

NOTES

FIDUCIARY DUTIES OWED BY FROZEN-OUT MINORITY SHAREHOLDERS IN CLOSE CORPORATIONS

A. RICHARD M. BLAIKLOCK*

INTRODUCTION

There are thousands of minority shareholders¹ who have had their ownership interests in close corporations² rendered worthless as a result of oppressive actions by majority shareholders.³ The loss to oppressed minority shareholders can be catastrophic.⁴ A “national business scandal”⁵ has emerged due to the unfair

* J.D. Candidate, 1997, Indiana University School of Law—Indianapolis; B.A., 1990, Hanover College—Hanover, Indiana. My thanks to John C. Trimble, Ted L. Nicholas, and Tomas Szoboszlai, for their insightful comments on the subject of this Note. This Note is written in memory of Mary Roberts.

1. The person or persons with a minority of shares in a close corporation will be referred to in the plural (minority shareholders) throughout this Note. It should be noted that the term “minority shareholders” is being selected in order to be consistent with the lexicon used in most case law and writings on the subject. However, this author believes that non-controlling shareholders is the more appropriate term, considering that control is the central issue in the determination of whether fiduciary duties are imposed.

2. There is definitional uncertainty as to what constitutes a close corporation, or a closely held corporation. See Kelvin H. Dickinson, *Partners in a Corporate Cloak: The Emergence and Legitimacy of the Incorporated Partnership*, 33 AM. U. L. REV. 559, 565 (1984) (“Despite the prevalence of the term ‘close corporation’ in legal opinions and literature, the term has no clear or commonly accepted meaning.”). In this Note, the synonymous terms will refer to “a corporation whose shares are not generally traded in the securities market.” 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S CLOSE CORPORATIONS § 1.02 (3d ed. 1994 & Supp. 1996) [hereinafter O’NEAL & THOMPSON, CLOSE CORPORATIONS].

3. See F. Hodge O’Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121, 121 (1987). Also, the person or persons with a majority of shares in a close corporation will be referred to in the plural (majority shareholders) throughout this Note. It should be noted that the term “majority shareholders” is being selected in order to be consistent with the lexicon used in most case law and writings on the subject. However, this author believes that controlling shareholders is the more appropriate term, considering that control is the central issue in the determination of whether fiduciary duties are imposed.

4. See 1 O’NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1.03. See also *infra*

treatment of minority shareholders in close corporations. Consequently, there has been an unabating flow of litigation dealing with the oppression of minority shareholders in close corporations.⁶ With only a few exceptions, which will be discussed in this Note,⁷ the vast majority of cases⁸ address minority shareholders' suits against majority shareholders for oppression. This oppression usually comes in the form of a "freeze-out."⁹ The basis for such suits by minority shareholders is that majority shareholders have breached a fiduciary duty owed to the minority shareholders.¹⁰

This Note addresses the contrary issue of whether frozen-out minority shareholders owe a continuing fiduciary duty to majority shareholders based solely on the minority shareholders' retention of shares in the corporation. Only two decisions have squarely addressed this issue.¹¹ In *Rexford Rand Corp. v. Ancel*, the fiduciary duty was held to extend beyond a freeze-out, unless minority shareholders rid themselves of ownership of their shares.¹² In *J Bar H, Inc. v. Johnson*,¹³ the court concluded that the fiduciary duty ceased when a successful freeze-out was exacted upon minority shareholders, regardless of whether the frozen-out shareholders retained stock in the corporation.¹⁴

In an attempt to determine which approach to this issue is better, both cases will be analyzed through established legal principles applicable to close corporations, and some general common law principles. An overview of the characteristics of close corporations,¹⁵ the fiduciary duties owed in close corporations,¹⁶ and the elements of a freeze-out¹⁷ will also be discussed.

For whatever reasons, case law analyzing the fiduciary duty minority shareholders owe majority shareholders is sparse. However, the case law which

notes 93-103 and accompanying text for discussion regarding the extent of the catastrophic loss to minority shareholders.

5. O'Neal, *supra* note 3, at 121.

6. *See id.*

7. *See infra* notes 68-77 and accompanying text.

8. *See* O'Neal, *supra* note 3, at 122 ("[M]uch of corporate practice relating to shareholder disputes is not reflected in case decisions or statutes. Many disputes are settled and thus never appear in court decisions.").

9. *See infra* notes 93-103 and accompanying text.

10. *See* 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 7.03 (2d ed. 1993 & Supp. 1996) [hereinafter O'NEAL & THOMPSON, OPPRESSION].

11. *See* *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1220 (7th Cir. 1995) (noting that prior to that decision, "only one court ha[d] addressed the question of whether a freeze-out terminate[d] a shareholder's fiduciary duty to a close corporation" (citation omitted)).

12. *Id.* at 1220-21.

13. 822 P.2d 849, 862 (Wyo. 1991).

14. *Id.*

15. *See infra* notes 24-45 and accompanying text.

16. *See infra* notes 46-92 and accompanying text.

17. *See infra* notes 93-103 and accompanying text.

does address the minority shareholders' duty leads to the conclusion that, absent an ability to control the activities of a close corporation, a minority shareholder does not owe the same heightened fiduciary duty¹⁸ as that owed by majority shareholders in close corporations.¹⁹ Therefore, despite the *Rexford Rand* holding to the contrary, shareholder status alone should not give rise to fiduciary duties in close corporations. This Note will demonstrate that, absent an ability to control corporate activities, frozen-out minority shareholders should be charged with the same fiduciary duties owed by minority shareholders in public corporations.²⁰ Thus, as a matter of law, any heightened fiduciary duties owed by minority shareholders in close corporations should cease upon a freeze-out.

This Note will also demonstrate that the doctrine of "unclean hands,"²¹ and the fact that a fiduciary duty carries with it a duty not to compete against the corporation,²² makes application of the *Rexford Rand* decision impractical and contrary to deep-rooted principles of equity. Finally, this Note will demonstrate that the arguments set forth in the *Rexford Rand* decision in support of imposing a fiduciary duty based solely on stock ownership are impractical, and have an unwarranted oppressive effect on minority shareholders.²³

I. CHARACTERISTICS OF CLOSE CORPORATIONS

Close corporations can be clearly distinguished from publicly held corporations by the fact that shares in close corporations are not publicly traded.²⁴ In addition to the lack of a public market for the shares, there are several other characteristics that are generally associated with a close corporation.

A. Attributes of a Close Corporation

The typical attributes of a close corporation include:

(1) the shareholders are few in number, often only two or three; (2) they usually live in the same geographical area, know each other, and are well acquainted with each other's business skills; (3) all or most of the shareholders are active in the business, usually serving as directors or officers or as key participants in some managerial capacity; and (4) there is no established market for the corporate stock, the shares not being listed on a stock exchange or actively dealt in by brokers; little or no trading

18. See *infra* notes 59-92 and accompanying text.

19. See *infra* notes 55-58 and accompanying text.

20. See *infra* note 150 and accompanying text.

21. See *infra* notes 178-86 and accompanying text.

22. See *infra* notes 187-202 and accompanying text.

23. See *infra* notes 203-33 and accompanying text.

24. See Arthur D. Spratlin, Jr., Comment, *Modern Remedies for Oppression in the Closely Held Corporation*, 60 MISS. L.J. 405, 406-07 (1990) (noting that the illiquidity of minority shareholders' shares is one of the leading characteristics of a close corporation).

takes place in the shares.²⁵

A shareholder in a close corporation generally “considers himself or herself as a co-owner of the business and wants the privileges and powers that go with ownership.”²⁶ A close corporation often provides the principal or sole source of income for the shareholders.²⁷ In fact, “[p]roviding for employment may have been the principal reason why the shareholder participated in organizing the corporation.”²⁸ In some instances, a guarantee of employment may have been one of the basic reasons for becoming a shareholder.²⁹ Shareholders also expect an immediate return on their investment in the form of salaries as officers or employees of the corporation, even in the absence of dividends.³⁰

The shareholders are also subject to the ordinary risks of running a business. Because the shareholders in close corporations often share these normal business risks along with the decision-making functions of directors and/or employees, they have been referred to as “shareholder-managers.”³¹ Generally, there are two or three persons who make all of the policy decisions in a close corporation.³² As a result, the owners are dependent upon one another for the success of the corporation.³³

B. Similarity of Close Corporations to Partnerships

Close corporations have been analogized³⁴ and, for some purposes, judicially treated³⁵ as partnerships. The basis for the comparison is that the characteristics associated with close corporations are generally found in partnerships.³⁶ Corporate status is elected by the shareholders in order to “‘clothe’ their partnership ‘with the

25. 1 O’NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1.08, at 31.

26. *Id.*

27. *See id.*

28. *Id.* at 31-32.

29. *See Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 662 (Mass. 1976). *See also* O’Neal, *supra* note 3, at 127 (referring to this decision as “ground-breaking”).

30. *See* 1 O’NEAL & THOMPSON, CLOSE CORPORATIONS, *supra* note 2, § 1.08, at 32.

31. *Id.*

32. *See id.* at 33-34 (“A close corporation is usually dominated by two or three persons, often by a single individual, and the key managers generally make all policy decisions and even most of the decisions involved in the day-to-day operation of the business.”).

33. *See Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 512 (Mass. 1975).

34. *See id.*

35. *See generally* John R. Van Winkle & Gary R. Welsh, *Origin, Development, and Current Status of Fiduciary Duties in Close Corporations: Has Indiana Adopted a Strict Good Faith Standard?*, 26 IND. L. REV. 1215, 1219-1223 (1993) (discussing the application of partnership principles to close corporations); *but see* Brent Nicholson, *The Fiduciary Duty of Close Corporation Shareholders: A Call for Legislation*, 30 AM. BUS. L.J. 513, 530-32 (1992) (noting problems with the partnership analogy).

