JOURNAL OF THE
MISSOURI BAR

Volume 79
Number 5

September-October
2023

PG. 213

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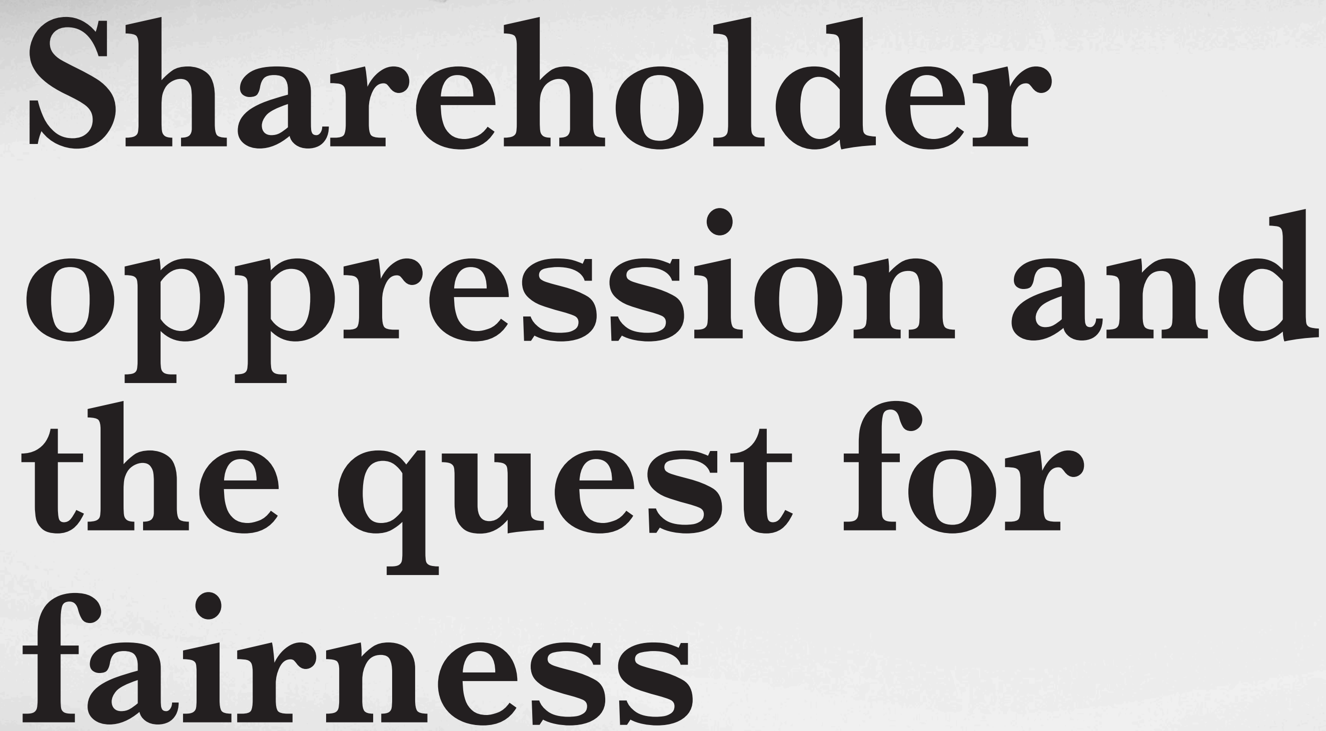
PG. 216

MoBar.org



Shareholder oppression and the quest for fairness

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There are many reasons why business owners end up in litigation against each other.

Sometimes, mistrust and misunderstandings occur because the parties do not share information. Those in control can view disclosure with disdain. Sometimes owners who work for the business view owners who do not as second-class citizens who can be disregarded. As a New York court described, "[t]hey think that as they do the work and have the responsibility, they are entitled to keep to themselves and divide among themselves all, or the substantial part, of the profits or gains of the business…."[1]

Other times, the control group may view those who inherit their shares as unworthy of fair or equal treatment. Yet, dismissive treatment against those who inherited their equity finds no support in the case law in Missouri or around the country. And sometimes financial abuse and oppression are triggered by simple greed. Those in control yield to the temptation of accumulating more control or more money at the expense of powerless, voiceless, or absent owners.

