THE CLOSE CORPORATION AND THE COLORADO LAWYER†

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The kind of corporation that most Colorado lawyers deal with is the so-called “close” or “closely held” corporation. This is a corporation with a relatively few shareholders—one whose shares are not listed on an exchange or actively dealt in by brokers. It is usually a small enterprise, although it need not be, for size is not the determinative factor that makes a corporation closely held.

This article discusses the special problems of this type of corporation and the impact the Colorado Corporation Code† has on those problems. It also suggests ways of tailoring the corporate form of business to make it suitable for a closely held business enterprise.²

DISTINCTIVE CHARACTERISTICS AND NEEDS OF CLOSE CORPORATIONS

To understand fully the distinctive problems of the close corporation, it is necessary to examine carefully the characteristics and needs of this type of business organization. In a close corporation the shareholders usually live in the same geographical area, know each other well, and are acquainted with each other's business skills. All or nearly all of them typically are active in the business as directors and officers or as key personnel. They quite commonly think of themselves as “partners” and want the power that partners have to choose their future business associates. Employment by the corporation is often the sole or principal source of income for some or all of the shareholders. Thus the typical shareholder in a close corporation is not simply an investor; he wants the rights of a co-owner and a voice in management and control.

As stock in a close corporation does not have an established market, valuation of shares for estate tax and other purposes is difficult. Furthermore, a shareholder who becomes dissatisfied with the way the corporation is being managed may find that he cannot dispose of his shares and get out of the company without suffering severe financial loss. Another characteristic of a close corporation is that tax considerations often control business policies, particularly dividend policies.

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2. See generally O'Neal, Close Corporations: Law and Practice (2 vol. 1958) [hereinafter cited as O'Neal].
One reason why lawyers advising businessmen in a close corporation have encountered difficult problems is that legislators and judges in the past have not realized that the close corporation differs radically in its characteristics and needs from the big, public-issue corporation. As a general proposition, legislatures have applied to the close corporation the same statutory rules they have applied to the public-issue corporation; similarly, the courts, in establishing rules for governing business organizations have not distinguished between the rules applicable to a corporate giant such as General Motors and the rules applicable to the incorporated "hot dog" stand. Even the form books have been geared to the public-issue corporation and have not taken into account the needs of the closely held enterprise. How does a book of corporation forms usually come into being? A teacher or an employee of a publishing company writes the law departments of large corporations, saying: "Send me your articles of incorporation, your bylaws, and other corporate documents." He then examines the documents obtained in this manner and selects what he considers the best of them for inclusion in the form book. Consequently, the book is likely to contain forms that are splendid for the large, public-issue corporations for which they were drafted, but very ill-adapted to a close corporation.

Under any corporation statute in this country, the lawyer organizing a close corporation or advising businessmen already operating a closely held business in the corporate form is faced with complex problems. It is difficult to set up a legal framework that will protect minority shareholders and at the same time leave sufficient flexibility in the corporate organization to meet future contingencies and to take advantage of unexpected opportunities that may arise.

RESTRICTIONS ON THE TRANSFER OF SHARES AND ARRANGEMENTS FOR BUY-OUTS

Free transferability of shares—one of the normal attributes of the corporate form of business—is usually not desirable in a closely held enterprise. The participants do not want the shares to be freely transferable. As has already been indicated, they want to be in a position to choose their future business associates. The participants are in constant and intimate contact and are commonly thought of as a business team. One may be a chemist, one a salesman, and one an executive who manages the corporation's internal operations and its financial affairs. All of them want to be


4. "[W]hen a private business or a partnership has become incorporated under the general law, and greatly favored by restricted liability, there is no reason for making any distinction between such a corporation and others, and our statutes make none." In re Klaus, 67 Wis. 401, 406-07, 29 N.W. 582, 584 (1886).

certain that anyone who comes into the enterprise will be congenial and will provide skills that will contribute to the success of the business. In particular, the participants may want to protect themselves from having to accept as an associate the widow or son of a deceased shareholder. Furthermore, the participants do not want competitors to be able to buy into the corporation and gain access to corporate records.

If the participants are well-advised, they will not want a person who is not going to take an active part in the business to become a shareholder. Inactive shareholders are undesirable because their interests usually conflict with those of the active shareholders. In order to minimize taxation, active shareholders usually withdraw most of the earnings of the corporation in the form of salaries rather than dividends; on the other hand, inactive shareholders, not being in the corporation's employ, want to keep salaries low and dividends high.\(^6\)

Since the enactment in 1958 of Subchapter S of the Internal Revenue Code,\(^7\) which permits close corporations meeting certain requirements to elect a tax status roughly similar to that of a partnership,\(^8\) there is an additional reason for placing restrictions on the transfer of shares. Among the requirements for eligibility to elect the Subchapter S status are the following: (1) the corporation must not have more than ten shareholders;\(^9\) and (2) the shareholders must be individuals or estates.\(^10\) If a shareholder transfers shares to a corporation or to a trust or if a shareholder divides his shares and transfers them to a number of persons so as to create more than ten holders of shares, the corporation loses its privilege to elect Subchapter S treatment. Furthermore, even if the shares are transferred to an eligible shareholder, his consent to the continuance of the election of Subchapter S status must be obtained.\(^11\) Therefore, whenever shareholders

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6. Since dividends are generally declared out of corporate profits, their declaration results in double taxation: first the company must pay an income tax on the profits realized by the corporation and then the individual shareholders are taxed on the proceeds of the dividend. Int. Rev. Code of 1954, § 1; Treas. Reg. § 1.61-9 (1957). In order to avoid this reduction of net return to the shareholders and still allow the participants to realize immediate income from the enterprise, most closely held corporations set officer-shareholder salaries at amounts which are as high as possible and yet qualify as corporate business deductions.

Since the statutory standard permits a corporation to deduct only a "reasonable allowance for salaries or other compensation for personal services actually rendered," Int. Rev. Code of 1954, § 162(a), only active shareholders can receive salaries for tax purposes; and an attempt to compensate an inactive shareholder by means of a salary will be treated as a disguised dividend and taxed as such. See Treas. Reg. § 1.162-7 (1958).


8. "A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities." Int. Rev. Code of 1954, § 701.

