

Fiduciary Duties in the Wisconsin Close Corporation: Time to Set the Law Straight

Sara C. McNamara
Marquette University Law School

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Business Organizations Law Commons](#)

Repository Citation

Sara C. McNamara, *Fiduciary Duties in the Wisconsin Close Corporation: Time to Set the Law Straight*, 100 Marq. L. Rev. 1445 (2017).
Available at: <http://scholarship.law.marquette.edu/mulr/vol100/iss4/10>

This Response or Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

FIDUCIARY DUTIES IN THE WISCONSIN CLOSE CORPORATION: TIME TO SET THE LAW STRAIGHT

I.	INTRODUCTION	1445
II.	WHAT ARE FIDUCIARY DUTIES? TWO DUTIES RECOGNIZED IN CORPORATE GOVERNANCE	1447
	A. Theories for Imposing Fiduciary Duties.....	1450
	B. What is a close corporation and how does it differ from the traditional corporation?	1452
	C. Leading Massachusetts' Cases Imposing Fiduciary Duties on Shareholders in Close Corporations.....	1457
	D. Leading Case in Delaware Rejecting Fiduciary Duties in Close Corporations.....	1460
III.	CLOSE CORPORATIONS IN WISCONSIN	1462
IV.	CONCLUSION.....	1467

I. INTRODUCTION

Justice Frankfurter once said:

But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?¹

With the evolution of new and modified business entities in today's society, it is becoming increasingly difficult to determine when and what fiduciary duties arise.² It has been well accepted for many years that partners owe each other fiduciary duties,³ and it has also been well

1. Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 85–86 (1943).

2. See generally Sandra K. Miller, *The Best of Both Worlds: Default Fiduciary Duties and Contractual Freedom in Alternative Business Entities*, 39 J. CORP. L. 295 (2014).

3. See Michael Haynes, *Partners Owe to One Another A Duty of the Finest Loyalty . . . or Do They? An Analysis of the Extent to Which Partners May Limit Their Duty of Loyalty to One Another*, 37 TEX. TECH L. REV. 433, 437 (2005). Although generally accepted that partners owe each other some fiduciary duties, the specification and extent of those duties has been

accepted that shareholders in large, public corporations do not owe any fiduciary duties.⁴ However, an issue arises when determining what fiduciary duties are owed by shareholders of a closely held corporation. Although the closely held corporation is incorporated just like the public corporation,⁵ the stockholders in the closely held corporation often end up behaving more like partners.⁶ This unique situation has presented a difficulty for many courts across the country.⁷

States have begun to diverge in their determination on whether shareholders in a closely held corporation owe each other fiduciary duties.⁸ Massachusetts is the leading state for the majority approach, holding that all shareholders in a close corporation do owe each other fiduciary duties,⁹ and Delaware is the leading state for the minority approach, holding that no fiduciary duties are owed.¹⁰ Where does Wisconsin sit on this issue? Thus far, the Wisconsin Supreme Court has yet to hear a case that would specifically decide this issue. While the court has quietly indicated it might lean toward the Delaware approach,¹¹ other previous opinions could also indicate a preference for the Massachusetts approach.¹² In order to best comport with the evolution of business entities and the reasonable expectations of shareholders in closely held corporations, the Wisconsin Supreme Court should conclude, when the opportunity arises, that all shareholders in closely held corporations owe each other fiduciary duties.

I will begin this Comment by exploring what fiduciary duties are and explaining the two most common fiduciary duties recognized by the courts.¹³ I will then discuss the two basic theories behind determining

challenged. *See generally id.*

4. *See* Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377 (2004).

5. *See id.* at 378.

6. Orrin K. (Skip) Ames III, *Closely Held Corporations: An Intersection of Business, Law, and Ethics*, 43 CUMB. L. REV. 171, 213 (2013).

7. *See* James M. Van Vliet, Jr. & Mark D. Snider, *The Evolving Fiduciary Duty Solution for Shareholders Caught in A Closely Held Corporation Trap*, 18 N. Ill. U. L. Rev. 239, 239–42 (1998).

8. *See generally* Siegel, *supra* note 4.

9. *See* Donahue v. Rodd Electrotype Co. of New England, 328 N.E.2d 505 (Mass. 1975).

10. Mary-Hunter Morris, *Only "The Punctilio" If I Say So: How Contractual Limitations on Fiduciary Duties Deny Protection to Victims of Oppressive Freeze-Outs Within Private Business Entities*, 10 DUQ. BUS. L.J. 73, 95–96 (2008); *see* Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993).

11. *See* Mark R. Hinkston, *Minority Shareholder Remedies Under Wisconsin Law*, WIS. LAW., May 2010, at 16, 53.

12. *See id.* at 19.

13. *Infra* Part II.

when fiduciary duties are owed, the Contractarian model and the Communitarian model.¹⁴ Next, I will explain what a closely held corporation is and analyze the important differences between a closely held corporation and a public corporation.¹⁵ Then I will discuss minority shareholder oppression and analyze both the majority and minority approaches on fiduciary duties in a close corporation, using the major cases that have been decided on this issue.¹⁶ Finally, I will discuss the law in Wisconsin and explain why the Massachusetts approach should be adopted in Wisconsin.¹⁷

II. WHAT ARE FIDUCIARY DUTIES? TWO DUTIES RECOGNIZED IN CORPORATE GOVERNANCE

First, before determining whether shareholders should owe each other fiduciary duties, it is necessary to understand what fiduciary duties are. Black's Law Dictionary defines fiduciary duty as a "duty of utmost good faith, trust, confidence, and candor owed by a fiduciary to the beneficiary."¹⁸ However, from that definition it is still necessary to determine who is a fiduciary.¹⁹ There is no dispute that partners are fiduciaries to each other.²⁰ In the seminal case of *Meinhard v. Salmon*,²¹ Justice Cardozo famously stated, "Joint adventurers, like co-partners, owe to one another . . . the duty of the finest loyalty . . . something stricter than the morals of the market place. Not honesty alone, but the *punctilio of an honor the most sensitive*, is then the standard of behavior."²² Through an eloquent use of words, Justice Cardozo is essentially stating that the fiduciary duty owed in a partnership is one of undivided loyalty.²³ By choosing to enter into a partnership, each partner is signifying that they will act for the sole benefit of the partnership, and not act for their own self interest.²⁴ While parties who enter into a close corporation tend to behave similar to partners, the partnership is an entirely different

14. *Infra* Part II.

