Reasonable Expectations of Shareholder-Employees in Closely Held Corporations: Towards a Standard of When Termination of Employment Constitutes Shareholder Oppression

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Samuel E. Neschis*

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I. INTRODUCTION

The Small Business Administration reports that small businesses represent ninety-nine percent of all United States employers and employ approximately one half of the nation's private workforce.1 Sixty-six percent of those businesses that have employees are corporations.2 Of those corporations, the vast majority are closely held corporations.3

The typical attributes of closely held or close corporations, the terms are often used interchangeably, are that the shareholders are few in number, often only two or three; the shareholders usually live in the same geographical area and are well acquainted with each other; all or most of the shareholders are active in the business, usually serving as directors, officers and employees; and there is no established market for the corporate stock.4 Most closely held corporations are formed by family members or friends who pool their resources and devote their time and energy towards building the business.5 Generally providing employment for themselves is the shareholders' primary purpose for forming the corporation.6 However, in part because of the personal relationships that often exist, dissension among shareholders is common.

The nature of closely held corporations is not conducive to resolving problems when dissension among shareholders develops. Corporations operate on the principle of majority rule.7 Therefore, if two opposing shareholders or two opposing groups of shareholders each own an equal amount of shares they can become deadlocked preventing the business from moving forward. When one shareholder or group of aligned shareholders owns the majority of shares and is, therefore, able to control the corporation, they are able to use this

3. See Venky Nagar, Kathy Petroni, & Daniel Wolfenzon, Governance Problems in Close Corporations 1 (NYU Pollack Center for Law & Business Working Paper, 2008) (analyzing the number of corporation that file tax returns that are listed on major stock indexes and finding that the vast majority of all U.S. corporations are closely held corporations), available at http://pages.stern.nyu.edu/~dwolfenz/CC.pdf.
4. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS & LLC'S: LAW & PRACTICE § 1.02 (Rev. 3d ed. 2013).
5. Id.
6. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 3:6 (Rev. 2d ed. 2013).
7. See id.
control to operate the corporation for their advantage at the expense of the minority shareholders. The minority shareholders’ problems are exacerbated by the fact that there is by definition no public market and there is rarely a private market for non-controlling interests in closely held corporations leaving them with no means of exit if they are being treated unfairly.\(^8\)

When dissension between majority and minority shareholders develops, it is common for majority shareholders to use their control of the corporation to freeze the minority shareholders out of the corporation.\(^9\) The goal of the freeze out is to force minority shareholders to sell their shares for a minimal price or to remain shareholders but not receive any benefit from the ownership of shares. A common freeze out technique is termination of minority shareholders’ employment. Termination of employment is a very effective freeze out technique because it generally results in the terminated minority shareholder ceasing to receive any benefit from his or her ownership of shares as profits in closely held corporations are generally distributed through salaries rather than dividends.\(^10\)

The potential for abuse of minority shareholders has long been recognized by courts and state legislatures. Over the past forty years, a substantial body of law has developed to protect minority shareholders from oppression by majority shareholders. Thirty-nine states and the District of Columbia have enacted statutes designed to protect minority shareholders in closely held corporations.\(^11\) Those statutes provide courts with a variety of remedies to protect shareholders from oppressive conduct by majority shareholders. However, the legislatures that have enacted those statutes have generally not defined the term “oppression,” leaving it to the courts to do so.\(^12\) Additionally, courts in several states that do not have shareholder oppression statutes have provided protection to minority shareholders through common law breach of fiduciary duty actions.\(^13\) Those courts have also had to delineate what type of conduct on the part of majority share-

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8. See id.
9. Id.
10. Id.
holders is sufficiently oppressive to constitute a breach of fiduciary duty.  

The most important development in this area in recent years is the acceptance by courts in a majority of states of the principle that the goal of shareholder oppression law is the protection of the reasonable expectations that minority shareholders hold when they participate in the formation of or join the corporation.  

This principle requires courts analyzing claims of shareholder oppression arising out of termination of employment to determine whether the shareholder has a reasonable expectation of continued employment and whether the majority shareholders violated that expectation by terminating the shareholder’s employment.  

This Article reviews and analyzes the attempts by courts throughout the United States to articulate the circumstances under which shareholders of closely held corporations have a reasonable expectation of continued employment and when the majority’s violation of that expectation through termination of employment entitles the terminated shareholder to relief. Part II of this Article provides an overview of judicial approaches to defining shareholder oppression. In Part III, this Article discusses the background of the reasonable expectations approach. Part IV provides an analysis of decisions from courts throughout the country that have applied the reasonable expectations approach in shareholder oppression cases arising out of termination of employment. This section also discusses the intersection of the shareholder oppression and employment at will doctrines and the factors that courts examine in determining whether a terminated shareholder had a reasonable expectation of continued employment. Part V, examines the remedies available to terminated shareholders in shareholder oppression cases.  

II. OVERVIEW OF JUDICIAL APPROACHES TO DEFINING SHAREHOLDER OPPRESSION  

Courts have developed two often overlapping approaches in defining oppression. The first approach, derived from British law, is the traditional test, sometimes referred to as the “fair dealing” test. The traditional test defines oppression as:

14. See, e.g., Brodie, 857 N.E.2d at 1079; Crosby, 548 N.E.2d at 221.  
15. See, e.g., Brodie, 857 N.E.2d at 1079.  
16. See id.  
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[B]urdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.\textsuperscript{18}

The conduct required of majority shareholders under this approach is closely related to the fiduciary duty of good faith and fair dealing that controlling shareholders owe to minority shareholders.\textsuperscript{19} Thus, courts analyzing claims of breach of fiduciary duty brought by minority shareholders often apply the same standard as courts analyzing claims of oppression under the traditional test.\textsuperscript{20}

The second approach to defining statutory oppression is the more recently developed "reasonable expectations" test. That approach defines oppression as "a violation by the majority of the 'reasonable expectations' of the minority."\textsuperscript{21} Oppression is found when the conduct of the majority shareholders "substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [minority shareholder's] decision to join the [corporation]."\textsuperscript{22} The reasonable expectations approach has also been applied in common law breach of fiduciary duty actions by courts in states like Massachusetts that do not have shareholder oppression statutes.\textsuperscript{23}

