COMMENTS

THE POWER PARADOX: THE NEED FOR ALTERNATIVE REMEDIES IN VIRGINIA MINORITY SHAREHOLDER OPPRESSION CASES

INTRODUCTION

Without advanced planning, minority shareholders in a closely held corporation can find themselves in the unenviable position of being up a creek without a paddle. Minority shareholders often invest in a corporation with the belief that the investment will provide them with a steady stream of income, either from a job or from payment of dividends.[1] Yet many fail to protect themselves with employment contracts or buy-sell agreements,[2] leaving them vulnerable to a majority shareholder who may decide to fire them or withhold dividends.[3] Without a source of income, a minority shareholder can face an indefinite period when there is no return on his or her investment.[4]

To address this problem, many states, including Virginia, have enacted some form of the Model Business Corporation Act (the "MBCA").[5] The MBCA allows for involuntary dissolution of a cor-

1. *See* Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993).

2. *See* Michael K. Molitor, *Eat Your Vegetables (Or At Least Understand Why You Should): Can Better Warning and Education of Prospective Minority Owners Reduce Oppression in Closely Held Businesses?*, 14 FORDHAM J. CORP. & FIN. L. 491, 495–96 (2009).

3. Thompson, *supra* note 1, at 703.

4. *Id.*

5. Harry Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as A Remedy For Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 33 n.31 (1987). In order to adopt the MBCA, most states name their respective statute according to the model language of section 1.01 of the MBCA which states: "This Act shall be known and may be cited as the '[name of state] Business Corporation Act." MODEL BUS. CORP. ACT § 1.01 (2007); *see, e.g.*, VA. CODE ANN. § 13.1-601 (Repl. Vol. 2011 & Cum. Supp. 2014) (noting that Virginia chose the language "Virginia Stock Corporation Act"). Specific provisions within Vir-

poration in certain circumstances.[6] Dissolution, however, is considered a drastic remedy as it requires the corporation to enter into receivership and eventually be sold off.[7] Because of this, courts are often hesitant to order dissolution except in cases of continued and egregious oppression. To address this problem, courts and legislatures in other jurisdictions have allowed equitable remedies, such as buy-outs or the appointment of a provisional director, in cases of minority shareholder oppression.[8]

Although courts in other states have interpreted the MBCA's oppression provision as allowing equitable remedies,[9] the Supreme Court of Virginia has ruled that Virginia's oppression statutory scheme provides only for the exclusive remedy of dissolution.[10] Accordingly, it is up to the General Assembly to add equi-

ginia's corporation legislation likewise appear identical or very similar. *Compare* MODEL BUS. CORP. ACT § 14.30(a)(2)(ii) (2007) (the MBCA's oppression subsection within its overall dissolution provision), *with* VA. CODE ANN. § 13.1-747(A)(1)(b) (Repl. Vol. 2011 & Cum. Supp. 2013) (Virginia's oppression subsection within its overall dissolution provision).

6. MODEL BUS. CORP. ACT § 14.30 (2007). Those circumstances include:

> [(1) where] the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; [(2)] the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent; [(3)] the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired.

Id.

7. *See, e.g.*, Colgate v. Disthene Group, Inc., 85 Va. Cir. 286, 317 (2012) (Buckingham County); Scott v. Trans-System, Inc., 64 P.3d 1, 9–10 (Wash. 2003); *Drastic Times Call for Drastic Measures: A Fairfax County Judge Orders Judicial Dissolution in the Face of Minority Shareholder Oppression*, RICH. B. ASS'N (Sept. 2012), http://www.richmondbar.org/wp-content/uploads/2013/07/business_law_tip_September_2012.pdf [hereinafter *Drastic Times*].

8. *See, e.g.*, Sauer v. Moffitt, 363 N.W.2d 269, 274–75 (Iowa Ct. App. 1984); *Scott*, 64 P.3d at 10; *cf.* Fix v. Fix Material Co., 538 S.W.2d 351, 361 (Mo. Ct. App. 1976).

9. *See Scott*, 64 P.3d at 9; *Fix*, 538 S.W.2d at 357 n.3 (providing a detailed discussion of certain equitable remedies used in various jurisdictions).

10. Giannotti v. Hamway, 239 Va. 14, 28, 387 S.E.2d 725, 733 (1990); White v. Perkins, 213 Va. 129, 135, 189 S.E.2d 315, 320 (1972). The Supreme Court of Washington has interpreted the same statutory language, "a court . . . may dissolve a corporation," as allowing for equitable remedies up to and including dissolution. The Supreme Court of Virginia, on the other hand, has found the exact same language to only allow dissolution of a corporation and nothing more. *Compare Scott*, 64 P.3d at 9 (finding that alternative remedies are available in addition to dissolution), *with Giannoti*, 239 Va. at 28, 387 S.E.2d at 733 ("The remedy specified by the legislative while discretionary, is 'exclusive,' and does not permit the trial court to fashion other, apparently equitable remedies.").

table remedies to the current statutory scheme. The time has now come for the General Assembly to take this step and ensure that trial courts have the authority necessary to address instances of alleged oppression.

Additional remedies are necessary to allow Virginia trial courts to respond to the unique circumstances presented in each case. Without additional remedies, trial courts are left with the choice of dissolution or dismissal, a stark contrast that ignores the murkiness of oppression in some cases.[11] To remedy this problem, this comment includes proposed draft legislation modeled after Oregon's dissolution statute. This new statute will provide Virginia courts with the flexibility needed to respond to the facts and circumstances presented in each unique oppression case.

The proposed statute would add equitable remedies to Virginia's dissolution statute, allowing courts to order a wide range of non-exhaustive remedies including an accounting, damages, or the appointment of an individual as a provisional director. The proposed statute makes dissolution a last resort option that a court only considers after other remedies are deemed insufficient. Further, the statute allows forward-looking shareholders to opt-out of most of the equitable remedies, excepting dissolution, damages, and an accounting, through agreement. Thus, the proposed statute addresses the problems inherent in a dissolution-only regime while providing shareholders with the opportunity to structure deals that avoid the effects of the statute.

The proposed statute will help give teeth to a law that Virginia courts are currently hesitant to apply.[12] Although Virginia's oppression statute provides some protection to minority shareholders, it is not generally seen as particularly protective.[13] Instead, Virginia law calls for significant deference to a corporation's management under the business judgment rule, which creates a

11. The Virginia statute does provide one other option, a pre-trial buy-out; however, only the defendant or the corporation may elect to buy-out the plaintiff and end the case. *See* VA. CODE ANN. § 13.1-749.1(A) (Cum. Supp. 2013).

12. *See, e.g.*, *Colgate*, 85 Va. Cir. at 304.

13. *Drastic Times*, *supra* note 7. It should be noted that Virginia Code section § 13.1-747 is written such that oppression is addressed as a subsection within the overall dissolution statute. VA. CODE ANN. § 13.1-747 (Repl. Vol. 2011 & Cum. Supp. 2013). Despite this construction, the oppression provision has become the thrust of the statute. For this reason, this article uses the term "oppression statute" when technically referencing the dissolution statute generally, of which oppression is addressed in a subsection.

presumption that a director of a corporation has discharged his duties "in accordance with his good faith business judgment of the best interests of the corporation."[14] While many states apply an objective standard to a director's decisions in running a corporation, Virginia applies a subjective view of the director's good faith business judgment.[15]

Despite this highly deferential atmosphere, the recent Virginia case of *Colgate v. Disthene Group* shows that Virginia courts will not defer to a corporation's directors in any and all circumstances.[16] *Colgate* involved a decades-long family dispute over the management of a kyanite mine and other operations, which collectively were worth millions.[17] The trial court held that the business judgment rule was inapplicable as it required directors to "actually exercise their *good faith* business judgment."[18] Since the court found there was "no reason to believe that the management of Disthene will ever treat the Plaintiffs fairly," dissolution was the appropriate remedy.[19]

This comment addresses where Virginia's current scheme falls short and why equitable remedies are needed in Virginia minority shareholder oppression cases. Part I looks at how the MBCA attempted to solve the problem of minority shareholder oppression. Part II explores how other jurisdictions have interpreted or added to the MBCA so as to provide additional remedies in minority shareholder oppression cases. Finally, Part III advocates for adoption of a new dissolution statute in Virginia that includes equitable remedies for such cases.

14. VA. CODE ANN. § 13.1-690 (Repl. Vol. 2011 & Cum. Supp. 2013).

15. *Compare In re* MFW Shareholders Litig., 67 A.2d 496, 500 (Del. Ch. 2013) (explaining Delaware's business judgment rule is an objective standard: "Under [Delaware's business judgment rule] the court is precluded from inquiring into the substantive fairness of [a director's decision] . . . unless [that decision was] so disparate that *no rational person* acting in good faith could have thought the [decision] was fair to the minority.") (emphasis added), *with* VA. CODE ANN. § 13.1-690 (Repl. Vol. 2011 & Cum. Supp. 2013) (stating that courts consider whether a director fulfilled his duties in "accordance with *his* good faith business judgment") (emphasis added).

16. *Colgate*, 85 Va. Cir. at 317.

17. *Id.* at 287–88; *see also* Bill McKelway, *Jurists Rejects Appeal of Firm's Dissolution*; *Va. High Court Refuses Kyanite Company's Bid to Overturn Liquidation*, RICH. TIMES-DISPATCH, Feb. 17, 2013, at B01 ("In all, Disthene holdings are believed to be valued at some $200 million.").

18. *Colgate*, 85 Va. Cir. at 294 (emphasis added).

19. *Id.* at 317.

I. TREATMENT OF MINORITY SHAREHOLDERS UNDER THE MBCA

The closely held corporate environment is particularly prone to abuse of minority shareholders who fail to protect themselves.[20] These corporations are often started by friends or family members with little or no business experience.[21] Furthermore, the initial shareholders often decide against consulting an attorney, finding it an unnecessary expense.[22] In determining that minority shareholders should be protected from abuse, many states, including Virginia,[23] have enacted the MBCA.[24] The MBCA offers some protection to minority shareholders who might otherwise be stuck in the undesirable position of possessing stock without the means to profit therefrom.[25] Virginia's General Assembly has also gone one step further by enacting a pre-trial buy-out remedy, which allows the defendants or the corporation to buy-out the plaintiff's ownership interest in the corporation prior to trial.[26] This section describes the problems unique to closely held corporations and how Virginia's current statutory scheme fails to adequately address those problems.