"In determining his income tax, each partner shall take into account separately his distributive share of the partnership's . . . [profits]." Int. Rev. Code of 1954, § 702(a).


plan to cause the corporation to elect Subchapter S status, it is wise to place restrictions on the transferability of stock in order to prevent the shares from being transferred to an ineligible holder, to a holder who will not consent, or to a number of shareholders so as to increase the total number of holders to more than ten.

A lawyer will want to consider many different kinds of restrictions that may be placed on the transferability of shares. Among these are the following: (1) consent restraints, that is, restrictions requiring for transfers the consent of the directors, of the other shareholders, or of a designated percentage of one of these groups; (2) provisions limiting transfers to specified classes of persons; (3) "first option" provisions, that is, provisions giving the corporation or the other shareholders "first right" to buy the shares of a holder who decides to sell; (4) options empowering the corporation, its officers or directors, or the other shareholders to purchase the shares of a holder on the happening of specified events, for example, his death, incapacity, or severance of employment with the corporation; (5) buy-out arrangements for the transfer of a deceased holder's shares to the corporation or to the other shareholders at a specified price or at a price to be determined by formula; (6) provisions for the redemption ("call") of common stock at the option of the corporation or its board of directors.

Courts sustain restrictions that they characterize as "reasonable."12 Absolute restrictions unlimited in time on the alienability of shares have almost invariably been held invalid as unreasonable.13 Factors which courts have considered in determining whether restrictions are reasonable include the following: (1) the size of the corporation;14 (2) the degree of restraint on the power to alienate;15 (3) the length of time the restriction is to remain in effect;16 (4) the method to be used in determining the transfer price of the shares;17 (5) the likelihood of the restriction contributing to the attainment of corporate objectives;18 (6) the possibility that

12. The underlying test seems to be whether the restraint is sufficiently needed by the particular corporation to overcome the general policy against restraints on alienation. See 87 U. Pa. L. Rev. 482, 483 (1939). Courts seem more willing to sustain stock transfer restrictions in close corporations than in widely held enterprises. Ibid.
THE CLOSE CORPORATION

a hostile shareholder would injure the corporation; and (7) the likelihood that the restriction will promote the best interests of the enterprise as a whole. Enough cases have now been decided in other American jurisdictions, although not in Colorado alone, to give the Colorado lawyer reasonable guidance on what kinds of restrictions will be sustained. The consent restraint is widely used in England and is unquestionably valid there. In this country, the earlier cases declared the consent restraint to be invalid as an unreasonable restriction of alienability. Some of the more recent cases, however, have sustained such restraints.

Buy-and-sell agreements and other buy-out arrangements have usually been held valid. Not only have the courts consistently held that buy-out arrangements are not testamentary, but they have also granted specific performance of such agreements, particularly when the stock involved consisted of shares in a closely held corporation.

Courts in almost all jurisdictions now uphold first option provisions, at least if the provisions are of the typical type and do not contain unusual and peculiarly restrictive terms. Redeemable common stock is permissible in some jurisdictions but of questionable validity in others.

The lawyer must use caution in determining whether to place the transfer restrictions in the articles of incorporation, in the bylaws, in a separate shareholders' agreement, or in more than one of these documents. Furthermore, irrespective of where else the restrictions are placed, it is

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20. Ibid.
21. See Sterling Loan & Inv. Co. v. Litel, 75 Colo. 34, 223 Pac. 753 (1924) (bylaw provision granting first option to other shareholders upheld).
23. See, e.g., Morris v. Hussong Dyeing Mach. Co., 81 N.J. Eq. 256, 86 Atl. 1026 (Ch. 1913); In re Klaus, 67 Wis. 401, 29 N.W. 582 (1886).
26. See Johnson v. Johnson, 87 Colo. 207, 286 Pac. 109 (1930); Bohnsack v. Detroit Trust Co., 292 Mich. 167, 290 N.W. 367 (1940). In the former case the court indicated that specific performance would be the proper remedy, although the cause was remanded for a determination of whether the purchase option was exercised within a reasonable time. The arrangement was unique in that it operated as a buy-out procedure although the purchase option did not extend to the shareholder's entire interest, but only to a sufficient number of shares to insure a transfer of a majority interest.
28. For a case in which redeemable common stock was upheld as valid, see Lewis v. H. P. Hood & Sons, Inc., 331 Mass. 670, 121 N.E.2d 850 (1954).
necessary to state the restrictions, or at least make some reference to them, on the share certificates themselves.\textsuperscript{29}

The only section of the Colorado Corporation Code making mention of share restrictions is section 31-3-2 (1), which in part states:

The articles of incorporation shall set forth: . . . (j) Any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision restricting the transfer of shares or any provision granting the corporation the right to impose restrictions on the transfer of its shares, and any provision which under this code is required or permitted to be set forth in the by-laws.\textsuperscript{30}

This statutory section indicates that (1) at least some restrictions on the transfer of shares are recognized in Colorado; (2) share transfer restrictions may be included in the articles of incorporation; and (3) if they are included in the articles and are reasonable, they will be upheld.\textsuperscript{31} Query whether this statute precludes the imposition of restrictions by shareholders' agreement or, in the absence of an enabling clause in the articles, by bylaw provision.\textsuperscript{32}

In recent years most of the litigation in American courts on share transfer restrictions has involved the interpretation of restrictions rather than the validity of such restraints. This fact indicates that lawyers are not doing a good job of drafting. The lawyer must be extremely careful to use language that is specific and unambiguous. For instance, in a first option provision, he must be careful to state exactly when the option comes into play, what events give the corporation or the other shareholders an option to buy, and when the option terminates. It is nearly always clear from a first option provision that the option to buy comes into effect when a shareholder decides to sell to an outsider. But does the option apply to the following situations: a decision by one shareholder to sell to another shareholder;\textsuperscript{33} a decision by a shareholder to transfer his shares

\begin{itemize}
\item \textsuperscript{31} Under Colo. Stat. Ann. ch. 41, §§ 6-4 (c), 100 (1935), it was held that restrictions on alienation of shares had to be enumerated in the certificate of incorporation and set forth upon the stock certificates themselves in order to be valid. Age Pub. Co. v. Becker, 110 Colo. 319, 134 P.2d 205 (1943).
\item \textsuperscript{32} See Sterling Loan & Inv. Co. v. Litel, 75 Colo. 34, 223 Pac. 753 (1924) (bylaw provision establishing first option in other shareholders upheld); Cook Ry. Signal Co. v. Buck, 59 Colo. 368, 149 Pac. 95 (1915) (shareholder's agreement for temporary withdrawal of stock from market held valid). The Colorado Court explicitly declined to follow these cases after passage of the statute. Age Pub. Co. v. Becker, 110 Colo. 319, 134 P.2d 205 (1943).
\end{itemize}
to a voting trust; or a decision by a person to whom the shares are transferred to transfer the shares again?

