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CORPORATE DISSOLUTION FOR ILLEGAL, OPPRESSIVE OR FRAUDULENT ACTS: THE MARYLAND SOLUTION

Section 79A (b) (2) of the Maryland Corporation Law, enacted in 1967, provides that:

Any holder of shares entitled to vote at an election of directors of a corporation may petition a court of equity to dissolve the corporation on one or both of the following grounds:

(2) that the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent.²

Section 79A further provides that the court, in a proceeding initiated by such a petition, “within its sound judicial discretion . . . shall determine whether the corporation should be dissolved” and “shall make a judgment or a final order dissolving the corporation” if it finds that the corporation should indeed be dissolved.² A similar provision, adopted by the American Law Institute in Section 90 of the Model Business Corporation Act,³ was first enacted in Illinois in 1933⁴ and has subsequently been enacted in twenty other states.⁵


The . . . court shall have full power to liquidate the assets and business of a corporation:
(a) In an action by a shareholder when it is established:
(1) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or
(2) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or
(3) That the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or
(4) That the corporate assets are being misapplied or wasted.


Prior to the enactment of Section 79A, Section 80 of the Maryland Corporation Law was the only Maryland statutory provision for involuntary dissolution of a corporation by judicial action. It provided for dissolution by a "court of equity" on the suit of "any stockholder" when the corporation was found to be "insolvent." In the event of an "equally divided vote of the stockholders" resulting in a "failure to elect directors" at "two successive annual elections," a court of equity, under Section 52(e), could, on the application of any stockholder, appoint a "receiver." The powers of such a receiver, as set out in Section 81(a), included the power to liquidate the assets of a corporation and close its affairs.

The amended Corporation Law retained Section 80, with only minor changes, but repealed Section 52(e). The deadlock situation previously treated in Section 52(e) is now dealt with in Section 79A(b)(1), which has expanded the powers of the court in the event of a deadlock to include the power to dissolve. In addition, Section 79A provides for petition for dissolution by "the holder of shares entitled to vote not less than twenty-five per cent of all the votes entitled to be cast" in the event "directors are so divided that the votes required for board action cannot be attained" or "the stockholders are so divided that the votes required for the election of directors cannot be obtained." Section 79A applies to all Maryland corporations, since the section is explicitly incorporated by reference in Section 109 of the Close Corporation Law.

In the past, no Maryland court has ever explicitly held that a court of equity has the power to dissolve solvent corporations in the absence of statutory authority. In cases of wasteful, fraudulent or

8. Md. Ann. Code art. 23, § 81 (a) (1966), § 81 was not affected by the 1967 amendments to the Corporation Law. "Liquidation" is defined as the sale of the corporation's assets and the distribution of the proceeds to its creditors and stockholders, and is generally synonymous with "winding up." "Dissolution" is defined as the termination of the corporation's existence as a legal entity, and necessarily requires "liquidation" as part of the process of dissolving. From the standpoint of a minority shareholder's concern in preserving his interest, the distinction between dissolution and liquidation is insignificant, but courts have placed varying degrees of emphasis on the distinction, variously recognizing a power to liquidate under circumstances where there is a confessed absence of power to dissolve or denying a right to liquidate on the basis of a lack of power to dissolve. See notes 13 & 15 infra and accompanying text.
13. See, e.g., Barton v. International Fraternal Alliance, 85 Md. 14, 36 A. 658 (1897); Mason v. Supreme Court of the Equitable League, 77 Md. 483, 27 A. 171 (1893). But see Hagerstown Furniture Co. v. Baker, 158 Md. 574, 149 A. 556 (1930), where a receiver, appointed for misconduct by the directors, was permitted to sell the company's assets when it appeared that the company could no longer be run profitably. The court reasoned that, if it did not possess the power to authorize such a sale, the purpose of the appointment of the receiver, that is, the preservation of the company's
illegal conduct, the courts appointed receivers to take charge of the corporation’s assets.\textsuperscript{14} The court-appointed receivers were not granted the authority they now possess under Section 81(a) of the corporation law to sell the assets of the corporation, because the courts did not wish to sanction, by indirect means, a dissolution that they could not order directly.\textsuperscript{15} Therefore, except for those receivership cases which may clarify the meaning of terms like “illegal” and “fraudulent,” there is no basis in the Maryland common law for the new provision for dissolution on the grounds of misconduct of those in control of a corporation.

The enactment of the misconduct dissolution provision reflects a desire to protect the interests of shareholders at the expense of director freedom of action. However, the language of the provision does not reveal clearly what conduct will be grounds for dissolution. Given the severe economic losses which dissolution produces, the fear of judicial dissolution may hamstring the directors’ exercise of business judgment to a greater extent than can be justified by the shareholder rights protected by the provision. This Note will elaborate on the criteria set forth in the dissolution section by examining analogous statutory and common law standards and will suggest changes in Section 79A designed to more properly balance the need for shareholder protection and the desirability of maintaining director freedom of action. Given the vague criteria for dissolution, the danger of broad judicial construction may have the further effect of discouraging new companies from selecting Maryland as their state of incorporation; full consideration of that effect is outside the scope of this Note.

assets, would be defeated by the very administration of the receivership. The court made it clear that the power being exercised was not statutory in origin.  