36. *See Donahue*, 328 N.E.2d at 512 (“[T]he close corporation bears striking resemblance to a partnership.”).

benefits peculiar to a corporation, limited liability, perpetuity and the like.”³⁷ When a close corporation is formed, the shareholders often consider themselves partners,³⁸ but treat the enterprise as a corporation when dealing with others.³⁹ Flowing from this analogy to partnerships, courts have imposed a fiduciary duty upon shareholders in close corporations similar to the duty general partners owe to each other.⁴⁰

However, some recent criticism has arisen as to the scope and applicability of the partnership analogy.⁴¹ Specifically, “[i]t is unclear how far the partnership analogy extends in close corporation law.”⁴² This lack of clarity occurs because

[b]y failing to complete the partnership analogy, courts subject close corporation shareholders to a guessing game of which partnership attributes will be imputed and which will not. There is little indication that courts have considered these issues. It appears they have borrowed a usable tool to formulate an attractive and popular result without regard for the implications.⁴³

Therefore, the partnership analogy, when not fully analyzed by a court applying it, may be dangerous, particularly when used selectively.⁴⁴ Nonetheless, despite the uncertainty of the partnership analogy in some circumstances, as a whole, the analogy is still widely recognized.⁴⁵

II. NATURE OF THE FIDUCIARY DUTY

Officers, directors, and majority shareholders in public corporations⁴⁶ owe

37. *Id.* (quoting *In re Approved Bus. Mach. Co.*, 286 N.Y.S.2d 580, 581 (N.Y. Sup. Ct. 1967)).

38. See 1 O’NEAL & THOMPSON, *CLOSE CORPORATIONS*, *supra* note 2, § 1.08, at 31 (“[B]usiness participants forming a close corporation not uncommonly consider themselves partners as to each other. They adopt the corporate form of business to obtain limited liability or some other real or fancied corporate advantage; they may think of their business as a corporation in its dealings with outsiders, but among themselves they are still ‘partners.’”).

39. See *id.*

40. See Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and its Impact upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 426-27 (1990).

41. See generally Nicholson, *supra* note 35, at 530-32 (arguing that the partnership analogy is deficient in certain applications).

42. *Id.* at 530.

43. *Id.* at 531.

44. See *id.* at 532.

45. See 2 O’NEAL & THOMPSON, *OPPRESSION*, *supra* note 10, § 7.03, at 13 (“In decisions relating to [close] corporations, courts frequently analogize the duties of directors and shareholders to those of partners in a partnership.”) (footnote omitted).

46. For purposes of this Note, the term, public corporations, refers to all corporations which are not close corporations.

fiduciary duties in certain circumstances.⁴⁷ In close corporations, for the reasons set forth below, majority shareholders have been held to a “heightened fiduciary duty”⁴⁸ that imposes a greater burden on them than their counterparts in public corporations.

A. *Trust, Confidence, Absolute Loyalty*

It is commonly held that shareholders in a close corporation have upheld their heightened fiduciary duty if they have behaved toward one another with the utmost good faith and loyalty.⁴⁹ Professor Lawrence E. Mitchell has defined and characterized the intricacies of a fiduciary relationship as:

[A] relationship of power and dependency in which the dependent party relies upon the power holder to conduct some aspect of a dependent’s life over which the power holder has been given and accepted responsibility. The dependent, for a variety of reasons, has limited (or had limited to her) control over one or more aspects of her personal or economic life. The power holder is charged with assuming the power abdicated by (or not granted to) the dependent in the manner she deems will best fulfill her responsibility. The power holder has, in some sense, voluntarily undertaken the responsibilities with which she has been charged. The dependent’s reliance upon the power holder or, not quite conversely, the power holder’s service as a surrogate for the dependent, characterizes the fiduciary relationship.⁵⁰

In exercising this power, the power holder must act in the dependent’s best interest.⁵¹ In the close corporation setting, the majority shareholder is the power holder, and the minority shareholder the dependent. When the power holder and the dependent share ownership interests in the property around which the relationship exists, such as majority and minority shareholders in close corporations, the ability of the power holder to exercise judgment independent of personal interests is strained.⁵²

Despite these strained interests, in the context of close corporations:

Stockholders . . . must discharge their management and stockholder responsibilities in conformity with [a] strict good faith standard. They

47. See *infra* notes 55-92 and accompanying text for discussion concerning the scope and applicability of these duties.

48. See 2 O’NEAL & THOMPSON, *OPPRESSION*, *supra* note 10, § 7.03, at 13 (“[C]ourts have held those in control of a closely held corporation . . . to a very strict standard of fiduciary obligation.”). Throughout this Note, “heightened fiduciary duty” will be used to refer to this strict fiduciary duty imposed on controlling shareholders in close corporations.

49. See *Donahue v. Rodd Electrottype Co.*, 328 N.E.2d 505, 515 (Mass. 1975).

50. Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1684 (1990) (citations omitted).

51. See *id.* at 1685-86.

52. See *id.* at 1687.

may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation. . . . [C]ontrast this strict good faith standard with the somewhat less stringent standard of fiduciary duty to which directors and stockholders of all corporations must adhere in the discharge of their corporate responsibilities.⁵³

The heightened fiduciary duty in close corporations has been extended not only to management, officers and directors, but also to shareholders *who are able to control* the corporation's activities.⁵⁴ As the following two sections will show, the circumstances in which fiduciary duties are imposed upon minority and majority shareholders differ. This difference depends upon an ability to exercise control over corporate activities.

B. Majority's Duty to the Minority is Clearly Defined

Majority stockholders, by virtue of the fact that they own at least a majority of the shares in a corporation, maintain a position of control over the corporation. When majority shareholders exercise that control, they stand in a fiduciary relationship with the corporation and the minority shareholders.⁵⁵ In *Donahue v. Rodd Electrotype Co.*, the leading case on this issue, the court held that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another."⁵⁶ Professor F. Hodge O'Neal noted:

53. *Donahue*, 328 N.E.2d at 515-16 (emphasis added). See also J.A.C. Hetherington, *The Minority's Duty of Loyalty in Close Corporations*, 1972 DUKE L.J. 921, 922 n.4 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928)) ("The classic expression of the duty of loyalty among co-adventurers is Judge Cardozo's comment: 'Not honesty alone, but the punctilio of an honor the most sensitive, is . . . the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.'"); Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 4 BUS. LAW. 699, 728 (1992) ("Differences as to the scope and meaning of the fiduciary duties under a *Donahue* standard do not detract from its widespread acceptance.").

54. See *Donahue*, 328 N.E.2d at 515 n.17 ("We do not limit our holding to majority stockholders. In the close corporation, the minority may do equal damage through unscrupulous and improper 'sharp dealings' with an unsuspecting majority.") (citation omitted); See also 3 WILLIAM M. FLETCHER, *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 844.20, at 219 (1994 & Supp. 1996) ("[C]lose corporation shareholders, as such, stand in fiduciary relationship to each other."); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 661 (Mass. 1976) (quoting *Donahue*, 328 N.E.2d at 515) (reaffirming the *Donahue* decision, that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another."); *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1218 (7th Cir. 1995) ("[A] shareholder in a close corporation owes a duty of loyalty to the corporation and to the other shareholders.").

55. See 12B FLETCHER, *supra* note 54, § 5811, at 155 ("[Majority stockholders] sustain a fiduciary relation to the holders of the minority stock and the corporation.").

56. *Donahue*, 328 N.E.2d at 515.

In the corporate setting, the inquiry into fiduciary obligation has produced general agreement that directors and officers stand in a fiduciary relationship to the corporation. . . . There is also a growing recognition that *controlling* shareholders stand in a fiduciary relationship to the corporation and to minority shareholders. . . . [C]ourts require controlling shareholders to exercise their powers in good faith and in a way that does not oppress the minority.⁵⁷

These sources lead to the conclusion that majority shareholders in a close corporation owe a heightened fiduciary duty to the corporation, and to the other shareholders in the corporation. This conclusion is the rule in most jurisdictions.⁵⁸

C. *Scope of Minority's Duty is Unclear*

1. *Minority Shareholders Owe a Fiduciary Duty When Able to Exercise Control Over Corporate Activities.*—A fiduciary duty is sometimes imposed on minority shareholders towards majority shareholders, and to a corporation, when minority shareholders are able to exercise a degree of control over a corporation's activities.⁵⁹ Because majority shareholders' fiduciary duties are imposed as a safeguard against abuse of the control inherent in the stockholders' positions as the majority, when minority shareholders are able to exercise similar control, a fiduciary duty is likewise imposed. Professor J.A.C. Hetherington, in a widely cited article, noted:

A shareholder who himself has some ulterior purpose in view may exercise his rights as an owner of stock in a way which is, and is intended to be, detrimental to the business interests of the corporation or the other shareholders. However, an adverse interest becomes important only when the shareholder's vote determines the outcome of a corporate issue. When the vote of any shareholder is decisive on any question, he is to that extent in control of the corporation. . . . *As soon as the minority has a degree of control over corporate decision making, however, the question arises as to whether it should not also be subject to a duty of loyalty comparable to that routinely borne by the majority and controlling shareholders.*⁶⁰

Professor Hetherington noted further that "the policies underlying the fiduciary responsibilities imposed on those who have control should be applicable to any

57. 2 O'NEAL & THOMPSON, *OPPRESSION*, *supra* note 10, § 7.03, at 11 (footnotes omitted) (emphasis added).

58. See L. Clark Hicks, Jr., Comment, *Corporations--Fiduciary Duty--In a Close Corporation, a Majority Shareholder Owes a Fiduciary Duty Towards the Minority When Seeking a Controlling Share*, 60 MISS. L.J. 425, 435 (1990) ("Most jurisdictions now follow the rule that controlling and majority shareholders owe a fiduciary duty to the minority shareholder, particularly in the context of a close corporation.") (citations omitted).

59. See 2 O'NEAL & THOMPSON, *OPPRESSION*, *supra* note 10, § 7.03, at 11.

60. Hetherington, *supra* note 53, at 934-35 (emphasis added).

shareholder whose vote or other conduct as a shareholder is in fact controlling in a particular situation.”⁶¹ To further support Professor Hetherington’s proposition, Professor Mitchell stated that the imposition of a fiduciary duty is a substitute for control.⁶² Therefore, absent an ability to control corporate activities, no heightened fiduciary duty arises.

Control can be invested in the minority by veto power,⁶³ by their positions as managers and directors, or in any other situation in which the minority shareholders can exercise such power over the majority.⁶⁴ Situations can arise in which, individually, minority shareholders do not possess the requisite control necessary to result in imposition of a fiduciary duty, but collectively, a group of minority shareholders form a “control group”⁶⁵ and, therefore, have a fiduciary duty imposed. Further, through “unscrupulous and improper ‘sharp dealings,’” the minority can be held to owe a fiduciary duty to the majority.⁶⁶ However, unlike majority shareholders, who by virtue of their status as the majority necessarily exert control any time they engage in corporate activities, minority shareholders owe this fiduciary duty only in certain circumstances.⁶⁷

2. *Absent an Ability to Control Corporate Activities, a Minority Shareholder Should Not Owe a Heightened Fiduciary Duty.*—Whether a minority shareholder, who possesses no control over the corporation, owes a fiduciary duty to the majority, is not clearly defined in the law. There appears to be no case law, or treatise, which *directly* states that minority shareholders in a close corporation do not owe a heightened fiduciary duty to the corporation and the other shareholders unless they exercise control over the corporation’s activities. Rather, there are several cases, whose holdings or dicta lead to this conclusion.