The traditional and reasonable expectations approaches are not mutually exclusive and will often lead to the same result. "[B]urdensome, harsh and wrongful conduct" by majority shareholders will usually violate the reasonable expectations of minority shareholders.\textsuperscript{24} However, application of the two approaches will not always result in the same outcome. Divergent outcomes may result from the fact that courts applying the traditional approach focus on the conduct of the majority, whereas courts applying the reasonable expectations approach focus on the effect of the challenged conduct on the minority.\textsuperscript{25} In evaluating whether the majority's conduct was proper under the traditional approach, courts generally analyze whether or not the

\textsuperscript{19} Id. at 394.
\textsuperscript{20} Manister v. WEBCO Co., 262 S.E.2d 433, 440 (W. Va. 1980).
\textsuperscript{21} Gimpel, 477 N.Y.S.2d at 1018.
\textsuperscript{22} In re Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984).
\textsuperscript{25} Moll, Perspective, supra note 24, at 762-63.
conduct was justified by a legitimate business purpose. However, conduct that may be justified by a legitimate business purpose may still frustrate the reasonable expectations of a minority shareholder. For instance, a shareholder may have a reasonable expectation of continued employment by the corporation. However, the majority shareholders may have a legitimate business reason for terminating that shareholder's employment. Whether or not that shareholder is entitled to relief may hinge on whether the court employs the traditional or reasonable expectations approach.

In recent years, a growing number of courts have adopted the reasonable expectations approach. The Iowa Supreme Court recently observed that the reasonable expectations test may now be the most widely followed approach. The increasing willingness of courts to look to the reasonable expectations of minority shareholders in deciding claims of oppression has been described by a leading commentator as one of the most significant trends in the law of close corporations in recent years.

However, while many courts now define oppression as a violation of a minority shareholder's reasonable expectations, they still face the task of establishing what shareholder expectations are reasonable.

III. BACKGROUND OF THE REASONABLE EXPECTATIONS APPROACH

The reasonable expectations approach grew out of the recognition that closely held corporations differ from other types of corporations in certain fundamental ways. First, shareholders of closely held corporations usually "expect to be actively involved in the management and operation of the [corporation]." Second, majority shareholders may use their ability to control the corporation "to undermine the expectations of [the] . . . minority." And third, there is by definition no public market for shares in closely held corporations and there is rarely a private market for minority interests. Therefore, minority shareholders usually have no means of exiting the corporation.

29. Id.
30. Id.
31. Id.
32. Id.
In 1980, in *Topper v. Park Sheraton Pharmacy, Inc.*, a New York trial court became one of the first courts to employ the reasonable expectation standard.33 *Topper* involved a claim by a minority shareholder that the majority shareholders committed oppression by terminating his employment entitling him to relief under the New York Business Corporation Law.34 Topper, a pharmacist, left his job of twenty-five years and moved from Florida to New York to form, with two other shareholders, a corporation that operated pharmacies within hotels.35 He invested his life savings in the venture and personally guaranteed all of the corporation’s debts.36 Approximately one year later, the two other shareholders, who together held a majority of the shares, terminated Topper’s employment.37 The court applied the reasonable expectations test noting both the special characteristics of closely held corporations as well as the similarity between closely held corporations and partnerships.38 Applying that standard, the court held that the majority shareholders’ termination of Topper violated his reasonable expectation of continued employment and constituted oppression within the meaning of the statute.39 The court refused to consider the majority shareholders’ asserted legitimate purpose in terminating Topper holding that their reason for terminating him was irrelevant.40

Four years later, in the landmark case of *In re Kemp & Beatley*, the New York Court of Appeals, citing *Topper*, endorsed the reasonable expectations standard for defining oppression.41 In determining that the reasonable expectations approach is the appropriate standard for defining oppression, the court looked to the special nature of closely held corporations including the typical expectations of shareholders that they will be involved in the management of the corporation and will receive the benefits of ownership through employment.42

The reasonable expectations approach has now been adopted by courts throughout the country. However, even among courts that have accepted the reasonable expectations approach, there is not universal agreement as to which types of shareholders are entitled to pro-

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34. Id.
35. Id. at 361-62.
36. Id. at 362.
37. Id.
39. Id. at 362.
40. Id.
42. Id.
tection under the reasonable expectations standard. Some courts hold that the reasonable expectations analysis is only appropriate for claims brought by shareholders who are founders of the corporation.\textsuperscript{43} The rationale for that position is that the relationship between the founding shareholders of a corporation is similar to that of partners.\textsuperscript{44} Like partners, the founding shareholders enter "into spoken and unspoken" agreements that are personal in nature.\textsuperscript{45} The reasonable expectations approach seeks to enforce those agreements.\textsuperscript{46} However, shareholders who were not among the original shareholders of the corporation were not parties to the agreement and do not have the right to enforce it.\textsuperscript{47} In articulating that position, the court in \textit{Gimpel v. Bolstein} stated that the agreement between the founding shareholders "will not run with the shares."\textsuperscript{48}

Applying that rationale, some courts hold that the reasonable expectations approach is not appropriate to claims brought by shareholders who receive their shares through gift or inheritance.\textsuperscript{49} Other courts hold that, while the reasonable expectations approach may be applied to claims brought by shareholders who received their shares by gift or inheritance, those types of shareholders are entitled to lower expectations than founder shareholders.\textsuperscript{50}

Similarly, some courts decline to apply the reasonable expectations approach to claims brought by non-founder shareholders who receive their shares as part of an employment compensation package or are allowed to purchase shares as a benefit of employment.\textsuperscript{51} Likewise, other courts hold that shareholders who receive their shares through an employment compensation package have lower expectations than founder shareholders.\textsuperscript{52}

Restricting or limiting the reasonable expectations approach to founder shareholders is by no means universal. For instance, the North Carolina Supreme Court has held that shareholders who receive their shares through gift or inheritance are entitled to have their reasonable expectations protected, in part, because they did not have

