shares are not generally traded in the securities markets."⁵⁷

Another commentator has listed the following characteristics for a closely held corporation:

- (1) the shareholders are few in number, often only two or three;
- (2) they usually live in the same geographical area, know each other, and are well acquainted with each other's business skills;
- (3) all or most of the shareholders are active in the business, usually serving as directors or officers or a key man in some managerial capacity; and
- (4) there is no established market for the corporate stock, the shares not being listed on a stock exchange or actively dealt in by brokers; little or no trading takes place in the shares.⁵⁸

Obviously, closely held corporations have been defined in many different ways using many different factors. Furthermore, in Missouri, members of a general or public corporation may be held to have the same fiduciary duties of a close corporation even when the corporation is not a statutory close corporation or a closely held corporation. *Forinash* held that a corporation was subject to the higher fiduciary duty imposed upon a close corporation

54. *Forinash*, 697 S.W.2d at 303. See also *Donahue*, 367 Mass. at 586, 328 N.E.2d at 511.

55. F. O'NEAL & R. THOMPSON, *supra* note 26, § 1:02.

56. *Id.*

57. *Id.*

58. Berger, *supra* note 22, at 700. A slightly different definition has been used in an American Law Report annotation article on closely held corporations:

First, the stockholders are few; second, most or all of them are active as officers and directors; third, circulation of the stocks is restricted among the present stockholders or there is no ready market for their shares; and fourth, the stockholders are usually related to each other and know each other well.

Annotation, *Duty and Liability of Closely Held Corporation, its Directors, Officers, or Majority Stockholders, in Acquiring Stock of Minority Shareholder*, 7 A.L.R.3D 500, 501 (1966).

even though that particular corporation was not a closely held corporation within the definition adopted by prior Missouri decisions.⁵⁹ Consequently, a public corporation which has some but not all the characteristics of a closely held corporation may be subject to the same fiduciary duty as a close corporation.

Labelling a close corporation as either "statutory" or "closely held" may not have much significance in a minority shareholder oppression case. The close corporation statute lists the types of relief available to a minority shareholder in a successful oppression claim:

- (1) [t]he performance, prohibition, alteration, or setting aside of any action of the corporation or of its shareholders, directors, or officers or of any other party to the proceeding;
- (2) [t]he cancellation or alteration of any provision in the corporation's articles of incorporation or bylaws;
- (3) [t]he removal from office of any director or officer;
- (4) [t]he appointment of any individual as a director or officer;
- (5) [a]n accounting with respect to any matter in dispute;
- (6) [t]he appointment of a custodian to manage the business and affairs of the corporation;
- (7) [t]he appointment of a provisional director, who has all the rights, powers, and duties of a duly elected director, to serve for the term and under the conditions prescribed by the court;
- (8) [t]he payment of dividends;
- (9) [t]he award of damages to any aggrieved party.⁶⁰

Furthermore, if any of these types of relief are deemed inadequate or inappropriate, a court may either allow a shareholder purchase of the shares or an involuntary dissolution of the corporation.⁶¹

All of these types of relief are available in minority shareholder oppression claims in closely held corporations.⁶² This list does in fact enumerate the types of relief courts have granted to close corporations that were not created by close corporation statutes.⁶³ In effect, this list codifies the remedies available to minority shareholders in closely held corporations at common law.

One possible difference between a statutory close corporation and a closely held corporation is that, under the RMBCA, minority shareholders in statutory close corporations must show that they have exhausted all forms of

59. *Forinash*, 697 S.W.2d at 303-04.

60. MO. REV. STAT. § 351.855 (Supp. 1990).

61. *Id.* §§ 351.860-865.

62. *See generally* F. O'NEAL & R. THOMPSON, *supra* note 9, §§ 3:01-:20.

63. *Id.*

nonjudicial remedies before they can file a lawsuit under the oppression section of the statute.⁶⁴ The Missouri Legislature has slightly altered this section of the RMBCA, however, by only forcing a shareholder to first pursue those nonjudicial remedies that the shareholder has agreed in writing to pursue first.⁶⁵ Consequently, this difference should be slight in Missouri.

Another possible difference is that a statutory close corporation shareholder is only entitled to relief if a court finds that one of the grounds for relief listed in the statute exists.⁶⁶ These grounds are fraud, oppression, unfairly prejudicial conduct, deadlock, or grounds for involuntary dissolution under the general corporation statute.⁶⁷ The grounds for judicial relief listed in the statute are not defined further.⁶⁸ A court therefore faces the same dilemma with both a statutory close corporation and a closely held corporation in minority shareholder oppression cases. What constitutes oppressive conduct towards a minority shareholder? Consequently, this difference between a statutory close corporation and a closely held corporation is moot.⁶⁹

III. FIDUCIARY DUTY IN A CLOSE CORPORATION

As the last section pointed out, the label attached to a close corporation is not important in minority shareholder oppression cases in Missouri. The important determination is the definition of the term "oppression." Every case that finds oppression in a corporation, whether close or not, determines that the fiduciary duty owed to a minority shareholder has been breached.⁷⁰ Fiduciary duty does not define oppression, though. The fiduciary duty owed between shareholders may be breached in many different ways. The terms fraud, oppression, unfairly prejudicial conduct, deadlock, and grounds for involuntary dissolution in the close corporation statute all involve breaches of

64. See MODEL ACT, *supra* note 3, commentary at 1854.

65. MO. REV. STAT. § 351.850.3 (Supp. 1990).

66. *Id.* § 351.855. See also MODEL ACT, *supra* note 3, commentary at 1853.

67. MO. REV. STAT. § 351.850 (Supp. 1990).

68. *Id.*

69. As the comments to the MBCA close corporation supplement point out, "[n]o attempt has been made to define oppression, fraud, or unfairly prejudicial conduct. These are elastic terms whose meaning varies with the circumstances presented in a particular case, and it is felt that existing case law provides sufficient guidelines for courts and litigants." MODEL ACT, *supra* note 3, commentary at 1853.

70. See, e.g., *Evans v. Blesi*, 345 N.W.2d 775, 776 (Minn. Ct. App. 1984) (majority shareholder breached fiduciary duty when "buying out" minority shareholder).

fiduciary duties.⁷¹ Therefore, stating that somebody has breached their fiduciary duty towards a minority shareholder merely begs the question.

One fact is certain. The fiduciary duty means a higher standard of care in a close corporation than in a public corporation. The cases and commentators are unanimous in this respect. Being labelled a close corporation by a court should alert officers, directors and majority shareholders of a corporation that they are about to hear about their heightened duty towards their minority shareholders.

This heightened fiduciary duty in a close corporation may range from a slightly higher duty to that duty to which partners owe each other in a partnership.⁷² One Missouri case has stated that "the officers, directors and controlling shareholders of a 'close' corporation owe a *higher* degree of fiduciary duty to minority shareholders than do their counterparts in public corporations."⁷³ Other cases and commentators have labelled the fiduciary duty in a close corporation as "very strict."⁷⁴ *Donahue* held that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe one another."⁷⁵

With the heightened fiduciary duty in a close corporation in mind, the next step is to define "oppression." The eight areas of oppression discussed in the next section cover most of the major areas but, are by no means all-inclusive.

71. MO. REV. STAT. § 351.850 (Supp. 1990). See generally Annotation, *What Amounts to "Oppressive" Conduct Under Statute Authorizing Dissolution of Corporation at Suit of Minority Shareholders*, 56 A.L.R.3D 358 (1974).

72. For a comprehensive study on the different duties of loyalty in a close corporation, see Ruder, *Duty of Loyalty—A Law Professor's Status Report*, 40 BUS. LAW. 1383 (1985).

73. *Forinash*, 697 S.W.2d at 302-03 (emphasis added).

74. See, e.g., *Newton v. Hornblower, Inc.*, 224 Kan. 506, 514, 582 P.2d 1136, 1143 (1978) (actual and punitive damages awarded when directors were engaging in self-dealing); F. O'NEAL & R. THOMPSON, *supra* note 9, § 7:17.

75. *Donahue*, 367 Mass. at 593, 328 N.E.2d at 515. *Accord* *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 276 (Alaska 1980); *Wilkes*, 370 Mass. at 848, 353 N.E.2d at 661.

