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F. Hodge O'Neal. Close Corporations, Law and Practice

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BOOK REVIEW

Close Corporations, Law and Practice. By F. Hodge O'Neal.[1] Mundelein, Ill.: Callaghan & Company. 2d Edition. 1971. Volume 1, pp. xvi, 635; volume 2, pp. xvii, 790. $75.00.

It is no exaggeration to say that F. Hodge O'Neal is the father of the close corporation in this country. Of course, "close corporations," in the sense of corporations controlled by small groups of people, are as old as corporations themselves, and have always constituted the majority of all corporations. Nevertheless, prior to publication of the first edition of Professor O'Neal's book in 1958, the special problems of these corporations were largely ignored by legislatures and exacerbated by the courts. The statutes then existing contemplated a pyramidal corporate structure in which the holders of a majority of the shares of the corporation, the large electorate, would choose a select governing body. The directors, who, behaving according to rules similar to those of the United States Senate, would, after due deliberation, make the appropriate management decisions, including the selection of executive officers to implement them. In short, the legislative scheme was intended to provide a legal framework for the corporate functions of entities such as U.S. Steel, General Motors, A.T. & T., or, except for the plutocratic feature, any parliamentary government. No separate statute for corporations not fitting this paradigm was available, and, except for an occasional section expressly authorizing high votes and quorums,[2] no attempt was made in the general corporation statutes of any state to meet the special needs of small corporations in which shareholders, directors and officers were the same people merely wearing different legal hats.

Although the statutes were indifferent to close corporations, they were, almost universally, not as positively unsympathetic as the courts interpreted them to be. Judicial antipathy to the close corporation was not confined to isolated aberrations of unenlightened judges. The highest courts in the leading commercial state, New York,[3] and the leading corporation state, Delaware[4]—despite the latter's reputation for friendly treatment of larger corporations—consistently frustrated the

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[2] See, e.g., N.Y. Stock Corp. Law § 9 (McKinney 1951), enacted to overcome Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829 (1945).

[3] See, e.g., McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234, motion to amend remittitur denied, 264 N.Y. 460, 191 N.E. 514 (1934); Long Park, Inc. v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633 (1948), motion to amend remittitur denied, 298 N.Y. 856, 84 N.E.2d 324 (1949); Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829 (1945).

[4] See, *e.g.*, Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (1947); Abercrombie v. Davies, 36 Del. Ch. 371, 130 A.2d 338 (1957).

careful efforts of even the most resourceful of counsel trying to serve the needs of close corporation clients.

Such was the state of the law prior to the publication of "Close Corporations." True, the close corporation already had been identified, and there were even small cries in the wilderness for recognition of the needs of such non-public corporations, but, before O'Neal's first edition, these went almost completely unheeded. O'Neal's was the first text specifically dealing with close corporations, their special needs, the law regarding them, and the means for satisfying those needs in the face of judicial opposition.

Unquestionably, the widespread change in the legislative and judicial treatment of the close corporation which has followed the publication of the first edition may be traced to the influence of O'Neal's book. One measure of his influence is the adoption of his definition of a close corporation in the statutes of a number of states[5] as one "whose shares are not generally traded in the securities markets."[6]

Since the publication of the first edition of Professor O'Neal's book in 1958, articles and books about close corporations have proliferated like rabbits.[7] O'Neal is still the master of the field. Indeed, the new edition of "Close Corporations" demonstrates the change in attitude, both legislative and judicial, which he has produced in a number of states towards such corporations. The survey in Chapter 1 of new state legislation intended to apply to close corporations indicates significant legislative interest in the distinctive needs of the close corporation.[8] In light of the developments traceable to the first edition, every lawyer who handles any close corporations, and every law professor and student interested in the field, must welcome the publication of this revised edition of the preeminent work in this area of the law.