A. *The Problem with Closely Held Corporations*

Minority shareholders often invest in corporations with their family or friends.[27] Many possess a useful skillset and plan to work for the corporation.[28] Thus, many shareholders invest with the belief that their investment will lead to steady income, either from a job or from dividends.[29] Minority shareholders often fail, however, to protect themselves before buying into a corporation

20. *See* Thompson, *supra* note 1, at 702.
21. *Id.*; Molitor, *supra* note 2, at 491.
22. *See* Molitor, *supra* note 2, at 491–93.
23. VA. CODE ANN. § 13.1-60 (Repl. Vol. 2011 & Cum. Supp. 2013); *id.* § 13.1-747(A)(1)(b) (Repl. Vol. 2011 & Cum. Supp. 2013).
24. *See, e.g.*, FLA. STAT. § 607.0101 (2013); N.C. GEN. STAT. § 55-1-01 (2013); *see also* MODEL BUS. CORP. ACT § 1.01 (2007) (outlining the model provision language with which specific states may adopt the MBCA).
25. *See* MODEL BUS. CORP. ACT § 14.30 (2007).
26. VA. CODE ANN. § 13.1-749.1 (Cum. Supp. 2013).
27. *See* Molitor, *supra* note 2, at 491.
28. Thompson, *supra* note 1, at 702.
29. *Id.*

by not utilizing employment contracts or buy-sell agreements.[30] Without any protection, minority shareholders are left susceptible to the decisions of the majority shareholder, who may decide to terminate the minority shareholder or reduce dividend payments.[31] This lack of control can sometimes leave a minority shareholder facing an indefinite period of time where he is not earning any income back from his investment.[32] Some minority shareholders, through no fault of their own, are even put in this position when they inherit their shares.

As an example of how a minority shareholder could invest in a corporation and fail to engage in the advanced planning necessary to protect himself, consider this hypothetical.

Individuals A, B, and C, all friends, incorporate the ABC Corporation to make widgets. All three have an equal share in the corporation, each owning 33% of the stock. All three are also employed in various positions of the corporation. None of the owners bother to draft an employment agreement, nor do they agree to a buy-sell arrangement or any other protections prior to investing together. All three believe that, as equal owners, their status as employees is protected. After several successful years making widgets, with all three partners receiving respectable salaries and dividend payouts, personality and business conflicts arise that align A and B against C. In their capacity as a majority of the directors, A and B decide to fire C and cut dividend payments while increasing their own salaries. This leaves C with no protection, having been "frozen out"[33] of a business that he helped cre-

30. *See* Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) From Close Corporation History*, 40 WAKE FOREST L. REV. 883, 912 (2005) ("Because close corporation owners are frequently linked by family or other personal relationships, there is often an initial atmosphere of mutual trust that diminishes the sense that contractual protection is needed."); *see also*, Molitor, *supra* note 2, at 493, 496 (referring more generally to ways in which minority shareholders fail to protect themselves at the outset). Buy-sell agreements can be drafted numerous ways, but may include provisions addressing who can buy the stock, what price the stock will be sold for, and what events might trigger a buyout. *See* Robert W. Wood, *In Business? Get a Buy-Sell Agreement!*, FORBES.COM (Feb. 7, 2011, 9:07 AM), http://www.forbes.com/sites/robertwood/2011/02/07/in-business-get-a-buy-sell-agreement/.

31. Thompson, *supra* note 1, at 703.

32. *Id*.

33. The term "frozen out" essentially means being cut off from the business both in terms of decision making and profiting therefrom. It is commonly used to signal oppression in the closely held corporation context. *See infra* note 35.

ate. With a minority interest, as long as A and B stay aligned in their decision-making, C has no way to force any change in the corporation and is left in the unenviable position of owning a financial interest with no return on his investment. To make matters worse, C has lost his primary source of income—employment at ABC Corporation. Finally, since this is a closely held corporation, with no shares listed on a public stock exchange, C has no market in which to sell his interest. Looking forward, were C to bring a successful claim for oppression, the only remedy currently available to the court is dissolution of the corporation—a forced sale of the business. Of course, A and B could step in and buy the corporation back, which would essentially amount to a buy-out of C's interest, but only if A and B have enough liquid assets to purchase the corporation or secure a loan for the purchase. If both A and B's money is tied up in ABC Corporation, as is often the case, then A and B might not be able to come up with the funds, and the business could be purchased by someone else.

As is clear from the hypothetical above, minority shareholders invest in a corporation with high hopes and big dreams. Minority shareholders often do not stop to consider what might happen if relationships sour and, instead, rely on the idea that their personal relationships with the other investors will survive, and hopefully even thrive, in the business world.[34] In many cases, however, the pressure of making business decisions can cause rifts in those relationships that eventually lead to the "freezing out"[35] of one, or possibly more, of the minority shareholders.

If C, in the above hypothetical, considered suing for dissolution, he would have to lay out exactly how A and B acted oppressively. Although central to determining whether or not dissolution is appropriate, the MBCA and many state statutes fail to define oppression. Instead, state courts have stepped in to provide a definition. The Supreme Court of Virginia opined in *White v. Perkins* that oppression is "a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder

34. *See* Moll, *supra* note 30, at 912.

35. *Id.* at 889–90. "Standard freeze-out techniques include the refusal to declare dividends, the termination of a minority shareholder's employment, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder, quite often, these tactics are used in combination." *Id.*

who entrusts his money to a company is entitled to rely."[36] The Supreme Court of South Carolina has listed several relevant factors in finding a violation of fair dealing or fair play, including: "exclusion from management, withholding of dividends, paying excessive salaries to majority shareholders, and analogous activities."[37] Other factors courts have considered include abusive conduct, recurring breaches of fiduciary duty, or frustration of a shareholder's reasonable expectations."[38]

B. *Virginia's Enactment of the MBCA's Oppression Provision*

Virginia adopted the MBCA in 1956.[39] Under the MBCA, a court may order a corporation dissolved in certain specific, exclusive circumstances.[40] One of those circumstances is when the directors, or those in control, have "acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent."[41] The law is specific about remedies available to the court, stating that a trial court may *dissolve* a corporation if the plaintiff establishes that one of the circumstances has been met.[42] The statute does not expressly allow for any other remedy, and Virginia courts have interpreted Virginia's version of the MBCA as providing for only one remedy, dissolution, in an oppression case.[43]

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36. 213 Va. 129, 134, 189 S.E.2d 315, 320 (1972) (citations omitted).

37. *See* Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 266 n.25 (S.C. 2001); *see also* Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 386–87 (2004) (noting that most state statutes allowing for dissolution due to oppression fail to define oppression, leaving the courts to supply a definition).

38. *See* Siegel, *supra* note 37, at 387.

39. VA. CODE ANN. § 13.1-94 (1950) (current version at VA. CODE ANN. § 13.1-747 (Repl. Vol. 2011 & Cum. Supp. 2013)).

40. *Id.* § 13.1-747 (Repl. Vol. 2011 & Cum. Supp. 2013)).

41. *Id.* § 13.1-747(A)(1)(b) (Repl. Vol. 2011 & Cum. Supp. 2013). The other two circumstances are where:

> [t]he directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock; or (2) [t]he shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired.

Id. §§ 13.1-747(A)(1)(a), (c) (Repl. Vol. 2011 & Cum. Supp. 2013).

42. *Id.* § 13.1-747 (Repl. Vol. 2011 & Cum. Supp. 2013).

43. *See, e.g.*, White v. Perkins, 213 Va. 129, 135, 189 S.E.2d 315, 320 (1972).

The Supreme Court of Virginia first considered the issue of whether the MBCA provided for equitable remedies in *White v. Perkins*.[44] In *White*, the plaintiff and the defendant formed a corporation with the defendant as the controlling shareholder.[45] The corporation, at the insistence of the defendant, never declared nor paid dividends.[46] Because the plaintiff was required to pay income taxes on money that he was not receiving, he became "financially pressed."[47] Despite his awareness of the plaintiff's financial situation, the defendant still refused to declare or pay dividends or, alternatively, agree to a buy-out of either his stock or the plaintiff's stock.[48]

The trial court found that the defendant majority shareholder oppressed the plaintiff minority shareholder and ordered the corporation to declare and pay dividends, as well as other remedies.[49] On appeal, the supreme court held that, while the trial court could have ordered the dissolution of the corporation, the court could not, under the statute, order any alternative remedies.[50] In determining that dissolution was the only statutorily available option, the court stated that Virginia's oppression provision "clearly shows an intent by the General Assembly that the alternatives provided there are exclusive rather than inclusive."[51] Thus, the court in an oppression case is faced with the choice of either dissolving the corporation or dismissing the case.[52]

44. *Id.*

45. *Id.* at 131, 189 S.E.2d at 317.

46. *Id.*, 189 S.E.2d at 318.

47. *Id.* at 131–32, 189 S.E.2d at 318.

48. *Id.*

49. *Id.* at 130, 189 S.E.2d at 317.

50. *Id.* at 135, 189 S.E.2d at 320. It should be noted that in *White*, the court did state that it clearly could have appointed a custodian with power to continue the business. *Id.* It is likely that the *White* court was alluding to the remedy currently codified at Virginia Code section 13.1-748(A) which permits a court to appoint a custodian to manage the corporation "*while the proceeding is pending*." VA. CODE ANN. § 13.1-748(A) (Repl. Vol. 2011) (emphasis added). This, however, is a temporary appointment only. Thus when reading the appointment language in *White*, one should place his or her emphasis on the exclusivity of dissolution. It is *White*'s holding that the alternatives to dissolution are exclusive, not inclusive. *White*, 213 Va. at 135, 189 S.E.2d at 320. Several subsequent Virginia decisions, holding that dissolution is the only alternative available to a court in Virginia, support this interpretation. *See infra* note 56.

51. *White*, 213 Va. at 135, 189 S.E.2d at 320.