\textsuperscript{14} The specific language used by the courts to describe the offensive misconduct varies somewhat. Some courts suggested that receivers could be appointed in cases where those in control of the corporation were guilty of conduct which was “\textit{ultra vires}, fraudulent or illegal.” Wall & Beaver Street Corp. v. Munson Line, Inc., 58 F. Supp. 101, 107 (D. Md. 1943); James T. Powers Foundry Co. v. Miller, 166 Md. 590, 595, 171 A. 842, 845 (1934); Howeth v. Coulbourne Bros. Co., 115 Md. 107, 117, 80 A. 916, 920 (1911); Callaway v. Powhatan Improvement Co., 95 Md. 177, 185, 52 A. 916, 918 (1902); Du Puy v. Transportation & Terminal Co., 82 Md. 408, 442, 33 A. 889, 895 (1895); Shaw v. Davis, 78 Md. 308, 318, 28 A. 619, 622 (1894). Others indicated that appointment of receivers was desirable in the event of “fraud or spoliation, or imminent danger of the loss of property.” Williams v. Salisbury Ice Co., 176 Md. 13, 27, 3 A.2d 507, 514 (1939); Hagerstown Furniture Co. v. Baker, 155 Md. 549, 558, 142 A. 885, 891 (1928); Baltimore Skate Mfg. Co. v. Randall, 112 Md. 411, 414, 76 A. 491, 492 (1910); Davis v. United States Elec. Power & Light Co., 77 Md. 35, 40, 25 A. 982, 984 (1893). In Coffman v. Maryland Publishing Co., 167 Md. 275, 286, 173 A. 248, 253 (1934), the court felt that “wasteful, fraudulent or \textit{ultra vires}” conduct warranted the appointment of a receiver. There were also indications that misconduct was not a sufficient ground for the appointment of a receiver at common law. Mason v. Supreme Court of the Equitable League, 77 Md. 483, 486, 27 A. 171, 172 (1893): “If the officers of [a corporation] should be guilty of misconduct, fraud, or mismanagement, a Court of equity has full power to restrain and enjoin them; but it will not . . . take away the rights of the share or certificate holders either by dissolving the corporation or by placing its affairs in the hands of a receiver.” Receivers were actually appointed only in the \textit{Hagerstown Furniture} and \textit{Du Puy} cases.

I. Absence of Precise Standards for Dissolution

The Maryland statutory scheme for dissolution in the event of misconduct on the part of those in control of a corporation appears in two separate subsections of Section 79A. This produces a peculiar result: Section 79A (b) provides that a holder of voting shares may petition for dissolution on the grounds of "illegal, oppressive or fraudulent conduct," but Section 79A (c) leaves the final determination of dissolution within the "sound judicial discretion" of the court. Apparently, the standard of "illegal, oppressive or fraudulent" conduct applies only to the standing of a shareholder to petition for dissolution. The actual judicial decision to dissolve the corporation is evidently not governed by that standard. Thus, the phrase "illegal, oppressive or fraudulent" is not a statutory standard for judicial dissolution at all, and there are, strictly speaking, no legislative criteria for the actual judicial determination of the desirability of dissolution.

Of course it could be argued that the legislature intended the courts to exercise their "sound judicial discretion" within the framework of the "illegal, oppressive or fraudulent" language set out in Section 79A (b). Even then, however, the standard would be so vague that the courts would be able to exercise considerable breadth of discretion in the dissolution of corporations for the misconduct of controlling interests.

Under either interpretation of the statute, those in control of a corporation are given no clear guidelines as to the specific conduct which will result in involuntary dissolution. This uncertainty, together with the severe economic consequences accompanying dissolution, may result in overly cautious conduct on the part of those in control of a corporation. Moreover, this uncertainty may enable a minority shareholder, by threatening suit for dissolution, to exert a greater influence on the conduct of the business than his interest warrants. Thus, the absence of a precise legislative standard may greatly restrict director freedom of action and may even permit a new variety of "strike suit."

The uncertainty created by the absence of a statutory standard is enhanced by the subtlety of the two judgments which a court must make in the exercise of its "discretion" to dissolve, i.e. the decision to intervene at all and, assuming intervention is proper, the determination that dissolution is the appropriate remedy in the case at issue. In the first place, judicial intervention in the affairs of a solvent corporation at the request of a shareholder involves consideration of two conflicting principles of corporate organization. "It is . . . fundamental in the law of corporations that the majority of its stockholders shall control the policy of the corporation . . . ." Discretion as to what
action would be most beneficial to the success of the corporate enterprise is vested in the majority stockholders so that, for practical reasons, the ordering of corporate activity will be fundamentally private and not public. Thus, it is said that courts will not interfere with the ordinary business judgments of those in control. 20 "But even more fundamental than the doctrine that the majority rules, is the principle that the corporate assets and profits must be administered for the benefit of all the stockholders." 21 Given the separation of ownership and management of property inherent in the corporate form of business, the "discretion" to manage should never be so broadly interpreted as to include appropriation for personal use. Therefore, a "fiduciary duty" is imposed on those in control of corporate affairs; when a majority of shareholders effectively controls business conduct they assume such a duty. 22 The judicial decision to intervene, therefore, entails a conclusion as to the proper limits of "business judgments."

