DOES THE PUNISHMENT FIT THE CRIME? THE STRUGGLE TO CRAFT REMEDIES IN SHAREHOLDER OPPRESSION CASES

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- Texas Survey of Professional Liability, published in SMU Law Review's Texas Survey, 64 SMU L. Rev. 469 (2011); 63 SMU L. Rev. 729 (2010); 62 SMU L. Rev. 1383 (2009); 61 SMU Law Review 1047 (2008); 60 SMU Law Review 1233 (2007).
- Attorney Disqualification, Texas Bar Journal, November (2009).
- Can You Keep a Secret? How Internal Disputes and Corporate Restructuring Can Affect the In-House Privilege, presented at the Texas State Bar Corporate Counsel Section Meeting (Dallas and San Antonio) (2011).
- Choosing, Using and Examining Expert Witnesses, presented at the University of Houston Law Foundation CLE, The Jury Trial, 2006, 2007, and 2008.

Table of Contents

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Does the Punishment Fit the Crime? The Struggle to Craft Remedies in Shareholder Oppression Cases

By Kelli Hinson,[1] Lyndon Bittle,[2] and Lance Currie[3]

"Shareholder oppression," first recognized in Texas in 1988, is a relatively young claim. To date, the Texas Supreme Court has not recognized the claim—though it may soon. *See Ritchie v. Rupe*, 339 S.W.3d 275 (Tex. App.—Dallas 2011, pet. granted). In recent years, Texas appellate courts have worked to refine and define liability for shareholder oppression, focusing on the rights and benefits minority shareholders expect when they join a venture, both general (expectations that all shareholders share) and specific (expectations unique to a particular minority shareholder). As a result, majority shareholders and those in corporate governance are beginning to have better guidance on how to respect the rights of the minority while still effectively operating their businesses and maintaining the rights and benefits of majority ownership.

But while courts have started to refine what it means to "oppress" a minority shareholder, they have not focused on the proper remedy and often order relief that does not match the protected expectations or the alleged oppressive conduct. If the defeat of the minority's expectations is the basis for liability, shouldn't the remedy be to fulfill those expectations? After surveying the development of Texas shareholder oppression law, this article discusses the remedies that courts have ordered and argues that courts should tailor relief to ensure that the minority's expectations are fulfilled—no more and no less.

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I. THE HISTORY OF SHAREHOLDER DISPUTES IN TEXAS

A. Origins of Shareholder Oppression

1. *Patton v. Nicholas*

The first Texas court to define an action for "oppressive conduct" was the Houston Court of Appeals in *Davis v. Sheerin*, 754 S.W.2d 375, 378 (Tex. App.—Houston [1st Dist.] 1988, writ denied). But *Davis* relies in large part on the Texas Supreme Court's decision in *Patton v. Nicholas*, 279 S.W.2d 848 (Tex. 1955). The *Patton* court recognized a claim for "malicious suppression of dividends" and used the court's equity powers to mandate issuance of a dividend. The corporation at issue in *Patton* was created to comply with a contractual settlement of a profit-distribution dispute between members of a partnership. *Id.* at 851. The "malicious purpose" in *Patton* was established by events beginning before the corporation was formed and continuing thereafter. Shortly after incorporation, the majority shareholder declared that "no dividends would be paid as long as the respondents were stockholders," and that "he would not buy the stock of respondents for even a small fraction of its value or sell his own at any price." *Id.* The majority followed through on his threats and profited disproportionately. *Id.* The court sustained the finding of malicious suppression of dividends, "coupling all the circumstances indicating the [majority shareholder's] intent to eliminate the [minorities] from every connection with the business, and at an unfair sacrifice on their part, with the fact that no dividends were paid." *Id.* at 854.

The court acknowledged that "general domination and control of the board of directors" by a majority shareholder are not wrongful, and may be expected.

> Being the founder of the business, president, owner of a clear majority of the stock and the only substantial stockholder on a board composed largely of employees, he could hardly avoid imposing his personal views on the other members, whatever his intentions.

279 S.W.2d at 853. "But," the court held, "the finding of his control of the board for the malicious purpose of, and with the actual result of, preventing dividends and otherwise lowering the value (. . . in the market place) of the stock of the [minority shareholders], is something else." *Id.*

The *Patton* court reversed the lower court's order liquidating the corporation through a receivership, and remanded to the trial court for determination of an appropriate dividend and entry of a mandatory injunction "tailoring the remedy to fit the particular case." *Id.* at 857. The court affirmed the lower court's denial of damages based on past "deprivation of dividends." *Id.* at 858; *see also Faour v. Faour*, 789 S.W.2d 620, 622 (Tex. App.—Texarkana 1990, writ denied) (following *Patton,* finding that shareholder cannot claim damages "for dividends not paid in the past"). On remand, the trial court in *Patton* appointed a Master in Chancery, who recommended a dividend based on the report of a disinterested CPA, and the court entered judgment mandating a dividend in that amount. *Patton v. Nicholas*, 302 S.W.2d 441 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.).

2. Texas Business Corporations Act art. 7.05

Davis and other shareholder oppression cases have also looked to the Texas Business Corporation Act article 7.05 as lending support to the general proposition that a court may use its equity power to remedy shareholder oppression. *See Davis*, 754 S.W.2d at 378. The Legislature enacted article 7.05 in 1955 (the same year as the *Patton* opinion), and amended it 1961. The act provided that courts could appoint receivers to liquidate or "rehabilitate" corporations when required to preserve corporate assets and protect parties at interest, including when the acts of "those in control" were "illegal, *oppressive*, or fraudulent," "but only if all other requirements of law are complied with and all other remedies available either in law or equity . . . are determined by the court to be inadequate." TEX. BUS. CORP. ACT art. 7.05(A)(1)(c), (3) (1992) (emphasis added).[4]

Article 7.05 did not define what conduct would be "oppressive," but the court decisions addressing the provision suggest that the standard for what constitutes oppression is relatively high and requires more than mere dissatisfaction with how the majority is running the business. In *Texarkana College Bowl, Inc. v. Phillips*, 408 S.W.2d 537 (Tex. Civ. App.—Texarkana 1966, no writ), for example, the court held that the minority shareholder had not demonstrated oppressive conduct under the statute. *Id.* at 538-39. The minority alleged that the majority shareholder's failure to reopen and operate a jointly-owned bowling alley would result in damages, including loss of business and good will, loss of bowling leagues, and a disruption of the local college's physical education classes. *Id.* The court held that the Business Corporation Act places the management of a business in the hands of the board of directors and that dissatisfaction with corporate management is not grounds to appoint a receiver under article 7.05. *Id.*[5] Further, the court held the minority had not met his burden under article 7.05 to demonstrate that "all remedies are inadequate to conserve the corporation's assets and business." *Id.* at 540.

The court in *Balias v. Balias*, 748 S.W.2d 253 (Tex. App.—Houston [1st Dist.] 1988, writ denied), similarly refused to find oppression under the statute where the plaintiff claimed that the defendant had, among other things, ousted the plaintiff from management, claimed 100% ownership of the company on federal tax filings, and changed the name of the corporation. *Id.* at 254, 257. The court reasoned that the plaintiff had failed to establish an enforceable provision governing the shareholders, failed to demonstrate any kind of arrangement that made the defendant's actions improper, and failed to prove that he had no other adequate remedies available. *Id.*

Article 7.05 discusses only the appointment of a receiver to remedy alleged oppressive conduct. But the *Davis* court and others have reasoned that if they have the power to appoint a receiver to take over a corporation, they have equitable power to impose less drastic remedies. *See, e.g.*, *Davis*, 754 S.W.2d at 379-80.[6]

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[4] Article 7.05 followed Texas Revised Civil Statutes article 2293, which was in turn cited by the *Patton* court to support the conclusion that "Texas courts, under their general equity powers, may . . . decree liquidation and accordingly appoint a receiver under par. 4 of Art. 2293" and ultimately may "tailor[] a remedy to fit the particular case." *Patton* 279 S.W.2d at 856-57.

[5] In further support for the argument that dissatisfaction is not enough to invoke article 7.05, see the Austin Court of Appeals' statement in *Fortenberry v. Cavanaugh* that the "existence of serious disagreements in the present case does not inexorably lead to the appointment of a receiver." No. 03-04-00816-CV, 2005 WL 1412103, at *3 (Tex. App.—Austin June 16, 2005, no pet.).