The statement in *Rexford Rand* that “minority shareholders owe a duty of

61. *Id.* at 946.

62. *See Mitchell, supra* note 50, at 1729.

63. *See Smith v. Atlantic Properties, Inc.*, 422 N.E.2d 798, 802 (Mass. App. Ct. 1981) (minority stockholder exerted control by means of a veto provision).

64. *See Hetherington, supra* note 53, at 946.

65. In a recent Massachusetts case, the issue arose whether two minority shareholders who were not involved in the management or operations of a corporation owed a fiduciary duty to the corporation or another minority shareholder. *Demoulas v. Demoulas Super Mkts., Inc.*, 677 N.E.2d 159 (Mass. 1997). In *Demoulas*, the trial court held that the minority shareholders accused of breaching a fiduciary duty towards the majority comprised a “control group” which had enough control over the corporation to result in imposition of a fiduciary duty. *Demoulas v. Demoulas Super Mkts., Civ. A. No. 90-2927(B)*, 1995 WL 476772, at *80 (Mass. Super. Ct. Aug. 2, 1995), *amended and remanded*, 677 N.E.2d 159 (Mass. 1997). The court then defined a “control group” as “a group of persons who act in concert to exercise a controlling influence over the management or policies of a business organization pursuant to an arrangement or understanding with each other.” *Id.* at *81 (citing ALI, *PRINCIPLES OF CORPORATE GOVERNANCE* § 1.09 (1994)).

66. *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 515 n.17 (Mass. 1975) (citation omitted) (the fiduciary duty was not limited only to the majority, because minority shareholders could do damage to unsuspecting majority shareholders).

67. *See Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1219 (7th Cir. 1995).

loyalty to a close corporation *in certain circumstances*,"⁶⁸ implies that in other circumstances there is no such duty of loyalty. In a close corporation context, "[t]he relationship between stockholders . . . is not always a fiduciary one."⁶⁹ Although case law regarding the minority shareholders' fiduciary duty owed to a majority is limited, those cases that have dealt with the issue have almost uniformly tied the fiduciary duty of the minority shareholders to an ability to control some aspect of the corporation's activities.⁷⁰

The most widely cited example⁷¹ of this relationship is *Smith v. Atlantic Properties, Inc.*⁷² In *Smith*, a minority shareholder⁷³ in a close corporation possessed the ability to veto actions denied by the remaining shareholders. The court held that this level of control over the corporation's actions had "substantially the effect of reversing the usual roles of the majority and the minority shareholders."⁷⁴ The veto provision provided the otherwise non-controlling shareholder with an "ad hoc controlling interest."⁷⁵ As a result, the minority shareholder owed a fiduciary duty to the majority, and his failure to use this veto power reasonably was a breach of his fiduciary duty.⁷⁶ The controlling interest provided by the veto provision was the basis for imposing the heightened fiduciary duty usually owed by majority shareholders in close corporations. Other cases addressing the same issue have reached the same conclusion.⁷⁷

68. *Id.* at 1219 (emphasis added). See *infra* notes 118-32 for overview of the facts and holding of the *Rexford Rand* decision.

69. Schoellkopf v. Pledger, 739 S.W.2d 914, 920 (Tex. App. 1987), *rev'd on other grounds*, 762 S.W.2d 145 (Tex. 1988) (per curiam) (footnote omitted).

70. See *e.g.*, *Ellis & Marshall Assoc. v. Marshall*, 306 N.E.2d 712 (Ill. App. Ct. 1973). No fiduciary duty was imposed on a resigned 35% shareholder in a close corporation who retained his shares after resigning and competing with his former employer. The decision was based on the fact that by resigning his posts as an officer and director of the corporation, the shareholder had no duty not to compete; the decision did not even allude to any fiduciary duty owed solely as a result of being a shareholder. See *id.* at 716-17.

71. See Mitchell, *supra* note 50, at 1699 ("A good starting point for analyzing the recent jurisprudence of fiduciary duty in the close corporation context is the famous Massachusetts trilogy . . . [which includes] *Smith v. Atlantic Properties, Inc.*").

72. 422 N.E.2d 798 (Mass. App. Ct. 1981).

73. The minority shareholder at issue owned 25% of the close corporation. *Id.* at 799.

74. *Id.* at 802.

75. *Id.*

76. See *id.* at 803.

77. See *Baylor v. Jordan*, 445 So. 2d 254, 256 (Ala. 1984) (recognizing that two *equal* shareholders, who possess *equal* bargaining power do not, based solely on their status as shareholders, owe each other a fiduciary duty); *Zimmerman v. Bogoff*, 524 N.E.2d 849 (Mass. 1988) (a 50% shareholder owed a fiduciary duty due to his ability to control the corporation's finances); *Johns v. Caldwell*, 601 S.W.2d 37, 41-42 (Tenn. Ct. App. 1980). The decision contrasts the fiduciary relationships owed by directors, officers, and majority shareholders with those of minority shareholders, noting that there was no authority submitted to the court "stating that a minority stockholder stands in a fiduciary relationship to a majority stockholder" in a close

Other case law, in dicta, has noted that a fiduciary duty is only owed when a minority shareholder possesses some level of control over the corporation's activities. In *Cain v. Cain*,⁷⁸ a 50% shareholder in a close corporation, who was an officer and director, breached his fiduciary duty by establishing a competing business.⁷⁹ The *Cain* decision specifically noted that a determination of fiduciary duties of controlling shareholders did not relate to the issue of whether uninvolved minority shareholders owed fiduciary duties in similar circumstances.⁸⁰ In *Demoulas v. Demoulas Super Markets, Inc.*,⁸¹ it was recognized that "minority shareholders who exercise some form of control over the corporation to the detriment of the majority shareholders owe fiduciary duties to the corporation."⁸² Implied in the statements that shareholders who exercised control owe fiduciary duties, is the conclusion that minority shareholders who do not exercise control do not owe the heightened fiduciary duties normally owed by majority shareholders in close corporations. Otherwise, the courts' analysis in the aforementioned decisions would have been moot, and they need only have stated that as a matter of law all shareholders in close corporations owe fiduciary duties to each other.

Further, in addressing the scope of the heightened fiduciary duties owed in close corporations, the U.S. Supreme Court has defined the scope of the duty in terms of those shareholders who are in a controlling or majority position. In *United States v. Byrum*⁸³ the Supreme Court stated that "[t]he obligation of the majority or of the dominant group of shareholders acting for, or through, the corporation is fiduciary in nature."⁸⁴ In *Southern Pacific Co. v. Bogert*,⁸⁵ the Court stated the general rationale underlying the rule of fiduciary duties in the corporate context:

[T]he doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustee for the

corporation. *Id.* at 42. Therefore, because the selling of stock by a minority shareholder was not a corporate function, a minority shareholder did not owe a fellow shareholder a fiduciary duty when selling his stock. *Id.*; *Kaspar v. Thorne*, 755 S.W.2d 151, 155 (Tex. App. 1988, no writ) (holding that non-controlling shareholders in a close corporation, as a matter of law, do not owe a fiduciary duty to the other shareholders); *Schoellkopf v. Pledger*, 739 S.W.2d 914, 920 (Tex. App. 1987), *rev'd on other grounds*, 762 S.W.2d 145 (Tex. 1988) (per curiam) (holding that although a fiduciary duty may exist in some circumstances, it does not apply as a matter of law to all shareholders of a close corporation).

78. 334 N.E.2d 650 (Mass. App. Ct. 1975).

79. *Id.* at 655, 656 n.1.

80. *Id.* ("We are not here concerned with a minority stockholder not involved in management.").

81. Civ. A. No. 90-2927(B), 1995 WL 476772 (Mass. Super. Ct., Aug. 2, 1995), *amended and remanded*, 677 N.E.2d 159 (Mass. 1997).

82. *Id.* at *80.

83. 408 U.S. 125 (1972).

84. *Id.* at 138 n.11 (quoting 13 OHIO JUR. 2D, *Corporations* § 662, at 90-91).

85. 250 U.S. 483 (1919).

minority does not rest upon . . . technical distinctions. It is the fact of *control* of the common property held and exercised, not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation.⁸⁶

Finally, because the vast majority of cases deal with the majority shareholders' duties to oppressed minority shareholders, case law is often worded in broadly sweeping language to the effect that all shareholders in a close corporation owe a fiduciary duty to each other. Many cases take their lead in this regard from the *Donahue v. Rodd Electrotpe Co.*⁸⁷ decision, which stated that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another."⁸⁸ Too often, this statement is read without reference to two essential footnotes. Footnote seventeen of the *Donahue* decision notes that the court did not limit its holding to majority stockholders because minority shareholders can "do equal damage through unscrupulous and improper 'sharp dealings' with an unsuspecting majority."⁸⁹ In footnote eighteen, the court in *Donahue* stressed that the strict fiduciary duty they applied to stockholders in a close corporation "*governs only their actions relative to the operations of the enterprise and the effects of that operation on the rights and investments of other stockholders.*"⁹⁰ Read together, these footnotes stand for the proposition that only when minority shareholders have the ability to control the actions of a corporation, based on their status as shareholders, do they owe a heightened fiduciary duty to the corporation and the other shareholders. When majority shareholders' actions are being scrutinized for possible oppression, the ability to control the activities of the corporation is a "given" and rarely acknowledged in a court's discussion regarding the reason for imposing a fiduciary duty upon majority shareholders. However, in cases addressing whether a minority shareholder owes a fiduciary duty to majority shareholders, most courts base their decisions on whether the minority shareholder has control over the corporation's activities.

These authorities clearly suggest that, absent an ability to control the activities of a close corporation, minority shareholders do not owe the same heightened fiduciary duty⁹¹ imposed on controlling shareholders in close corporations. However, when exercising control over corporate activities based on their status as shareholders, minority shareholders owe to the corporation and the other shareholders a heightened fiduciary duty equivalent to that imposed on majority shareholders in close corporations.⁹²

86. *Id.* at 492 (emphasis added).

87. 328 N.E.2d 505 (Mass. 1975).

88. *Id.* at 515.

89. *Id.* at 515 n.17 (citation omitted).

90. *Id.* at 515 n.18 (emphasis added).

91. *See supra* notes 48-54 and accompanying text.