Suppose the first option provision provides that when the shareholder sells he will give the other shareholders the first option to buy. Does he have to offer the shares in proportion to their existing holdings, or must he offer the same number of shares to each of the shareholders, or must he sell the shares to the other shareholders on a first-come, first-served basis?

Specific answers must be provided to these questions in the restrictive provision if litigation is to be avoided. The courts have repeatedly said that restrictions on the transfer of stock will be strictly construed. Therefore, if the draftsman does not make himself clear, it is quite likely that restrictions will fail to achieve their intended purpose. For instance, if a restriction provides that the corporation will have a first option to buy shares of stock in the event of "any transfer," the courts are quite likely to hold that the option is not applicable to inter vivos gifts, donations by will, and transfers by operation of law.

One of the more difficult decisions that the draftsman has to make is selecting a method of fixing the price at which the shares will be transferred. The price-determining arrangement should be established in advance and included in the restrictive provision.

Perhaps the most frequently used method of setting the price is fixing it at book value. This may be an unsatisfactory method of determination, however, for book value is often far different from actual value. Tax considerations in computing depreciation on assets frequently control the value at which corporate property is recorded on the books, and a corporation’s assets are often carried on its books at an amount which has historical significance only. Actual value may be many times book value. Furthermore, good will and going concern value are usually not reflected on the books at all. At the very least, a lawyer who is going to use book value should indicate whether good will is to be included in determining the book value of shares, and if so, how the value of the good will is to be calculated.

Another method of determining the transfer price is for the parties to set the price when the restrictive agreement is made, and then from time to time, say every two years, fix a new price. The difficulty that has been found with this approach is that people forget to adjust the price; or one person, seeing that the others are getting along in years and are likely to die first,

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will not agree to a change in price which accurately reflects appreciation in value of the corporation's business and assets. As a general proposition, therefore, the fixing of the price from time to time by the parties themselves has not proved to be a satisfactory method of determining transfer price.

Other methods for setting the transfer price are as follows: (1) fixing the price at what an outsider will offer;\(^{38}\) (2) determining the price by capitalization of the company's earnings;\(^{39}\) and (3) selecting appraisers to decide on the value of the shares.\(^{40}\) A method of price-fixing that seems to be growing in popularity—a sort of hybrid method—is an arrangement pursuant to which the parties themselves set the price, stipulate to adjust it from time to time, and agree that if they have failed at the adjustment period immediately before the transfer to agree on a modification of the price, appraisers will be called in to fix the value of the shares.

**Oppression of Minority Shareholders and the Squeeze-Out Problem**

The problem of oppression and "squeeze-outs" in close corporations is not easy to solve. Even in a family company discord is common. As a matter of fact, dissension and squeeze plays occur more often in family corporations than in other close corporations.\(^{41}\)

Every year thousands of small businesses are injured by dissension among the principal owners and the squeeze plays which frequently grow out of such dissidence. Fights among the owners of a business almost invariably lead to bad publicity, loss of confidence by suppliers and customers, and expensive litigation. Furthermore, the economy as a whole suffers because many persons who are prospective investors in small businesses hear about oppression of minority shareholders and about squeeze-outs and are afraid to invest in a close corporation. Finally, as a result of a squeeze play, a minority shareholder may find that he has suffered the

\(^{38}\) However, as was previously noted, a ready market usually does not exist for shares in a closely held enterprise. Furthermore, prospective purchasers may be hesitant to make offers if their bids will fix the price at which other persons will be privileged to buy.

\(^{39}\) Capitalization of earnings to determine transfer price presents several challenging problems. There is the initial difficulty of drafting an agreement that will provide an accurate method of calculating "earnings" and allow for adjustments for abnormal business years and nonrecurring items of profit and expenditure. In the closely held enterprise, profits are usually taken out of the business in the form of salaries, and it is difficult to ascertain what the company's profits actually are. Also, capitalization of earnings presupposes existence of going concern value or good will, and in a close corporation withdrawal of the shareholder whose shares are being purchased may seriously diminish such intangible assets.

\(^{40}\) If appraisal is the method selected for determining transfer price, the agreement will have to specify a procedure for selecting the appraisers. If more than two or three shareholders are involved, arriving at a suitable plan for appointing appraisers will frequently be difficult.

Another disadvantage, particularly evident if the appraisers are directed to apply complicated standards, is that appraisal can become quite expensive.

following losses: (1) he has been divested of any voice in the control of the corporation; (2) he has been deprived of information about company affairs and the decisions being made; (3) he has been removed from employment with the company; (4) his investment has ceased to have any value because he is not receiving either dividends or salary, and he cannot get his money out of the business or even use his interest as security for borrowing.  

The techniques that can be used to eliminate a minority shareholder from a business are almost limitless in number. In 1960 we undertook at the Duke Law School a study of small business squeeze plays, with a view to enumerating and describing the various squeeze-out procedures. In the beginning we thought that within a few months at most we could discover all of the squeeze-out techniques and develop recommendations to avoid dissension and prevent squeeze-outs. Instead the job took almost two years. Businessmen, their lawyers and other advisors have been most ingenious in devising ways of eliminating undesired business associates.

The most frequently used squeeze-out technique is simply the elimination of dividends. Sometimes the approach by majority shareholders to the minority shareholder is blunt. They simply say to him, “You might as well sell out. As long as you are in the company we’re not going to declare any dividends.” This is not the artful way, nor is it the wise way from the squeezer’s point of view. Quite often the approach is more subtle—the majority say to the minority: “Our company’s machinery is old; it needs to be replaced. Furthermore, we’ve got to expand; we’ve got to set aside reserves for ‘a rainy day’ when business is not as good as it is now. We can’t afford to declare dividends. If you need money now, you’d better sell out and invest in something else. We wish we could give you dividends, but dividend prospects are dim in this company for the next ten years.”

Dividends are usually cut off when the “squeezee” needs money badly; and of course this squeeze play, the withholding of dividends, is often accompanied by a removal of the shareholder from any employment with the company. He is also usually removed from the board of directors.