[6] Article 7.05 was codified in 2010 as Texas Business Organizations Code § 11.404. The wording of § 11.404 generally incorporates the provisions of article 7.05, but it expands it to include all domestic entities under § 11.402(b). The new provision reads:

> (a) Subject to Subsection (b), a court that has jurisdiction over the property and business of a domestic entity under Section 11.402(b) may appoint a receiver for the entity's property and business if:
>
> (1) in an action by an owner or member of the domestic entity, it is established that:
>
> * * *
>
> (C) the actions of the governing persons of the entity are illegal, oppressive, or fraudulent;
>
> * * *

B. *Davis v. Sheerin*

The First District Court of Appeals in Houston first recognized a claim for "shareholder oppression" when Sheerin—a minority shareholder owning 45% of the corporation—sued both individually and on behalf of the corporation, alleging oppressive conduct and breaches of fiduciary duties owed to him and to the corporation. *Davis*, 754 S.W.2d at 377. Sheerin and Davis (owner of the remaining 55%) incorporated the business in 1955 and served as directors and officers, along with Davis's wife. *Id.* Davis and Sheerin also formed a partnership that contained six pieces of real property. *Id.* Davis conducted the daily management of the corporation; Sheerin, unlike Davis and his wife, was not an employee of the business. *Id.* After Davis and his wife refused to allow Sheerin to inspect the corporation's books without production of his stock certificate, Sheerin filed suit. *Id.* Davis and his wife claimed that Sheerin had gifted his 45% interest to them and no longer owned any stock. *Id.* Following a jury trial, the court declared that Sheerin owned 45% of the corporation, the partnership, and the six pieces of real property, and the court issued multiple orders and awards of damages, most pertinent of which was an order that Davis and his wife buy-out Sheerin's 45% share of the corporation's stock for an amount determined by the jury to be its "fair value." *Id.* at 378. The court did not define "fair value" or explain how to calculate it. *Id.*

The *Davis* court began its analysis in a somewhat reverse order, determining first whether Texas courts had the power to issue a buy-out and then second, whether the alleged acts constituted oppression. To determine authority, the court focused first on article 7.05's authorization of the appointment of a receiver in certain circumstances, including illegal, oppressive, or fraudulent conduct by those in control. *Davis*, 754 S.W.2d at 378 (citing TEX. BUS. CORP. ACT art. 7.05(A)(1)(c)). The court noted that article 7.05 does not expressly authorize a "buy-out" as a remedy, and that no other Texas cases had ordered that particular remedy. *Id.* at 379. Nevertheless, the court cited cases from other jurisdictions as recognizing a buy-out as an appropriate remedy for oppression, even without statutory or contractual authority, including in states similar to Texas where a statute exists, but only authorizes liquidation as the remedy for oppressive acts. *Id*. The court then cited *Patton* and its stated policy of "tailoring the remedy to fit the particular case." *Id.* Based on *Patton*, the court held that "a court could order less harsh remedies under those same equity powers." *Id.* at 380.

Having concluded that the trial court had the authority to issue a buy-out, the *Davis* court next sought to determine whether one was warranted—i.e. what constituted "oppressive conduct." As discussed above, article 7.05 does not define oppression,[7] and no Texas case had ever defined the term.

So the court turned "to decisions of other jurisdictions" to define oppressive conduct. 754 S.W.3d at 381. In particular, the court relied on two cases from New York and Oregon to define liability: *In re Wiedy's Furniture Clearance Center Company*, 487 N.Y.S.2d 901 (N.Y. App. Div. 1985) and *Baker v. Commercial Body Builders, Inc*., 507 P.2d 387 (Or. 1973). The court first cited with approval *Wiedy's Furniture*, which held that "oppression should be deemed to arise only when the majority's conduct substantially defeats the expectations that objectively viewed were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture." *Davis*, 754 S.W.2d at 381 (citing *Wiedy's*, 487 N.Y.2d at 903). Second, the *Davis* court quoted the Oregon Supreme Court's opinion in *Baker* as identifying the "most quoted" definitions of oppression as:

(b) A court may appoint a receiver under Subsection (a) only if:

> (1) circumstances exist that are considered by the court to necessitate the appointment of a receiver to conserve the property and business of the domestic entity and avoid damage to interested parties;
>
> (2) all other requirements of law are complied with; and
>
> (3) the court determines that all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity under Section 11.402, are inadequate.

TEX. BUS. ORGS. CODE § 11.404 (a)(1)(C), (b)(1)–(3).

[7] The statute does, however, place oppression on equal footing with "illegal" and "fraudulent" conduct, as well as other extreme circumstances that might justify the harsh and intrusive remedy of appointing a receiver, which suggests that it is not intended to refer to mere dissatisfaction with the majority's conduct. TEX. BUS. CORP. ACT art. 7.05(A)(1)(c); *see Balias*, 748 S.W.2d at 256-57 (finding trial court properly denied application for "harsh remedy" of receivership where plaintiff sought to enforce informal "arrangement" not memorialized in shareholder agreement or articles of incorporation); *Texarkana College Bowl*, 408 S.W.2d at 540 (finding statute not satisfied by allegations of "dissatisfaction with corporate management").

> 'burdensome, harsh and wrongful conduct,' 'a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members,' or 'a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.'

Davis, 754 S.W.3d at 381 (quoting *Baker*, 507 P.2d at 393).[8] The court also stated that "[c]ourts take an especially broad view of the application of oppressive conduct in a closely-held corporation," *id.* at 381, though it is difficult to see how shareholder oppression would ever apply outside the close-corporation context.

The court then reviewed the record for oppressive conduct. The jury concluded, as is most relevant here, that Davis and his wife (1) conspired to deprive Sheerin of his 45% ownership, (2) made profit sharing distributions for their benefit to the exclusion of Sheerin, and (3) wasted corporate funds on their personal legal fees. *Id.* at 382. The court further explained that it was undisputed that Sheerin would be denied a future voice in the corporation. *Id.* at 383. These findings, taken together, were sufficient to support the trial court's conclusion of oppressive conduct and its likely continuance. *Id.*

When evaluating a remedy, the court noted *Patton*'s tailoring of its remedy (ordering dividend payments) to match the harm (suppression of dividends). *Id.* The court further stated that an "ordered 'buy-out' of stock at its fair value was a particularly appropriate remedy in a closely-held corporation, where oppressive acts of the majority are an attempt to 'squeeze-out' the minority, who do not have a ready market for the corporation's shares, but are at the mercy of the majority." *Id.* The court rejected any lesser remedy than a buy-out, such as a money award or an injunction, because Davis and his wife had sought to deny Sheerin any interest or voice in the corporation. *Id.* According to the court, a lesser remedy would not suffice. *Id.* The court concluded that the conduct plus efforts to purchase Sheerin's stock indicated that Davis and his wife wanted total control. *Id.* The court justified the buy-out because it would give the Davises that exact control—at a price. *Id.* Notably, Davis and his wife did not challenge the value of Sheerin's 45% ownership as found by the jury and subsequently set by the trial court. *Id.*[9]

C. *Willis v. Bydalek* and the Two Categories of Shareholder Oppression

The court in *Willis v. Bydalek*, 997 S.W.2d 798 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), repackaged the various liability standards discussed in *Davis*, resulting in shareholder oppression's most cited definitions. In *Willis*, Joseph Bydalek and Robert Fox formed a corporation to purchase and operate a club. *Id.* at 799. Fox, the sole officer and director, owned 51% of the shares, while Bydalek owned the remaining 49%. *Id.* at 800. The shareholders agreed that while Fox would operate as the administrator, the Bydaleks would handle the day-to-day operations. *Id.* The Bydaleks had the understanding that they would work at the club for a long period. *Id.* At the time the club opened, Fox died in an accident, and his sister, Willis, was appointed the administrator of his estate. *Id.* Within months, problems developed in the relationship between Willis and the

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[8] One criticism of this "definition" is that it is derived from the law of various other states, including states in which a corporation's directors, officers, or majority shareholders owe a fiduciary duty directly to minority shareholders and in which participants in all commercial transactions are bound by a general duty of good faith and fair dealing. Along with *Baker*, the *Davis* court leans heavily on *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270 (Alaska 1980); *McCauley v. Tom McCauley & Son, Inc.*, 724 P.2d 232, 236 (N.M. App. 1986); and *Skierka v. Skierka Bros., Inc.*, 629 P.2d 214, 221 (Mont. 1981), all of which are predicated on such duties. Unlike those states, Texas shareholders do not owe fiduciary duties to one another absent special circumstances, even in close corporations. *See Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005) (stating fiduciary duty in business dealings requires special relationship); *Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). Texas also does not recognize a general duty of good faith and fair dealing in commercial transactions. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 52 (Tex. 1998); *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1988) (finding broad duty of good faith and fair dealing would improperly "let each case be decided upon what might seem 'fair and in good faith' by each fact finder"). Yet *Davis* has been cited by other appellate courts to circumvent in these well-settled doctrines of Texas law. For example, *Hoggett v. Brown* cited *Davis* among others to note that "in certain limited circumstances, a majority shareholder who dominates control over the business may owe a [fiduciary] duty to the minority shareholder." 971 S.W.2d at 488 n.13. These cases do not discuss how the majority can fulfill fiduciary obligations to both the company and the minority, especially when the two interests diverge.

[9] The court reviewed two other remedies ordered by the trial court—the appointment of a receiver and an injunction ordering future dividend payments. *Id.* at 383-85. The court accepted the former while rejecting the latter, stating that the ordered buy-out and receivership, along with money damages unchallenged by the Davises, sufficiently protected Sheerin and rendered the injunction unnecessary. *Id.*

Bydaleks, which resulted in Willis changing the locks and removing the Bydaleks from management of the club. *Id.* The Bydaleks sued for conversion, breach of fiduciary duty, violation of a temporary injunction, civil conspiracy, and shareholder oppression. *Id.* The jury, having been charged on conversion and wrongful lockout only, found that there was no conversion, but that Willis had wrongfully locked out the Bydaleks and had done so willfully and maliciously. *Id.* The jury determined the fair value of the shares and awarded punitive damages. *Id.* Under its equitable powers, the court entered a judgment for shareholder oppression for the "fair value" of the stock—again undefined—and remitted the punitive damages to a lesser amount. *Id.* at 800-01.[10]

Willis argued on appeal that the verdict did not support a finding of shareholder oppression. *Id.* at 801. The court considered how *Davis* had defined oppressive conduct, and reframed it into two categories:

> 1. majority shareholders' conduct that substantially defeats the minority's expectations that, objectively viewed, were both reasonable under the circumstances and central to the minority shareholder's decision to join the venture; or
>
> 2. burdensome, harsh, or wrongful conduct; a lack of probity and fair dealing in the company's affairs to the prejudice of some members; or a visible departure from the standards of fair dealing and a violation of fair play on which each shareholder is entitled to rely.