IV. TYPES OF MINORITY SHAREHOLDER OPPRESSION

A. *Expectations of a Declared Dividend or Continued Salary*

Dividend withholding is a commonly used "squeeze-out" technique⁷⁶ in a close corporation.⁷⁷ Dividend withholding effectively precludes a minority shareholder from any return on his or her investment in the corporation.⁷⁸ This squeeze-out is accomplished in two ways. First, the corporation will not declare any dividends on the stock or will keep any declared dividends low.⁷⁹ Second, a minority shareholder who receives compensation as an officer or director loses the right to receive such compensation.⁸⁰

Missouri's new close corporation section allows a court to order the payment of dividends if the court finds the existence of one or more of the grounds for relief enumerated in the statute.⁸¹ Again, one must look to case law to interpret grounds for relief since oppressive conduct is not defined by the close corporation section.⁸²

Under the traditional rule, a court will apply the business judgment rule⁸³ to determine whether a corporation should pay a dividend on its stock.⁸⁴ A concise statement of the business judgment rule as it pertains to stock dividends was declared by the Supreme Court of Kansas:

The law gives the majority of the stockholders the right to control the policy and business of the corporation and the minority must submit to their decisions when the majority acts in good faith and within their powers. . . . No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs.⁸⁵

76. "Squeeze out" is a term often used to describe how minority shareholders are oppressed in a corporation. This term is widely used by courts and commentators to describe different types of shareholder oppression. *See generally* F. O'NEAL & R. THOMPSON, *supra* note 9, §§ 1:01-:05.

77. *Id.* § 3:04.

78. *Id.*

79. *Id.*

80. *Id.* *See generally* Whale Art Co. v. Docter, 743 S.W.2d 511 (Mo. Ct. App. 1987).

81. *See* MO. REV. STAT. § 351.855(8) (Supp. 1990).

82. *See id.* § 351.850.

83. The business judgment rule is discussed more thoroughly in Part (B) of this Section. *See infra* notes 118-39 and accompanying text.

84. *See generally* Feess v. Mechanics' St. Bank, 84 Kan. 828, 115 P. 563 (1911).

85. *Id.* at 840, 115 P. at 567.

The business judgment rule receives much closer scrutiny, however, in a close corporation.⁸⁶

*Dodge v. Ford Motor Co.*⁸⁷ is one of the landmark cases where a court ordered a corporation to declare a dividend on its stock.⁸⁸ In *Dodge*, squeezing out minority shareholders was not even the primary reason for withholding dividends.⁸⁹ The dividends were withheld to allow expansion of the corporation.⁹⁰ The court in *Dodge* showed its reluctance to interfere with the business judgment of the corporation regarding expansion, but declared a "special dividend" on the stock after considering the large profits of the corporation compared to the reluctance of the corporation to pay out dividends on its stock in the past.⁹¹

The heightened scrutiny of the business judgment rule in a close corporation was delineated many years after *Dodge* in another Michigan case, *Miller v. Magline, Inc.*⁹² The minority shareholders in *Miller* voluntarily left employment in a close corporation and successfully sued to have dividends declared when the close corporation had never before declared dividends on its stock.⁹³ *Miller* upheld the trial court's determination that a dividend should be paid when it held that "[i]t is especially true, where one man or family controls and dominates a corporation, that he, or they, must act in the utmost good faith in the control and management of the corporation as to minority stockholders."⁹⁴

86. See generally *Miller v. Magline, Inc.*, 76 Mich. App. 284, 256 N.W.2d 761 (1977).

87. 204 Mich. 459, 170 N.W. 668 (1919).

88. *Dodge* is cited in almost all casebooks in the section discussing court-ordered dividend distributions. See, e.g., A. CONARD, R. KNAUSS & S. SIEGEL, CORPORATIONS 80 (2d ed. 1982). The *Dodge* case is a very interesting history lesson in the struggles between majority and minority shareholders in a corporation before statutes addressed the remedies for oppressive conduct. *Id.* at 83. *Dodge* involved a power struggle between Henry Ford, majority shareholder in the Ford Motor Co., and the Dodge brothers, minority shareholders in the Ford Motor Co. *Dodge*, 204 Mich. at 459, 170 N.W. at 668. The Dodge brothers eventually left the Ford Motor Co. and formed the Dodge Motor Co. as a result of the power struggle between them and Henry Ford. See A. CONARD R. KNAUSS & S. SIEGEL, *supra*, at 83.

89. *Dodge*, 204 Mich. at 508-09, 170 N.W. at 684-85.

90. *Id.*

91. *Id.*

92. 76 Mich. App. 284, 256 N.W.2d 761 (1977).

93. *Id.* at 288, 256 N.W.2d at 761.

94. *Id.* at 304, 256 N.W.2d at 769 (quoting F. O'NEAL & R. THOMPSON, *supra* note 9, §§ 8:07-:08).

A court will often weigh many factors in determining whether a dividend should be declared.⁹⁵ Professor O'Neal lists and discusses these factors in one of his treatises:

- (1) amount of surplus in the corporation;
- (2) ratio of current assets to current liabilities;
- (3) working capital needed by the business;
- (4) working capital retained in prior years;
- (5) business prospects;
- (6) possible future liabilities;
- (7) whether a majority shareholder used his/her controlling position for his/her own benefit;
- (8) any special interests that are not shared by the minority shareholders in keeping the dividends minimal.⁹⁶

These factors need not all be present, just compelling enough for a court to find oppression and order a dividend payment on the stock.⁹⁷

In many close corporations, salaries are paid in lieu of any dividends.⁹⁸ This is especially appropriate in small corporations where minority shareholders serve as officers or directors of the corporation or are otherwise entitled to compensation by the corporation.⁹⁹ A cause of action for oppression arises when a minority shareholder stops receiving a salary because he or she is either fired or otherwise removed from the corporation.¹⁰⁰ A court will more readily allow relief when a minority shareholder largely depends upon this salary as a primary source of income.¹⁰¹

The "groundbreaking" case allowing relief where a minority shareholder has been removed from the payroll is *Wilkes v. Springside Nursing Home, Inc.*¹⁰² A minority shareholder who was a former officer and director of a close corporation was successful in sustaining damages against a corporation for loss of salary in this Massachusetts case.¹⁰³ *Wilkes* realized that a corporation must "have a large measure of discretion" in the hiring and firing

95. F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:05. See also N. LATTIN, R. JENNINGS & R. BUXBAUM, *CORPORATIONS* 1363 (4th ed. 1968).

96. F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:05.

97. *Id.*

98. F. O'NEAL & R. THOMPSON, *supra* note 26, § 1:07.

99. *Id.*

100. Common fact situations include retirement of an officer or director, widow of a former officer or director wanting continued compensation, disabling injury to an officer or director, etc. F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:04.

101. *Id.* § 3:05.

102. 370 Mass. 842, 353 N.E.2d 657 (1976).

103. *Id.* at 844, 353 N.E.2d at 657.

of its employees.¹⁰⁴ The court found, however, that this particular corporation had violated the "legitimate business purpose" test¹⁰⁵ when it terminated this minority shareholder's employment without cause.¹⁰⁶

Wilkes is a minority view.¹⁰⁷ The traditional rule is that officers and directors can be removed with or without cause and much deference is given to the business judgment of a corporation with regard to employment.¹⁰⁸ The traditional remedies available to a wrongfully discharged employee of a corporation lie under a "breach of employment contract" theory and not under an oppression claim.¹⁰⁹

Missouri has adopted a view similar to the *Wilkes* court. A shareholder's expectation of a salary and bonuses was acknowledged in *Whale Art Co., Inc. v. Docter*.¹¹⁰ *Whale Art* involved a close corporation with three shareholders.¹¹¹ The plaintiff shareholder owned forty-nine percent of the stock while the two defendant shareholders effectively owned the remaining fifty-one percent of the stock.¹¹² The corporation had been paying bonuses on a regular basis as compensation since its incorporation.¹¹³ The court in *Whale Art* ordered the corporation to continue paying these bonuses even after the plaintiff left his employment with the corporation.¹¹⁴ Furthermore, *Whale Art* found that the agreement to continue paying bonuses after termination of employment was based upon an oral contract.¹¹⁵

Whale Art demonstrates the view that Missouri courts are reluctant to allow a corporation to squeeze out a minority shareholder by withholding dividends or by termination of salary. The new close corporation section

104. *Id.* at 851, 353 N.E.2d at 663.