42. For a case in which a minority shareholder suffered the above-described losses but was able to obtain appointment of a receiver for the corporation, see Burleson v. Hayutin, 130 Colo. 58, 273 P.2d 124 (1954). See also Eureka Coal Co. v. McGowan, 72 Colo. 402, 212 Pac. 521 (1922) (receiver appointed as climax to squeeze-out situation).

But see Hepener v. Miller, 130 Colo. 243, 274 P.2d 818 (1954) (dissolution not granted to squeeze in analogous situation to Burleson case).

For an attempt to distinguish Burleson and Hepner, however tenuous, see Note, 32 Dicta 314 (1955).

43. This study has been published by the Duke University Press, Durham, North Carolina, as O’Neal & Derwin, Expulsion or Oppression of Business Associates: “Squeeze-Outs” in Small Enterprises (1961).


45. Generally, shareholders cannot remove a director without cause before
Shortly thereafter salaries of majority shareholders in their capacities as officers are often increased. Majority shareholders may feel that they are doing more of the company's work now that the minority shareholder is no longer employed. In any event, they not uncommonly increase their own salaries. As a result, the majority shareholders live handsomely, as do perhaps their sisters, cousins and aunts who are also company employees, while the minority shareholder starves. 46

There is a rule of law (in some states it is called the "Business Judgment Rule") under which the courts refuse to interfere in the internal affairs of a corporation as long as the directors are exercising their honest business judgement in making decisions. 47 Judges are not businessmen; they usually are not qualified, in the absence of a clear showing of fraud, to determine whether dividends should be paid, 48 whether a particular employee should be discharged, or what salary should be paid to a certain officer. 49 So, applying that Business Judgment Rule, the courts refuse to interfere. Also, the judiciary generally feels that majority shareholders should have the power to control the company; 50 after all, this nation is

the expiration of his term unless they are given such unusual power by a charter or bylaw provision. See Frank v. Anthony, 107 So. 2d 136 (Fla. App. 1958). But see Colo. Rev. Stat. Ann. § 31-5-5 (1963) which provides that "the entire board of directors or any lesser number may be removed with or without cause." (Emphasis added.) Furthermore, the shareholders can replace the director when his term expires, and in the meantime they can align themselves to outvote him systematically.

With regard to representation on the directorate, Colorado affords minority shareholders an element of protection that is not present in many states. Colo. Rev. Stat. Ann. § 31-3-2(1)(h) (1963) provides that corporations organized after December 31, 1958, must employ cumulative voting to elect directors unless the corporation specifically makes a "statement" (supposedly in the certificate of incorporation) to the contrary.

46. For a case in which one family assumed control of a closely held corporation at the expense of another family who owned shares in the enterprise, see Hepner v. Miller, 130 Colo. 243, 274 P.2d 818 (1954).

47. Although Colorado courts do not invoke the Business Judgment Rule by name, they subscribe to its precepts, and its principle is a viable part of Colorado law. See, e.g., Ingwersen Mfg. Co. v. Maddocks, 118 Colo. 281, 298, 195 P.2d 730, 739 (1948); Miller v. Murray, 17 Colo. 408, 412, 30 Pac. 46, 47 (1892). See also note 50 and accompanying text infra.

48. "Courts of equity are loath to interfere with the discretion which the directors of a private corporation organized for profit have in declaring dividends, and a strong case must be made for its interposition." Rollins v. Denver Club, 43 Colo. 345, 354, 96 Pac. 188, 190 (1908).


50. "[I]n the absence of fraud, the business policies of a corporation, within its statutory objects and purposes, is [sic] to be determined by a majority of its shareholders." Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 615, 233 P.2d 977, 1004 (1951), cert. denied, 342 U.S. 870 (1951).

Those questions [concerning business policies of the corporation] are for the stockholders, not for the courts, and, in the absence of actual fraud the decisions of
a democracy, and the majority voice is the voice that is usually heard and obeyed. The trouble is, in a two-man company (for example, where one person owns forty per cent of the stock and another man owns sixty per cent), democracy gets terribly monotonous: the same man is always on the short end of the vote.

In many squeeze plays the squeezers—the majority shareholders—make use of contracts between the corporation and themselves or other companies which they own. The majority shareholders are in control of the corporation; they are the directors or designate the directors; therefore, they are in a position to cause the corporation to contract with themselves or with companies owned by them. Of course, in legal theory the majority shareholders are fiduciaries of the corporation, and a corporation may rescind a contract it enters into with controlling shareholders if the contract is unfair. But the fact remains that time and again a corporation enters into management or consulting contracts with other corporations which the majority shareholders own; leases property to majority shareholders at an inadequate rental; contracts with majority shareholders or their companies for specified services at a designated rate; lends money to the majority shareholders at no interest or at a low rate; or borrows money from the majority shareholders at a high rate of interest.

There are ways of unfairly treating minority shareholders—and in some instances eliminating them—through the use of fundamental corporate changes, such as charter amendments, mergers, and dissolution.

a majority of those stockholders must stand as the decisions of the corporations.” Mountain States Packing Co. v. Curtis, 86 Colo. 355, 361-62, 281 Pac. 737, 740 (1929).

See also Glengary Consol. Mining Co. v. Boehmer, 28 Colo. 1, 3, 62 Pac. 839, 839 (1900).


57. See, e.g., Tansey v. Oil Producing Royalties, Inc., 36 Del. Ch. 472, 133 A.2d 141 (Ch. 1957).

58. See, e.g., Templeton v. Grant, 75 Colo. 519, 227 Pac. 555 (1924). In this case the minority shareholders, who were the president and vice-president of the corporation, withdrew from a special meeting of the board of directors. The
Majority shareholders have often squeezed out a minority holder by dissolving the corporation and selling its business and assets to a new corporation which has been set up by the majority shareholders to receive those assets. It is possible under the Colorado Code to modify the rights of a preferred shareholder by charter amendment—to reduce his dividend rates or create a new class of shares with prior and superior rights and even eliminate his accrued but undeclared dividends.