Like its predecessor, the new edition is divided into ten chapters, the headings of which are the same as in the first edition.[9] Each chap-

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[5] See, e.g., Fla. Stats. Ann. § 608.70(2) (Supp. 1971-72); N.J. Stats. § 14A:5-21(3)(b); N.Y. Bus. Corp. Law § 620(c) (McKinney 1963); N.C. Gen. Stats. § 55-73(b) (1965).

[6] F. O'Neal, Close Corporations, § 1.02, at 4 (2d ed. 1971) [hereinafter cited by section number only]. Interestingly enough, he seems in one section (§ 8.13) to adopt Carlos Israels' more limited definition. See C. Israels, Corporate Practice 77 (1969).

[7] The articles are too numerous to mention. The more recent books include: D. Kahn, Tax and Business Planning for Closely Held Corporations (1968); W. Painter, Corporate and Tax Aspects of Closely Held Corporations (1971); Estate Planning and the Close Corporation (S. Arnold ed., PLI 1970); Committee on Small Business, Section on Corporation, Banking and Business Law, American Bar Association, Selected Articles on Closely Held Enterprises (1971); Successful Techniques that Multiply Profits and Personal Payoff in the Closely-Held Corporation (Inst. Bus. Plan. 1971); see also, R. Kessler, New Jersey Close Corporations (1970); R. Kessler, New York Close Corporations (1968). Revised editions of standard corporate texts also, of course, include extensive treatments of the specialized problems of close corporations. See, e.g., H. Henn, Law of Corporations, ch. 10 (2d ed. 1970).

[8] §§ 1.14, 1.14a, 1.14b, 1.14c, 1.15.

[9] The first chapter is entitled "Distinctive Needs of Close Corporations and the General Failure of Legislatures and Courts to Appreciate Them." Chapter 2 covers "Steps

ter is subdivided into numbered sections which, while updated, correspond to sections of the earlier work. Additional sections, with new matter, have been interspersed, using letters so as to avoid the necessity of renumbering sections of the earlier edition.[10] The end result is to provide the reader with a familiar format in which to study the current state of the law.

In addition to its fine structural scheme,[11] the new edition exhibits the qualities fundamental to an excellent treatise: it is scholarly, comprehensive and eminently practical. Of these qualities, O'Neal's distillation of complex rules, based on an accurate synthesis of pertinent statutes and judicial decisions, demonstrates O'Neal's mastery of the law of close corporations. Thus, for example, O'Neal succinctly describes in a few pages the salient features of legislative enactments useful to close corporations. As it should be, the discussion within this particular section is divided among (1) provisions limited in scope,[12]

Preceding Organization of a Close Corporation." Chapter 3 deals with "Molding the Corporate Form by Charter and Bylaw Provision." Chapter 4 is captioned "Charter and Bylaw Provisions Giving Shareholders a Veto Power." "Control Distribution Devices: Shareholders' Agreements, Voting Trusts, Irrevocable Proxies, and Management Contracts" provide the subject-matter of Chapter 5. The last chapter in the first volume, Chapter 6, is entitled "Protecting the Tenure and Status of Shareholder-Employees and Key Personnel." Chapter 7 is devoted to "Stock Transfer Restrictions; Buy-Out Arrangements." Chapter 8; entitled "Problems of Operation," deals with what the late Carlos Israels called "corporate housekeeping," and also with the miscellany of close corporation problems not covered in the other chapters (protecting limited liability, powers of corporate officers, compelling dividends, compensation, duties of disclosure on share purchases under common law and Rule 10b-5, a survey of tax problems, and "squeeze-out" techniques). Chapter 9 covers the perennial "Problems of Dissension, Deadlock and Dissolution." The final chapter, which practitioners may find the most valuable, consists of 222 pages of "Specimen Provisions for Charters, Bylaws, Shareholders' Agreements and other Documents." (The "other documents" include a disability buy-out agreement, a deferred compensation agreement, a voting trust agreement, an agreement with creditors for a corporation in financial difficulty, a provision for election of directors by the creditors on default on a note, and long-term employment contracts.)