15. *Infra* Part III.

16. *Infra* Part IV.

17. *Infra* Part V.

18. *Fiduciary duty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

19. Black's Law Dictionary defines a fiduciary as "Someone who is required to act for the benefit of another person on all matters within the scope of their relationship." *Id.*

20. Siegel, *supra* note 4, at 378.

21. 164 N.E. 545 (N.Y. 1928).

22. *Id.* at 463–64 (emphasis added).

23. *Id.* at 464.

24. See Haynes, *supra* note 3, at 437.

business entity, and therefore, the law of fiduciary duties in a partnership does not apply in a closely held corporation.²⁵

Likewise, there are fiduciary duties regularly imposed in traditional corporations; however, those duties are applied to the directors and officers, but typically not to the shareholders.²⁶ In the corporate governance structure, two types of fiduciary duties are typically acknowledged.²⁷ First, the duty of care, in corporate governance, concerns the decision-making of the directors and officers.²⁸ This duty is focused on the process used to make the decision and not the content or quality of the decision itself.²⁹ Courts are hesitant to criticize the decisions of officers and directors as evidenced by the business judgment rule.³⁰ Under the business judgment rule, a court will presume that disinterested directors were fully informed, acted in good faith, and possessed an honest belief that the decision was in the best interest of the company.³¹ Courts realize that hindsight is 20/20, so they have chosen not to upset decisions, even bad ones, made by the directors or officers. The Wisconsin Supreme Court, in regard to the business judgment rule, has stated:

[T]his court will not substitute its judgment for that of the board of directors and assume to appraise the wisdom of any corporate action. The business of a corporation is committed to its officers and directors, and if their actions are consistent with the exercise of honest discretion, the management of the corporation cannot be assumed by the court.³²

Although the business judgment rule presumption favors management, the presumption is rebuttable.³³ If a plaintiff can show evidence of a lack of due care, lack of good faith, lack of independence, or a present self-interest by the directors, the presumption will be

25. See Van Vliet & Snider, *supra* note 7, at 248–49.

26. See Ames, *supra* note 6, at 190–91.

27. *Id.* at 189–90.

28. *Id.* at 190. Arguments have arisen to whether the duty of care applies both to the officers as well as the directors. *Id.* That discussion is not pertinent to this Comment so it will not be addressed.

29. *Id.*

30. See, e.g., Galbreath v. Scott, 433 So. 2d 454, 456–57 (Ala. 1983).

31. Douglas M. Branson, *The Rule That Isn't A Rule - the Business Judgment Rule*, 36 VAL. U. L. REV. 631, 635 (2002). Branson posits that the business judgment rule is not actually a rule, but instead a standard of non-review. *Id.* at 631.

32. Steven v. Hale-Haas Corp., 249 Wis. 205, 221, 23 N.W.2d 620, 628 (1946).

33. Ames, *supra* note 6, at 198.

overcome.³⁴ However, overcoming this presumption is typically described as a “heavy burden.”³⁵

If the business judgment rule presumption is overcome, courts use two different standards, “enhanced scrutiny” and “entire fairness,” to evaluate the business decision.³⁶ Under the enhanced scrutiny standard, the defendant directors “‘bear the burden of persuasion to show that their motivations were proper and not selfish,’ and that ‘their actions were reasonable in relation to their legitimate objective.’”³⁷ Under the entire fairness standard, the defendants “must establish to the court’s satisfaction that the transaction was the product of both fair dealing and fair price.”³⁸ Therefore, while directors and officers do owe a duty of care to the corporation and shareholders, the business judgment rule tends to heavily favor management in most circumstances, preventing a minority shareholder from effectively challenging a bad decision.

The second duty recognized in corporate governance is the duty of loyalty.³⁹ The duty of loyalty requires that directors and officers act in the best interest of the corporation.⁴⁰ Additionally, directors and officers cannot benefit personally from their role as a fiduciary.⁴¹ This is referred to as the exclusive benefit rule and “‘flatly forbid[s]’ fiduciaries from gaining personally from the [fiduciary] relationship.”⁴² Some courts, including the Delaware Supreme Court, have incorporated the duty of good faith into the duty of loyalty.⁴³ Acting in good faith essentially requires that the directors do not purposefully or knowingly engage in wrongful conduct.⁴⁴ Courts across the country have chosen to give themselves more discretion in evaluating the duty of loyalty, and

34. *Id.* at 198–99.

35. *Id.* at 202 (quoting *White v. Panic*, 783 A.2d 543, 551 (Del. 2001)).

36. Ames, *supra* note 6, at 205 (quoting *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011)).

37. *Id.* (quoting *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 810 (Del. 2007)).

38. *Id.* at 206 (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995)) (emphasis omitted).

39. *Id.* at 192.

40. *Id.*

41. *Id.*

42. *Id.* (quoting *Estate of Eller v. Bartron*, 31 A.3d 895, 898 (Del. 2011)).

43. *Id.* at 193; see *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *modified on reargument*, 636 A.2d 956 (Del. 1994).

44. Ames, *supra* note 6, at 194. It has been said that “[a]ny act made in bad faith is now considered an act of disloyalty.” *Id.* (quoting David Rosenberg, *Delaware’s “Expanding Duty of Loyalty” and Illegal Conduct: A Step Towards Corporate Social Responsibility*, 52 SANTA CLARA L. REV. 81, 86 (2012)).

therefore, evaluation of a violation of the duty of loyalty varies significantly more than an evaluation of a violation of the duty of care.⁴⁵ Furthermore, courts have created and imposed several other duties on directors and officers; however, these often get encompassed into the duty of care or the duty of loyalty.