92. *See supra* notes 55-58 and accompanying text.

III. "FREEZE-OUT" DEFINED

The very nature of the minority shareholder's lack of control over the corporation makes the minority vulnerable to the majority.⁹³ Although the corporate form provides the shareholders in a corporation with limited liability and other benefits, "it also supplies an opportunity for the majority stockholders to oppress or disadvantage minority stockholders."⁹⁴ This oppression or disadvantage is generally manifested by the majority "freezing-out" the minority shareholders.

Professor O'Neal set forth the generally accepted definition:⁹⁵

By the term "freeze-out" is meant the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants.⁹⁶

The effect of a "freeze-out" on a minority shareholder can be "catastrophic":⁹⁷

He may be deprived of any effective voice in the making of business decisions. Not only that, he may be locked out of the company's premises; and the majority participants may be able to withhold from him information on the affairs of the business and on policies being adopted and decisions being made. . . . Quite commonly when a participant invests in a close corporation he expects to work in the business on a full-time basis. He may put practically everything he owns into the business and expect to support himself from the salary he receives as a key employee of the company. Whenever a shareholder is deprived of employment by the corporation (as he frequently is in these squeeze-

93. See *Donahue*, 328 N.E.2d at 513 ("The minority is vulnerable to a variety of oppressive devices termed 'freeze outs' which the majority may employ.").

94. *Id.*

95. Although there are other definitions of "freeze-out," Professor O'Neal's is frequently referred to in cases. See *Murdock*, *supra* note 40, at 425 n.4 ("Freeze-out' . . . denote[s] the situation in which a minority shareholder retains his or her interest but is deprived either of employment or of dividends such that he or she is unable to realize any return on the investment in the close corporation."). See also *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1217 n.3 (7th Cir. 1995) (quoting *Fleming v. International Pizza Supply Corp.*, 640 N.E.2d 1077, 1080 n.4 (Ind. Ct. App. 1994), *vacated*, 676 N.E.2d 1051 (Ind. 1997) (citation omitted)):

The term "freeze-out" refers to "the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the enterprise or reduce their voting power or claims on corporate assets to relative insignificance. A freeze-out implies a purpose to force upon the minority shareholder a change which is not incident to any other corporate business goal."

Finally, in the context of this issue, "squeeze-out" is synonymous with "freeze-out."

96. 1 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 1.01.

97. *Id.* § 1.03.

plays) he may be in effect deprived of his principal means of livelihood. A shareholder may also find that his investment in the enterprise has become practically valueless.⁹⁸

Some common methods of exacting a “freeze-out” upon minority shareholders are the withholding of dividends,⁹⁹ draining off the corporation’s earnings,¹⁰⁰ depriving minority shareholders of corporate offices and employment,¹⁰¹ organizing a new corporation with the old corporation’s assets, leaving the minority with shares in an assetless corporation,¹⁰² and bringing about a merger unfair to minority shareholders.¹⁰³ All of these techniques are possible due to the control majority shareholders possess over the minority shareholders and the corporation.

IV. CASES AT ISSUE

A. *J Bar H, Inc. v. Johnson*

In *J Bar H, Inc. v. Johnson*,¹⁰⁴ the Wyoming Supreme Court addressed, for the first time in any reported case in the United States,¹⁰⁵ the issue of whether a freeze-out exacted upon minority shareholders terminates any heightened fiduciary duties minority shareholders owe to a close corporation. In *J Bar H, Johnson*, a minority shareholder,¹⁰⁶ and two other shareholders who constituted a majority,¹⁰⁷ owned a game processing company. The active majority shareholder¹⁰⁸ was the

98. *Id.*

99. *See* O’Neal, *supra* note 3, at 125.

100. *See id.* (This can occur by a majority shareholder paying “[e]xorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, high rentals for property the corporation leases from majority shareholders, and unreasonable payments to majority shareholders under contracts between the corporation and majority shareholders or companies the majority shareholders own. . .”).

101. *See id.*

102. *See id.*

103. *See id.*

104. 822 P.2d 849 (Wyo. 1991).

105. *See* *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1220 (7th Cir. 1995) (“Our research indicates that only one court [referring to the Wyoming Supreme Court in *J Bar H, Inc. v. Johnson*] has addressed the question of whether a freeze-out terminates a shareholder’s fiduciary duty to a close corporation.”).

106. *J Bar H*, 822 P.2d at 859-60 (although not technically a “minority shareholder” due to 50% ownership of the close corporation’s shares, the defendant 50% shareholder was deemed to be a “minority shareholder” due to “the restrictions placed on sale of her shares, and her lack of business acumen relative to that of [the other two shareholders, who between them owned the remaining 50%]”).

107. *Id.*

108. Although the case does not directly address the issue, the facts indicate that one of the majority shareholders was not active in corporate activities.

president and treasurer of the corporation, and the minority shareholder was the vice president and secretary. Managerial duties were apportioned between the minority shareholder and the active majority shareholder.

Within the first two years of operation, financial troubles arose and caused conflict between the minority shareholder and the active majority shareholder. The active majority shareholder began to “squeeze-out” the minority shareholder from managerial control by exercising “unilateral control of the day-to-day business. . . .”¹⁰⁹ These efforts culminated in the termination of the minority shareholder from her employment with the corporation, as well as leaving her with “no active role or operational responsibilities within the corporation.”¹¹⁰ The active majority shareholder claimed the authority to make these decisions by virtue of his position as president of the corporation.

One year later, “frustrated at her lack of control over J Bar H,” the minority shareholder set up her own business competing in the same market as J Bar H and solicited business from former J Bar H customers.¹¹¹ J Bar H then filed suit against the minority shareholder for damages and injunctive relief. While the suit was pending, the minority shareholder participated in a J Bar H board of directors meeting, which resulted in deadlocks on all issues of importance.

The trial court held that the minority shareholder breached her fiduciary duty to the corporation, but because the active majority shareholder caused the breach, no damages were awarded.¹¹² The Supreme Court of Wyoming, on review, held that the majority shareholders violated their fiduciary duties to the minority shareholder “when they performed a classic ‘squeeze-out. . . .’”¹¹³ The court framed its analysis in the context of whether the “squeeze-out” had any bearing on the minority shareholder’s fiduciary duty to the corporation.¹¹⁴ The decision noted that:

[T]he fiduciary duty not to compete depends on the ability to exercise the status which creates it. It is not stretching this principle too far to hold that where a shareholder/director/employee of a close corporation has been wrongfully terminated from employment with the corporation and has been unjustly prevented from fulfilling her function as a director or officer, she can no longer be considered to act in a fiduciary capacity for the corporation.¹¹⁵

The court then treated the minority shareholder as if she had resigned her offices in the corporation when she was shut out of the exercise of them.¹¹⁶ Based on that analysis, the *J Bar H* court held that the fiduciary duty owed by minority

109. *J. Bar H*, 822 P.2d at 853.

110. *Id.*

111. *Id.* at 854.

112. *Id.*

113. *Id.* at 859.

114. *Id.* at 860.

115. *Id.* at 861.

116. *Id.*

shareholders in close corporations is relieved upon a successful “squeeze-out” by majority shareholders.¹¹⁷

B. Rexford Rand Corp. v. Ancel

In *Rexford Rand Corp. v. Ancel*,¹¹⁸ the majority shareholders in a close corporation sued a minority shareholder who, prior to the suit, had been frozen-out¹¹⁹ of the corporation. The basis of the suit was that the minority shareholder, by reserving the corporation’s trade names, had breached a fiduciary duty. The minority shareholder was fired from his positions as vice president, treasurer, and employee of the corporation in 1991. The corporation had never paid a dividend to its shareholders. In 1993, Rexford Rand Corp. neglected to file its annual report, which caused the corporation to be administratively dissolved. The minority shareholder discovered this fact, reserved the names the corporation had been using, and secured a corporate charter in the name of “Rexford Rand Corporation.”¹²⁰ These actions prohibited Rexford Rand Corp. from operating under its original name, thereby causing the business significant economic impairment.¹²¹

The trial court ordered the return of the name to the corporation and permanently enjoined the minority shareholder from conducting business under the names previously held by Rexford Rand Corporation.¹²² Upon review, the court in *Rexford Rand* noted that:

[M]inority shareholders owe a duty of loyalty to a close corporation in certain circumstances. Minority shareholders have an obligation as de facto partners in the joint venture not to do damage to the corporate interests. If a minority shareholders [sic] harms the corporation through “unscrupulous and improper ‘sharp dealings’” with the majority, he has breached his duty of loyalty.¹²³

The court did not believe that the holding in *J Bar H, Inc. v. Johnson*¹²⁴ achieved the “optimal result.”¹²⁵ Moreover, even if the minority shareholder was frozen-out

117. *Id.*

118. 58 F.3d 1215 (7th Cir. 1995).

119. *Id.* at 1221 n.13. The *Rexford Rand* court proceeded under the premise that the minority shareholder had been frozen-out of the corporation, although a suit was pending at the time of this decision on that issue.

120. *Id.* at 1217.

121. *Id.* at 1218 n.5 (one of the majority shareholders testified that the business would be economically impaired by 80%).

122. *Id.* at 1217.

123. *Id.* at 1219 (quoting *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 515 n.17 (Mass. 1975) (other citations omitted)).

124. 822 P.2d 849 (Wyo. 1991).

125. *Rexford Rand*, 58 F.3d at 1220.

of the corporation, the minority shareholder did not have a right to appropriate the corporate name in an attempt to gain a favorable settlement with the corporation.¹²⁶ The decision linked the heightened fiduciary duty owed by the controlling or majority shareholders¹²⁷ with stock ownership.¹²⁸

Unless frozen-out minority shareholders seek a judicial dissolution of the corporation¹²⁹ or otherwise rid themselves of stock ownership, the *Rexford Rand* decision imposes a heightened fiduciary duty upon shareholders, regardless of their involvement in or ability to control corporate activities.¹³⁰ The court then noted that if, like the minority shareholder in *Rexford Rand*, “shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase.”¹³¹ The Seventh Circuit, thus, ultimately affirmed the lower court’s decision against the minority shareholder.¹³²

IV. REASONS FOR NOT IMPOSING A FIDUCIARY DUTY AFTER A FREEZE-OUT

A. A Fiduciary Duty Depends on the Ability to Exercise the Status Which Creates It: Control

1. *Absent an Ability to Control, No Fiduciary Duty Arises.*—The *J Bar H* court based its decision not to impose a fiduciary duty upon a frozen-out minority shareholder upon the analysis that the “fiduciary duty . . . depends on the ability to exercise the status which creates it.”¹³³ This conclusion was reached after a review of prior case law dealing with fiduciary duties owed by minority shareholders in close corporations and is supported for two reasons.¹³⁴ First, the conclusion of the *J Bar H* court, and of other sources to be reviewed in this section, is an extension of the concept that the ability to exercise control over the activities of a corporation is the reason for imposing a fiduciary duty on a shareholder. Second, an analysis of the characteristics of a close corporation also leads to the conclusion that, absent any control over the corporation, there should not be a fiduciary duty imposed on a shareholder.