Id. (citing *Davis*, 754 S.W.2d at 381). The court noted that courts should exercise caution in evaluating what constitutes oppressive conduct. *Id.* The reasonable expectations of the minority shareholder must be balanced with the corporation's ability to use its business judgment and run efficiently. *Id.*

While sufficient evidence supported the jury's finding of a wrongful lock-out, the court held there was no minority shareholder oppression when (1) the only wrong found was the lock-out, (2) neither the club nor Willis had ever made a profit, and (3) the Bydaleks lacked an employment agreement and, accordingly, had no objectively reasonable expectation of continued employment. *Id.* at 801-03.

As a result of holding that no shareholder oppression existed in this case, the court refused to address Willis's first point of error, which asserted that *Davis* was improperly decided. *Id.* at 803.

1. "Burdensome, Harsh, or Wrongful" Conduct that "Depart[s] from the Standards of Fair Dealing"

Before reciting the multiple phrases that have become the burdensome/fair dealing category of oppression, the *Davis* court was careful to note that "general definitions are of little value for application in a specific case." 754 S.W.2d at 382. Nevertheless, in the years immediately following the *Willis* court's reframing of the two-category definition of oppressive conduct from *Davis*, courts seemed to focus primarily on the "burdensome, harsh, or wrongful conduct" language.[11] This category of shareholder oppression is so broad that it provides no clear boundaries to guide courts—just as the *Davis* court warned against. Indeed, courts have often trumpeted the lack of standards. *See, e.g.*, *Cardiac Perfusion Services v. Hughes*, 380 S.W.2d 198, 202 (Tex. App.—Dallas 2012, pet. filed) ("The term 'shareholder oppression' is expansive and covers 'a multitude of situations dealing with improper conduct.'" (quoting *Davis*, 745 S.W.2d at 381)). This may explain why some courts simply distinguish all prior cases without expressly wrestling with any analysis of the definitions. *See, e.g.*, *Allchin v. Chemic, Inc.*, No. 14-01-00433-CV, 2002 Tex. App. LEXIS 5125, at *25-26 (Tex. App.—Houston [14th Dist.] July 18, 2002, no pet.). As a result, shareholders and the lawyers and judges analyzing their claims did not have a reliable model for what might constitute "oppression" under the burdensome/fair dealing category.[12]

[10] Because shareholder oppression is an equitable claim, the jury determines what facts occurred and then the court determines whether such conduct constitutes oppression and, if so, the appropriate remedy. *See Ritchie v. Rupe*, 339 S.W.3d at 289.

[11] As explained above, the burdensome/fair dealing category described in *Davis* originated from the Oregon Supreme Court's decision in *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387 (Ore. 1973). *See Davis*, 754 S.W.2d at 381. The Oregon Supreme Court was listing a series of definitions used by other courts and concluded that oppression was closely related to a general fiduciary duty of good faith and fair dealing (not recognized in Texas). 507 P.2d at 393-94. *Davis*, *Willis*, and other Texas courts have turned this historical recounting of other courts' definitions into a stand-alone definition of shareholder oppression.

[12] For example, many facts of life for minority shareholders—such as the inability to control management decisions and the difficulty of liquidating their investments—may appear to a fact-finder to be "burdensome and harsh" or to lack probity and fairness. But if such facts gave rise to a claim of oppression it would turn corporate governance law on its head. Left unchecked, this "definition" would "let each case be decided upon what might seem 'fair and in good faith,' by

In *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687 (Tex. App.—Fort Worth 2006, pet. denied), the trial court had entered a directed verdict on the plaintiff's shareholder oppression claim on the grounds that there could be no oppression between common and preferred shareholders as a matter of law. The Fort Worth Court of Appeals disagreed, finding that while the plaintiff was complaining about the conduct of the defendants as directors, rather than as shareholders, he had stated a viable claim by alleging that "those in control of the corporation" had engaged in "burdensome, harsh, or wrongful conduct." *Id.* at 700. The court also went on to find that there was some evidence the defendants had damaged the plaintiff's interests by exerting their control over the corporation to further their own financial interests over his. The jury had found that the defendants had improperly redeemed the plaintiff's preferred shares. Because this conduct "creat[ed] a financial benefit for themselves by decreasing the preferred share dividends that had to be paid out of capital they control," the court of appeals found that the evidence:

> raised a fact issue regarding whether their conduct fits the second category of oppression—burdensome, harsh, or wrongful conduct; a lack of probity and fair dealing in the company's affairs to the prejudice of some members; or a visible departure from the standards of fair dealing and a violation of fair play on which each shareholder is entitled to rely.

Id. at 700-701. The court therefore remanded the oppression and two other claims for trial, but without giving the trial court any more guidance as to the standard by which the defendants' conduct should be judged.

Gibney v. Culver, No. 13-06-112-CV, 2008 Tex. App. LEXIS 2954 (Tex. App.—Corpus Christi Apr. 24, 2008, pet. denied), involved the shareholders of Micro-Blend, Inc., a close corporation that manufactured patented blending systems for making soft drinks. *Id.* at *2. Michael Gibney was the creator of the idea and one of the initial four shareholders in Micro-Blend, along with Roy Culver. *Id.* at *2-3. Culver was the chief executive officer from the time of formation. *Id.* at *3. Micro-Blend had various outsourcing contracts with other companies owned by or affiliated with Culver to make manufacturing skids, supply employees to work at Micro-Blend, and to perform payroll services. *Id.* at *5-7. Gibney claimed that Micro-Blend had improperly paid Culver's entities millions of dollars when the Culver entities were not making the manufacturing skids or performing the required services. *Id.* at *5-8.

Gibney filed a shareholder derivative action and shareholder oppression suit against Culver, Culver Interests, and Micro-Blend. *Id.* at *9. By the time of trial, the sole issue before the jury was the shareholder oppression action. *Id.* at *12. The trial court ruled that the jury's findings—that Culver used his position as CEO of Micro-Blend to award excessive compensation to himself and to members of his family to Gibney's detriment—supported a finding of shareholder oppression against Culver. *Id.* at *15.

On appeal, Culver argued that the jury's findings were not supported by sufficient evidence. *Id.* After reviewing the evidence presented, the court agreed, holding that Gibney had not presented sufficient evidence of the excessiveness of the salaries, and sustained Culver's point of error on that issue. *Id.* at *54-55.

Culver then contended that because the evidence was legally insufficient to support the jury's findings, it was an abuse of discretion to find that Gibney was an oppressed minority shareholder. *Id.* at *55-56. The court explained that, even though the jury's answers were not sufficiently supported, it would examine the record for any other potential oppression.[13] Gibney attempted to invoke the "minority expectations" approach to argue that he was oppressed as to dividend distributions, but the jury found that Culver did not wrongfully withhold dividend payments and that Gibney's expectations regarding dividends had not been defeated. *Id.* at *60-62. In attempting to prove the burdensome/fair dealing category of shareholder oppression, Gibney alleged that Culver maliciously and wrongfully refused him access to the corporation's books and records. *Id.* The court stated in dicta that denial of access to the corporate books and records would "most certainly" fit the burdensome/fair dealing category. *Id.* at 62-63. However, the record did not reflect documentation of any written requests to look at the records. *Id.* The appellate court therefore held it was an abuse of discretion for the trial court to conclude that Gibney had sufficiently proven a shareholder oppression claim. *Id.*

each fact finder," a result rejected by the Texas Supreme Court in *English v. Fischer*, 660 S.W.2d at 522.

[13] *Id.* at *56 (citing *Redmon v. Griffith*, 202 S.W.3d 225, 234 & n.4 (Tex. App.—Tyler 2006, pet. denied) ("[A] claim for oppressive conduct can be independently supported by a variety of conduct. . . . [T]he fact that there may be a lack of evidence to support the existence of one such activity does not defeat the claim so long as there is evidence to support that another such instance of conduct occurred.")). *Redmon* contains the broadest articulation of shareholder oppression, as discussed in more detail below.

Guerra v. Guerra, No. 04-10-00271-CV, 2011 Tex. App. LEXIS 6730 (Tex. App.—San Antonio Aug. 24, 2011, no pet.), dealt with shareholder oppression claims by a shareholder who inherited a minority interest in the family business, Laredo Hardware, after her father's death. The court concluded that a person who receives her shares as a gift or bequest cannot recover for oppression under the "minority expectations" approach[14] and so analyzed her claims under a burdensome/fair dealing standard. *Id.* at *17-18. The court stated that the burdensome/fair dealing category "focuses on the majority shareholders' and controlling officers' conduct," as opposed to the minority's expectations. *Id.* at *18. The plaintiff alleged that her brother had engaged in oppression by usurping Laredo Hardware's corporate opportunity to purchase the property where the company was located, engaging in self-dealing by purchasing the land himself and leasing it to Laredo Hardware, and "deciding 'to destroy Laredo Hardware's cash reserves for his own benefit' instead of liquidating the company." *Id.* at *18-19. The court concluded that because these actions were considered and approved by the board as a whole, the brother's acts were not oppressive. *Id.* at *20-21.

In sum, Texas courts applying the burdensome/fair dealing "definition" have given little guidance to business owners, investors, or their lawyers who need to know whether particular actions will be deemed "oppressive," with potentially devastating consequences.