105. The "legitimate business purpose" test differs from the business judgment rule. This test is discussed more thoroughly in Part (B) of this Section. See *infra* notes 126-34 and accompanying text.

106. *Wilkes*, 370 Mass. at 852-53, 353 N.E.2d at 663-64. This holding does not mean that an officer or director can never be dismissed without cause. Many removals without cause are upheld by the courts. It is only when a removal without cause is an attempted "squeeze out" of a minority shareholder will the circumstances of an oppression claim arise. See generally F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:06.

107. *Accord* *Campbell v. Ford Industries, Inc.*, 274 Ore. 243, 546 P.2d 141 (1976).

108. See generally F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:06.

109. *Id.*

110. 743 S.W.2d 511 (Mo. Ct. App. 1987).

111. *Id.* at 513.

112. *Id.*

113. *Id.*

114. *Id.* at 515.

115. *Id.*

does not specifically list "continued salary" as a type of relief available to an oppressed minority shareholder.¹¹⁶ However, it does allude to such relief by allowing "[t]he award of damages to any aggrieved party."¹¹⁷

B. Business Judgment Rule

The business judgment rule which was briefly discussed in Part (A) of this Section is a common doctrine used by courts to evaluate the acts of a board of directors of a corporation. Practically, when a court speaks of the business judgment rule, the court normally is stating that it will not interfere with the acts of the board of directors of a corporation. As one Missouri court has stated:

The management and control of the property and business of a corporation is vested . . . in the Board of Directors, and this has been a fundamental principle of our statutory corporate law for many years. . . . The management and control of the corporation being vested by statute in the board of directors . . . is not in the stockholders and the actions of the board of directors in regard to the affairs of the corporation is controlling and exclusive and the stockholders cannot control the directors in the exercise of the judgment vested in them by the statute. the function of the board of directors is to exercise judgment and discretion which the court cannot do in their stead.¹¹⁸

The business judgment rule operates on three premises.¹¹⁹ First, the directors of a corporation are elected by the shareholders to manage the corporation and courts should not substitute their judgment for that of directors selected by the owners (shareholders) of the corporation.¹²⁰ Second, the decisions of the board of directors are based upon complex business considerations and should not be struck down absent a clear abuse of discretion.¹²¹ Third, the rule avoids "strike suits" and other frivolous litigation by disgruntled shareholders.¹²²

116. See MO. REV. STAT. § 351.855 (Supp. 1990).

117. *Id.* § 351.855(9). Section 351.855(1) can also be argued to provide relief in an employment contractual setting. It allows a court to order "[t]he performance, prohibition, alteration, or setting aside of any action of the corporation." *Id.* § 351.855(1).

118. *Saigh v. Busch*, 396 S.W.2d 9, 15-16 (Mo. Ct. App. 1965). *Accord Delahoussaye v. Newhard*, 785 S.W.2d 609, 613 (Mo. Ct. App. 1990).

119. See F. O'NEAL & R. THOMPSON, *supra* note 26, § 1:19.

120. *Id.*

121. *Id.*

122. *Id.*

While these three justifications hold true for most corporations, they seem to "break down" somewhat in a close corporation setting. As a result, many courts and commentators criticize a strict application of the business judgment rule to close corporations.¹²³ Professor O'Neal criticizes these three justifications:

These justifications for the business judgment rule, however, do not apply in all their vigor to a close corporation. . . . Participants in a close corporation do not usually think of themselves as delegating management of their corporation to an independent board of directors; the board is often viewed as only a legal formality. Insofar as the participants at the time they organize a close corporation look into the future; they usually anticipate that the owners will also be the managers and minority shareholders often expect to share in management.¹²⁴

Many courts have fashioned an alternative to the *per se* approach of the business judgment rule. This alternative is known as the "legitimate business purpose" test.¹²⁵ Under this test, when a business purpose is asserted by the majority (or those in control of a corporation), minority shareholders can demonstrate that "the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest."¹²⁶ Missouri courts have not yet used the "legitimate business purpose" test for close corporations.¹²⁷ The new close corporation section itself does not give any insight into whether to use the business judgment rule or the "legitimate business purpose" test.¹²⁸ The "legitimate business purpose" test was rejected specifically in favor of the traditional business judgment rule in the most recent Missouri close corporation case.¹²⁹ However, the recent enactment of the new close corporation section¹³⁰ and the growing trend to avoid the harshness of the *per se* traditional business judgment rule in a close corporation setting¹³¹ may influence future Missouri

123. *Id.* See generally *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977); *Donahue*, 367 Mass. 578, 328 N.E.2d 505.

124. F. O'NEAL & R. THOMPSON, *supra* note 9, § 1:19.

125. See *Schwartz v. Marien*, 37 N.Y.2d 487, 335 N.E.2d 334, 373 N.Y. Supp. 122 (1975) (leading New York case on this alternative test).

126. *Wilkes*, 370 Mass. at 851-52, 353 N.E.2d at 663.

127. See, e.g., *Delahoussaye*, 785 S.W.2d at 612; *Herbik*, 732 S.W.2d at 235; *Saigh*, 396 S.W.2d at 15-16.

128. See MO. REV. STAT. §§ 351.850-.855 (Supp. 1990).

129. *Delahoussaye*, 785 S.W.2d at 612.

130. *Delahoussaye* was decided on January 16, 1990. The new corporation section was enacted during July of 1990.

131. See generally F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:06.

courts to adopt the more flexible "legitimate business purpose" approach. Georgia, one of the states that has also adopted the close corporation section of the RMBCA,¹³² has specifically applied the "legitimate business purpose" test.¹³³

The business judgment rule and the "legitimate business purpose" test can arise in innumerable fact situations.¹³⁴ Common fact situations include when a minority shareholder is removed as an officer, director or other employee of a close corporation;¹³⁵ when redemption rights are exercised under a redemption agreement;¹³⁶ when the bylaws or articles of incorporation are amended;¹³⁷ attempted merger with another corporation;¹³⁸ and when dividends are not declared on the stock.¹³⁹ Officers, directors and majority shareholders of close corporations must realize that their action will be scrutinized more carefully under either test because of the inherent characteristics of a close corporation.

C. Diverting Corporate Funds

Diverting corporate funds can constitute oppression in many cases. The two most common scenarios are when corporate funds are diverted for the personal use of officers, directors or majority shareholders¹⁴⁰ and when the real or personal property of the close corporation is transferred to an officer,

132. See GA. CODE ANN. §§ 14-2-901 to -2-950 (1990).

133. See *Corbin v. Corbin*, 429 F. Supp. 276 (M.D. Ga. 1977) (majority shareholder diverted corporate funds to buy three luxury automobiles and to furnish corporate office at home).

134. Almost every case containing an oppression claim speaks of one or both of these tests.

135. *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1283 (2d Cir. 1976) (reviewing Delaware corporate law); *Corbin*, 429 F. Supp. 276 (M.D. Ga. 1977) (applying Georgia law); *Wilkes*, 370 Mass. 842, 353 N.E.2d 657 (1976) (applying Massachusetts law). See *supra* notes 100-17 and accompanying text.

136. *Alcott v. Hyman*, 42 Del. Ch. 233, 208 A.2d 501 (1965) (corporation can exercise redemption rights if there will be no impairment of capital).

137. 12B W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5824 (rev. perm. ed. 1984) (amendments of corporate charter); F. O'NEAL & R. THOMPSON, *supra* note 9, § 5:09 (amending the charter and bylaws—a "squeeze-out" technique).

138. F. O'NEAL & R. THOMPSON, *supra* note 9, §§ 5:04-:08 (squeeze-outs through mergers).

139. See *supra* notes 77-117 and accompanying text.

140. *Corbin v. Corbin*, 429 F. Supp. 276 (M.D. Ga. 1977); *Alaska Plastics Inc. v. Coppock*, 621 P.2d 270 (Alaska 1980).

director or majority shareholder.¹⁴¹ Officers, directors and majority shareholders should be careful not to violate either the business judgment rule or the "legitimate business purpose" test discussed in Part (B) of this section¹⁴² when attempting to transfer corporate property to a member of the close corporation.