A. *Theories for Imposing Fiduciary Duties*

Now that the two main fiduciary duties have been established, it is important to understand the two approaches for determining when those fiduciary duties are owed. The two recognized theories of the corporation are the Contractarian model and the Communitarian model.⁴⁶ The Contractarian model, which currently is the dominant model, follows Milton Friedman's perspective that a corporation exists solely to make money for the shareholders.⁴⁷ This model views a corporation as tied together through contracts and contractual relationships.⁴⁸ Therefore, Contractarians believe that fiduciary duties should not be mandated either by statute or common law but instead determined by the contract.⁴⁹ Under this model, fiduciary duties are viewed as nothing more than contractual relationships with no ethical or moral content.⁵⁰ In fact, proponents of this model believe that fiduciary duties create unnecessary transaction costs and should, therefore, be subject to free negotiation by the parties.⁵¹

However, this model fails to recognize several current realities. First, the Contractarian model assumes that all parties are savvy contractors or have unfettered access to legal counsel, which is not necessarily true.⁵² Although that may be the case in a traditional corporation, often times

45. Ames, *supra* note 6, at 192–94.

46. Alan E. Garfield, *Contractarians, Communitarians and Agnostics Special Issue on the Corporate Stakeholder Debate: The Classical Theory and Its Critics*, 43 U. TORONTO L.J. No. 3 (1993), 43 AM. J. COMP. L. 150, 152 (1995). A third view, the Team Production model has been developed, but it is not widely acknowledged. Ames, *supra* note 6, at 180. See generally Margaret M. Blair & Lynn A. Stout, *Team Production in Business Organizations: An Introduction*, 24 J. CORP. L. 743 (1999).

47. Ames, *supra* note 6, at 180.

48. *Id.* at 180–81.

49. *Id.* (“This model ‘emphasizes the supremacy of the private contract . . .’”) (quoting Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1613 (2004)).

50. See Ames, *supra* note 6, at 180–81.

51. *Id.* at 181.

52. Morris, *supra* note 10, at 79.

close corporations are formed between unsophisticated parties or family members who want to avoid some of the legal costs in starting a business.⁵³ The parties then decide to write up their own contract, without properly understanding fiduciary duties.⁵⁴ Additionally, even traditional business entities are beginning to focus not just on profits but also how their business impacts the community as a whole.⁵⁵ Professor Gregory Alexander from Cornell Law School opines that “[c]ognitive factors lead courts to analyze fiduciary relationships, at least those that are property-based, differently than they evaluate contractual relationships.”⁵⁶ Perhaps this is why fiduciary duties are often imposed by courts and mandated by statutes even when that imposition goes against the popular view that a corporation exists to make money.

A second model, the Communitarian model, has been developed to try and account for the failures of the Contractarian model.⁵⁷ This model has begun to emerge alongside the Corporate Social Responsibility movement, which assumes that people are all dependent on one another.⁵⁸ This model is not focused solely on making money, and recognizes that there has always been an inherent moral content to fiduciary duties.⁵⁹ In order to acknowledge that moral content, the Communitarian model considers the corporation to be a community in itself.⁶⁰ This perspective leads proponents for this model to argue that there are inherent fiduciary duties on managers to act for the benefit of the corporation as a community.⁶¹ That means looking out for the best interests of everyone involved in that community. Although the Communitarian model is not the dominant model, it has begun to grow in conjunction with acts of legislatures recognizing that directors and officers can act to benefit all stakeholders, not just the shareholders.⁶²

53. *See id.* at 86.

54. *See id.*

55. *See* Ames, *supra* note 6, at 182. Alan Garfield describes this situation as “one of corporate law’s more intriguing questions: To what extent should corporate law address the concerns of nonshareholder corporate stakeholders such as employees and creditors?” Garfield, *supra* note 46, at 150.

56. Ames, *supra* note 6, at 186 (quoting Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 768 (2000)).

57. *See* Garfield, *supra* note 46, at 152–53.

58. Ames, *supra* note 6, at 182.

59. Garfield, *supra* note 46, at 157.

60. Ames, *supra* note 6, at 182.

61. *Id.* at 183.

62. *Id.* at 184. Ames also acknowledges that “Legislation has also been passed authorizing ‘benefit corporations’ that are ‘designed to accommodate businesses that aim to benefit society

B. *What is a Close Corporation and How Does it Differ from the Traditional Corporation?*

Next, before deciding whether fiduciary duties should be imposed on shareholders in a close corporation, it is important to recognize the key differences between a public corporation and a close corporation. Traditionally, the corporate structure is divided into four tiers: (1) board of directors, (2) officers, (3) managers, and (4) shareholders.⁶³ In most public corporations, different individuals fill each of these roles.⁶⁴ Although it is common for board members and officers to own some stock, the shareholders typically do not play a role in the day-to-day operations of the business.⁶⁵ In fact, it has been noted that “[o]ne of the defining characteristics of the [traditional] corporate form is the separation of ownership and control.”⁶⁶ Additionally, in a public corporation there are typically a large number of shareholders, and they can freely sell their shares on a public market.⁶⁷

While the traditional corporate structure may get more public recognition, the majority of corporations are actually closely held corporations.⁶⁸ A close corporation has very different characteristics than the traditional corporate structure.⁶⁹ First, a close corporation usually has a small number of shareholders.⁷⁰ While there is no strict number required to be considered a close corporation, typically there are less than fifty shareholders.⁷¹ Second, unlike in a public corporation, the shareholders in a close corporation normally play a large role in the operations of a business, often acting as officers and directors.⁷² Finally, the shares of a close corporation traditionally lack liquidity because there

in more ways than traditional corporations can through contributions to shareholders, consumers, employees, and general economic growth.” *Id.* (quoting Felicia R. Resor, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91, 91–92 (2012)).

63. Ames, *supra* note 6, at 176. These four groups are sometimes called the “traditional spheres of influence and decision making.” *Id.*

64. *See id.* at 177.

65. *Id.*

66. Elizabeth A. Nowicki, *A Director’s Good Faith*, 55 BUFF. L. REV. 457, 462 (2007).

67. Douglas K. Moll, *Of Donahue and Fiduciary Duty: Much Ado About . . . ?*, 33 W. NEW ENG. L. REV. 471, 494 (2011)

68. Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. CORP. L. 371, 382–83 (2003).

69. Ames, *supra* note 6, at 177.

70. *Id.*

71. *See* WIS. STAT. §§ 180.1801, 180.1803 (2015).

