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## Book Review: "Squeeze-Outs" Minority Shareholders - Expulsion or Oppression of Business Associates

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## BOOK REVIEW

“SQUEEZE-OUTS” OF MINORITY SHAREHOLDERS—EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES. BY F. HODGE O’NEAL. Chicago: Callaghan & Co. 1975. Pp. xiv, 732. \$42.50.

As for other animals, so for humans: continuing close contact frequently breeds discontent and strife. Many of us are familiar with ingenious sibling tortures, the irritations of college roommates, and the ups and downs of marriage. It comes as no surprise then that the close and continuous contact between participants in “close” corporations, especially family firms, gives rise to many examples of oppressive conduct.

What may be surprising, however, is the variety of settings in which majority shareholders and corporate managers have tried to “squeeze-out”<sup>1</sup> minority shareholders, and the broad range of oppressive techniques used. Many of these settings and techniques are graphically illustrated in Professor F. Hodge O’Neal’s recent publication, “*Squeeze-Outs of Minority Shareholders*.”<sup>2</sup> The aged autocrat, the overzealous manager, the obstreperous minority shareholder and many others inhabit the corporate jungle described in this treatise. Their weapons include familiar tactics:<sup>3</sup> ending dividend payments, terminating employment, withholding information, and unilateral-ly introducing fundamental corporate changes.

Readers who know Professor O’Neal’s other writings, especially *Close Corporations—Law and Practice*,<sup>4</sup> will find the style and format of his new treatise familiar. The book is comprehensive and methodical. After a brief introduction outlining the scope of the work, the author sets out (a) the underlying causes of squeeze-outs, (b) a description of squeeze-out techniques, (c) how to resist and plan for squeeze-out attempts, and (d) “idea guides” for changes in legal controls. Each chapter is divided into brief,

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1. Professor O’Neal defines (p. 1) “squeeze-out” as follows: “By the term ‘squeeze-out’ is meant the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants.” In some contexts at least, other authors prefer to use “freeze-out.” See, e.g., A. CONARD, CORPORATIONS IN PERSPECTIVE 230 (1976).

2. The full title on the cover page is “SQUEEZE-OUTS” OF MINORITY SHAREHOLDERS—EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES. The spine simply says OPPRESSION OF MINORITY SHAREHOLDERS. Compare the title of an earlier version of this treatise set out in note 12 *infra*.

3. Ingenious and sophisticated tactics are also employed. See, e.g., *Teschner v. Chicago Title & Trust Co.*, 59 Ill. 2d 452, 322 N.E.2d 54 (1974) (reverse stock split followed by acquisition of fractional shares for cash). Professor O’Neal suggests (p. 362) that this decision is “highly questionable.” A similar assessment of this case is given in W. PAINTER, CORPORATE AND TAX ASPECTS OF CLOSELY HELD CORPORATIONS 14 (Supp. 1976).

4. This two-volume treatise, the second edition of which was published by Callaghan & Co. in 1971 with annual supplements since then, is a classic in its field. Although much of this general work is indirectly relevant to planning to avoid oppression of minority shareholders, §§ 8.07-.09 deal directly with squeeze-outs. The volume now being reviewed has liberal cross-references to this general work.

lucidly-written sections on discrete topics. Copious annotations follow each section and the volume ends with comprehensive tables and a detailed index. Although the volume is bound, the publishers have allowed for supplementation by pocket part.

Although shorter than most, chapter 4, "Squeeze-Out Techniques: Sale of Control and Related Techniques," is typical of the treatise as a whole.<sup>5</sup> The chapter begins with a section setting out the nature of the problem: a potential purchaser of corporate control may proceed in a number of ways, not all of which are necessarily harmful to minority shareholders. The traditional doctrine that the majority shareholder is free to sell at any price is briefly stated,<sup>6</sup> and two leading cases<sup>7</sup> are summarized in the text with notes which refer to other court decisions and commentaries. "Looting" cases, an exception to the traditional rule, are described in the following section. The author then sets out theories used by recent courts to limit the freedom of sellers of control: misrepresentation, breach of fiduciary duty, sale of corporate office, and circumvention of corporate action or diversion of corporate opportunity. A separate section is devoted to theories developed by leading commentators, Berle, Jennings, and Andrews, and their varying interpretations of the "celebrated" case of *Pearlman v. Feldmann*<sup>8</sup> as well as the assessment of some of these theories in *Honigman v. Green Giant Co.*<sup>9</sup> The chapter ends with a brief, but unfortunately somewhat dated,<sup>10</sup> analysis of remedies under rule 10b-5, especially of the *Birnbaum* doctrine. While much of the chapter consists of summaries of court decisions and the theories of other commentators, Professor O'Neal does suggest judicial trends, including Professor Berle's theory that "control" as a corporate asset is by no means dead, as well as further avenues for research.<sup>11</sup>

