

State Law & State Taxation Corner

Minority Shareholder Oppression?— The Problem is Not With the Answer But Rather With The Question

By Thomas E. Rutledge

In a class that I can no longer identify, we were told to imagine a man or woman leaning over a maze being navigated by a rat. The man or woman was to be wearing a lab coat and holding a stop watch with which the rat's progress from beginning to end was being timed. The professor's question was then presented—"What do we know from this scene?" After disposing of the obvious responses someone finally hit upon the response being sought, namely that the person holding the stopwatch thinks it important how quickly the rat can traverse the maze.

This is a lesson that has stuck with me, it illuminating the importance of examining the question rather than simply formulating a correct response thereto. When we undertake that step we can identify either failed premises or prejudices that are implicit in the question that will be, if not challenged, allowed to permeate the answer. When we fail to take this analytic step, we can inadvertently address the wrong question. It is entirely possible that how quickly the rat can navigate the maze is entirely irrelevant.

**"We thought we had the answers,
it was the questions we had wrong."¹**

I submit that the classic formula under which the "oppression" of minority shareholders and members is framed is a clear instance of a failure to critically consider the question before proceeding on to the answer. By way of example, it has been observed that:

The close corporation form of business organization offers a winning combination of civility, structure and limited liability while also permitting direct and relatively informal management. Yet, the various features that appeal to investors—a locked-in [capital] structure and centralized control—enable



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the majority to deprive the minority of a return on its investment.

The potential for minority shareholder oppression should be understood, therefore, as an inherent structural characteristic of the close corporation form. This characteristic created a dilemma for courts and state legislatures as well as for legal commentators who hope to offer guidance. The question is whether it is possible to adjust, *ex-post*, the relationship of shareholders to remedy shareholder oppression while preserving the aspects of the close corporation form that investors value *ex ante*.²

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And so begins the analysis: how can the corporate structure and the innumerable relationships defined thereby be modified to "remedy shareholder oppression?"³ But is that the question? A response to the naked allegation "I have been injured and demand to be made whole" with "Your remedy is . . ." skips a crucial analytic step, namely the dual aspect inquiry of "Is your alleged injury actual and subject to remedy?" We have often seen these debates in the realm of personal injury suits. Remember the outcry over the McDonald's hot coffee lawsuit? How about the case in which a woman received damages from the store in which she tripped over a toddler running amok, even though it was her child? There exists no shortage of skepticism as to the validity of these and similar claims, often accompanied by calls for reform of the tort law system to expand rules to the effect "you can't recover when it is your fault." In these two examples there is no real question that an injury has been suffered; the outcry is to the suggestion that the injury should as well have a remedy. In other cases we see raised the question of whether there has been any injury. I am personally aware of a case in which an applicant for disability insurance benefits brought suit against the mental healthcare professional, hired by the insurer, who determined that the applicant was not so mentally unwell as to warrant disability payments. The

claim was for defamation; essentially, the plaintiff claimed a determination she is not mentally unwell defamed her.

Against that background, it is fair to ask whether there should be *ex-ante* adjustments of the inter-corporate relationship to modify the contractual terms of the corporate form to create and enforce rights not afforded by the statute and not, as to the venture at hand, negotiated for and incorporated into the agreements comprising the venture?

Consider the classic claim by a minority shareholder that the termination of his employment violated his reasonable expectation of continued employment by the venture in which he is a shareholder.⁴ With essentially only one exception, and subject to qualification for termination in response to engaging in protected activity such as union organizing, filing a claim for workers' compensation or being terminated for refusal to violate the law,⁵ every state utilizes some form of the rule of employment-at-will.⁶ Under the formula employed in Kentucky, an employee may be terminated "for a good reason, for a bad reason, or for a reason that some might find morally indefensible."⁷ Delaware is another state utilizing the rule of employment-at-will.⁸ These rules are subject to modification in an employment agreement.⁹ The shareholder's assertion, made now after his or her employment has been terminated, is that the status of a shareholder is *inter alia* an employment agreement that protects him or her from the risks of at-will employment.