52. *See id.* Again, while the *White* court seemed to indicate that there might be another available alternative (i.e., appointing a custodian to continue the business), this lan-

In finding that dissolution was the only available remedy, the Supreme Court of Virginia did not elaborate as to why it reached this conclusion, except for implying that the conclusion was obvious from the statutory language.[53] Along with this textual analysis, the court may have based its opinion on other considerations, including the knowledge that minority shareholders are oftentimes able to pursue other causes of actions that provide alternative remedies,[54] and the idea that courts should promote the use of contracts to protect minority shareholders before a business deal is finalized, as opposed to courts providing the sole protection.[55] Subsequent Virginia opinions have followed the *White* court in finding that dissolution is the only remedy available to a trial court in oppression cases.[56] In *Giannotti v. Hamway*, the court held that "[t]he remedy specified by the legislature [dissolution], while discretionary, is 'exclusive' and does not permit the trial court to fashion other, apparently equitable remedies."[57] In short, *White* and other courts have narrowly construed the remedies available for cases of shareholder oppression. Under the current scheme, dissolution is wholly favored over the recognition of other equitable remedies.

C. *Virginia's Pre-Trial Buyout Option*

Following several decades where the only option in oppression cases was dissolution, the General Assembly enacted a statute that allows for a pre-trial buyout. Under Virginia Code section

guage would appear to contradict the overall holding in *White* and how subsequent Virginia courts have interpreted it and it should be viewed as dicta. *See supra* note 50. To the extent that such a remedy is indeed available, it is only a temporary solution. Virginia courts have not appointed a custodian as a permanent remedy in oppression cases.

53. *White*, 213 Va. at 135, 189 S.E.2d at 320.

54. For example, a minority shareholder could bring a breach of fiduciary duty claim.

55. In most cases, minority shareholders can protect themselves by entering into employment agreements, buy-sell agreements, and other contracts prior to investing in a corporation. *See, e.g.*, Nixon v. Blackwell, 626 A.2d 1366, 1379–80 (Del. 1993).

> The tools of good corporate practice are designed to give a purchasing minority stockholder the opportunity to bargain for protection before parting with consideration. It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted.

Id. However, minority shareholders who inherit their shares do not have this opportunity.

56. *See, e.g.*, Stickley v. Stickley, 43 Va. Cir. 123, 144–46 (1997) (Rockingham County); Giannotti v. Hamway, 239 Va. 14, 28–29, 387 S.E.2d 725, 733–34 (1990); Jordon v. Bowman Apple Prod. Co., 728 F. Supp. 409, 415 (W.D. Va. 1990).

57. *Giannotti*, 239 Va. at 28, 387 S.E.2d at 733.

13.1-749.1, a corporation or a shareholder in the corporation, can elect to buy the shares of the complaining shareholder.[58] An election, however, must be made within ninety days of the filing of a suit for dissolution, or "at such later time as the court in its discretion may allow."[59] The election must be done prior to trial, as once the election is made, a fair value of the shares will be determined either by agreement among the parties or, if they are unable to agree, by the court.[60] An election is "irrevocable unless the court determines that it is equitable to set aside or modify the election."[61] After the fair value of the shares is determined, the court must enter an order directing the purchase of the shares, and may also award the petitioning shareholder reasonable attorney fees and expert fees if the court determines that the petitioner's claims under section 13.1-747 were meritorious.[62] Further, once a buy-out order is entered, the court must dismiss the petition to dissolve, and the petitioning shareholder "no longer ha[s] any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded to him by the order of the court."[63]

The buy-out alternative was enacted to provide a "less Draconian remedy" in cases of shareholder conflict, while at the same time ensuring that no shareholder had a tactical advantage over the other shareholders.[64] With the possibility of a pre-trial buy-out, a shareholder interested in pursuing dissolution now must consider the potential exposure that he risks to a pre-trial buy-out.[65] As one trial court observed, "[i]t is perhaps an unintended result of the statute that a plaintiff who originally sought to dissolve a corporation ends up in a proceeding to establish value that provides for no formal discovery."[66] Thus, pursuing dissolution might lead to a forced sale in a proceeding where the plaintiff

58. VA. CODE ANN. § 13.1-749.1(A) (Cum. Supp. 2013).
59. *Id.* § 13.1-749.1(B) (Cum. Supp. 2013).
60. *Id.* § 13.1-749.1(C)–(D) (Cum. Supp. 2013).
61. *Id.* § 13.1-749.1(A) (Cum. Supp. 2013).
62. *Id.* § 13.1-749.1(E) (Cum. Supp. 2013).
63. *Id.* § 13.1-749.1(F) (Cum. Supp. 2013).
64. Allen C. Goolsby & Louanna O. Heuhsen, *Annual Survey of Virginia Law: Corporate and Business Law*, 40 U. RICH. L. REV. 165, 194 (2005).
65. *See id.*
66. Hartley v. Marco Invs., Inc., 82 Va. Cir. 294, 295 (2011) (Norfolk City).

does not have formal access to discovery and may be left with an agreement that contains unfavorable terms.[67]

D. Colgate v. Disthene Group

Since the enactment of the pre-trial buyout, Virginia has only seen two cases involving minority shareholder oppression go to trial.[68] The most recent case, *Colgate v. Disthene Group*, involved two sides of a family fighting over the management of a prosperous business in Buckingham County.[69] As one local news reporter summarized, this case "redefined Virginia business law, [and] exposed the withering business practices of a generations-old family mining and landholding concern."[70]

The *Colgate* case focused on the complicated and dramatic relationships between the descendants of Guy Dixon, who first bought a kyanite mine at a bankruptcy sale in 1945.[71] After Dixon's death, one side of the family inherited a majority of the shares, including all of the voting stock,[72] while the other side inherited a minority share of all non-voting stock.[73] Following several years of low dividend payments and evidence of "exorbitant" salaries, the minority shareholders filed suit against the majority shareholders.[74] The minority shareholders asserted, among other allegations, that they were being oppressed, accusing the majority shareholders of authorizing large bonuses while cutting dividends.[75] The minority shareholders sought dissolution of the Disthene Group.[76]

67. *Id.*; Goolsby & Heuhsen, *supra* note 64, at 194.

68. The first case, *Cattano v. Bragg*, centered on whether a minority shareholder could simultaneously bring a derivative suit and an individual action for judicial dissolution. 283 Va. 638, 643, 727 S.E.2d 625, 626 (2012).

69. 85 Va. Cir. 286, 287–89 (2012) (Buckingham County).

70. Bill McKelway, *Chase City Man Finally Prevails in Kyanite Case*, RICH. TIMES-DISPATCH (Sept. 23, 2013, 12:00 AM), http://www.timesdispatch.com/news/state-regional/chase-city-man-finally-prevails-in-kyanite-case/article_1129d777-ad2f-5ec3-acde-f1bfd742f5dc.html [hereinafter McKelway, *Chase City Man*].

71. *Colgate*, 85 Va. Cir. at 287.

72. *Id.* at 288.

73. *Id.*

74. *Id.* at 289.

75. *Id.*

76. *Id.*

The trial court found that several of the actions taken by the majority shareholders were oppressive and "visibly depart[ed] from the standards of fair dealing."[77] The court first determined that the majority shareholders purposely withheld dividend payments as retaliation for previous trust litigation pursued by the minority shareholders.[78] The court further found that the majority shareholders awarded themselves "enormous pay raises and even larger bonuses" during the same period of time.[79] In its conclusion, the court stated that the minority shareholders had "been treated as irksome interlopers, problems to be dealt with, preferably by squeezing them out at a below market price, or slashing their dividends in the hope of depriving them of the financial wherewithal to seek legal recourse."[80] The trial court then held that dissolution was appropriate and ordered the Disthene Group dissolved.[81]

Following the trial court's order of dissolution, this case was considered a potential "turning point in Virginia's judicial approach to the rights and protections of minority shareholders."[82] The plaintiff's expert witness opined that the holding would "help bolster minority shareholder investment in Virginia companies because of the protections the decision carries for minority shareholders."[83] The parties ultimately settled, wherein the defendants agreed to buy out the plaintiffs for $70 million,[84] after an appeal to the Supreme Court of Virginia was eventually granted.[85]

Another Virginia case involving possible oppression is currently working its way through the courts. The case involves the beloved Virginia landmark, Luray Caverns, owned by the Graves

77. *Id.* at 295, 298.
78. *Id.* at 296.
79. *Id.* at 297.
80. *Id.* at 316–17.
81. *Id.* at 317.
82. *Drastic Times*, *supra* note 7.
83. *Id.*
84. Bill McKelway, *Kyanite Mining Case Finally Comes to a Close*, RICH. TIMES-DISPATCH, June 11, 2013, at B1.
85. The Supreme Court of Virginia denied the first appeal request. The defendants then petitioned for a rehearing, which was granted by the supreme court. *See* Bill McKelway, *Kyanite Mining Case Going to Virginia Supreme Court*, RICH. TIMES-DISPATCH (June 10, 2013, 12:00 AM), http://www.timesdispatch.com/news/kyanite-mining-case-going-to-virginia-supreme-court/article_d5e573ca-a1a1-51f6-80c1-fe573536ce28.html [hereinafter McKelway, *Mining Case Going to Virginia Supreme Court*].

family and worth approximately $20 million.[86] Prior to the death of their parents, there were several internal disputes among the six siblings over who should run the caverns and who should be trustee for the family's multiple trusts.[87] The fighting exploded into multiple lawsuits over the last several decades, with accusations against one sibling for creating "golden parachutes" for herself and two of her brothers, and against that same sibling for acting "imperial" when she managed the caverns and freezing out another brother from all decision-making.[88]

Although the Luray case is still pending, the *Colgate* decision has important implications for how the case may turn out. With what appears to be a similar fact pattern, including one side of the family controlling the business and providing themselves with excessive monetary benefit, it is quite possible that any trial alleging oppression could result in dissolution.[89] Even without the Supreme Court of Virginia ultimately deciding the *Colgate* case, the combination of the trial court's decision[90] and the high settlement in *Colgate* may provide the Luray defendants with additional incentive to settle any case alleging oppression to avoid risking dissolution.

Virginia's statutory scheme currently offers only limited remedies in minority shareholder oppression cases. A plaintiff can attempt to negotiate an informal resolution with the majority shareholders or sue for dissolution.[91] After suit has been filed, the corporation or other shareholders have the option to buy-out the plaintiff.[92] Once the case gets to trial, however, the only remedy

86. Ken Otterbourg, *The Rift—A Family Dynasty Fights Over the Future of Luray Caverns*, WASH. POST, Mar. 17, 2013, at A-101.