\textsuperscript{44} \textit{Gimpel}, 477 N.Y.S.2d at 1019.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id. (quotations omitted).
\textsuperscript{49} \textit{Gimpel}, 477 N.Y.S.2d at 1019.
\textsuperscript{50} See, e.g., Mueller v. Cedar Shore Resort, Inc., 643 N.W.2d 56, 64 (S.D. 2002).
\textsuperscript{52} See, e.g., Berreman v. W. Publ'g Co., 615 N.W.2d 362, 375 (Minn. Ct. App. 2000).
the opportunity to negotiate for any sort of protection of their expectations.\textsuperscript{53} Many courts apply the reasonable expectations test to claims brought by non-founder shareholders, including shareholders who receive their shares through inheritance or as a benefit of employment, without specifically addressing the issue of whether the approach is available to claims brought by these types of shareholders.\textsuperscript{54}

IV. Application of the Reasonable Expectations Approach in Claims Arising out of Termination of Employment

Shareholders of closely held corporations have both general and specific expectations.\textsuperscript{55} General expectations are shared by all shareholders and arise simply from the ownership of shares.\textsuperscript{56} Examples of general expectations are the right to a proportionate share of the profits of the corporation, the right to any appreciation of the shares, the right to vote the shares if the shares have voting rights, and the right to inspect the books and records for a proper purpose.\textsuperscript{57} All shareholders are presumed to have general expectations.\textsuperscript{58}

Specific expectations, on the other hand, require 1) evidence of facts giving rise to the expectations among the shareholders of the corporation, 2) a showing that the expectations were reasonable under the circumstances, and 3) proof that the expectations were central to the minority shareholder's decision to become a shareholder.\textsuperscript{59} Examples of specific expectations that may be reasonable in particular circumstances are employment by the corporation and a role in management.\textsuperscript{60}

Not surprisingly, the majority of shareholder disputes that end up in litigation involve alleged violations of specific expectations. Violation of a shareholder's expectation of continued employment through termination is a commonly litigated claim.

Oppression of minority shareholders often involves an escalating course of conduct. Termination of employment is often the straw that breaks the camel's back and causes the minority shareholder to seek

\textsuperscript{53} Meiselman v. Meiselman, 307 S.E.2d 551, 558-59 (N.C. 1983).
\textsuperscript{56} Id. at 765-66.
\textsuperscript{57} Id. at 766 & 766 n.157.
\textsuperscript{58} Id. at 765.
\textsuperscript{59} Id. at 767.
\textsuperscript{60} O'Neal & Thompson, \textit{supra} note 6, at § 3:6.
counsel and file a shareholder oppression claim. This is because, for most shareholders of closely held corporations, providing employment for themselves is their primary motivation for participating in the formation of or joining the corporation and the salary derived from that employment is typically the minority shareholders' primary source of income. Therefore, termination of a minority shareholder's employment is a common and effective freeze out technique. Termination of a minority shareholder's employment often results in the minority shareholder ceasing to receive any financial benefit from the corporation as earnings in closely held corporations are generally distributed through salaries and bonuses rather than through dividends.

Therefore, it is not surprising that many claims of minority shareholder oppression arise out of the termination of a shareholder's employment. Terminated shareholders argue that they have a reasonable expectation of continued employment by the corporation that was violated by the majority's action in terminating them. However, as an expectation of employment is not a general expectation held by all shareholders of corporations, terminated shareholders must establish that their expectation of continued employment was reasonable in the context of the corporation at issue. In deciding whether a shareholder's expectation of employment was reasonable, courts often first evaluate whether the employment at-will doctrine is applicable to the shareholder's claim.

A. The Employment At-Will Doctrine in Shareholder Oppression Cases

The employment at-will doctrine provides that the employment relationship, absent a contract to the contrary, is "'at-will' meaning that either the employer or the employee can terminate the relationship at any time for any reason, even for no reason, without legal liability attaching." Although several statutory and common law exceptions to the employment at-will doctrine have developed, it "remains the presumptive employment relationship."
Ingle v. Glamore Motor Sales, Inc. demonstrates how application of the employment at-will doctrine to a claim brought by a terminated minority shareholder can leave the shareholder without a remedy. Ingle began working for a Ford dealership and subsequently purchased shares, at one point owning forty percent of the outstanding shares. He was actively involved in the management of the company serving as a director and first vice-president, personally guaranteed the corporate debt and advanced his own funds to the company when it was in need of working capital. He never had an employment agreement. After seventeen years, the majority shareholder terminated Ingle's employment, removed him as an officer and director and replaced him with the majority shareholder's sons. The majority shareholder then forced Ingle to sell his shares pursuant to a mandatory repurchase provision in the shareholder agreement. The New York Court of Appeals held that, as Ingle did not have an employment contract, his termination was proper under the employment at-will doctrine and his status as a shareholder did not exempt him from the effect of that rule.

In a strongly worded dissent, Judge Hancock, with Judge Kaye concurring, argued that the case should have been analyzed under the shareholder oppression doctrine rather than the employment at-will doctrine and that the central issue should have been whether Ingle's reasonable expectation of continued employment had been violated. Like the dissenting judges in Ingle, some courts have held that the employment at-will doctrine is not applicable to shareholder-employees. Other courts accept the continued validity of the employment at-will doctrine generally for shareholder-employees, but hold that the doctrine is not applicable when employment is intertwined with the shareholder's investment in the corporation. Numerous courts have simply ignored the employment at-will doctrine in reviewing claims brought by terminated shareholder-employees. Thus, many

67. Id. at 1315.
68. Id. at 1315.
69. Id.
70. Id. at 1312.
71. Ingle, 535 N.E.2d at 1312.
72. Id. at 1313, 1321.
73. Id. at 1317-18 (Hancock, J., dissenting).
76. See Moll, Investment Model, supra note 65, at 520.
courts now recognize an exception to the employment at-will doctrine for minority shareholder-employees of closely held corporations at least where employment is intertwined with the shareholder’s investment in the corporation.

However, even if a court does not apply the employment at-will doctrine, the shareholder must still establish that his or her expectation of continued employment was reasonable under the circumstances. There are certain factors that courts look to in evaluating the reasonableness of an expectation of continued employment.