Whatever the specific reasons, minority or noncontrolling owners of a company can find themselves mired in a business relationship that has soured and become unfair. Statutes were enacted around the country to give these shareholders remedies when this happens.

"…owners of a company can find themselves mired in a business relationship that has soured and become unfair."

Below we discuss the statutory framework for a claim of shareholder oppression and its cousin, breach of fiduciary duty. We next discuss some of the leading Missouri case law on the contours of oppression and breach of fiduciary duty. Finally, we address the remedies available for oppression and breach of fiduciary duty.

Statutory framework for shareholder oppression

Sections 351.494 and 351.850 of the General and Business Corporation Law of Missouri[2] provide statutory causes of action for oppressed minority shareholders if "[t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent … "[3] A claim of oppression has been held to be "an independent ground for relief not requiring a showing of fraud, illegality, mismanagement, wasting of assets, nor deadlock," even though these factors are often present in oppression cases.[4] Likewise, conduct that the courts will find oppressive is not limited to a defined set of actions, and the oppression statutes do not define exactly what is "oppression;"[5] rather, "[t]he existence of oppression must be determined on a case by case basis."[6]

Some of the leading case law on oppression

Robinson v. Lagenbach[7] is the Supreme Court of Missouri's most recent (2020) pronouncement on shareholder oppression and breach of fiduciary duty. In that case, the Court upheld a jury's award of $390,000 as damages for breach of fiduciary duty and the trial court's order requiring defendants to buy out the minority shareholder's shares at fair value (with some marketability and lack of control discounts). The Court described oppressive conduct as follows:

> Oppressive conduct suggests "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 dealings and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."[8]

The plaintiff in *Lagenbach*, Joan Robinson, was the president, a director, and minority shareholder of a closely held corporation (the Perma-Jack Company[9]) with her two siblings, who were the company's other two directors and, jointly, its controlling shareholders. The two defendants called a special board meeting and voted to remove Robinson as president and treasurer, terminated her salary and dividends, excluded her from the corporate offices, and effectively ousted her from any involvement in the company.[10] The defendants claimed they were dissatisfied with Robinson's management and blamed her for the company's loss of business,[11] discussing their dissatisfaction between themselves for two years but never informing Robinson of their grievances or giving her an opportunity to address them before removing her from the company.[12]

Although the defendants were found to have acted in accordance with the company's bylaws,[13] the jury returned a verdict for Robinson on her breach of fiduciary duty claim, finding that the defendants did not act in good faith in removing Robinson. Following a bench trial, the trial court similarly found the defendants committed shareholder oppression[14] and that their actions were not shielded by the business judgment rule because Robinson's removal was not undertaken in good faith.[15] In affirming the trial court's judgment on appeal, the Court determined that Robinson had presented sufficient evidence supporting her claim that the defendants acted in their own interests rather than for the good of the company[16] and rejected the defendants' argument that the trial court should have applied a "more exacting" standard for oppression (i.e., "to prevent irreparable injury, imminent danger of loss or a miscarriage of justice"), instead approving of the trial court's reliance on and application of the oppression standard quoted above to the facts of the case.[17]