87. *Id.*

88. *Id.*

89. *See id.*

90. Professor Carl Tobias, a law professor at the University of Richmond School of Law, who closely followed the case opined that the circuit court's "careful opinion will withstand scrutiny [by the supreme court] because [the judge's] ruling on the law was correct and [the judge] is closest to the underlying facts, having heard weeks of testimony at the trial level." McKelway, *Mining Case Going to Virginia Supreme Court*, *supra* note 85.

91. *Cf.* James Irving, *Minority Shareholder Rights in Virginia*, BEAN KINNEY & KORMAN PC (Dec. 2, 2013), http://www.beankinney.com/publications-articles-minority-shareholder-rights-virginia.html (noting that the business judgment rule is a potential defense for defendants in dissolution suits but only if they have not wholly refused to participate in the informal negotiation process).

92. *See* source cited *supra* note 12 and accompanying text.

available to the judge is dissolution.[93] Recognizing the limitations inherent in the MBCA's oppression provision, other jurisdictions have expanded the remedies available to courts in oppression cases.[94]

II. LESSONS LEARNED FROM REMEDIES AVAILABLE IN OTHER JURISDICTIONS

A majority of states have enacted the MBCA, which provides for an oppression cause of action.[95] Delaware, however, has decided against allowing oppression causes of action, instead finding that minority shareholders in such circumstances are protected by fiduciary duty requirements. Of those states that allow oppression cases, many have allowed additional remedies besides dissolution. Courts in some states, such as Washington and Missouri, have interpreted the oppression provision in the MBCA as granting a wide range of remedies.[96] Legislatures in other states, such as Illinois, have explicitly added alternative remedies to their statutes.[97] Virginia should follow the lead of other MBCA states that allow equitable remedies in oppression cases.

A. *Requiring Minority Shareholders to Protect Themselves on the Front End*

Delaware, the "pre-eminent jurisdiction in corporate law,"[98] has not adopted the MBCA. Instead, Delaware case law provides for a cause of action based on breach of fiduciary duties owed to minority shareholders by majority shareholders but does not recognize

93. VA. CODE ANN. § 13.1-747 (Repl. Vol. 2011 & Cum. Supp. 2013); *see also supra* notes 50–57 (noting the exclusively of dissolution as remedy for oppression).

94. *See infra* Part II.

95. MODEL BUS. CORP. ACT §§ 1.01, 14.30 (2007); Haynsworth, *supra* note 5, at 33 n.31; *see also supra* note 5 (for more discussion on the adoption of the MBCA and its oppression provision).

96. Scott v. Trans-System, Inc., 64 P.3d 1, 9–10 (Wash. 2003); Fix v. Fix Material Co., 538 S.W.2d 351, 357 (Mo. Ct. App. 1976).

97. 805 ILL. COMP. STAT. 5/12.50(b) (2013) ("As an alternative to dissolution, the court may order any of the other remedies contained in subsection (b) of Section 12.55") (referring to the remedies of appointing a custodian to manage the business or the appointing of a provisional director to serve for a particular term under court-prescribed terms).

98. Siegel, *supra* note 37, at 378.

an oppression cause of action. Although an oppression claim was once heard by a Delaware Chancery Court judge in *Litle v. Waters*,[99] the Supreme Court of Delaware quickly overruled this opinion and elucidated that minority shareholders of closely held corporations in Delaware could not bring a case alleging oppression.[100]

Litle was the first Delaware case to recognize a separate cause of action for oppression by minority shareholders and some found the opinion surprising.[101] The idea that oppression could be a separate cause of action under Delaware common law was short-lived. In 1993, one year after the *Litle* opinion was announced, a different chancery court judge stated: "I do not read *Litle* as establishing an independent cause of action for 'oppressive abuse of discretion' distinct from a cause of action based on a breach of fiduciary duty."[102] This line of reasoning was similarly adopted by the Delaware Supreme Court, which held in *Nixon v. Blackwell* that there was no separate cause of action based on oppression.[103]

In *Nixon*, the plaintiffs alleged that the defendants attempted to force a sale of the plaintiff's stock back to the corporation by cutting dividends and breached "their fiduciary duties by authorizing excessive compensation for themselves and other employees," among other allegations.[104] The trial court ordered a buy-out of the plaintiffs' stock.[105] On appeal, the Supreme Court of Delaware reversed, finding that the trial court's judgment went against the "well established . . . jurisprudence that stockholders need not always be treated equally for all purposes."[106] In so holding, the court found it significant that the plaintiffs were neither employees of the corporation nor were they "protected by specific provisions in the certificate of incorporation, by-laws, or a stockholders' agreement."[107] Further, the court went on to state that if

99. 1992 Del. Ch. LEXIS 25, at *25 (Del. Ch. Feb. 10, 1992).
100. Nixon v. Blackwell, 626 A.2d 1366, 1379–80 (Del. 1993).
101. *Id*.
102. Garza v. TV Answer, Inc., No. 12784 1993 Del. Ch. LEXIS 40, at *19 (Del. Ch. Mar. 11, 1993).
103. *Nixon*, 626 A.2d at 1379–80.
104. *Id.* at 1373.
105. *Id.* at 1373–74.
106. *Id.* at 1376.
107. *Id.* at 1377.

equality in the treatment of stockholders were necessary in corporate decision-making, that was a matter for the Delaware legislature to decide, not the courts.[108] Accordingly, minority shareholders of closely held corporations incorporated in Delaware cannot bring an independent claim of oppression.

In coming to the conclusion that Delaware law does not require equal treatment of stockholders, the *Nixon* court sympathized with the dilemma which minority shareholders face when attempting to receive the fair market value for their stock with no market valuation.[109] The court, however, explained that any sympathy was "in the abstract" only, as any stock purchaser in reality could bargain for more control and more rights before purchasing the stock.[110] In so doing, the stock purchaser "make[s] a business judgment whether to buy into such a minority position, and if so on what terms."[111] The stock purchaser further has the ability to protect himself on the front-end by entering into stockholder agreements that "provide for elaborate earnings tests, buy-out provisions, voting trusts, or other voting agreements."[112] Thus, the *Nixon* court found that "[t]he tools of good corporate practice are designed to give a purchasing minority stockholder the opportunity to bargain for protection *before* parting with consideration."[113] Finally, the court held that "[i]t would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted."[114]

In disallowing shareholder oppression actions, the *Nixon* court clearly believed that Delaware law provides sufficient protection for minority shareholders through the courts' commitment to enforcing fiduciary duties.[115] Delaware courts still "critically exam-

108. *Id.*
109. *Id.* at 1379.
110. *Id.* at 1379–80.
111. *Id.*
112. *Id.* at 1380.
113. *Id.* (emphasis added).
114. *Id.*
115. *Id.* at 1379–81 ("It would run counter to the spirit of the doctrine of independent legal significance . . . for this Court to fashion a special judicially-created rule for minority investors . . . ."); *see also* Siegel, *supra* note 37, at 404 ("Subsequently, the Delaware Supreme Court in *Nixon* confirmed . . . that there is no separate cause of action for oppression or for frustration of reasonable expectations."). By discouraging litigation, Delaware

ine otherwise ordinary decisions that were, in reality, designed to starve out the minority shareholder."[116] Thus, "while shareholders in [Delaware] will not have their reasonable expectations or mere preferences satisfied, it is a gross exaggeration to assume that courts in these states would permit these shareholders to be abused."[117] However, given that Delaware's entire fairness standard does not require equality, there is still the possibility that a financial freeze-out may result, or alternatively, may be allowed to persist due to a court's hesitancy to find oppression under the doctrine of entire fairness.[118]

Although front-end protection through contract is ideal, and should be encouraged by the courts, simply expecting a minority shareholder to protect himself upfront ignores the reality of who most minority shareholders are and what information is available to them prior to purchasing a minority interest in a corporation.[119] First, those involved in a closely held corporation are frequently friends or family members.[120] These personal relationships help create "an initial atmosphere of mutual trust that diminishes the sense that contractual protection is needed."[121] To correct this

courts may also be trying to prevent the significant corporate turmoil that accompanies litigation. As one commentator noted, "[t]raditional litigation of such shareholder disputes may be the legal equivalent of killing the goose that lays the golden egg." Susan Marmaduke, *A Statutory Escape Route: Shareholder Disputes*, 70 OR. ST. B. BULL. 36, 36 (2010). In such circumstances, "[b]y the time the parties' rights are finally adjudicated, the company may be damaged beyond repair: Working relationships are destroyed; legal fees and costs are crushing; and key employees are distracted from attending to the needs of the enterprise and its customers." *Id.*

116. Siegel, *supra* note 37, at 453.

117. *Id.* at 457.

118. *See Nixon*, 626 A.2d at 1381. The entire fairness standard requires two things: fair dealing and a fair pricing.

> The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.

Id. at 1376 (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)). Although entire fairness is a more stringent standard than the deferential business judgment rule, it does not require shareholders to be treated equally, as made clear by the *Nixon* court. *Id*.

119. *See* Moll, *supra* note 30, at 912.

120. *Id.*

121. *Id.*

mentality, states could enact legislation that would require owners of limited liability companies and corporations to read warnings about the risks of starting a business or "purchasing an equity interest in an existing closely-held [corporation]" without advanced planning.[122] Increasing the educational opportunities available to owners would increase the likelihood of advance planning, and subsequently provide for better protection of a minority shareholder's interests.[123]

B. *Interpreting the Oppression Provision as Expansive and Allowing Alternative Remedies*

Courts in other jurisdictions that have enacted the MBCA, including Washington and Missouri, have interpreted their statutes to allow for remedies up to and including dissolution in minority shareholder oppression cases.[124] The Supreme Court of Washington and the Missouri Court of Appeals have both held that the MBCA does not limit a court's equitable power.[125]

1. Washington

In *Scott v. Trans-System, Inc.*, the Supreme Court of Washington held that the MBCA's oppression provision allows for equitable remedies other than dissolution.[126] The plaintiff in *Scott* filed suit against the defendant alleging, among other things, oppression and misapplication or waste of corporate assets.[127] The plain-

122. Molitor, *supra* note 2, at 496.

123. *Id.* at 581, 585. Again, however, one must consider the mentality of an unsophisticated shareholder starting a corporation (who might breeze through any reading material provided him by the state) and those shareholders who inherited their interest in the corporation.