Secondly, the determination that dissolution is the appropriate remedy involves a balancing of the sufficiency of available alternative remedies to protect the complaining shareholder against the economic losses which all shareholders will suffer if dissolution is ordered. The usual extra-judicial remedy for those dissatisfied with the management of a corporation is to remove the directors or to sell out. 23 Individual wrongful transactions by directors may be remedied by an accounting or an injunction. 24 However, a controlling group which embarks on a concerted program of conduct which amounts to appropriation of the other stockholders' contributions to the corporate assets would undoubtedly not exercise the removal remedy. The sufficiency of the accounting or injunction remedy will be inversely related to the degree of "incorrigibility" of the controlling group's conduct. 25 Judicial intervention in the form of an accounting or injunction may well sufficiently impress those in control with the availability of sanctions so that they will not commit further wrongful acts, but the difficulty of continual judicial monitoring of an "incorrigible" controlling group may require a more permanent solution. To be weighed against the court's

20. Id. "Unwise and indiscreet management . . . . due to mistakes of judgment or mere default, would not be sufficient to grant the . . . [prayer for the appointment of a receiver]." Williams v. Salisbury Ice Co., 176 Md. 13, 23, 3 A.2d 507, 512 (1939).


23. Nobel v. Gadsden Land & Improvement Co., 133 Ala. 250, 31 So. 856, 857 (1902); Benedict v. Columbus Constr. Co., 49 N.J. Eq. 23, 23 A. 485, 489 (Ch. 1892). See generally MD. ANN. CODE art. 23, § 52 (d) (1965) (removal of directors by stockholder action at "any meeting" duly called at which a quorum is present). The availability of the "sell out" remedy is dependent upon the existence of a market for the complainant's shares. In the case of the closely-held corporation, there may be virtually no market for the complainant's shares, while in the case of the larger, widely-held corporation listed on an exchange there is a ready market for his shares. The availability of a market for the complainant's shares would also be weighed against the extent of the loss inherent in dissolution in determining the appropriateness of the dissolution remedy.


estimate of the degree of incorrigibility is the economic loss which all shareholders, innocent and guilty, suffer in a forced sale of a business. If feasible, judicial monitoring of the controlling group’s conduct is preferable to dissolution.

II. GUIDELINES FOR COURT APPLICATION OF THE “MISCONDUCT” DISSOLUTION PROVISION

While there is no Maryland common law background for the new involuntary dissolution provision and while the dissolution provision simply grants jurisdiction to courts of equity to hear petitions for dissolution without setting concrete “standards” for dissolution, the construction given comparable statutory provisions in other jurisdictions provides a starting point for the interpretation of the Maryland provision. The misconduct provisions enacted in other states are based primarily on the formulation adopted by the Model Act. While the language of the Model Act provision, unlike the Maryland provision, apparently sets out the “illegal, oppressive or fraudulent” language as a statutory standard, it is, like the Maryland provision, primarily a grant of jurisdiction to dissolve. The statutes are, therefore, sufficiently similar that a consideration of decisions under statutes based on the Model Act provides a basis for a preliminary approach to an interpretation of the Maryland provision. Cases decided under the Model Act provision for judicial intervention on the grounds of “misapplication or waste” of corporate assets are also significant, since such conduct could fall within the “illegal, oppressive or fraudulent” language of the Maryland act.

Most states having a misconduct provision permitting judicial dissolution have, like Maryland, only recently enacted it, although Pennsylvania and Illinois had such provisions as early as 1933. Consequently, there have been only sixteen reported cases involving the statutes based on the Model Act formulation. In four of the sixteen cases, dissolution or liquidation was ordered.

26. See notes 3 & 5 supra and accompanying text.
27. The Maryland dissolution provision does not contain the “misapplication or waste” language.
29. In Long v. Wilson Stove & Mfg. Co., 277 Ill. App. 57 (1934), the court appointed a receiver to liquidate the corporation under both the “illegal, oppressive
In *Long v. Wilson Stove & Manufacturing Co.*, an Illinois case, a family corporation was dominated by Wilson, who was director, president and one-third shareholder. It was the practice of the three directors to make decisions and, subsequently, to have them ratified by stockholders without formal stockholders' meetings. The business earned money from its founding in 1884 until the depression years of 1930–1932. Unable to stop losses, the directors passed a resolution to sell the corporation's assets and the matter was approved by a majority of the stockholders at a special meeting. The plaintiff, holder of 991 of the 4,500 outstanding shares, did not attend, although she was notified of the meeting. Wilson had invited 300 potential buyers to the sale, but no notices were published in newspapers or trade journals. Wilson's bid was $15,000 on property valued at from $50,000 to $100,000. The court appointed a receiver to liquidate the corporation, holding that the conduct of the majority in approving a sale of the corporation's assets at a time when there was clearly no market for them was "oppressive and fraudulent" with respect to the plaintiff-stockholder and was a "misapplication and waste" of those assets.

*Gidwitz v. Lanzit Corrugated Box Co.* involved a deadlock situation; voting power was divided fifty-fifty, as were the directors. As a result, no successors to the directors had been elected for ten consecutive annual meetings. The president of the corporation represented a single faction. Plaintiff alleged that he had been deprived of participation in the management of the company, that the president had organized another corporation with Lanzit funds and that this corporation was losing money, that the president hired an executive vice-president at a $32,000 per year salary, that the president made arbitrary deductions from the salary of the plaintiff, that the president had, without board approval, borrowed money for the corporation from institutions in which he had an interest, that the president had executed a proxy to himself to vote the corporation's interest in a subsidiary, and that the president had failed to consult with the directors on policy decisions. Plaintiff claimed that these facts showed "oppressive" conduct on the part of those in control. The denial of plaintiff's right to participate in management and the "arbitrary and high-handed manner" in which the president handled company affairs was held to constitute "oppressive" conduct justifying liquidation under the statute.

or fraudulent" provision and the "misapplication or waste" provision of the Illinois misconduct statute. In *Gidwitz v. Lanzit Corrugated Box Co.*, 20 Ill. 2d 208, 170 N.E.2d 131 (1960), the court ordered liquidation under the "illegal, oppressive or fraudulent" provision alone. In *Kessler v. United Agencies, Inc.*, 243 S.W.2d 779 (Mo. App. 1951), the court dissolved the corporation on the grounds set forth in the "misapplication or waste" provision alone. *Liddell v. Smith*, 65 Ill. App. 2d 352, 213 N.E.2d 604 (1965), invoked the Model Act provision as a whole, but the offending shareholder in that case exhibited conduct similar to that in the cases decided under the specific provisions.