B. Factors Analyzed by Courts in Evaluating the Reasonableness of an Expectation of Continued Employment

1. The Interconnectedness of Employment and the Shareholder’s Investment

In evaluating reasonableness of a shareholder’s expectation of continued employment, courts often look to the interconnectedness of the shareholder’s employment and his or her investment. Employment is considered part of the shareholder’s investment where the shareholder anticipates receiving a return on his or her investment primarily through salary and employee benefits rather than through dividends and where securing employment was the reason that the shareholder originally invested in the corporation. The factors that courts consider include: whether the shareholder made a capital investment in the company; whether the shareholder’s salary could be considered a de facto dividend; and whether continued employment was a significant reason that the shareholder made the investment.

For instance, in *McLaughlin v. Schneck*, the Utah Supreme Court held that McLaughlin, an executive who joined the company approximately ten years after it was formed and whose employment “allowed him to purchase stock . . . but [did not require him] to do so,” did not have a reasonable expectation of continued employment. The court found McLaughlin’s ownership of stock was separate from his employment. McLaughlin received a salary that was based solely on the value of his work and his investment was “separately rewarded

77. See, e.g., McLaughlin v. Schneck, 220 P.3d 146, 158 (Utah 2009); *Kortum*, 755 N.W.2d at 446; *Gunderson*, 628 N.W.2d at 191; Moll, *Investment Model*, supra note 65, at 521.
80. 220 P.3d 146, 158 (Utah 2009).
81. Id.
through the payment of dividends.”82 Significantly, he continued to receive dividends after his employment was terminated.83

In contrast, in *Balvik v. Sylvester*, the North Dakota Supreme Court held that Balvik, a minority shareholder who was a founder of the corporation having invested capital to start the corporation, had a reasonable expectation of continued employment where his salary constituted the only benefit that he received from the corporation as no dividends were paid and none were likely to be paid in the future.84

Investment does not necessarily require the tender of capital to the corporation. Some courts have viewed a shareholder's service to the corporation as an investment entitling the shareholder to a reasonable expectation of continued employment.85

2. The Existence of Employment and Shareholder Agreements

Another factor courts look to in assessing the reasonableness of a shareholder's expectation of continued employment is the existence of any agreement. The two types of agreements that often exist that are relevant to this inquiry are employment agreements and buy-sell agreements that provide for the repurchase of shares upon the occurrence of certain events.86 Some courts have held that shareholders who entered into employment or buy-sell agreements that contemplate involuntary termination do not have a reasonable expectation of continued employment.

For instance, in *Blank v. Chelmsford OB/GYN, P.C.*, the Massachusetts Supreme Judicial Court affirmed the dismissal of a minority shareholder's breach of fiduciary duty claim based on termination of employment where the shareholder-employee executed employment and buy-sell agreements providing, respectively, that he could be terminated without cause upon six months' notice and that his shares were to be repurchased upon termination of his employment for any reason whatsoever.87

Similarly, in *Ingle*, the New York Court of Appeals affirmed the dismissal of Ingle's shareholder oppression claim arising out of the termination of his employment where he had entered into a buy-sell agreement providing that his shares must be repurchased if he ceased

82. Id.
83. Id.
86. “Buy-sell” agreements are often contained within shareholder agreements that address various aspects of the shareholders' relationship.
to be an employee for any reason.88 Because of that agreement, the majority refused to consider Ingle’s argument that his status as a minority shareholder protected him from arbitrary termination.89 In a dissenting opinion, Judge Hancock, Jr. and Judge Kaye disagreed with the majority that, by entering into an agreement in which his shares would be repurchased if he ceased to be an employee, Ingle agreed that he could be terminated for any reason.90 For the dissenting judges, there were triable issues of fact as to Ingle's understanding of the language of the agreement and whether he had a reasonable expectation of continued employment.91

The North Dakota and Minnesota corporation acts explicitly provide that written agreements are presumed to reflect the parties' expectations concerning matters dealt with in the agreements.92 However, shareholders in those states are afforded an opportunity to rebut the statutory presumption and courts in those states treat the issue of whether a shareholder who executed a shareholder agreement providing for repurchase of shares upon involuntary termination has a reasonable expectation of continued employment as an issue of fact.93

For instance, in Kortum v. Johnson, the trial court had dismissed as a matter of law an oppression claim brought by a terminated minority shareholder because she executed a buy-sell agreement providing for the mandatory repurchase of her shares if she was involuntarily terminated for any reason.94 The North Dakota Supreme Court reversed and remanded for a determination as to whether the agreement reflected the parties' reasonable expectations at the venture's inception.95 On remand, the trial court made a factual finding that the buy-sell agreement reflected the parties' expectations and that, therefore, the shareholder did not have a reasonable expectation of continued employment.96 That decision was affirmed by the North Dakota Supreme Court.97

A finding that a shareholder who signs an employment agreement providing for termination without cause does not have a reasonable

89. Id. at 1313.
90. Id. at 1317 (Hancock, Jr., J. dissenting).
91. Id.
95. Id. at 449.
96. Id. at 446-47.
expectation of continued employment makes sense. The purpose of employment agreements is to memorialize the parties' understandings concerning the terms of employment, and provisions in employment agreements providing that termination may be without cause are generally straightforward. However, extrapolating that a shareholder does not have a reasonable expectation of continued employment from language in a buy-sell agreement providing for repurchase of shares upon involuntary termination is not as logical. Buy-sell agreements generally provide for either the "mandatory or optional repurchase of a shareholder's shares . . . upon the [happening] of certain event[s]" such as death, disability, bankruptcy and termination of employment.98 The principal purpose of buy-sell agreements is "to permit the original owners of the corporation to retain control over the identity of their business associates."99 A secondary purpose is "to protect the investment of the departing (or the estate of the departed) shareholder by facilitating the valuation and sale of an interest that might otherwise have no ready market."100 Buy-sell agreements are not generally intended to memorialize the parties' understandings concerning the terms of employment. An agreement in which a shareholder agrees that his or her shares will be repurchased if an involuntary termination occurs is not the same as an employment agreement in which an employee agrees that he or she may be involuntarily terminated without cause.