Without a doubt a shareholder, upon joining the venture, may request or even insist that he or she be other than an employee-at-will. If the shareholder insists and the other participants in the venture do not agree, then the individual can either abandon the venture or join it as an at-will employee. If the request is made and accepted, then there will be a modification of the otherwise applicable rule of at-will.¹⁰ This exchange is, however, agreement as to the terms of the bilateral agreement as to the terms of employment between the employer and the employee; the fact that the employee is as well a shareholder in the corporation does not enter the analysis except to the extent that the term of employment may, by the terms of the agreement, be conditional upon shareholder status.¹¹ Attention needs as well to be paid to the position of the employer, namely the corporation. Any agreement modifying the rule of employment-at-will must be shown to have bound the corporation, and that requires action by the board of directors.¹² A conversation between shareholders does not bind the corporation any more than does a conversation between a shareholder and a third party.¹³

Turning to claims that the termination of a shareholder from positions as an officer or director of the corporation were improper and should give rise to either damages or

injunctive relief, such are already addressed by, and fail, pursuant to statute. Appointment as an officer creates no right to that office,¹⁴ and the board has the authority to “remove any officer at any time with or without cause.”¹⁵ As to the position as a director, absent protections set forth in the articles of incorporation,¹⁶ the shareholders have the right to elect and to remove directors, and by statute that removal may be with or without cause.¹⁷

While a shareholder-employee may desire employment that can be terminated only for cause, it does not follow that a shareholder-employee has a legally enforceable agreement that his or her terms of employment are other than at-will. If an individual joins a venture as an investor and as well an employee, that individual needs to appreciate that the investor and employee statuses are distinct from one another and with respect to each negotiate and memorialize the protections they may seek from the default terms of the relationship. Failing to do so does and should result in the application of the default rules of law of both employment and business organization law.¹⁸

“There are no right answers to wrong questions.”¹⁹

The leading scholar in this field has recognized that, in particular instances, the *ex-post* assertion of “oppression” is not determinative of the existence of a problem requiring resolution.

Furthermore, minority shareholders not uncommonly consider themselves aggrieved when in fact they are being fairly treated. For example, the unhappiness of shareholders who believe they are being squeezed is sometimes attributable to the fact that they live at a distance from the place where the business is conducted, perhaps do not understand the business or its problems, and simply are not in a position to play leading roles in the conduct of the enterprise. Real squeeze plays sometimes cannot easily be distinguished from cases of imagined injustices grounded in frustration or unrealistic expectations. In the mind of an unhappy shareholder there is often no clearcut line between unpleasantness, dissention, or frustration on the one hand and oppression, injustice or squeeze-out on the other.²⁰

Notwithstanding the many criticisms leveled against it for its inherent agency problems,²¹ the question of its voice in the political process²² and its at-least-assumed focus on shareholder returns at the expense of other

stakeholders,²³ the corporation is an exceptionally successful vehicle for the organization of business ventures. For much of the last century it was the dominant form for intentional ventures with two or more members, and but for a relative few master limited partnerships has been *de facto* required for publicly held ventures. The corporate form, with state-to-state variations, defines the multitude of relationships that exist *inter-se* the corporation, allocating rights and obligations among the entity, the incorporator, the directors, the officers, the shareholders and creditors. While many rules of the corporate form are either not subject to modification,²⁴ subject only to limited modification²⁵ or subject to modification only in a particular manner,²⁶ in many ways the corporate form is amendable to customization to achieve a desired outcome.²⁷ To provide but one example, a minority shareholder, desiring to be guaranteed a seat on the board of directors, may request that she be issued shares of a class that is enabled to elect a director to the board,²⁸ thereby assuring for herself both access to information as to the venture’s fortunes and a voice in its management. But doing so is a manifestation of a desire that is agreed to by the other participants that is in turn memorialized in the manner required by law to be effectuated. Conversely, the lament that “I thought all shareholders are automatically directors and that is why I invested” does not deserve remedy.