[10] This is an advantage to those familiar with the section numbers in the earlier version. It is especially useful with a book like O'Neal's, since a number of other works refer to his. See, e.g., H. Henn, Law of Corporations (2d ed. 1970); R. Kessler, New Jersey Close Corporations (1970); R. Kessler, New York Close Corporations (1968); W. Cary, Cases and Materials on Corporations (4th ed. 1969).

[11] Three minor changes in format are obvious. As is becoming popular today, the new edition has switched to a "compression binding," a kind of sophisticated loose-leaf, which avoids the old bulging pocket part so common until recently. (I had a friend once who use to tear out pages from paperbacks as he read them on the subway, so that the books got lighter and lighter as he carried them around. A less destructive variation on this is possible with this new format of O'Neal's book. The reader can carry handy portions with him for reading on the way to and from work.) Secondly, and innovative, is the placing of footnotes at the end of each section rather than at the bottom of each page. This should not cause any great difficulty, due primarily to Professor O'Neal's careful organization of his material. Each section is relatively brief so that the reader does not have to flip over a number of pages to find the supporting notes. (The two exceptions, where the footnotes are somewhat far from the text are §§ 8.06 and 9.16. See also § 9.27 where the same result is produced by the length of the footnotes.)

[12] § 1.14.

(2) pioneering legislation,[13] and (3) the integrated close corporation statutes.[14]

The clarity and organization of this section is characteristic of the book as a whole. As I went through it I noted examples of the brief, clear and correct summaries of law which are given throughout the book.[15] What follows are only a few of the shortest of these excellent summaries:

The law of watered stock liability is admirably stated in a single sentence:

> Liability to the corporation and to its creditors is usually imposed on directors who intentionally permit the watering of stock; and, as a general proposition, the shares may be assessed for the deficiency in consideration as long as they are in the hands of the original holder, a donee, or a transferee with notice.[16]

Similarly, the effect of bylaw provisions on outsiders is stated with equal conciseness:

> Though the corporation, its shareholders, directors and officers are bound by the provisions of the bylaws, outsiders (for instance, persons contracting with agents of the corporation) are generally not charged with notice of these provisions.[17]

Another excellent discussion, one which is especially pertinent to the law of close corporations, focuses on director impinging agreements.[18] It is capped with the following:

> Many decisions lay down the principle that the shareholders cannot by agreement bind themselves to select a board of directors which will consent to be "dummies," and that they cannot deprive the directors of all or a substantial part of their powers.[19]

The complex law of informal director action is also distilled with the text being supported by five footnotes citing sixteen cases:

> Many decisions have held that less than all the directors in a close corporation, even a majority, acting separately and not collectively at a meeting, cannot bind the corporation. On

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[13] § 1.14a. O'Neal reviews Section 9 of the old New York Stock Corporation Law, the North Carolina and South Carolina Acts, and the New York Business Corporation Law.

[14] § 1.14b. (The analysis includes the Florida, Delaware, Maryland and Pennsylvania statutes.)

[15] The reader will note that this proves the reviewer read the book.

[16] § 2.17 at 83-4 (footnotes omitted).

[17] § 3.71 at 102 (footnotes omitted).

[18] § 5.16.

[19] § 5.16 at 54 (footnotes omitted).

> the other hand, a number of cases have held a corporation bound by acts of a majority of the directors even though no legal meeting was held; but some of these seem to be based on an acquiescence by the nonassenting directors after knowledge of the action, or an acquiescence by the shareholders either in the particular action in question or in informal conduct of the business generally.[20]

O'Neal's excellent footnotes enhance the value of these succinct summaries of complicated rules of law. Case citations do not just "lie there." The holding of a case is correctly and concisely included, usually in one line, and frequently with a direct quote which epitomizes that holding.[21] Furthermore, Professor O'Neal appears to have read every book and article written on the subject, and liberally adds references to them where they are helpful for additional information.[22] The result of this combination of distillation and research is scholarship of immeasurable value to both students and practitioners dealing with *any* type corporation.[23]

