Mississippi College Law Review

Volume 25
Issue 2 *Vol. 25 Iss. 2*

Article 4

2006

When Duty Calls: Should the Duty of Majority to Minority Shareholders in Closely Held Corporations Change as a Result of the New Revised Uniform Partnership Act

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Custom Citation
25 Miss. C. L. Rev. 171 (2005-2006)

WHEN DUTY CALLS: SHOULD THE DUTY OF MAJORITY TO MINORITY SHAREHOLDERS IN CLOSELY HELD CORPORATIONS CHANGE AS A RESULT OF THE NEW REVISED UNIFORM PARTNERSHIP ACT?

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I. INTRODUCTION

The Mississippi Legislature recently adopted the Revised Uniform Partnership Act (RUPA), which became effective on January 1, 2005.[2] The Revised Act made several significant changes to partnership law, including the addition of section 404, which provides specific rules concerning a partner's duty of loyalty and care.[3] As a result of prior case law applying partnership duty to closely held corporations, the question arises as to what effect RUPA will have on the duty in closely held corporations.[4] This Comment will address the previous treatment of duties in both partnerships and closely held corporations and attempt to predict the effect of the RUPA on the duty in closely held corporations.

II. BACKGROUND

A. What is Duty?

Fiduciary duty is a contractual term—primarily the duty of unselfishness—that applies in a situation where a principal delegates management power to an agent.[5] In this type of situation the agent may have the incentive to use control to benefit herself rather than the principal.[6] One way for the principal to protect his interests is to impose upon the agent a general "fiduciary duty of unselfishness."[7] This fiduciary relationship is a relationship of "trust and confidence" arising by the principal placing the control over his property in the hands of the agent.[8]

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2. *See* MISS. CODE ANN. § 79-13-101 et seq. (adopted Apr. 29, 2004 and effective from and after Jan. 1, 2005).

3. Uniform Partnership Act of 1997 § 404 (2004).

4. See discussion *infra* Sec. III.B.

5. Larry E. Ribstein, *Fiduciary Duties and Limited Partnership Agreements*, 37 SUFFOLK U. L. REV. 927, 937 (2004).

6. *Id.*

7. *Id.*

8. Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75, 80 (2004).

An agreement to enter into a fiduciary relationship generates both a duty of loyalty and a duty of care.[9] While these duties are strikingly different, they relate to and overlap with each other.[10] The duty of care is often articulated as follows:

> A director or officer has a duty to the corporation to perform the director's or officer's functions in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.[11]

A second duty owed to the corporation is a multifaceted duty of loyalty, of good faith, a central sphere of which has been recently labeled as the duty of fair dealing.[12] As one court expressed:

> [T]he duty goes beyond . . . and is coextensive with the legitimate, enduring interests of the corporation. Loyalty to those interests is the corporation's due. The duty of loyalty takes no canonical form. It is as complex as corporate interests and officer temptations and means of descent from grace.[13]

The extent and nature of these two duties vary according to each business relationship and the contractual agreements within the business. In addressing issues relating to fiduciary obligations, courts most often rely on statutory language as well as case law from their own and other jurisdictions.

B. Importance of Duty in Closely Held Corporations

A closely held corporation is defined as a "corporation having fifty or fewer shareholders where the management operates in an informal manner akin to a partnership."[14] While holders of stock in a pubic corporation can readily sell their stock when disagreements in management issues arise, shareholders in small, closely held corporations usually do not have an

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9. *Id.* (noting the tension that these two duties create: "[T]hese two competing claims reflect a tension between satisfying the duty of loyalty and promoting the duty of care, duties that wind around each other like a double helix comprising the fiduciary obligation.").

10. Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 84 (Miss. 1992).

11. AMERICAN LAW INSTITUTE, PRINCIPALS OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS, § 4.01(a) (proposed final draft 1992). *See* Derouen v. Murray, 604 So. 2d 1086, 1092 (Miss. 1992).

12. *Omnibank of Mantee*, 607 So. 2d at 90. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 11, at § 5.01. *See also Derouen*, 604 So. 2d 1086; Hill v. Se. Floor Covering Co., 596 So. 2d 874, 877 (Miss. 1992).

13. *Ominbank of Mantee*, 607 So. 2d at 90.