“The uncreative mind can spot wrong answers, but it takes a very creative mind to spot wrong questions.”²⁹

As to objections that shareholders, upon joining a venture, should not be expected to negotiate for protections from generally applicable rules of majority control and at-will employment, such is little more than an *ex-post* excuse for not having negotiated part of the relationship.³⁰ Assume a prototypical corporation with two shareholders, one holding 51 percent of the stock and the other the balance of 49 percent. The minority has agreed to pay \$10,000 into the corporation’s capital in return for those shares and has as well agreed to be an employee of the corporation in a particular office at a particular salary. In many instances the minority shareholder will have agreed that the corporation should make an election (it requiring the unanimous consent of the shareholders)³¹ to be taxed under Subchapter S of the Internal Revenue Code. At this juncture, the actor has negotiated the amount of capital to be contributed to the venture,

the consideration to be received for that contribution, the fact of an employment relationship and the terms of compensation, and the tax status of the corporation. The minority may have negotiated additional protections such as cumulative voting for directors, mandatory dividends to cover phantom income and puts and calls under a buy-sell agreement to create a market for the otherwise illiquid shares. It is manifest that the minority participant is negotiating the terms of the relationship, and there is no basis for asserting he or she should not be expected to negotiate any and all terms by which he or she desires that the standard form agreement otherwise applicable (that being the corporate law and, as to the employment relationship, employment law) be modified.³² If an actor chooses, whether consciously or otherwise, to not negotiate particular terms as to the relationship, then “they’ve only themselves to blame”³³ when it comes to pass that the default rules of the relationship do not yield him or her protections that, *ex post* the structuring of the relationship, he or she wishes were in place.³⁴

Acknowledging, at least as to these matters, a contractarian mindset, the time has come (indeed it is long past) to consign to the dust bin of history the notion of the “incorporated partnership.”[®]

Initially, the corporate contract³⁵ and the employment relationship are separate and distinct from one another. The former is a mesh of overlapping agreements. For example, the corporation is in part comprised of the obligations of the shareholders to contribute capital³⁶ who in return receive stock having the rights and benefits set forth in the articles of incorporation.³⁷ The contract is multi-lateral; all rights of the shares of any particular class participate in the provisions governing that class, all shareholders participate in the terms applicable to all classes of stock and of necessity the corporation is a party.³⁸ In another part, the corporation is comprised of the rights and obligations undertaken by the persons elected to the board of directors, they being charged with its management and affairs³⁹ as they are subjected to fiduciary obligations,⁴⁰ those obligations perhaps being mitigated by provisions imposing enhanced standards for personal culpability.⁴¹ Another part is comprised of

the various procedural rules of the by-laws determining logistical limits and requirements for the meetings and other valid actions of the shareholders and the board.⁴² Other provisions protect the rights of third-party creditors, requiring that distributions not be paid to the shareholders until their claims have been satisfied.⁴³ These limitations bind the corporation for the benefit of the creditors, imposing personal liability upon the directors for their breach.⁴⁴ Notably, these contracts are not personal. The rights of a shareholder are conveyed with the transfer of shares.⁴⁵ Lilly, the owner of the shares on Monday, is on Monday entitled to the rights of a shareholder. When on Wednesday Lilly sells the shares to Laura, then from Wednesday Laura has the rights of a shareholder and Lilly no longer enjoys those rights. When Julia is on Wednesday elected a director, Julia becomes subject to all of the burdens of being a director even as she comes into enjoyment of the rights of a director. Hannah, a creditor in the amount of \$1,000, has the rights afforded a creditor only for so long as her claim is open and outstanding; once her claim is paid Hannah has no further claim against the corporation.