A classic case of diverting corporate funds for the personal use of a majority shareholder in a close corporation occurred in a federal diversity case¹⁴³ in Georgia, *Corbin v. Corbin*.¹⁴⁴ The majority shareholder in *Corbin* diverted corporate funds to purchase three luxury automobiles in his name and to spend a large sum of money to furnish one of his rooms at his condominium as an office for use at night.¹⁴⁵ The majority shareholder also made a large cash advance of corporate funds to himself while the plaintiff minority shareholder only received a small cash advance.¹⁴⁶ *Corbin* found that this pattern of diverting corporate funds was an attempt to "freeze out" the plaintiff minority shareholder and issued injunctive relief to prevent further use of corporate funds for the personal use of the majority shareholder.¹⁴⁷

While *Corbin* is an obvious case of diverting corporate funds, other more subtle fact situations can constitute oppression. This was the case in *Alaska Plastics, Inc. v. Coppock*.¹⁴⁸ In *Alaska Plastics*, the court determined that certain director's fees were excessive and constituted constructive dividends.¹⁴⁹ While the fees were not exorbitant, the court seemed swayed by the fact that the plaintiff minority shareholder never received any money from the corporation.¹⁵⁰ *Alaska Plastics* was remanded for a determination of damages to the minority shareholder.¹⁵¹

141. 12B W. FLETCHER, *supra* note 137, § 5828 (transfers of corporate property).

142. *See supra* notes 118-39 and accompanying text.

143. The plaintiff was a resident of Jacksonville, Florida while the defendant was a resident of Macon, Georgia. *Corbin*, 429 F. Supp. at 277.

144. 429 F. Supp. 276 (M.D. Ga. 1977). This case was decided before Georgia adopted the same RMBCA close corporation section adopted by Missouri but Georgia law was applied since the corporation was from Georgia and added as a party defendant. *Id.* at 277.

145. The majority shareholder bought an Eldorado Cadillac, a Fleetwood Cadillac and a Lincoln Continental. The home office costs were \$8,500. *Id.* at 278.

146. The majority shareholder received \$37,341 while the plaintiff received \$2,836. *Id.* at 279.

147. *Id.* at 283.

148. 621 P.2d 270 (Alaska 1980).

149. *Id.* at 276.

150. *Id.* at 272.

151. *Id.* at 278.

Alaska Plastics raises another potential "pitfall" for officers and directors of a close corporation. Under the federal tax laws, excessive salaries may be construed as constructive dividends for purposes of calculating the recipient's gross income.¹⁵² A close corporation will not be able to avoid tax liability by dispensing large salaries since such disguised dividends are not deductible by the corporation.¹⁵³

A close corporation should be careful to make director's and officer's salaries reasonably related to the value of the services they render to the corporation. Also, officers and directors should not receive substantial increases in salaries without either a dividend distribution or some other form of compensation increase to minority shareholders. The holding of *Whale Art*¹⁵⁴ reminds the reader that a minority shareholder may have an expectation of continued salary or bonuses.¹⁵⁵

Likewise, transfers of corporate stock can constitute oppression. The new close corporation section requires that "[a] person desiring to transfer shares of a statutory close corporation . . . shall first offer them to the corporation."¹⁵⁶ This section prevents fraudulent conveyances of shares of officers, directors and majority shareholders to third persons such as spouses, other relatives, and the like. Any attempt to transfer shares in a statutory close corporation that violates the articles of incorporation, the bylaws of the close corporation, or the close corporation section is ineffective.¹⁵⁷

"Ultra vires" is a common law cause of action also brought by a minority shareholder to prevent a fraudulent transfer of corporate property.¹⁵⁸ Common fact situations of ultra vires transfers occur when there is an illegal or fraudulent assignment in contemplation of insolvency; sale or lease of all corporate property and abandonment of the corporate business; and transfer of the corporate property to third persons.¹⁵⁹ However, a minority shareholder

152. Treas. Reg. § 1.162-8 (1960).

153. Treas. Reg. § 1.162-7(b)(1)-(3) (1960).

154. *Whale Art Co. v. Docter*, 743 S.W.2d 511 (Mo. Ct. App. 1987).

155. See *supra* notes 110-15 and accompanying text.

156. MO. REV. STAT. § 351.770 (Supp. 1990).

157. *Id.* § 351.775.

158. "Ultra vires" literally means "beyond the powers" of the corporation. It pertains to acts that are beyond the authorization of the articles of incorporation and the bylaws of a corporation. See R. JENNINGS & R. BUXBAUM, CORPORATIONS 116 (5th ed. 1979).

159. See 12B W. FLETCHER, *supra* note 137, § 5828 and annotated cases. Fraudulent and illegal transfers in contemplation of insolvency can also bring up certain sections of the bankruptcy code. For a Missouri case dealing with the transfer of corporate property to third persons, see *Forinash v. Daugherty*, 697 S.W.2d 294 (Mo. Ct. App. 1985) (director selling stock to third person and giving up control of corporation).

can be prevented from bringing an ultra vires cause of action through the doctrine of laches.¹⁶⁰

An aggrieved minority shareholder has several grounds for relief for the wrongful diversion of corporate funds under Missouri's new close corporation section.¹⁶¹ The court can prohibit or set aside the transaction,¹⁶² remove a director or officer,¹⁶³ order an accounting with respect to the transaction,¹⁶⁴ appoint a custodian to manage the corporation,¹⁶⁵ or award damages to the minority shareholder.¹⁶⁶ All of these types of relief were also available to an aggrieved minority shareholder before the new close corporation section was enacted.¹⁶⁷

D. Disclosure of Information

An important way to avoid a minority shareholder oppression claim is to disclose all pertinent information to minority shareholders. Many squeeze-outs involve the deliberate withholding of information from the minority shareholder.¹⁶⁸ Squeeze-outs are, in effect, much easier to accomplish if certain information is withheld.¹⁶⁹ Difficulties occur in differentiating between information that must be disclosed and information that may be withheld.¹⁷⁰

The Supreme Court of Delaware in *Lynch v. Vickers Energy Corp.*¹⁷¹ fashioned a workable standard for the disclosure of information, which could be called the "germane facts" test.¹⁷² The court in *Lynch* had to determine whether the directors of a corporation disclosed enough information to a minority shareholder before accepting a tender offer for its stock.¹⁷³ *Lynch*

160. See 12B W. FLETCHER, *supra* note 137, § 5828. "Laches" depends both upon reliance and a lapsed period of time.

161. MO. REV. STAT. § 351.855 (Supp. 1990).

162. *Id.* § 351.855(1).

163. *Id.* § 351.855(3).

164. *Id.* § 351.855(5).

165. *Id.* § 351.855(6).

166. *Id.* § 351.855(9). These types of relief are not the only ones available. They are probably just the most appropriate types of relief in these situations.

167. See generally F. O'NEAL & R. THOMPSON, *supra* note 9, §§ 3:01-:20.

168. See generally *id.* §§ 3:09-:11.

169. *Id.*

170. *Id.*

171. 383 A.2d 278, 281 (Del. 1977), *overruled on other grounds*, Weinberger v. UOP, Inc., 457 A.2d 701, 703-04 (Del. 1983).

172. While *Lynch* did not involve a close corporation, the test is certainly useful for close corporations. *Id.* at 279.

173. *Id.* at 281.

stated that the directors of a corporation must disclose "all information in their possession germane to the transaction in issue. And by 'germane' we mean, for present purposes, information such as a reasonable shareholder would consider important in deciding whether to sell or retain stock."¹⁷⁴

The "germane facts" test is most useful in situations such as *Lynch* where there is a tender offer or a merger attempt¹⁷⁵ or where the close corporation itself is purchasing a minority shareholder's stock.¹⁷⁶ Attempted mergers or acquisitions of another corporation's stock are also subject to special rules under the new close corporation section if the status of the corporation as a statutory close corporation will be affected by such transactions.¹⁷⁷

Missouri has an interesting case dealing with burden of proof and disclosure of information when a majority shareholder purchases corporate property. In *Simpson v. Spellman*,¹⁷⁸ the court discussed the former Missouri *per se* rule prohibiting directors from conducting personal transactions with their own corporation.¹⁷⁹ The new "burden of proof" rule outlined by *Simpson* states that "a director may conduct personal transactions with his corporation if he can prove that he has not gained unconscionable or *secret* profits in the transaction and that he has dealt *openly*, honestly, and fairly with

174. *Id.*

175. Mergers should never be attempted without full disclosure of the action to minority shareholders. *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 236 (1988) (action brought to set aside merger under Rule 10b-5); *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985) (action brought to set aside merger under Rule 10b-5), *cert. denied*, 474 U.S. 1057 (1986).