14. Hall v. Dillard, 739 So. 2d 383, 386 (Miss. App. 1999).

open market for selling shares.[15] Because there is no market for close corporate stock, these shareholders are essentially trapped. Deciding to form the business as a corporation rather than a partnership will not relieve the business operation of fiduciary obligations.[16]

The unique characteristics of a closely held corporation, including the small number of shareholders, the lack of a market for corporate stock, and the considerable majority shareholder participation in the corporation's management, create the potential for majority shareholders to abuse and disadvantage minority shareholders.[17] Judge John H. Doyle told a story that illustrates this potential for abuse: "In 1893, a prominent Eastern newspaperman was asked, 'Sir, what are the shares of your company worth?' His reply[:] 'There are 51 shares that are worth $250,000. There are 49 shares that are not worth a —- —-.'"[18] The minority interest in closely held corporations is at substantial risk due to the conduct of the majority. This is an extremely dangerous position for the minority shareholder because the owners have the potential to completely lose their investment.[19] Adherence by majority shareholders to the "fiduciary duty of strict fairness" is especially significant in the framework of closely held corporations.[20]

Most often, closely held corporations arise out of personal relationships such as between family members or friends.[21] Ironically, it is this type of enterprise that becomes a frequent setting for the manipulation of minority shareholders when disagreements cause the underlying personal relationship to fall apart.[22] This vulnerability of minority shareholders in the context of closely held corporations is well documented and serves as the basis for courts to impose a fiduciary duty upon the majority requiring it to act with the utmost good faith and loyalty in the business transactions.[23]

III. CORRELATION BETWEEN PARTNERSHIPS AND CLOSELY HELD CORPORATIONS

Numerous courts, including the Mississippi Supreme Court, have acknowledged the similarities between closely held corporations and partnerships.[24] Courts often impose upon shareholders in closely held

15. 12B FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5713 (2004).

16. *Id.*

17. Camille Romero, *The Fiduciary Duties Owed in a New Mexico Closely Held Corporation:* Walta v. Gallegos Law Firm, P.C., 34 N.M. L. REV. 181, 186 (2004).

18. Arthur D. Spratlin Jr., *Modern Remedies for Oppression in the Closely Held Coporation*, 60 MISS. L.J. 405, 406 (1990) (citing Humphreys v. Winous Co., 133 N.E.2d 780, 783 (Ohio 1956) (quoting from Judge John H. Doyle's address to the Ohio State Bar in 1893)).

19. *Id.* at 407. *See The Strict Good Faith Standard—Fiduciary Duties to Minority Shareholders in Close Corporations*, 33 MERCER L. REV. 595, 596 (1982) (discussing potential abuses of minority because of majority's stronger position).

20. Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984), *aff'd* 802 F.2d 448 (3d Cir. 1986).

21. *Id.*

22. *Id.*

23. *Id.*

24. Romero, *supra* note 17, at 187 (citing Donohue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 n.17 (Mass. 1975). *See* Fought v. Morris, 543 So. 2d 167 (Miss. 1989).

corporations the same fiduciary duties that partners owe each other because of the striking resemblance between close corporations and partnerships as well as the risks to the minority interests in a close corporation.[25]

A. The Partnership Finest Duty of Loyalty and Care

In 1928, Judge Cardozo, writing for the Court of Appeals of New York, announced what is now one of the most often quoted statements of partnership law—"Many forms of conduct permissible in a workday world for those acting at arm's length[ ] are forbidden to those bound by fiduciary ties."[26] *Meinhard v. Salmon* held that partners in a partnership owe to one another the duty of the finest loyalty, which is not simply honesty alone but rather "the punctilio of an honor the most sensitive."[27] Unfortunately, recurring references to directors' and officers' "fiduciary duties" imply a less than helpful or accurate description of such duties, and Cordozo's quote often sounds so good that one seldom stops to decide what exactly it means.[28]

Partnership agreements are often used to create the rights and obligations of the partnership.[29] In addition to the rights, duties, and liabilities included in the partnership agreement, there is the inherent fiduciary duty between partners to act in the "best interests" of the partnership when carrying out the partnership's business.[30] Because the degree of fiduciary duties owed between partners varies with each particular circumstance, the court must thoroughly analyze the partnership relationship in order to determine the applicable standard for whether there has been a breach of a partner's fiduciary duty.[31]

B. Application of Partnership Duty to Closely Held Corporations

There is a long history of imposing fiduciary duties upon shareholders in close corporations.[32] The United States Supreme Court first acknowledged fiduciary obligations between majority and minority shareholders of

25. *See Donohue*, 328 N.E.2d at 515.

26. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. App. 1928).

27. *Id.*

28. James L. Robertson, *The Law of Corporate Governance: Coming of Age in Mississippi*, 65 MISS. L.J. 477 (1996).

29. Richard Kan, *Fiduciary Relationship Among Partners*, 29 ILL. LAW & PRAC. PARTNERSHIP § 32 (July 2004).

30. *Id.*

31. *Nature of Obligation Between Partners*, 68 C.J.S. *Partnership* § 77 (2004).

32. L. Clark Hicks Jr., *Corporations—Fiduciary Duty—In a Close Corporation, a Majority Shareholder Owes a Fiduciary Duty Towards the Minority When Seeking a Controlling Share*, 60 MISS. L.J. 425, 426 n.9 (1990). In the development of corporate law concerning fiduciary duties of shareholders, courts established very early that the managers and directors of a corporation owe a fiduciary duty of good faith to the corporation and its shareholders. *See, e.g.*, Elliot v. Baker, 80 N.E. 450 (Mass. 1907); Gibson v. Manuel, 534 So. 2d 199, 203 (Miss. 1988) (fiduciary duty of corporate directors and officers required defendant to discharge duty in "good faith and with that degree of care" dictated by such a duty); Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332 (Miss. 1979) (holding that "self-dealing" where corporation and fiduciary bargain on opposite sides of a transaction automatically raises presumptive

a corporation in *Southern Pacific Co. v. Bogert.*[33] The Court established the requirement that majority shareholders who control the corporation's stock are obligated to consider the minority interest.[34] However, the Court's imposition of fiduciary duties between majority and minority shareholders did not receive immediate acceptance in the context of closely held corporations.[35]

In *Fought v. Morris*, the Mississippi Supreme Court had the opportunity to examine the issue of whether defendants in a closely held corporation breached a fiduciary duty by not following the terms of a stock redemption agreement.[36] The *Fought* court held that shareholders in a close corporation have a fiduciary duty of good faith towards each other, and that a majority shareholder's attempt to gain a controlling interest must be "intrinsically fair" to the minority shareholder.[37] The opinion began by reviewing prior Mississippi case law to determine if there was direct precedent on which to base the analysis of the issue. One such case was *Ross v. Biggs,* where the Mississippi Supreme Court held that stockholders in a family corporation do not "bear toward each other the same relationship of trust and confidence which prevails in partnerships."[38] The *Fought* court recognized that this statement fails to consider the fact that the shareholders, directors, and managers of closely held corporations are often the same people.[39]

The Mississippi Supreme Court had not discussed this subject since *Ross*, so it looked to other jurisdictions that had.[40] In *Donahue v. Rodd Electrotype*, the Supreme Judicial Court of Massachusetts noted the resemblance between close corporations and partnerships, and imposed a "strict good faith standard" upon shareholders in close corporations.[41] The *Donahue* court stated that the management standards and responsibilities of shareholders in closely held corporations are substantially the same as those among partners, and are stricter than those of publicly held corporations.[42] The *Fought* court also discussed *Orchard v. Covelli*, which involved a close corporation whose majority shareholders did not act fairly towards

conflict of interests); Am. Empire Life Ins. Co. v. McAdory, 319 So. 2d 237, 240–41 (Miss. 1975) (corporate officers who turned corporate opportunity to their personal benefit breached fiduciary duty owed to corporation and shareholders). *See generally* W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 838 (rev. perm. ed. 1986 & Supp. 1988) (all jurisdictions now recognize fiduciary duty between officers and shareholders).

33. S. Pacific Co. v. Bogert, 250 U.S. 483 (1919).

34. *Id.* at 487–88.

35. *See* Hicks, *supra* note 32, at 428 n.16.

36. Fought v. Morris, 543 So. 2d 167 (Miss. 1989).

37. *Id.* at 171.

38. *Id.* at 169.

39. *Id.* at 170.

40. *Id.*

41. *Id.* (citing Donahue v. Rodd Electrotype, 328 N.E.2d 505 (Mass. 1975)).