Recognizing the difficulty in extrapolating a shareholder's expectations concerning employment from a repurchase provision in a buy-sell agreement, in Grady v. Grady, a Rhode Island court held that language in a buy-sell agreement providing for mandatory repurchase of a shareholder's shares upon involuntary termination of employment was too vague to establish that the shareholder did not have a reasonable expectation of continued employment.101 The court observed that involuntary termination could occur due to other reasons such as serious illness.102

In Ingle, the dissenting judges disagreed with the majority's finding that Ingle did not have a reasonable expectation of continued employment as matter of law based on the repurchase provision of the shareholder agreement in part because he had not been represented by an

99. Id. at 1304.
100. Id.
102. Id. at *27.
attorney when he signed the agreement.\textsuperscript{103} It is very common for minority shareholders to participate in forming or to join a corporation without the benefit of counsel to ensure that their interests are protected.\textsuperscript{104} One reason for that is that close corporations are often "formed by friends or family members who simply may not believe that disagreements could ever arise."\textsuperscript{105} If an attorney is used, that attorney is often selected by the majority shareholder. Despite the attorney's fiduciary duty to all of the shareholders, the attorney may not zealously protect the minority shareholders' interests when drafting the buy-sell agreement and other corporate documents. In situations where employees are given the opportunity to buy stock of an existing corporation, they often value the opportunity to become a shareholder but are in a weak bargaining position and are unlikely to insist upon protection.\textsuperscript{106} Therefore, extrapolating a shareholder's expectations concerning the terms of employment from general language in buy-sell agreements is problematic.

3. Shareholder Guarantees of Corporate Debt

One factor that has received little attention by courts in assessing the reasonableness of a shareholder's expectation of continued employment is whether the shareholder personally guaranteed corporate debt. Lenders commonly require shareholders of closely held corporations to personally guaranty loans to the corporation. A shareholder who is terminated, but has executed a personal guarantee, remains personally obligated to the creditor. Therefore, it is unlikely that a shareholder would agree to guaranty corporate debt unless the shareholder expected to be involved in the company's operations as a managerial employee in order to ensure that the company is able to and does repay the loans. Such an expectation would be objectively reasonable. However, a shareholder's willingness to guaranty corporate debt has not received much discussion in cases evaluating the reasonableness of a shareholder's expectation of continued employment.

In Ingle, the dissenting judges argued that there were triable issues of fact as to whether Ingle had a reasonable expectation of continued employment in part because he had personally guaranteed corporate

\textsuperscript{103} 535 N.E.2d 1311, 1317 (N.Y. 1989) (Hancock, Jr., dissenting).
\textsuperscript{104} See Murdock, supra note 63, at 426.
\textsuperscript{106} Id. (quoting J.A.C. Hetherington, Special Characteristics, Problems, and Needs of the Close Corporation, 1969 U. ILL. L.F. 1, 18 (1969)).
debt.\textsuperscript{107} Though, as discussed above, the majority of New York Court of Appeals judges declined to consider that position.\textsuperscript{108}

However, in \textit{Haley v. Forcelle}, the Minnesota Appellate Court held that a terminated shareholder who personally guaranteed $4.3 million of corporate debt did have a reasonable expectation of continued employment.\textsuperscript{109} The court observed that it is “unlikely that [the shareholder] would have agreed to personally guaranty company debt if he did not expect to have a continued role in the operations and management of the company” so that he could ensure that the company paid the debt for which he had agreed to be personally liable.\textsuperscript{110}

Given the prevalence of personal guarantees, it is surprising that this issue has not received more attention by courts evaluating the reasonableness of a shareholder’s expectation of continued employment.

4. Shareholder Misconduct and Incompetence

Not surprisingly, courts routinely hold that, where a shareholder-employee engages in misconduct, any expectation of continued employment that the shareholder may have is not reasonable. For instance, in \textit{Whitehorn v. Whitehorn Farms, Inc.}, the Montana Supreme Court held that a shareholder who converted corporate property did not have a reasonable expectation of continued employment and was properly terminated.\textsuperscript{111}

In \textit{Gimpel v. Bolstein},\textsuperscript{112} an action brought by Robert Gimpel, a minority shareholder who had been terminated for stealing money from the corporation, the court observed that:

it must be recognized that “reasonable expectations” do not run only one way. To the extent that Robert may have entertained “reasonable expectations” of profit in 1975, the other shareholders also entertained “reasonable expectations” of fidelity and honesty from him. All such expectations were shattered when Robert stole from the corporation. His own acts broke all bargains. Since then, the only expectations he could reasonably entertain were those of a discovered thief: ostracism and prosecution. To the extent that the majority has refrained from prosecuting him, they have dealt with him more kindly than he had reason to expect, not less.\textsuperscript{113}

\textsuperscript{107} 535 N.E.2d 1311, 1314-15 (N.Y. 1989) (Hancock, J. dissenting).
\textsuperscript{108} \textit{Id.} at 1315.
\textsuperscript{109} 669 N.W.2d 48, 60 (Minn. Ct. App. 2003).
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} 195 P.3d 836, 843 (Mont. 2008).
\textsuperscript{113} \textit{Id.} at 1019-20 (citations omitted).
Thus, the court held that Robert's termination was not oppressive.\textsuperscript{114} However, despite his misdeeds, the court held that there were limits on how shabbily Robert could be treated and that it was "constrained to recognize that Robert cannot be forever compelled to remain an outcast."\textsuperscript{115} Citing Genesis, the court observed that "even Cain was granted protection from the perpetual vengefulness of his fellow man."\textsuperscript{116} The court, therefore, ordered that the majority shareholders either purchase Robert's shares for a legitimate price or commence a policy of paying all of the shareholders, including Robert, meaningful dividends.\textsuperscript{117} Key to the court's decision to order those alternative remedies was its finding that the corporation had historically distributed all of its profit through salaries rather than paying dividends.\textsuperscript{118} Therefore, by barring Robert from employment, the majority assured that he would not receive his share of the corporation's profits. Thus, while Robert had forfeited his specific expectation of continued employment by stealing from the company, he was still entitled to the general expectation of a share of the profits.\textsuperscript{119}