124. MO. ANN. STAT. § 351.494 (West, Westlaw through 2014 Reg. Legis. Sess.); WASH. REV. CODE § 23B.14.300 (2012); *see, e.g.*, ALA. CODE § 10A-2-14.30 (LexisNexis 2013); ARIZ. REV. STAT. ANN. § 10-11430 (2013); ARK. CODE ANN. § 4-33-1430 (2001); IDAHO CODE ANN. § 30-1-1430 (2013); 805 ILL. COMP. STAT. 5/12.56 (2013); N.C. GEN. STAT. § 55-14-30 (2013); OR. REV. STAT. ANN. § 60.952 (West, Westlaw through Ch. 121 L. of 2014 Reg. Legis. Sess.); S.D. CODIFIED LAWS § 47-1A-1430 (2007); TENN. CODE ANN. § 48-24-301 (2012).

125. Scott v. Trans-System, Inc., 64 P.3d 1, 4–5, 9 (Wash. 2003); Fix v. Fix Material Co., 538 S.W.2d 351, 356–57 (Mo. Ct. App. 1976).

126. *Scott*, 64 P.3d at 9–10.

127. *Id.* at 4.

tiff requested dissolution, which the trial court granted.[128] The Washington Court of Appeals affirmed the decision, finding no abuse of discretion by the trial court.[129] The Supreme Court of Washington reversed the order of dissolution, holding that the evidence presented in support of dissolution was not sufficient for such a drastic remedy when other, less drastic remedies could have been ordered by the trial court and were appropriate under the circumstances.[130]

Washington's oppression statute, just like Virginia's, states that a trial court *may* dissolve a corporation if there is oppression.[131] In determining that the statute allowed for remedies other than oppression, the Supreme Court of Washington reasoned that dissolution suits were "fundamentally equitable in nature."[132] Relying on this conclusion, the court reasoned that trial courts faced with an oppression case could consider alternative equitable remedies.[133] Those remedies included: (1) an entry of an order requiring dissolution at a future date if the shareholders could not come to an agreement; (2) appointment of a receiver to run the affairs of the corporation; and (3) "an award of damages to [the] minority shareholders . . . for any injury suffered by them."[134] The *Scott* court further found that "[d]issolution should not be granted as a matter of right, since the provision allowing judicial dissolution is 'clearly couched in language of permission.'"[135] Thus, while Washington's oppression statute "grants . . . courts discretion to dissolve a corporation when those in control of the corporation are acting oppressively," the courts should not exercise such discretion unless "a remedy as severe as involuntary dissolution" is

128. *Id.*

129. *Id.*

130. *Id.* at 10.

131. WASH. REV. CODE § 23B.14.300(2)(b) (2012).

132. *Scott*, 64 P.3d at 9.

133. *Id.* (citing Fix v. Fix Material Co., 538 S.W.2d 351, 357 (Mo. Ct. App. 1976)).

134. *Id.* (quoting Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395–96 (Or. 1973)).

135. *Id.* at 5 (quoting Henry George & Sons, Inc. v. Cooper-George, Inc., 632 P.2d 512, 516 (Wash. 1981)).

necessary given the circumstances of the particular case.[136] Subsequent Washington court opinions have taken the supreme court's lead, ordering a variety of remedies in oppression cases.[137]

2. Missouri

The Missouri Court of Appeals has also held that dissolution is not an exclusive remedy under the MBCA.[138] In *Fix v. Fix Material Co.*, the plaintiff sued under Missouri's Business Corporation Act, seeking dissolution of the closely held corporation in which she was a minority shareholder due to oppressive conduct by those in control.[139] The plaintiff presented evidence of long-term employment contracts that the defendants awarded themselves as well as salary increases given to the defendants during years when the company suffered net losses.[140] Although the court affirmed summary judgment for the defendants, it held that the defendants' actions were "narrowly close" to oppression, and that a future suit by the plaintiff might be successful if the defendant's course of action failed to change.[141] The *Fix* court further ruled that, if a future suit was brought, the trial court had the power to order a variety of equitable remedies, including payment of damages, declaration of a dividend, buy-out of a minority shareholder's stocks, and, if warranted, dissolution.[142]

In an earlier decision, the Missouri Court of Appeals found that a previous version of the oppression statute, which allowed for liquidation of a corporation when the majority stockholders acted oppressively, was permissive in nature, and the courts were "not restricted to that remedy."[143] Thus, both the Supreme Court of

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136. *Id.* at 10.

137. *See, e.g.*, Skarbo v. Skarbo Scandinavian Furniture Imp., Nos. 54288-5-I, 54470-5-I, 2005 WL 1950599, at *9 (Wash. Ct. App. Aug. 15, 2005) (ordering a buy-out of the minority shareholder's shares); Snopac Prods. v. Spencer, No. 66115-9-I, 2012 WL 2688797, at *6–9 (Wash. Ct. App. July 9, 2012) (affirming the buyout of the minority shareholder's shares and payment of attorney fees as both were reasonable given the evidence).

138. *Fix*, 538 S.W.2d at 356–57.

139. *Id.* at 354.

140. *Id.* at 356, 359.

141. *Id.* at 361.

142. *Id.* at 357 n.3 (quoting Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395–96 (Or. 1973)).

143. Kirtz v. Grossman, 463 S.W.2d 541, 545 (Mo. Ct. App. 1971). This liquidation statute has since been replaced by Missouri's adoption of the MBCA's oppression provi-

Washington and the Missouri Court of Appeals have found that the very language of the MBCA oppression provision allows for equitable remedies on its face, with no need to modify the statute to explicitly add additional remedies.[144] Other state courts have ruled similarly and allowed equitable remedies despite dissolution being the only remedy expressly available under the statute.[145]

C. *Adding a Non-Exhaustive List of Remedies to the Oppression Statute*

Other jurisdictions have modified the MBCA's oppression provision to include a list of equitable remedies that the trial courts can consider as an alternative to dissolution.[146] To further illustrate this point, three states will serve as examples. First, New Jersey has added a list of remedies for use in oppression cases where the corporation has twenty-five or less shareholders.[147] Second, Illinois has added a non-exhaustive list of potential remedies available in all oppression cases.[148] Finally, Oregon has added a non-exhaustive list of equitable remedies that is very similar to Illinois' statute.[149]

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sion.

144. *Id.*; Scott v. Trans-System, Inc., 64 P.3d 1, 9, 10 (Wash. 2003); *Fix*, 538 S.W.2d at 357.

145. *See, e.g.*, Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 274 (Alaska 1980) (finding that Alaska's dissolution statute allowed equitable remedies). Although this case was decided under prior law, Alaska's current dissolution statute is quite similar. *See* ALASKA STAT. § 10.06.628 (2012); *see also* Maddox v. Norman, 669 P.2d 230, 235 (Mont. 1983) ("We hold that [Montana's previous oppression statute] is permissive rather than mandatory, and that district courts are empowered, but not required, to liquidate when corporate assets have been misapplied or wasted."). Montana's legislature has since adopted a new statute that lists alternative remedies available to courts. *See* MONT. CODE ANN. § 35-1-939 (2013).

146. *See, e.g.*, IOWA CODE ANN. § 490.1434 (West 2013) (providing a pre-trial buy-out option that is very similar to Virginia's buy-out provision, Virginia Code section 13.1-749.1); ME. REV. STAT. ANN. tit. 13-C, § 1434(3) (2013) (adding alternative remedies to Maine's oppression statute).

147. N.J. STAT. ANN. § 14A:12-7(c) (West, Westlaw through 2014 Legis. Sess.).

148. 805 ILL. COMP. STAT. 5/12.56(a)–(b) (2013).

149. *Compare* OR. REV. STAT. ANN. § 60.952(1)–(2) (West, Westlaw through Ch. 121 L. of 2014 Reg. Legis. Sess.) (setting forth a non-exhaustive list of remedies available to shareholders of a close corporation in Oregon), *with* 805 Ill. Comp. Stat. 5/12.56(a)–(b) (2013) (setting forth a non-exhaustive list of remedies available to shareholdes in non-public corporations).

1. New Jersey

New Jersey is one of the few states where the state legislature added a list of alternative remedies to the MBCA. Under New Jersey's statute, the trial court has the authority to "appoint a custodian, appoint a provisional director, order a sale of the corporation's stock . . . , or enter a judgment dissolving the corporation . . . ."[150] Pursuant to the statute, a provisional director appointed by a court would have all the authority and power of an elected director of the corporation, "including the right to notice of and to vote at meetings."[151] Further, a custodian is given even more power . . . .[152] A custodian appointed by the court may "exercise *all* of the powers of the corporation's board and officers to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors . . . ," subject only to court-imposed limitations.[153] New Jersey's statute makes clear that remedies for minority shareholder oppression are only available in cases where the corporation has twenty-five or less shareholders.[154]

The Supreme Court of New Jersey has interpreted New Jersey's oppression provision as responding "at least in part, to the fact that traditional principles of corporate law were often unsuccessful at curbing abuses of power by majority interests in closely-held corporations."[155] The addition of alternative remedies was accordingly meant to "increas[e] the willingness of courts to intervene and provide relief to shareholders."[156] Although expected to even the balance of power, the *Brenner v. Berkowitz* court cautioned that the statute was "meant only to protect the minority, not to provide a weapon to enable it to obtain unfair advantage against the majority."[157] Finally, while a review of the relevant authorities does not overtly shed light on why the New Jersey leg-

150. N.J. STAT. ANN. § 14A:12-7(1) (West, Westlaw through 2014 Legis. Sess.).

151. *Id.* § 14A:12-7(3).

152. *See id.* § 14A:12-7(4).

153. *Id.* (emphasis added).

154. *Id.* § 14A:12-7(1)(c).

155. Brenner v. Berkowitz, 634 A.2d 1019, 1026 (N.J. 1993) (quoting Walensky v. Jonathan Royce Int'l, Inc., 624 A.2d 613, 616 (N.J. Super. Ct. App. Div. 1993)).

156. *Id.* at 1032.

157. *Id.* at 1030 (quoting Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1730 (1990)).

islature limited the availability of alternative remedies in oppression cases to corporations with twenty-five or less shareholders, it is plausible that this limitation is meant to recognize the fact that the most vulnerable shareholders are usually those who start, or enter into, corporations with family and friends that are generally small and have only a few shareholders.