31. 20 Ill. 2d 208, 170 N.E.2d 131 (1960).
32. See also *Collier v. Mayflower Apartments*, 196 Ga. 419, 26 S.E.2d 731 (1943), where the majority stockholders in defendant corporation had cancelled a $20,000 debt owing to the defendant corporation by a second corporation wholly owned by the majority for $12,500 when there was no question of that second corporation's solvency. The complaint was held sufficient as stating a cause of action for fraud.
33. *Gidwitz* raises the problem of the interrelationship of the "deadlock" provision of dissolution statutes and "misconduct" provisions. For treatments of dissolution in
In *Kessler v. United Agencies, Inc.*, a widow, who inherited the majority interest in the defendant corporation, entered into an agreement with minority shareholders that she would vote her shares in favor of liquidation if she failed to operate the business at a profit after one year. At the end of the year, no dividends had been paid and the widow-manager refused to allow plaintiffs to examine the corporation’s books, although she continued to draw a salary. In addition, it appeared that she had credited corporate funds to personal accounts. Plaintiff sought dissolution on the grounds that corporate assets were being misapplied and wasted, and the Missouri trial court order to that effect was upheld.

In *Liddell v. Smith*, the plaintiff owned one-third of the outstanding shares of a corporation; the remainder were owned by the defendant. The plaintiff alleged that the defendant had usurped control of the corporation, had removed the books from the state, had removed company equipment from land owned by the company to his own land, and had generally sought to take over the assets of the business. Dissolution was ordered, but the decision was apparently based on the deadlock provision as well as the misconduct provisions of the Illinois statute.

These cases illustrate that the conduct required for dissolution under the "illegal, oppressive or fraudulent" provision is not significantly different from that required for dissolution in the common law dissolution case of *Miner v. Belle Isle Ice Co.*, the leading non-


34. 243 S.W.2d 779 (Mo. App. 1951).
35. The court in *Kessler* stated that dissolution was a "drastic remedy" but that, in this case, it was not invoked "against the wishes of a substantial group of stockholders who might want to continue the business" since "the stockholders had already voted such liquidation and dissolution." 243 S.W.2d at 782. Whether the result would have been different in the absence of the agreement is not indicated. In the case of *Strong v. Fromm Laboratories, Inc.*, 273 Wis. 159, 77 N.W.2d 389, 395 (1956), the Wisconsin Supreme Court determined that, given the study that went into the drafting of the involuntary dissolution provision, the absence of a commonly adopted statutory provision, specifically a clause that dissolution be "beneficial to the interests of the stockholders," implied a rejection of that requirement in an action under a deadlock provision based on § 90 of the Model Act.
37. 93 Mich. 97, 53 N.W. 218 (1892). Plaintiff Miner and defendant Lorman entered into a partnership to sell ice in 1869, and in 1874 the business was incorporated, each partner receiving forty-three and one-half per cent of the stock issued. The business prospered. Miner held the office of president and Lorman that of manager; both received annual salaries of $1200. In 1881 Lorman bought out two complaining shareholders and by 1882 held just over fifty per cent of the shares issued. In 1882 Miner, who handled the production end of the business, began to complain of the loose manner in which Lorman, who handled the distribution end, accounted for receipts. Lorman then filled the board of directors with persons subject to his control. Lorman's salary was raised to $4,000 per year and one of his "directors" was hired as secretary at a salary of $1000 per year. Miner was discharged from his office. Meetings were held without notice of place so that Miner could not be present. No dividends were paid. Rent paid by the corporation for jointly owned property were higher for Lorman than for Miner. Lorman leased a property he had purchased for $3500 to the ice company at a rate which returned $4,650 in six years. This land, eventually sold to the company by Lorman, was later returned to him at a price less than the company had paid despite the fact that the land's value had increased. Lorman guaranteed dividends to Carpenter, the only other principal stockholder, apparently in order to insure his compliance with his conduct of the business. Upon Miner's petition, the Michigan court ordered the company dissolved.
statutory dissolution case, and subsequent common law dissolution cases. The offensive “controlling group” conduct involved in those common law decisions included purposeful failure to call meetings, refusal to allow stockholders to inspect the corporation’s books when they had that right or falsification of the corporation’s records, allocation of excessive salaries to themselves, appropriation of corporate funds to personal use, either through fraudulent transactions with the company or fraudulent transactions with other companies substantially owned by those in control. In other such cases the controlling majority was found to have been guilty of mismanagement or of withholding dividends, sometimes with the purpose of depressing stock values so that the minority could be bought out. A review of both statutory and common law dissolution cases enables one to catalogue the kinds of conduct for which dissolution has been ordered, but the standard for that conduct remains vague and can be only loosely characterized as prohibiting controlling group “appropriation” of corporate assets. At the same time, however, the statutory and common law cases clearly illustrate that dissolution will be granted only for conduct which is flagrantly improper.

