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CURRENT DEVELOPMENTS AND CONSIDERATIONS

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MINORITY SHAREHOLDER OPPRESSION IN TEXAS: CURRENT DEVELOPMENTS AND CONSIDERATIONS

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I. Introduction:

Minority shareholder oppression claims have become more common in Texas in recent years. However, the law of shareholder oppression in Texas remains somewhat unsettled and continues to evolve. Based on recent rulings by Texas appellate courts, shareholder oppression has emerged as a popular claim for minority shareholders asserting injury caused by majority shareholders. Given the prevalence of closely and privately held corporations in Texas, the development of minority oppression law in Texas is even more significant.

At its core, shareholder oppression involves a majority shareholder acting as a "bully." The oppressor, or majority shareholder, is tantamount to the biggest kid on the playground with the nicest toys and is blessed with the power to make decisions for the entire playground (a controlling stake in the corporate entity) regardless of the interests or rights of the smaller kids. The smaller kids, or the oppressed shareholders, on the other hand, seem and feel powerless on the playground.

Minority shareholders have long searched for a solution to perceived abuses by the majority shareholder. Shareholder oppression has evolved in fits and starts to provide this remedy. Its evolution has borrowed heavily over the years from related causes of action (*e.g.*, fiduciary duty) and been guided by ad hoc equitable remedies created by the courts. Its rise in popularity mirrors shareholder remedies such as derivative suits designed to protect minority shareholders in publicly traded entities.

Despite its recent recognition, shareholder oppression in Texas rests on somewhat unsettled ground. Although several Texas courts of appeals have endorsed shareholder oppression and provided lengthy definitions of what constitutes oppression, the Texas Supreme Court has not yet recognized oppression as a valid claim. A pending case, *Ritchie v. Rupe*, 339 S.W.3d 275 (Tex. App.—Dallas 2011, pet. granted), will be argued before the Texas Supreme Court on February 26, 2013. Thus, the Texas Supreme Court has an opportunity to decide whether or not to embrace shareholder oppression as a recognized cause of action. Regardless of the outcome of the case,

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debate concerning the value of and necessity for shareholder oppression claims undoubtedly will continue in Texas and elsewhere.

While this cause of action experiences growing pains, there are nevertheless certain issues that practitioners should be aware of in this area of the law. The first is the background of oppression and its history. Another important preliminary consideration in the area of shareholder oppression claims is choice of law. Indeed, the determination of what body of law applies to an oppression claim is critical. Given the wildly differing definitions of oppression amongst the states, knowing what law to apply is critical. The assumption that Texas law applies may not be warranted.

It is also important to distinguish between statutory shareholder oppression and common law oppression. Additionally, the differences between a shareholder oppression claim and a fiduciary duty claim should be studied prior to bringing suit, as similar facts characterizing the two claims may cause confusion.

This paper touches briefly on these issues. With a dynamic topic such as shareholder oppression, the unique facts of each case demand a thorough examination beyond that which is presented here. This is especially true with respect to closely held corporations where the personal dynamics of family and partnerships can result in more emotionally charged situations than typically accompany corporate governance disputes.

A. Choice of Law

Shareholder oppression law has evolved unevenly and sporadically across the country. Texas jurisprudence, for example, includes many oppression cases. The law in Delaware, on the other hand, is much more limited and much less explicit.

There are two theories on how to determine what law should apply to shareholder oppression cases. The first rests on the assumption that shareholder oppression is a tort and that, therefore, the "most significant relationship" test should apply. The second test relies on an understanding of shareholder oppression as an outgrowth of corporate governance and applies the "Internal Affairs" doctrine.

1. The "Most Significant Relationship" Test

Some courts refer to shareholder oppression as a tort, suggesting at least possibly that choice of law for shareholder oppression should mirror choice of law for other torts.[2] This is consistent with courts' understanding of shareholder oppression as "an expansive term that is used to cover a multitude of situations dealing with improper

[2] *See Cotten v. Weatherford Bancshares Inc.*, 187 S.W.3d 687, 702 (Tex. App.—Ft. Worth 2006, pet. denied) (considering oppression as a potential "underlying tort" to civil conspiracy); *Willis v. Donnelly*, 118 S.W.3d 10, 30-31 (Tex. App.—Houston [14th Dist.] 2003), *aff'd in part and rev'd in part on other grounds*, 199 S.W.3d 262 (Tex. 2006) (determining that the breach of fiduciary duty elements of an oppression claim "sound in tort").

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