72. Morris, *supra* note 10, at 85.

is no public market for the purchase and sale of those shares.⁷³ The traditional corporate structure did not anticipate shareholders playing a large role in the management of the corporation.⁷⁴ Therefore, the creation of the close corporation typically creates an inherent tension between the minority and majority shareholders simply because of the close relationships of the parties.⁷⁵ Unfortunately, due to the unique relationships and the absence of a ready market for the sale of shares, many general principals of corporate law do not adequately protect shareholders in a close corporation.⁷⁶

Many states have recognized the inherent differences between a close corporation and a public corporation and have chosen to enact statutes that apply only to close corporations.⁷⁷ However, in order for those statutes to apply, a corporation must specifically opt-in to those provisions in its articles of incorporation.⁷⁸ While the statutes seem to be helpful and provide guidance, many close corporations choose not to opt-in to the special provisions.⁷⁹ One reason for this may be the lack of applicable case law under those statutes.⁸⁰ Lawyers learned how to adapt traditional corporate rules to fit the close corporation because the close corporation existed for many years before states began to adopt specialized statutory provisions.⁸¹ However, some states, including Wisconsin, have further decided that a statutory close corporation should be treated differently than a non-statutory close corporation.⁸² Whether that decision is the correct one is beyond the scope of this Comment. However, minority shareholders in both a statutory close corporation and a non-statutory close corporation always face the possibility of encountering the same problem: oppression.⁸³

As discussed previously, one of the most significant differences between a large, public corporation and a closely held corporation is

73. *Id.*

74. Ames, *supra* note 6, at 177.

75. *Id.* at 210.

76. See Morris, *supra* note 10, at 86; see also Ames, *supra* note 6, at 210.

77. See, e.g., ALA. CODE § 10A-30-2.01 (LexisNexis 2011); DEL. CODE. tit. 8, § 341 (2015); KAN. STAT. § 17-7202 (2015).

78. See, e.g., WIS. STAT. § 180.1801 (2015).

79. See Siegel, *supra* note 4, at 383; see also Hinkston, *supra* note 11, at 18.

80. Siegel, *supra* note 4, at 383.

81. See Hinkston, *supra* note 11, at 18.

82. See Read v. Read, 205 Wis. 2d 558, 572, 556 N.W.2d 768, 773 (Ct. App. 1996).

83. See Siegel, *supra* note 4, at 386–87.

involvement in the decision-making process.⁸⁴ While shareholders in public corporations are typically idle investors, shareholders in closely held corporations typically expect to either be a director, officer, or employee of the business.⁸⁵ Additionally, many times the shareholders in a close corporation are linked by family or personal relationships.⁸⁶ It is not uncommon for a close corporation to offer shareholders a salary and employment benefits in place of the typical dividends.⁸⁷ This process of avoiding dividends produces significant tax advantages for the corporation.⁸⁸ Often, experts will refer to the salary and employment benefits given to shareholders in a close corporation as “de facto dividends.”⁸⁹ Although this method has its tax advantages, it can also be manipulated to harm shareholders.⁹⁰ Due to the lack of real dividends, a shareholder’s return on investment typically comes only from these “de facto” dividends.⁹¹ Therefore, if that shareholder loses his job, he also loses any return on investment.⁹² This is a substantial and consequential difference between a close corporation and a public corporation.

The uniqueness of the close corporation was first acknowledged by a New York court in 1912 that referred to business entities that “were little more . . . than chartered partnerships.”⁹³ In a partnership, a partner may withdraw from the partnership at any time and is entitled to receive the value of his or her interest.⁹⁴ However, a shareholder in a corporation is not given this same opportunity. This leaves the door open for the majority shareholders to easily manipulate the corporation and

84. Morris, *supra* note 10, at 85–86.

85. *Id.* at 86.

86. *Id.* (“As stated by one scholar, “[In a] closely held corporation . . . everyone knows everyone.”) (quoting John H. Matheson & R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business*, 91 MINN. L. REV. 657, 659–60 (2007)).

87. Art, *supra* note 68, at 383.

88. *Id.* In a corporation, salary payments are a business deduction for the company and therefore, only taxable to the employee. *Id.* In contrast, dividend payments are also taxed as income to the shareholder, but cannot be deducted by the corporation. *Id.* Some scholars consider this “double taxation.” ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW § 1.05 (Matthew Bender 1999).

89. Art, *supra* note 68, at 383 (citing *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1178 (N.Y. 1984)).

90. *See id.* at 383–84.

91. *See Moll, supra* note 67, at 486.

92. *Id.* at 486–87.

93. *Ripin v. Atl. Mercantile Co.*, 98 N.E. 855, 856 (N.Y. 1912).

94. Art, *supra* note 68, at 385. *See UNIF. P'SHIP ACT § 601* (UNIF. LAW COMM'N 1997) (“A person is dissociated as a partner when: (1) the partnership knows or has notice of the person's express will to withdraw as a partner . . .”).

disadvantage the minority shareholders. Theoretically, a minority shareholder may sell their shares, but in a close corporation, this is often not realistic.⁹⁵ Therefore, the majority will use their power to force a shareholder to sell the shares for an unfair price.⁹⁶ This strategy of using one's majority power to the detriment of another shareholder has been termed a "freeze-out" or a "squeeze out."⁹⁷ The method for achieving this goal is typically as follows:

- (1) terminating the minority's employment in the corporation,
- (2) voting the minority off the corporation's board,
- (3) using the board to declare little or no dividends, while continuing to pay the majority a salary, and, as the minority has now been effectively stripped of all possible return on their investment or opportunity to participate in management of the corporation,
- (4) offering to purchase the minority's stock at an unreasonably low price.⁹⁸

These techniques allow the majority to get rid of the unwanted minority while also acquiring the minority's interest for unfair compensation.⁹⁹ Historically, if the majority could show a legitimate business purpose for their actions the court would not intervene.¹⁰⁰ However, as support for the oppression doctrine grows, courts have become increasingly cautious when a minority is disadvantaged solely to benefit the majority.¹⁰¹

The Model Business Corporation Act first began protecting the interests of minority shareholders by authorizing judicial dissolution if "the directors or those in control of a corporation" commit "illegal, oppressive, or fraudulent [conduct]."¹⁰² Because dissolution has been viewed as a drastic remedy, many states now allow courts to prescribe their own equitable remedy.¹⁰³ Although this is an improvement on the oppression doctrine, there are still hurdles that minority shareholders must overcome. Although illegal and fraudulent conduct is usually

95. Art, *supra* note 68, at 385 ("No other parties will pay a high price to acquire a minority holding in a close corporation that oppresses its minority shareholders. The minority is not likely to receive fair value in this situation without judicial intervention.").