Merger has sometimes been used as a procedure to eliminate undesired shareholders. For example, in a Washington case, Matteson v. Ziebarth, the majority shareholders received an offer from an outsider who wanted to buy the corporation's shares. The prospective purchaser was not willing to buy anything less than all of the corporate stock, and the minority shareholders would not sell their shares. The majority shareholders thereupon organized a new corporation in which they took all the common stock for themselves. They then arranged a merger, merging the old corporation into the new. Under the merger, preferred stock in the new company was given to all the shareholders of the old corporation (both majority and minority shareholders) in return for their old shares. This preferred stock was redeemable. The obvious plan of the majority shareholders was to redeem the preferred stock so that they would hold all the stock in a corporation with the business of the old company, and they would then be in a position to sell all of its shares to the outside purchaser. The court permitted the merger. Most courts probably would not approve a merger plan of this kind, but nevertheless this case does illustrate that merger can sometimes be used as a squeeze-out technique.

The holdings of minority shareholders can often be diluted by the corporation's issuance of new stock to majority shareholders at a favorable price. The new stock may be issued at a time when the minority shareholders proceeded to remove them from office, elect new officers in their stead, amend the bylaws to increase the number of directors and fill the vacancies created by the amendment. The court found that the majority directors had acted in good faith in the best interests of the corporation (see notes 47, 50 and accompanying texts supra) and upheld the action taken subsequent to the withdrawal.


60. See Colo. Rev. Stat. Ann. § 31-3-6(2)(h),(k),(1) (1963)). Under Colo. Rev. Stat. Ann. §§ 31-3-7, 31-3-8 (1963), preferred shareholders are entitled to vote as a class on amendments affecting their preferential rights; however, if holders of the common stock also hold two-thirds of the preferred, this provision will not protect minority holders of preferred shares.


62. See, e.g., Hyman v. Velsicol Corp., 342 Ill. App. 489, 97 N.E.2d 122 (1951). Nor is this technique limited to use by majority shareholders who are in control of the board of directors. See Kullgren v. Navy Gas & Supply Co., 110 Colo. 454, 135 P.2d 1007 (1943), in which controlling minority shareholders sought to issue new shares for the express purpose of entrenching themselves in power.
holders do not have money to exercise their pre-emptive rights and buy their proportionate part of the new stock, or an effort may be made by majority shareholders to circumvent the minority's pre-emptive rights. The Colorado Corporation Code provides that shareholders' pre-emptive rights may be limited or denied in the articles of incorporation. Thus, majority shareholders, if they control enough shares to amend the articles, can eliminate minority shareholders' pre-emptive rights. Furthermore, under the Code, in the absence of specific prohibition in the articles, majority shareholders can cause the corporation to grant stock rights and options to officers and key employees (usually majority shareholders), who can later exercise these options to obtain additional stock.

In publicly held corporations pre-emptive rights are a source of almost insoluble difficulty, creating delay and expense in offering a new issue of shares to thousands of shareholders. For this reason, many state corporation statutes permit pre-emptive rights to be restricted or eliminated. Most of the considerations that justify the suppression of pre-emptive rights in publicly held corporations, however, do not apply to closely held corporations, at least not to those with a simple share structure. Shareholders in a close corporation are vitally interested in maintaining their proportionate control and interest in dividends and assets. Issuance of new stock to others may throw out-of-balance an otherwise carefully formulated plan distributing control among the various participants. Thus, it will usually be desirable for the lawyer organizing a close corporation to enlarge and carefully define shareholders' pre-emptive rights in the articles of incorporation.

**Arrangements Which Avoid Squeeze-Outs**

The first step the lawyer who is setting up a new corporation should take to avoid dissidence and to prevent squeeze plays is to study the underlying causes of dissension and squeeze-outs. Many squeeze-outs are, of course, attributable to the avarice of unscrupulous men who take advantage of trusting or less able associates. Nevertheless, squeeze-outs result less often from sheer grabs for power or profit than might be supposed. Most squeeze-out cases are characterized by basic conflicts of interest, protracted policy disagreements, or demonstrated inability of those who are squeezed out to carry a fair share of the responsibility and effort involved in operating a business.

Nor is right always with the minority owners. Quite often they are so uncooperative and unreasonable that majority owners cannot be blamed for wanting to eliminate them from the business. Indeed, obstreperous con-

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63. There are many exceptions to pre-emptive rights that may be utilized by a "squeezer." See Note, 40 Calif. L. Rev. 132, 139 (1952); Comment, 35 U. Colo. L. Rev. 482 (1963).
duct of minority owners is sometimes an attempt on their part to compel majority owners to buy their interests at exorbitant prices.

Also, minority owners sometimes conclude that they are being squeezed when their unhappiness can with more reason be attributed to other causes. They may live far from the place where the enterprise is conducted. Perhaps they do not understand the business or its problems, or they may not be in a position to play leading roles in its operations for any number of reasons. Real squeeze plays are sometimes hard to distinguish from cases of imagined injustices grounded in frustration or unrealistic expectations.

Trouble develops most often, perhaps, when one of the original participants in an enterprise becomes inactive or his interest is acquired by an inactive owner—for example, his widow. In such a situation differences are especially likely to develop over the respective amounts to be allocated to salaries and dividends. When all shareholders in a corporation devote full time to its affairs, they ordinarily take most of its earnings in salaries rather than in dividends in order to minimize double taxation. If, however, there are shareholders who are not on the payroll, this practice will obviously not be satisfactory to them.

Other patterns that may lead to serious dissension include the following:

(1) The aged founder of a business, who perhaps has always run it as a one-man show, becomes more and more tyrannical, ignoring wishes of co-owners and insisting on outmoded business methods.

(2) The more competent and energetic participants in an enterprise feel that the others are holding the enterprise back or are getting an unduly large portion of its earnings.

(3) One of the owners of a business acquires an interest in a competing enterprise.

(4) A business is organized to exploit a new invention or patent, with the inventor receiving an interest in the new enterprise. However, no provision is made for the company to acquire rights to new competitive discoveries of the inventor or to compensate him for improvements made on his original invention.


68. See note 6 and accompanying text supra.

69. See, e.g., Tansey v. Oil Producing Royalties, Inc., 36 Del. Ch. 472, 133 A.2d 141 (Ch. 1957).


(5) A considerable number of people, perhaps employees of the corporation, are each issued a small number of shares. The business prospers and grows. Eventually some of the small shareholders demand dividends on what they now consider valuable property, or they try to create conflicts among the large shareholders.