In contrast, the employment relationship is bilateral and unique. The agreement is between the corporation, it being the employer,⁴⁶ and the employee, who in this discussion is as well a shareholder thereof. None of the other shareholders, the directors, the officers or the corporation’s creditors are parties to that employment arrangement. It is unique in that the agreement is that the corporation will employ a particular person; there is no capacity in the employee to substitute the services of another for his or her own. Based upon these distinctions, the employment relationship of a shareholder versus his or her employer corporation needs to be assessed under the contractual principles of employment law rather than as an aspect of the law of corporations; the employee’s status as a shareholder is immaterial.⁴⁷

What People Think of as the Moment of Discovery is Really the Discovery of the Question⁴⁸

Much of this confusion between employment law and corporate law can be traced to *Donahue v. Rodd Electrottype*⁴⁹ and *Wilkes v. Springside Nursing Home, Inc.*⁵⁰ with their efforts to protect the hypothetical “reasonable expectations” of a shareholder who failed by contract to memorialize his rights. In so doing, the law of business organizations had foisted upon it the otherwise nonexistent chimera, the “incorporated partnership,”⁵¹ a curious structure in which the owners are apparently entitled to employment that is

terminable only for cause.⁵² Amazingly, this application of the supposed law of partnerships was done in direct opposition to the law of partnerships generally⁵³ and the rights of partners to expel a partner.⁵⁴

As to the suggestion that the rights and obligations of owners, whether they be partners or shareholders, should be the same (followed then by the suggestion that it is the rules of the partnership paradigm that should control), two titans in the field have observed:⁵⁵

Proponents of the partnership analogy assume that participants in closely held corporations are knowledgeable enough to incorporate to obtain the benefits of favorable tax treatment or limited liability but ignorant of all other differences between corporate and partnership law.

The message is clear—accept all of the consequences, both benefits and burdens, of the choice of entity decision that is made.

Acknowledging, at least as to these matters, a contractarian mindset, the time has come (indeed it is long past) to consign to the dust bin of history the notion of the “incorporated partnership.”⁵⁶ Without conceding they ever had any analytic legitimacy, their age is long past. Persons who organize their business as a partnership need to be governed by their private contract and thereafter by the law of partnerships. Persons who organize their business as an LLC need to be governed by their private contract and thereafter by the law of LLCs. Persons who organize their business as a corporation need to be governed by their private contract and thereafter by the law of corporations. In all three of those contexts the law of employment needs to be applied on its own terms.

ENDNOTES

¹ Bono, 11 O’Clock Tick Tock.

² Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEORGETOWN L. J. 1207, 1209 (2009). I do not mean to convey any criticism of Professor Means generally or of this work. The article from which this quote is drawn is devoted to creating a framework of analysis in those corporate laws that, at least from time to time, would impose fiduciary duties *inter-se* some or all shareholders. In another of his articles, he has addressed what is here proposed to be the initial question, namely whether there exist fiduciary duties among shareholders. See Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161 (2011). In my home jurisdiction of Kentucky, fiduciary duties do not exist *inter-se* the shareholders. See Thomas E. Rutledge, *Shareholders Are Not Fiduciaries—A Positive and Normative Analysis of Kentucky Law*, 51 LOUISVILLE L. REV. 535 (2012-13).

³ Means, *Voice-Based Framework*, *supra* note 2, at 1209. See also *Donohue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 513 (Mass. 1975) (“Although the corporate form provides the above-mentioned advantages for the stockholders (limited liability, perpetuity, and so forth), it also supplies an opportunity for the majority stockholders to oppress or disadvantage minority stockholders.”).

⁴ See also 1 THOMPSON O’NEAL AND THOMPSON’S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, §3.6 (Rev. 2nd ed. 2012).