Shareholders who do not competently perform their duties as employees also do not have a reasonable expectation of continued employment.\textsuperscript{120} For instance, in \textit{Exadaktilos v. Cinnaminson Realty Co.}, the court held that the plaintiff, who had been gifted shares of a corporation that operated a restaurant from his father-in-law, forfeited any expectation of continued employment.\textsuperscript{121} This was because he "failed to get along with other employees, causing the loss of key personnel, . . . quit on more than one occasion," and failed to "learn the business."\textsuperscript{122} Similarly, in \textit{Bogosian v. Woloohoian}, the court held that a shareholder who stopped performing any work as an employee after she had been removed as president did not have a legitimate expectation of continued employment.\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id. at 1021.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Gimpel, 477 N.Y.S.2d at 1022.
  \item \textsuperscript{118} See id. at 1020.
  \item \textsuperscript{119} See id. at 1021.
  \item \textsuperscript{120} See Gunderson v. Alliance of Computer Prof'ls, Inc., 628 N.W.2d 173, 192 (Minn. Ct. App. 2001).
  \item \textsuperscript{121} 400 A.2d 554, 556, 562 (N.J. Super. 1979), aff'd 414 A.2d 994 (N.J. App. Ct. 1980).
  \item \textsuperscript{122} Id. at 561-62.
  \item \textsuperscript{123} See 167 F. Supp. 2d 491, 498 (D.R.I. 2001).
\end{itemize}
C. Consideration of the Majority's Purpose for Termination in Evaluating the Reasonableness of a Shareholder's Expectation of Continued Employment

Courts applying the reasonable expectations analysis focus on the minority's expectations rather than on the majority's motivation for the termination. Therefore, a court applying a pure reasonable expectations approach does not take the majority's reasons for terminating the minority shareholder into account. For example, in both Balvik v. Sylvester\(^{124}\) and In re Topper\(^{125}\) discussed above, the courts refused to consider the majority's purported justification for the terminations, holding that the majority's purpose for termination was irrelevant.

In contrast to the minority centered focus of the reasonable expectations approach, courts that apply the traditional test of oppression focus on the conduct of the majority.\(^{126}\) As a result, these courts are more concerned with preserving the majority's discretion to make decisions.\(^{127}\) Courts applying the traditional test will not find oppression liability where the majority can demonstrate a legitimate business purpose for its actions even if those actions harm minority shareholders.\(^{128}\)

However, some courts that have applied the reasonable expectations approach have been willing to take the majority's purpose for termination into account. Those courts attempt to strike a balance between the minority shareholder's expectations and the corporation's need to run the business efficiently.\(^{129}\)

An early example of this balancing approach is the landmark case of Wilkes v. Springside Nursing Home, Inc.\(^{130}\) In Wilkes, a decision of the Massachusetts Supreme Judicial Court, dissension among shareholders led to the termination of a dissenting shareholder's employment.\(^{131}\) Wilkes and three others had formed Springside Nursing Home, Inc., a corporation which owned real estate and operated a nursing home on the property.\(^{132}\) All four were directors, participated in the management of the business, and were employees performing

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126. See Moll, Perspective, supra note 24, at 762-63 & 768-69.
127. Id. at 767.
128. Id.
131. Id. at 661.
132. Id. at 659.
different duties for the corporation. Quinn, one of the shareholders, sought to have another corporation in which he had an ownership interest purchase a portion of Springside's property. Wilkes prevailed on the other shareholders "to procure a higher sales price than Quinn [wished] to pay" which led to "bad blood" between Wilkes and Quinn. The two other shareholders sided with Quinn and the three used their majority control to not re-elect Wilkes as a director or officer and to terminate his employment, although he had not committed any misconduct and had performed his duties competently.

In an early statement of the importance of continued employment for minority shareholders to receive a return on their investment, the Wilkes court observed that "[b]y terminating a minority stockholder's employment . . . the majority effectively frustrate the minority stockholder's purposes in entering the corporate venture and also deny him an equal return on his investment." The Wilkes court's focus on the minority shareholder's purpose for joining the corporation was a precursor of the reasonable expectations approach.

However, the Wilkes court did not focus solely on the expectations of the minority shareholder. The court expressed concern that focusing solely on the minority shareholder could impose "limitations on legitimate action by the controlling group" that would "unduly hamper its effectiveness in managing the corporation in the best interest of all of [the shareholders]." The court established a procedure for reviewing claims brought by minority shareholders to balance the protection needed by minority shareholders with the flexibility needed by the controlling shareholders in order to effectively manage the business. First, the majority shareholders must "demonstrate a legitimate business purpose for its action[s]." If the majority shareholders are able to establish that they had a legitimate business purpose, the burden shifts to the minority shareholder to demonstrate that that purpose could have been achieved through alternate means that would have been less harmful to the minority's interest. The court found that the majority shareholders did not demonstrate a legitimate business purpose, inferring that their real intention was to

133. Id. at 659-60.
134. Id. at 660.
135. Wilkes, 353 N.E.2d at 660.
136. Id. at 661, 664.
137. Id. at 662-63.
138. Id. at 663.
139. See id.
140. Wilkes, 353 N.E.2d at 663.
141. Id.
freeze Wilkes out and to force him to sell his shares for a price below their value.\(^{142}\)

The Wilkes approach of balancing minority shareholders' expectations and majority shareholders' need to operate the business efficiently has been followed by courts in other jurisdictions. In an attempt to achieve this balance, courts, even those that utilize the reasonable expectations approach, may deny relief where the majority shareholders can demonstrate a legitimate business purpose for the termination if the terminated shareholder cannot establish that there was a less harmful alternative to termination.

For instance, in \textit{Grady v. Grady}, a Rhode Island Superior Court analyzed a matter involving a corporation owned by three brothers in which two brothers used their combined majority to terminate a third brother, William, who had been the president of the corporation.\(^{143}\) The court found that "William did have a reasonable expectation of continued employment."\(^{144}\) However, the court did not end the analysis at that point. The other brothers were given an opportunity to demonstrate that they had a legitimate business purpose for termination.\(^{145}\) The brothers were able to meet this burden by demonstrating that "William was chronically absent from work" and disruptive to the company's operations by "pulling employees away from their assigned tasks and assigning them to . . . unnecessary tasks [in order to show] his authority."\(^{146}\) However, utilizing the Wilkes procedure, the court held that William was entitled to an opportunity to demonstrate that there was a less harmful alternative to termination and ordered further proceedings so that it could make a factual determination as to that issue.\(^{147}\)

In assessing the legitimacy of the majority's asserted business purpose, courts will attempt to separate actual reasons for termination from pretext. In \textit{O'Connor v. U.S. Art Co.}, a Massachusetts Superior Court held that the controlling shareholders did not act with a legitimate business purpose when they terminated O'Connor, a minority shareholder who served as president, allegedly due to O'Connor's poor bookkeeping, where the termination occurred after negotiations for the purchase of O'Connor's shares had stalled and the majority shareholders had long been aware of his shoddy bookkeeping prac-

\(^{142}\) See \textit{id.} at 663-64.