96. Morris, *supra* note 10, at 87.

97. *Id.*

98. *Id.* at 87-88.

99. Art, *supra* note 68, at 383-84.

100. *Id.* at 388.

101. *Id.*

102. MODEL BUS. CORP. ACT § 14.30(2) (2005).

103. Morris, *supra* note 10, at 89.

obvious, it is often more difficult for a minority shareholder to prove oppression.¹⁰⁴ The majority will virtually always claim that their actions were legitimate. In order to better protect shareholders in a close corporation, courts have begun to provide relief through a direct cause of action for breach of fiduciary duties between shareholders.¹⁰⁵

Under the traditional corporate form, shareholders do not have any fiduciary duties.¹⁰⁶ That was a perfectly reasonable rule, considering the typical characteristics of a public corporation. In a large, publicly held corporation, it would be unreasonable to expect a shareholder owning an insignificant portion of the company to have a duty of loyalty to the corporation.¹⁰⁷ Additionally, minority shareholders in publicly held companies have little to no control over the actions of a company and are free to transfer their shares whenever they like.¹⁰⁸ In fact, it is common for people to possess a minority stake in a vast array of corporations so enforcing a duty of loyalty would not be practical. However, due to the evolving business environment, case law across the country has developed two major exceptions to the general rule.¹⁰⁹ First and beyond the scope of this Comment, some courts have held that majority and controlling shareholders owe fiduciary duties, even in a large, publicly held corporation.¹¹⁰ Second, and the main issue of this Comment, some courts have held that all shareholders in close corporations owe each other fiduciary duties.¹¹¹ When beginning a fiduciary duty analysis, the court must look at the relationships among the parties as well as the parties reasonable expectations of how they would treat each other.¹¹² While some courts, specifically in Massachusetts, actively enforce fiduciary duties of shareholders in a close corporation,¹¹³ other courts, particularly Delaware courts, continually reject that those duties exist.¹¹⁴

104. See Ames, *supra* note 6, at 221–24.

105. Morris, *supra* note 10, at 89.

106. Art, *supra* note 68, at 378.

107. See *id.*

108. Ames, *supra* note 6, at 177.

109. Art, *supra* note 68, at 379.

110. *Id.*

111. *Id.*

112. Ames, *supra* note 6, at 188–89.

113. See *Donahue v. Rodd Electrotype Co. of New England*, 328 N.E.2d 505 (Mass. 1975).

114. See *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993).

C. *Leading Massachusetts' Cases Imposing Fiduciary Duties on Shareholders in Close Corporations*

In the leading case on this issue, *Donahue v. Rodd Electrotype Co. of New England*,¹¹⁵ the highest court in Massachusetts imposed the highest duties on the shareholders of a closely held corporation.¹¹⁶ In *Donahue*, the plaintiff was a minority shareholder in Rodd Electrotype Company, which was, essentially, a family corporation.¹¹⁷ All shareholders other than the Donahues were part of the Rodd family and had active management roles in the company.¹¹⁸ In early 1970, the father in the Rodd family, Harry Rodd, was aging and in poor health.¹¹⁹ He wanted to slowly exit and let his children continue to run the company.¹²⁰ Therefore, Harry Rodd began negotiations with his son Charles Rodd, who represented the company, to purchase forty-five of Harry Rodd's remaining eighty-one shares.¹²¹ The board of directors approved the purchase and the corporation formally purchased the forty-five shares of stock in July 1970.¹²² The following year, Harry Rodd divested the rest of his shares in the company to his children.¹²³ At this point, the three Rodd children each held fifty-one shares of stock and Ms. Donahue held fifty shares.¹²⁴ In March of 1971 at a shareholder meeting, Ms. Donahue first learned that the corporation had purchased Harry Rodd's shares, and questioned the legitimacy of the purchase.¹²⁵ A few weeks later, the Donahues offered their shares to the corporation on the same terms given to Harry Rodd, but the corporation refused the purchase.¹²⁶

115. 328 N.E.2d 505 (1975).

116. Moll, *supra* note 67, at 472. Moll also notes that *Donahue* "played a significant role in spawning a new era of judicial activity that focused on providing protection to minority shareholders in closely held corporations from abusive majority conduct." *Id.* at 473 (footnote omitted).

117. *Donahue*, 328 N.E.2d at 508.

118. *Id.* Joseph Donahue, the husband of the plaintiff was deceased at the time of this trial. *Id.* Mr. Donahue only came to be a shareholder in the business at the suggestion of Mr. Harry Rodd. *Id.*

119. *Id.* at 510. Although Harry Rodd assumed presidency of the company in 1955, between 1955 and 1970 Mr. Rodd gradually decreased his involvement in the company and allowed his sons to take over. *Id.* at 509-10.

120. *Id.* at 510.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 511.

Ultimately, for the reasons that will follow, the court held that by refusing to purchase the Donahues' stock, the shareholders were violating their fiduciary duties owed to Ms. Donahue as a fellow shareholder.¹²⁷ The court ordered that either Harry Rodd had to pay the corporation back and take back his shares or the corporation had to purchase Ms. Donahue's shares on the same terms that Harry Rodd's were purchased.¹²⁸

The Massachusetts court in *Donahue* began their analysis by articulating the three most popular characteristics a corporation must possess in order to be considered a close corporation.¹²⁹ The characteristics were: "(1) a small number of stockholders; (2) no ready market for corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation."¹³⁰ Further, based on these characteristics, the court noted that a close corporation is significantly similar to a partnership, and just like between partners in a partnership, in order for the close corporation to succeed the stockholders must have a relationship of trust, confidence, and loyalty.¹³¹ While some courts have disagreed with this view, the court in *Donahue* stated that by ignoring the necessity of trust and confidence, one is ignoring the "practical realities" of a small business enterprise in which the "stockholders, directors, and managers are the same persons."¹³²

Additionally, the court noted that there are several negative consequences a minority shareholder may face in a closely held corporation; one important consequence is the majority's ability to refuse to declare dividends.¹³³ In a public corporation, the "general rule [is] that the declaration of dividends rests within the sound discretion of the directors . . ."¹³⁴ However, the absence of dividends affects the stockholder of a large, publicly held corporation very differently than a minority stockholder in a close corporation.¹³⁵ As the court in *Donahue* noted, many minority stockholders have a substantial percentage of their assets tied up in the corporation and anticipate an income from declared

127. *Id.* at 520.