The court in *Donahue v. Rodd Electrotpe Co.* stated that a characteristic of

126. *Id.* at 1221.

127. *See supra* notes 55-58 and accompanying text.

128. *Rexford Rand*, 58 F.3d at 1220 (“The freeze-out did not deprive [the minority shareholder] of his status as a shareholder . . . and as a shareholder in a close corporation, [the minority shareholder] should have placed the interests of the corporation above his personal interests.”).

129. *See id.* at 1221 (“[A]ggrieved parties should take their claims to court and seek judicial resolution.”).

130. *See id.* at 1220-21.

131. *Id.* at 1221.

132. *Id.*

133. *See J Bar H, Inc. v. Johnson*, 822 P.2d 849, 861 (Wyo. 1991).

134. *See id.* at 860-61.

a close corporation is that “ownership and management are in the same hands.”¹³⁵ Out of this arrangement, a fiduciary duty similar to a partnership is imposed on the participants.¹³⁶ The origin of the fiduciary duty owed in a partnership is the “entrustment to the partners of substantial control over the interests of their co-partners.”¹³⁷ Therefore, when a partner has withdrawn from the partnership and no longer has an ability to control the partnership’s activities, as long as the withdrawing partner retains no economic interest in the partnership, the withdrawing partner no longer owes a fiduciary duty to the partnership.¹³⁸

A significant difference between a partnership and a close corporation is that “[i]n a partnership, a member of the firm can withdraw his share of the firm’s capital and earnings at any time by exercising his right to dissolve the partnership,”¹³⁹ whereas frozen-out shareholders in close corporations generally have no readily accessible market for their shares,¹⁴⁰ and are usually only able to sell their shares to the very people who forced them to withdraw from active participation in the corporation.¹⁴¹ Professor O’Neal stated,

An important cause of dissension in close corporations is the difficulty an unhappy minority shareholder has in disposing of his interest. Usually the only prospective purchasers of a minority interest in a close corporation are the other shareholders of the corporation, which of course is under the control of the other shareholders. If the other shareholders refuse to buy or offer only a token purchase price, the unhappy shareholder is “locked” into the corporation.¹⁴²

The *Rexford Rand* court makes dangerous use of the partnership analogy¹⁴³ by failing to consider the aforementioned issues¹⁴⁴ in concluding that shareholder

135. 328 N.E.2d 505, 511 (Mass. 1975).

136. *See id.* at 512.

137. 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP § 6.07, at 6:73 (1994 & Supp. 1995). *See also id.* at 6:71, for reinforcement of the proposition that a fiduciary duty arises from an ability to control the enterprise: “[T]he duties of a general partner in a limited partnership have been held to be somewhat more intense than those of a general partner in a general partnership, because the limited partners do not directly participate in management.” (emphasis added).

138. *See* J. WILLIAM CALLISON, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 12.09, at 12-23 (1992 & Supp. 1993).

139. 1 O’NEAL & THOMPSON, OPPRESSION, *supra* note 10, at § 2.15.

140. *See id.* § 2.15 (noting that there is not a readily accessible market for minority shareholders’ shares).

141. *See id.* (“Often the only prospective buyer of a minority interest in a close corporation is the majority shareholder.”).

142. O’Neal, *supra*, note 3, at 123.

143. *See* Nicholson, *supra* note 35, at 535 (“The use of the partnership analogy is dangerous because it is incomplete and deceptive.”).

144. *See supra* notes 137-41 and accompanying text.

status, standing alone, creates a fiduciary duty owed by minority shareholders in close corporations. In *Rexford Rand, Hagshenas v. Gaylord*¹⁴⁵ is cited as authority for the proposition that “a shareholder in a close corporation owes a duty of loyalty to the corporation and to the other shareholders.”¹⁴⁶ The court in *Rexford Rand*, however, did not analyze the reason for imposing these heightened fiduciary duties in the same manner as did the court in *Hagshenas*. In *Hagshenas*, despite imposing a fiduciary duty on a 50% shareholder, the duty was not imposed solely because of the shareholder’s stock ownership. The court in *Hagshenas* stated:

We are not persuaded that [the 50% shareholder’s] resignation as an officer and director relieved him of his fiduciary duty. We recognize that, after his resignation, [the 50% shareholder] was not involved in sales, management, or other [corporate] day-to-day operations. By maintaining his 50% ownership interest, however, [the 50% shareholder] retained significant *control over [the corporation]*. . . . He did not purport to *give up this control when he resigned*.¹⁴⁷

The clear implication of these statements is that had the shareholder, upon resigning, given up the ability to control corporate activities, the heightened fiduciary duty that attaches to controlling or majority shareholders would cease to apply to the shareholder. The *Rexford Rand* court appears to have “borrowed a suitable tool to formulate an attractive . . . result without regard for the implications.”¹⁴⁸ Thus, as the *J Bar H* court concludes, absent an ability to control the corporation, the reason for imposing a fiduciary duty is not present, and no heightened fiduciary duty is imposed on frozen-out minority shareholders.¹⁴⁹

2. *Minority Shareholder Status, Without More, Should Not Result in a Fiduciary Duty.*—At issue is whether frozen-out minority shareholders with no ability to exert control over a corporation’s activities should have a continuing fiduciary duty to the corporation just because they own shares in the corporation. Does shareholder status, standing alone, create a level of control in a close corporation such that a heightened fiduciary duty should be imposed on frozen-out minority shareholders? Ordinarily, in public corporations, shareholder status alone does not result in imposition of such a duty.¹⁵⁰ One exception to this rule occurs when a majority or controlling shareholder in a publicly held corporation

145. 557 N.E.2d 316 (Ill. App. Ct. 1990).

146. *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1218 (7th Cir. 1995) (citing *Hagshenas*, 557 N.E.2d at 316).

147. *Hagshenas*, 557 N.E.2d at 323 (emphasis added).

148. Nicholson, *supra* note 35, at 531 (footnotes omitted).

149. *J Bar H, Inc. v. Johnson*, 822 P.2d 849, 861 (Wyo. 1991).

150. *See Mairs v. Madden*, 30 N.E.2d 242, 244 (Mass. 1940) (“Mere ownership of stock does not create a fiduciary relation between the stockholders.”). *See also* 12B FLETCHER, *supra* note 54, § 5811, at 155 (“A stockholder, even though he owns a majority of the stock, does not occupy a trust relation towards the other stockholders *merely* because of his holding of such stock. . . .”) (emphasis added).

“exercises actual control and direction over corporate management.”¹⁵¹ A fiduciary duty is also imposed on a majority shareholder in certain other circumstances,¹⁵² such as “when exercising the corporate right to redeem shares,”¹⁵³ and when a majority stockholder dominates control of a majority of the board of directors.¹⁵⁴

This duty “arises from the exercise of power with respect to the corporation, so that it is only when a person affirmatively undertakes to dictate the destiny of the corporation that he assumes such a fiduciary duty.”¹⁵⁵ In publicly held corporations, even a minority shareholder can be deemed to owe a fiduciary duty, under certain circumstances.¹⁵⁶ When minority shareholders in a publicly held corporation exert some control over the corporation, they can be held to owe a fiduciary duty to the corporation arising out of their ability to control corporate activities.¹⁵⁷

Why, then, should frozen-out minority shareholders who have essentially valueless stock, stock that has no public market, have a greater fiduciary duty than non-controlling stockholders of publicly traded companies? They should not. Because the frozen-out minority shareholders have no control over the corporation and because the shareholders’ ability to control corporate actions is the basis for imposition of a fiduciary duty in any corporation, no such heightened duty should exist. Frozen-out minority shareholders should be treated as though they were non-controlling shareholders in a public corporation, who, unless exerting control over corporate activities do not owe a fiduciary duty to the corporation or to the other shareholders.

The *J Bar H*¹⁵⁸ decision that a fiduciary duty “depends on the ability to exercise the status which creates it,”¹⁵⁹ correctly recognizes that when a shareholder loses control over the corporation, the control over the enterprise that was the original basis for imposing a fiduciary duty no longer exists. Shareholder status in public corporations, without more, does not result in imposition of a fiduciary duty. Therefore, frozen-out minority shareholders should not owe fiduciary duties to the venture they have been frozen-out of, and should be treated as if they were non-controlling shareholders in a publicly held corporation.

151. 18A AM. JUR. 2D *Corporations* § 732, at 601-02 (1985 & Supp. 1996). See also 12B FLETCHER, *supra* note 54, § 5811, at 156 (“If a shareholder exercises absolute de facto control over a corporation, such actual dominion carries with it fiduciary responsibility regardless of the presence or absence of de jure titles.”).

152. See 12B FLETCHER, *supra* note 54, § 5811, at 155.

153. *Id.*

154. See *id.*

155. 18A AM. JUR. 2D *Corporations* § 732, at 602 n.53 (citation omitted).

156. See 12B FLETCHER, *supra* note 54, § 5811, at 156.

157. See *id.*

158. *J Bar H, Inc. v. Johnson*, 822 P.2d 849, 861 (Wyo. 1991).

159. *Id.*

B. In Other Relationships Which Result in Imposition of a Fiduciary Duty, Relinquishment or Termination of the Relationship Terminates the Duty; Why Should Frozen-Out Shareholders of a Close Corporation Be Treated Differently?