2. "Defeat[ing] . . . Minority Expectations"

Defining shareholder oppression as the defeat of the minority's expectations makes the claim similar to implied-in-fact contracts and provides courts with better guidance than the burdensome/fair dealing approach. Nevertheless, until the recent case of *Ritchie v. Rupe*, 339 S.W.3d 275 (Tex. App.—Dallas 2011, pet. granted), now on appeal to the Texas Supreme Court, few Texas state cases expressly focused on the minority's expectations. *But see Gibney*, 2008 Tex. App. LEXIS 2954, at *60-62.

Several federal bankruptcy courts in Texas, however, have used an expectations-based approach. The Bankruptcy Court for the Southern District of Texas narrowly upheld a shareholder oppression claim based on minority expectations in *Four Seasons Equipment, Inc. v. White (In re White)*, 429 B.R. 201 (Bankr. S.D. Tex. 2010). In that case, the company issued bonuses to employee-shareholders, as opposed to issuing dividends, in an effort to avoid double taxation. *Id.* at 207-08. When one employee-shareholder was terminated, he was no longer eligible for bonuses, and so the bonus-over-dividend approach meant he was no longer receiving a proportionate share of corporate distributions. *Id.* at 208. The court concluded that the bonuses were disguised dividends, and the company was not distributing the dividends proportionately, despite uncontroverted testimony at trial that proportionate distribution was the intent of the board. *Id.* at 209. In reviewing the shareholder oppression claim, the court cited *Patton* and stated that a corporation that operates "to deprive a shareholder of its reasonable expectations to share in the corporation's profits has operated in an oppressive manner." *Id.* at 214.[15] The court noted that *Davis* had ordered a buy-out while *Patton* had issued an injunction ordering a dividend. *Id.* at 215. Rather than decide between those options, the court elected to let the company choose which remedy it preferred, as the terminated shareholder would be made whole in either circumstance. *Id.* at 215-16. Notably, the court used the shareholders' agreement to determine the buy-out price, should the company elect that option. *Id.* at 217-18.[16]

The Eastern District of Texas Bankruptcy Court also found oppression based on the defeat of minority expectations in *Gage v. Rosenbaum (In re Rosenbaum)*, No. 08-43029, Adv. Proc. No. 09-4023, 2010 Bankr. LEXIS 1509 (Bankr. E.D. Tex. 2010). Over the course of six years, the defendants in that case withdrew nearly all of the corporate assets for their personal benefit. *Id.* at *12, 19-20. "[A]s money came into [the company]'s account, the [defendants] paid a few . . . bills, and then paid whatever was left to themselves." *Id.* at *12-13. The court found that the majority's actions were oppressive because the "practice of transferring substantially all of [the company]'s assets to themselves defeated [the minority]'s expectations which, when objectively viewed, were both reasonable under the circumstances and central to [the minority's] decision to purchase shares." *Id.* at *20. The court did not analyze a remedy for oppression separate from other claims,

[14] Because the courts focus on the expectations that were "central to the minority shareholder's decision to join the venture," the court held that a shareholder who merely inherited her shares or obtained them by gift has no such expectations to protect. *Id.* Whether a shareholder in this position can bring a claim under the defeated expectations definition is beyond the scope of this article.

[15] The court also noted that the controlling shareholder diverted $2,000,000 to his personal use. *Id.* at 215.

[16] The majority had not previously complied with the agreement, which included exercising an option to buy out employee-shareholders at the end of their employment. *Id.* at 211-13. Had they done so, the agreement would have governed the relationship and the minority shareholder would no longer be a shareholder, nullifying the shareholder oppression claim. *See id.*

awarding instead combined damages for shareholder oppression, breach of fiduciary duty, and fraud of $324,000, which was "the sum the [majority] fraudulently induced [the minority] to pay for stock in Cornerstone." *Id.* at *26. In truth, this case is better analyzed as a fraudulent inducement claim, and the shareholder oppression claim was unnecessary.

The same court again found shareholder oppression in *In re Mandel*, No. 10-40219, 2011 Bankr. LEXIS 3829 (Bankr. E.D. Tex. 2011), when the defendant's acts "transformed [the company] into little more than an empty shell" and constituted oppressive conduct—defined as "depriv[ing] a minority shareholder of the shareholder's reasonable expectations as an equity holder of the corporation." *Id.* at *63. The court awarded $1 million in combined damages for shareholder oppression, breach of contract, fraud, and conspiracy, with no separate remedy analysis for oppression—again calling into question the need for the shareholder oppression claim. *Id.* at *76.[17]

In the state courts, the Fourteenth District Houston Court of Appeals, in *Allchin v. Chemic, Inc.*, No. 14-01-00433-CV, 2002 Tex. App. LEXIS 5125 (Tex. App.—Houston [14th Dist.] July 18, 2002, no pet.) (not designated for publication), refused to find that the plaintiff shareholder's expectations had been defeated under the circumstances presented. *Id.* at *20. And while not expressly recognized by the court, the result of the court's rulings meant that the "minority" received exactly what he expected when joining the venture—the enforcement of a buy-sell agreement after his voluntary termination.

Walter Wadiak initially formed Chemic as the sole shareholder and president in 1983. *Id.* at *2. Thirteen years later, Wadiak and his neighbor, Steven Allchin, executed two contracts that resulted in Allchin becoming a shareholder and serving as executive vice-president, chairman of the board, and secretary of Chemic. *Id.* at *2-3. Allchin paid for part of the stocks and had an outstanding balance for the remaining stocks; he maintained that he paid for those stocks through compensation owed. *Id.* at *4-5. Wadiak and Allchin's relationship became strained, and Allchin gave notice that he would no longer be working at Chemic. *Id.* at *7. Allchin's termination of employment triggered a clause in the Buy-Sell Agreement, which provided that Chemic had "the option to purchase a shareholder's stock if the shareholder died, terminated employment, or effected a stock transfer in another means." *Id.* at *6-8. A suit followed in which the trial court granted a motion for directed verdict against Allchin's shareholder oppression claim. *Id.* at *13-14. The court entered a judgment on the verdict in part, a JNOV in part, and other specific orders, including the enforcement of the Buy-Sell Agreement. *Id.*

In the first issue on appeal, Allchin challenged the directed verdict. *Id.* at *14. At the outset of the court's analysis, it noted that Allchin claimed ownership to fifty percent of the stock, the stock certificates indicated he owned fifty percent, and he had equal voting rights with Wadiak as provided for under the terms of the sales-contract. *Id.* at *18-19. The court refused to say that a shareholder oppression action exists in Texas, particularly under the circumstances presented in this case. *Id.* at *20. After an in depth review, the court found that the shareholder oppression action was based on the following allegations: (1) Allchin did not receive as much training as he expected; (2) Wadiak failed to use his talent and best effort to increase success of the business; (3) Wadiak failed to participate and contribute to business operation and leadership; (4) Wadiak failed to let Allchin be involved in the management of the company; (5) Wadiak used the company for personal gain; (6) Wadiak failed to obtain Allchin's consent to the proposal to purchase Allchin's stock; and (7) Wadiak failed to keep the company accounts in the bank specified in the sales contract. *Id.* at *23. The court found that it was proper for the trial court to grant a directed verdict, and it overruled Allchin's first issue. *Id.* at *26-27. In doing so, the court made special note of Allchin's voluntary departure from the company, stating that "[a]n employee who voluntarily leaves the employment of the corporation presents a less persuasive case for concluding the majority shareholders oppressed him." *Id.* at *25.

In the second issue on appeal, Allchin challenged the judgment notwithstanding the verdict. *Id.* Among other things, Allchin asserted that the JNOV setting aside the jury's finding that Wadiak had maliciously breached his fiduciary duty to Allchin was not proper. *Id.* at *11. The court overruled this point of error because the jury found zero damages for the breach, and accordingly, the breach would only affect the shareholder oppression claim, which the court had previously found to be meritless. *Id.*

The court resolved other issues before affirming the trial court's declaratory judgment enforcing the Buy-Sell Agreement. *Id.* at *42-46. As a result, Allchin ended up with his expectations fulfilled. Most of his

[17] The court discussed several damages theories (again without specific analysis in the context of shareholder oppression), including a "lost asset" theory, unjust benefits or profits received by the defendant, and damages for misappropriation and theft of trade secrets. *Id.* at *70-77. In the end, however, the court stated that when "it is difficult to determine the precise sum [of damages], Texas law generally leaves the determination of the amount to be awarded to the discretion of the trier of facts"—in this case the bankruptcy court. *Id.* at *76

complaints were mooted by either being a 50% owner or voluntarily ending his employment. And choosing to terminate his employment invoked the Buy-Sell Agreement, causing the court to enforce his expectations as reflected in that agreement.

D. *Redmon v. Griffith*: Shareholder Oppression as a Trump Card

In *Redmon v. Griffith*, 202 S.W.3d 225 (Tex. App.—Tyler, pet. denied), 25% minority shareholders sued the corporation (GEM) and the 75% majority shareholders on a variety of claims (including breach of fiduciary duty, shareholder oppression, and breach of contract), and also brought derivative claims in the name of GEM against the majority shareholders. *Id.* at 231. After GEM filed bankruptcy, plaintiffs dismissed their claims against the company as well as their derivative claims. *Id.* The Redmons had asserted that the Griffiths used corporate funds to pay personal expenses; diverted corporate opportunities, funds, and revenues; denied Jim Redmon access to financial records; and attempted to use oppressive or "squeeze-out" tactics. *Id.* at 235–36. The trial court granted summary judgment for the defendants and entered a take-nothing judgment. *Id.* at 231.