The term “oppressive,” a term less familiar to the legal profession than “illegal” or “fraudulent,” appears open to a broader, less strict

38. Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817 (4th Cir. 1933); Henry v. Ide, 208 Ala. 33, 93 So. 860 (1922); Tri-City Electric Service Co. v. Jarvis, 206 Ind. 5, 185 N.E. 136 (1933); Klugh v. Coronaca Milling Co., 66 S.C. 100, 44 S.E. 566 (1932).


41. Henry v. Ide, 208 Ala. 33, 93 So. 860 (1922); Red Bud Realty Co. v. South, 153 Ark. 320, 241 S.W. 21 (1922); Riley v. Callahan Mining Co., 28 Idaho 525, 155 P. 665 (1916); Tri-City Electric Service Co. v. Jarvis, 206 Ind. 5, 185 N.E. 136 (1933); State ex rel. Connors v. Shelton, 238 Mo. 281, 142 S.W. 417 (1911); Bilby v. Morton, 119 Okla. 15, 247 P. 384 (1926); Klugh v. Coronaca Milling Co., 66 S.C. 100, 44 S.E. 566 (1902).


43. Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817 (4th Cir. 1933); Lichens Co. v. Standard Commercial Tobacco Co., 28 Del. Ch. 220, 40 A.2d 447 (1944); Riley v. Callahan Mining Co., 28 Idaho 525, 155 P. 665 (1916); Brent v. B.E. Brister Sawmill Co., 103 Miss. 876, 60 So. 1018 (1913).

44. Brent v. B.E. Brister Sawmill Co., 103 Miss. 876, 60 So. 1018 (1913); Bernstein v. New Jersey Bankers Sec. Co., 109 N.J. Eq. 233, 156 A. 768 (1931).

45. Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817 (4th Cir. 1933); Henry v. Ide, 208 Ala. 33, 93 So. 860 (1922); Red Bud Realty Co. v. South, 153 Ark. 320, 241 S.W. 21 (1922).


47. The two courts which have sought to define “oppressive” have had to rely on dictionary definitions. The Illinois Appellate Court in Central Standard Life Ins. Co. v. Davis, 10 Ill. App. 2d 245, 134 N.E.2d 653, 659 (1956), quoted the dictionary phrases “unreasonably burdensome; unjustly severe”, “tyrannical”, “overpowering to the senses.” Later the court indicated that a cause of action would be stated if a
interpretation than the existing statutory cases or the common law cases would seem to require and, therefore, merits particular study. Two Illinois cases have dealt with the narrow issue of "oppressive" conduct. In both cases the courts concluded that the circumstances did not establish oppression.

In Central Standard Life Insurance Co. v. Davis,48 plaintiff-corporation, a preferred stockholder in a hotel company, sought dissolution on behalf of itself and 400 other preferred stockholders. The three defendant-directors held all the outstanding common stock at the commencement of the action. One director, who held 7990 of the 8000 outstanding shares of common stock, was also a majority owner in a corporation set up to operate the hotel company in question. The hotel company had shown profits from 1924, when it was chartered, until 1931, but between 1931 and 1951, when the plaintiff purchased his interest, no dividends had been paid. Accumulated dividends on preferred stock amounted to approximately $1,000,000 while the assets of the company were variously estimated to be $700,000, according to plaintiff's evaluation, and $2,300,000, according to defendant's appraisal. Gross annual income had increased from $400,000 in 1942 to $1,000,000 in 1951. Plaintiff claimed that, since the company had never made profits, the only interest of the defendant in continuing the company's operations was that derived from his exclusive control and that failure of the defendant to liquidate in the face of depreciating assets constituted "oppressive" conduct.

The master who first heard the case recommended dismissal for want of a showing that the acts of the director had ever been complained of at a stockholder's or director's meeting. The appellate court held that "oppressive" conduct was not established, since no evidence of "mismanagement or misapplication of assets" had been presented. The Supreme Court of Illinois rejected the requirement of "mismanagement or misapplication of assets" as a necessary ingredient of oppression. The court also rejected the argument that "oppressive" is "substantially synonymous with 'illegal' and 'fraudulent,'" and acknowledged that "'oppressive' does not necessarily savor of fraud."49

"clear abuse of trust" were shown. 134 N.E.2d at 660. The House of Lords, in Scottish Co-operative Wholesale Soc., Ltd. v. Meyer, [1959] A.C. 324, 342, used the terms "burdensome, harsh and wrongful."

48. 10 Ill. 2d 566, 141 N.E.2d 45 (1957).
49. 141 N.E.2d at 50. In defining "oppressive" in Davis, the Illinois Supreme Court distinguished the case of Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F.2d 817 (4th Cir. 1933), on the ground that the conduct therein was "fraudulent" while the case then under consideration involved only "oppressive" conduct. The distinction is dubious, however, and the weakness of the distinction undermines much of what the Illinois court said about the meaning of "oppressive." In Tower Hill, the defendant company was under the control of a single stockholder who held a large majority of the common stock but little preferred stock. No meetings of stockholders were held for thirteen years and the majority stockholder controlled directors during that time. Preferred stock dividends were in arrears and assets were barely sufficient to pay the preferred stockholders. Recognizing that he had little to lose and that there was a good chance of increasing the value of his common stock, the majority stockholder invested in a highly speculative venture, which ultimately failed. In an action by a preferred stockholder the Court of Appeals for the Fourth Circuit, applying common law, affirmed the appointment of a receiver to wind up the corporation. While the court characterized the conduct of the majority as an "abuse of power" and as in "deliberate disregard of plaintiff's rights," it did not use the term "fraudulent,"
The court placed great emphasis on the fact that the increase in gross income illustrated a prospect of gain, which made the "drastic remedy" of dissolution inappropriate. In addition, the court pointed out that since plaintiff had acquired his shares only recently at a price which indicated speculation, he had "already taken advantage of the situation he complains of in the price that he paid for his stock."50 The court noted, however, that the dismissal did not mean that preferred stockholders must wait until the termination of the life of the corporation before distribution of its assets would be ordered, and that "[t]ime may show that there is no reasonable prospect of profitable operation."51