The *J Bar H* and *Rexford Rand* decisions treat the relinquishment of corporate directorships, offices, and employment in the close corporation setting differently. The *J Bar H* court treats the frozen-out minority shareholder as a resigned officer and director of the corporation.¹⁶⁰ As a former director and officer, the frozen-out minority shareholder was relieved of her fiduciary duties to the corporation.¹⁶¹ Unlike *J Bar H*, the court in *Rexford Rand*¹⁶² concludes that unless frozen-out minority shareholders rid themselves of stock ownership, obtain a judicial buy-out of their shares, or obtain a judicial dissolution of the corporation, the fiduciary duty will continue indefinitely.¹⁶³ According to the *Rexford Rand* decision, this is the case whether or not the relinquishment of director and officer duties was a result of a freeze-out.¹⁶⁴ Despite the differing analysis in *J Bar H* and *Rexford Rand*, it is indisputable that in both cases the minority shareholders no longer held, for whatever reason, a corporate office, directorship, or position of employment with the corporation at issue in each case. In all other comparable situations, absent an express agreement to the contrary,¹⁶⁵ a fiduciary relationship ceases when the relationship which created it is terminated.¹⁶⁶

A corporate officer owes a fiduciary duty to the corporation and to the shareholders.¹⁶⁷ "When a corporate officer ceases to act as such, either because of his or her resignation or removal from office, or because of the insolvency of the corporation, the fiduciary relationship ceases."¹⁶⁸ This is also the case in close corporations in which officers have been relieved of their positions.¹⁶⁹ Similarly, a corporate director owes a fiduciary duty to the corporation and to the shareholders.¹⁷⁰ When a corporate director no longer retains that role, the fiduciary

160. *Id.* at 859.

161. *See id.*

162. *See supra* notes 118-32 and accompanying text.

163. *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1221 (7th Cir. 1995).

164. *Id.* at 1221 n.13 (noting that imposition of a continuing fiduciary duty did not require a determination of whether the minority shareholder's loss of employment, directorship, and officer status was a result of a freeze-out).

165. For example, a non-compete agreement would be an express agreement to the contrary.

166. *See infra* notes 167-77 and accompanying text.

167. *See generally* 18B AM. JUR. 2D *Corporations* §§ 1689-1694 (1985 & Supp. 1997) (discussing fiduciary duties owed by directors, officers, and employees).

168. 3 FLETCHER, *supra* note 54, § 860, at 275.

169. *See Voss Eng'g, Inc. v. Voss Indus.*, 481 N.E.2d 63 (Ill. App. Ct. 1985) (holding that resigned corporate officer in a close corporation no longer owed a fiduciary duty to the corporation).

170. 3 FLETCHER, *supra* note 54, § 837.60, at 198. *Also see generally*, Walter R. Hinnant, *Fiduciary Duties of Directors: How Far Do They Go?*, 23 WAKE FOREST L. REV. 163 (1988).

relationship is terminated.¹⁷¹ This is also the case in close corporations.¹⁷² This proposition receives further support from agency law. In an agency relationship the agent owes a fiduciary duty to the principal;¹⁷³ when the agency relationship is terminated, so is the fiduciary duty.¹⁷⁴

Finally, when a partnership is dissolved, the fiduciary relationship that existed up to the point of dissolution ceases.¹⁷⁵ When partners end their relationship, and there is an agreed upon financial settlement of partnership affairs, the fiduciary duties continue with respect to partnership assets and opportunities that were in place prior to dissolution, but the fiduciary duty is not applicable to new opportunities arising after dissolution.¹⁷⁶ As for a withdrawing partner, the fiduciary relationship owed to the partnership does not exist unless the withdrawing partner has a remaining economic interest in the partnership.¹⁷⁷

Why then, should a heightened fiduciary duty be imposed on frozen-out minority shareholders long after they have ceased acting in a controlling capacity for the corporation? It should not. Like all other comparable relationships, when frozen-out minority shareholders lose their positions of control within a corporation, their heightened fiduciary duty to the corporation should cease.

C. The Doctrine of "Unclean Hands" Should Bar Judicial Relief for Majority Shareholders Guilty of Freezing-Out Minority Shareholders

The doctrine of "unclean hands" prevents a litigant from obtaining relief by a court of equity "on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue."¹⁷⁸ In particular:

It means that whenever a party who seeks to set the judicial

171. See 3 FLETCHER, *supra* note 54, § 837.60, at 198.

172. See *supra* note 169 (Resigned corporate directors in close corporations no longer owe fiduciary duties to the corporation.).

173. See RESTATEMENT (SECOND) OF AGENCY § 13 (1957).

174. See *id.* § 393.

175. See 2 BROMBERG & RIBSTEIN, *supra* note 137, § 7.12, at 7:111 ("In general, partners in a dissolved firm may compete with their former co-partners as long as they account for any appropriation of the goodwill of the dissolved partnership, and as long as the competition does not breach an express or implied noncompetition agreement.").

176. See CALLISON, *supra* note 138, § 12.11, at 12-23. See also REVISED UNIFORM PARTNERSHIP ACT § 603, cmt. 2 (Sections 603(b)(2) and (3) "clarify a partner's fiduciary duties upon dissociation. *No change from current law is intended.* With respect to the duty of loyalty, the . . . duty not to compete terminates upon dissociation, and the dissociated partner is free immediately to engage in a competitive business, without any further consent.") (emphasis added).

177. See CALLISON, *supra* note 138, § 12.11, at 12-23 ("Within limits, a partner may compete with the partnership after he or she has withdrawn from the partnership. However, a partner may not solicit partnership existing clients before he or she leaves the partnership.").

178. 27 AM. JUR. 2D *Equity* § 136, at 667 (1966 & Supp. 1995).

machinery in motion and obtain some equitable remedy has violated conscience or good faith, or other equitable principles in his prior conduct with reference to the subject in issue, the door of equity will be shut against him notwithstanding the defendant's conduct has been such that in the absence of circumstances supporting the application of the maxim, equity might have awarded relief.¹⁷⁹

This doctrine is recognized in every state in the United States,¹⁸⁰ and in the District of Columbia.¹⁸¹ This principle appears applicable if the *Rexford Rand* result of imposing continuing fiduciary duties upon frozen-out minority shareholders solely due to their non-controlling ownership of corporate stock is followed. Such being the case, the frozen-out minority shareholders would have a fiduciary duty to

179. 27 *id.* § 137, at 670.

180. See *Foy v. Foy*, 447 So. 2d 158, 162 (Ala. 1984); *Wilson v. Brown*, 897 S.W.2d 546, 549 (Ark. 1995); *Knaebel v. Knaebel*, 663 P.2d 551, 554 (Alaska 1983); *Manning v. Reilly*, 408 P.2d 414, 418 (Ariz. Ct. App. 1965); *General Elec. Co. v. Alameda Superior Court*, 291 P.2d 945, 947 (Cal. 1955); *Collens v. New Canaan Water Co.*, 234 A.2d 825, 833 (Conn. 1967); *Bodley v. Jones*, 59 A.2d 463, 469 (Del. 1947); *Losey v. State*, 28 So. 2d 604, 605 (Fla. 1947); *Dixon v. Murphy*, 385 S.E.2d 408, 409 n.2 (Ga. 1989); *Shinn v. Edwin Yee, Ltd.*, 553 P.2d 733, 743 (Haw. 1976); *Gilbert v. Nampa Sch. Dist. No. 131*, 657 P.2d 1, 9 (Idaho 1983); *Mills v. Susanka*, 68 N.E.2d 904, 906 (Ill. 1946); *Traylor v. By-Pass 46 Steak House, Inc.*, 285 N.E.2d 820, 822 (Ind. 1972); *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 81 (Iowa 1984); *Goben v. Barry*, 676 P.2d 90, 97 (Kan. 1984); *Eline Realty Co. v. Foeman*, 252 S.W.2d 15, 19 (Ky. Ct. App. 1952); *Rhodes v. Miller*, 179 So. 430 (La. 1938); *Hamm v. Hamm*, 584 A.2d 59, 61 (Me. 1990); *Adams v. Manown*, 615 A.2d 611, 617 (Md. 1992); *Amerada Hess Corp. v. Garabedian*, 617 N.E.2d 630, 634 (Mass. 1993); *Stachnick v. Winkel*, 230 N.W.2d 529, 532 (Mich. 1975); *Fred O. Watson Co. v. United States Life Ins. Co.*, 258 N.W.2d 776, 778 (Minn. 1977); *O'Neill v. O'Neill*, 551 So. 2d 228, 232 (Miss. 1989); *Durwood v. H.W. Dubinsky*, 361 S.W.2d 779, 791 (Mo. 1962); *In re Marriage of Lawrence*, 642 P.2d 1043, 1049 (Mont. 1982); *Marr v. Marr*, 515 N.W.2d 118, 120 (Neb. 1994); *Tracy v. Capozzi*, 642 P.2d 591, 593 (Nev. 1982); *Noddin v. Noddin*, 455 A.2d 1051, 1053 (N.H. 1983); *Faustin v. Lewis*, 427 A.2d 1105, 1107 (N.J. 1981); *Home Sav. & Loan Ass'n v. W.C. Bates*, 417 P.2d 798, 799 (N.M. 1966); *Seagirt Realty Corp. v. Chazanof*, 196 N.E.2d 254, 255 (N.Y. 1963); *Ray v. Norris*, 337 S.E.2d 137, 141 (N.C. Ct. App. 1985); *Jacobsen v. Pedersen*, 190 N.W.2d 1, 4 (N.D. 1971); *Goldberger v. Bexley Properties*, 448 N.E.2d 1380, 1383 (Ohio 1983); *Grim v. Cheatwood*, 257 P.2d 1049, 1051 (Okla. 1953); *North Pac. Lumber Co. v. Oliver*, 596 P.2d 931, 937 (Or. 1979); *In re Estate of Pedrick*, 482 A.2d 215, 222 (Pa. 1984); *School Comm. of Pawtucket v. Pawtucket Teachers Alliance*, 221 A.2d 806, 815 (R.I. 1966); *Arnold v. City of Spartanburg*, 23 S.E.2d 735, 738 (S.C. 1943); *Miller v. County of Davison*, 452 N.W.2d 119, 121 (S.D. 1990); *Omohundro v. Matthews*, 341 S.W.2d 401, 410 (Tex. 1960); *Nielsen v. MFT Leasing*, 656 P.2d 454, 456 (Utah 1982); *Cook v. Cook*, 76 A.2d 593, 597 (Vt. 1950), *rev'd on other grounds*, 342 U.S. 126 (1951); *Brown v. Kittle*, 303 S.E.2d 864, 867 (Va. 1983); *R.C. McKelvie v. Hackney*, 360 P.2d 746, 752 (Wash. 1961); *Gardner v. Gardner*, 110 S.E.2d 495, 502 (W. Va. 1959); *S & M Rotogravure Serv., Inc. v. Baer*, 252 N.W.2d 913, 918-19 (Wis. 1977); *Harsha v. Anastos*, 693 P.2d 760, 762 (Wyo. 1985).

181. See *Ross v. Fierro*, 659 A.2d 234, 240 (D.C. 1995).

breach.

