

# BOOK REVIEWS

CLOSE CORPORATIONS, Vol. 1. By *F. Hodge O'Neal*. Mundelein, Illinois: Callaghan & Company, 2d ed., 1971. Pp. xvi, 540.

Since its initial publication in 1958, Professor O'Neal's treatise, *Close Corporations*, has been recognized as the standard work in the field of close corporation law. Prophetically, one book review at that time suggested that pocket supplements would be welcomed in such a rapidly developing and changing area of the law.<sup>1</sup> Now the two-volume treatise has been revised and re-issued in a convenient, hard-bound, loose-leaf cover for easy replacement and supplementing of material. It is a classic which belongs in every law library.

Legal writing dealing with close corporations, once rare, has become voluminous in the past two decades.<sup>2</sup> One writer believes that the legal literature treating the needs of close corporations and the difficulty of fulfilling those needs under traditional corporation statutes has been the only significant source of pressure for reform.<sup>3</sup> In any event, a number of state legislatures have recognized the special situation of the close corporation by adopting separate close corporation statutes or by inserting provisions useful to close corporations in general statutes.<sup>4</sup> Professor O'Neal predicts that in the years ahead many states will adopt an integrated close corporation law similar to the Delaware or Maryland statutes.<sup>5</sup> The statutory progress is commendable and will assist the participants in a close corporation in molding the corporate form to fit their needs; however, the most important factor in this adaptation effort will continue to be the legal architect who knows and uses the tools or devices which are available for achieving the ends sought by his clients.<sup>6</sup> Properly equipping the

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1. Carrington, Book Review, 26 TENN. L. REV. 448 n.3 (1959).

2. See Hetherington, *Special Characteristics, Problems and Needs of the Close Corporation*, 1969 U. ILL. L.F. 1 (1969).

3. *Id.*

4. States which have adopted separate close corporation statutes include Delaware, DEL. CODE ANN. tit. 8, §§ 341-56 (Supp. 1968); Florida, FLA. STAT. ANN. §§ 608.70-.77 (Supp. 1972); Maryland, MD. ANN. CODE art. 23, §§ 100-11 (Supp. 1971); and Pennsylvania, PA. STAT. ANN. tit. 15, §§ 371-86 (Supp. 1972). Other states have statutory provisions designed for close corporations. See, e.g., N.Y. BUS. CORP. LAW (McKinney 1963), *as amended*, (McKinney Supp. 1972); N.C. GEN. STAT. §§ 55-1 to -175 (1965), *as amended*, (Supp. 1971); S.C. CODE ANN. §§ 12-11.1 to -31.2 (Supp. 1972). See also 1 F. O'NEAL, CLOSE CORPORATIONS § 1.14a (2d ed. 1971). Professor O'Neal credits the framers of the North Carolina Business Corporation Act, N.C. GEN. STAT. §§ 55-1 to -175 (1965), *as amended*, (Supp. 1971), enacted in 1955, with the "first really extensive and imaginative statutory innovations on close corporations. . . ." 1 F. O'NEAL, *supra*, § 1.14a, at 57.

5. 1 F. O'NEAL, *supra* note 4, § 1.14b.

6. A lawyer typically represents the total "situation" in a close corporation and may

legal architect is the objective of Professor O'Neal's treatise, and the objective is attained in a masterful fashion.

Volume I begins with a chapter which defines the close corporation, sets out its principal characteristics and needs, and traces its treatment at the hands of legislatures and courts. Out of a variety of possible formulations, the definition of a close corporation as a corporation "whose shares are not generally traded in the securities markets" is chosen.<sup>7</sup> The central problems of the close corporation are summarized, including the question of how to provide for partnership characteristics such as unanimity and informality of action, restrictions on the transfer of ownership, and dissolution rights, within the traditional corporate form of organization.<sup>8</sup> The efforts of legislatures and courts to meet these needs by affording special treatment to close corporations are analyzed and judged to be inadequate, even though substantial progress has been made in the past decade.<sup>9</sup>

In one of the most provocative sections of the treatise, Professor O'Neal states that the most serious defect of current close corporation legislation is its failure to furnish adequate self-executing protection for minority shareholders who have failed to bargain for sufficient protection against mistreatment.<sup>10</sup> He suggests that in view of the widespread failure of minority shareholders to use self-help, attention should be given to ways of providing automatic statutory protection.<sup>11</sup> Other commentators have proposed giving any oppressed shareholder the right to compel dissolution or to require the corporation or the other shareholders to buy his shares at a "fair" price.<sup>12</sup> Professor O'Neal goes further and suggests legislation directing the courts to protect the reasonable expectations (such as employment or participation in management) of persons acquiring an interest in a close corporation, even in the absence of an express agree-

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overlook or be reluctant to dwell at length on the pitfalls of minority stockholder status when the majority stockholder is the leading participant. In addition, the participants desire to minimize legal fees and are often unprepared mentally to face up to potential problems. Accordingly, sticky ethical problems inherent in representing persons with conflicting goals may be overlooked or ignored. A good working acquaintance with the treatise will sharpen the lawyer's appreciation for the ethical problems and better equip him to handle them.