The other Illinois case dealing with "oppression," Polikoff v. Dole & Clark Building Corp.,52 involved a corporation reorganized in 1933 with two classes of stock, no dividends to be paid on the second class as long as any shares of the first were outstanding. Plaintiff owned under two per cent of the first class of stock and sixteen per cent of the second class; defendant owned fifty-five per cent of the first class and seventy-six per cent of the second class. Defendant and his son-in-law were directors and officers from 1951 through the commencement of the action in 1958. Defendant received a salary of $6,000 per year to manage the corporation's primary asset, a building containing a movie theater, nine stores and a hotel. The operations showed annual losses of $4,200 between 1952 and 1957 and a profit of $1,700 in the year the action was commenced. Directors' fees of $300 per year paid previously were eliminated that same year. In 1953 the real estate of the corporation was mortgaged to the defendant's wife for $60,000, those proceeds being used to renovate the building. No surplus was applied to the retirement of the outstanding shares of the first class. The defendant refused to sell the corporation's real estate at plaintiff's recommendation and, the plaintiff alleged, he spent too little to advertise the hotel and had made little effort to secure a tenant for the theater. The defendant was buying up corporation stock at depressed prices. Recognizing that there was a danger of foreclosure on the mortgage and that there was no reasonable prospect of retiring the outstanding shares, plaintiff sought liquidation. The court found the defendant's conduct was not "oppressive":

[T]he remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one — oppression of the majority by the minority.

Almost all aspects of plaintiff's charges relate solely to business decision-making which by our statute is made the responsibility of the board of directors and the officers of a corporation.

Yet the Illinois court in Davis made that characterization and distinguished the case on that ground.

50. 141 N.E.2d at 51.
51. Id.
Whether [the defendant] spent too much or too little for advertising, or for salaries, or for rehabilitation of the premises, are matters with which the court will not concern itself — at least not in so far as they bear on the question of liquidation.\textsuperscript{53}

The word "oppressive" also appears in the English Companies Act of 1948.\textsuperscript{54} In Scottish Co-operative Wholesale Society, Ltd. v. Meyer,\textsuperscript{55} the majority stockholder was a company which entered into a business with the minority stockholder in order to obtain the benefit of his trade license and skills. When the license and services of the minority stockholder were no longer needed, the majority offered to buy him out at substantially less than fair value, and then diverted the company's business to itself. This conduct was found to be "oppressive." In Re H.R. Harmer, Ltd.,\textsuperscript{56} the majority shareholder had acted as sole proprietor from 1886 to 1947, when the business was incorporated. After incorporation he continued to dominate the business, disregarding the resolutions of the board of directors. He committed the company to the establishment of an additional foreign branch, refused to permit board meetings to review his action in firing an employee, charged his wife's travel expenses to the company despite a board resolution, refused to renew an employment contract with a particularly valuable employee, ordered the sale of an American subsidiary, and engaged a private detective to watch the company staff. His conduct was found to be "oppressive."

While the broader English construction of "oppressive" is probably more consistent with the apparent purpose of the dissolution statutes, to broaden shareholders' remedies, than is the Illinois construction, the cases illustrate that the conduct described by the term "oppressive" is in reality no different from the unfair dealing or breach of duty characterized as "fraudulent" in other cases.\textsuperscript{57}

\textsuperscript{53} 184 N.E.2d at 795–96.
\textsuperscript{54} 11 & 12 Geo. 6, ch. 38, § 210:
(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) . . . may make an application to the court by petition for an order under this section.
(2) If on any such petition the court is of opinion—
(a) that the company's affairs are being conducted as aforesaid; and
(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up;
the court may . . . make such order as it thinks fit, whether for regulating the conduct of the company's affairs in the future, or for the purchase of the shares of any members of the company by other members of the company or by the company . . . or otherwise.
\textsuperscript{56} [1958] 3 All E.R. 689.
\textsuperscript{57} The term "oppressive" has appeared in two relevant Maryland cases. In Shaw v. Davis, 78 Md. 308, 317, 28 A. 619, 621 (1894), the Maryland Court of Appeals quoted with approval from the English decision in MacDougall v. Gardiner, 1 Ch. D. 13 (C.A. 1875):
[N]othing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder in behalf of himself, and others, unless there be something illegal, oppressive, or fraudulent, — unless there is something
III. Balancing Minority Protection and Corporate Freedom of Action

A. The Problem of the Widely-Held Corporation

The evil created by the uncertain statutory criteria for the degree of misconduct which warrants dissolution is the infringement of freedom of corporate action. Directors and controlling shareholders may be forced to make their business judgments more with an eye toward avoiding a violation of that vague standard than toward serving the best interest of the corporation. In addition, minority shareholders may use the threat of dissolution to force the majority to accede to their demands or, perhaps, to pay sizeable sums in "settlement" of dissolution actions.