128. *Id.* at 521.

129. *Id.* at 511.

130. *Id.*

131. *Id.* at 512.

132. *Id.* at 513.

133. *Id.*

134. *Id.*

135. See Moll, *supra* note 67, at 486.

dividends.¹³⁶ Furthermore, a minority shareholder in a close corporation does not have the luxury of easily selling their shares on a public market.¹³⁷ An oppressed minority shareholder is left with little options other than to file for dissolution.¹³⁸ However, in order to achieve dissolution, a minority shareholder must comply with strict laws.¹³⁹ Therefore, this option is of little help in the majority of circumstances. These inherent dangers for minority shareholders and the close resemblance between a close corporation and a partnership, led the court in *Donahue* to hold that shareholders in a close corporation owe one another fiduciary duties, including the duty of “utmost good faith and loyalty.”¹⁴⁰

In the situation in *Donahue*, the court applied that “utmost good faith and loyalty” duty to stockholders who cause the corporation to enter into a stock purchase agreement.¹⁴¹ In order to satisfy that duty, the controlling stockholders must offer to each stockholder an equal opportunity to sell a number of shares at an identical price.¹⁴² The court stated that “[t]he controlling group may not . . . utilize its control of the corporation to obtain special advantages and disproportionate benefit from its share ownership.”¹⁴³ When a corporation, controlled by majority stockholders, offers to buy one shareholder’s stock and not another’s, they are conferring two benefits upon the first shareholder.¹⁴⁴ First, the majority shareholders have essentially created a liquid market where it previously did not exist.¹⁴⁵ Second, the benefitted shareholder is gaining access to corporate assets for personal use.¹⁴⁶ If only the preferred shareholder is given these benefits, the controlling shareholders are not satisfying their duties of utmost good faith and loyalty.¹⁴⁷

While the Massachusetts court’s decision in *Donahue* was a landmark

136. *Donahue*, 328 N.E.2d at 514.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 515. One scholar posits that “[b]y holding that shareholders in a closely held corporation ‘owe one another’ a fiduciary duty, however, courts such as *Donahue* change the principal focus of a fiduciary duty analysis to an individual shareholder.” Moll, *supra* note 67, at 476.

141. *Donahue*, 328 N.E.2d at 518.

142. *See id.*

143. *Id.*

144. *Id.* at 518–19.

145. *Id.*

146. *Id.*

147. *See id.*

decision, part of that decision was rejected about a year later in *Wilkes v. Springside Nursing Home, Inc.*¹⁴⁸ In *Wilkes*, the court reiterated the conclusion that all stockholders in a close corporation owe each other the same fiduciary duties that partners owe each other.¹⁴⁹ However, that court was reluctant to agree with the *Donahue* court that every shareholder must be given an equal opportunity.¹⁵⁰ Although not directly overruling anything in *Donahue*, the court in *Wilkes* recognized that majority shareholders can have some “selfish ownership” but must be able to articulate a legitimate business purpose for its action.¹⁵¹ Ultimately, even if the majority does demonstrate a legitimate business purpose the minority shareholder has the opportunity to demonstrate that the same objective could have been achieved through means that would have been less harmful to the minority’s interest.¹⁵² So while some commentators believe this indicates Massachusetts law is moving closer to a corporate standard, it appears that this test still leans heavily in favor of minority shareholders. For example, even though the *Wilkes* court slightly tightened the standard articulated by the *Donahue* court, it still ultimately found for the plaintiff.¹⁵³ It held that the majority shareholders did not have a legitimate business purpose in excluding the minority shareholder from his employment with the corporation.¹⁵⁴ Further, the court looked to the minority shareholder’s reasonable expectations and found that his expectations that he would be employed with the corporation furthered its holding that the majority shareholders violated their fiduciary duties.¹⁵⁵

D. *Leading Case in Delaware Rejecting Fiduciary Duties in Close Corporations*

While Massachusetts courts have explicitly imposed fiduciary duties between shareholders in a closely held corporation, the Delaware courts have more subtly rejected those duties.¹⁵⁶ The Delaware Supreme Court in *Nixon v. Blackwell*¹⁵⁷ chose to enforce the “entire fairness” test instead

148. 353 N.E.2d 657 (Mass. 1976).

149. *Id.* at 661.

150. *Id.* at 663.

151. *Id.*

152. *Id.*

153. *Id.* at 664.

154. *Id.*

155. *Id.*

156. *See generally* *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993).

157. *Id.*

of imposing heightened fiduciary duties.¹⁵⁸ In that case, the minority shareholders, were the only non-employee Class B stockholders in the corporation.¹⁵⁹ The Corporation chose to establish an Employee Stock Ownership Plan (ESOP) for the employees holding Class B stock.¹⁶⁰ Under the ESOP, employees were allocated a share of the assets held by the plan in proportion to their annual compensation.¹⁶¹ Under the Plan, terminating and retiring employees were entitled to receive their interest in the ESOP by taking Class B stock or cash in lieu of stock.¹⁶² Therefore, the ESOP provided the employee Class B stockholders with a substantial advantage over non-employee Class B stockholders: liquidity.¹⁶³ However, the court held that the majority stockholders had no duty to treat the minority stockholders equally.¹⁶⁴ Instead, the court held that this type of conduct should be evaluated under the “entire fairness test.”¹⁶⁵ The entire fairness test, as applied in Delaware, has been explained as follows:

When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.¹⁶⁶

Further, the two basic aspects of fairness are fair dealing and fair price.¹⁶⁷ The court in *Nixon* only considered the issue of fair dealing.¹⁶⁸ The court found that there was some evidence that the ESOP was established, at least in part, to benefit the corporation.¹⁶⁹ Additionally, the court stated that a requirement on corporations to treat non-employee stockholders the same as employee stockholders would be a

158. *Id.*

159. *Id.* at 1370–71.

160. *Id.* at 1371.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 1377.

165. *Id.* at 1375.

166. *Id.* at 1376 (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)).