The doctrine of “unclean hands” has been applied in cases involving fiduciary duty issues that involved close corporations in which majority shareholders attempted to invoke the defense against breach of fiduciary duty allegations made by minority shareholders.¹⁸² When the doctrine is applied, it is imperative that a plaintiff seeking relief “shall have acted fairly and without fraud or deceit *as to the controversy in issue.*”¹⁸³

Despite the fact that the *Rexford Rand* decision determined that it was irrelevant whether the minority shareholder in that case had been frozen-out,¹⁸⁴ the doctrine of “unclean hands” clearly would have operated as a bar to any relief that the majority shareholders claimed they were entitled to as a result of the minority shareholders breach of fiduciary duty. Both claims arose from the same “controversy in issue,”¹⁸⁵ a breach of fiduciary duty. Therefore, in *Rexford Rand*, had the minority shareholder been allowed to prove that he was first frozen-out of the corporation, the “unclean hands” doctrine should have barred the majority shareholders from claiming that the minority shareholder subsequently breached his fiduciary duty to the corporation. Court decisions¹⁸⁶ clearly support the proposition that the “unclean hands” doctrine should bar relief in all breach-of-fiduciary-duty cases brought by majority shareholders against minority shareholders who, prior to the alleged breach by minority shareholders, were frozen-out of the corporation.

182. See *American Family Care, Inc. v. Irwin*, 571 So. 2d 1053, 1058 (Ala. 1990) (“[M]isconduct of an officer/director of a corporation is relevant to a claim for breach of fiduciary duty and is relevant to establish a defense of unclean hands.”); *Knaebel v. Heiner*, 663 P.2d 551, 554 (Alaska 1983) (“Unclean hands” doctrine applicable if, on remand, evidence showed that the minority shareholder made an illegal loan to himself.); *Jaffe Commercial Fin. Co. v. Harris*, 456 N.E.2d 224, 228 (Ill. App. Ct. 1983) (Minority shareholder did not defraud the corporation nor the majority shareholders; therefore, the “unclean hands” doctrine was inapplicable.); *W & W Equip. Co. v. Mink*, 568 N.E.2d 564, 576 (Ind. Ct. App. 1991) (“Unclean hands” doctrine would have been allowable, although not applicable based on the facts, as a defense for majority shareholders against a “freeze-out” claim by a minority shareholder.); *Burack v. Burack, Inc.*, 524 N.Y.S.2d 457, 460 (N.Y. App. Div. 1988) (Regarding application of the “unclean hands” doctrine: “[W]hen a minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complaint of oppression should relief be barred.”); *Gunzberg v. Art-Lloyd Metal Prod. Corp.*, 492 N.Y.S.2d 83, 85 (N.Y. App. Div. 1985) (“Only when a ‘minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression’ should relief be barred [by the “unclean hands” doctrine].”) (citation omitted).

183. *Knaebel*, 663 P.2d at 554 (emphasis added).

184. *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1221 n.13 (7th Cir. 1995).

185. *Knaebel*, 663 P.2d at 554.

186. See *supra* notes 180-85 and accompanying text.

D. To Impose a Continuing Fiduciary Duty Upon a Frozen-out Minority Shareholder Amounts to Imposition of a Life-Long Non-Compete Agreement

One who owes a fiduciary duty to a corporation cannot compete with the corporation.¹⁸⁷ Because the *Rexford Rand* decision ties a fiduciary duty to the ownership of shares,¹⁸⁸ until shareholders get rid of their shares, they owe a continuing fiduciary duty. The result of the *Rexford Rand* decision is that frozen-out minority shareholders owe a continuing fiduciary duty unless they voluntarily sell their shares, or receive assistance from the courts and obtain a forced buyout.¹⁸⁹ Therefore, unlike any other situation,¹⁹⁰ frozen-out shareholders have a continuing obligation not to compete against corporations which terminated their employment, and most likely their primary source of income.¹⁹¹

The cumulative effect of the *Rexford Rand* decision places minority shareholders in the position of deciding whether to engage in litigation which would judicially relieve them of the fiduciary duty,¹⁹² or deciding not to engage in the litigation and foregoing the ability to work in what was likely their profession prior to and during their involvement with the corporation¹⁹³ from which they were frozen out. If the former decision is made, the fiduciary duty would last as long as the case would take to go to trial or settle. In either event, this represents a great uncertainty as far as time is concerned. If the latter decision is made, the fiduciary duty is apparently owed for the remainder of a minority shareholder's life, unless they are able to sell the shares, which, at best, is a difficult, and likely unprofitable undertaking.¹⁹⁴ Either result is unjust,¹⁹⁵ and is not supported by a

187. See generally David J. Gass, *Departing Directors, Officers and Employees and the Limits of Their Fiduciary Duties*, 72 MICH. B. J. 650 (1993) (discussing the effect of fiduciary duties on the ability of departing directors, officers and employees to compete with their former employers).

188. *Rexford Rand*, 58 F.3d at 1220 ("The freeze-out did not deprive [the minority shareholder] of his status as a shareholder . . . and as a shareholder in a close corporation, [the minority shareholder] should have placed the interests of the corporation above his personal interests.").

189. *Id.* at 1220-21 ("[C]ourts will occasionally order forced buyouts as a remedy for oppression. . . [the frozen-out minority shareholder] should have relied on his suit . . . seeking damages or dissolution of the corporation.").

190. See *supra* notes 160-77 and accompanying text (noting that neither a terminated employee, officer or director of a corporation, nor a withdrawn partner owes a continuing fiduciary duty, in the absence of an express or implied covenant not to compete).

191. See 1 O'NEAL & THOMPSON, *CLOSE CORPORATIONS*, *supra* note 2, § 1.08 (a close corporation often provides the principal or sole source of income for the shareholders)

192. See *infra* notes 211-21 and accompanying text for discussion regarding the financial burden such litigation places on the frozen-out minority shareholder.

193. See O'Neal, *supra* note 3, at 123 (Typically, a minority shareholder has "developed skill in the particular type of business operated by the corporation.").

194. See *infra* notes 211-21 and accompanying text.

195. See 2 O'NEAL & THOMPSON, *OPPRESSION*, *supra* note 10, § 7.13 ("Fiduciary duty and

long standing public policy against imposing non-compete agreements in restraint of trade upon individuals.¹⁹⁶

Although covenants in restraint of trade are not completely barred, the terms of such an agreement must be reasonable,¹⁹⁷ and as such, cannot “limit competition in any business or restrict the promisor in the exercise of a gainful occupation.”¹⁹⁸ To make a non-compete agreement reasonable, the agreement must be limited by the type of activity, the geographical area, and by time.¹⁹⁹ Only one of these three requirements need be absent in an agreement in order for the entire agreement to be deemed unreasonable.²⁰⁰ If, as the *Rexford Rand* decision would have it, shareholders in close corporations, solely because of their status as stockholders, owe a continuing fiduciary duty to the corporation, the fiduciary duty could be life-long.

Imposing a continuing fiduciary duty based only on the ownership of stock in a close corporation places an unreasonable restriction²⁰¹ upon a minority shareholder’s ability to earn a living. The court in *J Bar H* held that mere stock ownership in a close corporation by frozen-out minority shareholders does not result in a continuing fiduciary duty such that the frozen-out minority shareholders could not compete with the corporation. Contrary to the *Rexford Rand* decision,²⁰² the result of the *J Bar H* decision is consistent with the long standing public policy against unreasonable restraint of trade.

VI. REASONS FOR CONTINUING THE FIDUCIARY DUTY OWED TO MAJORITY SHAREHOLDERS BY FROZEN-OUT MINORITY SHAREHOLDERS

The *Rexford Rand* decision has two primary reasons²⁰³ for not holding that minority shareholders’ fiduciary duties terminate when they are frozen-out of a close corporation. The first argument is that minority shareholders have a judicial remedy for breach of fiduciary duty available as a means of obtaining relief in the nature of a forced buyout of stock, and that until this remedy is sought, or minority shareholders otherwise rid themselves of share ownership, the fiduciary duty owed

fairness are necessarily fluid concepts.”).

196. See *Oregon Steam Navigation Co. v. Winsor*, 87 U.S. 64, 68 (1873) (“The general rule is that there must be no ‘injury to the public by being deprived of the restricted party’s industry,’ and that the party himself must not be precluded from pursuing this occupation and thus prevented from supporting himself and his family.”).

197. See RESTATEMENT (SECOND) OF CONTRACTS § 186(1) (1981) (“A promise is unenforceable on the grounds of public policy if it is unreasonably in restraint of trade.”).

198. *Id.* § 186(2).

199. See *id.* § 188 cmt. d.

200. See *id.*

201. See *id.* There are no temporal limitations on this restriction. Therefore, it is unreasonable.

202. *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1220 (7th Cir. 1995) (stating that it does “not believe that *J Bar H* achieves the optimal result”).

203. *Id.* at 1220-21.

to the corporation continues.²⁰⁴ The second argument is that minority shareholders who engage in “sharp dealings”²⁰⁵ breach their fiduciary duty to the corporation. The first argument can result in great unfairness²⁰⁶ to the minority shareholder, and the second argument appears to be a misapplication of the law. Neither argument results in a judicially efficient or equitable remedy to this issue.

A. Frozen-Out Minority Shareholders Should Seek a Judicial Remedy

The *Rexford Rand* court held that frozen-out minority shareholders owe a continuing fiduciary duty to a corporation until they relieve themselves of their shares.²⁰⁷ Unless the minority shareholders are satisfied with damages without release of their stock ownership, which would still result in a continued fiduciary duty to the corporation according to the *Rexford Rand* decision,²⁰⁸ then they must voluntarily sell, or have a judicial buy-out rid them of their shares.²⁰⁹ As indicated previously in this Note,²¹⁰ the effect of retaining the shares after the freeze-out, according to the *Rexford Rand* decision, would result in a lifelong obligation not to compete with the corporation. However, the judicial remedies available to frozen-out minority shareholders often are not worth the costs and risks the shareholder must assume.

“[T]he path a dissident shareholder must tread to secure rights is strewn with financial and legal hardship of such magnitude few find it worth the effort.”²¹¹ Minority shareholders, who did not have the bargaining power or worth at the formation of the corporation to become majority shareholders, must battle majority shareholders and the corporation. The minority shareholders will likely not be able to match the resources employed by the majority shareholders, and thus may be forced to settle, or cease prosecuting entirely, due solely to financial considerations. Even if minority shareholders are able to overcome such tactics, the remedies available to them are often inadequate.