7. 1 F. O'NEAL, *supra* note 4, § 1.02.

8. *Id.* § 1.12.

9. *Id.* § 1.14c.

10. *Id.*

11. *Id.*

12. Hetherington, *supra* note 2, at 22.

ment between the participants in the corporation.<sup>13</sup> In addition, he advocates providing the courts with a broader assortment of remedies with which to protect minority shareholders, such as the power not only to require dissolution but also to impose upon the parties whatever settlements the courts consider just and equitable.<sup>14</sup> It can be argued that such legislative and judicial action might create uncertainty in relationships among businessmen and might unduly substitute a judge's wisdom for a businessman's bargain—albeit a bad bargain from the standpoint of one of the participants. On the other hand, there is precedent for legislation of this kind,<sup>15</sup> and the approach is compatible with consumer protection and similar concepts in other fields which have gained wide acceptance.

The remaining chapters of the volume turn to the practical aspects of how the practicing lawyer can build desirable partnership characteristics into the close corporation structure. Chapter 2 presents an analysis of the pre-organization planning stage, including a review of the various forms of organization and a discussion of tax aspects and other important considerations which bear on the choice of the proper form in a given situation. In the succeeding chapter on charter and by-law provisions, the lawyer is admonished not to be shackled to a standard charter and by-law form, but rather to mold thoughtfully and carefully the basic corporate instruments to fit the needs of his clients. The chapter is replete with information and insights for the legal draftsman generally, with particular emphasis on charter and by-law provisions for creating control or veto devices to protect minority stockholders. These devices include limited purposes clauses in the charter,<sup>16</sup> various combinations of voting and nonvoting stock,<sup>17</sup> charter clauses limiting the power of or abolishing the board of directors<sup>18</sup> and charter clauses establishing dividend policies.<sup>19</sup> A separate chapter examines systematically and in detail how charter and by-law provisions setting forth unanimous or high-vote requirements can be utilized to give minority shareholders the veto power. Another chapter gives similar analytical treatment to control distribution devices

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13. I F. O'NEAL, *supra* note 4, § 1.14c.

14. *Id.*

15. Companies Act, 11 & 12 Geo. 6, c. 38, § 210(2) (1948); S.C. CODE ANN. § 12-22.23 (Supp. 1972).

16. I F. O'NEAL, *supra* note 4, § 3.10.

17. *Id.* §§ 3.11-.23.

18. *Id.* § 3.60.

19. *Id.* § 3.63a.

such as shareholder agreements, voting arrangements and management contracts. A typical example of the thoroughness with which each subject is examined is a checklist of twenty-one precautions for the attorney to observe in drafting voting agreements.<sup>20</sup> A final chapter discusses the employment contract as a device for protecting the tenure and status of stockholder employees and key personnel.

The treatise is an extremely valuable aid for the practicing lawyer. It sets forth in one place the typical problems confronting the organizers of a close corporation (and therefore their lawyer as well), and it presents in logical, analytical fashion the methods for solving the problems. Proper use of the treatise can increase the lawyer's efficiency in dealing with close corporations and improve the quality of his work.

Although focusing on planning, drafting, counseling and preventive law rather than on doctrine or curative law, the treatise has great value for the academician as well as the practitioner. Professor O'Neal has collected and discussed much of the writing in the field of close corporations,<sup>21</sup> and his statement and solution of practical problems contain sound theoretical insights and philosophy. It is not surprising, therefore, that the legal writers in the close corporation field, of whom Professor O'Neal is acknowledged to be the master, are credited with instituting statutory reforms. Professor O'Neal deserves the appreciation and commendation of bar and bench for his continuing efforts as a teacher, scholar and author.

*Larry J. Dagenhart\**

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CLOSE CORPORATIONS, Vol. 2. By *F. Hodge O'Neal*. Mundelein, Illinois: Callaghan & Company, 2d ed., 1971. Pp. xviii, 222.

One approaches the task of reviewing this treatise with a feeling of awe, for it would be difficult to exaggerate the extent of Professor O'Neal's influence over the ongoing development of close corporation law.<sup>1</sup> The first edition of his treatise, in combination with his

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20. *Id.* § 5.27.

21. Conversely, it is a rare article in the field that does not quote Professor O'Neal.

\* B.S. 1953, Davidson College; J.D. 1958, New York University; Member of the North Carolina Bar.

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1. The uniqueness and importance of Professor O'Neal's contribution to close corporation law is reflected in the well-nigh universal enthusiasm with which the original version of his