The Tyler Court of Appeals reviewed each cause of action separately, addressing whether the plaintiffs had standing to assert each claim, then whether they presented sufficient evidence to avoid summary judgment. In its preliminary analysis of standing, the court noted several fundamental principles of Texas law: (1) corporate officers owe fiduciary duties to the corporation, but not to individual shareholders "unless some contract or special relationship exists between them in addition to the corporate relationship"; (2) "a corporate shareholder has no individual cause of action for personal damages [such as diminution of stock value] caused solely by a wrong done to the corporation"; (3) a claim for injury to a corporation belongs to the entity, and may be brought by a shareholder only in a derivative capacity; and (4) an individual shareholder's direct action against another shareholder or corporate officer must be predicated on "a duty arising from a contract or otherwise and owing directly" to the plaintiff. *Id.* at 233–34.

The court observed, however, that some Texas courts have "recognized an individual cause of action for 'shareholder oppression' or 'oppressive conduct.'" *Id.* at 234 (citing cases). The court quoted the two categories of oppressive conduct articulated in *Willis v. Bydalek*, 997 S.W.2d at 801, and noted that such a claim "can be independently supported by evidence of a variety of conduct." *Id.* Unfortunately, the *Redmon* court never addressed obvious conflicts between the principles previously articulated and a broad application of a shareholder oppression cause of action. In effect, shareholder oppression became a trump card to avoid the limitations of more well-defined causes of action. For example, the court held that the plaintiffs could pursue an oppression claim based on allegations and some evidence that the defendants "paid personal expenses from corporate funds without the approval of the board of directors." *Id.* at 235. The court made no effort to reconcile this holding with the rule that a shareholder cannot state an individual cause of action based on a claim vested solely in the corporate entity.

The court then considered the claim for breach of fiduciary duty, and again reiterated the principle that the shareholder plaintiffs cannot assert an individual claim for breach of duties owed only to the corporation. *Id.* at 236–37. Nevertheless, the court held that because plaintiffs had alleged "a great deal of control" by the 75% majority shareholder and a variety of "wrongful conduct," they had established standing to pursue a claim for "breach of fiduciary duty by way of oppressive conduct." *Id.* at 238.[18] Again, the oppression claim trumped settled Texas law and saved a fiduciary duty claim that otherwise should have been dismissed. Finally, the court held that because plaintiffs had offered some evidence of oppressive conduct (paying personal expenses with corporate funds), that evidence would suffice to defeat summary judgment on breach of fiduciary duty as well. *Id.*

As for plaintiffs' breach of contract claim based on termination of their employment, the court held that any such agreement was made with the corporation, for which the defendants were not liable. *Id.* at 239. But it played the trump card again, holding that plaintiffs could assert "wrongful termination within the confines of their shareholder oppression claim." *Id.*

The majority of plaintiffs' claims were remanded to the trial court. *Id.* at 242. Because of the posture of the case, no remedy for the alleged oppression was discussed. No record of the ultimate disposition of those claims has been located. Despite its seeming inconsistency with well-settled principles of Texas law, this opinion is routinely cited in support of the broadest possible application of the shareholder oppression cause of action—a claim with no identifiable boundaries.

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[18] This analysis creates a chicken and egg scenario. A majority shareholder's alleged breach of a nonexistent fiduciary duty to the minority may become the basis for a Texas court finding that the duty does exist.

E. Great Expectations: Dallas Court of Appeals Refocuses Liability to General and Specific Expectations in *Ritchie* and *ARGO*

While Texas courts have used the two categories discussed above to discuss shareholder oppression, commentators have suggested that both descriptions "are generally consistent and overlap." *See* Douglas K. Moll, *Shareholder Oppression & Employment At Will in Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517, 528-29 (1999). As Professor Douglas K. Moll of the University of Houston explains, "courts have increasingly used the reasonable expectations standard to determine whether oppressive conduct has taken place," "[t]he highest courts in several states have adopted the reasonable expectations approach, and commentators have generally favored the reasonable expectations approach." *Id.* at 529.

1. *Ritchie v. Rupe*

With heavy reliance on Professor Moll's analysis, the Dallas Court of Appeals recently issued a series of opinions reframing the definition of shareholder oppression to focus on the reasonable expectations of shareholders—both general (belonging to all shareholders) and specific (belonging to a particular shareholder based on specific circumstances). In *Ritchie v. Rupe*, 339 S.W.3d 275 (Tex. App.—Dallas 2011, pet. granted), the court held that the Rupe Investment Corporation ("RIC") and its controlling shareholders "acted oppressively toward Ann [a minority shareholder] by refusing to meet . . . with prospective purchasers of the Stock because that conduct . . . substantially defeated Ann's general reasonable expectation of marketing the Stock." *Id.* at 296. The court held further that an order requiring RIC to redeem the minority's shares was an appropriate equitable remedy, but "the trial court erred in ordering the Stock be purchased for a price that did not constitute fair market value." *Id.* at 281.

The court linked the claim of shareholder oppression to TEX. BUS. CORP. ACT art. 7.05(A)(1)(c), now codified at TEX. BUS. ORGS. CODE § 11.404(a)(1)(C), the statutory provision authorizing a court-ordered receivership to rehabilitate a corporation if, *inter alia*, the court finds "oppressive" actions by "the governing persons of the entity." *See Ritchie*, 339 S.W.3d at 285-86. Noting that the statute does not define "oppressive" actions, the court focused on a description of shareholder oppression as "conduct that substantially defeats the minority's expectations that, objectively viewed, were both reasonable under the circumstances and central to the minority shareholder's decision to join the venture." *Id.* at 290 (quoting *Willis v. Bydalek*, 997 S.W.2d 798, 801 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)). The court acknowledged that "[i]n deciding whether conduct rises to the level of oppression, courts must exercise caution, balancing the minority shareholder's reasonable expectations against the corporation's need to exercise its business judgment and run its business efficiently." *Id.* at 289 (citing *Willis*, 997 S.W.2d at 801).

Applying Professor Moll's classification, the court distinguished between *general* and *specific* reasonable expectations. *Id.*[19] General reasonable expectations are those held by all shareholders by virtue of stock ownership. *Id.* at 291. "These expectations belong to all shareholders and thus, absent evidence to the contrary, are both reasonable under the circumstances and central to the decision to invest in the corporation." *Id.* These include:

- "the right to proportionate participation in earnings,"
- "the right to any stock appreciation,"
- "the right (with proper purpose) to inspect corporate records,"
- "the right to vote if the stock has voting rights," and
- the right to sell stock to another person "at a mutually acceptable price."

Id. at 291-92.

In contrast, the court defined "specific reasonable expectations" as "those specifically agreed to or expected as part of the transactions forming a particular corporation or that may develop over time among shareholders of a particular corporation." *Id.* at 291. "[S]pecific reasonable expectations require proof of specific facts giving rise to the expectation in a particular case and that the expectation was reasonable under the circumstances and central to the decision to join the venture." *Id.*[20] "'[A] specific reasonable expectation is personal in nature, as it requires proof that a close corporation majority shareholder and a particular minority shareholder reached a mutual understanding about a certain entitlement the minority is to receive in return for its investment in the business." *Id.* at 291 n.25

[19] Citing Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, & Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717, 765-77 (2002) ("*Shareholder Oppression*").

[20] The *Ritchie* court does not attempt to reconcile its loose language that specific expectations may "develop over time" with the long-accepted concept that, to be relevant, a shareholder's expectations must have existed at the time she "decided to join the venture." *Id.* at 291; *see also Davis*, 754 S.W.2d at 381.

(quoting Moll, *Shareholder Oppression*, 86 MINN. L. REV. at 767). Here, there was "no shareholders' or buy-sell agreement, right of first offer, or other restriction on the sale of the Stock to third parties." *Id.* at 282. Absent an agreement creating specific expectations, the court concluded that there were no limitations on the general expectation that a shareholder can sell her stock to third parties for a mutually acceptable price. *See id.* at 293-294. The majority's alleged efforts to frustrate such a sale to a third party thus defeated the minority's reasonable expectations.

The court briefly considered the burdensome/fair dealing category of oppression, citing Professor Moll's recognition of the overlap between this category and the reasonable expectations category. *Id.* at 294. It noted that conduct that defeats a minority shareholder's expectations will often constitute "burdensome, harsh, or wrongful" conduct. *Id.* But the court did not discuss whether (or under what circumstances) this "fair dealing" standard could create liability for shareholder oppression if the shareholder's expectations were not substantially defeated. The end result is an opinion that analyzes oppression almost exclusively with an eye toward expectations, but without expressly stating that this approach supersedes or renders unnecessary the burdensome/fair dealing category.[21] One could, however, read the phrase "a visible departure from the standards of fair dealing and a violation of fair play *on which each shareholder is entitled to rely*" from the burdensome/fair dealing category to incorporate the "reasonable expectations" test defined in *Ritchie*.

The court affirmed the trial court's order of a buy-out. *Id.* at 281. As have other courts addressing the issue, the court looked to TEX. BUS. CORP. ACT art. 7.05 to justify the buy-out, stating that art. 7.05 "clearly envisions that [lesser equitable remedies] are available and, if adequate, preferable to the remedy of appointing a receiver to take over the affairs of the corporation in order to rehabilitate it." *Id.* at 285-86. Citing *Patton* and *Davis*, the court held that a buy-out was available "in the appropriate case" as a remedy for shareholder oppression. *Id.* at 286-89.