2. Illinois

Illinois is another state where the legislature added additional remedies other than dissolution in cases of minority shareholder oppression.[158] Under Illinois' Business Corporation Act, the trial court can order a variety of remedies in oppression cases, including removal from office of an officer or director, payment of dividends, award of damages, and a buy-out.[159] Dissolution may also be ordered, but only if the court determines that any alternative remedy would be insufficient.[160] The statute goes on to state that the listed remedies are not exclusive.[161] Accordingly, Illinois' legislature has cloaked Illinois courts with broad discretionary power to order appropriate remedies in minority shareholder oppression cases.

Illinois' General Assembly adopted its oppression statute, along with the list of remedies, in response to the Illinois' courts aversion toward granting relief in cases where "shareholder relationships broke down."[162] This aversion led some "shareholders to resort to 'self-help' measures," such as establishing a competing business, that were "injurious both to themselves and the corporation."[163] Further, in interpreting the policy behind Illinois' oppression statute, the Supreme Court of Illinois stated that the alternative remedies were "specifically enacted to . . . increas[e] the remedies available to minority shareholders and . . . enlarg[e] the

158. 805 ILL. COMP. STAT. 5/12.56(a)(3) (2013).

159. *Id.* §§ 5/12.56(b)(3), (b)(9)–(11).

160. *Id.* § 5/12.56(b)(12).

161. *Id.* § 5/12.56(c).

162. William R. Quinlan & John F. Kennedy, *The Rights and Remedies of Shareholders in Closely Held Corporations Under Illinois Law*, 29 LOY. U. CHI. L.J. 585, 606 (1998).

163. *Id.* For example, in *Hagshenas v. Gaylord*, the plaintiff, following the court's refusal to intervene in a case involving deadlock, established a competing business and began poaching employees from the defendant's business. 557 N.E.2d 316, 318–20 (Ill. App. Ct. 1990).

discretionary authority of the circuit courts to award relief in situations which do not warrant dissolution but which do warrant some other, less severe remedy."[164] Finally, in support of Illinois' alternative remedy statute, one commentator argued:

> [g]iven the infinite number of ways that business partners can oppress each other, the Illinois statutory scheme is effective because it is flexible enough to preserve the assets of the corporation, and because, at the same time, it provides the disputing parties with a framework that allows them to work out their differences.[165]

Thus, Illinois' scheme provides a much more flexible framework for oppression cases than does Virginia's.

3. Oregon

Finally, Oregon's statute is very similar to Illinois' oppression statute.[166] Oregon's oppression statute provides courts with a non-exhaustive list of equitable remedies that courts can order. These remedies include alteration of the corporation's articles of incorporation or bylaws,[167] the removal from office of any director or officer,[168] the appointment of an individual as a director or officer,[169] or the award of damages to an aggrieved party.[170] Oregon's statute further instructs the court that dissolution is only appropriate "if the court determines that no remedy specified in the [preceding subsections] or other alternative remedy is sufficient to resolve

164. Schirmer v. Bear, 672 N.E.2d 1171, 1176 (Ill. 1996). Although the court concentrated on the alternative remedy statute for public corporations, the court found that its statutory construction "comports with the current statutory scheme regulating shareholder remedies for nonpublic corporations." *Id.* The court further noted that the addition of these alternative remedies was a direct response to earlier Illinois court decisions holding that a shareholder in a public corporation could not be granted an alternative remedy unless the defendant's conduct rose to a level that justified dissolution. *Id.* at 1175–76; *see also* 805 ILL. COMP. STAT. 5/12.55 (2012) (listing remedies available to a shareholder in a public corporation who is alleging oppression by controlling shareholders).

165. Quinlan & Kennedy, *supra* note 162, at 615.

166. *Compare* OR. REV. STAT. ANN. § 60.952(1)–(2) (West, Westlaw through Ch. 121 L. of 2014 Reg. Legis. Sess.) (Oregon's statute regarding remedies available to shareholders of a closely held corporation), *with* 805 ILL. COMP. STAT. 5/12.56(a)–(b) (2013) (Illinois' statute regarding remedies available to shareholders of private coporations).

167. OR. REV. STAT. § 60.952(2)(b) (West, Westlaw through Ch. 121 L. of 2014 Reg. Legis. Sess.).

168. *Id.* § 60.952(2)(c).

169. *Id.* § 60.952(2)(d).

170. *Id.* § 60.952(2)(j).

the matters in dispute."[171] Thus, much like Illinois, Oregon courts are provided with significant discretion to order a variety of remedies in cases involving minority shareholder oppression.

III. VIRGINIA'S GENERAL ASSEMBLY SHOULD EXPAND THE REMEDIES AVAILABLE FOR OPPRESSION

Virginia's General Assembly should follow Illinois and Oregon's lead and add equitable remedies to the oppression statute. The statute should track the language of Oregon's statute by providing a list of remedies, including alteration of the corporation's articles of incorporation or bylaws, the removal from office of any director or officer, the appointment of an individual as a director or officer, the award of damages to an aggrieved party, or the declaration of dividends. The statute should also explicitly state that the remedies are not exclusive and dissolution should be a last resort option which is only ordered after the court has considered other remedies and deemed them insufficient.

A. *Proposed Statute for Virginia*

This proposed legislation is taken from Oregon's oppression statute. Although Oregon and Illinois' statute are similar in many aspects, for the reasons discussed below, Oregon's statute better addresses all the concerns raised by minority shareholder oppression. The proposed Virginia statute reads, in pertinent part:[172]

> (1) In a proceeding by a shareholder in a corporation that does not have shares that are listed on a national securities exchange or that are regularly traded in a market maintained by one or more members of a national or affiliated securities association, the circuit court may order one or more of the remedies listed in subsection (2) of this section if it is established that:
>
> > (b) The directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent;
>
> (2) The remedies that the court may order in a proceeding under subsection (1) of this section include but are not limited to the following:

171. *Id.* § 60.952(2)(m).
172. This is an excerpted version of the statute. For the full version, see the Appendix.

(a) The performance, prohibition, alteration or setting aside of any action of the corporation or of its shareholders, directors or officers or any other party to the proceeding;
(b) The cancellation or alteration of any provision in the corporation's articles of incorporation or bylaws;
(c) The removal from office of any director or officer;
(d) The appointment of any individual as a director or officer;
(e) An accounting with respect to any matter in dispute;
(f) The appointment of a custodian to manage the business and affairs of the corporation, to serve for the term and under the conditions prescribed by the court;
(g) The appointment of a provisional director to serve for the term and under the conditions prescribed by the court;
(h) The submission of the dispute to mediation or another form of nonbinding alternative dispute resolution;
(i) The issuance of distributions;
(j) The award of damages to any aggrieved party;
(k) The purchase by the corporation or one or more shareholders of all of the shares of one or more other shareholders for their fair value and on the terms determined under subsection (5) of this section;
(l) The retention of jurisdiction of the case by the court for the protection of the shareholder who filed the proceeding; or
(m) The dissolution of the corporation if the court determines that no remedy specified in paragraphs (a) to (l) of this subsection or other alternative remedy is sufficient to resolve the matters in dispute. In determining whether to dissolve the corporation, the court shall consider among other relevant evidence the financial condition of the corporation but may not refuse to dissolve the corporation solely because it has accumulated earnings or current operating profits.

(3) The remedies set forth in subsection (2) of this section shall not be exclusive of other legal and equitable remedies that the court may impose. Except as provided in this subsection, the shareholders of a corporation may, pursuant to an agreement, agree to limit or eliminate any of the remedies set forth in subsection (2) of this section. The remedies set forth in subsection (2)(e), (j) and (m) [referring to an accounting, an award of damages, and dissolution] of this section may not be eliminated.
(4) In determining the appropriate remedies to order under subsection (2) of this section, the court may take into consideration the reasonable expectations of the corporation's shareholders as they existed at the time the corporation was formed and developed during the course of the shareholders' relationship with the corporation and

with each other. The court shall endeavor to minimize the harm to the business of the corporation.[173]

As previously mentioned, Oregon and Illinois' oppression statutes are, in many respects, mirror images of each other.[174] Oregon's statute, however, does have one significant difference that Virginia should adopt. Under Oregon's statute, shareholders are allowed to "eliminate any of the remedies" by agreement, except for the award of damages, an accounting, or dissolution.[175] As discussed in more detail below,[176] this section helps to relieve some of the concerns raised by those skeptical of expanding the statutory remedies available to trial courts in minority shareholder oppression cases. Virginia would do well to follow suit and adopt the proposed statute containing a similar provision.

B. *Benefits of Expanding the Statutory Remedies in Oppression Cases*

Courts in other states have found that the MBCA allows for remedies besides dissolution, including buy-outs and the appointment of custodial receivers to monitor the corporation.[177] Courts in these states have allowed for other remedies because, among other reasons: (i) additional options increases the likelihood that a judge will order an effective remedy, (ii) the courts should offer some protection to minority shareholders who inherit their shares or fail to protect themselves when they enter into a closely held corporation, and (iii) less drastic remedies help prevent power imbalances that are too in favor of either the majority shareholder or the minority shareholder.

173. As a note, Virginia's pre-trial buy-out statute would still be an option to the defendants or the corporation as a way to end litigation prior to a trial. VA. CODE ANN. § 13.1-749.1 (Cum. Supp. 2013).

174. *Compare* OR. REV. STAT. ANN. § 60.952(1) (West, Westlaw through Ch. 121 L. of 2014 Reg. Legis. Sess.) (setting forth the remedies available to shareholders of a closely held corporation), *with* 805 ILL. COMP. STAT. 5/12.56(a) (2013) (setting forth the remedies available to shareholders of a private coporation).

175. OR. REV. STAT. ANN. § 60.952(3) (West, Westlaw through Ch. 121 L. of 2014 Reg. Legis. Sess.).

176. *See infra* Part III(B).

177. *See supra* Parts II(B), (C).

1. Alternative Remedies Increase the Likelihood of an Effective Remedy Being Ordered

First, additional remedies increase the likelihood that a judge will order an effective remedy, thereby giving greater protection to minority shareholders.[178] In a study that analyzed forty-seven court decisions involving minority shareholder oppression between 1984 and 1985, buy-outs were the most common remedy ordered, comprising 54% of the cases, with dissolution only being ordered in ten of the cases (or 27%) and other relief besides dissolution or buy-outs being ordered in three other cases (8%).[179] Thus, a buy-out was the predominant remedy ordered in jurisdictions that allowed equitable remedies. Another study confirmed this conclusion, finding that 54% of cases initiated between 1960 and 1976 ended in a buy-out, even in cases where the court denied the plaintiffs relief.[180] Further, the 1985 study found that buy-outs were most common in cases involving a family owned business.[181] With buy-outs being so common, courts should be given the ability to order this remedy.