42. *Donahue*, 328 N.E.2d at 515–16. The *Fought v. Morris* opinion notes that Massachusetts courts continued to apply this good faith standard in *Hallaham v. Haltom Corp.*, 385 N.E.2d 1033 (Mass. App. Ct. 1979).

the minority during dissolution of the corporation.[43] The *Orchard* court acknowledged the "vulnerability" of minority shareholders, and required the controlling interest to act with a duty of loyalty and fairness to minority shareholders.[44]

The court in *Fought* followed the *Orchard* court's rationale and held that the majority shareholder's action in a closely held corporation must be "intrinsically fair" to the minority interest.[45] Hence, shareholders in a close corporation can hold each other to the same fiduciary duties of good faith and loyalty as partners in a partnership.[46] With this opinion, Mississippi joined with the majority of jurisdictions who impose fiduciary obligations on majority shareholders to minority shareholders in closely held corporations.[47] Because courts have realized how minority shareholders in close corporations differ from minority shareholders in publicly held corporations, many courts, including those in Mississippi, are recognizing a fiduciary duty owed by the majority to the minority shareholders.[48] However, instead of developing a separate standard of fiduciary duties for shareholders in closely held corporations, courts in Mississippi and elsewhere are analogizing closely held corporations to partnerships, probably because each jurisdiction has well-developed partnership case law to serve as precedent.[49]

C. Newly Defined Duty of the Revised Uniform Partnership Act

The Revised Uniform Partnership Act (RUPA) added section 404, General Standards of Partner's Conduct, in an effort to provide clarification and definition to fiduciary obligations among partners in a partnership.[50] This section is structurally different from the previous version of the Uniform Partnership Act, which only touches on a partner's duty of loyalty and leaves further development of the fiduciary duties to the common law of agency.[51] Subsection 404(b) begins by classifying a partner's duty of loyalty to the partnership and the other partners as limited to the following:

> (1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the

43. *Fought*, 543 So. 2d at 170 (citing Orchard v. Covelli, 590 F. Supp. 1548 (W.D. Pa. 1984)).

44. *Orchard*, 590 F. Supp. at 1557 (stating that this vulnerability stems from several factors including that the majority is able to dictate the manner in which the corporation is run, that the shares are not publicly traded, and that the minority interest is unattractive to a prospective purchaser).

45. *Fought*, 543 So. 2d at 171.

46. *Id.*

47. *See* Retzer v. Retzer, 578 So. 2d 580, 594 (Miss. 1991) (noting the difference in duties existing between majority and minority shareholders in publicly held and closely held corporations). *See also* Hall v. Dillard, 739 So. 2d 383 (Miss. App. 1999) (holding that stockholders of close corporations must bear toward each other the same relationship of trust and confidence that prevails in partnerships).

48. *See* Spratlin, *supra* note 18, at 412.

49. *See* Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 457 (N.M. 2002). *See also* Romero, *supra* note 17, at 188.

50. Uniform Partnership Act of 1997 § 404 (2004).

51. § 404, 4 Uniform Laws Annotated 404, cmt. 1 (2004).

> conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
> (2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and
> (3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.[52]

Continuing the rule that partnership property assumed by the partner is held for the benefit of the partnership, Subsection 404(b)(1) is premised on UPA section 21(1).[53] While new to the Act, this specific mention of how partnership property should be appropriated is simply a codification of the existing case law on the issue.[54] Subsection (b)(2) is derived from Sections 389 and 391 of the Restatement (Second) of Agency, and subsection (b)(3), derived from Section 303 of the Restatement (Second) of Agency, is a requirement that the agent act solely on behalf of the principal.[55]

Subsection 404(c) is also new and establishes the duty of care that partners owe to the partnership and to the other partners:

> (c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.[56]

Even though the UPA does not include a statutory duty of care, some courts acknowledge and impose a common law duty of care.[57] The standard of care recognized by most courts and imposed by the RUPA is that of gross negligence.[58]

Another important addition in section 404 is subsection 404(d), which imposes upon all partners the obligation to perform their responsibilities with good faith and fair dealing as defined within the Act, as well as with any duties outlined in the partnership agreement.[59] This obligation is characterized in RUPA as an "ancillary obligation" that affects a partner's actions whether arising under the partnership agreement or the Act.[60] The exact meaning of "good faith and fair dealing" is not precisely defined