The inability of holders of minority interests to dispose of their interests without serious financial loss undoubtedly intensifies dissension which leads to squeeze-outs in many businesses. Moreover, the difficulty of determining the value of an interest in a small business is often a starting point of dissension from which the ugly drama of a squeeze-out gradually unfolds.

The neglect of small businessmen to obtain legal advice at the time a business is being organized; the failure of lawyers, when consulted, to foresee problems that might arise out of transitions in ownership and control, and to take steps to meet those problems; the failure to put all aspects of the business agreement into writing—these errors must bear a large part of the blame for allowing situations to develop in which the squeeze-out seems the easiest, if not the only, solution.

The lawyer can take a number of affirmative measures at the time a business is being organized or before friction has developed to prevent oppression and to avoid squeeze plays. The most frequently used arrangements are as follows: (1) restrictions on transfer of stock and buy-out arrangements; (2) charter or bylaw provisions establishing high vote requirements for shareholder and director action; (3) shareholders' agreements; (4) long-term employment contracts between corporation and shareholder; (5) arrangements for settling disputes.

Restrictions on the transferability of stock have already been discussed. They decrease the chances of dissension by preventing shares from getting into the hands of persons who will not be active in the enterprise. Subsequent sections of this article discuss in some detail the other arrangements for avoiding squeeze-outs.

**GIVING SHAREHOLDERS A VETO OVER CORPORATE DECISIONS: HIGH VOTE REQUIREMENTS FOR SHAREHOLDER AND DIRECTOR ACTION**

Perhaps the most effective way of protecting a minority shareholder against a squeeze-out is to include in the articles a provision requiring unanimity or a high vote for shareholder and director action. Such pro-

76. See notes 6-40 and accompanying text *supra.*
visions are authorized by several sections of the Colorado Corporation Code. Section 31-4-18 provides:

Whenever, with respect to any action to be taken by the shareholders of a corporation, the articles of incorporation require the vote or concurrence of the holders of a greater proportion of the shares, or of any class or series thereof, than required by this code with respect to such action, the provisions of the articles of incorporation shall control.\(^7\)

In addition, section 31-5-6 provides in part:

The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the by-laws.\(^7\)

Finally, provisions can be inserted in the articles of incorporation for high quorum requirements for shareholders\(^7\) and directors' meetings.\(^8\)

Obviously, if a favorable vote of holders of eighty-five per cent of the shares outstanding is required for shareholder action, a person who holds twenty per cent of the shares is in a position to prevent shareholder approval of any resolution he finds objectionable. The shareholders elect the directors,\(^8\) at least in the absence of a shareholders' agreement designating the directors;\(^8\) and, under modern corporation statutes, shareholder approval is required for fundamental corporate acts such as charter amendment,\(^8\) sale of all assets,\(^8\) merger,\(^8\) consolidation,\(^8\) or dissolution.\(^8\) Thus a high vote requirement for shareholder action gives a minority shareholder a veto over the personnel of the directorate and protects him against the various squeeze-out techniques which involve fundamental corporate acts.


\(^1\) Query the validity in Colorado of a shareholders' agreement designating directors. See People ex rel. Arkansas Valley Sugar Beet & Irrigated Land Co. v. Burke, 72 Colo. 486, 212 Pac. 837 (1923), holding that such a provision was void as against public policy, for it attempted to circumvent the then-existing statutory mandate requiring election of directors by shareholder cumulative voting. Colo. Stat. § 865 (Courtright 1914).

The present Colorado Corporation Code permits a corporation to renounce the use of cumulative voting to select directors. See note 45 supra. However, Colo. Rev. Stat. Ann. § 31-5-2 (1963) provides that the shareholders shall "elect" directors.


\(^4\) See, e.g., Colo. Rev. Stat. Ann. § 31-5-12(2) (1963) (shareholder approval required for a sale of the "principal part or all of the business, assets, property, or franchises of the corporation not [made] in the usual course of its business").


\(^6\) Ibid.

A high vote requirement for shareholder action alone, however, does not give a veto over many management or policy actions which might be used in a squeeze-out. To protect a minority shareholder against certain types of squeeze plays, he needs to be given a veto over action within the province of the board of directors—including the hiring and discharge of employees, changes in employees' compensation, execution of contracts, lending of money, and issuance of additional corporate stock. To give a minority shareholder a veto over acts of this kind, it is necessary to establish a high vote for director action and couple it with an arrangement which assures the minority shareholder representation on the board of directors.

A shareholder can be assured of representation on the board of directors in a number of ways. Not uncommonly when a small corporation is organized, each shareholder is given membership on the initial board. If a shareholder is on the first board of directors and a high vote is required for shareholders action, he can prevent the election of a new board; in most states the old board carries over until a new board is elected and qualifies. Another way of giving a minority shareholder representation on the board is by a unanimous shareholders' agreement which designates him or his nominee as a director. A third way is to classify the shares, giving the minority shareholder all the shares of one class and providing that each class of shares will elect a designated number of directors. It is quite common now in small corporations for stock to be classified into Class A, Class B and Class C stock, with the only difference between the classes being that each class elects a different director or group of directors.88

Even though high vote requirements are perhaps the most effective safeguards against squeeze-outs, the protection they give minority shareholders must be weighed against risks and disadvantages they bring for the company and majority shareholders. There are several important points that should be considered and kept in mind. First, a shareholder with a veto may use his veto power to extort unfair concessions from his associates as a condition to giving his approval to desired corporate action. Second, veto arrangements deprive a corporation of the flexibility which it may need to adjust to new situations. Third, high vote requirements greatly increase the chance of deadlock and corporate paralysis and raise the difficult question of what arrangements can be set up to break deadlocks when they develop.

To minimize the disadvantages in the use of veto arrangements, the scope of the veto can be limited to areas in which it is felt protection is most needed by the minority shareholder—perhaps to fundamental corporate action and to decisions on the employment and discharge of key employees and the fixing of their compensation. Naturally, the risk of dead-

88. Ability to elect Subchapter S status, see notes 7-11 and accompanying text supra, must also be considered when classification of a corporation's stock is contemplated. In order to qualify for this special tax treatment a corporation must not "have more than one class of stock." Int. Rev. Code of 1954, § 1371(a)(4).
lock grows as the number of shareholders increases; and if a corporation is to have more than four or five shareholders, it may be unwise to give a single shareholder power to veto corporate action. In a corporation with seven shareholders and a seven-man board, for instance, it may be preferable to set the vote for shareholder and director action in a way which requires concurrence of two shareholders or directors to effect a veto.