In *Waters v. G & B Feeds, Inc.*,[18] a 2010 decision of the Missouri

Court of Appeals for the Southern District, the court relied on the same oppression standard later approvingly recited by the *Lagenbach* Court in affirming the trial court's finding of shareholder oppression.[19] The trial court in *Waters* found the defendant engaged in oppressive behavior by, among other things, disregarding the plaintiff's – his son's ex-wife's – 50% ownership interest, making decisions on behalf of the company without consulting or seeking her assent, borrowing money and refinancing debts without her input or concern for the effect it would have on her interests, refusing to cooperate in the sale of the company which resulted in a lower selling price, filing tax returns identifying only himself as owning 50% or more of the company's stock, using company product at cost or for free, and failing to give a proper accounting of his stewardship of the business affairs.[20] The Court of Appeals concluded this was sufficient evidence to support the trial court's finding that defendant breached his fiduciary duty to the plaintiff in his dealings with her and in his operation of the company's affairs and found no error of the trial court "in finding [the defendant] operated G&B without lawful authority while exercising oppressive and wrongful behavior."[21] The Court of Appeals noted that "[s]uch repeated and contumacious behavior was 'harsh, dishonest [and] wrongful … and a visible departure from the standards of fair dealing.'"[22]

Conversely, the defendant was found not to have engaged in oppression in *Kanton v. Luettecke Travel Service*.[23] In that case, the plaintiff alleged the defendant engaged in oppressive conduct by changing the company's tax status, denying her access to books and records, terminating her employment, and hiring his wife as an employee and paying his wife corporate funds for services she never allegedly performed.[24] The trial court granted the defendant's motion for partial summary judgment as to two counts in the petition.[25] On appeal, the plaintiff argued the trial court erred in granting partial summary judgment to the defendant because issues of fact existed regarding the oppressive conduct.[26] The Missouri Court of Appeals for the Eastern District disagreed and affirmed the trial court's grant of partial summary judgment, concluding there was no genuine issue of material fact that changing a corporation's tax status was not inherently oppressive or wrong given that the plaintiff admitted there was nothing in the company's bylaws or articles prohibiting such a change or requiring her permission, that the plaintiff never actually asked to see the company's books and records, that the plaintiff was never terminated and instead resigned from her position with the company, and that the defendant's wife in fact performed bookkeeping services and was paid a modest salary for those services.[27]

"…fiduciary duty demands treating shareholders with persistent fidelity and loyalty…"

Fiduciary duty

It is critical to consider breach of fiduciary duties when analyzing any business breakups. Fiduciary duties are at the root of the concept of shareholder oppression, as directors, officers, and those in control of a company have fiduciary duties to shareholders and the entity.[28] A breach of fiduciary duty claim thus buttresses and complements a claim of oppression.[29] Further, even if one considers only the oppression cause of action, that claim evaluates the conduct of officers and directors through the prism of these corporate actors' fiduciary duties.[30]

In evaluating whether fiduciary defendants have acted in ways which are oppressive, one should examine whether the fiduciaries have satisfied all their fiduciary duties.[31] These fiduciary duties at a minimum require the fiduciary to act with honesty and good faith and with loyalty, full disclosure, and due care.[32]

Above all, the fiduciary duty demands treating shareholders with persistent fidelity and loyalty and not treating the office as an opportunity for power or financial advantage. As U.S. Supreme Court Justice Benjamin Cardozo famously said in the context of a trustee:

> A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.[33]

In *Gieselmann v. Stegeman*,[34] for example, the Supreme Court of Missouri upheld the trial court's judgment cancelling and voiding stock certificates improperly issued to a director defendant and declaring a portion of such shares be returned to the ownership of the primary plaintiff upon affirming the trial court's finding that the defendants' actions constituted a breach of their fiduciary duties owed to the corporation's other shareholders.[35] The defendants in *Geiselmann* were found to have perpetrated a complicated laundry list of deception, fraud, usurpation and abuses of power, and illegal corporate actions to benefit themselves at the expense of the plaintiffs.[36] Among other things, they fraudulently deprived a plaintiff of stock by purporting to cancel his stock certificates without informing him and subsequently issuing that stock to themselves.[37] In affirming the lower court's finding that the defendants breached their fiduciary duty to the plaintiff shareholders, the Court identified that "[a] director of a corporation occupies a position of the highest trust and confidence and the utmost good faith is required of him in the exercise of the powers conferred upon him."[38] The Court further noted that a director "may not deal with the property of the corporation for his own personal benefit or advantage, … profit at the expense of the shareholders, … or cause the issuance of stock for his own personal aggrandizement to the detriment of other shareholders or for the purpose of obtaining control of the corporation."[39]