An earlier version of the present work, written by Professor O'Neal and a

5. Chapter 4 is also atypical in that it has virtually no unreported case studies. An important feature of the present work is that it includes cases of attempted or successful squeeze-outs communicated to Professor O'Neal by attorneys or other business advisers. Most of these cases did not reach the courts or the law reports. The author briefly suggests (pp. v-vi) his procedure for soliciting this information and cataloguing the cases received. While these case studies are extremely valuable, further systematic study is desirable. Perhaps a representative sample of corporations could be studied to discover the incidence of squeeze-out attempts and their economic costs.

6. Professor O'Neal's statement (p. 179) of traditional doctrine illustrates his ability to summarize lucidly and accurately a complex body of law:

The traditional view is that a shareholder, irrespective of whether he is also a director, officer, or both, may sell his shares, just as other kinds of personal property, for whatever price he can obtain, even if his shares constitute a controlling block and the price per share is enhanced by that fact. Further, he is under no obligation to obtain for other shareholders an opportunity to sell their shares on the same favorable terms he is receiving or even to inform them of that price or of the terms of the sale. [Footnotes omitted.]

7. *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962); *Tryon v. Smith*, 191 Ore. 172, 229 P.2d 251 (1951).

8. 219 F.2d 173 (2d Cir.), *cert. denied*, 349 U.S. 952 (1955).

9. 208 F. Supp. 754 (D. Minn. 1961), *aff'd*, 309 F.2d 667 (8th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963).

10. The text of the treatise antedates the recent United States Supreme Court securities law decisions. In the context of the *Birnbaum* doctrine see especially *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 616 (1975).

11. One avenue, for example, would be a systematic study of the potential economic impact of modifying the legal rules related to sale of control.

research associate, was published by Duke University Press in 1961 under the title *Expulsion or Oppression of Business Associates*.<sup>12</sup> The new volume is more than an expanded reprint of the earlier work. Material retained is expanded, reorganized, and more heavily annotated. Most of these changes adjust shortcomings of the earlier work and make this work of greater value to the practitioner.<sup>13</sup>

Expansion of the text includes not only supplementing existing sections but also introducing two significant new chapters: chapters 4 and 7. Chapter 4, dealing with sale of control, is outlined above. Chapter 7 describes tactics for resisting squeeze-outs and oppression. The author suggests in this chapter a variety of practical steps which minority shareholders may use to protect their interests: getting information, using securities legislation, dealing with procedural problems such as combining federal and state claims, preserving rights, and presenting a grab-bag of theories<sup>14</sup> to a court.

Much of the reorganization of the text is designed to improve the logical presentation of the material, but in at least one instance the reorganization reflects an important shift in emphasis from the earlier work. In the final chapter, which presents recommendations for legal changes, Professor O'Neal emphasizes the need for legal validation of contractual arrangements worked out by the parties. A shorter version of this section appeared only at the end of the last chapter in the previous work, which emphasized instead the need for greater statutory regulation.

Although the treatise as expanded and reorganized is a comprehensive study of squeeze-outs,<sup>15</sup> practitioners will probably find it most useful when advising clients after a breakdown of relations between business associates.<sup>16</sup>

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12. The full title of this work, now out of print, is *EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES—"SQUEEZE-OUTS" IN SMALL ENTERPRISES*. This original study was part of a series of investigations into the legal problems of small business conducted by Duke University under the Management and Research Grant Program of the Small Business Administration. Mr. Derwin, Professor O'Neal's co-author, prepared materials on squeeze-outs in the partnership context. The volume now under review has omitted materials on partnership squeeze-outs. This omission is regretted. Many of the causes of squeeze-out attempts are the same in both close corporations and partnerships, yet legislation and the attitudes of courts traditionally have differed significantly. Although there are some studies, more are needed. For a recent study of limited partnership disputes, see Roulac, *Resolution of Limited Partnership Disputes: Practical and Procedural Problems*, 10 REAL PROP., PROBATE & TRUST J. 276 (1975).