SHAREHOLDERS' AGREEMENTS

Undoubtedly the most frequently used devise for giving protection to minority shareholders against squeeze-outs is a contract among the shareholders. Perhaps one reason for the frequency with which shareholders' agreements are used is the relative ease of preparing such agreements.

Among provisions which might be included in a shareholders' agreement to help forestall squeeze-outs are the following: (1) specified shareholders or their nominees are to constitute the board of directors; (2) each shareholder is to be employed in a key position by the corporation at a specified salary; (3) salaries of officers and other key employees are not to be changed except by unanimous consent of the shareholders; (4) each shareholder or specified group of shareholders is to have the power to veto some or all corporate decisions; (5) whenever the corporation's surplus exceeds a specified sum, dividends in the amount of the excess will be paid to the shareholders; (6) a shareholder will not transfer his shares until he has first offered them to the corporation and to the other shareholders; and (7) disputes among the participants are to be submitted to arbitration for settlement. The parties might also consider including in the agreement a statement that a breach of the covenants therein will result in irreparable damage, which damage is not measurable in money, and that therefore the parties agree to injunctive relief to compel compliance.

A lawyer preparing a shareholders' agreement should study the applicable state law with great care to determine whether the provisions he wants to use are legal, and he should use caution in drafting the measures. Shareholders' agreements are the subject of lawsuits more often than the average lawyer realizes. In general, they are challenged as violating the statutory provision vesting the management of the business and affairs of the corporation in the board of directors. Section 31-5-1 of the Colorado Corporation Code provides in part:


90. For a detailed discussion of considerations affecting the validity of shareholders' agreements and of planning and drafting precautions to strengthen such agreements, see 1 O'Neal, ch. 5.

THE CLOSE CORPORATION

The business and affairs of a corporation shall be managed by a board of directors which shall exercise all the powers of the corporation, except as otherwise provided in this code or by its articles of incorporation.92

Nevertheless, provisions of the type which we have been discussing—to the extent that they will be given effect by the courts—set up a bulwark against some of the more common squeeze-out techniques. For example, if a person buying a minority interest in a close corporation insists upon a shareholders’ agreement which assures him that he will be employed by the corporation at a specified salary and that if salaries are raised his will be increased in proportion to those of other participants, he may protect himself against the possibility that the other shareholders will “gang up” on him and exclude him from company employment while they siphon off corporate earnings by means of high compensation to themselves. Similarly, a provision requiring payment of dividends assures a shareholder that he will get some return on his investment if the business is profitable and prevents other participants from draining off corporate earnings.

LONG-TERM EMPLOYMENT CONTRACTS BETWEEN SHAREHOLDER AND CORPORATION

Not uncommonly, persons organizing a small business corporation invest practically all their money and assets in the enterprise. They may expect to devote their full time to the business and to earn their livelihood largely by working for it. Therefore, minority shareholders may need assurance that they will be retained in the company’s employment. A person who is taking a minority interest can to some extent protect himself against being deprived of employment with the company by insisting on a long-term employment contract. Note that what is contemplated here is not an agreement among the shareholders but a contract between the corporation and a particular shareholder-employee.93

93. A shareholders’ agreement providing that a particular individual will have a long-term contract as an officer of the corporation is susceptible to attack on the basis that (1) it usurps the statutory power, Colo. Rev. Stat. Ann. § 31-5-1 (1963), of the board of directors to manage the corporation’s affairs; see, e.g., Abbot v. Harbeson Textile Co., 162 App. Div. 405, 147 N.Y. Supp. 1031 (App. Div. 1914); (2) it violates the statute, Colo. Rev. Stat. Ann. § 31-5-15 (1963), providing that directors shall select corporate officers; (3) it tends to cause the directors to disregard their fiduciary duties to the corporation and to other shareholders; see, e.g., Dubbs v. Kramer, 302 Pa. 455, 153 Atl. 733 (1931); and (4) it may be abusive or unfair to non-contracting shareholders; see, e.g., Odman v. Oleson, 319 Mass. 24, 64 N.E.2d 439 (1946).

Furthermore, such a shareholders’ agreement would not prevent removal of an officer (even though an action for damages might be occasioned by removal); for such a provision or interpretation would run afool of the statutory prescription, Colo. Rev. Stat. Ann. § 31-5-16 (1963), empowering the board of directors to remove officers and employees “whenever in its judgment the best interests of the corporation will be served thereby. . . .” See note 95 and accompanying text infra.
To guard against the possibility that when the corporation grows and becomes prosperous the salaries of majority shareholders will be increased without a proportionate increase in his compensation, the minority shareholder may insist that his employment contract include, in addition to a basic salary, some provision for contingent compensation (for example, a percentage of profits) or an arrangement under which his salary will be increased in a fixed proportion with the salaries of designated corporate officers. Furthermore, he may insist upon the contract including provisions for severance pay or liquidated damages in the event the corporation breaches the contract, or provisions obligating the corporation to purchase his stock or give him a lifetime pension in the event it discharges him or fails to renew his contract.

The protection afforded a minority shareholder by a long-term employment contract, however, is tenuous and incomplete. In the first place, the validity of long-term employment contracts is still somewhat uncertain in some jurisdictions, including Colorado. Furthermore, the courts generally will not specifically enforce an employment contract; and of course damages usually will not be an adequate remedy to a minority shareholder who has invested everything he has in the company and is depending on employment by it for his livelihood. It is interesting to note in this respect that section 31-5-16 of the Colorado Corporation Code provides for removal of officers by the directors, but such removal is without prejudice to the contract rights, if any, of the officer removed. Finally, those in control of a company can make a shareholder-employee's life miserable by refusing to cooperate with him and by taking various steps to make his work unpleasant or unrewarding, such as effecting changes in his duties and in the locale to which he is assigned.

Arrangements for Settling Disputes and Breaking Deadlocks

Often a squeeze play can be avoided by providing in advance—by charter, bylaw provision or shareholders' agreement—an arrangement to resolve whatever policy disagreements or other disputes arise from time to time among participants in an enterprise. Three approaches seem promising. One is an arrangement by which impartial outsiders will be brought in to manage the business until tempers have cooled or the parties have resolved their differences. This can be done through the use of the voting trust. Another approach is to provide in advance for arbitration of whatever disputes arise. In jurisdictions in which agreements to arbitrate future disputes (including disputes on management and policy questions) will be

enforced, arbitration has great potential for settling quickly and satisfactorily many of the disputes which occur in small businesses—thus avoiding the long, drawn-out dissension which leads to so many squeeze plays.