52. § 404.
53. § 404, 4 Uniform Laws Annotated 404, cmt. 2 (2004).
54. *Id.*
55. *Id.*
56. § 404.
57. *See* § 404, 4 Uniform Laws Annotated 404, cmt. 3 (2004).
58. *Id.*
59. *Id.* at cmt. 4.
60. *Id.*

under current case law. The drafters of the RUPA chose to leave the terms undefined, enabling courts to review the specific circumstances of each case before establishing what those words mean.[61]

The most recent version of the Uniform Laws Annotated Uniform Partnership Act summarizes those states that have adopted the Revised Uniform Partnership Act, many with their own variations from the original text.[62] Mississippi is not included in the Uniform Laws Annotated summary because of its very recent adoption and effective date of January 1, 2005.[63] As of this writing, thirty-three states and the District of Columbia have adopted RUPA.[64] Due to the short time period the changes have been in place, commentary and law discussing the application and future consequences of the RUPA is scant.

IV. EFFECT OF THE NEW RUPA DUTY ON CLOSELY HELD CORPORATIONS

A review of the concept of duty in both partnerships and closely held corporations, the case law applying the partnership duty to closely held corporations, and the Revised Uniform Partnership Act changes to partnership duty raises the question: what effect, if any, does the RUPA have on fiduciary obligations in closely held corporations? Do the duties change according to the new RUPA-specific rules contained in section 404, or remain as before, unaffected by the new RUPA section? Even though this seems like a clear question that must eventually be answered, there does not appear to be a single case or legal commentary specifically answering it. With that in mind, following are a few concerns that should be addressed when a court is ultimately faced with the issue of deciding what effect the RUPA has on the duty of majority to minority shareholders in closely held corporations.

A major concern stems from the RUPA drafters' attempt to create a comprehensive and exclusive rule encompassing a partner's fiduciary duties. By attempting to draft a rule that categorizes a partner's duty into sections and subsections, the unfortunate result may be that some aspects of fiduciary duty were excluded. For example, some suggest that the RUPA section 403 excluded the common law duty to disclose material information.[65] Even if the drafters did not exclude any particular components of fiduciary duties, the newly added section 404 may have the unintended result of rendering partnership law unable to adapt to changes

61. *Id.*

62. § 404.

63. MISS. CODE ANN. § 79-13-101 et seq. (adopted Apr. 29, 2004 and effective from and after Jan. 1, 2005).

64. National Conference of Commissioners on Uniform State Laws, *Uniform Partnership Act (1994) (1997), available at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upa9497.asp (last visited Jan. 29, 2006).

65. J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS §12:17 (2004) (also noting that there is a possible argument that a disclosure obligation is included in the RUPA § 404(d) obligation of good faith and fair dealing).

in business practices.[66] Rather than setting broad guidelines, the Revised Act attempted to define what is a permissible business practice and what is a breach of fiduciary duties.[67] Certainly when deciding how to define and classify the fiduciary duties of majority to minority shareholders in a close corporation, the goal would be to create broad guidelines rather than strict, inflexible standards.

Despite these few concerns, there was a definite need to clarify and provide some guidance as to what "the punctilio of an honor the most sensitive"[68] means in relation to a partner's duties. Overall, the RUPA drafters seem to have carefully studied the relationship between partners in a partnership and established a set of rules on fiduciary duties that leaves room for future development in the courts and that allows partnerships to include fiduciary provisions in their individual partnership agreements.[69] Placing closely held corporation duties in the context of the already established precedent on partnership duty would provide guidance to courts. In fact, the drafters of the Uniform Limited Partnership Act followed RUPA's framework for partnership fiduciary duties when creating and drafting the ULPA.[70] Thus, any guidance, clarification, or structure the RUPA provides to fiduciary duties of partnerships is available to apply in the context of fiduciary duties in closely held corporations.

