

Remedies for Oppression of Non-Controlling Shareholders in Illinois Closely-Held Corporations: An Idea Whose Time Has Gone

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I. INTRODUCTION

The Illinois Business Corporation Act ("BCA") provides that a non-controlling shareholder in an Illinois closely-held corporation,¹ who is the victim of "oppression" committed by those in control of the corporation, may be entitled to judicial dissolution of the corporation or other remedies.² Although numerous other claims are available to non-controlling shareholders relating to improper behavior by those in control, courts and commentators overwhelmingly view the availability of remedies for oppression as a key protection against the arbitrary and heavy-handed conduct of "controlling shareholders."³

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1. "[A] close corporation is one in which the stock is held in a few hands, or in a few families, and wherein it is not at all, or only rarely, dealt in by buying or selling." *Galler v. Galler*, 203 N.E.2d 577, 583 (Ill. 1964) (citing *Brooks v. Willcuts*, 78 F.2d 270, 273 (8th Cir. 1935)). The Illinois legislature has defined "non-public corporation" to mean "a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association." Business Corporation Act, 805 ILL. COMP. STAT. 5/12.56(a) (2000 & West Supp. 2001). There has been little or no practical difficulty in determining whether a particular corporation is or is not, in fact, a "closely-held" corporation because the corporations at issue in the reported Illinois decisions are clearly one or the other.

2. 805 ILL. COMP. STAT. 5/12.56(b). The Illinois Business Corporation Act recognizes the possibility of oppression by "directors or those in control of the corporation." 805 ILL. COMP. STAT. 5/12.56(a)(3). For purposes of this Article, which focuses upon relations between shareholders, only oppression by controlling shareholders will be addressed.

3. This Article uses the functional terms "controlling" and "non-controlling," rather than "majority" and "minority" to identify shareholders or groups of shareholders acting together. Although "control" and majority stock ownership are usually synonymous in closely-held corporations, that is not necessarily the case. See 1 JAMES D. COX ET AL., CORPORATIONS §§ 11.10, 11.51 n.1 (Supp. 2001).

This Article critically examines oppression as a basis for non-controlling shareholder remedies in Illinois closely-held corporations by comparing the benefits of "oppression theory"⁴ with its associated costs. The basic outcome of that analysis is that the costs of oppression theory substantially outweigh the demonstrated benefits. The oppression theory has demonstrated little, if any, utility as a mechanism to protect its intended beneficiaries—non-controlling shareholders of Illinois closely-held corporations. Despite benefits that are modest (at best), oppression theory creates substantial inefficiencies in corporate governance and shareholder dispute resolution.

If oppression were eliminated as a basis for shareholder remedies, non-controlling shareholders would continue to be adequately protected by other means, efficiency in corporate governance would be enhanced, and the courts would be relieved of unavailing and time-consuming litigation flowing from oppression claims.

This Article begins with a brief overview of the existing protections afforded non-controlling shareholders in Illinois.⁵ This Article continues with a discussion of the benefits of the oppression theory.⁶ Next, this Article presents the arguments against the oppression theory including the development of the theory in Illinois.⁷ Finally, this Article concludes that the oppression theory is not necessary for the protection of non-shareholder interests.⁸

II. PROTECTION OF NON-CONTROLLING SHAREHOLDERS IN ILLINOIS

Mistreatment of non-controlling shareholders by those in control is often mentioned as one of the most significant problems in the governance of closely-held corporations.⁹ Illinois law has responded by providing a number of mechanisms to protect non-controlling shareholders. The BCA provides that a court may dissolve an Illinois non-public corporation, or provide other remedies to non-controlling shareholders, upon a finding that the "directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent with respect to the petitioning shareholder

4. As used in this Article, "oppression theory" means the availability to non-controlling shareholders of a remedy for oppressive conduct by a controlling shareholder.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

8. See *infra* Part V.

9. See Edwin J. Bradley, *A Comparative Assessment of the California Close Corporation Provisions and a Proposal for Protecting Individual Participants*, 9 LOY. L.A. L. REV. 865, 865-67 (1976).

whether in his or her capacity as a shareholder, director, or officer.”¹⁰ In addition, Illinois law imposes fiduciary duties upon shareholders in a closely-held corporation which further limits the prerogatives of control and provides corresponding protection for those not in control.¹¹

Thus, not easily pigeon-holed, Illinois statutory and common law prohibits four (not necessarily mutually exclusive) general categories of conduct by those in control of closely-held corporations: (1) illegality, (2) fraud, (3) breach of fiduciary duties, and (4) oppression.¹² The following section briefly addresses the scope and application of the first three categories as a background to understanding the role of oppression in Illinois corporate governance law.

A. Illegality, Fraud and Fiduciary Duty

First, corporate governance provisions of the BCA limit the discretion of controlling shareholders both procedurally and substantively. Those provisions generally take the form of guarantees that all shareholders will have adequate notice of intended corporate action,¹³ access to information¹⁴ and the right to participate in decision-making, to the extent of their holdings, by voting¹⁵ at required annual shareholder meetings.¹⁶

Second, controlling shareholders are prohibited from using their positions to defraud the other shareholders. A common examples of proscribed conduct is self-dealing transactions, in which the controlling shareholder uses corporate assets for his own benefit, either individually or through another controlled business entity.¹⁷

Third, modern fiduciary duty analysis in the closely-held Illinois corporation equates co-shareholders to partners: the “decision to form and operate as a corporation rather than a partnership does not change the fact that [the shareholders] were embarking on a joint enterprise, and their mutual duties and obligations were similar to those of

10. 805 ILL. COMP. STAT. 5/12.56(a)(3) (West Supp. 2001). The Illinois Business Corporation Act follows the provisions of § 97(a) of the Model Business Corporation Act. MODEL BUS. CORP. ACT § 97(a) (1969) (current version at MODEL BUS. CORP. ACT § 14.30(2)(ii) (1998)).

11. 805 ILL. COMP. STAT. 5/7 (1993 & West Supp. 2001).

12. See *infra* Part II.A-B.

13. 805 ILL. COMP. STAT. 5/7.15 (1993).

14. 805 ILL. COMP. STAT. 5/7.30, 7.75 (1993).

15. 805 ILL. COMP. STAT. 5/7.40 (1993 & West Supp. 2001).

16. 805 ILL. COMP. STAT. 5/7.05 (1993).

17. See, e.g., *Kalabogias v. Georgou*, 627 N.E.2d 51, 57 (Ill. App. Ct. 1993).

partners.”¹⁸ Thus, controlling shareholders are subject to duties as if they were the partners of their non-controlling counterparts.¹⁹

The principles of fraud and fiduciary duty and the interpretation of the BCA have been developed and refined through long and consistent application of the law in Illinois. In addition, the laws of Delaware and other popular venues of incorporation provide useful guidance in interpretation and application of fiduciary duties.²⁰ By contrast, the concept of oppression remains so strikingly undefined as to be described as “nebulous.”²¹

B. Oppression Theory in Illinois

Oppression is often used (and misused) to describe in general any mistreatment of a non-controlling shareholder. Although entire treatises have been written on the subject of minority shareholder oppression,²² a precise definition remains elusive. This lack of a precise definition is especially true in Illinois. Illinois corporation statutes have provided remedies for oppressive conduct since 1933,²³ although the term has not been statutorily defined. Case law is also devoid of a generally-applicable definition. Oddly, much of the relevant case law defines oppression more by what it is *not*, than by what it is.²⁴ In addition, it is

18. *Tilley v. Shippee*, 147 N.E.2d 347, 352 (Ill. 1958).

19. The problems of self-interested dealings are not, of course, confined to closely-held corporations and fiduciary analysis is applicable to all corporations in some form. *See* 1 COX ET AL., *supra* note 3, §§ 11.10, 11.51 n.1 (discussing that although “control” and majority stock ownership are usually synonymous in closely-held corporations, that is not always the case).

20. In some instances, the law establishes rights and duties which apply mutually between stockholders, regardless of the magnitude of their respective ownership positions. In other instances, the scope of the right or duty is defined by the stockholder’s status as “majority” or “controlling” stockholder as distinguished from “minority” or “non-controlling stockholder.” In addition, certain rights and duties of stockholders apply regardless of whether the corporation is publicly traded or closely-held, while other duties may be implicated only in the “close” context.

21. Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128, 129 (1965).

22. *See, e.g.*, 2 F. HODGE O’NEAL & ROBERT B. THOMPSON, *OPPRESSION OF MINORITY SHAREHOLDERS* (2d ed. 1985 & Supp. 2001).

23. Oppression was listed as a ground for dissolution in the Illinois Business Corporation Act of 1933. *Cent. Standard Life Ins. Co. v. Davis*, 141 N.E.2d 45, 49 (Ill. 1957) [hereinafter *Cent. Standard II*]; *see also* Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 455 (1990) (stating that the Illinois Business Corporation Act of 1933 introduced the concept of oppression as a basis for liquidation).

24. For example, the Illinois Supreme Court stated, in an oft-quoted passage:

Plaintiff argues that the word “oppressive” does not necessarily savor of fraud, and that the absence of “mismanagement, or misapplication of assets” does not prevent a finding that the conduct of the defendants has been oppressive. We agree with that interpretation, and we reject defendants’ argument that the word is substantially

evident that oppression does not merely overlap with the other grounds for relief (i.e., illegality, fraud, and breach of fiduciary duty) in that oppressive conduct “does not necessarily savor of fraud, and the absence of mismanagement, or misapplication of assets, does not prevent a finding that the conduct of the dominant directors or officers has been oppressive; the word is not synonymous with illegal or fraudulent.”²⁵ Finally, whether certain conduct falls within the realm of oppression must be determined from the facts of each case.²⁶

It is not difficult to understand how oppression gained its reputation as a “nebulous” claim.²⁷ Nevertheless, courts and commentators are quick to point out that oppression theory gains much of its vitality from its flexibility. To define oppression too exclusively or narrowly, they argue, would encourage behavior at the margins of acceptability—directly contrary to the intended result of broad protection for non-controlling shareholders.²⁸

III. ARGUMENTS IN FAVOR OF OPPRESSION THEORY

Commentators have almost universally applauded the expansion of minority stockholder rights and remedies in general and oppression theory in particular.²⁹ Among the various claims that may be asserted

synonymous with “illegal” and “fraudulent.” Misapplication of assets or mismanagement of funds are not, as we read the statute, indispensable ingredients of “oppressive” conduct.

Cent. Standard II, 141 N.E.2d at 50.

25. *Gidwitz v. Lanzit Corrugated Box Co.*, 170 N.E.2d 131, 135 (Ill. 1960) (quoting *Cent. Standard II*, 141 N.E.2d at 50) (relying on the interpretation of § 210 of the British Companies Act in *Elder v. Elder & Watson*, 1952 Sess. Cas. 49, 55).

26. The court said, for instance, in *Gray v. Hall*:

[A]ctions which might be oppressive under one set of circumstances would not be oppressive under others. For instance, the paying of large salaries to corporate officers might be justified where a corporation has large retained earnings. This same behavior might be oppressive where the corporation is unable to pay dividends to minority stockholders, due to large salaries drawn by officer-majority stockholders. Similarly, the non-payment of dividends might indicate oppressive behavior where the corporation retains large amounts of earnings for no apparent reason except to “freeze out” minority stockholders. The non-payment of dividends by a corporation cannot be determined to be oppressive except when viewed in the backdrop of the corporation’s overall financial picture.

Gray v. Hall, 295 N.E.2d 506, 509 (Ill. App. Ct. 1973).

27. Comment, *supra* note 21, at 129.

28. William R. Quinlan & John F. Kennedy, *The Rights and Remedies of Shareholders in Closely Held Corporations Under Illinois Law*, 29 LOY. U. CHI. L.J. 585, 615 (1998).

29. See, e.g., Thomas J. Bamonte, *Expanding the Fiduciary Duties of Close Corporation Shareholders: The Dilemma Facing Illinois Corporate Law*, 15 N. ILL. U. L. REV. 257, 259-60 (1995) (discussing the pros and cons of applying heightened fiduciary duties in close

by a dissatisfied non-controlling shareholder, oppression has been cited as the "provision that empirically seems to be the most fruitful avenue for minority shareholders to pursue."³⁰

There are three important assumptions underlying the arguments in favor of oppression theory. First, due to unique aspects of the closely-held corporation, the traditional panoply of laws regulating corporate governance in general does not adequately protect non-controlling shareholders in the closely-held corporation. Second, owners of closely-held corporations routinely fail to contract for protections that non-controlling shareholders ought to enjoy. Finally, oppression theory effectively fills the void left by the combination of inadequate legal restraints on the controlling shareholder's behavior and the participants' lack of planning in that regard.

A. The Unique Nature of the Closely-Held Corporation

One of the arguments favoring the availability of a claim for oppression is the absence of a public market for the stock of closely-held corporations.³¹ Minority shareholders in a corporation with a public market for its stock can "vote with their feet" if they feel themselves oppressed or otherwise mistreated by those in control.³² Thus, the possibility of oppression is essentially eliminated in the context of a publicly traded corporation—at least one providing reasonable liquidity and meaningful exit opportunities.

By contrast, the non-controlling shareholder in a closely-held corporation usually has no ready buyer other than the controlling shareholder—and sometimes even that is not an option.³³ A claim for oppression (or the threat of asserting such a claim) acts as a partial substitute for the public market by creating a valve to release the pressure of oppressive behavior.³⁴

corporations); Quinlan & Kennedy, *supra* note 28, at 594-98 (exploring the nature of the relationships of closely-held corporations and how to avoid disputes).

30. Murdock, *supra* note 23, at 455.

31. 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORP. § 9.02 (3d ed. 1986 & Supp. 2001); Bamonte, *supra* note 29, at 259; Quinlan & Kennedy, *supra* note 28, at 588.

32. 2 O'NEAL & THOMPSON, *supra* note 31, § 9.02, at 4 ("[A] shareholder in a close corporation does not have the exit option available to a shareholder in a publicly held corporation, who can sell shares in a securities market if dissatisfied with the way the corporation is being operated.").

33. The majority shareholder has little economic incentive to acquire the remaining stock other than the opportunity to avoid the costs associated with the presence of the minority shareholder(s).

34. That justification has been criticized. It has been suggested that illiquidity in itself is not the real problem facing an oppressed shareholder. In the case of a non-controlling shareholder

Another unique aspect of the closely-held corporation, which suggests, some argue, the need for special protection for the non-controlling shareholder, is that the owners of a closely-held corporation are quite often its managers as well.³⁵ Supporters of oppression theory argue that the identity of ownership and management creates an incentive for the controlling owner-manager to use his dual positions to over-compensate himself to the detriment of owners who are not managers or who are not in a position of control.³⁶

B. The Participants' Lack of Planning

There is little doubt that the participants in a closely-held corporation can contract for particular rights between themselves that would essentially redirect most, if not all, ensuing disputes from claims of oppression to traditional contract actions. However, that possibility does not necessarily translate into practical application.

Proponents of oppression theory point out that participants in closely-held corporations very often (perhaps usually, although this has never been proven) do not avail themselves of the many planning opportunities available to them.³⁷ Instead, the participants approach the venture as more of a slightly formalized partnership in which they do not fully comprehend the need for planning.³⁸ That approach is said to arise from several different causes, including: the non-controlling shareholder's ignorance of his potential vulnerability, a trust in one's co-venturers that approaches naivete, and a sort of irrational exuberance

who is subject to extreme oppression at the hands of those in control, even a liquid market would be of little assistance because the oppression so severely impacts the value of his investment that he would find no buyers. FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 230-31 (1991).

35. Quinlan & Kennedy, *supra* note 28, at 588.

36. The contrary argument is that the combination of ownership control and management control in privately-held companies does not necessarily create greater difficulties for those not in control than does the separation of ownership and management in publicly traded companies. In the end, the manager (whether he is a controlling owner, a non-controlling owner or not an owner at all) has an incentive to increase his compensation as manager to its highest possible level, while still maintaining his managerial position. One might well question whether that optimum level would differ between two otherwise identical businesses—one publicly owned, the other privately held. Economic efficiency theory would suggest that the wide variety of investment vehicles available in the market would tend to minimize the divergences in compensations between managers of closely held corporations and those in publicly held companies. EASTERBROOK & FISCHER, *supra* note 34, at 230-31.

37. Murdock, *supra* note 23, at 426.

38. Carol L. Isreals, *The Sacred Cow of Corporate Existence, Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778, 778-79 (1952).

for the new venture that overwhelms caution.³⁹ Whether it is that combination of factors or some other, it is fairly apparent that planning for the closely-held corporation is far from universal.⁴⁰

C. *The Need to Fill the Void*

The perceived need for special protection of the non-controlling shareholder in the closely-held corporation, together with the very common absence of planning by the participants, has resulted in the creation of special remedies in the law for this special class of investors.⁴¹ Proponents of oppression theory often attribute that development to the intervention of the legislature and courts to fill the "void" in shareholder protection.⁴²

Perhaps a more compelling explanation of the development of oppression theory involves an economic efficiency analysis. Oppression theory—as well as other types of shareholder protection, such as imposition of fiduciary duties—may be viewed as standardized terms in the agreement between the parties.⁴³ In that way, the non-controlling shareholder is protected, even if he did not have the leverage or the foresight to bargain individually for those protections. However, to be effective and efficient, that argument only goes so far because the terms implied in law must be similar to the bargain that the parties would have struck had they addressed the issues. Thus, the argument runs, efficiency is enhanced by giving the parties the benefit of their bargain without the transaction costs that they would have incurred to reach the bargain themselves.⁴⁴

IV. ARGUMENTS AGAINST OPPRESSION THEORY

As noted above, both courts and commentators overwhelmingly favor the availability of remedies for oppressed non-controlling shareholders in closely-held corporations.⁴⁵ But several substantial objections to the availability of remedies for oppression are routinely overlooked in the

39. Murdock, *supra* note 23, at 426 ("[P]eople enter closely-held businesses in the same manner as they enter marriage: optimistically and ill-prepared.").