The most valuable features of the book, however, are the comprehensive treatment of the problems of close corporations and practical suggestions for handling them, drawn from O'Neal's careful study of the applicable law. Throughout, Professor O'Neal's technique is to take a practical problem (e.g., the need for protection of a minority shareholder through giving him a veto,[24] the protection of a participant's financial security in the corporation,[25] or the means for resolving disputes which inevitably arise in close corporations[26]), explain the problem and its ramifications, explore the law on the subject thoroughly, and then give drafting suggestions for solving the problem and accomplishing the desired objective. When what otherwise appears to be an excellent solution to a problem may possibly give rise to other problems, an appropriate caution is given.[27] Finally, helpful language

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[20] § 8.03 at 7-8.

[21] See, e.g., § 8.04 at 19.

[22] See, e.g., § 8.17 n. 25 at 142 listing the literature on Subchapter S.

[23] There are many illustrations of the book's benefit to students and practitioners. From the few quotations in the text, it is obvious that the book is a good, general text on corporation law, as well as on the specialized subject of close corporations. For additional examples of the excellent summaries of law, see, e.g., § 705a (the applicability of share transfer restrictions to pledges), § 7.06 (the validity of share transfer restrictions), § 8.05 (in which the law of agency is accurately summarized in a single paragraph), § 8.06 (especially at 35, on the authority of officers in a deadlocked corporation), § 8.08 (perceptively summarizing the law on the rights of minority shareholders to compel declaration of dividends), § 8.10 (the rules of compensation), § 8.12 (especially at 101, on relief against excess compensation), § 8.15 (disclosure requirements in share purchases), § 9.28 (analyzing dissolution statutes).

[24] See Chapter 4.

[25] See Chapter 6.

[26] See Chapter 9.

[27] See, e.g., § 8.13 at 109.

to implement the suggestions is given in the extensive collection of forms.

Professor O'Neal's technique of discussion of the problem, exploration of the law, and resolution of the problem through careful advice is exactly the practical treatment of the subject which the practitioner needs and wants. But the practitioner is not the only one who can benefit from Professor O'Neal's book. Law school courses today are properly becoming more "clinical." Although a basic knowledge of the applicable rules of law is a necessary prerequisite, it is not alone sufficient for a good legal education, since the law graduate must be able to handle the actual problems of real clients, i.e., apply the law to concrete stituations. It is precisely because Professor O'Neal's book is a book for the practitioner that it is also invaluable in courses and seminars designed to train the student for small business practice. Consequently, as more law schools add practice-oriented courses to their curricula, the utility of O'Neal's book to students of corporate law will continue to grow.

My praise for the comprehensive and scholarly character of O'Neal's second edition should, according to book review norms, be balanced with a few words of criticism. As part of the race of critics, book reviewers, it has been said, have a duty "to hinder the reception of every work of learning or genius." Like politicians out of power, they must, therefore, be merciless faultfinders. Consequently, I searched for errors in O'Neal's newest edition,[28] but naturally I could find none of any consequence. Even a search for omissions proved fruitless, although some reviewers might question the omission of certain material within the new edition.

A few reviewers might, for example, want more on "professional corporations" than the one section devoted to the subject.[29] I would disagree for three reasons. First, such corporations are so different from ordinary close corporations that they are universally treated separately under state corporation laws from ordinary business corporations, even in states having separate close corporation statutes,[30] and, accordingly, merit separate text treatment; second, there is already a mass of literature on the subject, readily available to those interested in this special type of corporation;[31] and third, the possibly ephemeral nature

[28] I found only a handful of footnotes that could be improved upon: to § 1.15 n. 10, I would have added that New York Decedent Estate Law was repealed; in § 2.04 n. 7, I would have noted that Internal Revenue Code § 1361(a) was repealed by Section 4 of P.L. 89-389 (1966); in § 3.58 n. 12, I would have referred to N.Y. Bus. Corp. Law § 616; to § 6.16 n. 11, I would have added that N.Y. Bus. Corp. Law § 716(c) allows the holders of 10% of the outstanding shares to bring an action for removal of an officer.