As discussed above, Virginia already has a pre-trial buy-out option.[182] Thus, it would appear that Virginia has provided the most common alternative remedy and no additional change is necessary. However, while pre-trial buy-outs are an option that defendants and corporations should have available to them, some might decide instead to proceed to trial.[183] Under the current statutory regime, once the defendant and corporation have decided to forego a pre-trial buy-out, the only other remedy available is dissolution.[184] The pre-trial buy-out, therefore, does nothing to

178. Haynsworth, *supra* note 5, at 26.

179. *Id.* at 51, 53.

180. J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 30, 33 (1977).

181. Haynsworth, *supra* note 5, at 56.

182. VA. CODE ANN. § 13.1-749.1 (Cum. Supp. 2013); *supra* Part I(C).

183. For example, in *Colgate v. Disthene Group,* the Disthene Group and its shareholders chose not to accept a pre-trial settlement or elect to buy-out the plaintiffs. *See generally supra* notes 71–84 and accompanying text (discussing the *Colgate* case and pointing out that the litigation ended in a large buy-out settlement but only after a trial on the merits, and after the subsequent appeal had been granted).

184. *See* VA. CODE ANN. § 13.1-749.1(A) (Cum. Supp. 2013); *id.* § 13.1-747 (Repl. Vol. 2011 & Cum. Supp. 2013). A plaintiff does not have the option to force a pre-trial buy-out

remedy the court's reluctance to order dissolution nor does it help protect minority shareholders should the majority not want to buy them out.

2. Courts Should Provide Some Protection to Minority Shareholders Who Fail to Protect Themselves or Who Inherit Their Shares

Second, the General Assembly should recognize the realities of human psychology; that is, that people are inherently optimistic about their own future.[185] Although most minority shareholders have the opportunity to protect themselves prior to purchasing shares, with the exception being shareholders who are gifted or inherit their stock, many fail to do so.[186] Even well-educated people might get caught up in the romanticism of starting a business with their friends or family and, in so doing, decide that the costs of protection (including hiring an attorney to draft employment or buy-sell agreements) outweigh any potential risk—especially when the probabilities of those risks are so far-fetched in the subjective minds of the would-be minority shareholders.[187] Further, there is still the segment of minority shareholders who do not have the opportunity to protect themselves because they either inherited or were gifted their stock.[188] These individuals may have

by the defendant or the corporation. *Id*. § 13.1-749.1(A) (Cum. Supp. 2013).

185. Molitor, *supra* note 2, at 554.

186. *See id*. at 495–96, 554.

187. Moll, *supra* note 30, at 912; *see also* Meiselman v. Meiselman, 307 S.E.2d 551, 558 (N.C. 1983) (observing that "close corporations are often formed by friends or family members who simply may not believe that disagreements could ever arise"). Further, some individuals might not be comfortable raising the issue of potential future conflict and protective agreements, especially when their partners are friends or family. Although clearly not the exact same situation, it is interesting to consider the unpopularity of prenuptial agreements even when a person's financial security is at stake. *See* Beth Potier, *For Many, Prenups Seem to Predict Doom*, HARV. U. GAZETTE (Oct. 16, 2003), http://www.news.harvard.edu/gazette/2003/10.16/01-prenup.html. Although this might seem like an almost laughable comparison in the world of business, it is important to remember the kinds of people who are more likely to get caught in a cycle of oppression: individuals who do not have business backgrounds and start a company with their friends or family. *See* Molitor, *supra* note 2, at 491, 554. Thus, minority shareholders, if aware of the types of protection available, may be uncomfortable raising these issues and instead decide to forego an uncomfortable conversation with the hope and belief that no issues will arise in the future.

188. Some may argue that, although the descendants had no opportunity to protect themselves, the original shareholder who bequeathed the minority shares did have such an opportunity and failed to secure any protection. Thus, Guy Dixon, who originally bought the kyanite mine and founded the Disthene Group, had the opportunity to leave

a large portion or even all of their inheritance tied up in a corporation, with no hope of liquidating any of the inheritance without the approval of the majority shareholder. For example, the minority shareholders in *Colgate* inherited millions in non-voting stock from their grandfather.[189] Although the minority shareholders proposed a buy-out and offered the majority shareholder a settlement after the case was initiated, the majority shareholders refused.

3. Less Drastic Remedies Help Prevent Power Imbalances

Finally, in some circumstances, a court that finds a majority shareholder's actions concerning, but not rising to the level where dissolution would be appropriate, has no other remedies to offer the plaintiff.[190] Because of this, majority shareholders might be rewarded for bad behavior that is just shy of continual oppression. As some scholars have pointed out, courts are reluctant to order the drastic remedy of dissolution unless there is clear evidence of continued oppression.[191] This reluctance to order dissolution undermines the very purpose of the oppression statute—that is, to protect minority shareholders.[192] Accordingly, alternative remedies are necessary to provide courts with flexibility to respond to the various circumstances presented in a case.

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his son and daughter an equal share of the business, but chose to create a majority shareholder and minority shareholder. Colgate v. Disthene Grp., Inc., 85 Va. Cir. 286, 287 (2012) (Buckingham County). This argument ignores the fact that most individuals do not foresee future problems arising from a minority shareholder situation, particularly in a family situation where the inheriting parties are siblings or otherwise related.

189. McKelway, *Mining Case Going to Virginia Supreme Court*, *supra* note 85. The Disthene Group was worth an estimated $200 million; the plaintiffs owned 42% of the stock. *Colgate*, 85 Va. Cir. at 287.

190. Hetherinton & Dooley, *supra* note 180, at 9–11 (An oppression action under the MBCA "require[s] the minority to establish that the majority's conduct is sufficiently culpable to give rise to an action for damages at common law . . . [even in cases involving] disputable value judgments where courts are traditionally reluctant to interfere with management decisions.").

191. *See, e.g.*, Moll, *supra* note 30 at 893–94; *see Drastic Times*, *supra* note 7; *see also* Scott v. Trans-System, 64 P.3d 1, 10 (Wash. 2003) (finding that the defendants' conduct did not rise to the continuous level necessary to justify dissolution of the corporation).

192. Although plaintiffs may also bring fiduciary duty claims, the only additional remedy available to them is damages. While paying damages may bring about a change in the corporate culture, a fiduciary duty claim does not allow a court to judicially sever ties between the minority shareholder and the corporation, a remedy that might be necessary given the souring of relationships that led to the lawsuit in the first place.

C. *Counter-Arguments to Adding Equitable Remedies to Virginia's Oppression Statute*

Those critical of adding equitable remedies to the oppression provision in Virginia's dissolution statute, or alternatively adopting an independent oppression statute, offer several counter-arguments against doing so. Those counter-arguments include: (i) there are very few cases that actually proceed to trial, (ii) minority shareholders should protect themselves, and (iii) allowing alternative remedies puts too much power in the hands of the judiciary to essentially oversee businesses.

1. Few Cases Actually Advance to Trial

Very few cases alleging minority shareholder oppression are actually brought in Virginia, raising the question of whether additional remedies are necessary to handle so few cases. Indeed, since 2005, when the Virginia General Assembly allowed pre-trial buy-out options, only two cases alleging oppression have gone to trial.[193] Further, some may argue that a minority shareholder is not bound to bring a dissolution cause of action as his only hope for remedying a case of oppression; instead, minority shareholders may also bring fiduciary duty claims or other business tort claims.

In *Colgate*, one of only two cases brought following the enactment of the pre-trial buyout option in Virginia, the minority shareholders also brought a breach of fiduciary duty claim against the majority shareholders,[194] who were also directors. Under Virginia Code section 13.1-690, "[a] director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation."[195] They likely would have won at the trial court level on a fiduciary duty claim. The *Colgate* court found that the business judgment rule did not protect the majority shareholders since "Disthene's board of directors did not

193. *See* VA. CODE ANN. § 13.1-749.1 (Cum. Supp. 2013); Cattano v. Bragg, 283 Va. 638, 727 S.E.2d 625 (2013); *Colgate*, 85 Va. Cir. at 286.

194. Although fiduciary duty claims were brought, the parties agreed to litigate the oppression claims first. *Colgate*, 85 Va. Cir. at 288–90.

195. VA. CODE ANN. § 13.1-690(A) (Repl. Vol. 2011 & Cum. Supp. 2013).

act as a board and make informed decisions."[196] Further, the trial court went on to find that the board "merely bent to [the majority shareholder's] ironhanded will and rubberstamped his decisions," and that "[the majority shareholder and his son] were motivated not by the best interests of the corporation, but by their personal best interests."[197]

A fiduciary duty claim, however, would not have ended the family dispute. Although a successful fiduciary duty claim would have provided the plaintiffs with a steady stream of income, it might not have stopped continued oppression by the majority shareholders. While this theory is necessarily speculative, the majority shareholders' past actions show a pattern of continued oppression unheeded by judicial action. Several years before the oppression lawsuit, the *Colgate* plaintiffs filed a lawsuit alleging the looting of the plaintiff's stock, which the majority shareholder moved out of the family trust and placed into one of the corporation's many holdings.[198] Following a ruling for the plaintiffs and a severe rebuking from the bench, the defendant majority shareholders agreed to settle the case.[199] Despite the consequences of the trust litigation, the majority shareholders soon cut the plaintiff's dividends while increasing their own pay and bonuses.[200] The majority shareholders' continued oppressive conduct eventually led to the dissolution lawsuit.[201] Thus, as the *Colgate* case shows, equitable remedies are necessary to adequately respond to the cases that appear before Virginia courts.

2. Minority Shareholders Can Protect Themselves with Contracts

Another argument offered is that, in most cases, minority shareholders can protect themselves by entering into employment agreements, buy-sell agreements, and other contracts prior to investing in a corporation. Unfortunately, human nature leads inexperienced investors to be overly optimistic of the business's

196. *Colgate*, 85 Va. Cir. at 294.
197. *Id.*
198. *Id.* at 288; *see* McKelway, *Chase City Man*, *supra* note 70.
199. McKelway, *Chase City Man*, *supra* note 70; *see Colgate*, 85 Va. Cir. at 288.
200. *Colgate*, 85 Va. Cir. at 289.
201. *Id.*

likely success and too trusting of their business partners.[202] For example, in the hypothetical discussed in Part I,[203] C invested in a corporation with two of his friends. C believed that, as an equal owner, his status as an employee of the corporation was protected and did not protect himself with a buy-sell agreement or an employment contract. Unfortunately for C, his employee status was not protected and business conflicts led A and B to agree to fire C and cut dividend payments.