\(^{144}\) \textit{id.} at *13.

\(^{145}\) \textit{id.} at *9.

\(^{146}\) \textit{id.} at *10.

\(^{147}\) \textit{id.} at *11.
The court held that the asserted purpose was really a pretext for the majority's decision to freeze O'Connor out of the business. Similarly, in *Pointer v. Castellani*, the Massachusetts Supreme Judicial Court rejected the majority shareholders' claim that they acted with a legitimate business purpose in terminating a minority shareholder who served as president because he was the owner of a separate company that purchased real estate from the corporation. The court held that the asserted purpose was contrived as the majority shareholders had always been aware of the separate corporation.

Where shareholders have not performed their duties adequately, courts have held that there was a legitimate business purpose for termination. For instance, in *Priebe v. O'Malley*, the Ohio Appellate Court found that majority shareholders had a legitimate business purpose for termination where the terminated shareholder was "not producing sales and... was not working well with other employees" and there was evidence that the terminated shareholder converted corporate property for his personal use.

However, that the business may have suffered setbacks generally may not constitute a legitimate reason for terminating a minority shareholder-employee where the decline is not attributable to the shareholder. In *Gigax v. Repka*, the Ohio Appellate Court held that there was not a legitimate business purpose for terminating a shareholder-employee where the corporation experienced a decline but the majority failed to establish that the decline was caused by the terminated shareholder.

Under the *Wilkes* formula, once the majority shareholders establish that they had a legitimate business purpose for termination, the burden shifts to the minority shareholder to establish that the purpose could have been accomplished through means less harmful than termination. It is this opportunity to establish that the majority's purpose could have been achieved through means other than termination that distinguishes courts that attempt to balance the interests of the majority and the minority from courts that simply apply the traditional test. The latter end the analysis if the majority is able to establish a legitimate business purpose for termination.

149. *See id.* at *9-10.
150. 918 N.E.2d 805, 818 (Mass. 2009).
151. *Id.*
152. 623 N.E.2d 573, 577-76 (Ohio 1993).
However, there are very few reported cases in which courts have addressed whether there were less harmful alternatives. Perhaps this is due to the reluctance of courts to involve themselves too intimately in the operations of the business. The decisions in which courts used the Wilkes balancing procedure are predominantly from Massachusetts, which is not surprising as Wilkes was a decision of the Massachusetts Supreme Judicial Court. However, the Wilkes approach of balancing the minority shareholder’s expectations with the majority’s need to operate the business efficiently has been adopted by courts in other jurisdictions. Therefore, minority shareholders in those jurisdictions who are terminated for legitimate business purposes do have the opportunity of demonstrating that those purposes could have been achieved through means less harmful than termination. Examination of a pair of Massachusetts cases provides some examples of the types of less harmful alternatives that minority shareholders may be able to put forth.

In *Leslie v. Boston Software Collaborative, Inc.*, the court addressed a situation in which two of the three equal shareholders of a corporation that performed software consulting services terminated Leslie, the third shareholder, due to complaints by employees about the way that he treated them and complaints by customers about the quality of his work. An additional reason for Leslie’s termination was that he billed significantly less than the other two shareholders in part because he performed most of the administrative functions for the business. The court held that there were less harmful alternatives to termination, including: restructuring Leslie’s duties so that he was “insulated from direct contact with . . . employees;” encouraging and assisting him in “becoming more extensively involved in [billable] projects;” directing him to “take courses to upgrade his skills;” and implementing “creative compensation techniques.”

In *Keating v. Keating*, the court addressed a situation involving a dispute between a brother and sister regarding who was to lead a family business. The father, who was the majority shareholder, chose the sister and terminated the employment of the brother, Paul Keating, Jr. The court held that while the father’s choice of the sister may have been a legitimate business decision, there were less harmful

156. Id. at *2.
157. Id. at *8.
159. Id. at *24-25, *49.
alternatives to terminating Paul Jr.\textsuperscript{160} For instance, Paul Jr. could have been assigned different duties and placed in a different position on the organizational chart and could have been assigned to a different location in the central office or in another location.\textsuperscript{161}

Despite both the \textit{Leslie} and \textit{Keating} courts' conclusions that that the majority should have made accommodations to enable the minority shareholder to remain employed, neither court ordered that the shareholder's employment be reinstated. Both courts acknowledged that the relationships were too damaged for the parties to ever be able to work together again.\textsuperscript{162} However, the courts did not order the same remedy. Both Leslie and Paul Jr. had requested that the majority shareholders be ordered to purchase their shares. The \textit{Leslie} court refused to order this remedy and instead awarded Leslie six months' severance pay and additional damages in the amount of bonuses, which were actually disguised dividends that the two other shareholders had received.\textsuperscript{163} The court further ordered that any future payments made to the majority shareholders that were classified as salary but were actually disguised dividends should be paid in the same amount and at the same time to Leslie.\textsuperscript{164} Lastly, the court ordered that Leslie should be reinstated as a full voting member of the board of directors so that he would be aware of the operations of the corporation and would be able to participate in management.\textsuperscript{165} In contrast, the \textit{Keating} court granted Paul Jr.'s request for a court ordered buyout of his shares.\textsuperscript{166}

Thus, although the \textit{Leslie} court determined that the relationship between Leslie and the other two shareholders was too broken for Leslie to remain an employee of the corporation, it ordered a remedy that required ongoing interaction between Leslie and the other shareholders. The \textit{Keating} court, on the other hand, by ordering a buyout of Paul Jr.'s shares, provided for a complete break between Paul Jr. and the other shareholders. The \textit{Keating} court's order of a buyout is the more logical and constructive remedy and has become the remedy most favored by courts.