40. One of the common factors of litigated shareholder disputes is the absence of a shareholder agreement or the shareholder's failure to update the agreement to reflect changed circumstances.

41. Quinlan & Kennedy, *supra* note 28, at 588; Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW 699, 707-26 (1993).

42. Thompson, *supra* note 41, at 707-26.

43. EASTERBROOK & FISCHER, *supra* note 34, at 247-48.

44. *Id.* at 251-52.

45. See *supra* Part III (discussing the arguments in favor of oppression theory).

face of the generally favorable commentary on the topic. Many of those objections rest upon basic economic analysis.

No one doubts that shareholder dissension in closely-held corporations creates costs to the enterprise itself arising from a number of factors, including: ineffective use of management time, diversion of resources from high-return projects to litigation, interference with the company's ability to obtain financing and, ultimately, potential failure of the business.⁴⁶ The negative effects of shareholder dissension are felt beyond the enterprise, impacting the economy and taxing scarce judicial resources.⁴⁷

The logical and efficient public policy response to shareholder dissension would be the creation of mechanisms to avoid or quickly resolve those disputes with the goal of reducing the resulting inefficiencies. Efficient standards minimize waste.⁴⁸ However, rather than address and resolve inefficiencies, oppression theory creates costs of its own.⁴⁹ As will be demonstrated below, those costs overwhelm any benefits.

There are four primary costs created by oppression theory, each of which will be addressed in this Article. First, rather than filling an endemic "void" in planning, oppression theory seems to create a void by serving as a partial (albeit unsatisfactory) substitute for corporate governance planning.⁵⁰ Second, the unsatisfactory nature of oppression theory as a void filler is evident because the current Illinois formulation of oppression leaves controlling shareholders without the kind of clear guidelines for avoiding oppressive behavior⁵¹ that would be created by effective planning. Third, to the extent that oppression fills a void in planning, it does so by creating a rule that corporate governance by unanimity is the only safe harbor for the controlling shareholder.⁵² The final objection, flowing from the convergence of the series of problems outlined above, is that oppression theory tends to increase the costs and severity of shareholder disputes.⁵³

46. Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 287 (1990).

47. *Id.* at 286.

48. *Id.* at 318.

49. EASTERBROOK & FISCHER, *supra* note 34, at 238.

50. *See infra* Part IV.B.

51. *See infra* Part IV.C.

52. *See infra* Part IV.D.

53. *See infra* Part IV.E.

Each of these arguments is addressed in some detail below. However, proponents of oppression theory may meet each argument with the retort that considerations of "shareholder rights," of which oppression is considered to be a key component in Illinois, must be the paramount concern. In sum, proponents argue that, whatever its direct and collateral costs, oppression theory is an effective means to protect non-controlling shareholders and that its scope should be expanded.⁵⁴

It appears that those commentators may have seriously overestimated the true benefits of oppression claims to non-controlling shareholders. Notwithstanding the broad purposes of oppression theory and the sweeping rhetoric used by many Illinois courts, it is difficult, if not impossible, to find a reported Illinois appellate opinion in which the assertion of an oppression claim has resulted in a meaningful benefit to a minority shareholder separate from other claims that were, or could have been, asserted. In other words, the non-controlling shareholder in those cases would have been fully protected by asserting claims for breach of fiduciary duty, illegality or fraud, without invoking oppression.

The next section of this Article examines the utility of the oppression claim through a case-by-case analysis of reported Illinois appellate opinions addressing oppression.⁵⁵ The sections that follow expand upon the four policy-based objections to oppression theory that are noted above.⁵⁶

A. Oppression Theory is Ineffective

An analysis of Illinois cases leads one to conclude that the actual efficacy of oppression as a basis for non-controlling shareholder remedies is much less certain than the rhetoric employed by courts and commentators might lead one to believe. Upon examination, oppression does not seem to be a very "fruitful avenue for minority shareholders"⁵⁷ after all. Instead, while often giving lip service to oppression in broad and sweeping terms, the decisions of Illinois courts are best understood as being grounded not in the rather slippery notion of oppression, but instead in better defined claims for illegality, fraud or breach of fiduciary duty.

In addition, a chronological review of those cases shows that the development of oppression law in Illinois is characterized not by a

54. See, e.g., Murdock, *supra* note 23, at 455; Quinlan & Kennedy, *supra* note 28, at 585.

55. See *infra* Part IV.A (discussing how oppression theory is ineffective).

56. See text accompanying *supra* notes 50-53.

57. Murdock, *supra* note 23, at 455.

consistent evolution, but by three distinct stages. Oppression began its life in Illinois primarily as a means of assuring that the “drastic” dissolution remedy was employed only in egregious situations in which it was truly warranted.⁵⁸ In the second stage, the oppression concept came to be applied more as a substantive wrong that included conduct essentially amounting to breach of the controlling shareholder’s fiduciary duties.⁵⁹ Finally, when the BCA was amended to make remedies other than dissolution available to shareholders, the oppression concept changed again.⁶⁰ The analysis in the third stage focused not on the wrongful conduct of the controlling shareholder, but on whether the controlling shareholder’s governance of the corporation fulfilled the non-controlling shareholder’s reasonable expectations for his participation in the corporation.⁶¹

1. First Stage—Oppression as a Unification Principle

The Illinois courts’ options for granting relief to a non-controlling shareholder were limited originally to dissolution or nothing.⁶² Because dissolution traditionally has been considered a “drastic” remedy,⁶³ courts were naturally circumspect in granting the remedy.⁶⁴ Although oppression was listed in the BCA as an independent and distinct ground for dissolution, the courts actually used oppression as shorthand to indicate that the wrongful acts of the controlling shareholder were not merely isolated incidents or unrelated occurrences, but instead amounted to a continuing course of conduct that would justify the drastic dissolution remedy.⁶⁵ Thus, oppression could apply to many sorts of inherently wrongful—although not necessarily illegal or fraudulent—conduct which, individually, might not rise to the level of concern necessary to justify dissolution.

58. See *infra* Part IV.A.1 (discussing the unification principle of oppression theory).

59. See *infra* Part IV.A.2 (discussing how oppression theory is a breach of duty).

60. See *infra* Part IV.A.3 (discussing the reasonable expectations of oppression theory).

61. Interestingly, at least one commentator has suggested that the application of fiduciary duty principles has undergone a three-stage development that seems to roughly parallel the development of oppression theory. Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1680 (1990).

62. See *infra* notes 84-93 and accompanying text (describing the development of dissolution as a remedy for oppression).

63. See, e.g., *Cent. Standard II*, 141 N.E.2d 45, 51 (Ill. 1957).

64. There is a background concern that the availability of forced dissolution as a remedy for non-controlling shareholder claims may allow minority shareholders to exercise “retaliatory oppression” against those in control. Bahls, *supra* note 46, at 296.

65. See *infra* notes 84-129 and accompanying text (illustrating oppression through a constant course of conduct).

The Illinois Supreme Court's 1957 decision in *Central Standard Life Insurance Co. v. Davis*⁶⁶ affirmed oppression as a basis for corporate dissolution and provided many of the broad definitional platitudes⁶⁷ still quoted today, but ironically resulted in no relief to the complaining minority.⁶⁸ *Central Standard* was brought as a class action on behalf of the preferred stockholders of Abraham Lincoln Hotel Company ("Hotel Company").⁶⁹ The Hotel Company built and owned a hotel that was operated by the Abraham Lincoln Hotel Operating Company ("Operating Company").⁷⁰ Of the multiple defendants named in the lawsuit, defendant C. Hayden Davis owned controlling interests in both the Hotel Company and the Operating Company.⁷¹

The Hotel Company's only source of income was rent received from the Operating Company.⁷² The Hotel Company paid dividends to its preferred shareholders from 1924 until 1931.⁷³ The genesis of the plaintiff's claims was the Hotel Company's failure to pay dividends to preferred shareholders after 1931.⁷⁴ When the complaint was filed, the dividends owed to the preferred shareholders amounted to over one million dollars.⁷⁵

The plaintiff argued that the Hotel Company should be liquidated because it would never be able to pay the accrued dividends on the preferred stock and that the defendants' refusal to liquidate the company

66. *Cent. Standard II*, 141 N.E.2d at 45.

67. See, e.g., Mitchell, *supra* note 61, at 1697 (discussing "compilation of platitudes" in *Chiles v. Robertson*, 767 P.2d 903 (Or. Ct. App. 1989)).

68. Indeed, there appear to be very few reported Illinois decisions analyzing the issue of oppression in the two decades following the adoption of the Business Corporation Act in 1933. See *Marnik v. Northwestern Packing Co.*, 82 N.E.2d 195 (Ill. App. Ct. 1948) (Abstract only); *Lush'us Brand Distribs., Inc. v. Fort Dearborn Lithograph Co.*, 70 N.E.2d 737 (Ill. App. Ct. 1946); *Sulinski v. Humboldt & Wabansia Bldg. Corp.*, 43 N.E.2d 181 (Ill. App. Ct. 1942); *Long v. Wilson Stove & Mfg. Co.*, 277 Ill. App. 57 (1934); see also *Murdock*, *supra* note 23, at 456.

69. *Cent. Standard II*, 141 N.E.2d at 47. Significant to the facts of the case, the plaintiffs' stock was cumulative preferred stock, which required payment of all dividends accrued on the preferred stock before any dividend could be paid to the common shareholders. See *id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. See *id.*

75. *Id.* The court in *Central Standard II* noted that the full amount of the cumulated dividend would have to be paid to preferred shareholders before any dividends could be paid to the common shareholders. *Id.* Further, the cumulated dividends and the par value of the outstanding preferred stock—or a total of some \$1,750,000—would have to be paid to preferred holders on liquidation of the Hotel Company before any payments would be made to common shareholders. *Id.*

was oppressive.⁷⁶ The plaintiff alleged only oppression, not illegal or fraudulent conduct.⁷⁷

The trial court dismissed the case, finding no illegal, oppressive or fraudulent conduct.⁷⁸ The appellate court stated that a "clear abuse of trust" was sufficient to establish oppressive conduct under the BCA⁷⁹ and noted that the word oppressive in the BCA must be read separately from "illegal" and "fraudulent."⁸⁰ The court seemed to struggle with just what oppression should include, however, resorting to various dictionary definitions of the term, including "unreasonably burdensome," "unjustly severe," "tyrannical," and "overpowering to spirit or senses."⁸¹ The appellate court affirmed the trial court's holding,⁸² apparently because there had been no showing of "mismanagement, or misapplication of assets."⁸³

The Illinois Supreme Court noted that the "concept of oppressive conduct as a ground for dissolution of a corporation in equity appears for the first time in the 1933 act,"⁸⁴ but there is no "authoritative determination" of its "precise scope."⁸⁵ The court rejected the argument that dissolution may not be granted as a remedy to minority shareholders unless it is "demonstrated to a certainty that continuation of the business must inevitably result in serious loss in the near future."⁸⁶ The *Central Standard* court also rejected "defendants' argument that the word [oppression] is substantially synonymous with 'illegal' and 'fraudulent.'"⁸⁷ Unfortunately, the supreme court initiated the trend in Illinois case law of defining "oppression" by stating what it is not:

Plaintiff argues that the word "oppressive" does not necessarily savor of fraud and that the absence of "mismanagement, or misapplication of assets" does not prevent a finding that the conduct of the defendants

76. *Id.*

77. *Id.* at 49.

78. *Id.* at 48.

79. *Cent. Standard Life Ins. Co. v. Davis*, 134 N.E.2d 653, 654 (Ill. App. Ct. 1956), *aff'd*, 141 N.E.2d 45 (Ill. 1957) [hereinafter *Cent. Standard I*].

80. *Id.* at 658-59.

81. *Id.*

82. *Id.* at 660.

83. *Id.* at 659.

84. *Cent. Standard II*, 141 N.E.2d 45, 49 (Ill. 1957).

85. *Id.*

86. *Id.* (citing *Dixie Lumber Co. v. Hellams*, 80 So. 872, 874 (Ala. 1919); *Phinizy v. Anniston City Land Co.*, 71 So. 469, 471 (Ala. 1916); *Mfrs.' Land & Improvement Co. v. Cleary*, 89 S.W. 248 (Ky. 1905); *James F. Powers Foundry Co. v. Miller*, 171 A. 842, 845 (Md. 1934)).

87. *Cent. Standard II*, 141 N.E.2d at 50.

has been oppressive. We agree with that interpretation, and we reject defendants' argument that the word is substantially synonymous with "illegal" and "fraudulent." Misapplication of assets or mismanagement of funds are not, as we read the statute, indispensable ingredients of "oppressive" conduct.⁸⁸

The *Central Standard* court's definition of oppression has become the standard reference point for subsequent courts in oppression cases. However, those succeeding opinions often miss an important element of the court's analysis, relating to the economic reality of a minority shareholder's decision to assume that position. That is, the non-controlling shareholder's apparent disadvantage may simply reflect the natural benefits of his bargain.

A plaintiff cannot complain of the continuation of a venture which, though solvent, is not profitable, when he fails to show that *he has not already taken advantage of the situation he complains of in the price that he paid for his stock*. Equity will not award the drastic relief here sought in order to aid a plaintiff in what might be a profitable speculation.⁸⁹

Despite its broad language favoring remedies for oppression, the *Central Standard* court held that the plaintiff was entitled to no relief because "the record suggests that the company may shortly be in a position to pay dividends on the preferred stock."⁹⁰ The court reached that result even though the financial predicament of the preferred shareholders appeared compelling.⁹¹ Apparently the shareholders had received no dividends for over thirty years and it appeared unlikely that they would receive much at dissolution upon expiration of the corporation's charter.⁹² Nevertheless, the plaintiff's naked allegation of oppression (without fraud, illegality or other distinct wrongdoing) was unavailing.⁹³

Two years after *Central Standard*, the Illinois Supreme Court revisited the concept of oppression with similar rhetoric but a markedly

88. *Id.* (relying upon the interpretation of § 210 of the British Companies Act in *Elder v. Elder & Watson*, 1952 Sess. Cas. 49, 55).

89. *Id.* at 51 (emphasis added) (citing *Wall & Beaver St. Corp. v. Munson Line*, 58 F. Supp. 109, 116 (Md. 1944)).

90. *Id.* at 50. However, the *Central Standard II* court also noted that "it does not follow that the preferred shareholders must await the termination of the life of the corporation before distribution of its assets can be decreed. . . . Time may show that there is no reasonable prospect of profitable operation. The present record does not." *Id.* at 51.

91. *See id.* at 49.

92. *See id.* at 50.

93. *Id.*

different result. *Gidwitz v. Lanzit Corrugated Box Co.*⁹⁴ is a classic deadlock case in which the ownership of stock in Lanzit Corrugated Box Co. ("Lanzit") was evenly split between two factions of the Gidwitz family so that there were "neither majority or minority stockholders" of Lanzit.⁹⁵ The board of directors consisted of two members from each of the Gidwitz family factions.⁹⁶ Before the family rift occurred, Joseph Gidwitz—who headed the defendant faction—was unanimously elected president.⁹⁷ As a result of that split, Joseph became ensconced as president and was "able to manage, operate, and control Lanzit almost as a sole proprietorship, while paying technical respect to the existing corporate structure and the laws relating to corporations."⁹⁸

The plaintiffs brought suit, asserting that both the directors and shareholders of the corporation were deadlocked and claiming that the defendants "committed illegal, oppressive and fraudulent acts," which the plaintiffs specifically alleged and proved.⁹⁹ The trial court found that the shareholders and the directors of Lanzit had been deadlocked since 1950; that the shareholders had failed to elect new directors for ten consecutive annual meetings; and that irreparable injury to the corporation was "threatened by reason of the deadlock."¹⁰⁰ Significantly, the court also found that the defendants' acts were "oppressive in that, through the medium of the deadlock among the directors and the stockholders, said Defendants have been in control of the Corporation for the last ten years by reason of Joseph being President and chief executive officer."¹⁰¹ Based upon those findings,

94. *Gidwitz v. Lanzit Corrugated Box Co.*, 170 N.E.2d 131 (Ill. 1960).

95. *Id.* at 135.

96. *Id.* at 134.

97. *Id.* at 135-36.

98. *Id.* at 136.

99. *Id.* at 133. Plaintiffs enumerated the following allegedly oppressive acts of the president and others in the Lanzit control group: (1) The plaintiffs were deprived of participation in the management of the corporation; (2) Joseph organized another corporation with Lanzit funds without consulting plaintiffs and without board authorization and that corporation ultimately lost a substantial amount of money; (3) The defendants refused to increase the board from four to five members to break the ten-year deadlock; (4) Joseph improperly hired a corporate officer without board approval; (5) Joseph made "arbitrary deductions" from Victor Gidwitz's salary; (6) Joseph caused Lanzit to borrow money funds from a bank, from a company of which Joseph was president and from a partnership in which Joseph was a partner, all without board approval; (7) Joseph executed a proxy to himself to vote shares in a Lanzit subsidiary; and (8) Joseph failed to consult any director except his brother on corporate policy decisions. *Id.* at 135.

100. *Id.* at 133.