While the court upheld the buy-out, it rejected the buy-out price. The jury determined the "enterprise value" of the minority stock, which did not discount for lack of marketability or minority status. *Id.* at 301. The court remanded the case for a determination of the "fair market value" of the minority's stock, including discounts, concluding:

> In crafting an equitable remedy for appellant's oppressive conduct in connection with [appellee]'s efforts to sell the Stock, the trial court should have provided the relief prevented by appellant's conduct, i.e. a sale at fair market value. If [appellee] had been able to sell to a willing buyer under no obligation to purchase, [appellee] would have obtained the "fair market value" of the Stock. As an equitable remedy for appellants' oppressive conduct, [appellee] is entitled to no more than that.

Id. at 301-02.[22] *Ritchie* is now on appeal to the Texas Supreme Court awaiting a decision on the merits. While the petitioners have challenged the finding of oppression and the propriety of a buy-out on several grounds, the respondent has not challenged the court's conclusion as to the appropriate remedy—tailored to rectify the infringement of a particular expectation.

2. *ARGO v. Shagrithaya*

If there was doubt after *Ritchie* whether the Dallas Court of Appeals believes a reasonable expectations analysis is the proper method of determining shareholder oppression, its decision in *ARGO Data Res. Corp. v. Shagrithaya*, 380 S.W.3d 249 (Tex. App.—Dallas 2012, pet. filed), should settle the matter. Max Martin[23] and Bala Shagrithaya founded ARGO Data Resource Corporation ("ARGO") in 1980 and held 53% and 47% of the company's stock, respectively. *Id.* at 258. After many years of building a very profitable business, disputes arose between the two shareholders. *Id.* at 259-63.

Over the years, Martin and Shagrithaya had received roughly equal compensation, which was up to

[21] The court did state that the burdensome/fair dealing category focuses more on the conduct of the directors and those in control than the reasonable expectations of the minority shareholder. But if a minority shareholder could recover for directors' or majority shareholders' actions in the absence of defeated expectations, the resulting windfall would place the minority shareholder in a better position than he or she ever expected.

[22] The court noted in dicta that discounts for lack of marketability or minority status may not be appropriate when the minority is not looking to sell, but is rather forced to relinquish an ownership position by oppressive conduct of the majority (i.e. "squeezed out"). *Id.* at 301. Yet ordering a buy-out at higher than fair market value would create a windfall for the minority. As discussed below, the better remedy is to use the court's injunctive powers to stop, rectify, and prevent the offensive conduct, as this more closely places the parties in the position in which they should have been absent such conduct.

[23] Carrington Coleman, including the authors Lyndon Bittle and Kelli Hinson, served as trial and appellate counsel for Max Martin.

$1 million per year by 2005. *Id.* at 258-59. Dissatisfied with Shagrithaya's work performance, Martin reduced Shagrithaya's compensation to $300,000 in 2006. *Id.* Shagrithaya then offered to "step down" from ARGO, and the two men began discussing a buy-out of Shagrithaya's shares. *Id.* at 259. Martin offered to have ARGO purchase the shares for $66 million, the undisputed fair market value (including minority discounts). *Id.* at 259-60. Shagrithaya rejected what he considered to be a low-ball offer. *See id.* at 260. Then, after twenty-five years of agreeing that ARGO should not issue dividends but should, instead, retain the company's earnings for ARGO's benefit, Shagrithaya began demanding the company issue large dividends. *Id.* at 260-61. Although Martin was initially reluctant, he ultimately supported the issuance of a $25 million dividend at the end of 2008. *Id.*at 260, 263. Shagrithaya received his 47% share of the dividend. *Id.* at 270.

Shagrithaya sued Martin in 2007 for shareholder oppression and other claims. *Id*. at 262. After a six-week trial ending in October 2009, the jury found that Martin had committed eleven specific acts, including:

> (1) reducing Shagrithaya's annual compensation by 70 percent without board approval; (2) maintaining his own compensation at $1 million annually without board approval; (3) retaining ARGO's earnings to buy out Shagrithaya's interest in ARGO without disclosing the plan to Shagrithaya; (4) causing ARGO to retain earnings rather than paying appropriate dividends; (5) failing to disclose that the IRS had assessed a retained earnings tax against ARGO of approximately $1.2 million; (6) offering to have ARGO redeem Shagrithaya's shares at $66 million (allegedly below value); (7) requiring Shagrithaya to report to a newly-appointed President of ARGO, allegedly appointed without board approval; (8) acquiring a Colorado condominium from ARGO without disclosing the sale or obtaining approval of ARGO's board; (9) using ARGO to pay personal expenses; (10) maintaining his wife on the ARGO payroll while she performed no services; and (11) retaining a law firm on ARGO's behalf to challenge the IRS tax assessment.

Id. at 263, 266-68, 271-72. The trial court held that those acts were oppressive and, among other things, ordered ARGO to issue an $85 million dividend as an equitable remedy. *Id*. at 263-64.

On appeal, the court reversed and rendered judgment, ordering Shagrithaya to take nothing. *Id.* at 257. The court held that the jury's factual findings were supported by sufficient evidence. *Id.* at 263-72. But, reiterating and applying the standards adopted in *Ritchie*, it held as a matter of law that the enumerated acts were not "oppressive" because they did not defeat Shagrithaya's general or specific reasonable expectations. *Id.* The court meticulously addressed each allegedly oppressive act found by the jury. *Id.*

First, the court stated that an expectation of a certain level of compensation is not a general expectation of all shareholders, and "absent an employment contract, an expectation of employment at a certain level of compensation cannot be considered objectively reasonable." *Id.*[24] So Shagrithaya was required to prove specific facts entitling him to a certain compensation level. *Id.* at 266. And even though Shagrithaya disagreed with the decision to lower his compensation, "the inability to control board decisions is inherent in the position of a minority shareholder." *Id.* at 267. As for Martin maintaining his own compensation at $1 million, "a shareholder has no general reasonable expectation about the compensation levels of the corporation's executives," though "a shareholder does have a right to proportionate participation in the company's earnings." *Id.* at 267-68. Unreasonably high compensation to the majority shareholder can be considered a disguised dividend. *Id.* However, the fact that Shagrithaya testified he never had a problem with Martin receiving compensation of $1 million annually, and the supportive testimony of Shagrithaya's own compensation expert, settled the issue as Martin was not taking a disproportionate share of the earnings. *Id.* at 268.

The third and fourth acts found by the jury related to whether ARGO should have issued dividends, as opposed to retaining corporate earnings. "[A] shareholder has no general expectation of receiving a dividend." *Id*. at 270. And Shagrithaya "joined ARGO with no expectations of receiving dividends" so "Martin's conduct did not defeat Shagrithaya's specific expectations." *Id.* As the lack of dividends did not defeat Shagrithaya's general or specific expectations, it did not constitute shareholder oppression. *Id.* at 271.

As for the fifth and eleventh acts, the court found that Shagrithaya presented no evidence as to how the failure to disclose the IRS letter affected his interests and that ARGO benefited as a whole from the engagement of counsel to address the IRS issue. *Id.* at 271, 273-74. The sixth act was offering the fair market

[24] The court rejected the complaint about reducing Shagrithaya's compensation without proper board approval, as that related to Shagrithaya's position as an employee and not a shareholder. *Id.* at 266. The court also noted that the board subsequently corrected the procedural defect. *Id.*

value of $66 million to purchase Shagrithaya's shares—rather than a price not discounted for lack of marketability or minority status as favored by Shagrithaya. *Id.* at 271. But the court found Shagrithaya had actively demonstrated an interest in having ARGO buy out his shares, so fair market value, including discounts, was the appropriate measure. *Id.* at 271-72. In any event, the court held "the mere offer to purchase the shares for fair market value cannot amount to oppression." *Id.* at 272.

The seventh act, Martin's instructing Shagrithaya to report to an executive against his wishes, did not relate to his rights as a shareholder. *Id.* Finally, the eighth, ninth, and tenth acts related to Martin's alleged improper use of ARGO's assets. *Id.* But after an audit, Martin repaid to ARGO more than the amount Shagrithaya claimed Martin misused, meaning Shagrithaya's rights as a shareholder were unharmed. *Id.* As a result, the court concluded that none of the acts found by the jury constituted shareholder oppression. *Id.* at 273. The court reversed and rendered judgment on Shagrithaya's remaining claims. *Id.* at 273-76.[25]

In a few places throughout the opinion, the court made passing mention of the burdensome/fair dealing category. *See, e.g.*, *id.* at 271-72. Yet in each circumstance, the court evaluated whether conduct was burdensome, for example, based on whether Shagrithaya's expectations were met, *see, e.g.*, *id.*, which follows *Ritchie's* observation that the two categories overlap, 339 S.W.3d at 294.