⁵ See, e.g., *Firestone Textile Co. Div.*, 666 SW2d at 734 (worker’s compensation

claim); *Pari-Mutuel Clerk’s Union v. Kentucky Jockey Club*, 551 SW2d 801, 803 (Ky. 1977) (union organizing); *Frampton v. Central Ind. Gas Co.*, 297 NE2d 425 (Ind. 1973) (workers compensation claim); *McGarrety v. Berlin Metals, Inc.*, 774 NE2d 71 (Ind. App. 2002) (employee’s refusal to file fraudulent tax return).

⁶ Restatement (Third) of Employment Law §2.01, comment a (Tentative Draft No. 2 (revised) (Sept. 30, 2009)).

⁷ See *Grzyb v. Evans*, 700 SW2d 399, 400 (Ky. 1985) (quoting *Firestone Textile Co. Div. v. Meadows*, 666 SW2d 730, 731 (Ky. 1983)). *Accord Alvarez v. Royal Atlantic Developers, Inc.*, CA-11, 610 F3d 1253, 1266 (2010), quoting *Nix v. WLCY Radio/Rahall Communications*, CA-11, 738 F2d 1181, 1187 (1984) (“[An] employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.”); *Herbert v. Architect of the Capitol*, DC-D.C., 776 FSupp2d 59, 81 (2011) (“An employer may make an employment decision for good reason, a bad reason, or no reason at all so long as ... [discriminatory or retaliatory motivations] do not influence the decision,” quoting *Santa Cruz v. Snow*, DC-D.C., 402 FSupp2d 113, 125 (2005)); *Safeshred, Inc. v. Martinez*, 365 SW3d 655, 660 (Tex. 2012) (“[W]e have long held firm to the principle that, in Texas, an at-will employee may be fired for a good reason, a bad reason, or no reason at all.”).

⁸ See generally Teresa A. Cheek, *The Employment-At-Will Doctrine in Delaware: A Survey*, 6 DEL. L. REV. 311 (2003). The Delaware courts have found that the shareholder relationship does not set aside the applicable rule of employment-at-will. See, e.g., *Ueltzhoffer v. Fox Fire Dev. Co.*, 1991 Del.Ch. LEXIS 204 (Del. Ch. Dec. 19, 1991) (finding no breach of duty where majority shareholders terminated the employment of the minority shareholder). In *Olsen v. Seifert*, 1998 Mass. Super. LEXIS 592 at *15 (Mass. Super. Aug. 28, 1998), applying Delaware law—and specifically *Riblet Prods. Corp. v. Nagy*, 683 A2d 37 (Del. 1996)—it was held that the plaintiff’s employment “contract rights were not enhanced or enlarged because of his status as a shareholder.”

⁹ See *Grzyb v. Evans*, 700 SW2d 399, 400 (Ky. 1985) (quoting *Firestone Textile Co. Div. v. Meadows*, 666 SW2d 730, 731 (Ky. 1983)).

¹⁰ The degree of formality required for an express modification and the degree of the modification are matters beyond the scope of this discussion.

¹¹ For example, the agreement could provide that the term of employment will end upon the shareholder ceasing to be a shareholder by reason of a voluntary or involuntary sale or disposition of the shares.

¹² See, e.g., Ky. Rev. Stat. Ann. §271B.3-020(1)(k); Ky. Rev. Stat. Ann. §271B.8-010(2); Del. Code Ann. tit. 8, §122(5); Ind. Code §23-1-22-2(11); Ind. Code §23-1-33-1(b).

¹³ See *Haldeman v. Haldeman*, 197 SW376, 381 (Ky. 1917) (“An individual director has no authority as such; he can only act as agent by appointment, like other agents are appointed. Moreover, directors must act together as a board; the separate assent of a majority is not binding on the corporation.”); 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §30 (a shareholder qua shareholder is not an agent of the corporation); HOWARD HILTON SPELLMAN, A TREATISE ON THE LAW GOVERNING CORPORATE DIRECTORS 7 (1931).