[29] § 2.04h.

[30] See, e.g., Md. Code Ann., art. 23, §§ 430-444 (Michie, Cumulative Supp. 1971), a separate statute for professional corporations. In New York a separate article (article 15) has been added to the Business Corporation Law to provide for such corporations.

[31] See, e.g., the authorities cited by Professor O'Neal in the notes to § 2.04h. Books on such corporations for particular jurisdictions are also appearing. See, e.g., E. Sebetic, Professional Corporation Forms (N.Y. State Bar Ass'n 1971).

of these corporations—a change in the Internal Revenue Code provisions on retirement plans could render them obsolete overnight[32]—all justify cursory treatment in a general work devoted to a type of corporation we are bound to have with us for a long time.

Others might criticize the lack of a state-by-state cataloguing of the relevant statutes and legislation, but it seems to me that O'Neal cannot be faulted here either. With the "law explosion" proliferating cases[33] and diverging statutes, it is more and more difficult to write a book which adequately covers the law of every state. Professor O'Neal, discussing arbitration, almost plaintively concedes this himself, noting that "the legal maze seems somewhat less confusing and the problems somewhat less difficult when attention is focused on the laws of a single jurisdiction."[34] What is good advice in one state is bad in another. Thus, shares redeemable at the option of the holder, may, for instance, be a substitute for a buy-sell agreement,[35] but are prohibited (except in an open-end investment company) in New York.[36] An ideal form in one state may be inappropriate,[37] or of dubious validity, in another.[38]

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[32] See Worthy, IRS Chief Counsel Outlines What Lies Ahead for Professional Corporations, 32 J. Taxation 88 (1970).

[33] Despite the proliferation of case law, O'Neal includes all the important recent cases. See, e.g., Powell v. Kennedy, 463 S.W.2d 802 (Mo. 1971), in § 7.24c n. 1; United States v. Davis, 397 U.S. 301 (1970), in § 7.27 n. 52; the three 1971 cases: People v. Johnson, 28 Mich. App. 10, 183 N.W.2d 813 (1971), Long v. Smith, 466 S.W.2d 32 (Tex. Civ. App. 1971), and Bossier Millwork & Supply Co. v. D & R Const. Co., 245 So. 2d 414 (La. App. 1971), cited in § 8.04 n. 12; Charles McCandless Tile Service v. United States, 422 F.2d 1336 (Ct. Cl. 1970), in § 8.13 n. 22. See also Matter of Jacobson, 27 N.Y. 2d 67, 313 N.Y.S.2d 684 (1970), discussed in § 4.12 n.5. The latter decision, unfortunately, illustrates not only the necessity for carefully drafted provisions (see R. Kessler, New York Close Corporations 350 [1968]), but the continuing unfriendliness of the New York Court of Appeals to close corporations.

More than the important ones, he has *all* the cases. It is painful to admit, but I'm sure he has more New York cases than I have in R. Kessler, New York Close Corporations (1968), and more New Jersey ones than I have in R. Kessler, New Jersey Close Corporations (1970), to say nothing of those from all the other states, and even from Canada and England. The table of cases is 49 pages long!

[34] § 9.26 at 94.

[35] § 9.05 at 11. See also § 10.21.

[36] N.Y. Bus. Corp. Law § 512(b) (McKinney 1963).

[37] See § 10.21 setting forth indemnification provision. N.Y. Bus. Corp. Law § 721 (McKinney 1963) in effect makes the statutory provisions exclusive. (See official comment.)