176. Kansas has much case law on the fiduciary duty of full disclosure when purchasing stock from a minority shareholder. *See, e.g., Delano v. Kitch*, 663 F.2d 990, 995 (10th Cir. 1981) (under Kansas law, directors and officers must make full disclosure before buying or selling stock from or to shareholders), *cert. denied*, 456 U.S. 946 (1982); *Sampson v. Hunt*, 222 Kan. 268, 269-71, 564 P.2d 489, 490-91 (1977) (agreement to buy minority shareholder's stock was set aside when value was substantially less than true value); *Stewart v. Harris*, 69 Kan. 498, 499-502, 77 P. 277, 278-79 (1904) (transaction set aside where president of bank purchased shares at much less than actual value).

For an extensive analysis of the duty to disclose information when purchasing a minority shareholder's stock, see Annotation, *Duty and Liability of Closely Held Corporation, Its Directors, Officers, or Majority Stockholders, in Acquiring Stock of Minority Shareholder*, 7 A.L.R.3d 500 (1966).

177. *See generally* MO. REV. STAT. § 351.830 (Supp. 1990).

178. 522 S.W.2d 615 (Mo. Ct. App. 1975).

179. *Id.* at 619-20. The original rule was that "any transaction in which a director of a corporation purchased corporate property was constructively fraudulent." *Id.* at 619. The new rule governing this particular topic is codified at MO. REV. STAT. § 351.327 (Supp. 1991).

the corporation and the stockholders."¹⁸⁰ The words "secret" and "openly" suggest that a standard such as the "germane facts" test would be appropriate in evaluating such a transaction in Missouri.

The new close corporation statute affords many grounds for relief when a minority shareholder discovers that an officer, director or minority shareholder is withholding germane information.¹⁸¹ One of the most useful grounds for relief in such a situation is a court-ordered "accounting" with respect to the suspect transaction.¹⁸² Of course, the reader should readily ask how a minority shareholder will learn about a suspect transaction if information is withheld in the first place.¹⁸³

Another important area dealing with the disclosure of information is the minority shareholder's right to inspect the corporate books. Missouri,¹⁸⁴ and most states,¹⁸⁵ regulated this right by statute. This section of the corporation statute is contained in the general corporation law,¹⁸⁶ but applies to the close corporation section.¹⁸⁷ Under this section, the corporation must keep correct and complete records of meetings and accounts at its registered office or its principal place of business.¹⁸⁸ These records must contain all pertinent information dealing with the shares of the corporation.¹⁸⁹ Every shareholder has the right to inspect the corporate books in accordance with the bylaws of the corporation.¹⁹⁰ Regardless of the bylaws, a shareholder may also inspect

180. *Simpson*, 522 S.W.2d at 619-20 (emphasis added).

181. *See generally* MO. REV. STAT. §§ 351.855-865 (Supp. 1990).

182. *Id.* § 351.855(5).

183. This statement is not meant to suggest that information should be withheld to avoid an oppression claim by a minority shareholder. The best standard to follow is the "germane facts" test.

184. MO. REV. STAT. § 351.215 (1986).

185. Nearly every state provides for a shareholder's right to inspect the corporate books. *See* appropriate state corporation statute for verification.

186. MO. REV. STAT. § 351.215 (1986).

187. "The provisions of this chapter [general corporation law] apply to statutory close corporations to the extent not inconsistent with the provisions of sections 351.750 to 351.865 [close corporation section]." MO. REV. STAT. § 351.750 (Supp. 1990).

188. MO. REV. STAT. § 351.215.1 (1986). An agent of the corporation in Missouri can keep the corporate books if a registered office or principal place of business is not located in Missouri. *Id.*

189. Information included must be "the number of shares subscribed, the names of the owners of the shares, the numbers owned by them respectively, the amount of shares paid, and by whom, and the transfer of such shares with the date of transfer." *Id.*

190. *Id.*

the corporate books upon written notice if the shareholder has a "reasonable and proper purpose."¹⁹¹

A close corporation should allow a shareholder to inspect the corporate books without forcing the shareholder to obtain a court order showing that he or she has a reasonable and proper purpose. Oppression cases exist where minority shareholders are effectively squeezed out by delays in legal processes.¹⁹²

The Missouri corporation section regulating the inspection of the corporate books specifically requires that the "corporation shall keep correct and complete books."¹⁹³ This suggests that close corporations should hold meaningful corporate meetings with officer, director, and shareholder participation where minutes are taken carefully.¹⁹⁴ A close corporation should also make sure that the officers of the corporation make out reports of any actions they may be called on to perform at corporate meetings.¹⁹⁵

Close corporations should also voluntarily disclose all germane information to minority shareholders regardless of whether such information is available in the corporate books.¹⁹⁶ The duty to disclose information to minority shareholders is not discharged by the fact that such information could be obtained from inspecting the corporate books.¹⁹⁷

E. Loans of Corporate Funds

The loaning of corporate funds is closely related to diverting corporate assets to officers, directors, or majority shareholders in a close corporation.¹⁹⁸ Loans to corporate members are suspect when they are accompanied by little or no interest and the recipient provides little or no security for the loan.¹⁹⁹

191. *Id.* The fine for refusing to allow a shareholder to inspect the corporate books is two-hundred fifty dollars per offense. *Id.* § 351.215.2.

192. *See generally* F. O'NEAL & R. THOMPSON, *supra* note 9, § 6:01 (using legal processes as a squeeze-out technique).

193. MO. REV. STAT. § 351.215.1 (1986).

194. *See generally* F. O'NEAL & R. THOMPSON, *supra* note 9, § 6:02 (maneuvers related to corporate meetings).

195. *Id.* *See also* Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (board of directors failed to disclose all material facts before securing shareholder's approval of merger).

196. Actual knowledge is normally easier to prove and weighs more heavily against a minority shareholder than constructive knowledge.

197. *See* Annotation, *supra* note 176, at 503-04.

198. *See generally* F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:12.

199. *Id.* For an interesting Kansas case where a corporate loan was given in lieu

Missouri's general corporation statute strictly prohibits a corporation from loaning any shareholder money to pay for "any part of any share or shares," regardless of whether the loan is secured by a deed of trust, a mortgage, or otherwise.²⁰⁰ All shares of stock in Missouri must be paid for with legal consideration.²⁰¹ Legal consideration is money, labor, or property actually received, which excludes promissory notes and future services.²⁰² These rules also apply to the new close corporation section.²⁰³

The general corporation statute in Missouri is silent as to loans to its members for purposes other than to acquire corporate stock.²⁰⁴ Many states only allow a corporation to lend money to a member of a corporation when the loan is reasonably expected to benefit the corporation in the judgment of the directors.²⁰⁵ This stricter view on the loaning of corporate funds should be sufficient to protect officers, directors, and majority shareholders of close corporations in Missouri who wish to obtain loans of corporate assets. These precautions on loans also encompass a loan given to another corporation in which an officer, director, or majority shareholder of the lending corporation has a substantial financial or personal interest.²⁰⁶

The words "judgment of the directors" contained in many state statutes on corporate loans contemplate that a court will evaluate such a loan using the business judgment rule instead of the stricter "legitimate business purpose" test. Consequently, directors of close corporations should be aware of the differences between these two rules as discussed in Part (B) of this section.²⁰⁷ In both instances, any corporate loan should be secured by a deed of trust, a mortgage, or other adequate security.²⁰⁸

Corporate loans given to a close corporation by an officer, director, or majority shareholder may be suspect if they are secured by a mortgage or deed of trust. The mortgage or deed or trust may be placed upon corporate property with a view towards foreclosure.²⁰⁹ This may have the effect of a

of a salary to avoid paying income taxes, see *Oberhelman v. Barnes Inv. Corp.*, 236 Kan. 335, 336-37, 690 P.2d 1343, 1345-46 (Kan. 1984).

200. MO. REV. STAT. § 351.165 (1986).

201. *Id.* § 351.160.

202. *Id.*

203. MO. REV. STAT. § 351.750 (Supp. 1990).

204. *See* MO. REV. STAT. § 351 (1986).

205. *See, e.g.*, KAN. STAT. ANN. § 17-6303 (1988). Kansas has adopted the Delaware corporate law virtually verbatim, as have many states.