¹⁴ See, e.g., Ky. Rev. Stat. Ann. §271B.8-440(1); Ind. Code §23-1-36-4(a).

¹⁵ See, e.g., Ky. Rev. Stat. Ann. §271B.8-430(2); Ind. Code §23-1-36-3(c).

¹⁶ See, e.g., Ky. Rev. Stat. Ann. §271B.8-040; Ky. Rev. Stat. Ann. §271B.8-080(2); Ind. Code §23-1-33-8(a).

¹⁷ See, e.g., Ky. Rev. Stat. Ann. §271B.8-030(4); Ky. Rev. Stat. Ann. §271B.8-080(1); Ind. Code §23-1-33-8(a).

¹⁸ It is the failure to appreciate this distinction that has led to so much confusion and quite frankly ill-conceived law. For example, in *Wilkes v. Springside Nursing Home, Inc.*, 353 NE2d 657, 662 (Mass. 1976), the court observed that “a guaranty of employment with the corporation may have been one of the ‘basic reason[s] why a minority owner has invested capital in the firm.’” (citations omitted). What the court failed to, but should have recognized, is that the investment of equity capital and “guaranteed” employment are distinct relationships, and that equity investment does not compel or in any manner necessitate employment.

¹⁹ Ursula K. Le Guin.

²⁰ 1 ROBERT B. THOMPSON, O’NEAL AND THOMPSON’S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS §1.1 (2004) (citation omitted).