In order to prevent future investors from making the same mistakes as C, some scholars argue that business owners should be required to learn about ways to protect themselves prior to entering into a business agreement.[204] Prospective owners of a corporation could be required to read a document that outlines potential risks and ways to protect against those risks prior to being able to register a corporation.[205] These documents would be maintained by the state and made available on the state's website.[206]

This approach, however, would not work for individuals who inherited a corporation, like the plaintiffs in *Colgate*. It was, in fact, the original owner of the corporation (the plaintiffs' grandfather and defendant's father) who left them with a minority/majority shareholder situation, instead of giving each line of descendants an equal share in the corporation.[207] Yet, requiring some education prior to the registration of a closely held corporation would probably reduce the likelihood of oppression and would lessen the need for alternatives to dissolution.

Further, the proposed statute would allow savvy shareholders to protect themselves with contracts on the front end while also protecting those shareholders that did not foresee potential problems or who were unable to protect themselves.[208] The proposed legislation allows shareholders to agree to eliminate all the alternative remedies listed, excepting the award of damages, an ac-

202. Thompson, *supra* note 1, at 705; *see also supra* notes 185–87 and accompanying text.

203. *See supra* Part I(A).

204. *See* Molitor, *supra* note 2, at 496.

205. *See id.*

206. *See id.* at 575.

207. Colgate v. Disthene Grp., Inc., 85 Va. Cir. 286, 288 (2012) (Buckingham County).

208. *See supra* Part III(A).

counting, or dissolution.[209] Thus, shareholders who do not want these alternative remedies to be available in any future disputes can contract them away. This does not hinder the statute's main goal—protection of minority shareholders—because those shareholders are agreeing to terms up front instead of informally forming a corporation with very little protection.

Finally, the proposed statute helps prevent an imbalance of power in favor of the minority shareholder, who could threaten havoc with an oppression suit. With alternative remedies available, courts that were once hesitant to provide any remedy because the only remedy was dissolution may now be more willing to order lesser remedies. The increased likelihood of some sort of remedy being awarded to the plaintiff increases the power of the minority shareholder.[210] Allowing for an opt-out of almost all the remedies restores that balance of power while also ensuring that the minority shareholder understands the vulnerability of his position prior to exchanging consideration for stock.

3. Allowing Alternative Remedies Places Too Much Power in the Hands of the Judiciary

A final argument against expanding equitable remedies in minority shareholder oppression cases is that doing so increases the judiciary's power and allows a judge to essentially oversee businesses. It is certainly true that cases that might have previously been dismissed because the judge was reluctant to order dissolution may now instead see a ruling in favor of the plaintiff with an equitable remedy ordered. However, the business judgment rule still applies in cases of oppression and still creates a presumption that a director has acted "in accordance with his good faith business judgment of the best interests of the corporation."[211] It is not

209. *See supra* Part III(A).

210. As one scholar pointed out, "'[t]raditional litigation of such shareholder disputes may be the legal equivalent of killing the goose that lays the golden egg.'" In such circumstances, "[b]y the time the parties' rights are finally adjudicated, the company may be damaged beyond repair: Working relationships are destroyed; legal fees and costs are crushing; and key employees are distracted from attending to the needs of the enterprise and its customers." Marmaduke, *supra* note 115. Therefore, it is in the best interest of the corporation and the majority shareholders to avoid litigation when possible, giving the conniving minority shareholder the power to hold the corporation hostage to potential litigation.

211. *See* VA. CODE ANN. § 13.1-690 (Repl. Vol. 2011 & Cum. Supp. 2013).

until after the plaintiff has rebutted this presumption and proven oppression that a judge can grant equitable remedies.[212] Equitable remedies thus protect minority shareholders while not overstepping or overruling the business judgment rule.

CONCLUSION

Currently, minority shareholders who allege oppression in Virginia may only request dissolution as a remedy.[213] While many states, either through legislation or case law, have found that courts have the power to order remedies other than dissolution,[214] the Supreme Court of Virginia has ruled otherwise.[215] Thus, the supreme court has placed the ball squarely in the General Assembly's court—if additional remedies are to be provided, it must be the General Assembly who acts to change the statute and explicitly allow such remedies. Legislatures in other states, such as Oregon, have done just that by adding a non-exhaustive list of alternative remedies to their dissolution statutes in cases of minority shareholder oppression.[216] The General Assembly should follow Oregon's lead by adopting the proposed oppression statute or, at the very least, adding equitable remedies to the dissolution statute, thereby granting Virginia's trial courts the discretionary power to order an appropriate remedy based on the unique facts of a case.

212. As one of the plaintiff's attorneys in *Colgate* noted, "[u]ntil now, majority shareholders at many companies in Virginia and elsewhere have been able to run a company for their own benefit while running roughshod over minority shareholders." *Disthene Group Settlement Bolsters Minority Shareholders' Rights,* LECLAIRRYAN (Aug. 22, 2013), http://www.leclairryan.com/news/xprNewsDetail.aspx?xpST=NewsDetail&news=1007.

213. *See supra* notes 50–57 and accompanying text.

214. *See, e.g.*, 805 ILL. COMP. STAT. 5/1250(b) (2013); Fix v. Fix Material Co., 538 S.W.2d 351, 357 (Mo. Ct. App. 1976); Scott v. Trans-System, Inc., 64 P.3d 1, 3 (Wash. 2003).

215. White v. Perkins, 213 Va. 129, 135, 189 S.E.2d 315, 320 (1972).

216. *See, e.g.*, OR. REV. STAT. ANN. § 60.952(1)(b) (West, Westlaw through Ch. 121 L. of 2014 Reg. Legis. Sess.).

APPENDIX—PROPOSED DRAFT STATUTE

The full proposed statute would read:

(1) In a proceeding by a shareholder in a corporation that does not have shares that are listed on a national securities exchange or that are regularly traded in a market maintained by one or more members of a national or affiliated securities association, the circuit court may order one or more of the remedies listed in subsection (2) of this section if it is established that:

(a) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;
(b) The directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent;
(c) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; or
(d) The corporate assets are being misapplied or wasted.

(2) The remedies that the court may order in a proceeding under subsection (1) of this section include but are not limited to the following:

(a) The performance, prohibition, alteration or setting aside of any action of the corporation or of its shareholders, directors or officers or any other party to the proceeding;
(b) The cancellation or alteration of any provision in the corporation's articles of incorporation or bylaws;
(c) The removal from office of any director or officer;
(d) The appointment of any individual as a director or officer;
(e) An accounting with respect to any matter in dispute;
(f) The appointment of a custodian to manage the business and affairs of the corporation, to serve for the term and under the conditions prescribed by the court;
(g) The appointment of a provisional director to serve for the term and under the conditions prescribed by the court;
(h) The submission of the dispute to mediation or another form of nonbinding alternative dispute resolution;
(i) The issuance of distributions;
(j) The award of damages to any aggrieved party;
(k) The purchase by the corporation or one or more shareholders of all of the shares of one or more other shareholders for

their fair value and on the terms determined under subsection (5) of this section;
(l) The retention of jurisdiction of the case by the court for the protection of the shareholder who filed the proceeding; or
(m) The dissolution of the corporation if the court determines that no remedy specified in paragraphs (a) to (l) of this subsection or other alternative remedy is sufficient to resolve the matters in dispute. In determining whether to dissolve the corporation, the court shall consider among other relevant evidence the financial condition of the corporation but may not refuse to dissolve the corporation solely because it has accumulated earnings or current operating profits.

(3) The remedies set forth in subsection (2) of this section shall not be exclusive of other legal and equitable remedies that the court may impose. Except as provided in this subsection, the shareholders of a corporation may, pursuant to an agreement, agree to limit or eliminate any of the remedies set forth in subsection (2) of this section. The remedies set forth in subsection (2)(e), (j) and (m) [referring to an accounting, an award of damages, and dissolution] of this section may not be eliminated.

(4) In determining the appropriate remedies to order under subsection (2) of this section, the court may take into consideration the reasonable expectations of the corporation's shareholders as they existed at the time the corporation was formed and developed during the course of the shareholders' relationship with the corporation and with each other. The court shall endeavor to minimize the harm to the business of the corporation.

(5)(a) If the court orders a share purchase, the court shall:

(i) Determine the fair value of the shares, with or without the assistance of appraisers, taking into account any impact on the value of the shares resulting from the actions giving rise to a proceeding under subsection (1) of this section;
(ii) Consider any financial or legal constraints on the ability of the corporation or the purchasing shareholder to purchase the shares;
(iii) Specify the terms of the purchase, including, if appropriate, terms for installment payments, interest at the rate and from the date determined by the court to be equitable, subordination of the purchase obligation to the rights of the corporation's other creditors, security for a deferred purchase price and a covenant not to compete or other restriction on the seller;
(iv) Require the seller to deliver all of the seller's shares to the purchaser upon receipt of the purchase price or the first installment of the purchase price; and
(v) Retain jurisdiction to enforce the purchase order by, among other remedies, ordering the corporation to be dissolved if the

purchase is not completed in accordance with the terms of the purchase order.

(A) The share purchase ordered under this subsection shall be consummated within 20 days after the date the order becomes final unless before that time the corporation files with the court a notice of its intention to dissolve and articles of dissolution are properly filed with the Secretary of State within 50 days after filing the notice with the court.
(B) After the purchase order is entered and before the purchase price is fully paid, any party may petition the court to modify the terms of the purchase, and the court may do so if the court finds that the modifications are equitable.
(C) Unless the purchase order is modified by the court, the selling shareholder shall have no further rights as a shareholder from the date the seller delivers all of the shareholder's shares to the purchaser or such other date specified by the court.

(6) In any proceeding under subsection (1) of this section, the court shall allow reasonable compensation to the custodian, provisional director, appraiser or other such person appointed by the court for services rendered and reimbursement or direct payment of reasonable costs and expenses. Amounts described in this subsection shall be paid by the corporation.

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