\textsuperscript{160} See id. at *50.
\textsuperscript{161} Id.
\textsuperscript{163} Leslie, 2002 WL 532605, at *8-9.
\textsuperscript{164} Id. at *9.
\textsuperscript{165} Id.
\textsuperscript{166} Keating, 2003 WL 23213143, at *50.
Prior to the 1970s, the only remedy oppression statutes provided was dissolution. Courts traditionally described dissolution as a drastic remedy and were, therefore, hesitant to grant requests by minority shareholders for dissolution. The view that dissolution is drastic arose out of concern that it would result in the death of the business with the accordant loss of jobs and tax revenue.

In the 1970s, state legislatures began amending their corporation acts to provide courts with the authority to order alternate remedies to dissolution upon a finding of minority shareholder oppression. Most states, whether through statutes or common law, now permit courts to order a full “range of equitable remedies.” Examples of alternate remedies include: “removal from office of any director or officer,” the “appointment of an individual as a director or officer,” the “appointment of a custodian to manage . . . the corporation,” an order to pay dividends, “damages to [the] aggrieved party,” and the “purchase by the corporation or one or more other shareholders” of the minority shareholder’s shares. The authorization of remedies that are less drastic then dissolution caused courts to relax the requirements for a finding of oppression and has encouraged the acceptance by courts of the reasonable expectations approach.

The most common remedy now is the court ordered buy-out of the minority shareholder’s shares by either the majority shareholders or the corporation. This remedy is consistent with the understanding that employment by the corporation is the vehicle through which the shareholder receives the return on his or her investment. The buy-out remedy also solves the lack of exit problem by providing a forced market for the minority shareholder’s shares. Additionally, unlike remedies such as the remedy ordered by the Leslie Court that require ongoing interaction between the battling shareholders, it provides a means for the parties who, certainly by the time that they ended up in litigation, cannot continue to work together to separate. However, in order to properly compensate the minority shareholder for the loss of

167. See Murdock, supra note 63, at 440-41.
168. Id.
171. See Murdock, supra note 63, at 464.
172. Id. at 470.
his or her investment, the valuation method must be fair.\textsuperscript{174} Disputes over the proper method of valuing the business are often a central part of shareholder oppression litigation. Moreover, although not considered by many courts, in order to fully compensate a terminated shareholder-employee for both the loss of his or her investment as well as the loss of wages through employment, courts may also award back pay and severance as compensatory damages.\textsuperscript{175}

VI. CONCLUSION

Termination of a minority shareholder's employment is a common and effective freeze out technique. This is because, for most shareholders of closely held corporations, providing self-employment is their primary purpose in participating in the formation of or joining the corporation. Over the past forty years, an extensive body of law has developed to protect minority shareholders who are victims of freeze outs; however, courts struggle to define what type of conduct on the part of majority shareholders constitutes oppression. In recent years, the principle that conduct is oppressive when it violates the reasonable expectations that the shareholder had when he or she participated in the formation of or joined the corporation has gained increasing acceptance and is now the accepted rule in a majority of states. However, courts still face the task of articulating what expectations are reasonable.

A review of decisions involving shareholder oppression and breach of fiduciary duty claims arising out of termination of employment reveals that there is no uniform consensus as to when a shareholder's expectation of continued employment will be deemed reasonable. However, certain common threads have emerged.

Where employment is intertwined with the shareholder's investment in the corporation, the shareholder will have an easier time establishing that his or her expectation of continued employment is reasonable. Shareholders who participated in the founding of the corporation will have an easier time establishing the reasonableness of their expectation of continued employment than non-founder shareholders, such as shareholders who received their shares through gift or inheritance or shareholders who were permitted to purchase shares of an existing corporation as part of an employment compensation package.

\textsuperscript{174} Murdock, \textit{supra} note 63, at 470-71.
\textsuperscript{175} See, \textit{e.g.}, Cooke v. Fresh Exp. Foods Corp., 7 P.3d 717, 725 (Or. 2000).
Shareholders who sign employment agreements providing that their employment may be terminated without cause must overcome the difficult hurdle of negating the argument that any expectation of continued employment was unreasonable in light of their assent to a termination without cause provision. Shareholders who sign shareholder or buy-sell agreements providing for the repurchase of their shares upon involuntary termination will often also face the challenge of overcoming the argument that their consent to such a provision was an acknowledgment that they could be involuntarily terminated for any reason that negates the reasonableness of any expectation of continued employment. However, extrapolating that a shareholder waived any expectation of continued employment from a repurchase upon involuntary termination provision in a buy-sell agreement is problematic as buy-sell agreements are generally not intended to memorialize the parties' understandings concerning employment.

Some courts hold that a shareholder's personal guaranty of corporate debt is a significant factor in evaluating the reasonableness of a shareholder's expectation of continued employment as shareholders who agree to be personally liable for corporate debt likely expect to remain managerial employees so that they can ensure that the debt has repaid. Given the prevalence of personal guarantees, it is surprising that this factor has not received more attention by courts.

Where shareholders have committed misconduct or performed their employment duties incompetently, they will have a difficult time establishing that any expectation of continued employment is reasonable.

While, under a pure reasonable expectations approach, courts do not consider the legitimacy of the majority shareholder's purpose for termination, some courts that apply the reasonable expectations approach will attempt to balance the minority shareholder's expectations with the majority's interest in running the business efficiently. In those courts, once the majority is able to establish a legitimate business purpose, the minority shareholder is afforded an opportunity to establish that that purpose could have been achieved through means less harmful to the minority shareholder than termination. In evaluating the legitimacy of the majority's purpose, courts will attempt to distinguish between pretextual reasons for termination and legitimate business concerns.

There are very few reported cases in which courts have discussed what types of less harmful alternatives majority shareholders are required to employ. The few decisions that have addressed this issue suggest that majority shareholders may be required to provide the mi-
minority shareholder with accommodations such as different job duties or to allow them to work at different locations.

Once shareholders establish that termination of their employment is a violation of their reasonable expectations and, therefore, oppressive, courts now have a range of equitable remedies from which to choose. The most common remedy is the court ordered buyout of the minority shareholder’s shares by the majority shareholders or the corporation. This remedy is the most logical alternative as it is consistent with the understanding that employment by the corporation is the vehicle through which the shareholder received a return on his or her investment, solves the lack of exit problem by providing a market for the minority shareholder’s shares, and provides for a complete separation of parties who can no longer cooperate and should not continue to own a business together.