The original remedy available to a frozen-out minority shareholder was dissolution of the corporation. However, “corporate dissolution has been judicially viewed as a drastic remedy. . . .”²¹² Because of court’s general hesitation to order dissolution, three alternative remedies have evolved: “(1) direct judicial

204. *See id.*

205. *Id.* at 1219 (quoting *Donahue v. Rodd Electrotyping Co.*, 328 N.E.2d 505, 515 n.17 (Mass. 1975)).

206. *See supra* note 123 and accompanying text.

207. *Rexford Rand*, 58 F.3d at 1220.

208. *See supra* notes 129-31 and accompanying text.

209. *Rexford Rand*, 58 F.3d at 1221 (“[I]f unable to resolve matters amicably, aggrieved parties should take their claims to court and seek judicial resolution.”).

210. *See supra* notes 187-202 and accompanying text.

211. 2 O’NEAL & THOMPSON, *OPPRESSION*, *supra* note 10, § 7.01 (quoting A.A. Sommer, Jr., Commissioner, Securities and Exchange Commission, Law Advisory Council, Address, University of Notre Dame School of Law (Nov. 14, 1974)).

212. Murdock, *supra* note 40, at 426.

action, generally by way of injunction, e.g., mandating the declaration of dividends; (2) appointment of a provisional director or custodian; or (3) a judicially ordered buy-out of the minority at a fair price."²¹³ In relation to the *Rexford Rand* decision, only the remedies of dissolution and the judicially ordered buy-out of the minority at a fair price would relieve minority shareholders of their fiduciary duty to the corporation. Also, these two options generally provide the only permanent solution to the problem.²¹⁴

"The cases in which courts refer to dissolution or liquidation as a drastic remedy, if not legion, are certainly numerous."²¹⁵ Therefore, if pursuing a dissolution, minority shareholders face an uphill battle. "Often a court will expressly choose a buyout over dissolution as a less harsh remedy."²¹⁶ A buyout requires a judicial determination of fair value of the shares subject to the buyout.²¹⁷ Such a determination is not easy. "Invariably, the parties are far apart in their respective views of the value of the business. Often, the 'experts' are equally far apart."²¹⁸ Also, the valuation method is essentially conservative²¹⁹ and is not an "exact science."²²⁰ Further, "[a]nticipating the buyout of a minority shareholder, majority shareholders and the directors and officers they control may manipulate a corporation's financial records to show no or little book value of assets and low or no earnings."²²¹ The cumulative effect of these considerations is that frozen-out minority shareholders face a great deal of uncertainty when they decide to attempt to obtain a judicial buy-out of their stock, or a dissolution of the corporation.

The *J Bar H* decision does not require that frozen-out minority shareholders relinquish their stocks in order to rid themselves of a fiduciary duty. Instead, frozen-out minority shareholders are treated as former directors and officers of the corporation, and as such, as a matter of law, they owe no fiduciary duty to the corporation.²²² This provides frozen-out minority shareholders with a choice of either pursuing any of the available remedies,²²³ or holding the shares until they become valuable.²²⁴ Either decision can be made without regard to any concern

213. *Id.* at 427-28.

214. *See id.* at 428 ("[T]he only permanent resolution to the problem would be to eliminate the complaining minority interest. . .").

215. *Id.* at 440.

216. 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.20.

217. *See id.* § 7.21, at 113. *See generally* Murdock, *supra* note 40 (detailing the various remedies available to minority shareholders, as well as specific methods of evaluating stock).

218. Murdock, *supra* note 40, at 471.

219. *Id.*

220. *Id.* at 472. *See generally* Michael R. Schwenk, Note, *Valuation Problems In The Appraisal Remedy*, 16 CARDOZO L. REV. 649 (1994).

221. 2 O'NEAL & THOMPSON, OPPRESSION, *supra* note 10, § 7.21.

222. *J Bar H, Inc. v. Johnson*, 822 P.2d 849, 861 (Wyo. 1991).

223. *See supra* notes 213-21 and accompanying text.

224. *See* Murdock, *supra*, note 40, at 447 ("There are circumstances . . . in which the minority does not want to 'go out,' at least at the price which is in prospect. . . [I]f the business is one that might be attractive to a third party buyer, and if conditions are such that the majority might be

over fiduciary duties owed to the corporation. Instead, minority shareholders could base their decision solely on what best serves their financial interest. Further, this result also relieves minority shareholders who have bought into a corporation solely for investment purposes of any fiduciary duties solely due to their share ownership.

The *J Bar H* decision appears to be more equitable than the *Rexford Rand* decision. The former decision allows frozen-out minority shareholders to essentially “wash their hands” of the corporation and continue earning a livelihood, without being forced to relieve themselves of their shares. The latter decision requires frozen-out shareholders to go through an expensive, time consuming ordeal in order to rid themselves of a fiduciary duty, at the end of which they may not obtain a fair value for their investment.

As an additional argument in favor of requiring that frozen-out minority shareholders obtain judicial relief, the *Rexford Rand* decision notes that: “If shareholders take it upon themselves to retaliate any time they believe they have been frozen out, disputes in close corporations will only increase.”²²⁵ This argument lends support to the proposition that upon minority shareholders’ termination of employment and control over a corporation’s actions, like those in other relationships,²²⁶ the fiduciary duty should immediately cease as a matter of law. This would be the most effective means of stopping litigation and conflicts in these situations, not that of requiring frozen-out minority shareholders to engage the judicial system in order to obtain relief.

B. Sharp Dealings by Minority Shareholders

The *Rexford Rand* decision recognizes the established rule that if minority shareholders engage in “unscrupulous and improper ‘sharp dealings’”²²⁷ with the majority, they have breached their fiduciary duty.²²⁸ There is little doubt that by obtaining the corporation’s trade names the minority shareholder in *Rexford Rand* engaged in unscrupulous activities that would do damage to the corporation.²²⁹ However, assuming that the application of the “sharp dealings” doctrine was correct in the *Rexford Rand* case, the court did not limit its holding to that doctrine.

The *Rexford Rand* court chose not to hold that *because* of the shareholder’s sharp dealings a continuing fiduciary duty was imposed. Instead, solely because of his status as a shareholder, the frozen-out minority shareholder owed a broad fiduciary duty, the imposition of which did not relate to the shareholder’s ability

interested in a subsequent sale, the minority might prefer to ‘wait it out’ rather than be forced to convert its interest currently to cash.”).

225. *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1221 (7th Cir. 1995).

226. *See supra* notes 160-77 and accompanying text.

227. *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 515 n.17 (Mass. 1975).

228. *Rexford Rand*, 58 F.3d at 1219.

229. *Id.* at 1218 n.5 (“[T]he value of the business would be economically impaired by ‘80 percent’ . . .”).

to exercise control over the corporation through unscrupulous and improper "sharp dealings."²³⁰ As such, the *Rexford Rand* decision did not limit the imposition of a fiduciary duty to minority shareholders who engaged in "sharp dealings," but instead imposed a much broader duty which exceeded the scope necessary in order to come to the conclusion that there was a breach of fiduciary duty.

Further, the actions of the minority shareholder in *Rexford Rand* did not arise from his ownership of stock. This is significant in the application of the sharp-dealings doctrine because "[a] shareholder who himself has some ulterior purpose in view may exercise his rights as an owner of stock in a way which is, and is intended to be, detrimental to the business interests of the corporation of the other shareholders."²³¹ Although it is obvious that the minority shareholder's actions were a "troubling"²³² method of obtaining bargaining power, they were not illegal, nor were they tied to ownership of shares. Absent the court-imposed fiduciary duty, there appears to be nothing that could have stopped the minority shareholder from obtaining the names and requiring the corporation to buy the names from him, or face losing the right to the names completely. As a result, although the actions of the minority shareholder in *Rexford Rand* were certainly unscrupulous, they were not tied to the ownership of the stock, and should not have been within the purview of the "sharp dealings" doctrine set forth in *Donahue*.²³³

CONCLUSION

Fiduciary duties of controlling or majority shareholders in close corporations are heightened when compared to other business enterprises, with the exception of partnerships. The origin of a fiduciary duty in close corporations is based on an analogy with the fiduciary duty imposed in partnerships. The fiduciary duty imposed on partners in partnerships is based on the principal that each partner has an ability to control actions of the partnership. It follows that the same should hold true in close corporations; when shareholders lose their ability to exercise control over the corporation, much like a partner withdrawn from a partnership, the reason for imposition of the duty is no longer present, and the fiduciary duty should cease.

The *J Bar H* decision recognized this logical progression of fiduciary duty principles in close corporations, and held that, as a matter of law, when minority shareholders have been frozen-out of close corporations, any heightened fiduciary duties that minority shareholders owed prior to the freeze-out ceased.²³⁴ The *Rexford Rand* decision did not recognize these principles, and imposed upon frozen-out minority shareholders a fiduciary duty solely due to their status as shareholders.²³⁵ The *Rexford Rand* decision effectively ignored the doctrine of

230. *Id.* at 1220.

231. Hetherington, *supra* note 53, at 935.

232. *Rexford Rand*, 58 F.3d at 1220.

233. *Donahue v. Rodd Electrottype Co.*, 328 N.E.2d 505, 515 n.17 (Mass. 1975).

234. *See supra* notes 104-17 and accompanying text.

235. *See supra* notes 118-32 and accompanying text.

“unclean hands,” and imposed upon frozen-out minority shareholders what effectively amounted to a life-long bar against competing with their corporation. Further, despite the *Rexford Rand* court’s desire not to have additional claims in the judicial system,²³⁶ in order for frozen-out minority shareholders to rid themselves of the fiduciary duty owed to a corporation, they are required to either sell their shares to the corporation, which is likely to result in a significant loss to minority shareholders, or seek judicial intervention in the form of a buy-out or dissolution. Neither of these options provides the optimal result to this issue, and the latter will add claims to the judicial system.

The *J Bar H* decision clearly comes to the best result when considering whether a frozen-out minority shareholder owes a continuing fiduciary duty to the corporation and the remaining shareholders. The effect of the *J Bar H* decision is that frozen-out minority shareholders are treated the same as in other terminated relationships which involve fiduciary duties. Ultimately, frozen-out minority shareholders are treated the same as minority shareholders in public corporations. Therefore, once minority shareholders’ control over a corporation ceases as a result of a freeze-out, so to, as a matter of law, do the heightened fiduciary duties. This result cuts down on litigation expenses for the corporation, the shareholders, and the judicial system, and also provides a just mechanism with which to address this complex issue.

236. *Rexford Rand*, 58 F.3d at 1221.