101. *Id.*

the trial court concluded that the plaintiffs had established the right to liquidation.¹⁰²

The appeal was taken directly to the Illinois Supreme Court,¹⁰³ which began its analysis by noting, incorrectly, that there

appears to be no claim that the acts of the directors or officers in this case are "illegal" or "fraudulent," but only that the "deadlock" is "oppressive" to plaintiffs as shareholders because they, as directors, are precluded thereby from participating at the policy level in the direction and supervision of Joseph Gidwitz's activities as president of the corporation.¹⁰⁴

The court cited to the familiar *Central Standard* proposition, in stating that the word oppressive

does not carry an essential inference of imminent disaster; it can contemplate a continuing course of conduct. The word does not necessarily savor of fraud, and the absence of "mismanagement, or misapplication of assets," does not prevent a finding that the conduct of the dominant directors or officers has been oppressive. It is not synonymous with "illegal" and "fraudulent."¹⁰⁵

The court further noted that the "essential attribute of a shareholder in a corporation is that he is entitled to participate, according to the amount of his stock, in the selection of the management of the corporation, and he cannot be deprived or deprive himself of that power."¹⁰⁶

The court suggested that the mere fortuity of Joseph having been president at the time the fifty-fifty split occurred should not subvert the principles of shareholder participation and majority control.¹⁰⁷ In addition, the court noted that Joseph "used his position as president of a closely held corporation, split fifty-fifty in stock ownership . . . to completely control and manage the corporation without majority stock support."¹⁰⁸

Although the court erroneously suggested that no illegality had been alleged, it went on to catalog a host of acts or omissions in violation of the BCA and Lanzit's bylaws. Among other things, the Lanzit shareholders were deprived of their rights to vote for directors during

102. *Id.* at 133-34.

103. *Id.* at 134.

104. *Id.*

105. *Id.* at 135 (quoting *Cent. Standard II*, 141 N.E.2d 45 (Ill. 1957)).

106. *Id.* (citing *Laughlin v. Johnson*, 230 Ill. App. 25 (1923); *Colton v. Williams*, 65 Ill. App. 466 (1896)).

107. *See id.* at 136.

108. *Id.* at 138.

the ten years when no annual shareholder meetings had been held.¹⁰⁹ Moreover, although one special meeting of shareholders had been held during that time, Joseph improperly ruled out of order a proposal that the number of directors be increased from four to five.¹¹⁰ While a few meetings of the board of directors were held during the ten-year period, no matters of business or corporate policy were presented to the board.¹¹¹ As a result of this failure to hold meaningful shareholder and board meetings, Joseph was also able to avoid the obligation imposed upon the president by the bylaws, to report on the operations of the corporation.¹¹²

The court also found that Joseph exceeded his authority as president in connection with a number of his corporate decisions and was further troubled by Joseph's failure to consult with the board before approving interest-bearing loans made to Lanzit by entities controlled by Joseph.¹¹³ Joseph was never granted authority by Lanzit's shareholders or directors to arrange the loans and, "in effect, borrowed from himself and realized a profit thereon."¹¹⁴

In addition, the court also found that the "record . . . supports numerous acts of hostility toward and deprivation of the rights of Victor Gidwitz and Carrie Gidwitz as stockholders."¹¹⁵ In summary, the court found that the "improper acts of Joseph, as president of Lanzit, the continuing course of conduct followed by the defendants through their president, the lack of majority control, and the denial to plaintiffs of their corporate rights and privileges, exhibit oppression in this particular situation."¹¹⁶ Those findings were based, in part, upon

a continuing course of oppressive conduct for which the future holds little or no hope of abatement. A continuing course of refusal of the controlling group to agree with the plaintiffs on any issue is evidenced. Moreover, Joseph has acted in an arbitrary and high-handed manner as president of the corporation—refusing to follow the dictates or direction of the corporate bylaws, or to subordinate his actions to the advice or control of the board of directors.¹¹⁷

109. *Id.* at 136.

110. *Id.*

111. *Id.*

112. *Id.* at 136-37.

113. *See id.* at 137.

114. *Id.*

115. *Id.* at 138.

116. *Id.*

117. *Id.*

The supreme court therefore affirmed the decree dissolving the corporation.¹¹⁸

Although *Gidwitz* may appear to be a ringing vindication of oppression theory as a prophylactic against overbearing conduct by those in control of a corporation, that case's underlying allegations and findings are not about a distinct claim of oppression. Rather, the court uses the term oppression to describe the "cumulative effects of . . . many acts and incidents, and their indicated continuing nature."¹¹⁹ The essential point is that those underlying "acts and incidents" were independently either violations of Joseph's fiduciary duties or of the BCA.¹²⁰ For example, the BCA requires that the corporation hold annual shareholder meetings, but Lanzit held none.¹²¹ Certain powers granted to the board, such as appointing officers and granting proxies to vote shares in a subsidiary corporation,¹²² were usurped.¹²³ Joseph's unilateral decisions to organize another company with Lanzit funds and to cause Lanzit to accept loans from which he profited are fairly egregious examples of fiduciary duty violations.¹²⁴

Despite Joseph's obvious violations of the statute and his duties as a fiduciary, the *Gidwitz* court seemed to see the need for a unifying factor tying those acts together before dissolving the corporation.¹²⁵ That came in the form of oppression, which the court recognized as the "cumulative effects of [the defendant's wrongful acts], and their indicated continuing nature . . ."¹²⁶ *Gidwitz* stands for the proposition that the court's natural reluctance to impose the "drastic remedy"¹²⁷ of dissolution would not be overcome by isolated, albeit numerous, incidents of illegal or improper behavior.¹²⁸ Only a continuing course

118. *Id.*

119. *Id.*

120. *See id.*

121. 805 ILL. COMP. STAT. 5/7.05 (2000); *Gidwitz*, 170 N.E.2d at 136.

122. *See* *Gidwitz*, 170 N.E.2d at 136 (stating that "the principles governing . . . corporate structures must apply to this corporation . . ."); *see also* ILL. REV. STAT. 32, § 157.43 (1955) ("All officers of the corporation . . . shall have such authority and perform such duties . . . as may be provided in the by-laws . . .") (current version at 805 ILL. COMP. STAT. 5/8.50 (2000)).

123. *Gidwitz*, 170 N.E.2d at 137-38.

124. *Id.*

125. *See id.* at 138 ("The cumulative effects of these many acts . . . entitle plaintiffs to . . . dissolution.").

126. *Id.*

127. *See, e.g., Cent. Standard II*, 141 N.E.2d 45, 51 (Ill. 1957) (stating that "corporate dissolution is a drastic remedy . . .").

128. *Gidwitz*, 170 N.E.2d at 138.

of wrongful behavior would justify such an extreme remedy as dissolution.¹²⁹

In *Polikoff v. Dole & Clark Building Corp.*,¹³⁰ the First District Appellate Court provided another example of the courts' disinclination to grant the "drastic" liquidation remedy and illustrated the limited role of oppression in its first stage of development.¹³¹ *Polikoff* addressed the complaint of a minority stockholder of the Dole & Clark Building Corporation ("Dole & Clark") that the majority stockholder (who was also the president and a creditor of the corporation) was running the business more for his benefit than for the benefit of the stockholders.¹³²

Members of the family of defendant Paul A. Grundman ("Grundman") owned about fifty-five percent of Dole & Clark's Class A common stock and seventy-six percent of the Class B common stock.¹³³ The plaintiff owned less than two percent of each class of stock.¹³⁴ It appears that Grundman completely controlled the corporation as the president and a director.¹³⁵ Grundman's son-in-law was the corporate secretary and a director, and his daughter filled the third directorship.¹³⁶ Grundman received a salary of \$6,000 per year, which the plaintiff asserted was "grossly excessive in view of the financial condition of the corporation" and Grundman's less than overwhelming workload.¹³⁷

Dole & Clark's principal asset was a building that housed a movie theater, nine stores and a small hotel.¹³⁸ The theater had been vacant for some time and produced no revenue.¹³⁹ The hotel rooms were only

129. *Id.*

130. *Polikoff v. Dole & Clark Bldg. Corp.*, 184 N.E.2d 792 (Ill. App. Ct. 1962).

131. *Id.* at 795-96.

132. *Id.* at 793-94.

133. *Id.* at 793.

134. *Id.* The court explained the capital structure of the corporation in some detail because it provides an important context for the plaintiff's allegations. *Id.* Dole & Clark was formed in 1933 as a result of a plan of reorganization. *Id.* The holders of bonds before the reorganization received Class A common stock and the former equity owners received Class B common stock. *Id.* The Class A stock was entitled to no dividends, but was to be paid \$100 per share upon liquidation of the corporation or retirement of the stock. *Id.* The former Class B stock was entitled to no dividends while any Class A stock remained outstanding. *Id.* Thus, the bondholders who received the Class A stock retained a liquidation preference after the reorganization. *Id.*

135. *See id.* at 794 ("During the years in question, (1952-1958), defendant Grundman was president, a director and manager of the property . . .").

136. *Id.*

137. *Id.*

138. *Id.* at 793.

139. *Id.* at 794.

about half rented and the plaintiff asserted that too little was spent on hotel advertising.¹⁴⁰ At a time when Dole & Clark had suffered several years of operating losses, Grundman's wife made a \$60,000 loan to the corporation secured by a mortgage on the real estate.¹⁴¹ Dole & Clark used the proceeds of the loan to improve the building even though it was uncertain whether the mortgage principal could be repaid, resulting in foreclosure and financial gain to the Grundmans.¹⁴²

The plaintiff sought liquidation of the corporation, alleging that Grundman's management of the business (particularly his refusal to sell the building or reopen the theater) was oppressive and constituted a waste or misapplication of corporate assets.¹⁴³ The plaintiff also asserted that there was no reasonable prospect for the profitable operation of the business, particularly in light of mortgage payments to Grundman's wife.¹⁴⁴ The minority shareholder's primary complaint was that due to Grundman's management, the corporation's surplus funds to retire the Class A shares—which, according to the plaintiff was the "principal object for which [the corporation] was formed"—were being depleted.¹⁴⁵ The plaintiff also objected that Grundman's position as a creditor of the corporation (through his wife's mortgage) placed him in a position of conflict.¹⁴⁶

The trial court dismissed the action for failure to allege facts constituting illegal, oppressive or fraudulent conduct by those in control of the corporation or the waste or misapplication of assets, and the plaintiff appealed this decision.¹⁴⁷ The appellate court began its analysis of the plaintiff's claims with the basic proposition that "the majority of [the corporation's] stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business."¹⁴⁸ As if that beginning were not bad enough news for the plaintiff, the court also noted that "the remedy of

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 794-95. Plaintiffs alleged the following oppressive or wasteful actions: (1) Grundman refused to have the corporation operate the vacant theater; (2) Grundman refused to permit the corporation to sell the real estate contrary to the plaintiff's wishes; (3) Grundman and his family bought additional Dole & Clark stock at depressed prices; (4) Grundman refused to follow the plaintiffs' suggestions in managing the corporation; and (5) Grundman spent corporate funds to pay attorneys' fees to oppose the plaintiff's suit. *See id.* at 794.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 793.

148. *Id.* at 795 (quoting *Wheeler v. Pullman Iron & Steel Co.*, 32 N.E. 420, 423 (Ill. 1892)).

liquidation is so drastic that it must be invoked with extreme caution.”¹⁴⁹ Significantly, the court also warned that remedies for oppression should be limited by concern for the principle of majority rule: “The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one—oppression of the majority by the minority.”¹⁵⁰

In contrast to *Gidwitz*—the only previous case where dissolution was ordered¹⁵¹—the *Polikoff* court found that virtually “all aspects of plaintiff’s charges relate solely to business decision-making which by our statute is made the responsibility of the board of directors and the officers of a corporation.”¹⁵² Because the matters complained of were within the statutory purview of the directors and management, “the acts charged to Grundman are merely the exercise of business judgment which cannot be made subject to the attack of disgruntled minority shareholders without destroying the practicality of the corporate form.”¹⁵³ Thus, the court concluded that most of the plaintiff’s complaints about Grundman’s conduct were blunted by the principle of majority rule and the business judgment rule.¹⁵⁴

In seeming contrast to previous and subsequent case law regarding a fiduciary’s divided loyalties, the court also brushed off the plaintiff’s allegations regarding Grundman’s possible conflict of interest based upon his wife’s mortgage, observing that “[e]very corporate director or officer is in a position to betray his position of trust from the moment of his election.”¹⁵⁵

Finally, the court was not impressed with the argument that Dole & Clark should be dissolved for the reason that “there is no reasonable expectation of profitable operation.”¹⁵⁶ Relying upon the standard set forth in *Central Standard*, the *Polikoff* court found that “[t]ime may show that there is no reasonable prospect of profitable operation. The

149. *Id.*

150. *Id.*

151. See *supra* notes 94-129 and accompanying text (discussing *Gidwitz*).

152. *Polikoff*, 184 N.E.2d at 796.

153. *Id.* This appears to be the first application in Illinois case law of the business judgment rule to protect officers and directors from an attack based upon allegedly oppressive conduct.

154. *Id.* (citing *Bixler v. Summerfield*, 62 N.E. 849, 850-51 (Ill. 1902)).

155. *Id.* In its haste to dispose of the case, the court seemed to ignore that the operative allegation was not that the fiduciary was “in a position” to violate his trust, but that by adopting the dual role as director and creditor he had actually done so.

156. *Id.*

present record does not.”¹⁵⁷ Finding no basis for the liquidation of the corporation, the *Polikoff* court affirmed the dismissal of the complaint.¹⁵⁸

In *Polikoff*, as in *Central Standard*, a pure oppression claim did the plaintiff no good.¹⁵⁹ The plaintiff attempted to raise at least one specific claim of wrongdoing arising from the defendant’s alleged self-dealing in connection with the mortgage.¹⁶⁰ The court’s fairly cavalier treatment of that issue seems to have been based upon a lack of evidence of actual wrongdoing.¹⁶¹ Thus, there was nothing left but a naked allegation of oppression.¹⁶²

From a broader perspective, the *Polikoff* plaintiff seemed to be alleging that Grundman’s actions endangered her expectation that her Class A shares would be retired promptly, which she described as “the principal object for which [the corporation] was formed.”¹⁶³ The plaintiff’s argument was ahead of its time. As discussed below, that sort of expectation-based view of oppression may have carried more weight a couple of decades later.¹⁶⁴ Unfortunately for that plaintiff, however, the court was not prepared to adopt that analysis in 1962.¹⁶⁵

The First District Appellate Court’s next reported opinion in a shareholder oppression case came eight years later, with *Ross v. 311 North Central Avenue Building Corp.*¹⁶⁶ In *Ross*, the complaining shareholder obtained a remedy—but again, not on the ground of oppression.¹⁶⁷ *Ross* was a class action brought by minority shareholders

157. *Id.* (quoting *Cent. Standard II*, 141 N.E.2d 45, 51 (Ill. 1957)).

158. *Id.* Presiding Justice Burman dissented from the opinion of the court, finding grounds for possible liquidation. *Id.* at 797 (Burman, J., dissenting). In particular, the dissent validated the plaintiff’s basic argument that Grundman was using his position of trust to employ corporate funds to protect the security for his wife’s mortgage, rather than for the benefit of the corporation and its stockholders. *Id.* (Burman, J., dissenting). Moreover, Justice Burman believed that the facts substantiated the claims that there was no reasonable likelihood of profitable operation. *Id.* (Burman, J., dissenting). He particularly feared that adopting the defendants’ arguments in light of the supreme court’s holding in *Gidwitz v. Lanzit Corrugated Box Co.* might be read as precedent that a liquidation remedy would be unreasonably restricted, being granted only in the event of a deadlock. *See id.* (Burman, J., dissenting).

159. *See supra* notes 66-93 and accompanying text (discussing *Cent. Standard II*).

160. *Polikoff*, 184 N.E.2d at 794.

161. *Id.* at 795.

162. *Id.*

163. *Id.*

164. *See infra* Part IV.A.3 (discussing the “reasonable expectations” model of oppression).

165. *See infra* notes 383-415 (discussing the 1992 case that first gave real weight to shareholders’ reasonable expectations).

166. *Ross v. 311 N. Cent. Ave. Bldg. Corp.*, 264 N.E.2d 406 (Ill. App. Ct. 1970).

167. *Id.* at 415.

of the 311 North Central Avenue Building Corp. ("Building Corp."), which owned and operated an apartment hotel.¹⁶⁸ The plaintiff class owned about thirty-four percent of Building Corp.'s outstanding stock.¹⁶⁹ The defendants were the corporation and members of the Nikolas family, owners of about sixty-four percent of Building Corp.'s stock.¹⁷⁰ Three members of the Nikolas family constituted the board of directors and officers of the corporation.¹⁷¹

The plaintiffs alleged that the Nikolas defendants withdrew over \$48,000 from Building Corp., which the defendants asserted was loaned to a corporation of which the Nikolas family were the owners, officers and directors, and which was secured by a second mortgage on real estate.¹⁷² It appears that the non-controlling shareholders of Building Corp. were not advised of the purported loan until about a year later, when the annual report showed an entry for a second mortgage as an investment of the corporation, but did not disclose that the loan was made to a corporation affiliated with the Nikolas family.¹⁷³ When one of the plaintiffs asked the president of Building Corp. about the second mortgage item, the president stated, "I can do anything I see fit with this money."¹⁷⁴

The plaintiffs filed suit immediately upon discovering the identity of the recipient of the funds, seeking the dissolution of Building Corp.¹⁷⁵ The defendants returned the money to Building Corp. nine days after being served with summons, and the court somewhat incredulously related the defendants' position that they had received the funds by selling "the alleged second mortgage at par."¹⁷⁶ After repayment, the funds were held in reserve by the corporation and were not distributed to the shareholders.¹⁷⁷

It is fairly clear that the trial court concluded that the controlling shareholders essentially attempted to steal \$43,000 from the Building Corp.¹⁷⁸ The court found that there was no evidence that the supposed

168. *Id.* at 408.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 408-09.