As noted above, a too-narrow definition of shareholder fiduciary duties in closely held corporations would not be effective in resolving issues of breach of duties, but some structure or definition is necessary in order for shareholders to properly conduct business. Mississippi has already recognized the unique characteristics of closely held corporations and has imposed upon shareholders in close corporations the fiduciary duties of loyalty and care similar to those between partners in a partnership.[71] If they follow previous rationale and analysis, it seems that Mississippi courts should find that the fiduciary obligations in closely held corporations will change and adapt along with the partnership duties in RUPA. The RUPA section 404 does not drastically overhaul partnership duties, but rather clarifies and codifies existing common-law and case-law duties. Therefore, Mississippi courts are likely to apply the new RUPA section that specifically outlines partnership duties to closely held corporation duties in an effort to provide structure and clarification to closely held corporation law.

However, Mississippi should carefully approach the decision of how to apply the new RUPA section on partnership duties to existing shareholder duties in closely held corporations. The course that Mississippi corporate law takes should be informed, and it should thoroughly consider the pros

66. J. William Callison & Allan W. Vestal, *The Want of a Theory, Again*, 37 SUFFOLK U. L. REV. 719, 727 (2004).

67. *Id.*

68. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. App. 1928).

69. *See* Uniform Partnership Act of 1997 § 404, 4 Uniform Laws Annotated 404, cmt. 1 (2004). *See also* CALLISON & SULLIVAN, *supra* note 65.

70. *See* Callison & Vestal, *supra* note 66.

71. Fought v. Morris, 543 So. 2d 167, 171 (Miss. 1989).

and cons of applying this heightened fiduciary duty to closely held corporations. Thus far it appears that courts, including Mississippi's, have been too willing to extend partnership fiduciary principles in the close-corporation context. While the close-corporation structure does in fact resemble that of a partnership, there are critical differences between these two business associations that should be addressed. One difference is that partners are agents of the partnership, and, as a result, have the legal ability to bind the partnership for their actions. Another difference is that all partners have personal, unlimited liability for partnership debts. Because the Uniform Partnership Act recognizes the potential hazards of the unique partnership relationship, it imposes fiduciary duties on all partners.

Shareholders in close corporations do not have the same interdependency relationships as partners in partnerships. Also, shareholders are not liable for the debts of their corporation. These significant differences should be carefully considered when deciding whether to impose partnership fiduciary duties on shareholders of close corporations. While courts are often quick to note the similarities between a close corporation and a partnership, they sometimes fail to appreciate that partnership fiduciary duties are tailored to the unique partnership relationship.

If faced with the decision of whether to apply the new RUPA partnership duty section to close corporations and with the question of what effect the new duty section will have on existing partnership law, Mississippi courts should carefully examine the differences and similarities between the two forms of business associations. They should analyze the consequences of applying partnership duty to shareholders in close corporations. Perhaps one approach would be to decide whether there should be any special, judicially created rules to protect minority shareholders of closely held corporations. A minority of courts and commentators suggests that closely held corporations should use contractual mechanisms to protect themselves rather than relying upon the courts to create special rules. Shareholders in close corporations can use private contracting mechanisms such as buy-sell agreements and supermajority requirements to protect themselves. Treating the two business forms alike has the potential to undermine the unique characteristics of the corporation and the partnership, and can effectively deny society the full benefits inherent in the corporate form.

Lastly, Mississippi courts should use caution to avoid stepping into the role of the legislature when judicially creating fiduciary obligations between majority and minority shareholders of close corporations. If there is a need to define or clarify the fiduciary obligations among shareholders in close corporations, that task should fall on the shoulders of the state legislature—not the judiciary.

V. CONCLUSION

The last three decades have produced significant changes in how courts look at and treat closely held corporations.[72] As courts continue to recognize the uniqueness of closely held corporations and the vulnerability of their minority shareholders, they should use the RUPA treatment of partnership duties as guidance, while also carefully considering the differences between partnerships and close corporations. Mississippi courts should take the opportunity to reevaluate fiduciary duties of shareholders in closely held corporations and decide whether it would be better to continue applying the partnership duty to shareholders or to leave that decision to the legislature. If Mississippi chooses to apply RUPA's new section to the close corporation context there should be a developing body of case law that could be used to analyze cases involving fiduciary duties in closely held corporations. Only time will tell whether Mississippi courts will apply the RUPA section 404 to closely held corporations, but when duty calls, the court should approach the decision with caution and carefully consider the consequences before applying the newly outlined duties of loyalty and care to closely held corporations.

72. Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193 (1988).