206. *See generally* F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:12 (siphoning off corporate earnings by favorable loans and leases).

207. *See supra* notes 118-39 and accompanying text.

208. *See generally* F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:12 n.16.

209. *See* 12B W. FLETCHER, *supra* note 137, § 5830.

fraudulent transfer of corporate real property to a member of the close corporation as discussed in Part (C) of this section²¹⁰ and may constitute oppression.²¹¹

F. Issuing New Shares of Stock, Recapitalization and Changing Stated Capital

The questions of whether new shares of stock can be issued or whether stated capital can be increased or decreased are first addressed by looking to the articles of incorporation and bylaws of a close corporation.²¹² Missouri's general corporation statute also sets out initial guidelines for numbers of shares and stated capital.²¹³ However, the rules set forth by the general statute and the articles of incorporation and bylaws of a close corporation may be of no effect to prevent such actions in a close corporation. This problem arises when a majority shareholder holds enough voting stock to do either of these actions without the approval of the minority shareholders.²¹⁴

Oppression claims arise when new shares of stock are issued or stated capital is increased in order to squeeze-out a minority shareholder.²¹⁵ Any attempted exercise of these two actions should not violate the "legitimate business purpose" test discussed in Part (B) of this section.²¹⁶

Recapitalization is another squeeze-out technique.²¹⁷ Recapitalization may allow officers, directors or majority shareholders "to strengthen their control of a corporation or to facilitate their purchase of additional voting

210. See *supra* notes 156-67 and accompanying text.

211. See, e.g., *Gunderson v. Illinois Trust & Savings Bank*, 199 Ill. 422, 65 N.E. 326 (1902) (foreclosure on mortgaged corporate property set aside for fraud).

212. The number of shares and amount of stated capital can be further restricted from the statutory guidelines in the articles of incorporation and the bylaws of the corporation. See generally MO. REV. STAT. §§ 351.180-200 (1986).

213. *Id.*

214. The articles of incorporation or the bylaws of a corporation may allow for a new issuance of stock or a change in stated capital with a certain percentage of shareholder approval. A majority shareholder who owns more than this percentage can virtually exercise any of these actions on her own. The majority shareholder will still be subject to the statutory rules. *Id.*

215. See generally F. O'NEAL & R. THOMPSON, *supra* note 9, §§ 5:09-12.

216. The "legitimate business purpose" test is stricter than the business judgment rule. Therefore, any action should be safe legally if this test is followed. See *supra* notes 118-39 and accompanying text.

217. See F. O'NEAL & R. THOMPSON, *supra* note 9, § 5:13.

stock."²¹⁸ The same standards applicable to the issuance of new shares of stock will apply to recapitalization.²¹⁹

An oppression claim also may be raised by a minority shareholder under certain circumstances where the stated capital is reduced.²²⁰ A close corporation effectively can raise the voting power of a majority shareholder by reducing the stated capital in some cases.²²¹ The reduction of stated capital is strictly governed in Missouri by the general corporation statute²²² which is applicable to the new close corporation section.²²³

G. *Usurping a Business Opportunity of the Corporation*

The usurping of a corporate opportunity is another commonly used squeeze-out technique.²²⁴ This situation occurs when an officer, director or majority shareholder personally seizes a corporate opportunity that should belong to the corporation.²²⁵ Often, the person seizing a corporate opportunity will form a new corporation to exploit the seized opportunity.²²⁶ In the oft-quoted case of *Guth v. Loft, Inc.*,²²⁷ a Delaware court described the duty owed to a corporation when a business opportunity arises:

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from

218. *Id.*

219. *See id.* §§ 5:12-13.

220. *Id.* § 5:14.

221. *See, e.g.,* *Godley v. Crandall & Godley Co.*, 212 N.Y. 121, 105 N.E. 818 (1914) (corporation not allowed to reduce stated capital and turn over shares without compensation to new corporation in order to dissolve existing corporation).

222. *See* MO. REV. STAT. § 351.195 (1986).

223. *See* MO. REV. STAT. § 351.750 (Supp. 1990).

224. *See generally* F. O'NEAL & R. THOMPSON, *supra* note 9, § 3:18.

225. *Id.*

226. *Id.* *See, e.g.,* *Samia v. Central Oil Co.*, 339 Mass. 101, 158 N.E.2d 469 (1959).

227. 23 Del. Ch. 255, 5 A.2d 503 (1939). Like *Dodge*, *Guth* is another interesting history lesson in the power struggles between officers, directors and shareholders. *Loft, Inc.*, the aggrieved corporation in *Guth*, was an exclusive Coca-Cola distributor. When Coca-Cola refused to give *Loft, Inc.* a discount, the corporation began to look towards the Pepsi-Cola Co. Mr. Guth, the president of *Loft, Inc.*, then seized the Pepsi-Cola opportunity for himself. *Guth*, 23 Del. Ch. at 259-60, 5 A.2d at 505-06. This was probably the advent of the "Cola Wars." *See also* R. JENNINGS & R. BUXBAUM, *supra* note 158, at 498.

a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his [her] duty, not only affirmatively to protect the interests of the corporation committed to his [her] charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his [her] skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.²²⁸

Guth formulated a "fairness" test to determine the possible existence of a corporate opportunity.²²⁹ This fairness test is the one most often used by courts today.²³⁰ This test has been modified by the Delaware courts to contain four elements to determine whether a corporate opportunity exists: (1) "the 'interest or expectancy' test, also called the 'essential' test; (2) the 'line of business' test; (3) the 'practical advantage' test; and (4) the 'use of corporate resources' test."²³¹

The "interest or expectancy" test depends upon whether the opportunity is essential to the corporation and whether the corporation would expect to seize the opportunity if presented with it.²³² This test can be negated if the corporation is presented with the opportunity and rejects it.²³³

The "line of business" test depends on whether the opportunity embraces an activity which the corporation "has fundamental knowledge, practical experience and ability to pursue, which, logically and naturally, is adaptable to its business having regard for its financial position, and is one that is consonant with its reasonable needs and aspirations for expansion."²³⁴ This test takes both current business and future reasonable expansion possibilities into account.

The "practical advantage" and "use of corporate resources" tests are basically self-explanatory. Would the opportunity serve a practical advantage

228. *Guth*, 23 Del. Ch. at 270, 5 A.2d at 510.

229. *Id.* at 270-279, 5 A.2d at 510-513.

230. *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985). The other two commonly-used tests are the "expectancy" test and the "line of business" test. *Id.* These two tests have now been combined with the fairness test to formulate an overall test. *Id.* at 968.

231. *Id.* See also R. JENNINGS & R. BUXBAUM, *supra* note 158, at 497-99.

232. *Lewis*, 502 A.2d at 968.

233. *Id.*

234. *Guth*, 23 Del. Ch. at 279, 5 A.2d at 514.

to the corporation and were corporate assets used by a member of the corporation to acquire the opportunity?²³⁵

*Samia v. Central Oil Co.*²³⁶ represents a case where a group of majority shareholders usurped a business opportunity and started a new corporation to exploit that opportunity. The majority shareholders in *Samia* even siphoned-off funds from the existing corporation to establish the new corporation.²³⁷ *Samia* ordered the majority shareholders to transfer some stock in the new corporation to their former minority shareholders in an amount equal to the former minority shareholders' interests.²³⁸

A similar issue arises when an officer, director or majority shareholder competes in an independent competitive business. In *Gottlieb v. McKee*,²³⁹ a Delaware court was faced with such a fact situation. The directors of the corporation in *Gottlieb* made certain investments in another corporation which brought about the lawsuit.²⁴⁰ *Gottlieb* refused to grant the directors summary judgment with regard to whether a corporate opportunity existed.²⁴¹ Whether a member of a corporation can invest in another corporation depends heavily on the "line of business" test.²⁴² If the two corporations are in the same line of business, they are competing corporations.²⁴³

Again, the usurping of a business opportunity is not explicitly listed as a grounds for relief under Missouri's new close corporation section.²⁴⁴ An oppression claim would surely arise, though, under one of the general definitions listed in the appropriate statute.²⁴⁵

H. General Treatment of Minority Shareholders

The general treatment of minority shareholders can also be called minority shareholder "etiquette" or "courtesy." The following paragraphs in this sub-section describe some minor things that officers, directors, and

235. *Lewis*, 502 A.2d at 969-70.