173. *Id.* at 411 (quoting the defendant George Nikolas, III).

174. *Id.*

175. *Id.* at 409.

176. *Id.*

177. *Id.*

178. *See id.* "The plaintiffs have rendered a beneficial service to all the shareholders of the corporation in filing the suit and procuring a refund of the funds improperly diverted by the

second mortgage had been executed.¹⁷⁹ The court further found that the funds returned to the corporation should have been distributed to the shareholders because "the funds were not needed for corporate purposes" in light of the directors' demonstrated willingness to "freeze [those funds in] the loan for a twenty year period."¹⁸⁰

The trial court held that the "conduct of the defendants was oppressive,"¹⁸¹ the purported loan itself was a fraud upon the minority shareholders, and the false representation of a second mortgage was also fraudulent.¹⁸² The trial court removed the defendants from the management of the corporation and ordered liquidation of the corporation.¹⁸³

The appellate court upheld the trial court's findings of fraudulent and oppressive acts and found that the trial court properly ordered dissolution of the corporation.¹⁸⁴ The appellate court also rejected the defendants' argument that there was no harm because the funds were repaid to the corporation, stating that the "central issue concerning the transaction in question was whether defendants' conduct was a fraud as to the corporation and its minority stockholders."¹⁸⁵ The issue of defendants' fraud could not be "cured" merely by the repayment of funds to the corporation after the defendants' fraud was uncovered.¹⁸⁶ Moreover, the court emphasized that no loss is necessary to sustain an order dissolving the corporation for oppression.¹⁸⁷

It is easy to see that the wrongdoing of the Nikolas family, as framed by the *Ross* court, is best understood as fraud and self-dealing, not oppression. Perhaps the court believed that adding oppression to the mix—particularly in light of the return of the money—gave it solid footing to support the dissolution remedy, following the lead of the supreme court in *Gidwitz*. Nevertheless, it is difficult to imagine that the controlling shareholders' naked theft of corporate funds for their

defendants, and are entitled to compensation for attorney's fees and other services and expenses." *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 410. The court did not specify in what ways the defendants' conduct was "oppressive" or how the finding of oppression differed from the finding of fraud.

182. *Id.* at 409.

183. *Id.* at 410.

184. *Id.*

185. *Id.* at 412.

186. *Id.*

187. *Id.* at 413. The court stated, "[i]t is not necessary that fraud, illegality or even loss be shown to exhibit oppression of plaintiffs and their interest in the corporation." *Id.* (quoting *Gidwitz v. Lanzit Corrugated Box Co.*, 170 N.E.2d 131, 138 (Ill. 1960)).

own purposes, even though the money was later returned, would not have been enough by itself to justify dissolution of the corporation under the rubric of fraud or illegality.

The Fifth District Appellate Court's opinion in *Compton v. Paul K. Harding Realty Co.*¹⁸⁸ is one of the most broadly-worded and often-cited oppression cases in Illinois. Paul K. Harding Realty Co. ("Realty") was a closely-held corporation formed by defendant Paul K. Harding ("Harding"), plaintiff Martha Compton, and Compton's brother, plaintiff Forrest Leoty.¹⁸⁹ Although the court's opinion does not specify the ownership interest of each shareholder, it appears that Harding held a majority of the stock in exchange for an \$8,500 investment, while Compton and Leoty together invested \$7,650.¹⁹⁰ Harding was president and manager of Realty, and Compton was executive vice-president and treasurer.¹⁹¹

All three shareholders signed a shareholder agreement which provided that the president was to be the "operating head" of Realty and "have the authority to set salaries . . . and do things which normally are the responsibility of the operating head of the company."¹⁹² It also provided that the salary of the operating manager was to be set at \$100 per week, and increased to \$175 per week when the business began to make a profit.¹⁹³

The court observed that the "internal affairs of the corporation were badly managed and loosely attended" from the start.¹⁹⁴ Among other things, "salaries, commissions and appraisal fees of the officers were without a discernable pattern or plan,"¹⁹⁵ and, notwithstanding the shareholders' agreement, Harding's salary as president of the corporation started at \$175 per week, increased to \$200 per week a few months later and eventually rose to \$250 per week without any formal shareholder or board approval.¹⁹⁶

The plaintiffs essentially alleged that Harding ran the corporation as a one-man show, engaging in mismanagement, self-dealing, waste of

188. *Compton v. Paul K. Harding Realty Co.*, 285 N.E.2d 574 (Ill. App. Ct. 1972).

189. *Id.* at 576-77.

190. *Id.* at 577-78.

191. *Id.* at 577.

192. *Id.* at 576-77.

193. *Id.*

194. *Id.* at 577.

195. *Id.*

196. *Id.*

corporate assets, fraud and breach of contract along the way.¹⁹⁷ They sought the appointment of a receiver and the dissolution of Realty.¹⁹⁸ After trial, the court found that Harding had been paid a salary that was over \$29,000 in excess of the amount to which he was entitled under the shareholder agreement, but that he had committed no fraud.¹⁹⁹ The court also ordered that the corporation be dissolved and the proceeds distributed to the shareholders based upon a formula intended to compensate plaintiffs for the excessive payments to Harding.²⁰⁰

Harding appealed, arguing that the trial court erred in upholding the contract entered into by the parties.²⁰¹ The appellate court affirmed the trial court and upheld the agreement, noting that shareholder agreements had long been upheld by Illinois courts even though those agreements "may be in some respects in technical violation of the Business Corporation Act."²⁰²

The defendant further asserted that, because the trial court found that Harding had not committed fraud and "there was no evidence of injustice or impropriety upon their part," the court erred in ordering dissolution.²⁰³ The court cited the familiar admonition of the supreme court in *Central Standard* that no evidence of fraud or illegality is required to support a finding of oppression.²⁰⁴ Oppression, the court held, could be found in "an arbitrary, overbearing and heavy-handed course of conduct."²⁰⁵

The court cited the following specific conduct constituting oppression: (1) Harding's failure to call board meetings or consult with the plaintiffs on management issues, (2) his "imperious" attitude in answering questions about his salary, and (3) his delay in responding to requests for information.²⁰⁶

197. *Id.* The following constitute Harding's alleged wrongdoing: (1) no meeting of shareholders or directors was ever held; (2) the operation and policies of Realty were controlled and directed by Harding without the knowledge or consent of the plaintiffs; (3) Harding caused the corporation to pay him some \$16,000 in excessive salary. *Id.* at 579, 581.

198. *Id.* at 577.

199. *Id.* at 578.

200. *Id.* Based upon the appellate court's explication of the trial court's liquidation formula, it appears that the amounts to be distributed to shareholders equals 106.25% of the total liquidation proceeds. *See id.*

201. *Id.*

202. *Id.* (quoting *Galler v. Galler*, 203 N.E.2d 577 (Ill. 1964)).

203. *Id.* at 581.

204. *Id.* (citing *Gidwitz v. Lanzit Corrugated Box Co.*, 170 N.E.2d 131 (Ill. 1960); *Cent. Standard II*, 141 N.E.2d 45 (Ill. 1957)).

205. *Id.*

206. *Id.*

The appellate court upheld the order of dissolution, but modified the judgment to provide that the shareholders' agreement should govern the distribution of the corporation's assets on liquidation.²⁰⁷ Notwithstanding the court's references to oppression as a particular wrong, *Compton*, like *Gidwitz* and *Ross*, is another example of courts using oppression as the icing on the cake to support a dissolution remedy. Although the court did not find that Harding committed fraud, his various acts in derogation of the corporate form were at least in violation of the BCA.²⁰⁸

The reference to oppression demonstrated that the defendant's wrongdoing was not so much his failure to abide by the BCA, but his underlying intention to exclude the plaintiffs. With or without the oppression gloss, the plaintiffs essentially pointed out to the court that the defendant had acted routinely as if the corporation did not exist.²⁰⁹ The court took the logical next step by dissolving the corporation, thereby freeing the plaintiffs' capital.

Compton may be viewed as the last of the cases decided under the first stage of oppression development in which oppression was used not as an independent wrong, but as a unifying principle in the analysis of other wrongs, such as fraud, illegality, and breach of duty. Opinions in the first stage are notable for very broad, but vague, language. That type of rhetoric is still cited in courts' discussions of oppressions.²¹⁰

However, the "definitions" of oppression crafted by courts in those cases, especially *Central Standard* and *Gidwitz*, must be understood in their context. While hardly exemplars of clarity and precision, the vague oppression definition offered up in those cases might have sufficed if limited to its initial purpose as a unifying principle. But oppression eventually grew beyond that limited role, taking on a more substantive meaning. That development raises serious questions about the wisdom of maintaining definitions of oppression that were created and intended for a different, and much more limited, application.

2. Second Stage—Oppression as a Breach of Duty

By the time the Third District Appellate Court decided *Notzke v. Art Gallery, Inc.*²¹¹ in 1980, oppression began to take on a more substantive, although still not sharply defined, role as an independent

207. *Id.* at 582.

208. *Id.*

209. *See id.*

210. *See infra* Part IV.A.2.

211. *See Notzke v. Art Gallery, Inc.*, 405 N.E.2d 839 (Ill. App. Ct. 1980).

wrong committed by the controlling shareholder. In that second phase of oppression development, courts began to treat oppression as the violation of duties owed by the controlling shareholder. However, where courts explained that certain factors gave rise to a finding of oppression, one never really knows whether the behavior at issue would have been deemed oppressive had one or more factors been absent or if some other factors had been present. Thus, it is difficult to escape the conclusion that during the second stage of development, oppression was very much like pornography—the courts did little to define it, but claimed to know it when they saw it.²¹²

The first of the second stage cases, *Notzke*, centered upon a dispute over The Art Gallery, Inc. ("Art Gallery"), which was formed by the plaintiff, Gerald Notzke, and defendants Richard Lewis and Ronald Hild, each investing \$15,000 and each receiving 2000 shares in return.²¹³ The board of directors was composed of the three shareholders, and Notzke was elected president.²¹⁴

Art Gallery was formed to build and operate a cocktail lounge in Peoria, and the corporation borrowed some \$52,000 for that purpose.²¹⁵ Neither of the defendants had any experience in the construction or operation of a cocktail lounge.²¹⁶ Notzke, the plaintiff, designed the lounge and supervised its construction with Hild's assistance.²¹⁷ Lewis and Hild were pleased with Notzke's work, and the board of directors adopted a resolution to pay Notzke \$5,000 at some time in the future.²¹⁸

Art Gallery operated for a few months under the management of Notzke and Hild until they began to have business disagreements.²¹⁹ Eventually, the shareholders agreed that Notzke would leave his outside employment and become the full-time manager of the lounge, while Hild would have no ongoing management responsibility.²²⁰ The plaintiff asserted that the other shareholders had promised him the managerial job "as long as he was effective in that capacity."²²¹

212. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing the challenge faced by the Court in trying to "define the indefinable" of pornography in First and Fourteenth Amendment cases).

213. *Notzke*, 405 N.E.2d at 840.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 840-41.

221. *Id.* at 841.

Apparently, the relations between the owners continued to deteriorate until Lewis and Hild eventually informed the plaintiff that they wanted to sell their interests in the Art Gallery.²²² Lewis asked \$20,000 for his shares, and Hild wanted \$30,000.²²³ The plaintiff offered to purchase Lewis' shares for about \$18,000 and stated that he would buy out either shareholder, but could not afford to purchase from both at the same time.²²⁴

Lewis agreed to sell his shares to Hild for \$30,000 payable in sixty monthly installments of \$622.²²⁵ The plaintiff was not offered a similar installment payment plan by either shareholder.²²⁶ After Hild and Lewis reached an agreement for the stock sale, Hild and Notzke dealt with each other as the only two shareholders—with Hild holding two-thirds of the stock and Notzke holding the remaining third.²²⁷

In December of 1975, the plaintiff wrote two corporate checks to himself totaling \$4,900 (an amount close to the \$5,000 bonus that he was promised, but never received).²²⁸ When Hild received news of the checks, he was not moved by the spirit of the season but promptly stopped payment and removed the corporate records from the business premises.²²⁹ In light of those developments, the shareholders determined that the plaintiff would manage the lounge, but that Hild would have sole power to disburse funds, hire and fire employees and generally manage the company.²³⁰

Early in 1976, Hild alleged that Notzke tried to make up for the loss of his "Christmas bonus" by taking cash from the register during his shift tending bar.²³¹ According to Hild, Notzke admitted to the theft, and Hild fired him and banned him from the lounge.²³² Notzke, however, denied the theft and asserted that Hild told him that they "just couldn't see eye-to-eye" and that Hild "no longer needed" Notzke.²³³ After firing Notzke, Hild took over as manager of the lounge for a

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

salary of \$500 per week.²³⁴ The court noted that, without his salary as club manager, Hild would have been unable to make the payments of \$622 per month owed to Lewis for the stock purchase.²³⁵

Notzke sued Hild, Lewis and Art Gallery seeking specific performance of a restrictive buy-sell agreement, damages from the breach of that agreement, damages from the breach of an oral employment agreement and liquidation of the corporation pursuant to the BCA.²³⁶ The plaintiff's central allegation was that the defendants conspired together and that the plaintiff was "deprived of his position in the corporation, his share of corporate control, and his managerial employment as a result of this conspiratorial course of conduct. Plaintiff contends this represents oppressiveness under the statute."²³⁷

After a bench trial, the court ordered that the defendants purchase the plaintiff's Art Gallery shares within three months for a payment equal to one-third of the corporation's net worth.²³⁸ After the defendants failed to do so, the court ordered that the corporation be liquidated.²³⁹

The appellate court began its legal analysis with reference to the broad definition of oppressive conduct set forth in *Gidwitz*.²⁴⁰ However, the court also noted that, while the "concept of oppressiveness as a ground for corporate liquidation has been available to shareholders since 1933 . . . neither the litigants nor our research have revealed an authoritative determination of its precise scope."²⁴¹

The court attached particular significance to a string of suspicious coincidences. First, within three months after Notzke became manager on a full-time basis, Lewis and Hild both wanted to sell their shares but offered them to the plaintiff on terms which made acquisition by the plaintiff impossible.²⁴² Second, shortly thereafter, it appears that Lewis agreed to sell his shares to Hild on much more favorable terms.²⁴³ Third, Hild fired Notzke and took over as manager at a salary of \$2,000

234. *Id.* at 842.

235. *Id.*

236. *Id.* at 840.

237. *Id.* at 842.

238. *Id.*

239. *Id.*

240. *Id.* at 843 (citing *Gidwitz v. Lanzit Corrugated Box Co.*, 170 N.E.2d 131, 135 (Ill. 1960)).

241. *Id.* (citation omitted). The court then briefly reviewed most of the prior Illinois cases on the topic of oppression, with the exception of *Polikoff v. Dole & Clark*, 184 N.E.2d 792 (Ill. App. Ct. 1962). *Notzke*, 405 N.E.2d at 843.

242. *Id.* at 843-44.

243. *Id.* at 844.

per month (up from the \$1,600 per month previously paid to plaintiff for the same job) shortly after he became obligated to pay Lewis \$622 per month for his stock.²⁴⁴

The court considered those events to be more than mere coincidences:

Considering the parameters of oppressiveness established in our decisional law, we feel the complaint at bar alleged a course of conduct which was "overbearing and heavy handed."²⁴⁵ Conspiratorial action allegedly affecting an individual shareholder's control over corporate matters and the effective operation and profitability of the venture, coupled with alleged irregularity in the equity transfer meet the threshold of objectionable oppressiveness addressed by the statute and case law thereunder.²⁴⁶

The court also seemed to be particularly concerned that Hild continued to maintain the theft even though no criminal charges were ever brought against the plaintiff.²⁴⁷ The court suggested that Hild's allegation of theft was a mere pretext for firing Notzke as part of the defendants' "conspiratorial ploy."²⁴⁸

The court then looked to the nature of the defendants' conduct to determine whether corporate liquidation was an appropriate remedy.²⁴⁹ The court stated, "[w]here, as here, a director and officer of a corporation has accused another director of dishonesty and continues to act on the premise that the accusation is true, not only is such conduct oppressive, it also permeates all of the business relations between the parties."²⁵⁰ The appellate court upheld liquidation as an appropriate remedy.²⁵¹

Notzke can be read as perhaps the first reported Illinois opinion to base dissolution solely upon a finding of oppression. However, the facts do not support a conclusion that there was oppression, at least not as the term was previously used in Illinois law. Although the court's rhetoric is pure oppression, it appears that the court's real concern

244. *Id.* The implication of the court's juxtaposition of those events, of course, is that Lewis and Hild conspired to eliminate Notzke so that Lewis could be bought out of his stock position with the company's money and effectively at no cost to Hild.

245. *Id.* at 843. The court here appears to be referring to *Compton v. Paul K. Harding Realty Co.*, 285 N.E.2d 574, 581 (Ill. App. Ct. 1972).

246. *Notzke*, 405 N.E.2d at 842.

247. *Id.* at 844.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

centered upon breaches of duty by the two defendant shareholders. Thus, the court used oppression to mean a failure of substantive and procedural fairness in dealings between the shareholders.²⁵²

That reading explains the court's focus on the "conspiratorial ploy," by which one defendant shareholder sold out, the other defendant shareholder was able to fund the buy-out by receiving corporate funds and the plaintiff shareholder was left out in the cold. Regardless of the actual thought process behind the court's ruling, it cannot be said that the plaintiff would have been without a remedy in the absence of oppression theory. Even in *Notzke*—where oppression was the only articulated basis for dissolution—it appears that the same result would have been achieved, perhaps on a more defensible basis, under a fiduciary duty analysis.