- ²¹ See, e.g., Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L. J. 235, 237 (1981-82) ("The use of that wealth and power by corporate management to move government toward goals that management favors—with little or no consultation with investors—is also a phenomenon that is generally undeniable."); REINIER KRAAKMAN, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 35 (2nd ed. 2009) ("... an 'agency problem'—in the most general sense of the term—arises whenever the welfare of one party, termed the 'principal', depends upon actions taken by another party, termed the 'agent'. The problem lies in motivating the agent to act in the principal's interest rather than simply in the agent's own interest. Viewed in these broad terms, agency problems arise in a broad range of contexts that go well beyond those that would formally be classified as agency relationship by lawyers.").
- ²² *Citizens United v. Fed. Elec. Comm'n*, S.Ct., 558 US 310, 343 (2010) ("The Court has ... rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'") (citation omitted).
- ²³ See, e.g., David G. Yosifon, *The Law of Corporate Purpose*, 10 BERK. B. L.J. 181 (2013).
- ²⁴ See, e.g., MBCA §7.02(d) (not allowing either the articles or bylaws to permit a special meeting of the shareholders to consider matters not set forth on the meeting notice); MBCA §8.03(a) (directors must be individuals, i.e., natural persons); Del. Code Ann. tit. 8, §141(b) (each director shall be a natural person).
- ²⁵ See, e.g., MBCA §7.02(a)(2) (articles of incorporation may not set the required threshold of the shareholders to call a special meeting of the shareholders higher than 25 percent thereof).
- ²⁶ See, e.g., MBCA §7.02(a)(2) (articles of incorporation (but not the bylaws) may raise threshold for shareholders to call special meeting from 10 percent to 25 percent); Ky. Rev. Stat. Ann. §271B.7-380(1), (2) (articles of incorporation (but not the bylaws) may provide for cumulative voting for directors).
- ²⁷ Section 7.32 of the MBCA permits greater private ordering of internal "logistical" rules in the corporation than are otherwise permissible.
- ²⁸ See, e.g., Ind. Code §23-1-33-8(b).
- ²⁹ Antony Jay.
- ³⁰ Professor O'Neal, in F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reforms*, 33 BUS. LAW. 873, 883 (1978), wrote:
A person taking a minority position in a close corporation often leaves himself vulnerable to "squeeze-out" or by oppression by failing to insist upon shareholders' agreement or appropriate charter or by-law provisions, even if the corporation is domiciled in a jurisdiction with laws favorable to such protective arrangements. He may be unaware of the risks involved or a bargaining position may be so weak that he is unable to negotiate for protection. Further, he may be given or may have inherited his minority interest Steps should be taken to prevent the oppression of minority shareholders who lacked either the foresight or bargaining power to provide for adequate protection of themselves.
With due respect to Professor O'Neal, his assessments of both the problem and the solution are erroneous. First, it is not the role of the legal system to re-write agreements for persons who fail for themselves to negotiate protections. See also *infra* note 34. The notion that the contract should be modified to afford protections to one who, at the time of its inception, lacked the bargaining power to negotiate for that exact same protection effects little more than an elimination of the majority's right to control the venture within the confines of those agreements that are negotiated and, on balance, the rules governing the business venture in question. The majority will be able to act only with minority consent or risk litigation in which the court may (Professor O'Neal suggests "should") determine that the minority is indeed protected from the consequences of the action taken. Second, if the law is to now *ex post* protect those who lacked the foresight to protect themselves *ex ante*, then it is now most efficient to undertake no efforts at self-protection, leaving it to the courts to do that task *ex post* joining the venture and the breakdown in the relationship among the owners.
- ³¹ Code Sec. 1362(a)(2).
- ³² There is nothing here unique to the relationship of a minority shareholder to a corporation or the relationship of an employee/shareholder to the employer. In family law there are defined rules for the distribution of property that may be modified with a prenuptial agreement. The law of estates dictates how assets will be distributed upon death; a different result may be brought about by a will. Purchasers and sellers of goods are bound by the terms of the Uniform Commercial Code except and to the degree that they otherwise agree.
- ³³ GILBERT O'SULLIVAN, *THEY'VE ONLY THEMSELVES TO BLAME* (Decca Record Co. Ltd. 1973).
- ³⁴ See, e.g., *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 SW3d 657, 661 (Ky. App. 2007) ("Persons must be free to contract; and it is for the law to enforce the agreement they have made, not to make it or to correct it for them.") (quoting *Ligon v. Parr*, 471 SW2d 1, 5 (Ky. 1971)); *SAMS Hotel Group, LLC v. Environs, Inc.*, CA-7, 716 F3d 432, 438 (2013) ("The general rule of freedom of contract includes the freedom to make a bad bargain.").
- ³⁵ See, e.g., *Stevenot v. Norberg*, CA-9, 210 F.2d 615, 618 (1954) ("Passing now to consideration of the merits, the relation of appellees as stockholders to the Debtor Corporation was one of contract. The contract embodied the Corporate Charter, the Articles of Incorporation, the By-laws, and the pertinent statutes of the state of incorporation.").
- ³⁶ See, e.g., Ind. Code §23-1-26-2; Ky. Rev. Stat. Ann. §§271B.6-210(2), (3); Ky. Rev. Stat. Ann. §271B.6-220(1).
- ³⁷ See, e.g., Ind. Code §23-1-25-1; Ky. Rev. Stat. Ann. §§271B.6-010(1), (3); Ky. Rev. Stat. Ann. §271B.6-020.
- ³⁸ See, e.g., Ind. Code §23-1-25-1; Ky. Rev. Stat. Ann. §§271B.6-010(1), (3); Ky. Rev. Stat. Ann. §271B.6-020.
- ³⁹ See, e.g., Ind. Code §23-1-33-1(b); Ky. Rev. Stat. Ann. §271B.8-010(2).
- ⁴⁰ See, e.g., Ind. Code §23-1-35-1; Ky. Rev. Stat. Ann. §271B.8-300(1).
- ⁴¹ See, e.g., Del. Code Ann. tit. 8, §102(b)(7); Ky. Rev. Stat. Ann. §271B.2-020(2)(d).
- ⁴² See, e.g., Ind. Code §23-1-29-5; Ind. Code §23-1-34-3; Ky. Rev. Stat. Ann. §271B.2-060(2).
- ⁴³ See, e.g., Ind. Code §23-1-28-3; Ky. Rev. Stat. Ann. §271B.6-400(3); Ky. Rev. Stat. Ann. §§271B.14-050(1)(c), (d).
- ⁴⁴ See, e.g., Ind. Code §23-1-35-4; Ky. Rev. Stat. Ann. §271B.8-330.
- ⁴⁵ See, e.g., 12 WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* §5452 (2012) ("The owner of the shares, as in the case of other personal property, has an absolute and inherent right, as an incident of his or her ownership, to sell or transfer the shares at will, except insofar as the right may be restricted by the articles of incorporation, bylaws, an agreement among shareholders, or between shareholders and the corporation. In the absence of such restrictions, a transfer of shares does not require the consent of the corporation and cannot be prohibited.") (citations omitted); CHARLES B. ELLIOTT, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* §427 (3d ed. 1900) ("A transferee of shares acquires the rights of the transferor [sic] . . .").
- ⁴⁶ See Ky. Rev. Stat. Ann. §271B.3-020(1)(k).
- ⁴⁷ See, e.g., *Ingle v. Glamore Motor Sales, Inc.*, 535 NE2d 1311, 1313 (N.Y. 1989) ("It is necessary in this case to appreciate and keep distinct the duty a corporation owes to a minority shareholder as a *shareholder* from any duty it might owe him as an employee.") (emphasis in original).
- ⁴⁸ Jonas Salk.
- ⁴⁹ *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 NE2d 505 (Mass. 1975). In this decision, the court held that there existed a "fundamental resemblance" between a close corporation and a partnership, the degree of trust and confidence then was identified as "essential to this scale and manner of enterprise," and because of the "inherent danger to minority interests" in the close corporation, "stockholders in the closed corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another." *Id.* at 515. Applying that rule in the context of a purchase of shares from a member of the control group, the corporation was obligated as well to offer the redemption opportunity at an equal price to each other shareholders. "Unless an equal opportunity is given to all stockholders, the purchase of shares from a member of the controlling group operates as a 'preferential' distribution of assets." *Id.* at 518-19. In contrast, in *Blaustein v. Lord Baltimore Capital*, 84 A3d 954 (Del. Jan. 21, 2014), the Delaware Supreme Court upheld a