3. *Cardiac Perfusion Services v. Hughes*

The Dallas Court of Appeals issued a third published opinion on shareholder oppression in *Cardiac Perfusion Services v. Hughes*, 380 S.W.3d 198 (Tex. App.—Dallas 2012, pet. filed). Michael Joubran[26] formed Cardiac Perfusion Services ("CPS") in 1991, and hired Randall Hughes as his first employee. *Id*. at 201. In 1992, Hughes became a 10% owner of CPS and entered into a Buy-Sell Agreement that restricted the sale or transfer of CPS shares and required Joubran and CPS to purchase Hughes's stock upon termination of his employment with CPS at the stock's book value as of the end of the previous year. *Id.* Several years later, a dispute arose between the parties, and Hughes's employment was terminated. *Id*. Joubran then sued Hughes seeking, among other things, a declaratory judgment that the Buy-Sell Agreement governed Joubran's obligation to purchase Hughes's stock. Hughes countersued for shareholder oppression and other claims. *Id.*

The jury found that Joubran (1) suppressed profit distributions to Hughes, (2) paid himself excessive compensation using CPS funds, (3) improperly paid his family using CPS funds, (4) used CPS funds to pay personal expenses, (5) used his control of CPS to lower the value of Hughes's stock, and (6) refused to let Hughes examine CPS's books and records. *Id*. Hughes did not assert, and the trial court did not find, that his termination was oppressive conduct. *Id.* The trial court concluded, based on the jury's findings, that Joubran engaged in shareholder oppression and required Joubran and CPS to redeem Hughes's shares at what the jury found to be fair value, $300,000, *id.* at 202, rather than the contractually agreed-to price of $77,764 pursuant to the Buy-Sell Agreement.

On appeal, the court considered whether the trial court erred in using the fair value (without discounts for minority status or lack of marketability) rather than the value defined by the Buy-Sell Agreement. *Id.* The court quoted dicta in *Ritchie*, which did not involve a shareholders' agreement or buy-sell agreement: "Enterprise value [without discounts] has been seen as the appropriate valuation when a minority shareholder . . . has been forced to relinquish his ownership position by the oppressive conduct of the majority." *Id.* (quoting *Ritchie* 339 S.W.3d at 300-01). Although purporting to rely on this language from *Ritchie*, the court did not address whether Hughes had in fact been forced out by the oppressive conduct of the majority. As noted above, the termination of Hughes's employment, which triggered the Buy-Sell Agreement, was not oppressive. Nevertheless, the court held the trial court did not abuse its discretion by using fair value, rejecting CPS's and Joubran's authority stating that Texas does not allow parties to recover through equity that to which they are contractually not entitled. The court reasoned that those authorities did not "involve a trial court's exercise of its equitable discretion in the context of a claim for shareholder oppression."[27] Stated another way, the court held that shareholder oppression nullified the Buy-Sell Agreement. *Id.*

The opinion does not address whether a less severe remedy than a buy-out would have been appropriate for the conduct found to be oppressive.

[25] Shagrithaya has filed a petition seeking review by the Texas Supreme Court.

[26] Carrington Coleman, including author Lyndon Bittle, represents Michael Joubran on appeal and has filed a petition seeking review to the Texas Supreme Court challenging the appellate court opinion on his behalf.

[27] *Id.* at 204 (rejecting the application of *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007); *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671 (Tex. 2000); and *City of The Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699 (Tex. App.—Fort Worth 2008, pet. dism'd)).

4. *Feldman v. Kim*

One other appellate court notably addressed shareholder oppression post-*Ritchie*: *Feldman v. Kim*, No. 14-11-00184-CV, 2012 Tex. App. LEXIS 3155 (Tex. App.—Houston [14th Dist.] April 24, 2012, no pet.). In *Feldman*, the Fourteenth District in Houston reversed a trial court's grant of summary judgment in favor of majority shareholder defendants and their partnership on a shareholder oppression claim. The court found that the majority allocated revenue disproportionately in its favor while allocating expenses proportionately. *Id.* at *11-12. The majority's actions placed the minority "in the position of subsidizing the returns for his associates while receiving none for himself"—a fact that "taken alone, is sufficient to defeat summary judgment." *Id.* at *12. The result mirrors *Ritchie*'s statement that a shareholder has a general expectation of "the right to proportionate participation in earnings." 339 S.W.3d at 291.

II. MEETING EXPECTATIONS: CRAFTING A SENSIBLE REMEDY

In *Patton v. Nicholas*, 279 S.W.2d 848 (Tex. 1955), the precursor to Texas shareholder oppression law, the Texas Supreme Court instructed that "[w]isdom would seem to counsel tailoring the remedy to fit the particular case." *Id.* at 857. This concept is imbedded in other equitable remedies as well. *See, e.g., Burrow v. Arce,* 997 S.W.2d 229, 241 (Tex. 1999) (equitable remedy "must fit the circumstances presented"); *Holubec v. Brandenberger*, 111 S.W.3d 201, 206 (Tex. 2003) (equitable relief should impose the least possible burden that will remedy the harm). Despite this wise guidance, each of the four Texas appellate courts to consider a remedy for shareholder oppression has ordered a buy-out. But when less intrusive corrective measures could protect a minority's expectations, a one-size-fits-all buy-out approach gives the minority a windfall by placing him in a better position than otherwise possible. Absent special circumstances or an agreement, a minority shareholder never has an expectation that he can sell his minority position at will without any discount for lack of marketability or minority status. *See Ritchie*, 339 S.W.3d at 301; *see also* Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 324 n.115 (2004). Rather, the minority's general expectation is to be able to sell at fair market value, including discounts, and only if there is a willing buyer. Texas law should not allow minority shareholders to seek from the court what they could not obtain from the market.

The better approach lies in applying the expectations-focused liability analysis championed by *Ritchie* and *ARGO* to craft a remedy appropriate for each individual situation. If shareholder oppression exists when a minority's reasonable expectations are defeated, the court's remedy should ensure that the minority's reasonable expectations—both general and specific—are revived and satisfied. Moreover, Texas courts should encourage parties to set forth their mutual expectations in writing at the outset of the relationship rather than asking the courts to define their respective rights and obligations after a dispute has arisen. Courts should refrain from ordering any more relief than necessary to put the parties into their expected positions absent the oppressive conduct. Rather than order a buy-out, courts should use money awards and injunctions to protect the minority in the least obtrusive manner as the Texas Supreme Court instructed in *Patton*.

A. *Davis* and Other Inappropriate Buy-Outs

Davis v. Sheerin, 754 S.W.2d 375 (Tex. App.—Houston[1st Dist.] 1988, writ denied), set the tone by ordering a buy-out in the first Texas case to recognize a shareholder oppression claim. The *Davis* court understood that it "must consider whether lesser remedies than a 'buy-out' could adequately protect the [minority]'s interests." *Id.* at 382. It is in this analysis, however, that the court erred.

The jury in *Davis* found that the majority (1) "received informal dividends . . . to the exclusion of [the minority]," (2) the majority "wasted corporate funds by using them for their legal fees," and (3) the majority "conspired to deprive appellee of his stock ownership." *Id.* at 382. The court also recounted "undisputed evidence" of additional conduct, including that the majority (4) claimed the minority had gifted away his stock, despite corporate records to the contrary, (5) sent a letter stating that the corporation would not declare dividends and instead, would disburse bonuses to the officers of the company (who did not include the minority), and (6) stated at a board meeting that the minority's "opinions or actions would have no effect on the Board's deliberations." *Id.* The court expressly noted that there was an absence of the "typical 'squeeze out' techniques," such as suppressing dividends or excessive salaries. *Id.* Nevertheless, the court stated that conspiring to deprive the minority of his interest, wasting corporate assets, and receiving informal dividends at the exclusion of the minority, coupled with an intent to "deny[the minority] any interest or voice in the corporation" justified the buy-out. *Id.* at 382-83.

The actual *acts* of the majority, as opposed to the finding of conspiracy and the intent to "deny any interest or voice," included paying himself a bonus as a disguised dividend and wasting corporate assets. *Id.* at 382. Both acts can be rectified without resorting to ordering a buy-out. The court could have ordered the majority to pay back the improper dividend or ordered the company to match the dividend payment to the minority (as in *Patton*). To the extent wasting corporate funds could ever support a direct claim for shareholder oppression (as opposed to a derivative claim), the court could simply have ordered the funds paid back to the company. The remaining "future acts," including an intent not to pay future dividends or to deprive the minority of a voice, could have been rectified though appropriate injunctions—or possibly should not have required redress at all since an intent to act does not cause the same harm as actually acting.

In essence, the court chose to allow the subjective intent of the majority (conspiracy, intent not to issue dividends) to justify ordering a buy-out. This focus on the *majority*'s conduct or motivation, rather than the *minority*'s expectations is outdated in light of *Ritchie* and *ARGO*. It further provides little to no limit on trial court activism. While juries are tasked with determining whether certain acts occurred, "the determination of whether such acts constitute shareholder oppression is a question of law for the court." *ARGO*, 380 S.W.3d at 264; *see also Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999). Moreover, Texas courts, through their equity powers, determine the remedy for oppressive conduct. *See Patton*, 279 S.W.3d at 857-58. Allowing courts, based solely on the subjective determination of the majority's intent, to order a buy-out that puts the minority in a better position than he would have been absent the oppression is simply a bridge too far.