The next appellate decision in Illinois addressing oppression was *Romanik v. Lurie Home Supply Center, Inc.*²⁵³ As with *Notzke*, the *Romanik* court appeared to treat oppression as a substantive wrong but, unlike *Notzke*, awarded the minority no relief. In *Romanik*, the minority shareholders of Lurie Home Supply Center, Inc. ("Lurie") sued the corporation and several members of the family of Peter Lurie, who was the deceased former president and controlling shareholder of Lurie.²⁵⁴ Named as defendants were Peter's widow and executor of his estate, Edna Lurie, and Ronald Lurie, who was Peter's son as well as a corporate director and Lurie's legal counsel.²⁵⁵

The plaintiffs challenged both Peter's purchase, from a third party, of the building and land where Lurie's store was located, and an increase in rent to be paid to Peter by Lurie for use of the property.²⁵⁶ They also objected to Peter's new employment agreement, which provided a substantial increase in salary and death benefits.²⁵⁷ Subsequently, the plaintiffs added allegations regarding a consulting agreement and preferred stock that was issued for Peter's benefit.²⁵⁸ Peter died during the pendency of the case.²⁵⁹ Thereafter, Lurie granted a death benefit to Edna.²⁶⁰ It also made three separate short-term loans to the Peter Lurie Revocable Trust ("Trust"), totaling nearly \$71,000, to pay Peter's estate

252. *See id.*

253. *Romanik v. Lurie Home Supply Ctr., Inc.*, 435 N.E.2d 712 (Ill. App. Ct. 1982).

254. *Id.* at 714.

255. *Id.* at 715.

256. *Id.*

257. *Id.*

258. *Id.* at 716.

259. *Id.*

260. *Id.*

taxes.²⁶¹ The last two payments were made while the first was past due.²⁶² The plaintiffs also challenged the death benefit and those loans.²⁶³

After the trial, the court granted partial relief by voiding the issuance of preferred stock, the three loans made by Lurie to the Trust and the death benefit paid to Edna.²⁶⁴ The plaintiffs appealed to the appellate court, seeking full relief, while defendants cross-appealed seeking reversal of the judgment or a new trial.²⁶⁵

Regarding the plaintiffs' claim that Peter breached his fiduciary duty as an officer and director by entering into the employment agreement with Lurie, the court noted that, because Peter was a director, officer and controlling shareholder of the corporation when the agreement was established, the defendants bore the burden of showing the reasonableness of the employment agreement.²⁶⁶ The court found that the employment agreement was reasonable, except that the deferred compensation provision was reduced from ten to five years.²⁶⁷

With regard to the lease transaction, the court stated the well established rule that "[w]here a director or officer transacts business with the corporation, the duty of undivided loyalty requires that the transaction be fair and places the burden of demonstrating fairness on the director or officer."²⁶⁸ The appellate court found that the defendants failed to demonstrate the fairness of the lease transaction.²⁶⁹ The court determined that the value of the property had declined by almost seventy percent in the six years after Peter purchased it, but he nevertheless charged Lurie an annual rental equal to nearly ninety percent of the total value of the property.²⁷⁰ The effect of the lease agreement, according to the court, was to permit Peter to improperly shift the burden of his bad investment onto Lurie.²⁷¹

The court of appeals also held that the preferred shares should not have been issued because they related to a payment due after Peter

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 716-17.

265. *Id.* at 717.

266. *Id.*

267. *Id.* at 718-19.

268. *Id.* (citing *Shlensky v. S. Parkway Bldg. Corp.*, 166 N.E.2d 793 (Ill. 1960)).

269. *Id.*

270. *Id.* at 720.

271. *Id.* The court directed that the trial court on remand should determine the fair rental rate and order return of the excess rental payments to the corporation. *Id.* at 720-21.

retired.²⁷² In fact, Peter never signed the consulting agreement and never retired (having died before he could retire) and, therefore, the court ordered that the shares be returned to Lurie.²⁷³

The plaintiffs also prevailed on their claim that the directors breached their duties by approving the three loans to the Trust.²⁷⁴ On appeal, the defendants contended that the loans were proper interest-bearing investments within the discretion of the board, but the court found that two of the loans were issued at below-market rates.²⁷⁵ Moreover, even though the first loan was overdue when the subsequent loans were issued, Lurie did not require any security for the subsequent loans.²⁷⁶ Because the favorable terms benefited the controlling shareholder at the expense of the corporation, the court found that the directors breached their duties and ordered that two of the three loans be repaid at the then prevailing interest rate.²⁷⁷

In its first explicit discussion of oppression, the appellate court turned to the plaintiffs' allegation that the \$5,000 death benefit paid to Peter's widow as authorized by Peter's sons was "further evidence of defendants' 'oppressive tactics' and was not required by the employment agreement."²⁷⁸ It is not clear what additional evidence of supposed oppressive tactics had been offered.

The court noted that "corporate directors commonly authorize benefits to widows that are not required by the employment contract" and that such payments should be sustained if "reasonable in amount, and the directors have exercised an honest and reasonable business judgment in granting them."²⁷⁹ The court found that the amount of the payment was clearly reasonable and that, even though granted by the recipient's sons, there was no evidence that the payment was part of an "oppressive scheme" or that the directors did not exercise "honest and reasonable business judgment in authorizing payment."²⁸⁰

The plaintiffs also alleged that the failure to declare dividends was oppressive.²⁸¹ Initially, the court noted that the "decision concerning

272. *Id.* at 721.

273. *Id.*

274. *Id.* at 722.

275. *Id.*

276. *Id.*

277. *Id.* at 723.

278. *Id.* at 721.

279. *Id.* at 721-22 (citing F. HODGE O'NEAL & ROBERT B. THOMPSON, *CLOSE CORPORATIONS* ch. 8, at 118 (1971)).

280. *Id.* at 722.

281. *Id.* at 723.

the declaration of a dividend where a legal dividend fund is available rests solely within the sole discretion of the board of directors. Courts are reluctant to interfere with the exercise of the directors' business judgment unless the withholding is fraudulent, oppressive or totally without merit."²⁸² The court then described the plaintiffs' practical problem. They could hardly be heard to complain that no dividends had been declared since Peter became the seventy-five percent shareholder, because in fact no dividends had *ever* been paid.²⁸³ Because the defendants were able to offer legitimate business reasons for the failure to pay dividends, the court upheld the trial court's ruling that the directors properly determined to retain earnings.²⁸⁴

As noted above, *Romanik* does not involve any remedies for oppression.²⁸⁵ To the extent that the plaintiff received relief, it was on grounds other than oppression. The court, however, found for the defendants regarding corporate actions challenged purely on the basis of oppression.²⁸⁶

The modern low-water mark for oppression theory came as a result of two cases decided by the First District Appellate Court. The first, *Jaffe Commercial Financial Co. v. Harris*,²⁸⁷ was decided in 1983. The second, *Coduti v. Hellwig*,²⁸⁸ was decided in 1984. In the first, *Jaffe Commercial Finance Co. v. Harris*, the court addressed the alleged freeze-out of a minority shareholder of defendant Harris Loan and Mortgage Co. ("Harris Loan").²⁸⁹ The shareholders of Harris Loan were Joel Salk ("Salk"), who controlled one-third of the stock,²⁹⁰ and defendants Paul Harris ("Paul") and his brother Ruben Harris ("Ruben"), who together owned two-thirds of the stock.²⁹¹ Each of the three shareholders was elected a director and re-elected annually.²⁹² Paul was president of Harris Loan, Ruben was vice president and

282. *Id.* (citing *Hofeller v. Gen. Candy Corp.*, 275 Ill. App. 89 (1934)).

283. *Id.*

284. *Id.* The board's reasons for retaining earnings included keeping funds available for the anticipated "purchase of a warehouse, the expansion of inventory and the possibility that the company might have to finance its own inventory." *Id.*

285. See *supra* notes 253-84 and accompanying text (discussing the *Romanik* case).

286. *Romanik*, 435 N.E.2d at 722-23.

287. *Jaffe Commercial Fin. Co. v. Harris*, 456 N.E.2d 224 (Ill. App. Ct. 1983).

288. *Coduti v. Hellwig*, 469 N.E.2d 220 (Ill. App. Ct. 1984), *overruled by* *Schirmer v. Bear*, 672 N.E.2d 1170 (Ill. 1996).

289. *Jaffe Commercial Fin. Co.*, 456 N.E.2d at 226.

290. *Id.* Salk's interests were held in the name of the plaintiff, *Jaffe Commercial Finance Co.* ("Jaffe"). *Id.*

291. *Id.* at 226-27.

292. *Id.* at 227.

treasurer, and Salk was secretary.²⁹³ The Harrises conducted the daily operations of the business and each received a salary.²⁹⁴ Salk was paid as a consultant.²⁹⁵

At the time Harris Loan was formed, the shareholders entered into a shareholders' agreement which prohibited a shareholder from selling his stock to an outsider without first offering the stock to the corporation and the other shareholders at book value.²⁹⁶ There was no discussion of paying stock dividends.²⁹⁷

After several years of profitable operation, a disagreement arose between the Harris brothers and Salk.²⁹⁸ As a result of the dispute, Salk advised the Harrises that he wished to sell his interests in Harris Loan stock and demanded \$300,000.²⁹⁹ Pursuant to the buy-sell agreement, the Harrises offered to purchase Salk's interests for book value, amounting to \$35,000.³⁰⁰ After Salk threatened the Harrises with a lawsuit, which he claimed would have a chilling effect on their lines of credit, the Harrises terminated Salk's consulting agreement and removed him as corporate secretary and director.³⁰¹

Salk sued, claiming that the Harrises had engaged in oppression by freezing Salk out of the business.³⁰² He sought to enforce an alleged "actual agreement between the Harris brothers and Salk, by course of conduct and oral agreement" that each shareholder would have a seat on the board of directors.³⁰³ Under the alleged agreement, Salk would serve as corporate secretary; each shareholder would invest equally in the enterprise; and each shareholder would "receive income from the company in accordance with an agreed-upon formula" so that each would receive an equal return on his investment, except that the Harris brothers would be compensated for managing the business; and Salk would serve as a consultant.³⁰⁴

293. *Id.*

294. *Id.*

295. *Id.* at 228.

296. *Id.* at 227.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* (citing Ill. Rev. Stat. ch. 32, ¶ 157.86 (1979)).

303. *Id.* at 229.

304. *Id.* at 227, 229.

Salk also claimed that he was entitled to the payment of dividends from Harris Loan on the basis of past practice.³⁰⁵ Even though Harris Loan had not paid dividends denominated as such, Salk asserted that the so-called consulting payments that he received from 1973 through 1977 were actually made in lieu of dividends to permit Salk and Harris Loan to dodge taxes.³⁰⁶

The trial court held that the Harrises committed neither breach of fiduciary duty nor oppression by removing Salk, but merely exercised their rights as majority shareholders to "vote their strength."³⁰⁷ In addition, the court held that Salk failed to prove the alleged oral agreement regarding the operation of Harris Loan and Salk's participation in it.³⁰⁸ Finally, the court found that Salk was barred from equitable relief by his unclean hands because he had purportedly received "dividends" disguised as sham consulting payments.³⁰⁹

The appellate court upheld the lower court's finding that the plaintiff was not entitled to relief because the evidence regarding the purported agreement between the shareholders was "ambiguous and contradictory."³¹⁰ The court noted that the existence of such an agreement was contradicted by the facts.³¹¹ Among other things, the Harrises had a specific compensation package, while Salk did not.³¹² In addition, Salk represented himself to the IRS and otherwise as a consultant, and he was paid as a consultant based upon bills that he submitted.³¹³

Furthermore, the court rejected the plaintiff's claim that the Harris brothers breached their fiduciary duties as directors and controlling shareholders because their compensation was not reasonable.³¹⁴ The court affirmed the existence of a fiduciary duty among shareholders of a closely-held corporation by stating, "[t]he decision of joint adventurers to form and operate as a corporation, rather than as a partnership, does not change the fact that they embarked on a joint enterprise; thus, their mutual duties and obligations are similar to those of partners."³¹⁵

305. *Id.* at 227.

306. *Id.* at 228.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 229, 232.

311. *Id.* at 229-31.

312. *Id.* at 229.

313. *Id.* at 230.

314. *Id.*

315. *Id.* (citing *Tilley v. Shippee*, 147 N.E.2d 347, 352 (Ill. 1958)).

However, the court also made clear that those duties do not supplant the general rule of judicial deference to the lawful acts of corporate directors.³¹⁶ Because the trial court properly found that the salaries in question were not beyond the range of reason, there was no basis to find that the Harris brothers breached their fiduciary duties in that regard.³¹⁷

In addressing the plaintiff's contention that the Harris brothers improperly excluded Salk from the management, control and income of the corporation,³¹⁸ the court first quoted the expansive definition of oppression found in *Gidwitz*.³¹⁹ The court ultimately determined that the Harris' conduct did not constitute oppression because they merely "voted Salk out as a director" by out-voting plaintiff's stock.³²⁰

The appellate court contrasted the facts of *Harris* with those of *Compton*,³²¹ in which the controlling shareholder violated corporate law in several respects, such as excluding the plaintiffs from any meaningful participation in the corporation.³²² Harking back to the earliest corporate law cases in Illinois, which established the majority rule principle, the court specifically endorsed the trial court's holding that the majority did no more than vote its strength.³²³

Jaffe, like *Polikoff* some two decades before, involved allegations of the non-controlling shareholder's "reasonable expectations." In *Polikoff*, the plaintiff expected that her stock would be redeemed.³²⁴ It was not, and redemption did not appear a likely possibility, but the plaintiff there received no relief.³²⁵ In *Jaffe*, the alleged expectation was membership on the board and receipt of distributions in some form. Those unfulfilled expectations did not give rise to a remedy for the minority shareholder. As explained below,³²⁶ by the time *Jaffe* was

316. *Id.* The court stated: "'Generally, unless the majority shareholders and directors are clearly managing the affairs of the corporation dishonestly or the compensation is so unreasonable as to constitute "waste" or "spoliation," courts have not substituted their judgment for that of directors.'" *Id.* (quoting *Romanik v. Lurie Home Supply Ctr., Inc.*, 435 N.E.2d 712, 718 (Ill. App. Ct. 1982)).

317. *Id.*

318. *Id.* at 231.

319. *Id.*

320. *Id.* at 232.

321. *Id.* at 231.

322. *See id.*

323. *Id.* at 232. The court specifically noted that "[a] shareholder in a corporation is entitled to participate in the management according to the amount of his stock, . . . [however,] the majority, by merely voting its strength to effectively oust Salk from participation in the business of Harris Loan, did not act oppressively." *Id.* (citations omitted).

324. *See supra* notes 145, 163 and accompanying text (discussing the *Polikoff* case).

325. *See supra* notes 158-59 and accompanying text.

326. *See infra* Part IV.A.3.

decided, the reasonable expectation model of oppression theory had taken hold in some jurisdictions, but not yet in Illinois.

About a year after *Jaffe*, the First District dealt with its next oppression case in *Coduti v. Hellwig*,³²⁷ with results similarly disappointing to the non-controlling shareholder. That case was brought by a minority shareholder, James Coduti ("Coduti"), of Hudson Tool & Die Corporation ("Hudson"),³²⁸ who sought to dissolve Hudson and to obtain "an accounting of allegedly improper benefits received" by Hudson's controlling shareholder, Werner Hellwig ("Hellwig").³²⁹ Coduti, Hellwig and Hellwig's son constituted the board of directors.³³⁰ The shareholders never entered into a shareholders' agreement, even though Coduti purportedly had requested one.³³¹

The working arrangement between the major shareholders was that Hellwig served as president of Hudson and handled the administrative duties.³³² Coduti also served as an officer and managed the production facilities.³³³ It appears that Coduti worked long hours at Hudson, while Hellwig devoted substantially less time to the business and spent significant periods away.³³⁴ The shareholders' salaries had historically been set without formal action by the board of directors.³³⁵ For example, at one point Hellwig substantially reduced his salary when he believed that he was not fully able to perform his duties and raised it again when he thought that he could.³³⁶

Coduti alleged that Hellwig conducted the business in an "arbitrary, heavy-handed and overbearing" manner.³³⁷ In particular, Coduti

327. *Coduti v. Hellwig*, 469 N.E.2d 220 (Ill. App. Ct. 1984), *overruled by* *Schirmer v. Bear*, 672 N.E.2d 1171 (Ill. 1996).

328. *Id.* at 223.

329. *Id.*

330. *Id.*

331. *Id.* at 224.

332. *Id.* at 223.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 225. In introducing Coduti's oppression allegations, the appellate court made particular reference to *Compton v. Paul K. Harding Realty Co.*, for the proposition that a controlling shareholder's actions that are "arbitrary, overbearing and heavy-handed" constitute oppression. *Id.* (quoting *Compton v. Paul K. Harding Realty Co.*, 285 N.E.2d 574, 581 (Ill. App. Ct. 1972)). Hellwig's alleged arbitrary, overbearing and heavy-handed conduct included the following: "refusing to authorize dividends or bonuses when the corporation has large cash reserves; refusing to allow Coduti's attorney to be present at a director's meeting; holding director's meetings without notice to Coduti; causing Coduti to be arrested; and opening Coduti's mail and belittling him in the presence of others." *Id.*

alleged that Hellwig excluded Coduti's attorney from board meetings and permitted checks to be issued without Coduti's signature.³³⁸ Coduti also alleged that Hellwig breached his fiduciary duties to Hudson and that those breaches constituted fraud.³³⁹ The breach of duty allegations concerned a separate Illinois corporation called Hollywood Perforators ("Hollywood"), which Hellwig and his son owned.³⁴⁰ Coduti alleged that Hellwig caused Hudson to pay some of Hollywood's expenses as well as Hellwig's personal expenses.³⁴¹

Having covered fraud and oppression, Coduti also made a stab at the final category of conduct that may entitle a shareholder to dissolution under the BCA—"waste and misapplication of assets."³⁴² Coduti asserted, among other things, that Hellwig ran up large credit balances on corporate charge cards and his country club membership, thereby misapplying corporate assets.³⁴³

Following the trial, the lower court found all issues in favor of the defendants, noting particularly that the plaintiff failed to demonstrate evidence of waste, mismanagement, illegality or oppression so as to warrant Hudson's dissolution.³⁴⁴ Accordingly, the trial court denied any and all relief, including an accounting.³⁴⁵

On appeal, the court examined the judicial dissolution provision of the BCA and analyzed the holdings of several of the leading oppression cases in Illinois.³⁴⁶ Based upon its analysis of the case law, the court concluded that "no single act which, by itself, will be deemed oppressive without consideration of the surrounding circumstances."³⁴⁷ Thus, the court determined that "each case claiming oppression as a basis for corporate dissolution must be determined solely upon its own

338. *Id.* at 226.