decision of the Delaware Chancery Court to the effect that the corporation was not obligated to repurchase the shares of a minority shareholder. While there was an agreement that the parties would enter into negotiations with respect to a potential repurchase, the ultimate agreement was dependent upon reaching agreement as to "terms and conditions agreeable to the company and the shareholder who owns the shares to be repurchased." 84 A3d 954, 956. In this instance no agreement could be reached, and the shareholder could not on the basis of an alleged fiduciary duty insist that a purchase be effected.

⁵⁰ *Wilkes v. Springside Nursing Home, Inc.*, 353 NE2d 657 (Mass. 1976).

⁵¹ See also THOMPSON, *supra* note 4, at §2.10.

⁵² See, e.g., *Wilkes v. Springside*, 353 NE2d at 664:

⁵³ See UPA §6(2), 6 (pt. I) U.L.A. 393 (2001); RUPA §202(b), 6 (pt. I) U.L.A. 92 (2001).

⁵⁴ See UPA §31(1)(d), 6 (pt. II) U.L.A. 370 (2001).

⁵⁵ Frank Easterbrook and Daniel Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 297 (1986).

⁵⁶ See also Larry E. Ribstein, *Close Corporation Remedies and the Evolution of the Closely-Held Firm*, Illinois Public Law and Legal Theory Research Paper 10-21 ("The (*Wilkes v. Springside Nursing Home, Inc.*) court had to decide between leaving the parties to stew in their imperfect planning or rescuing them by re-writing their agreement. The court did the latter, creating confusion for business people but delight for generations of law professors.").

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