[38] Compare § 10.29 at 76, Art. V, Section 8 of the Specimen Code of Bylaws, with N.Y. Bus. Corp. Law § 708 (McKinney 1963). See also § 10.25 which offers a model clause authorizing directors to vote by proxy. Louisiana would appear to be the only state authorizing this. See § 3.62 n. 4. Arkansas, which once authorized it, now expressly prohibits such proxy voting. (See Committee Note Ark. Stats. Ann. 64.301 [1966]). Compare also § 10.30, Specimen Provision (3) allowing a committee to fix board compensation, with N.Y. Bus. Corp. Law § 712(a)(3) (McKinney 1963). Note also that charter provisions validating interested directors' contracts which are suggested in § 3.66 are unnecessary in New York (N.Y. Bus. Corp. Law § 713 (McKinney Supp. (1971)), and if they purport to validate contracts on terms more liberal than those in the statute, will probably result in unacceptability of the certificate by the Department of State. Similarly, compare the § 3.68 suggestions with the charter provision exonerating directors, N.Y. Bus. Corp. Law § 717 (McKinney 1963).

Caveats are, accordingly, frequently necessary because of the statutory provisions, or case decisions, of the particular state for which the lawyer may be drafting the papers. Despite the almost impossible task of compiling them, such caveats are abundantly given,[39] as well as a detailed analysis of the relevant statutes from all states.[40]

While the new edition is thorough and accurate, I do find myself differing with Professor O'Neal on a few points. Thus, I would question, for example, the advisability of exempting purchase money mortgages from high vote requirements;[41] the desirability of granting to every shareholder an "unqualified right at all times" to examine all corporate records;[42] the advice that "[i]n most situations, it is preferable to rely solely on a high vote requirement," as opposed to an additional high quorum one;[43] the assertion that assurance is given by a voting trust that a deceased shareholder will be able to dispose of his shares at advantageous prices;[44] and the suggestion that employment contracts should be invalidated if they "will interfere unreasonably with future boards of directors in the control of corporate affairs."[45]

One (at least one attuned to New York law) may also feel that Professor O'Neal is overly optimistic in such assertions as: "[a] modern court can hardly refuse to give effect to a character *or bylaw* provision designed to meet a legitimate business need if it does not prejudice the interests of corporate creditors or of the public, and if it is approved by all the original participants and its existence is made known to subsequent purchasers of shares,"[46] or that high quorum requirements "are probably valid even in the absence of statutory authorization,"[47] and also his intimation that voting rights disproportionate to shareholdings can be granted in New York by a mere shareholder agreement.[48]

O'Neal's optimism appears to be based on the inclination of the Delaware courts to give a flexible reading to statutory provisions. Al-

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[39] See §§ 3.09, 3.46, 3.67, 3.79, 4.07, 4.19 at 25, 5.16, 5.17 at 65, 5.20 at 78, 5.27, 6.08, 6.14 n.8; see as to case law §§ 3.55, 5.27 at 95; §§ 7.04, 7.06.

[40] See, e.g., §§ 1.14, 1.14a, 1.14b, 1.14c, 3.43, 3.44, 4.14, 4.15, 4.16, 4.17, 5.07a, 5.37, 6.15 at 42, 7.11. In addition, references to the important A.B.A. Model Business Corporation Act are, as they should be, to the most recent version.

[41] § 3.38, at 41. Mortgages can be foreclosed, and hence can be as dangerous as sales.

[42] § 3.63 at 89. This can be dangerous unless an interest in a competing corporation can be effectively prevented. See Slay v. Polonia Publishing Co., 249 Mich. 609, 229 N.W. 434 (1930), and § 7.02 at 4.

[43] § 4.22 at 31. This is dangerous unless it is made very clear in the charter that *all* shareholders, rather than merely all those present, must consent.

[44] § 6.04 at 6.

[45] § 6.06 at 11. This vague test (reasonableness) gives too much leeway to unsympathetic courts.

[46] § 3.80 at 120 (emphasis added).

[47] § 4.22 at 30.

