

CORPORATIONS, SECURITIES AND FINANCIAL SERVICES COMMITTEE

MEETING TO BE HELD ON SEPTEMBER 2, 2017

Grounds for Dissolution – Oppression of Minority Shareholders

Currently, s. 607.1430 provides, among other grounds for judicial dissolution, that the directors or those in control of the corporation have acted, are acting, or are reasonably expected to act in a manner that is illegal or fraudulent. The corollary section of the Model Act (s. 14.30) includes one additional ground for judicial dissolution, “oppression of minority shareholders.” Oppression of minority shareholders is a particular action or actions directed towards a particular shareholder.

In 1994, when Florida’s current judicial dissolution statute was adopted, there was a view that the concept of oppression was too vague and would present the possibility of vexatious litigation based on an uncertain standard. In contrast, advocates for including the oppression provision argued that oppression is capable of reasonable definition and that minority shareholders might not otherwise have an adequate basis for relief in squeeze-out situations such as loss of office, salary or dividends. Such advocates also argued that the failure to include “oppression” as a grounds for judicial dissolution has a definite chilling effect on the rights of minority shareholders in Florida.

It is believed that some Florida courts, by applying fiduciary principles, have gotten around the failure to include “oppression” as a ground for dissolution in order to provide an equitable remedy for a minority shareholder.

In point of fact, and while not a reason in and of itself to make a change, Florida is clearly out of the mainstream on this issue. Today, over 35 states have adopted oppression as a ground for judicial dissolution or an analogous provision (a summary memo on this topic prepared by Andrew Schwartz is included as Exhibit A to this Agenda). Further, some states have limited this particular right to seek judicial dissolution to only those shareholders who meet certain minimum ownership requirements (for example, (i) Maryland, Massachusetts and Georgia, all of which are Model Act states, have such requirements, requiring the ownership of 25%, 40%, and 20% of the outstanding shares respectively, (ii) California requires the ownership of 1/3rd of the outstanding shares, and (iii) New York sets a 20% ownership requirement).

The Uniform Revised Limited Liability Company Act also includes "oppression of minority members" as a ground for judicial dissolution. When Chapter 605 was adopted, it was decided to defer the question of including this ground for dissolution in the LLC statute pending consideration of the topic as part of the consideration of modifications to the FBCA, in an effort to address harmonization.

At this meeting, the members of the CS&FS Committee will have an opportunity to share their thoughts on this issue.

1. If time permits, we will discuss the following topics that are not resolved in the current draft of FBCA:
 - A. Use of “Must” vs. Shall” – There continue to be changes in the 2016 version of the Model Act with respect to the use of the words “must” vs. “shall.” There also appears to be no absolute convention being followed in the Model Act. Should we follow the Model Act changes in this regard, even though the Model Act is not consistent on this point? Even if we are not following the Model Act religiously in this regard, if we believe that something should be clearly identified as mandatory, should we decide to use the word “must” as our convention in all such cases and make necessary changes throughout the FBCA?
 - B. Pledging Shares in a Redemption Transaction – Section 607.06401(7) does not deal with how to pledge redeemed shares back to the redeemed shareholder as security for a debt in connection with the redemption. Should it? Should there be an exemption to having such shares treated as treasury shares as long as such shares remain pledged in this context?
 - C. Impact of Late Annual Report – What happens to the active status of a corporation during the period that it is late in the filing of its annual report but it is not yet administratively dissolved? Should the corporation still be considered to be in active status and should this be reflected on the active status certificate?



Akerman LLP
Las Olas Centre II, Suite 1600
350 East Las Olas Boulevard
Fort Lauderdale, FL 33301-2999
Tel: 954.463.2700
Fax: 954.463.2224

Memorandum

From: Andrew E. Schwartz
To: Members of the Chapter 607 sub-committee of the Florida Bar Business Law Section
Date: May 24, 2017
Subject: Oppression as a ground for Judicial Dissolution

Section 14.30(b)(2)(ii) of the Model Act allows, upon the initiation of a proceeding by a shareholder, for a court to dissolve a corporation if it is established that "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent". This memorandum surveys the statutes in each state and looks at their handling of that section.