The third approach is to establish an arrangement under which one faction of shareholders will buy out the interest of the other in the event a dispute persists for a specified period of time. A provision, for example, might require the majority shareholder in a two-man company to buy out the minority shareholder at a specified price, if for a period of two years the two fail to agree on successors for members of the board of directors. Another arrangement, which is becoming rather popular, provides that any shareholder shall have the right to dissolve the corporation at any time but that, before exercising the right to dissolve, he must first offer his shares to the other shareholders at a specified price or at a price to be determined by formula.

In a two-man company where the shares are evenly divided, the two shareholders sometimes enter into an agreement which provides that either shareholder may at any time set a price which he is willing to take for his interest in the business or to give for the other's interest and that the other will then have a specified period of time to decide whether he will buy or sell at that price. No instance has been found where an arrangement of this kind has been used in a company in which one shareholder owned more than half the stock; nevertheless, no reason is apparent why the shareholders in such a company could not use this type of buy-out. The price, instead of being stated in terms of a half-interest in the business, would have to be set at so much per share.

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97. It is unclear whether agreements to arbitrate future disputes are enforceable in Colorado. Colo. R. Civ. P. 109 provides in part:

(a) Controversies may be arbitrated. All controversies, which may be the subject of a civil action, may be submitted to the decision of one or more arbitrators, in the manner and with the effect set forth in this rule.

(b) Articles of Agreement; Award. The parties before they make their submissions, shall execute a written agreement that they will submit all matters, or some particular matter of difference, to the arbitrator named therein, and will abide the award, and that the award may be filed with the clerk of the district court, as a basis of a judgment, and that an execution may be issued for its collection. (Emphasis added.)

Although Rule 109 is ambiguous with respect to the validity of agreements for arbitration of future controversies, and appears to envisage arbitration of only present disputes, Colorado courts have indicated that provisions to arbitrate future disagreements may be valid. Koscove v. Peacock, 136 Colo. 371, 317 P.2d 332 (1957); see also Gold Uranium Mining Co. v. Chain O'Mines Operators, Inc., 128 Colo. 399, 262 P.2d 927 (1953).

98. For a discussion of the potentialities of arbitration for settling disputes in close corporations and of the planning and drafting precautions that make arbitration provisions more effective and less vulnerable to attack, see 2 O'Neal, §§ 9.08-9.25.
CONCLUSION

In Colorado, as in other states with corporation statutes based on the Model Act, the legislature has in general applied the same statutory rules to close corporations as to public-issue corporations. Because many of these provisions are inappropriate to satisfy the needs of close corporations and the desires of their shareholders, it is sometimes difficult for a Colorado lawyer to mold the corporate form of business until it is ideally suited for a particular closely held enterprise. Nevertheless, by the use of such devices as have been discussed in this article—shareholders’ agreements, restrictions on alienation of shares, buy-out agreements, high quorum and vote requirements, long-term employment contracts, and provisions for the orderly settlement of disputes and deadlocks—the lawyer can in most instances provide serviceable frameworks for closely held businesses. In some other jurisdictions with ill-devised statutes lawyers by the exercise of imagination and ingenuity have been able to set up business structures which meet the needs of the enterprises and gratify the legitimate desires of their clients.

With one exception99 state legislatures have not seen fit to enact a separate corporation code for closely held corporations. However, a number of jurisdictions have included in their business corporation acts provisions drafted primarily to satisfy the peculiar needs of close corporations; and in practical operation these enactments apply largely, if not exclusively, to such enterprises.

Statutory provisions beneficial to the close corporation found in one or more states but not found in Colorado include the following:100 (1) statutes permitting a corporation to be formed by a single incorporator;101 (2) statutes allowing a corporation to have fewer than the traditional minimum of three directors;102 (3) statutes permitting one man to hold all corporate offices;103 (4) statutes empowering directors to fix their own

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100. For a more detailed discussion of the enumerated statutory provisions, see O’Neal, Recent Legislation Affecting Close Corporations, 23 Law & Contemp. Prob. 341 (1958).


compensation as directors and officers;\footnote{104} (5) statutes requiring directors to declare dividends in specified circumstances;\footnote{105} (6) statutes sanctioning shareholders' agreements allocating corporate control and impinging upon powers traditionally vested in the board of directors or otherwise departing from the traditional pattern of corporate management;\footnote{106} (7) statutes permitting special contractual arrangements among shareholders to provide under what circumstances the corporation will be dissolved or to establish nonstatutory dissolution procedures;\footnote{107} and (8) statutes authorizing judicial appointment of a provisional director when a corporation's board of directors is evenly divided on management policies.\footnote{108}

Enactments such as these take cognizance of the readily perceived differences between closed and public-issue corporations, and they permit an easier structuring of business organization to promote efficient operation of closely held enterprises. Leaders of the corporate bar in Colorado might well give consideration to amendment of the Corporation Code to insert provisions designed to give increased flexibility to the corporate form and thus permit further tailoring of the corporate device to the needs of particular businesses.

\footnote{104} See, \textit{e.g.}, Ohio Rev. Code Ann. § 1701.60 (Baldwin 1964); Wis. Stat. Ann. § 180.31 (1957).

\footnote{105} Colorado does not specifically waive the common law requirements of an independent quorum and majority. See Colo. Rev. Stat. Ann. § 31-2-1(11) (1963) ("each corporation shall have power to elect or appoint officers and agents of the corporation, and define their duties and fix their compensation") and Colo. Rev. Stat. Ann. § 31-5-1 (1963) ("the board of directors shall have the authority to fix the compensation of directors, unless otherwise provided in the articles of incorporation"). See also note 51 and accompanying text \textit{supra}.

\footnote{106} See, \textit{e.g.}, N.M. Stat. Ann. § 51-3-16 (1953).

\footnote{107} Colorado's statute governing declaration of dividends speaks only in discretionary terms, providing that "the board of directors of a corporation may" declare dividends when funds are available, except in specifically enumerated situations. Colo. Rev. Stat. Ann. § 31-5-10 (1963). (Emphasis added.)