It is apparent, however, that the danger of this erosion of corporate freedom of action is greater with larger, widely-held corporations than with closely-held corporations. Accordingly, one possible solution may be to limit the right of action for dissolution to the case of the closely-held corporation. With the publicly-held corporation, there is less likelihood that a group having voting control can be enlisted in concerted action to draw off corporate assets. Also, the availability of a market in which a complaining shareholder can sell out is greater, and the economic losses sustained in a forced sale of the business are more severe (in absolute terms). Finally, the number of "innocent" employees or shareholders affected by the dissolution is larger. Since the equities against dissolution are strong in the case of larger corporations, the number of deserving complainants who would be deprived of the dissolution remedy by confining its application to the close corporation situation is probably not large. Some states have sought to confine the remedy to stockholders holding a minimum percentage, typically from ten to thirty-three percent, of the outstanding stock, thereby limiting the availability of dissolution, for practical purposes, to cases involving smaller corporations where large percentage holdings are more commonly found. While such a provision enables directors to test proposed actions by sounding out major stockholders before undertaking them, it also has the effect of arbitrarily cutting off worthy complainants without substantially aiding

ultra vires on the part of the company, qua company, or on the part of the majority of the company, so that they are not fit persons to determine it. Accord, Williams v. Salisbury Ice Co., 176 Md. 13, 26-27, 3 A.2d 507, 513 (1939) (quoting the statement with approval). Such a formulation would make "illegal, oppressive or fraudulent" sub-categories of ultra vires. In Booth v. Robinson, 55 Md. 419 (1881), the expression "fraud or breaches of trust" was given as the standard for shareholder action while the expression "fraud or oppression" was used as the standard in a similar context several pages later. 55 Md. at 439, 451. The situations in which the two phrases were used were not, however, sufficiently similar to allow the inference that "breaches of trust" and "oppression" were synonymous in the court's view.

58. CAL. CORP. CODE § 4650 (West Supp. 1967) (33 1/3 per cent of shares, excluding those of the wrongdoers); LA. REV. STAT. § 12.56 (1951) (20 per cent); OKLA. STAT. ANN. tit. 18, § 1.196 (Supp. 1968) (10 per cent). The Montana legislature recently repealed a similar provision in ch. 300, § 143, [1967] Mont. Laws 1029.

the directors in determining what conduct may give rise to dissolution. Thus, the suggestion that the impairment of corporate freedom of action may be corrected by restricting the right of action to the close corporation situation appears unacceptable.

One device that would serve to alleviate the special danger to the larger corporation is to establish a power in the court to fashion remedies tailored to the situation at hand. Consistent with the rule that the normal remedy of the dissenting stockholder is to sell his stock, dissolution could be denied to those owning a class of stock listed on an exchange.\(^{60}\) In the more likely case of a corporation whose shares are not listed, those wishing to continue the business could be permitted to avoid dissolution by purchasing the shares of the complainant.\(^{61}\) The power to order such a buy-out, either by the other stockholders or by the corporation itself, is probably inherent in the power to dissolve. In \textit{Strong v. Fromm Laboratories, Inc.},\(^{62}\) the Wisconsin court, in a deadlock situation, made such a disposition without explicit statutory authority when it decreed dissolution "unless a plan . . . be consummated whereby one of the two contending shareholder factions purchases the interest of the other in the corporation."\(^{63}\) Section 210 of the English Companies Act of 1948 explicitly grants a broad discretion to the courts to fashion a remedy appropriate to the circumstances, including the right to order a buy-out.\(^{64}\) That section is, on its face, designed to protect the complaining stockholder from the losses incident to dissolution and, accordingly, the House of Lords in \textit{Scottish Co-operative Wholesale Society, Ltd. v. Meyer}\(^{65}\) upheld a decision ordering the "oppressive" majority to purchase the shares of the minority. Apparently, however, the remedy is viewed by the English courts as appropriate not only where it is necessary to protect the complaining shareholder from losses due to winding up, but also where it is equitable to afford the remaining stockholders the opportunity to continue the business.\(^{66}\) Such a provision has the effect of minimizing the possibility that a suit for dissolution could be used to wind up a large, prosperous corporation to the detriment of a great

to derivative suit provisions that allow defendant to require that plaintiff provide security for costs. Cf. Md. R.P. 328 (b).

As to the danger of strike suits in the derivative suit area, Hornstein suggests that a legislative enactment permitting judicial refusal to dismiss suits in which a purpose to force settlement is indicated could achieve the same protection afforded by the "minimum percentage" and "security for costs" restrictions without denying the right of action to anyone. Hornstein, \textit{New Aspects of Stockholders' Derivative Suits}, 47 COLUM. L. REV. 1, 3 (1947). Cf. Md. R.P. 209 (d).

60. \textit{See generally DEL. CODE ANN. tit. 8, § 262 (k) (1) (1967), quoted in E. FOLK, THE NEW DELAWARE CORPORATION LAW 37 (1967), which denies a shareholder the right to an appraisal remedy upon merger in cases where the relevant class of stock is nationally listed.}


62. 273 Wis. 159, 77 N.W.2d 389 (1956).

63. 77 N.W.2d at 397. The factions each controlled fifty per cent of the voting shares.