The Court's holding in *Gieselmann* also illustrates the fundamental duties of transparency and full disclosure owed by a fiduciary to his or her principal or beneficiary. The defendants in *Gieselmann* were found to have breached their fiduciary duties by consummating a sale of treasury stock without notifying the plaintiffs, as well as holding secret meetings that were improperly or never noticed and that were also improper because no quorum was present.[40]

Similarly, in the 1996 decision of the Missouri Court of Appeals for the Western District in *Ramsey v. Boatman's First National Bank*,[41] the co-trustee bank was found to have breached its fiduciary duty by failing to ensure that its beneficiary was deciding to invest in her son's – the co-trustee's – business ventures (real estate limited partnerships) with adequate knowledge of the facts and surrounding circumstances, which would have included at a minimum informing its beneficiary of the conflict of interest created by investing in her son's business ventures and in making loans to her son and informing her of the fact that it had a policy of not investing in limited partnerships because it considered such investments nonquality investments for trusts.[42] In reaching its holding, the court of appeals provided, "[i]t is the duty of a trustee to fully inform the cestui que trust of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material for the cestui que trust to know for the protection of his interests."[43] In so holding, the Court of Appeals rejected the co-trustee bank's argument on appeal that it could not be held liable for breach of fiduciary duty as such failures were excused because the beneficiary consented to, directed, or ratified the challenged trust transactions.[44] Moreover, the Court of Appeals held that the co-trustee bank could not rely solely on the other co-trustee to properly administer the trust.[45]

"…courts are not limited to the remedies identified in the statutes…"

Remedies

The power of Missouri courts to provide equitable remedies to a shareholder trapped in an inequitable relationship with his or her co-owners is nearly unlimited.[46] Indeed, Missouri courts "*can render whatever relief is required*,"[47] for equity "will not suffer a wrong without a remedy"[48] and "delights in amicable adjustments."[49] While the court always retains the power to dissolve the company,[50] Missouri case law instructs that courts are not limited to the remedies identified in the statutes and have great flexibility to order equitable remedies based on the unique problems presented in each case.[51]

In addition to dissolution, remedies for oppressed shareholders may include, but are not limited to:

- an order for dissolution only upon a specified event;[52]
- an award of damages to compensate the shareholder for the diminution of their equity;[53]
- removal or appointment of directors and officers;[54]
- an injunction barring or requiring certain conduct;[55]
- an order requiring a corporation or a majority of its shareholders to purchase the minority's shares;[56]
- appointment of a receiver;[57]
- appointment of a "special fiscal agent" to report to the court and the court's retention of jurisdiction of the case to protect minority shareholders;[58]
- an order for an accounting by the majority in control of a corporation for funds alleged to have been misappropriated;[59]
- an order requiring declaration of a dividend or a reduction and distribution of capital;[60]
- an order permitting minority shareholders to purchase additional stock under conditions specified by the court;[61] and
- other equitable orders such as an injunction requiring a corporation's articles or bylaws to be revised or amended to rectify the unfairness experienced by the minority shareholder.[62]

For example, in *Lagenbach*, the jury awarded the plaintiff monetary damages of $390,000 for the defendants' breach of fiduciary duties, and the trial court ordered the defendants to buy out the minority shareholder's shares at fair value with some marketability and lack of control discounts upon finding the defendants committed shareholder oppression, both of which the Supreme Court of Missouri affirmed on appeal.[63] In determining that discounts for marketability and lack of control were appropriate based on the particular facts and circumstances in *Lagenbach*, the Court noted that "the court determines fair value by taking into account the context and idiosyncrasies of the particular situation" and that there is "no fixed set of factors a court must review to determine 'fair value.'"[64]