339. *Id.* at 227.

340. *Id.* at 223.

341. *Id.* at 228.

342. *Id.* at 229.

343. *Id.*

344. *Id.* at 224.

345. *Id.*

346. *Id.* at 224-25 (citing *Gidwitz v. Lanzit Corrugated Box Co.*, 170 N.E.2d 131 (Ill. 1960); *Cent. Standard II*, 141 N.E.2d 45 (Ill. 1957); *Notzke v. Art Gallery, Inc.*, 405 N.E.2d 839 (Ill. App. Ct. 1980); *Gray v. Hall*, 295 N.E.2d 506 (Ill. App. Ct. 1973); *Compton v. Paul K. Harding Realty Co.*, 285 N.E.2d 574 (Ill. App. Ct. 1972); *Ross v. 311 N. Cent. Ave. Bldg. Corp.*, 264 N.E.2d 406 (Ill. App. Ct. 1970)). Probably because of its collection and synopsis of leading cases, *Coduti* is considered by many judges to be a leading Illinois case on the topic of shareholder oppression.

347. *Id.* at 225. "[A]ctions which might be oppressive under one set of circumstances would not be oppressive under others." *Id.* (quoting *Gray*, 295 N.E.2d at 509).

facts.”³⁴⁸ The appellate court reviewed each of Coduti’s allegations of oppressive conduct to determine whether any or all of them constituted oppression in this particular context.³⁴⁹

First, the court noted the familiar rule that courts are reluctant to interfere with the board’s discretion regarding whether to declare dividends “‘unless the withholding is fraudulent, oppressive or totally without merit.’”³⁵⁰ The appellate court upheld the trial court’s finding that the refusal to declare dividends was not oppressive for three reasons: (1) Coduti and his children were Hudson employees and received large bonuses, (2) when Hellwig proposed dividends, Coduti never suggested a larger or additional dividend, and (3) Hellwig testified that Hudson required a large cash reserve for several apparently legitimate purposes.³⁵¹

In addition, the court made short work of Coduti’s assertions about irregularities in board meetings.³⁵² The court stated that excluding Coduti’s attorney from a meeting of the board of directors was not oppressive.³⁵³ Nor was the board’s decision (in Coduti’s absence) to permit checks to be issued with only Helwig’s signature deemed oppressive.³⁵⁴ The court noted that Coduti’s refusal to sign checks had interfered with the company’s accounts payable and payroll and that it appeared that no check signed by Helwig alone had cleared, because Coduti eventually resumed signing checks.³⁵⁵

The court also addressed the peculiar allegation that Hellwig committed oppression by having Coduti arrested.³⁵⁶ That episode arose from Hellwig’s decision to rescind Coduti’s authority to make bids without Hellwig’s approval.³⁵⁷ Hellwig testified that his decision arose

348. *Id.* Although the appellate court’s determination to decide every case upon its own facts is heartening, the appellate court seemed to miss the point that those facts are going to be examined without reference to any set standards of conduct.

349. *Id.* (citing *Gray*, 295 N.E.2d at 509).

350. *Id.* at 226 (quoting *Romanik v. Lurie Home Supply Ctr., Inc.*, 435 N.E.2d 712, 723 (Ill. App. Ct. 1982)). The court appears to have missed the ironic circularity (of the kind which pops up so often in oppression jurisprudence) in stating that refusal to declare dividends may be grounds for a finding of oppression if the failure to declare dividends is oppressive.

351. *See id.* Coduti previously wanted the corporation to accumulate cash reserves, and Hellwig wanted it to pay out its reserves as dividends. *See id.* In the litigation, the parties took directly contrary positions. *See id.*

352. *See id.* at 226-27.

353. *Id.*

354. *Id.*

355. *Id.* at 227.

356. *Id.*

357. *Id.*

from a fifty-five percent decline in business and that he was just doing his job as president.³⁵⁸ Apparently, Coduti did not appreciate Hellwig's views and, upon learning that his quotation authority had been revoked, chased Hellwig into the plant waiving a piece of copper.³⁵⁹ Or perhaps not, because although charged with aggravated assault, Coduti was later acquitted.³⁶⁰ The appellate court determined that the conflicting evidence required it to defer to the findings of the trial court that no oppression was involved.³⁶¹ The court followed the same approach with regard to Coduti's allegation that Hellwig had "belittled" him in the presence of outsiders and consistently opened his mail.³⁶² Because of conflicting testimony, the appellate court deferred to the trial court's finding that the allegations did not make out a case of oppression.³⁶³

With regard to Coduti's charges of breach of fiduciary duty and fraud, the court upheld the trial court's finding that there was no breach of duty.³⁶⁴ Finally, the court determined that the credit balances on Hellwig's corporate charge cards and country club memberships were matters committed to the business judgment of the board of directors and did not constitute illegality.³⁶⁵

In the final analysis, the appellate court noted that "it is . . . important to keep in mind the context in which the events here complained of occurred, that is, within a corporate organization."³⁶⁶ Quoting at length from *Wheeler v. Pullman Iron & Steel Co.*,³⁶⁷ the appellate court reaffirmed the proposition that the fundamental principle of corporate government is majority rule.³⁶⁸

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* at 228.

365. *Id.* at 229. The court specifically stated that those were issues "with which the court will not concern itself—at least not insofar as they bear on the question of liquidation." *Id.* at 229 (quoting *Polikoff v. Dole & Clark Bldg. Corp.*, 184 N.E.2d 792, 796 (Ill. App. Ct. 1962)).

366. *Id.*

367. *Wheeler v. Pullman Iron & Steel Co.*, 32 N.E. 420 (Ill. 1892).

368. *See Coduti*, 469 N.E.2d at 230. The court specifically stated that:

The record here does not support Coduti's contention that he has been deprived of his lawful right to participate in the management of Hudson. Rather, his complaints stem from his position as a minority shareholder and from personal disagreements with Hellwig, neither of which form a basis for the drastic remedy of corporation dissolution.

Id.

Upon a denial of rehearing, the *Coduti* court issued an interesting supplemental opinion. The court noted that the BCA of 1983 became effective during the appeal and replaced the 1933 BCA.³⁶⁹ *Coduti* argued that the case should be remanded to the trial court for further consideration pursuant to section 12.55 of the BCA of 1983.³⁷⁰ The court held, however, that the new section would not help *Coduti* because he was still required to make a case under section 12.50.³⁷¹ Unfortunately, because *Coduti* did not prove his claims under section 12.50, he was not entitled to a remedy—neither dissolution nor an alternative remedy.³⁷² In the end, the oppression claim did *Coduti* no good. None of *Coduti*'s allegations were individually or collectively availing and the oppression gloss did nothing to save them.

During both the first and second stage of the development of the oppression doctrine, the focus was clearly on wrongdoing by the controlling shareholder.³⁷³ In the next stage of development, the focus shifts, with less weight being given to actual wrongdoing by the defendant, and more to the aspirations of those not in control.

3. Third Stage—Reasonable Expectations

After the adoption of the BCA of 1983, as noted in *Coduti*, the remedies available to non-controlling shareholders are no longer limited to dissolution as they once were. The BCA now lists a range of optional remedies and permits the chancellor to fashion others.³⁷⁴ Although courts still describe oppression using the language of the first stage cases, especially *Central Standard* and *Gidwitz*, oppression theory has now evolved into something virtually unrecognizable from either of those opinions.

Under the third, and current, phase of oppression theory, "the crux is not identifying a traditional wrong but rather identifying the basis of the bargain—what were the explicit or implicit conditions pursuant to

369. *Id.* at 231 (supplemental opinion).

370. *Id.* (supplemental opinion).

371. *Id.* (supplemental opinion). The court noted:

From the statutory language it is apparent that the new section contemplates only an alternative remedy, rather than a distinct action. Consequently, the right to that remedy depends upon proof of all of the elements which would have entitled a party to a judicial dissolution, because the action must be either for dissolution or must allege the same grounds for dissolution as set forth in Section 12.50.

Id. (supplemental opinion).

372. *Id.* (supplemental opinion).

373. *See supra* Part IV.A.1–2.

374. 805 ILL. COMP. STAT. 5/12.56(b) (2000 & West Supp. 2001).

which the parties associated themselves together in the corporate form.”³⁷⁵ Illinois was among the first states to acknowledge the reasonable expectations of shareholders. Although the *Polikoff* and *Jaffe* courts seemed to pay little attention to the complaining shareholders’ expectations, the legislature did. The 1983 BCA counsels the court to consider the reasonable expectations of the parties at the time the venture was formed and as they developed thereafter.³⁷⁶

While rather early on the bandwagon, Illinois was not the innovator in adopting a “reasonable expectations” test. That distinction belongs to New York. In 1980, the New York Supreme Court decided *In re Topper*,³⁷⁷ a case brought by a one-third owner of two New York corporations.³⁷⁸ After having worked for twenty-five years in Florida, the plaintiff invested his entire life savings in the corporations and moved himself and his family to New York to participate in the new venture.³⁷⁹ Within a year, the plaintiff’s employment with the corporations was terminated.³⁸⁰

Based on those facts, the *Topper* court found that the other shareholders’ conduct was oppressive.³⁸¹ The *Topper* court also noted that the plaintiff’s expectations of the controlling stockholders’ obligations were valid even though his expectations were not reduced to writing.³⁸²

375. Murdock, *supra* note 23, at 465. Flowing from that rationale, “the reasonable-expectations standard may well be the quintessential illustration of the position taken by many economists that the corporation is but a nexus of contracts, so that the role of a court in response to a dissolution petition is to carry out the probable intent of the parties.” 1 COX ET AL., *supra* note 3, § 14.14.

376. 805 ILL. COMP. STAT. 5/12.56(d). “In determining the appropriate relief to order . . . the court may take into consideration the reasonable expectations of the corporation’s shareholders as they existed at the time the corporation was formed and developed during the course of the shareholders’ relationship with the corporation and with each other.” *Id.*

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

378. *Id.* at 361.

379. *Id.* at 362.

380. *Id.*

381. *Id.* The court held that:

Whether the controlling shareholders discharged petitioner for cause or in their good business judgment is irrelevant. The Court finds that the undisputed understanding of the parties was such at the time of the formation of the corporations that the respondents’ actions have severely damaged petitioner’s reasonable expectations and constitute a freeze-out of petitioner’s interest; consequently, they are deemed to be “oppressive” within the statutory framework.

Id.

382. *Id.* at 365. The court stated specifically:

This Court, too, recognizes that in a close corporation the bargain of the participants is often not reflected in the corporation’s charter, by-laws nor even in separate signed

The reasonable expectations analysis reflected in *Topper* was a striking departure from prior Illinois oppression cases. While attempting to disguise the "reasonable expectations" model of oppression, Illinois courts continued to employ rhetoric that was ill-suited to the new reality. That clash has aggravated the prior definitional problem endemic to oppression theory.

The first Illinois case that appears to give real weight to the shareholder's reasonable expectations is the 1992 decision in *Hager-Freeman v. Spircoff*.³⁸³ Show-Biz Home Video, Inc. ("Show-Biz"), was formed by Christel Hager-Freeman, Carl Spircoff and Charles DiCaro to operate a video rental store.³⁸⁴ Each owned an equal amount of stock and they agreed that each would serve as an officer and director of the corporation and have specific jobs within the company.³⁸⁵

After the three operated the store together for a couple of years, disputes arose between Charles and Carl, leading Charles to inform the other shareholders that he wished to sell his shares and leave the business.³⁸⁶ The plan as presented to Christel was that Charles would sell his shares to Christel and Carl, so that they would end up as equal shareholders.³⁸⁷ In accordance with that plan, Christel and Carl each deposited \$5,000 with the corporation's lawyer to purchase Charles' shares.³⁸⁸ The corporation's lawyer allegedly told Christel that she need not be separately represented by a lawyer in the transaction.³⁸⁹

As it turned out, she could have used legal assistance. Without Christel's knowledge, and with the corporation lawyer's help, Carl bought all of Charles' Show-Biz shares, leaving him two-thirds of the outstanding stock and control of the corporation.³⁹⁰ Upon gaining

agreements. The parties' full understanding may not even be in writing but may have to be construed from their actions. Unlike their counterparts in large corporations, minority shareholders in small corporations often expect to participate in management and operations. "Furthermore, there generally is an expectation on the part of some participants that their interest is to be recognized in the form of a salary derived from employment with the corporation." These reasonable expectations constitute the bargain of the parties in light of which subsequent conduct must be appraised.

Id. (citations omitted) (quoting *Exadaktilos v. Cinnamonson Realty Co.*, 400 A.2d 554 (N.J. Super. Ct. Law Div. 1979)).

383. *Hager-Freeman v. Spircoff*, 593 N.E.2d 821 (Ill. App. Ct. 1992).

384. *Id.* at 822.

385. *Id.* at 829.

386. *Id.* at 822, 829.

387. *Id.* at 822.

388. *Id.*

389. *Id.*

390. *Id.*

control, Carl promptly locked Christel out of the business, fired her from her job at Show-Biz and denied her access to the corporation's books and records.³⁹¹

Christel sued Carl, Show-Biz and the corporation's lawyer, claiming that Carl and Show-Biz were guilty of oppression and that the lawyer breached his duty to her.³⁹² Christel's key allegation was that Carl deceived her about the purchase of Charles' stock and then used his ill-gotten majority position to improperly lock her out of the corporation.³⁹³

She also complained of the failure to hold shareholder or board meetings, and she eventually took matters into her own hands by serving notice of a special meeting of the board of directors.³⁹⁴ The meeting did not go Christel's way. Carl announced that "as the majority stockholder" he planned to "run this corporation the way it is supposed to be run."³⁹⁵ He also introduced and passed a resolution relieving Christel of her duties as a corporate director and officer because they "could not see eye-to-eye."³⁹⁶

Christel further alleged that the corporate minute book included forgeries of her signature, that stock certificates were altered without her consent and that Carl made a false entry in the books showing that Christel owed more than \$15,000 to the corporation.³⁹⁷ Moreover, she complained that Carl removed her as a signatory on all of the corporate accounts, hid the checkbooks, changed the locks, refused to provide her with financial statements and "deprived [her] of the opportunity to participate in the management and business decisions of a corporation in which [she] had invested her life savings."³⁹⁸ To make matters worse, Christel alleged that corporate earnings decreased dramatically after Carl's takeover, that Carl refused to distribute profits or dividends and that he informed Christel that she should not hold her breath waiting for any such distributions.³⁹⁹ Carl also ignored Christel's demand for an accounting.⁴⁰⁰

391. *Id.* at 822, 829.

392. *Id.* at 822.

393. *Id.* at 824-25.

394. *Id.* at 829. It is not clear why Christel did not call for such a meeting years earlier if the absence of meetings grieved her so.

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

After Christel filed her lawsuit, Carl called a special shareholders' meeting at which he refused to permit Christel to discuss business matters.⁴⁰¹ In addition, Carl elected himself and one of his sons as two of the three directors.⁴⁰² Immediately thereafter, Carl held a board of directors meeting and elected himself president and his son as secretary,⁴⁰³ with each slated to receive an annual salary in the amount of \$10,000, even though Carl's son was a full-time college student.⁴⁰⁴

The trial court dismissed Christel's oppression claims,⁴⁰⁵ apparently under an analysis supported by *Jaffe* and *Coduti*.⁴⁰⁶ The appellate court began its analysis with reference to the BCA provision for judicial dissolution where those in control of the corporation act "'in a manner that is illegal[,] oppressive or fraudulent.'"⁴⁰⁷ Predictably, the court noted that oppression is not limited to "illegal" or "fraudulent" actions or the misapplication or mismanagement of funds.⁴⁰⁸

Significantly, the court specifically noted some of the unique aspects of the closely-held corporation as factors bearing upon Christel's reasonable expectations for entering into the venture: (1) Show-Biz is a small corporation whose stock is not publicly traded, (2) Christel invested her life savings into the business and helped manage it for some time before Carl took over, and (3) in addition to taking control, Carl and his son were enriched while Christel's shareholder rights were infringed.⁴⁰⁹

The court analogized the case to *Gidwitz*,⁴¹⁰ where one of two equal shareholder factions took over and ran the corporation for years to the exclusion of the other faction.⁴¹¹ The court observed that the *Gidwitz* court found that course of conduct to be oppressive, noting that oppression can arise from a "continuing course of heavy-handed conduct."⁴¹² In light of that precedent, the appellate court determined

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* at 823.

406. *See id.* at 830-31 (drawing on the cases of *Jaffe Commercial Fin. Co. v. Harris*, 456 N.E.2d 224 (Ill. App. Ct. 1983) and *Coduti v. Hellwig*, 469 N.E.2d 200 (Ill. App. Ct. 1984)).