167. *Id.*

168. *Id.*

169. *Id.* at 1375.

decision for the legislature, not the court.¹⁷⁰

When courts throughout the country have chosen to enforce fiduciary duties between shareholders, the actual types of duties are not always consistent.¹⁷¹ Essentially, the most frequently stated fiduciary duties include loyalty, good faith, and full disclosure, and the duty of fair dealing.¹⁷² Additionally, by imposing the fiduciary duties, shareholders must walk a fine line between working towards the corporation's interest, rather than their own personal interest.¹⁷³ One state's courts have determined that a controlling shareholder who enters into a transaction with the corporation fulfills his duty of loyalty if "(1) the transaction is fair to the corporation when entered into; or (2) the transaction is authorized or ratified by disinterested shareholders."¹⁷⁴ However, several courts have adopted the "legitimate purpose test" established by the Massachusetts court in *Wilkes*.¹⁷⁵ That test involves three essential components. First, a minority shareholder must show that they were oppressed by a majority shareholder.¹⁷⁶ Second, the majority shareholder has the opportunity to show that they had a legitimate business purpose for the action.¹⁷⁷ Finally, the minority shareholder then has the opportunity to show that the majority could have achieved their objective through some other avenue that was less harmful to the minority shareholder.¹⁷⁸ However, seldom will a minority shareholder be unable to show that there was some other alternative.¹⁷⁹ So while this test purports to sufficiently protect the majority shareholder, it realistically presents a strong bias in favor of minority shareholders.

III. CLOSE CORPORATIONS IN WISCONSIN

In 1989, the Wisconsin legislature adopted a statutory subchapter that applies directly to statutory close corporations.¹⁸⁰ A corporation in Wisconsin has the opportunity to declare itself a close corporation under

170. *Id.* at 1377.

171. Ames, *supra* note 6, at 192-97.

172. Art, *supra* note 68, at 386.

173. *Id.*

174. *Id.* at 387.

175. *Id.* at 388.

176. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976).

177. *Id.*

178. *Id.*

179. See Art, *supra* note 68, at 388.

180. See WIS. STAT. § 180.1801 (2015).

Wisconsin Statutes section 180.1801.¹⁸¹ Statutory close corporations are limited to fifty or fewer shareholders.¹⁸² Additionally, the following notice must be noted conspicuously on each share certificate issued:

The rights of shareholders in a statutory close corporation may differ materially from the rights of shareholders in other corporations. Copies of the articles of incorporation, the bylaws, if any, and shareholders' agreements or other documents, which may restrict transfers and affect voting and other rights, may be obtained without charge by a shareholder on written request to the corporation.¹⁸³

However, it is not uncommon for a corporation in Wisconsin to be considered a "close corporation" but not a "statutory close corporation."¹⁸⁴ This is likely due in part to the Wisconsin Supreme Court's holding that the enactment of the statutory close corporation in Wisconsin did not preempt existing common law rights for close corporations.¹⁸⁵ Close corporations could possibly have felt more comfortable relying on the already present body of case law in Wisconsin than opting in to the new provisions that may not adhere to the objectives of their close corporation.

However, the benefits of the statutory rules are numerous. The statutes provide for strict rules regarding the transfer of shares, which is an essential concern in a close corporation.¹⁸⁶ Additionally, the statute allows a close corporation to operate without a board of directors, an option a public corporation would not be entitled to.¹⁸⁷ Finally, under Wisconsin Statutes section 180.1833, if an individual or individuals in control of the corporation are acting in a manner that is "illegal, oppressive, fraudulent or unfairly prejudicial to the petitioner" a court has power to grant relief.¹⁸⁸ Essentially, this statute prohibits majority shareholders from oppressing a minority shareholder.

While the statutory protections may work well for statutory close corporations, the Wisconsin courts have been quick to make distinctions

181. *Id.*

182. WIS. STAT. § 180.1803.

183. WIS. STAT. § 180.1809.

184. Hinkston, *supra* note 11, at 18.

185. Jorgensen v. Water Works, Inc., 218 Wis. 2d 761, 780, 582 N.W.2d 98, 106 (Ct. App. 1998).

186. WIS. STAT. § 180.1805.

187. WIS. STAT. § 180.1821.

188. WIS. STAT. § 180.1833.

between a close corporation and a statutory close corporation. At least one Wisconsin court has made clear that they will not extend the benefits provided for statutory close corporations to non-statutory closely held corporations.¹⁸⁹ That court held, based on prior decisions, that a shareholder in a close corporation that was not a statutory close corporation, could not bring a claim when the primary injury was to the corporation and not to the individual stockholder.¹⁹⁰ The court held that extending the relief available for statutory close corporations to non-statutory close corporations would “eviscerate the current statutes distin[ction].”¹⁹¹ However, that same court held that the enactment of the statutory close corporations did not alter the common law available for non-statutory close corporations.¹⁹² Perhaps, this is why several corporations have chosen not to opt-in and become a statutory close corporation.¹⁹³

The Wisconsin Supreme Court has not directly addressed a case where it was asked to determine whether shareholders owe each other fiduciary duties in a closely held corporation. However, the court has suggested that they would be more in favor of Delaware’s approach and reject the existence of fiduciary duties.¹⁹⁴ However, in the appropriate circumstances, Wisconsin should choose to adopt the opposite approach and impose fiduciary duties on shareholders in close corporations, whether or not the corporation explicitly chooses to opt-in to the statutory provisions.

Wisconsin law has addressed the first common exception recognizing fiduciary duties for shareholders in a corporation. Wisconsin has held that a majority shareholder owes a fiduciary to a minority shareholder,¹⁹⁵ but that this duty has not yet been extended to non-majority shareholders. In 2012, a Wisconsin Court of Appeals refused to impose fiduciary duties between two fifty-percent shareholders because it claimed it would be declaring new law.¹⁹⁶ However, that court ultimately refused to enforce the agreement between the two shareholders because

189. See generally *Jorgensen*, 218 Wis. 2d 761.

190. *Read v. Read*, 205 Wis. 2d 558, 574, 556 N.W.2d 768, 774 (Ct. App. 1996).

191. *Jorgensen*, 218 Wis. 2d at 776.

192. *Id.* at 780.

193. See *Hinkston*, *supra* note 11, at 18.

194. See *Jorgensen*, 218 Wis. 2d at 777.

195. *See Prod. Credit Ass’n of Lancaster v. Croft*, 143 Wis. 2d 746, 423 N.W.2d 544 (Ct. App. 1988).