236. 339 Mass. 101, 158 N.E.2d 469 (1959).

237. *Id.* at 106-07, 158 N.E.2d at 473.

238. *Id.* at 130, 158 N.E.2d at 486.

239. 34 Del. Ch. 537, 107 A.2d 240 (1954).

240. *Id.* at 539, 107 A.2d at 241.

241. *Id.* at 546, 107 A.2d at 245.

242. *See supra* note 234 and accompanying text.

243. *Gottlieb*, 34 Del. Ch. at 543, 107 A.2d at 244. *See also* 3 W. FLETCHER, *supra* note 137, § 862 (usurpation of a corporate opportunity).

244. *See generally* MO. REV. STAT. § 351.850 (Supp. 1990).

245. Some of these grounds are "illegal, oppressive, fraudulent, or unfairly prejudicial" conduct as discussed in Section III of this Comment. *Id.* *See also supra* notes 66-69 and accompanying text.

majority shareholders can do to avoid provoking a minority shareholder into filing an oppression claim. While these suggestions may sound trivial, they require virtually no effort and commonly fall into that often avoided category called "common sense."²⁴⁶ Some of these suggestions are mandated also by statute.²⁴⁷

Minority shareholders should be invited to all annual shareholder meetings with sufficient notice.²⁴⁸ The new close corporation section sets the annual meeting date for a statutory close corporation as "the first business day after May thirty-first unless its articles of incorporation, bylaws, or a shareholder agreement . . . fixes a different date."²⁴⁹ An annual meeting for a statutory close corporation can also be waived unless one or more shareholders request a meeting by written notice to the corporation.²⁵⁰

If an annual meeting is held, the general corporation statute requires that written notice be given to all shareholders entitled to vote at the meeting.²⁵¹ This notice must be given either personally or by mail to each voting shareholder between ten and fifty days before the meeting.²⁵² The notice must contain the place, day and hour of the meeting.²⁵³

Special meetings are meetings other than the scheduled annual meetings. If a special meeting is called, the notice to each voting shareholder must also list the purposes of the meeting.²⁵⁴ Special meetings should not be called at an inconvenient time or place for minority shareholders if a convenient time and place is available.²⁵⁵ Also, a minority shareholder should be allowed to call a special meeting in accordance with the bylaws of a corporation.²⁵⁶

Conduct at shareholder meetings is important. Close corporation shareholder meetings should be meaningful with officer, director and shareholder participation.²⁵⁷ One officer should not be able to dictate the

246. It should seem apparent to the reader at this point that many oppression claims could be avoided if the minority shareholder is content with the operations of the corporation. This piece of the Comment is geared towards the "little things" that should ensure a smooth relationship with minority shareholders.

247. See generally MO. REV. STAT. §§ 351-59 (1986).

248. See *id.* §§ 351.225-.230.

249. MO. REV. STAT. § 351.815.1 (Supp. 1990).

250. *Id.* § 351.815.2.

251. MO. REV. STAT. § 351.230.1 (1986).

252. *Id.*

253. *Id.*

254. *Id.*

255. See generally F. O'NEAL & R. THOMPSON, *supra* note 9, § 6:02 (maneuvers related to corporate meetings).

256. *Id.*

257. *Id.*

conduct of the other officers to the point where the other officers have no say in corporate matters.²⁵⁸

Whale Art, discussed in Part (A) of this section,²⁵⁹ referred to a shareholder's expectation of continued salary or bonuses.²⁶⁰ A related concern deals with pension or profit-sharing plans in a close corporation. A close corporation should exercise extreme care when attempting to extinguish a minority shareholder's right to an existing pension or profit-sharing plan.²⁶¹ A minority shareholder in an oppression case in Minnesota was awarded extensive punitive damages when his benefits from a close corporation were extinguished.²⁶²

One final interesting oppression case is another Minnesota case²⁶³ reported by Professor O'Neal in one of his treatises.²⁶⁴

Majority shareholders, it was said, openly treated the minority shareholders with hostility and disrespect, refusing to discuss company affairs with the minority or to disclose to the minority information on the business. They dismissed with contempt minority suggestions for improving or developing the business, although one minority member was the company's executive vice-president and another was a member of the board of directors. In order to discourage minority directors from continuing to serve on the board, the majority terminated the corporation's traditional policy of paying fees to directors. Some of the majority shareholders refused to speak to the company's executive vice-president even though their offices were located near one another. On one occasion in the presence of company employees, the company's president, a member of the majority, stuck out his tongue and thumbed his nose at the executive vice-president. On another occasion, while a minority director was making a presentation to the board, the president gave out contemptuous grunts, made faces, and rudely read publications and otherwise busied himself. The president refused minority officers the use of company offices they had long occupied, demanding the return of keys and changing locks on office doors; he cancelled their credit cards without explanation; and he refused them the customary use of

258. See, e.g., *Sheehy v. Barry*, 87 Conn. 656, 89 A. 256 (1914) (suit brought to dissolve corporation for mismanagement); *Helfman v. American Light & Traction Co.*, 121 N.J. Eq. 1, 187 A. 540 (N.J. Ch. 1936) (corporation deemed to be alter-ego of one of the directors).

259. See *supra* notes 110-15 and accompanying text.

260. 743 S.W.2d at 511.

261. See, e.g., *Evans v. Blesi*, 345 N.W.2d 775 (Minn. Ct. App. 1984).

262. *Id.* at 777. The trial court awarded \$500,000 in punitive damages which was reduced to \$250,000 in the court of appeals. *Id.*

263. The case was settled without litigation so it is not reported. See F. O'NEAL & R. THOMPSON, *supra* note 9, § 6:09 n.28.

264. *Id.* § 6:09.

company cars. He instructed company employees to deliver all mail addressed to minority officers to another company officer for inspection and "screening." As part of a scheme to humiliate the executive vice-president and destroy his morale, majority shareholders tried to force him to move to a distant state by assigning to him the responsibility for managing for the company in that state a line of products in which the majority shareholders knew he had no confidence, a line of products which they knew was failing and which in fact did fail. As a crowning insult, majority shareholders caused the corporation not to invite minority shareholder-employees to the annual Old-Timers Party held on the 75th Anniversary of the company, although they had attended similar functions in the past and one of them had been with the company longer than any other employee. Finally, although outsiders make a cash offer to purchase all the corporation's stock on exceedingly favorable terms, majority shareholders summarily rejected the offer.²⁶⁵

This case illustrates that minority shareholders may be provoked into filing an oppression claim when treated rudely by the hierarchy of a close corporation. It also demonstrates that many different acts by officers, directors or majority shareholders can add up to a viable oppression claim.

V. SUGGESTIONS TO AVOID AN OPPRESSION CLAIM

The following list is a summary of Section IV of this Comment. The footnote to each suggestion provides a quick reference to that part of Section IV which lists and discusses cases and commentaries supporting the suggestion. This list should provide corporate attorneys with an easy checklist for locating and attempting to avoid possible oppression claims when dealing with a close corporation client. Copies of this list could also be given to close corporation clients as a means of preventive law. Again, this list will err on the side of cautiousness since an oppression claim can arise from a myriad of fact situations.²⁶⁶

1. Have an honest, discretionary reason for not declaring dividends on the stock.²⁶⁷
2. Declare a dividend on the stock when the equities of the close corporation indicate that a dividend is feasible.²⁶⁸
3. Make sure that declared dividends are not sufficiently low enough that they will be *de minimis*.²⁶⁹

265. *Id.*

266. *See supra* note 31 and accompanying text.

267. *See supra* notes 84-85 and accompanying text.

268. *See supra* notes 77-97 and accompanying text.