13. From the perspective of the practicing attorney a major shortcoming of the earlier work was the slighting of securities law problems. The volume now under review has greatly expanded its coverage of securities law, but rapid developments in this field and the shift in direction of the present United States Supreme Court suggest that Professor O'Neal's treatise will have to be supplemented. Professor O'Neal recognizes the problem. See O'Neal & Janke, *Utilizing Rule 10b-5 for Remedying Squeeze-Outs or Oppression of Minority Shareholders*, 16 B.C. IND. & COM. L. REV. 327, 329 (1975).

14. Such theories may include the reformation of articles of incorporation, or the drawing of analogies to partnerships.

15. Professor O'Neal's treatise is both more extensive and more comprehensive than anything else on the subject. W. PAINTER, *CORPORATE AND TAX ASPECTS OF CLOSELY HELD CORPORATIONS* (1971) devotes ch. 4 ("Techniques of Squeeze-out of Minority Shareholders and Planning to Prevent a Squeeze-out") to squeeze-out problems, but the discussion is necessarily briefer and less comprehensive.

16. In many ways the volume is most useful to the practitioner advising a client who wishes to initiate a squeeze play. Professor O'Neal recognizes this possibility and comments (p. 9):

The disturbing thought occurs that the cataloguing of squeeze techniques might give ideas to prospective squeezers and thus induce squeeze plays

Chapters on causes of squeeze-outs and ideas for legal reform will be of less interest to the average practitioner, and the discussion of planning to avoid squeeze-outs is already covered adequately by other texts, most notably Professor O'Neal's own work on close corporations.<sup>17</sup> Even with respect to advising clients after a breakdown of relations, the treatise is primarily valuable as a starting point for further research and should be supplemented with other works, especially when all-devouring and ever-changing securities legislation is concerned.

Practitioners who handle only occasional corporate problems will not find this volume high on their list for library acquisitions, especially given its hefty price. However, for attorneys who handle corporate problems on a regular basis the volume will be a useful supplement to the basic treatises.

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which would not otherwise occur or might supply techniques to squeezers searching for ways of eliminating undesired associates. Perhaps in some instances squeeze-outs will be induced or furthered by this book. However, publicity is often an effective remedy for economic diseases.

It should be noted also that squeezers are not necessarily the villains. Perhaps greater economic efficiency of allowing squeeze-outs outweighs potential economic costs, such as investments not made for fear of a squeeze-out.

Professor O'Neal fails to discuss directly an increasingly debated professional responsibility problem for the corporate legal adviser who counsels management initiating a squeeze-play. There are suggestions in the literature that counsel may have a duty under the Code of Professional Responsibility (EC 7-8) to advise management of the effect on shareholders of a squeeze-out. See, e.g., van Dusen, *Who is Counsel's Corporate Client?*, 31 BUS. LAW. 474, 477 (1975). See, however, Professor O'Neal's related discussion of the corporate client-attorney privilege at § 7.06 of the work under review.

17. Undoubtedly the treatise will make an attorney who does not handle many incorporations more sensitive to potential squeeze-out situations. Whether the treatise will end up in the hands of such an attorney is doubtful. Moreover, there are limits to which an attorney can anticipate potential problems. Even experienced and sensitive attorneys may be reluctant to raise potential but remote problems because it may discourage clients from going through with the deal. What is needed—and what perhaps no treatise can provide—is skill in dealing with people in counseling and negotiating contexts. Litigation rarely solves disputes as Professor O'Neal himself recognizes (pp. 8-9). The widely-acclaimed 1964 Illinois court decision in the *Galler* case has appeared again and again in the courts. *Galler v. Galler*, 45 Ill. App. 2d 452, 196 N.E.2d 5 (1964); 32 Ill. 2d 16, 203 N.E.2d 577 (1964); 69 Ill. App. 2d 397, 217 N.E.2d 111 (1966); 95 Ill. App. 2d 340, 238 N.E.2d 274 (1968); 21 Ill. App. 3d 811, 316 N.E.2d 114 (1974), *aff'd*, 61 Ill. 2d 464, 336 N.E.2d 886 (1975).

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