407. *Id.* at 830 (quoting the Illinois Business Corporation Act).

408. *Id.* (citing *Cent. Standard II*, 141 N.E.2d 45 (Ill. 1957)).

409. *Id.*

410. *Gidwitz v. Lazit Corrugated Box Co.*, 170 N.E.2d 131 (Ill. 1960).

411. *See supra* notes 94-120 and accompanying text (discussing the *Gidwitz* case).

412. *Hager-Freeman*, 593 N.E.2d at 830. The court also cited with approval *Notze v. Art Gallery, Inc.*, 405 N.E.2d 839 (Ill. App. Ct. 1980); *Gray v. Hall*, 295 N.E.2d 506 (Ill. App. Ct. 1973); and *Compton v. Paul K. Harding Realty Co.*, 285 N.E.2d 574 (Ill. App. Ct. 1972).

that Christel's allegations "set out a course of unfair and heavy-handed conduct that may be fairly viewed as oppression under the statute."⁴¹³ The appellate court accordingly reinstated Christel's claim.⁴¹⁴

The court's analogy of *Hager-Freeman* to *Gidwitz* is odd because the facts of *Hager-Freeman* more closely parallel those of *Notzke*, and *Gidwitz* does not explicitly address the shareholders' reasonable expectations.⁴¹⁵ In any event, *Hager-Freeman*, like both *Gidwitz* and *Notzke*, speaks in terms of "oppression," even though the result is more justifiable on fiduciary duty grounds. Nevertheless, the result was not surprising. After Carl and the company's lawyer duped Christel so that Carl could become controlling shareholder, Carl was doomed in the eyes of the law. Whether approached in terms of fraud, breach of duty or oppression, everything that Carl did in his role as purported controlling shareholder was tainted.

Most recently, the Illinois Supreme Court addressed a case in which a shareholder sought relief from allegedly oppressive conduct in *Schirmer v. Bear*.⁴¹⁶ The case revolved around the relationship of two stockholders in the William R. Bear Agency, Inc. ("Agency").⁴¹⁷ Of the 1,000 shares of common stock issued by the Agency, William R. Bear and his wife—who were not parties to the litigation—originally owned 750 shares and their son, defendant William F. Bear, owned 250 shares.⁴¹⁸

The plaintiff, Timothy Schirmer, joined the Agency as a broker and also entered into two stock purchase agreements.⁴¹⁹ In the first, William R. Bear and his wife agreed to sell 44 of their shares to Bear and 187 shares to Schirmer.⁴²⁰ Schirmer made a \$10,000 down payment toward the purchase and agreed to pay the balance of \$66,670 at 9.25% annual interest per year, bringing Schirmer's total obligation, including principal and interest to \$106,000.⁴²¹ Schirmer also received an option to purchase 53 additional shares at the price of \$410 per share.⁴²² Under the second stock purchase agreement, the Agency bought back Mr. and Mrs. Bear's remaining 519 shares for \$212,790 at

413. *Hager-Freeman*, 593 N.E.2d at 830.

414. *Id.* at 831.

415. See *supra* notes 213-37 and accompanying text (discussing the facts of *Notzke*).

416. *Schirmer v. Bear*, 672 N.E.2d 1171 (Ill. 1996).

417. *Id.*

418. *Id.* at 1172.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

a 9.25% annual interest rate.⁴²³ The Agency's total obligation under the agreement was approximately \$290,000, which was guaranteed by Bear and Schirmer.⁴²⁴

From the time Schirmer joined the Agency until about July, 1990, he and Bear got along well with each other and the business apparently prospered, with gross annual commissions rising from approximately \$180,000 to \$285,000.⁴²⁵ Schirmer earned a salary and annual bonuses.⁴²⁶ Things started to turn sour, however, shortly after July, 1990, when the final installment payment under both stock purchase agreements fell due.⁴²⁷

After the final payments were made and the corresponding stock certificates were released, Bear and Schirmer agreed to extend the terms of the first stock purchase agreement until Bear and Schirmer completed a new agreement.⁴²⁸ They also agreed between themselves that the value of the corporation was \$500,000.⁴²⁹

Around the same time, Schirmer notified Bear that he intended to exercise his option to purchase fifty-three additional shares under the terms of the first stock purchase agreement.⁴³⁰ Bear rejected the option exercise and also informed Schirmer that he had "closed the books of the Agency, thereby forgoing any bonuses or profit sharing for the year."⁴³¹ Schirmer strongly protested Bear's decision to eliminate bonuses or profit sharing for the year.⁴³² He also accused Bear of wasting the Agency's assets and requested a buy-out of his stock for \$195,000, based upon the \$500,000 valuation previously agreed upon between the owners.⁴³³ Schirmer offered to either leave the Agency or remain as a salaried employee after the buyout.⁴³⁴

The Agency's lawyer wrote to Schirmer, stating that his proposals were deemed a resignation and offered Schirmer \$76,670 for his

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 1172-73.

428. *Id.* at 1172.

429. *Id.*

430. *Id.* It is unclear what Schirmer's business motivation would have been to accomplish the purchase inasmuch as doing so would only have increased his stake from 38.9% to 44.9%, leaving him as a minority shareholder with no additional rights. *See id.*

431. *Id.* at 1172-73.

432. *Id.* at 1173.

433. *Id.*

434. *Id.*

stock,⁴³⁵ an amount apparently based upon a provision of the first stock purchase agreement which permitted Mr. and Mrs. Bear to repurchase Schirmer's stock if Schirmer quit or was fired for cause.⁴³⁶ The attorney also noted that if Schirmer refused to sell, he faced the prospect of remaining a minority shareholder without distributions from the Agency for a substantial period of time.⁴³⁷

The Agency's board of directors met in August, 1990, pursuant to notice served by Bear.⁴³⁸ The meeting turned out to be a shareholders' meeting. Bear, as majority shareholder, voted to amend the Agency's bylaws to reduce the size of the board of directors from three members to one and elected himself as the sole director.⁴³⁹ Bear also appointed himself president and treasurer and appointed his wife as secretary.⁴⁴⁰ Bear saw to it that Schirmer's name was removed from all corporate accounts and set Schirmer's termination date, after which he was to receive no income or benefits from the Agency.⁴⁴¹ Notably, the notice for the directors' meeting, sent by Bear, did not include notice of a shareholders' meeting or the topics to be addressed.⁴⁴²

After being removed, Schirmer sued, alleging waste of corporate assets, illegality, oppression and fraud.⁴⁴³ Schirmer's basic theory was that he had entered into the venture based upon a good faith intention to own and operate the business with Bear, but instead Bear had merely "used" him to finance the stock purchase agreements.⁴⁴⁴ Once the required payments were completed, Bear illegally removed him from the Agency.⁴⁴⁵ Schirmer sought either dissolution of the Agency or a forced buyout of his shares.⁴⁴⁶

The court found that Schirmer's removal as an officer and director was "obviously illegal, but the record is devoid of any evidence that plaintiff was harmed thereby."⁴⁴⁷ Based upon the supplemental opinion

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

in *Coduti*,⁴⁴⁸ the trial court ruled that there was no remedy available because Schirmer failed to prove all of the elements necessary to warrant dissolution of the corporation.⁴⁴⁹

On appeal, the Second District Appellate Court declined to follow *Coduti* and held that there is no need for a plaintiff shareholder to establish that dissolution is justified to be entitled to relief.⁴⁵⁰ That holding paved the way for such remedies as a buy-out of the non-controlling shareholder's stock where the controlling shareholder's actions—while not necessarily illegal or fraudulent—violate the minority's "reasonable expectations."⁴⁵¹ Accordingly, the appellate court reversed the trial court and remanded the case for a hearing to determine the value of Schirmer's stock so that a buy-out could be ordered.⁴⁵²

On Bear's petition, the supreme court granted leave to appeal to address the limited question of whether, under section 12.55 of the BCA, the plaintiff must prove grounds to justify dissolution of the corporation to be entitled to the remedy of a forced share buyout.⁴⁵³ The supreme court's opinion is essentially an exercise in statutory construction. The court held that the plain language of section 12.55 "provides for a separate and distinct cause of action from Section 12.50" under which relief is available if the plaintiff shareholder demonstrates that the defendant engaged in illegal, oppressive or fraudulent conduct.⁴⁵⁴ However, the plaintiff need not prove that the defendant's conduct was so severe as to justify dissolving the corporation.⁴⁵⁵

Although the type of analysis applied by the *Topper* court has not been explicitly adopted by Illinois judicial decisions, attention to the reasonable expectations of the non-controlling stockholder appears to

448. *Coduti v. Hellwig*, 469 N.E.2d 220 (Ill. App. Ct. 1984), *overruled by* *Schirmer v. Bear*, 672 N.E.2d 1171 (Ill. 1996).

449. *Schirmer*, 672 N.E.2d at 1173-74.

450. *Schirmer v. Bear*, 648 N.E.2d 1131, 1136-37 (Ill. App. Ct. 1995).

451. *Id.*

452. *Id.* at 1137.

453. *Schirmer*, 672 N.E.2d at 1171-72. Although § 12.55 of the BCA was substantially amended during the appeal, neither party asserted that the new provisions applied to the case and, therefore, the court decided the case by application of § 12.55 as it stood before amendment. *Id.* at 1174. The supreme court also noted that its interpretation "comports with the current statutory scheme regulating shareholder remedies for nonpublic corporations." *Id.* at 1176 (citing 805 ILL. COMP. STAT. 5/12.56 (West Supp. 1995)).

454. *Id.* at 1175 (quoting *Kimmel v. Wirtz*, 793 F. Supp. 818, 820 (N.D.Ill. 1992)).

455. *Id.* at 1176.

have become a basis of decision in Illinois.⁴⁵⁶ Nationwide, recognition of the reasonable expectations test is now so well accepted in legal thought that it has been described as "near the center of the legal universe."⁴⁵⁷

The goal of shareholder protection is laudable. But it is far from certain that the rush toward the reasonable expectations model meets that goal or constitutes sound public policy. As noted above, two of the primary assumptions underlying the oppression theory are that the unique nature of the closely-held corporations calls for non-controlling shareholder protection by means of the special oppression claim and, second, that oppression claims are an effective means to protect those shareholders.⁴⁵⁸

The reported Illinois decisions addressing oppression claims in closely-held corporations undermine those assumptions. The analysis of those cases, set forth above, illustrates that the application of the corporate governance provisions of the BCA—providing at least procedural protection to those not in control—and fiduciary duty law (applicable to those in control, either as shareholders, directors, officers or employees)—which provides substantive protection to the non-controlling shareholder—are truly adequate to protect non-controlling shareholders.⁴⁵⁹ By contrast, oppression itself has not been a significant independent source of shareholder protection in any one of its three stages of development. Thus, the argument that the unique nature of the closely-held corporation makes it necessary to formulate non-controlling shareholder remedies, not needed in other enterprises, is seriously compromised.

B. Oppression Theory is a Disincentive to Planning

The third assumption underlying oppression theory, that an oppression claim is necessary because shareholders of closely-held

456. The absence of explicit judicial adoption may not be surprising because the reasonable expectations approach to oppression has "received more scholarly than judicial attention." Robert W. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 50 (1982). Nor is it correct to conclude that Illinois courts will pay no attention to whether the controlling shareholder has engaged in "wrongful conduct." It is more accurate to say that the definition of "wrongful conduct" has become very malleable.

457. Donald F. Clifford, Jr., *Close Corporation Shareholder Reasonable Expectations: The Larger Context*, 22 WAKE FOREST L. REV. 41, 42 (1987).

458. See *supra* Part III (discussing the arguments in favor of oppression theory).

459. EASTERBROOK & FISCHER, *supra* note 34, at 241.

corporations routinely fail to plan as they ought for corporate governance issues, must also be questioned.

The supposed failure to plan is, in itself, difficult to understand. Indeed, the consequences of a corporate dispute to the non-controlling shareholder have been described as "catastrophic."⁴⁶⁰ Furthermore, planning does not require much effort. Planning for the closely-held corporate enterprise is hardly an arcane or rarely-practiced science. Good practice requires that the lawyer advise a client who plans to enter into a corporate enterprise (particularly as a non-controlling shareholder) of the many planning opportunities available.⁴⁶¹ In addition, excellent form books are available to assist in corporate planning.⁴⁶²

By means of a straightforward written agreement, the shareholders can define the relationship among themselves and between themselves and the corporation.⁴⁶³ Agreements between shareholders for control of the closely-held corporation (such as voting trusts and similar arrangements) and its governance are made available by statute and enforced by the courts.⁴⁶⁴ Restrictions on the purchase and sale of stock are also upheld.⁴⁶⁵ In addition, such agreements can and should address the amount and type of income that each party expects to receive from participating in the enterprise.⁴⁶⁶

Those who seek to promote remedies for oppression take a different approach. They suggest that a non-controlling shareholder should not

460. Bahls, *supra* note 46, at 286.

461. See EASTERBROOK & FISCHER, *supra* note 34, at 233, 237-38; William L. Cary, *How Illinois Corporations May Enjoy Partnership Advantages: Planning for the Closely Held Firm*, 48 NW. U. L. REV. 427 (1953).

462. See, e.g., 6-7 MARK H. JOHNSON & JACOB RABKIN, *CURRENT LEGAL FORMS* (Bender 1992); 3-3a CLARK A. NICHOLAS, *CYCLOPEDIA OF LEGAL FORMS* (Callagh & Co. 1994); HOWARD M. ZARITSKY, *STRUCTURING BUY-SELL AGREEMENTS: ANALYSIS WITH FORMS* (2d ed. Warren, Gorham & Lamont 2000).

463. Kerry M. Lavelle, *Drafting Shareholder Agreements for the Closely-Held Business*, 4 DEPAUL BUS. L.J. 109, 110 (1991).

464. Voting trust agreements for pooling shares for control of the corporation are specifically endorsed by statute. 805 ILL. COMP. STAT. 5/7.65 (2000 & West Supp. 2001); see, e.g., Venner v. Chi. City Rwy. Co., 101 N.E.2d 949 (Ill. 1913); see also Wasserman v. Rosengarden, 406 N.E.2d 131 (Ill. App. Ct. 1980); Compton v. Paul K. Harding Realty Co., 285 N.E.2d 574 (Ill. App. Ct. 1972).

465. See, e.g., Galler v. Galler, 203 N.E.2d 577 (Ill. 1964); see also Pinsof v. Pinsof, 438 N.E.2d 525 (Ill. App. Ct. 1982).

466. Lavelle, *supra* note 463, at 128. The process of creating explicit agreements among shareholder may be most helpful because, by doing so, the participants (and their lawyers) raise issues which the shareholders would not have considered if not for the planning process. *Id.* at 129.

be expected to take basic reasonable business steps to protect his investment.⁴⁶⁷ Those commentators typically couch their arguments in terms of a need to protect the non-controlling shareholder who is unaware of the planning opportunities available to him or unaware of the concerns that counsel in favor of planning.⁴⁶⁸ Some also suggest that a kind of irrational exuberance characterizes the entry into a new business venture so that the non-controlling shareholder may be excused from attending to such mundane things as advance planning.⁴⁶⁹

Those arguments make little practical sense. The implied thesis is that shareholders in closely-held corporations are "knowledgeable enough to incorporate to obtain the benefits of favorable tax treatment but ignorant of all other differences between corporate and partnership law."⁴⁷⁰ Yet it is difficult to believe that those shareholders are not at least a little attuned to the idea that they should act to protect the basic expectations that are the sine qua non of their involvement in the corporate enterprise. Those who argue in favor of oppression theory have failed to present evidence to support the implicit hypothesis that businessmen tend to utterly ignore documentation of deal points that are critical to their business decisions.⁴⁷¹

Moreover, those commentators suggest that planning is not only regularly omitted but actually superfluous on the premise that non-controlling shareholders usually have certain general expectations in

467. See F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 881-82 (1978).

As minority participants in close corporations may not anticipate dissension or oppression, and indeed may be unaware of their vulnerability, they frequently fail to bargain for adequate protection against mistreatment. In view of this widespread failure of minority shareholder to use self-help, commentators and legislative draftsmen might well turn their attention to ways of providing automatic statutory protection.

Id.

468. *Id.* at 883-84.

469. Murdock, *supra* note 23, at 426 (stating that "people enter closely-held businesses in the same manner as they enter marriage: optimistically and ill-prepared").

470. EASTERBROOK & FISCHER, *supra* note 34, at 250. The authors go on to argue that "[t]here is no support for this assumption once you recognize that people have to jump through a lot of formal hoops (assisted by counsel) to incorporate but can become partners by accident." *Id.*

471. This is particularly true in that

[p]articipants in the closely-held corporation are better informed about their legal rights and obligations than participants in either partnerships or public corporations. Investors in close corporations often put a great deal of their wealth at stake, and the lack of diversification (compared with investors in publicly held firms) induces them to take care.

Id. at 237; see also Hillman, *supra* note 456, at 68 (noting the "deliberation required for the creation of a corporation").

common.⁴⁷² Those include: benefiting from the cash flow of the business, either through salaries from employment or dividends, and participation in management.⁴⁷³ Some go so far as to suggest that there should be an entitlement to a job and membership on the board for life.⁴⁷⁴

These generalized categories of expectations are a far cry from anything one could use as a real basis to run a company. Naturally, an investor in a closely-held corporation wants to be “involved” in the corporation. If he did not, presumably he would use his funds for some purpose other than buying stock. But involvement can mean anything from toiling eighteen hours a day to sitting back and waiting for the company to be bought out by a competitor at a huge premium. Who is to say if the shareholders themselves do not?