269. *Id.*

4. Provide salaries, bonuses or other compensation on a regular basis if compensation is given in lieu of declared dividends.²⁷⁰

5. Show extreme care when terminating a minority shareholder's compensation if the minority shareholder depends largely upon this compensation to maintain a certain standard of living.²⁷¹

6. Have a legitimate business purpose for removing a minority shareholder as an officer, director or employee of the close corporation.²⁷²

7. Have a legitimate business purpose for exercising any redemption rights under a redemption agreement.²⁷³

8. Have a legitimate business purpose for amending the bylaws or articles of incorporation of the close corporation.²⁷⁴

9. Do not attempt a merger with another corporation without a legitimate business purpose for doing so.²⁷⁵

10. Make sure that a legitimate business purpose for any corporate action is not outweighed by a legitimate purpose which is less harmful to a minority shareholder's interest.²⁷⁶

11. Do not divert corporate funds for the personal use of an officer, director or majority shareholder of the close corporation.²⁷⁷

12. Make the salaries of members of the close corporation reasonably related to the value of the services they render to the corporation.²⁷⁸

13. Do not substantially increase the salaries of officers, directors or majority shareholders to the exclusion of minority shareholders.²⁷⁹

14. Do not transfer title to corporate real or personal property without legal consideration.²⁸⁰

15. Offer shares of the close corporation to members of the corporation before attempting to transfer the shares to third persons.²⁸¹

16. Do not perform any acts that are beyond the powers vested by the bylaws and articles of incorporation of the close corporation.²⁸²

270. See *supra* notes 98-117 and accompanying text.

271. *Id.*

272. See *supra* note 135 and accompanying text.

273. See *supra* note 136 and accompanying text.

274. See *supra* note 137 and accompanying text.

275. See *supra* note 138 and accompanying text.

276. See *supra* notes 125-27 and accompanying text.

277. See *supra* notes 140-51 and accompanying text.

278. See *supra* notes 148-55 and accompanying text.

279. *Id.*

280. See *supra* notes 156-57, 207-11 and accompanying text.

281. See *supra* notes 156-57 and accompanying text.

282. See *supra* notes 158-60 and accompanying text.

17. Voluntarily disclose any information that may not be available to a minority shareholder which may affect the value of the minority shareholder's stock which becomes available to an officer, director or majority shareholder by virtue of their position.²⁸³

18. Inform minority shareholders if the availability of additional financing for the close corporation arises.²⁸⁴

19. Inform minority shareholders of the existence of any favorable contracts that may come before the close corporation.²⁸⁵

20. Inform minority shareholders of any new business prospects.²⁸⁶

21. Inform minority shareholders of any possible plans by an officer, director or majority shareholder to dispose of all or part of their interest in the close corporation in the near future.²⁸⁷

22. Inform minority shareholders of any tender offer or any other type of offer to purchase stock from the close corporation before acting on the offer.²⁸⁸

23. Fully inform a minority shareholder of all germane facts concerning the close corporation before attempting to purchase his or her stock.²⁸⁹

24. Voluntarily disclose to the minority shareholders any preliminary merger talks with another corporation.²⁹⁰

25. Voluntarily disclose any other germane facts to the minority shareholders. Germane facts are facts that a reasonable shareholder would consider important in deciding whether to sell or retain stock.²⁹¹

26. Do not merge with another corporation or otherwise acquire another corporation's assets to the point that the status of the corporation as a 'close' corporation will be lost.²⁹²

27. Allow a minority shareholder to inspect the corporate books without making him or her obtain a court order to do so.²⁹³

28. Do not use any unnecessary delay tactics in a legal proceeding involving a minority shareholder.²⁹⁴

283. See generally Annotation, *supra* note 176.

284. See *supra* note 168.

285. *Id.*

286. *Id.*

287. *Id.*

288. See *supra* notes 171-77 and accompanying text.

289. See *supra* note 176 and accompanying text.

290. *Id.*

291. *Id.*

292. See *supra* note 177 and accompanying text.

293. See *supra* notes 184-92 and accompanying text.

294. See *supra* note 192 and accompanying text.

29. Maintain correct and complete corporate books.²⁹⁵
30. Take careful minutes at any corporate meeting and record them accordingly.²⁹⁶
31. Have the officers of the close corporation make out reports of any actions they may be called on to perform at corporate meetings.²⁹⁷
32. Do not assume that the obligation to voluntarily disclose to minority shareholders all germane information concerning the close corporation is discharged when such information is available for inspection in the corporate books.²⁹⁸
33. Do not loan any corporate money to any shareholder to pay for any part of any share or shares of corporate stock.²⁹⁹
34. Make sure that all shares of stock are paid for with legal consideration. Legal consideration is money, labor or property actually received.³⁰⁰
35. Do not loan corporate money to a member of the close corporation unless the loan will benefit the corporation.³⁰¹
36. Do not loan corporate money to another corporation in which a member of the close corporation has a substantial financial or personal interest unless it will benefit the close corporation.³⁰²
37. Corporate loans should never be low interest or interest-free and should always be secured by a deed of trust, mortgage or other adequate security.³⁰³
38. Make sure that any corporate loan given to a member of the close corporation is made with the intention of being repaid and not in lieu of a salary to avoid paying income taxes.³⁰⁴
39. Do not issue a deed of trust, mortgage or bond on corporate property in favor of a member of the close corporation if the main objective is to allow that member to obtain the property upon foreclosure.³⁰⁵
40. Do not issue new shares of stock or increase the authorized capital of the close corporation without complying with the state laws and the bylaws and articles of incorporation.³⁰⁶

295. See *supra* note 193 and accompanying text.

296. See *supra* note 194 and accompanying text.

297. See *supra* note 195 and accompanying text.

298. See *supra* notes 196-97 and accompanying text.

299. See *supra* notes 200-03 and accompanying text.

300. *Id.*

301. See *supra* notes 204-06 and accompanying text.

302. See *supra* note 206 and accompanying text.

303. See *supra* notes 199-208 and accompanying text.

304. See *supra* note 199.

305. See *supra* notes 209-11 and accompanying text.

306. See *supra* notes 212-14 and accompanying text.

41. Do not use methods of recapitalization to allow officers, directors or majority shareholders to strengthen their control over the close corporation.³⁰⁷

42. Do not reduce the stated capital of a close corporation to effectively raise the voting power of a majority shareholder or in violation of state law.³⁰⁸

43. Do not allow an officer, director or majority shareholder to usurp a business opportunity of the close corporation.³⁰⁹

44. Do not create another corporation and transfer the assets and operations of the close corporation to that corporation.³¹⁰

45. Do not allow an officer, director or majority shareholder to invest or otherwise participate in an independent, competitive business of the close corporation.³¹¹

46. Invite minority shareholders to all annual meetings in which they are entitled to vote with sufficient notice designating the place, date and hour of the meeting.³¹²

47. Make sure that notice of any meeting is delivered personally or by mail not less than ten days and not more than fifty days before the meeting.³¹³

48. Do not schedule any special meeting without the above stated notice requirements along with the purpose(s) for which the meeting is called.³¹⁴

49. Do not schedule any special meetings at an inconvenient time or place for a minority shareholder if a convenient time and place is available.³¹⁵

50. Allow minority shareholders to schedule a special meeting in accordance with the bylaws of the close corporation.³¹⁶

51. Conduct meaningful corporate meetings with officer, director and shareholder participation.³¹⁷

307. *See supra* notes 217-19 and accompanying text.

308. *See supra* notes 220-23 and accompanying text.

309. *See supra* notes 224-45 and accompanying text.

310. *See supra* notes 236-38 and accompanying text.

311. *See supra* notes 239-43 and accompanying text.

312. *See supra* notes 248-53 and accompanying text.

313. *See supra* note 252 and accompanying text.

314. *See supra* note 254 and accompanying text.

315. *See supra* note 255 and accompanying text.

316. *See supra* note 256 and accompanying text.

317. *See supra* note 257 and accompanying text.

52. Do not allow one officer of the close corporation to dictate the conduct of the other officers to the point where the other officers have no say in corporate matters.³¹⁸

53. Do not effectively cut off any right a minority shareholder may have to any existing pension or profit-sharing plan from the close corporation.³¹⁹

54. Invite minority shareholders to all corporate functions, whether the functions are business or social.³²⁰

55. Do not treat minority shareholders with open hostility and disrespect concerning corporate affairs.³²¹

VI. CONCLUSION

At least one lesson (and hopefully not the only lesson) should be apparent from reading this Comment. Successful minority shareholder oppression claims are on the rise in Missouri and in other jurisdictions across the country. This incline is even sharper when the case involves a close corporation. The Missouri courts have already kept a "tighter leash" on close corporations than they have public corporations. The Missouri Legislature decided to reinforce that leash in 1990.

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318. See *supra* note 258 and accompanying text.

319. See *supra* notes 259-62 and accompanying text.

320. See *supra* notes 263-65 and accompanying text.

321. *Id.*