Nevertheless, Texas courts have consistently ordered buy-outs without any effort to follow *Patton*'s charge to "tailor[] the remedy to fit the particular case." *Id.* at 857. In *Advance Marine Inc. v. Kelley*, the minority shareholder sued alleging that the majority issued inadequate dividends and conspired to divert corporate assets to themselves at the exclusion of the minority. No. 01-90-00645-CV, 1991 Tex. App. LEXIS 1614 at *2-4 (Tex. App.—Houston [1st Dist.] June 27, 1991, no writ). Rather than requiring the majority or the company to issue dividends or pay back any diverted assets, the trial court ordered a buy-out. *Id.* at *1. The appellate court affirmed, stating simply that courts have the power to order a buy-out. *Id.* at *5 (citing *Davis*, 754 S.W.2d at 383). The court made no effort to examine whether it *should* order a buy-out; it merely concluded that it *could*. The court also rejected the majority's argument that the buy-out price did not include any discounts for minority status, stating that the argument merely went to the weight of the evidence justifying the ordered price. *Id.* at *7. Whether to apply minority discounts should be decided as a matter of law by the court as in *Ritchie*; it is not evidence of the price. By ordering the buy-out and ignoring discounts, the court awarded the minority shareholder much more compensation than she ever could have received in the open market.[28]

Cardiac Perfusion Services v. Hughes, 380 S.W.3d 198 (Tex. App.—Dallas 2012, pet. filed), makes the same mistake as *Davis* and *Advance Marine*. The jury there found that the majority shareholder suppressed profit distributions and paid himself excessive compensation, improperly paid his family and paid for personal expenses using corporate funds, used his control to lower the value of the minority's stock, and refused to let the minority examine the company's books and records. *Id.* at 201. The trial court ordered a buy-out, and the appellate court did not consider any alternative. *Id.*at 202-05. The court should have analyzed whether a buy-out was the most appropriate remedy for the conduct found to be oppressive, which did not cause the minority to lose his ownership interest. Rather, the minority shareholder lost his ownership interest as a result of the Buy-Sell Agreement, which he agreed to. *Id.* at 201. If a buy-out was not an appropriate remedy, it was the plaintiff who bore the burden to seek and evidence appropriate redress. *See Davis v. Estridge*, 85 S.W.3d 308, 310 n.2 (Tex. App.—Tyler 2001, pet. denied) ("[I]t is the plaintiff's burden to prove he is deserving of equitable relief . . . ."). Rather than analyzing whether the buy-out was appropriate, the court merely cited *Davis* and stated that a buy-out was within the trial court's equitable power. *Id.* at 204 (citing *Davis*, 754 S.W.2d at 380). Yet the acts were (1) misusing corporate funds and paying excessive salaries, which were harms to the company and could have been paid back; and (2) not allowing the minority to review corporate records, which could have been rectified through injunctive relief if it had not been rectified before trial. As a result, the minority received a buy-out far beyond his expectations—at a value higher than his Buy-Sell Agreement allowed. *Id.* at 204-05.

[28] For another example of how trial courts overuse the buy-out remedy, see *Christian v. Stafford*, No. 14-99-00038-CV, 2000 Tex. App. LEXIS 6423 (Tex. App.—Houston [14th Dist.] Oct. 26, 2000, no pet.). While the appellate court did not analyze the appropriateness of the remedy because the jury's findings were insufficiently supported, it is still shocking that the trial court ordered a buy-out when the conduct was limited to entering into lease agreements with insiders at less than fair value. *Id.* at *2. One would think ordering the majority to reimburse the company for its losses would have easily sufficed.

B. *Ritchie v. Rupe*: An Appropriate Buy-Out?

That is not to say a buy-out is never appropriate. Rather, a buy-out can be an appropriate remedy in the limited circumstance when it is necessary to fulfill the minority's expectations. This is the scenario in *Ritchie v. Rupe*, 339 S.W.3d 275 (Tex. App.—Dallas 2011, pet. granted).

As described in detail above, *Ritchie* involved the majority's interference with the minority's efforts to sell her stock. *Id.* at 296-97. Specifically, the officers and directors refused to meet with prospective purchasers, preventing the minority from fulfilling her "general reasonable expectation of marketing the Stock." *Id.* at 296.[29] The court concluded that the ordered buy-out at fair market value—including discounts—was appropriate. *Id.* at 301. That is because, if the minority "had been able to sell to a willing buyer under no obligation to purchase, [she] would have obtained the 'fair market value' of the Stock" and she "is entitled to no more than that." *Id.* In other words, ordering a buy-out at fair market value places her in the exact position she expected to be in—with the stock sold to a third party at the price the market would bear.[30]

But *Ritchie*'s holding does not mean that a buy-out is always appropriate. Rather, the court awarded the buy-out only after considering *Patton*'s guidance and concluding it met the minority's expectations. *Id.* at 286-89. Notably, the court distinguished *Brodie v. Jordan*, 857 N.E.2d 1076 (Mass. 2006), which concluded that under the applicable statute the only available remedy was receivership, because "the outcome in *Brodie* flows from the conclusion that the trial court's remedy [of a buy-out] . . . placed the plaintiff in a significantly better position than she would burrow buy-out was appropriate in *Ritchie* only because it did not place the minority shareholder in a "better position than she would have enjoyed absent the wrongdoing." *See id.*

C. Assuming a Buy-Out is Justified, at What Price?

If a buy-out is appropriate, how should the price be determined? The answer lies in examining the general and specific expectations that a court concludes have been defeated. *Ritchie*, *Cardiac Perfusion Services*, and *Four Seasons Equipment, Inc. v. White* analyzed at what price a buy-out was appropriate. *Ritchie* ordered a buy-out at fair market value, including appropriate discounts for lack of marketability and minority status. 339 S.W.3d at 301. In doing so, the court specifically noted the absence of a shareholders' or buy-sell agreement, which could have created specific expectations to be protected. *See id.* at 291-92. Absent such an agreement, the majority only violated the minority's general expectation of being able to freely sell her stock at fair market value. *See id.* at 291-92, 301. Accordingly, the remedy was tied to that objectively reasonable expectation.

Cardiac Perfusion Services—unlike *Ritchie*—did not include discounts in the ordered buy-out price. 380 S.W.3d at 204-05. As justification, the court cited dicta in *Ritchie* stating that "enterprise value," defined in that case as not including discounts, "has been seen as the appropriate valuation when a minority shareholder, with no desire to leave the corporation, has been forced to relinquish his ownership position by the oppressive conduct of the majority." *Id.* at 204 (quoting *Ritchie*, 339 S.W.3d at 300-01). The court did not, however, address whether the minority shareholder had, in fact, been forced to relinquish his ownership position by oppressive conduct, rather than by operation of contract.

If a buy-out is ordered at all, discounts generally should be applied (absent a shareholders' agreement to the contrary) because minority shareholders generally do not have an expectation of selling their stake freely absent such discounts. *See Ritchie*, 339 S.W.3d at 301. A criticism of this approach could be that ordering a buy-out with discounts when the minority does not want to sell unfairly gives the majority what it wants. The majority gets to oppress the minority, and when the minority seeks judicial relief, the majority takes complete control of the company and merely pays fair market price. But when a minority shareholder does not want to sell her position, the remedy should not be to order a buy-out at a higher price, but rather to not order her position sold at all. If the minority's expectation was to remain a shareholder in the company, but with her rights protected, that is the target the court should be aiming for when crafting a remedy.

[29] In their briefing to the Texas Supreme Court, the majority shareholders have challenged the court's holding that a company or majority shareholders are obligated to assist the minority shareholder in selling her shares. The authors express no opinion on this issue, and merely comment on the appropriateness of the *Ritchie* court's method for determining a remedy, if in fact the described conduct constituted shareholder oppression.

[30] An extremely narrow application of an expectations-fulfilling remedy could be an injunction forcing the majority to meet with third parties. But this limits relief too narrowly, as courts should be able to monetize an expectations-based remedy. The minority expects to sell, but is barred by the actions of the majority. The law routinely forces the parties that cause the harm to pay the consequence. Requiring the majority to buy-out in this circumstance gives the minority the value necessary to fulfill her expectations while cleanly ending the dispute.

But what special circumstances would justify a price other than fair market value? When a minority shareholder's *specific* expectations include a different buy-out price. Herein is another error found in *Cardiac Perfusion Services*. The *Ritchie* court defined specific expectations as "those specifically agreed to or expected as part of the transactions forming a particular corporation or that may develop over time among the shareholders of a particular corporation." 339 S.W.3d at 291. In *Cardiac Perfusion Services*, the minority signed a Buy-Sell Agreement whereby he specifically agreed that the purchase price of his shares upon his termination would be "calculated using the book value of the shares as of the fiscal year preceding the termination." *Id.* at 201. The court thus did not meet the minority's expectations by ordering an undiscounted purchase price—the court ignored them. The minority did not agree to a purchase price only if the majority acted in a certain manner or did not terminate him improperly. The minority agreed to a purchase price "upon 'the severance of [that] shareholder's employment relationship'" without restrictions on manner or circumstance. *See id.* If the minority wanted protection and a different price under different circumstances, he could have insisted on such provisions or declined to purchase the stock on the terms offered. The court should not have allowed the shareholder oppression claim to trump the will of the parties.

In contrast, the court in *Four Seasons Equipment*, 429 B.R. at 217, looked to the shareholders' agreement to determine price. There, the agreement defined how to calculate a buy-out price, and specifically stated that "[t]he shares of stock are not discounted for marketability, control[,] or any other reason." *Id.* The court saw "little reason to substitute the Court's own judgment as to the fair terms of the buy-out price" when "the formula was agreed to by the parties without coercion." *Id.*

III. CONCLUSION

Shareholder oppression law in Texas is evolving and changing. Soon, the Texas Supreme Court may weigh in on the validity of the claim and on how to establish liability. If it chooses to recognize the claim, endorsing the expectations-based liability analysis found in *Ritchie* and *ARGO* will provide the greatest certainty and predictability regarding the conduct that may be deemed oppressive. Courts should also re-examine *Patton* and the other Texas authority instructing courts to tailor equitable remedies to the particular case. A buy-out is not always the best solution, and remedies for shareholder oppression should match the defeated expectations giving rise to liability.