[48] O'Neal § 5.13 at 48. Any attempt to grant more than one vote per share by shareholder agreement would seem to run afoul of N.Y. Bus. Corp. Law §§ 612(a) and 613, which only expressly allow departures from the "one share–one vote" rule if contained in the certificate of incorporation. See also § 9.05 at 13.

though its highest court has not shown notable sympathy for the special needs of close corporations,[49] Delaware's reputation as *the* corporation state is largely based on its adoption of what I would call the "loophole theory." This "Delaware doctrine" is well summarized by Professor Folk as follows:

> If there are two or more ways of doing the same thing, or achieving the same goal, the parties may choose either way, and will not be subject to limitations or restrictions with respect to the way not chosen.[50]

Under this theory statutory provisions are read independently of one another, so that if actions are colorably permitted under any one, they will be upheld. Therefore, broad statutory language authorizing "any provisions for the regulation and management"[51] of the corporation, might justify the liberal interpretation O'Neal proposes.

Few states, however, appear to go along with this Delaware theory.[52] And the New York Court of Appeals, for one, has given little indication of a departure from its long-standing insistence upon clear statutory approbation (rather than mere absence of prohibition), plus strict adherence to the terms of any such authorizing statute, for any special close corporation provisions.[53] However, although Professor O'Neal may be wrong in the predictive sense in these statements, he is, of course, correct in the hortatory one. There is, moreover, some validity to the "self-fulfilling prophecy" theory, and, hepefully, it may work beneficially rather than in its usual actualization of the foreboded.[54]

Conclusion

Like its predecessor, the new edition of *Close Corporations* offers a comprehensive analysis of the relevant statutes and court decisions.

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[49] See cases cited in note 3 supra.

[50] E. Folk, The New Delaware Corporation Law 26 (Corp. Serv. Co. 1967).

[51] See, e.g., A.B.A. Model Bus. Corp. Act § 25.

[52] Compare Hariton v. Arco Electronics, Inc., 41 Del. Ch. 74, 188 A.2d 123 (1963), upholding denial of appraisal rights where what was, in effect, a merger was effected through the technicality of a "sale," with the contrary holdings in Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958); Applestein v. United Board & Carton Corp., 60 N.J. Super. 333, 159 A.2d 146 (Super. Ct. Chan. Div. 1960), aff'd, 33 N.J. 72, 161 A.2d 474 (1960); Rath v. Rath Packing Co., 257 Iowa 1277, 136 N.W.2d 410 (1965).

[53] See, e.g., Model, Roland & Co. v. Industrial Acoustics Co., 16 N.Y.2d 703, 261 N.Y.S.2d 896 (1965). Recent cases also indicate a continuation of that court's antipathy to close corporations. See, e.g., Gearing v. Kelly, 11 N.Y.2d 201, 227 N.Y.S.2d 897 (1962); Matter of Jacobson, 27 N.Y.2d 67, 313 N.Y.S.2d 684 (1970); but see Katzowitz v. Sidler, 24 N.Y.2d 512, 301 N.Y.S.2d 470 (1969).

[54] All courts should uphold *all* shareholder agreements, unless nonparties can show prejudice, or such agreements are voidable on ordinary contracts principles, *not* including "public policy" grounds based on the corporation statute or "principles of corporate law." A satisfactory default law, perhaps based on the Maryland statute, should also be considered by every legislature for those who do not want to undertake the drafting of a comprehensive agreement.

Its value, however, extends beyond the research material compiled within its pages. O'Neal's practical suggestions for the practitioner and his scrupulous investigation of the possible implications of a proposed course of action contribute immeasurably to the new edition's value.

As I noted earlier, O'Neal's first edition has significantly affected the recent judicial and legislative treatment of close corporations. Although the needs of close corporations have attracted considerable attention since the publication of the first edition, as yet the appropriate judicial and legislative response has not universally occurred. O'Neal's new edition retains his concern for these distinctive needs and echoes his earlier exhortation for full recognition of the close corporation's special problems.

The changes which O'Neal advocates will hopefully be forthcoming faster than we anticipate. If they are, it will be largely due to Professor O'Neal's efforts. At least until then, his book will be essential to lead us through the labyrinth to the goal of protecting the small incorporated businessman.

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