Equally vexing, the various lists of supposedly universal expectations are not the result of any empirical studies, but seem to represent essentially their respective authors’ own views about the “reasonable expectations” of non-controlling shareholders. Those commentators also admit that discerning what expectations should apply is a substantial problem.⁴⁷⁵ This may be so because the supposed “universality” of expectations tends to break down in the cold light of vastly varied motivations.

Even if one could settle on some kind of “universal” set of expectations (and that seems unlikely), there is a much bigger problem. The seemingly benevolent argument that the courts should take care of those non-controlling shareholders who fail to take care of themselves masks a result that is not necessarily benign. Through the application of oppression law, it is courts, and not the corporate participants themselves, who are charged with formulating the terms of key agreements relating to corporate governance. The sum total of those determinations, embodied in the decisional law, will tend to create a set of “standard” expectations upon which non-controlling shareholders are entitled to rely. Those rules will then be applicable to every closely-held corporation, without regard to practical business considerations that may render them inappropriate to a particular corporation.

472. O’Neal, *supra* note 467, at 886.

473. 1 COX ET AL., *supra* note 3, §§ 14.13–14.53; *see also* Bahls, *supra* note 46, at 323 (providing an extended list).

474. Murdock, *supra* note 23, at 431, 435–36; Quinlan & Kennedy, *supra* note 28, at 586.

475. *See, e.g.*, Bahls, *supra* note 46, at 325–26 (discussing how expectations can reasonably change over time, further confusing issues).

By forming such a set of standards, one ironically ignores the very considerations that led to the creation of standards in the first place—the expectations of the particular shareholders themselves. That is, the universal standards do not address the parties' specific circumstances, nor do they account for the real (but largely unexpressed) economic bargain that the parties struck.

It has been argued that the development of a set of generally applicable principles (such as fiduciary duties) would be beneficial because such principles form "implicit standard terms" that lower the costs of contracting.⁴⁷⁶ However, the cost of being wrong when formulating that set of standards—i.e., not approximating what the shareholders would create if they contracted on their own—is high. As shown above, the likelihood of developing the "wrong" set of standards is quite high, as well.⁴⁷⁷

The "wrong" set of standards means that shareholders will be forced to live with inefficient results, or incur the costs of contracting around an inefficient or otherwise inapplicable standard. If the standards are interpreted not as defaults but as imperatives, there will be no option but to live with the inefficient result—or incorporate in some jurisdiction that has not designated its judges as better able to form contracts than its businesspeople. Thus, the very efficiency that proponents of oppression theory promote results in substantial inefficiency.

*C. Controlling Shareholders are Left Without Clear Guidelines for
Avoiding Oppressive Behavior*

One might argue that those who seek a set of standards to protect non-controlling shareholders from the overreaching of those in control would be best advised to start at the source. That is, to approach the problem by setting forth a clear standard of conduct that is expected of the controlling shareholder so that both the controlling and non-controlling shareholders understand their respective rights and obligations in the context of corporate governance. Doing so would satisfy a basic goal of corporation law, to provide a "principled and coherent set of regulations to ensure that those who hold power are accountable to those who are dependent upon its fair exercise."⁴⁷⁸

476. Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 291 (1986).

477. See *supra* notes 472-74 and accompanying text (discussing the possible general expectations of non-controlling shareholders).

478. Mitchell, *supra* note 61, at 1675.

But the modern formulation of the oppression claim in Illinois fails to do so in that the contours of what conduct may constitute oppression are not definite, but are strikingly vague and changeable. The concept is now so nebulous that it is essentially impossible to predict what conduct may be viewed in hindsight as oppressive.⁴⁷⁹

This situation is true for several reasons. First, the controlling shareholder does not necessarily know the non-controlling shareholder's reasonable expectations. Second, the reasonable expectations test may impress upon the controlling shareholder different standards of behavior depending upon which non-controlling shareholder (or group of non-controlling shareholders) he is dealing with. Third, the reasonable expectations test may saddle the controlling shareholder with standards of behavior that are inconsistent with, or directly contrary to, his other legal obligations.

First, the non-controlling shareholder's expectations, reasonable or not, may not be known to the controlling shareholder. Even proponents of a view of oppression that recognizes the non-controlling shareholder's reasonable expectations admit that these are often "just vague and half-articulated understandings."⁴⁸⁰ Although some have suggested that an expectation is by definition reasonable only if known to the controlling shareholder,⁴⁸¹ Illinois has not adopted such a qualification. It is the height of folly to expect that a controlling shareholder will necessarily abide by the unexpressed, albeit deeply held, expectation of a non-controlling shareholder.

The almost inevitable result of holding the controlling shareholder to a standard of which he is unaware is that eventually the controlling shareholder interferes with the non-controlling shareholder's expectations, leading to dissension within the corporation. For those who contend that the problem is resolved simply by ongoing consultation with non-controlling shareholders, the solution is not so simple.

A second difficulty (and one not solved by consultation in a corporation with more than two shareholders) is that dependence upon the expectations of individual shareholders will almost certainly create differing, and sometimes conflicting, standards of behavior for the

479. To make matters worse, courts have expressed themselves on the topic of oppression in hopelessly broad rhetoric that does not necessarily match the actual results of the cases. See *supra* Part IV.A.1-2 (discussing Illinois cases).

480. O'Neal, *supra* note 467, at 886.

481. 1 COX ET AL., *supra* note 3, §§ 14.13-14.51; Bahls, *supra* note 46, at 324; Hillman, *supra* note 456, at 77-79.

controlling shareholder.⁴⁸² Yet the controlling shareholder is expected to conform his behavior to the (perhaps unexpressed) requirements of each of those shareholders. That is distinctly unlike the fiduciary duty concept, under which the controlling shareholder's conduct is judged by a single standard as to all of his fellow shareholders.

Third, a controlling shareholder's conduct may be deemed oppressive although not contrary to law or even when it is explicitly approved in the law.⁴⁸³ For example, conduct that is often cited as oppressive in shareholder litigation is failing to elect or re-elect the non-controlling shareholder to a seat on the board of directors or appoint him as an officer.⁴⁸⁴ Yet those are functions of voting by shareholders and directors that are, and should be, controlled by the majority. Likewise, terminating the non-controlling shareholder's employment with the corporation is often alleged to be oppressive, even though decisions regarding hiring and firing are vested in the corporation's officers, who are appointed by the board of directors, which is in turn elected by majority vote of the shareholders.⁴⁸⁵ Thus, a right that the law provides to the controlling shareholder may be threatened or potentially eliminated with reference to an oppression analysis.

The controlling shareholder's dilemma is obvious. A review of Illinois case law will do little to equip him with a useful normative definition of oppression.⁴⁸⁶ On the other hand, reference to the "reasonable expectations" test informs the controlling shareholder that he need not even bother reading the decisional law. He should instead attempt to determine the "reasonable expectations" of the non-controlling shareholders. Or, perhaps more to the point, what the non-controlling shareholders might claim, in a suit seeking shareholder remedies, that their reasonable expectations were. Thus, to meet the challenges of running a closely-held Illinois corporation, the controlling

482. By way of further complications, some commentators suggest that the degree to which reasonable expectations should be considered by courts depends upon the nature of the individual relationships between the shareholders. O'Neal, *supra* note 467, at 885-86. This approach has also been criticized. See, e.g., Hillman, *supra* note 456, at 64.

483. The reasonable expectations model may provide remedies to the non-controlling shareholder who is "generally dissatisfied with some aspect of his or her role in the business but who has not been the victim of misconduct by those in control." Hillman, *supra* note 456, at 3.

484. Quinlan & Kennedy, *supra* note 28, at 586.

485. 805 ILL. COMP. STAT. 5/8.50, 8.55 (2000).

486. The very vagueness of the term has been hailed as desirable because "any attempt to define 'oppressive' would tend to reduce the flexibility of the provision" in light of the varied circumstances which may give rise to oppression. Hillman, *supra* note 456, at 44 n.134 (quoting Comment, *supra* note 21, at 140-41).

shareholder must not only be an astute businessperson, but also a mind reader and a seer. A tall order indeed.

D. Oppression Theory Promotes the Highly Inefficient Result of Corporate Governance by Unanimity

Modern oppression theory is also objectionable because it effectively makes all shareholders a "controlling" shareholder for at least some purposes. Even a single shareholder who opposes a corporate action may feel his reasonable expectations trampled upon and may resort to a lawsuit (or the threat of a lawsuit) claiming oppression. The result is that a controlling shareholder's only safe harbor from shareholder litigation may be government by unanimity.

That result implicates a number of substantial costs. Failure to achieve unanimity will result in paralysis.⁴⁸⁷ Knowing that, the non-controlling shareholder may be encouraged to demand concessions in exchange for his assent to a corporate action.⁴⁸⁸ The result in any event—deadlock, opportunistic behavior by the non-controlling shareholder, or shareholder litigation—is inefficiency created or aggravated by the oppression theory.

Before oppression became a real doctrine in Illinois corporate law, it was well recognized that the basic rule of corporate governance was shareholder majority rule:

It is . . . fundamental in the law of corporations that the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business. Everyone purchasing or subscribing for stock in a corporation impliedly agrees that he will be bound by the acts and proceedings done or sanctioned by a majority of the shareholders, or by the agents of the corporation duly chosen by such majority, within the scope of the powers conferred by the charter.⁴⁸⁹

The so-called Majority Rule Doctrine was firmly established in Illinois corporate law,⁴⁹⁰ but seems to have given way under the

487. EASTERBROOK & FISCHER, *supra* note 34, at 248.

488. *Id.*

489. *Wheeler v. Pullman Iron & Steel Co.*, 32 N.E. 420, 423 (Ill. 1892) (citations omitted). The principle that corporations are governed by the board of directors is codified in the BCA: "[E]ach corporation shall have a board of directors and the business and affairs of the corporation shall be managed by or under the direction of the board of directors." 805 ILL. COMP. STAT. 5/8.05 (2000 & West Supp. 2001).

490. The Majority Rule Doctrine holds that, upon subscription for stock, an investor impliedly consents to corporate policies as determined by the majority. Bahls, *supra* note 46, at 292; see also Linda L. Shapiro, Note, *Involuntary Dissolution of Close Corporations for Mistreatment of Minority Shareholders*, 60 WASH. U. L.Q. 1119, 1149 (1982).

modern application of oppression theory. The requirement that the controlling shareholder must not transgress any shareholder's "reasonable expectations" means that the "fundamental" law of corporations that "the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business"⁴⁹¹ is no longer a dependable touchstone.⁴⁹² Rather, where control of the policy and business of the corporation is limited by the non-controlling shareholder's "reasonable expectations," that consideration may, of result, be contrary to the course which the controlling shareholders would otherwise seek.

Because oppression claims focus upon changes or proposed changes in the corporation or its operation which impinge upon a non-controlling shareholder's expectations, oppression may be thought of in practical effect as the violation by a controlling shareholder of an implied contract between shareholders. As with an implied contract, oppression is the violation of an implicit agreement or agreements among shareholders. Key to the implied contract, which underlies oppression claims, is that the parties (i.e., the shareholders) entered into business together with the intention that no fundamental change to the corporation or its operation will be undertaken without the assent of the non-controlling shareholder.

The much more rational conclusion to be drawn from the formation of a corporation in which one shareholder (or more than one shareholder, acting together) has voting control and one or more shareholders lack voting control is that the shareholders entered into that arrangement with the intent that the democratic process proceed and that the controlling shareholder(s) would employ the natural prerogatives of control. Indeed, one might argue that the only reasonable expectation of a minority shareholder is that he will be outvoted every time unless he contracts to protect himself from that result. Under the guise of reasonable expectations, oppression theory interferes with that entirely reasonable interpretation of the parties' expectation.

At a minimum, the introduction and continuing expansion of the oppression concept means that corporate decisions cannot be accomplished by majority vote, but that both the controlling and non-controlling shareholders must be in accord on all major corporate decisions. That result is much more than the participation by the non-

491. *Wheeler*, 32 N.E. at 423.

492. When courts apply the principle of majority rule in close corporations, they often disappoint the reasonable expectation of minority participants. O'Neal, *supra* note 467, at 884.

controlling shareholder in corporate affairs that the law would otherwise require.⁴⁹³ It amounts to vesting in the non-controlling shareholder a veto power for at least some purposes. Under that state of affairs, one may reasonably ask why anyone would risk the capital necessary to gain a controlling ownership position when one percent might be enough to veto actions not to one's liking (i.e., not in accordance with one's "reasonable expectations").

The availability of an oppression claim is complicated further if there are disagreements (or differing expectations) among several non-controlling shareholders. In that event, when majority rule may be most urgently needed to keep the corporate enterprise moving forward, a controlling shareholder is most vulnerable to claims of oppression. He risks frustrating not merely one shareholder's reasonable expectations but simultaneously transgressing the differing expectations of numerous shareholders. In a regime that stresses individual expectations of minority participants over the good of the enterprise as a whole, the corporation loses the ability to act decisively and, as a result, loses the ability to take timely advantage of corporate opportunities.

E. Oppression Theory Tends to Increase the Cost and Severity of Shareholder Disputes

The problems inherent in the use of oppression as a basis for shareholder remedies, as outlined above, are on full display in shareholder litigation. On the one hand, the controlling shareholder defendant is likely to be thoroughly convinced (whether accurately or not) that he has done nothing more than fulfill his mandate to run the corporation.

On the other hand, the non-controlling shareholder plaintiff may believe that his reasonable expectations have been frustrated. The very indefinite nature of oppression encourages such plaintiffs to introduce (or devise) evidence of every real or imagined wrong or slight supposedly committed by those in control of the corporation.⁴⁹⁴ The result is lots of heat but little light, needlessly taxing scarce judicial resources and senselessly increasing costs to all of the litigants.⁴⁹⁵

In the middle is the court, charged with the unenviable task of presiding over a type of dispute that is typically emotionally charged and characterized by a level of personal animosity absent in many other

493. See, e.g., 805 ILL. COMP. STAT. 5/7.05, 7.40 (2000 & West Supp. 2001).

494. There is a real danger of reference to expectations that are "unilateral at the time the lawsuit is filed." Bahls, *supra* note 46, at 325.

495. *Id.* at 327.

types of business litigation. One of the court's goals is to discern whether the reasonable expectations of the non-controlling shareholder have been frustrated by the controlling shareholder whose actions may otherwise comply with the law but may nevertheless constitute oppression.

As illustrated above, the court approaches that difficult mission with little guidance in the case law.⁴⁹⁶ If the court views its duty as discerning a subjective reasonable expectation, it will base its decision mainly upon evidence of the non-controlling shareholder's actual expectations as of the time he joined the enterprise and as they developed thereafter. The problems presented by such a *post hoc* determination of largely subjective matters is obvious when the non-controlling shareholder has every reason to expand the scope of his supposed expectations to the greatest possible extent.

The list of "expectations" that litigants can come up with when pressed is virtually limitless. Take, for example, one commentator's suggestion that shares sold by a non-controlling shareholder to the corporation or to the controlling shareholder should not be subject to a minority discount because to do so "would frustrate the reasonable expectation of all shares having equal value."⁴⁹⁷ Of course, there is no economic rationality to that expectation, as reflected in the common control premium phenomenon in which a buyer is willing to pay more per share for controlling stock than for non-controlling stock.⁴⁹⁸ But what non-controlling shareholder—in the context of litigation—would not be willing to testify that he expected that his minority shares would have equal value with those shares entitled to control the corporation?

Alternatively, the court may adhere to an objective expectations test, in which the court is left to define the non-controlling shareholder's wants and limit the controlling shareholder's control when the parties did not (or could not) do so themselves.⁴⁹⁹ There is great difficulty inherent in that approach, as well. There is the initial problem of defining standards, as discussed above. Further complicating matters, a set of standards may be uniformly applied within the context of a single

496. See *supra* notes 23-28 and accompanying text (discussing the lack of guidance in defining oppressive conduct); see also Douglas K. Moll, *Shareholder Oppression v. Employment at will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517 (1999).

497. Bahls, *supra* note 46, at 303.

498. Zenichi Shisido, *The Fair Value of Minority Stock in Closely Held Corporations*, 62 FORDHAM L. REV. 65, 84 (1993).

499. 1 COX ET AL., *supra* note 3, §§ 14.13-14.52.

case but different chancellors are quite likely to interpret the standards in vastly differing ways, so that the test is not objective after all.

That vagueness of standards and unpredictability of results tends to discourage an early end to litigation. When the parties are unable to accurately predict how courts might decide a matter, they have difficulty negotiating a solution.⁵⁰⁰ Some commentators have suggested that the transaction costs of shareholder litigation are particularly wasteful because, regardless of the nature of the underlying allegations, the usual remedy is a forced buy-out of the complaining shareholder.⁵⁰¹ Therefore, they argue that the court's legitimate (or at least most efficient) role is as a price-fixing mechanism in the absence of a market.⁵⁰²

Whatever result emerges from such litigation is likely to bear little relationship to any course of events that any shareholder anticipated upon entering into the enterprise. But that, after all, is the ultimate outcome—and fundamental weakness—of oppression theory. After having paid a high cost (in terms of efficiency) for the overlay of oppression theory, participants in the corporate enterprise are left without a predictable outcome. Truly the worst of both worlds.

V. CONCLUSION

The high costs and relative lack of utility of oppression theory are clearly reflected in the Illinois cases. Without oppression, non-controlling shareholders in Illinois closely-held corporations would be fully protected by other legal doctrines. Those factors strongly indicate that maintaining oppression as a basis for shareholder remedies in Illinois is not wise public policy. As Illinois has led the way in the development of corporate governance law in the past, it should do so again. Oppression should be eliminated from the BCA and common law as a basis for shareholder remedies.

500. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 228 (1982).

501. J.A.C. Hetherington & Michael R. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 34-35 (1977).

502. *Id.*

