

CORPORATIONS, SECURITIES AND FINANCIAL SERVICES COMMITTEE

MEETING TO BE HELD ON JANUARY 18, 2018

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 among some Business Law Section members who worked on the draft that the concept of oppression was too vague and would present the possibility of vexatious litigation based on an uncertain standard. In contrast, other Business Law Section members working on the draft advocated for including the oppression provision, arguing 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, but that analysis is anecdotal.

In point of fact, and while not a reason in and of itself to make a change, Florida may be considered to be 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). Some of these states have limited this particular right to seek judicial dissolution to only those shareholders who meet certain minimum ownership requirements (for example, (i) Maryland and Georgia, both of which are Model Act states, have such requirements, requiring the ownership of 25% 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), while others (such as California and Michigan) include language which has the effect of requiring more egregious conduct to constitute oppression or an equivalent of oppression. At the same time, certain states (such as Indiana, Nevada, North Carolina, Ohio, and Texas) are like Florida and have not included oppression as a ground for judicial dissolution, and Massachusetts has not adopted as a grounds for dissolution any conduct other than deadlock (although they have a closely held corporation statute that allows the parties to broadly add dissolution remedies into their articles of incorporation).

The Uniform Revised Limited Liability Company Act also includes "oppression of minority members" as a ground for judicial dissolution. However, when Chapter 605 was adopted, it was decided to defer the question of including this ground for judicial 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 the September 2, 2017 meeting of the Corporations, Securities and Financial Services Committee, there was a full discussion on this issue and a general consensus was reached to add "oppression" to the statute as a ground for judicial dissolution. There is also a general consensus that the term "willful" should be added before the term "oppression" in subsection (1)(b)4.

At the September 19, 2017 meeting of the Subcommittee, the Subcommittee continued to discuss whether to add "oppression" as a grounds for judicial dissolution in subsection (1)(b)4. and, if so, whether to (i) add it to that section of the statute without definition (following the Model Act), and leave it to the courts to define that term, (ii) to add it to that section of the statute without definition, but to add the word "willful" before "oppression", and to leave it to the courts to define those terms, or (iii) if either "oppression" or "willful oppression" is added to the statute as a grounds for judicial dissolution, to add a definition of "oppression" or "willful oppression."

Based on the discussion at that meeting, there was a general consensus to use the term "willful oppression," and to add a definition of "willful oppression." The Subcommittee members in attendance at the meeting reviewed the definitions proposed by each of the co-chairs, but there was no general consensus reached as to the substance of or the specific language to be used in that definition.

Following that meeting, two different constructs of the definition of "willful oppression" were developed and presented to the Subcommittee for its consideration, as follows:

Professor Cohn

The term "willfully oppressive" in subsection (1)(b)4 refers to intentional conduct that adversely and substantially affects the reasonable expectations of the shareholder, disproportionate to other shareholders, based on a provable explicit understanding or understandings between the shareholder and the directors or those in control of the corporation regarding corporate position, employment, distributions or other corporate benefits. The term does not include conduct permitted by a shareholders' agreement to which the affected shareholder is a party or the corporation's articles of incorporation, bylaws, or consistently applied written corporate policy known or should have been known to the shareholder at the time that the shareholder became a shareholder or for which the shareholder subsequently voted or expressly consented.

Gary Teblum

For purposes of subsection (1)(b)4., the term "willfully oppressive" conduct is a continuing intentional conduct or course of conduct or a significant intentional action or series of actions that adversely and substantially adversely affects the interests or reasonable expectations of the shareholder as a shareholder, disproportionate to other shareholders, based on provable understandings with the directors or those in control of the corporation. The term does not include

conduct or actions permitted by a shareholders' agreement to which the affected shareholder is a party or the corporation's articles of incorporation, the corporation's bylaws or a consistently applied written corporate policy or procedure of the corporation in effect or that became effective or that were known or should have been known to the shareholder at the time that the shareholder became a shareholder or for which the shareholder subsequently expressly voted or to which the shareholder subsequently expressly consented.

The agenda for the October 5, 2017 meeting of the Subcommittee contemplated that the Subcommittee would consider at that meeting which definition to approve. However, during that meeting, the Subcommittee once again had a long discussion on the gating topic of whether to include "oppression" or "willful oppression" as a grounds for dissolution under the statute, even if defined.

Since the Subcommittee continues to get bogged down on this issue, the co-chairs have decided that another meeting of the larger group will be needed to make a final decision on this issue and that this issue should once again be taken up at the January 2018 meeting of the Corporations, Securities and Financial Services Committee. The co-chairs have also provided notice to interested parties that this topic will be taken up again at that meeting, in an effort to make sure that all interested parties will have the opportunity to participate in this discussion.

The critical topic to be discussed at this meeting of the Corporations, Securities and Financial Services Committee will, once again, be the issue of whether, in s. 607.1430, to add "oppression" of minority shareholders as a ground for judicial dissolution, and if so, in what form. At this meeting of the Corporations, Securities and Financial Services Committee, our plan is to review this issue one last time and, one way or the other, come to a final decision on how we will handle this issue.

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)

<u>State</u>	<u>Statute</u>	<u>Section</u>
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)
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)

<u>State</u>	<u>Statute</u>	<u>Section</u>
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)
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

<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)

<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)