64. \textit{See note 54 supra.}


number of innocent stockholders while, at the same time, insuring that the remedy is available to even the smallest stockholder.

B. The Necessity for Persistent Misconduct

Section 79A provides that the “acts” of the directors or the controlling shareholders must be “illegal, oppressive or fraudulent,” arguably suggesting that a continued course of such conduct is required before dissolution is granted. Two states actually use the modifier “persistent” and permit dissolution only on a showing of “persistent fraud, mismanagement or abuse of authority” or “persistent unfairness.” Such a construction serves to clarify somewhat the vague standards for dissolution by indicating that, whatever degree of abuse will justify dissolution, that degree of abuse must inhere in several transactions before dissolution will be ordered.

IV. Who May Seek Dissolution?

In the states adopting the Model Act provisions, the right of action is granted to “a stockholder” or “a shareholder.” While several states have allowed actions by preferred, and presumably non-voting stockholders, Maryland allows an action only by “[a]ny holder of shares entitled to vote.” The case of Tower Hill-Connelsville Coke Co. v. Piedmont Coal Co. illustrates that the non-voting stockholder’s situation merits attention. In that case, with preferred stock dividends in arrears, the holder of primarily common stock, recognizing that he had little to lose, plunged the corporation into a program of highly speculative investments to the detriment of the interest of preferred stockholders. However, since the interests of the preferred shareholder relate primarily to the payment of dividends and because dividend policy is a business decision basic to the principle of private ordering of corporate activity, judicial intervention on behalf of preferred shareholders is probably improper. Thus

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67. CAL. CORP. CODE § 4651 (e) (West 1955) (emphasis added).
68. CAL. CORP. CODE § 4651 (e) (West 1955) (emphasis added); MINN. STAT. ANN. § 301.49(3) (1947) (emphasis added).
69. See notes 3 & 5 supra.
71. Md. Ann. Code art. 23, § 79A (b) (Supp. 1967). Under Md. Ann. Code art. 23, § 44 (c) (1966), the "stockholder of record of pledged shares shall be entitled to vote such shares...") For a case reaching the same conclusion in a non-statutory involuntary dissolution proceeding, see Sant v. Perronsville Shingle Co., 179 Mich. 42, 146 N.W. 212 (1914). Proceeds from the sale of assets were held by the court pending presentation of the stock certificates.
72. 64 F.2d 817 (4th Cir. 1933).
73. Prior litigation between the parties indicates that the preferred stock held by the plaintiff was actually voting stock. See Tower Hill-Connelsville Coke Co. v. Piedmont Coal Co., 33 F.2d 703 (4th Cir. 1929). See generally, 40 HARV. L. REV. 994 (1927) (distinguishing the importance of interest of non-voting stock in the control of normal corporate decision-making from its significance in the decision to dissolve the corporation).
74. See Long v. Norwood Hills Corp., 380 S.W.2d 451 (Mo. App. 1964). Plaintiff complained that defendant, a business organized to operate a country club in which
the restriction of the dissolution remedy to voting shareholders is probably desirable. The Maryland provision, however, might also be construed to prohibit the holder of a voting trust certificate from bringing suit under Section 79A (b) (2). Such a construction is not warranted by the considerations applicable to preferred stock, and the provision should not be construed to exclude such stockholders.\(^{75}\)

V. Conclusion

The continued judicial denial of the right to dissolve a solvent corporation in the absence of statutory authority dictated the need for the enactment of Section 79A (b) (2). The variety of transactions by which majority stockholders and their directors can "exploit" minority stockholders makes the formulation of a precise statutory standard for dissolution impossible. The lack of a clear standard in the face of the extreme consequences resulting from transgressing the vague standard may result in an undue restriction on director freedom of action. A construction requiring "persistent" misconduct as a prerequisite to dissolution would clarify the standard somewhat. Beyond that, the director can be given no precise guidelines by which to govern his conduct; the most that can be done is to confer on courts a broad discretion to formulate relief appropriate to the case at hand. The "buy-out" order is an example of such tailoring of remedy; an order that the corporation be dissolved, should misconduct be found in a future case, is another. In the light of the reluctance of the Maryland courts to develop the dissolution remedy on their own, the power to formulate such additional remedies should probably be added by the legislature to Section 79A (c). For example, following the Companies Act of 1948, Section 210, the added provision might read as follows:

If on any petition under subsection (b) (2) the court is of the opinion that an order dissolving the corporation would unfairly prejudice some stockholders, but otherwise the facts would justify dissolving the corporation, the court may make such order as it deems appropriate, whether for regulating the conduct of the corporation's affairs in the future, or for the purchase of the shares of any stockholder by the other stockholders, by the corporation or otherwise.

most stockholders were members, had never paid cash dividends since its formation in 1933 (it had paid one stock dividend in 1949) despite the fact that operations were profitable in all but a few years. Plaintiff himself had held stock in the corporation since its formation but had withdrawn from club membership and had made no formal complaint of such dividend policy until 1958. While the court found that under all the circumstances, dissolution was inappropriate, it did warn the directors to be more aware of the profit motive in their future conduct of corporate activities. Id. at 474.

75. Cf. Southern Maryland Agricultural Ass'n v. Magruder, 198 Md. 274, 81 A.2d 592 (1951). There the defendant alleged that the plaintiff, having failed to produce stock certificates in the defendant-corporation, lacked standing to sue. The production of a voting trust agreement was held a sufficient explanation for the failure to produce stock certificates and a sufficient demonstration of an interest which could be protected by suit.