<u>State</u>	<u>Statute</u>	<u>Section</u>
Alabama	Follows the Model Act verbatim.	10A-2-14.30(2)(ii)
Alaska	Has no oppression provision. Allows for judicial dissolution on petition "if it appears necessary for the protection of any parties in interest."	10.06.618
Arizona	Follows the Model Act verbatim.	10-1430(B)(2)
Arkansas	Follows the Model Act verbatim.	4-27-1430(b)(2)(ii)

Exhibit A

California	Allows for judicial dissolution where "those in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness toward any shareholders or its property."	1800(b)(4)
<u>State</u>	<u>Statute</u>	<u>Section</u>
Colorado	Follows the Model Act verbatim.	7-114-301(2)(b)
Connecticut	Follows the Model Act verbatim.	33-896(1)(B)
Delaware	Does not specifically allow for dissolution upon a proceeding by a shareholder. The Court of Chancery may revoke or forfeit the charter of any corporation "for abuse, misuse or nonuse of its corporate powers/"	284(a)
District of Columbia	Follows the Model Act verbatim.	29-312.20(2)(B)
Georgia	Follows the Model Act in allowing for judicial dissolution for oppression upon the petition of shareholders, but adds that the action must be "in connection with the operation or management of the business and affairs of the corporation, and the proceeding is initiated by the holders of at least 20 percent or more of all outstanding shares of a corporation/"	14-2-1430(2)(B)
Hawaii	Follows the Model Act verbatim.	414-411(2)(B)
Idaho	Follows the Model Act in allowing for judicial dissolution for oppression upon the petition of shareholders, but adds an additional requirement that "irreparable injury to the corporation is threatened or being suffered by reason thereof/"	30-29-1430(2)(b)
Illinois	Follows the Model Act in allowing for judicial dissolution for oppression upon the petition of a shareholder, but adds, for public corporations, an additional requirement that the conduct be "with respect to the petitioning shareholder". For non-public corporations, the conduct must be "with respect to the petitioning shareholder whether in his or her capacity as a shareholder, director or officer"	5/12.55(a)(2) 5/12.56(a)(3)
Indiana	Has no oppression provision. Otherwise follows Model Act section 14.30.	21-1-47-1
Iowa	Follows the Model Act verbatim.	490.1430(b)(2)
Kansas	Does not specifically allow for dissolution upon a proceeding by a shareholder. The district court has jurisdiction to forfeit the articles of incorporation of any corporation "for abuse, misuse or nonuse of its corporate powers, privileges or franchises."	17-6812
Kentucky	Removes the word "oppressive", but otherwise follows the Model Act.	271B.14-300(2)(b)

Exhibit A

Louisiana	Has no oppression provision. Otherwise follows Model Act section 14.30.	1-1430
Maine	Follows the Model Act verbatim.	Tit.13C,§1430(2)(B)

Exhibit A

<u>State</u>	<u>Statute</u>	<u>Section</u>
Maryland	Follows the substance of the Model Act. Does not apply to corporations with a class of equity securities registered under the Exchange Act.	3-413(b)(2)
Massachusetts	Has no oppression provision. Otherwise follows Model Act section 14.30.	14.30
Michigan	<p>Allows for a shareholder to bring an action to establish that "the acts of the directors or those in control of the corporation are illegal, fraudulent or willfully unfair and oppressive to the corporation or the shareholder". Does not allow for such an action for corporations traded on a national securities exchange.</p> <p>Defines "willfully and oppressive conduct" as follows: "A continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affective shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure."</p>	450.1489
Minnesota	Allows for a shareholder to bring an action for supervised judicial dissolution where "the directors or those in control of the corporation have acted fraudulently or illegally toward one or more shareholders or directors or as officers or employees of a closely held corporation."	302A.751(b)(2)
Mississippi	Follows the Model Act verbatim. Does not apply to corporations with a class of equity securities listed on an exchange or to any corporation with at least 300 shareholders and shares with a market value of over \$20 million (excluding affiliates).	79-4-14.30(a)(2)(ii)
Missouri	Follows the Model Act verbatim.	351.494(2)(b)
Montana	Follows the Model Act verbatim.	35-1-938(2)(b)
Nebraska	Follows the Model Act verbatim.	21-20,162(2)(b)(iii)
Nevada	Does not allow for shareholder petition for judicial dissolution. The district court does not have power until "any corporation organized under this chapter shall be dissolved or cease to exist in any manner whatsoever."	78.600