196. *Estate of Sheppard ex rel. McMorrow v. Specht*, 2012 WI App 124, ¶ 7, 344 Wis. 2d 696, 824 N.W.2d 907.

the agreement was too vague and uncertain to be enforceable, not because the shareholders did not owe each other fiduciary duties.¹⁹⁷ Therefore, it appears the conclusion that the two fifty-percent shareholders did not owe each other fiduciary duties is simply dicta. When the Wisconsin courts have determined controlling shareholders violated their duties, they have chosen to rely on the law enforcing fiduciary duties of majority shareholders instead of determining whether all shareholders owe fiduciary duties in a closely held corporation.

In an important Wisconsin case from 1996, *Read v. Read*,¹⁹⁸ the plaintiff argued in his brief that the modern trend was to “treat shareholders in closed corporations as partners.”¹⁹⁹ The court answered this argument by claiming that allowing a direct action against the directors and controlling shareholders would be changing the law.²⁰⁰ However, under section 180.1833, a provision available to statutory close corporations, a shareholder can bring a direct action.²⁰¹ The court ultimately refused *Read*’s claim because the corporations involved were not statutory close corporations.²⁰² However, even the court acknowledged that the corporations were close corporations.²⁰³ Understandably, the Wisconsin court was likely trying to persuade Wisconsin close corporations to opt-in to the statutory provisions. However, in the twenty years since the *Read* decision was handed down, many close corporations have still chosen not to opt-in to the statutory provisions.²⁰⁴

An analysis of the Wisconsin decisions proves to be less than clear on the issue of fiduciary duties. While the court indicates they want to look out for minority interests in close corporations,²⁰⁵ they are hesitant to come to the clear conclusion that the shareholders owe each other the fiduciary duties.²⁰⁶ It seems counterintuitive to adopt a statute to protect these interests, but then deny the protections to corporations that fit the necessary criterion. While the court claims that they would be changing the law by providing protections for the minority shareholders in closely

197. *Id.* ¶ 1.

198. 205 Wis. 2d 558, 556 N.W.2d 768 (Ct. App. 1996).

199. *Id.* at 570.

200. *Id.*

201. WIS. STAT. § 180.1833 (2015).

202. *Read*, 205 Wis. 2d 558.

203. *See id.* at 573.

204. Hinkston, *supra* note 11, at 18.

205. *See id.*

206. *Id.*

held corporations,²⁰⁷ that concern is ill-founded. The statutes govern the statutory close corporations in Wisconsin, and the Wisconsin courts still have the power to create common law for non-statutory close corporations.²⁰⁸

Considering the defining characteristics of a close corporation and the lack of popularity of the statutory provisions available, Wisconsin should mandate fiduciary duties for all shareholders in closely held corporations. When considering this issue, Wisconsin courts should explicitly refrain from adopting a Contractarian model for Wisconsin corporations. Adopting a Contractarian model would be largely unhelpful considering the sophistication of the majority of parties that would be contracting to start close corporations.²⁰⁹ Incorporation provides many benefits to a business that cannot be provided by a partnership,²¹⁰ therefore, many small businesses may choose to incorporate to receive these benefits. It is also extremely likely that unsophisticated parties will choose to forgo formal legal representation in order to save money. Therefore, any contract between the parties could possibly fail to adequately represent the true interests of the parties. Additionally, most individuals entering into a business venture do not want to anticipate that something could go wrong. They assume because they are entering business with their brother, best friend, cousin, etc., the problems will work themselves out. Often this is not the case, and if the contract did not anticipate fiduciary duties, the shareholders may be out of luck under a Contractarian model.²¹¹

Although minority shareholders in a close corporation should be afforded broad protection, the majority also should have the opportunity to run the business as they like. Therefore, Wisconsin should adopt the “legitimate purpose test” articulated in *Wilkes v. Springside Nursing Home, Inc.*²¹² Again, that three-part test requires that (1) a shareholder show they were oppressed, (2) the defendant has an opportunity to show there was a legitimate business purpose for the action, and (3) the oppressed shareholder can show that there was an alternative option to achieve the

207. *Read*, 205 Wis. 2d 558.

208. *See Jorgensen v. Water Works, Inc.*, 218 Wis. 2d 761, 780, 582 N.W.2d 98, 106 (Ct. App. 1998).

209. *See Morris*, *supra* note 10, at 79.

210. *See id.*

211. *See Ames*, *supra* note 6, at 181.

212. 353 N.E.2d 657 (Mass. 1976).

same objective.²¹³ This model will allow the majority to take actions that may disadvantage the minority only if there are no other available options.²¹⁴ Additionally, in order for this test to be effective, the court should give shareholders a clear definition or examples of oppression. Typically, minority shareholder oppression will happen through withholding dividends, terminating employment with no other possibility of return, refusing to buy back shares except at a reduced rate, and other variations of this type of conduct.²¹⁵ Adopting the legitimate purpose test, coupled with a clear definition of oppression, will give close corporations in Wisconsin a clear message of what the law is in Wisconsin. Without enforcing fiduciary duties in non-statutory close corporations, Wisconsin is essentially forcing shareholders to either opt-in to the statutory provisions or continue on in a business with no clear indication of whether their interests will be protected.

IV. CONCLUSION

Fiduciary duties have been recognized for hundreds of years and will continue to be recognized in the future.²¹⁶ With the invention of new and more complex business entities, the enforcement of fiduciary duties becomes more complicated. Specifically, business entities that combine characteristics of two currently recognized entities present significant difficulties in the courts, as evidenced through the ever-growing close corporation. Although the states have diverged in their determination of whether shareholders in close corporations owe each other fiduciary duties, the evolving trend of Corporate Social Responsibility will likely cause more courts to adopt a Communitarian approach to fiduciary duties. Under this approach it is likely that Wisconsin, as well as other states, will conclude that recognizing fiduciary duties between shareholders in close corporation will benefit all parties involved.

SARA C. MCNAMARA*

213. *Id.* at 663.

214. *See id.*

215. Morris, *supra* note 10, at 87–88.

216. *See generally* Ames, *supra* note 6.

• Editor in Chief, Volume 100 of the Marquette Law Review. I would like to thank the entire staff of Volume 100 for their hard work on this comment and all articles in the volume. I would also like to thank the Marquette Law Review faculty advisors for making this a smooth and enjoyable experience.