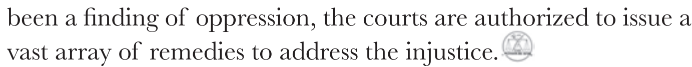
While court-ordered corporate dissolution is a drastic remedy, it may be appropriate even in cases where the defendant is found to have engaged in conduct that is oppressive but not necessarily illegal or fraudulent. In *Waters v. G & B Feeds, Inc.*,[65] for example, the Missouri Court of Appeals for the Southern District affirmed the trial court's order dissolving the company based on the finding that the controlling shareholder engaged in oppressive actions that were "harsh, dishonest [and] wrongful … and a visible departure from the standards of fair dealing."[66] In so doing, the court noted that it need not find the defendant has engaged in conduct that is illegal, oppressive, *and* fraudulent (the three types of acts listed in § 351.494) to authorize liquidation, but "[o]ppressive behavior, standing alone, is enough to cause liquidation of a corporation."[67]

However, courts generally see dissolution as a *dernier resort*. For example, noting that judicial liquidation under § 351.485 is permissive and may be unnecessary to the case at hand, the Missouri Court of Appeals in *Kirtz v. Grossman*[68] remanded the case to the trial court with instructions to conduct a hearing to determine the fair value of the corporation's assets and order the defendant company to pay the plaintiffs the fair value of their undervalued stock under a liquidation plan that was found to be oppressive.[69] In remanding, the court identified that "[i]f the record here permitted us to determine the fair value of Diatemp's assets we would order Essex to pay plaintiffs the amount of their proportionate share in money, and upon Essex's failure to do so we could then decree Diatemp's dissolution by a liquidating receiver."[70]

Conclusion

A claim for oppression in Missouri is supported by both statute and common law and has been held to be an independent ground for relief not requiring a showing of fraud or illegality. Such claims may arise from a myriad of fact situations and must be determined on a case-by-case basis depending on the particular facts and circumstances of each case. Missouri courts analyze shareholder oppression claims in the context of fiduciary duties owed to minority or noncontrolling shareholders. Once there has

been a finding of oppression, the courts are authorized to issue a vast array of remedies to address the injustice.



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Endnotes

1 *Godley v. Crandall & Godley Co.*, 139 N.Y.S. 236, 244 (App. Div. 1st Dep't 1912).

2 Mo. Rev. Stat. § 351.010–.1228. In 1990, the Missouri Legislature revised the General and Business Corporation Law of Missouri to include an entire new section devoted solely to statutory close corporations (Mo. Rev. Stat. §§ 351.750–.865 (Supp. 1990)). This was intended to "increase the standard of care between officers, directors and shareholders in a close corporation to that duty owed between partners in a partnership." *See* Gary D. Justis, *Avoiding a Minority Shareholder Oppression Claim in a Close Corporation in Missouri: The Impact of the New Close Corporation Statutes,* 56 Mo. L. Rev. 257, 258 (1991). Missouri's statutory "close corporation" section of the General and Business Corporation Law is modeled after the Revised Model Business Corporation Act of 1984. *Id.* at 257.

3 Mo. Rev. Stat. §§ 351.494(2)(b), 351.850.1(1) (1990). Missouri does not have a corresponding LLC member oppression statute but oppressed LLC members are not without recourse, as classic breach of fiduciary duty claims may be available to them. *See Schieve v. Meyer,* 628 S.W.3d 726, 734 n.9 (Mo. App. W.D. 2021) ("[T]he law in Missouri is that managers (member or nonmember managers) owe members of the LLC fiduciary duties as a matter of law by virtue of the manager and member relationship.") (internal alterations and quotation marks omitted); *see also* Gerard V. Mantese, Brian P. Markham, *Shareholder Oppression and Business Divorces*, 101-8 Mich. B.J. 36 (Sept. 2022).