Exhibit A

<u>State</u>	<u>Statute</u>	<u>Section</u>
New Hampshire	Follows the Model Act verbatim. Does not apply to corporations with a class of equity securities listed on an exchange or to any corporation with at least 300 shareholders and shares with a market value of over \$20 million (excluding affiliates).	293-A:14.30(a)(2)
New Jersey	Allows for judicial dissolution where "the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees." Only applies to corporations with 25 or fewer shareholders.	14A: 12-7(1)(c)
New Mexico	Follows the substance of the Model Act.	53-16-16(A)(1)(b)
New York	Allows for a petition by shareholders holding twenty percent or more of the outstanding shares (other than a company registered under the Investment Company Act of 1940 or that has shares listed on a national securities exchange or quoted on an OTC market) where "the directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders."	1104-a(a)(1)
North Carolina	No oppression provision. Allows for dissolution where "liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder."	55-14-30(2)
North Dakota	Allows for dissolution in an action by a shareholder where "the directors or those in control of the corporation have acted fraudulently or illegally towards one or more shareholders in their capacities as shareholders or directors of any corporation or as officers or employees of a closely held corporation." The section as a whole indicates that it applies only to non-public corporations.	10-19.1-115(2)(b)(2)
Ohio	No oppression provision. Otherwise substantively follows Model Act section 14.30.	1701.91
Oklahoma	Does not specifically allow for dissolution upon a proceeding by a shareholder. The district court has jurisdiction to forfeit the articles of incorporation of any corporation "for abuse, misuse or nonuse of its corporate powers, privileges or franchises."	1104(A)

Exhibit A

<u>State</u>	<u>Statute</u>	<u>Section</u>
Oregon	Follows the Model Act verbatim. <u>Only</u> allows for such action in a corporation that has shares listed on a national securities exchange or that are regularly traded in a market maintained by one or more members of a national or affiliated securities association.	60.661(2)(b)
Pennsylvania	Follows the Model Act, but adds the requirement that "it is beneficial to the interests of the shareholders that the corporation be wound up and dissolved."	1981(a)(2)
Rhode Island	Substantively follows the Model Act.	7-1.2-1314(a)(1)(ii)
South Carolina	Follows the Model Act. Along with "illegal, fraudulent or oppressive" conduct, also adds conduct that is "unfairly prejudicial". The conduct must be "either to the corporation or to any shareholder (whether in his capacity as a shareholder, director or officer of the corporation."	33-14-300(2)(ii)
South Dakota	Follows the Model Act verbatim.	47-1A-1430(2)(b)
Tennessee	Follows the Model Act verbatim.	48-24-301(2)(B)
Texas	Does not allow for dissolution upon a proceeding by a shareholder. The court may enter a decree if it finds that public interest requires winding up and termination because the filing entity has been convicted of a felony or a high managerial agent of the filing entity has been convicted of a felony committed in the conduct of the filing entity's affairs, the filing entity or high managerial agent has engaged in a persistent course of felonious conduct, <u>and</u> termination is necessary to prevent future felonious conduct of the same character.	11.301(a)(5)
Utah	Follows the Model Act verbatim.	16-10a-1430(2)(b)
Vermont	Follows the Model Act verbatim.	14.30(2)(B)
Virginia	Follows the Model Act verbatim. Applies only to non-public corporations.	13.1-747(1)(b)
Washington	Follows the Model Act verbatim.	23B.14.300(2)(b)
West Virginia	Follows the Model Act verbatim.	31D-14-1430(2)(B)
Wisconsin	Follows the Model Act verbatim.	180.1430(2)(b)
Wyoming	Follows the Model Act verbatim.	17-16-1430(ii)(B)