4 See *Fix v. Fix Material Co., Inc.*, 538 S.W.2d 351, 357–58 (Mo. App. 1976). [Query: This is the St. Louis district; should that be noted?]

5 *Robinson v. Langenbach,* 599 S.W.3d 167, 180–81 (Mo. banc 2020).

6 *Waters v. G & B Feeds, Inc.*, 306 S.W.3d 138, 147 (Mo. App. S.D. 2010).

7 599 S.W.3d 167 (Mo. banc 2020).

8 *Id.* at 180–181 (citing *Whale Art Co. v. Docter,* 743 S.W.2d 511, 514 (Mo. App. E.D. 1987); *Virgil Kirchoff Revocable Trust Dated 06/19/2009 v. Moto, Inc.*, 482 S.W.3d 834, 837 (Mo. App. E.D. 2016)). In announcing this standard for assessing oppressive conduct, the Supreme Court rejected defendants' argument for a strict oppression standard under which a court would only provide a remedy "to prevent irreparable injury, imminent danger of loss or a miscarriage of justice." *Robinson*, 599 S.W.3d at 181–82.

9 Perma-Jack is a "franchisor of a foundation repair and stabilization system" founded by George Lagenbach in 1975. When Lagenbach retired in 1985, his three children (the parties in *Lagenbach*) became equal shareholders of Perma-Jack and, together, served as its board of directors beginning in 1987. *Lagenbach*, 599 S.W.3d at 173.

10 *Lagenbach,* 599 S.W.3d at 174.

11 *Id.* at 174.

12 *Id.* at 174.

13 *Id.* at 175. It was determined that as two-thirds majority of the company's board of directors, defendants had the authority under the bylaws to remove Robinson as an officer of the company. *Id.*

14 The trial court in *Lagenbach* stated that it reached its finding of oppression based on the evidence adduced and the jury's earlier verdict regarding the breach of fiduciary duty claim but also that it separately found "that the defendants' actions [met] the requisite standard" based on its finding that the defendants used their control of the company to expel Robinson, cut her off from profits, and put all compensation from the company into the control of one of the defendants, leaving Robinson with unmarketable shares of stock, all without any attempt to discuss these actions in advance with Robinson, give her any warning or attempt to negotiate some kind of stock buy-out or other financial accommodation, and defendants actively coordinated between themselves and sought to conceal their plans and intentions from Robinson well in advance of the special meeting where she was voted out of the company. *Id.* at 181. On appeal, the Lagenbach Court concluded that this evidence, "considered in the light most favorable to the judgment and verdict, fully supported the circuit court's finding of oppression." *Id.*

15 *Id.* at 175.

16 *Id.* at 178.

17 *Id.* at 181–82.

18 306 S.W.3d 138 (Mo. App. S.D. 2010).

19 Id. at 147 (citing *Whale Art,* 743 S.W.2d at 514).

20 *Id.* at 147.

21 *Id.*

22 *Id.* (citing *Struckhoff v. Echo Ridge Farm, Inc.*, 833 S.W.2d 463, 467 (Mo. App. E.D. 1992)).

23 901 S.W.2d 241 (Mo. App. E.D. 1995).

24 *Id.* at 245.

25 *Id.* at 243. The trial court granted summary judgment as to Counts I and II of the Petition. Count I sought judicial dissolution pursuant to Mo. Rev. Stat. § 351.494(2)(b) and (d) (1990) due to the defendant's allegedly oppressive actions and Count II sought a court-appointed receiver to wind up and liquidate pursuant to Mo. Rev. Stat. § 351.498.1 (1990). *Id.* at 244.

26 *Id.* at 244.

27 *Id.* at 245–246.

28 *See Johnson v. Duensing,* 351 S.W.2d 27, 32 (Mo. banc 1961) (stating that