The Study on the Transplantation of Controlling Shareholders' Fiduciary Duty from U.S. to China

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I. INTRODUCTION

Started with the "Berle-Means" thesis,[1] the attention of both the theoretical and practical field is paid on the construction of the board of directors' system. Nonetheless, LLSV proved through their convincing empirical study that only a handful of countries in which the shareholder's right is well protected have the dispersed equity structure, while the equity structure is concentrated around the world.[2] Under such concentrated holdings structure, corporate governance is not only the problem of agency relationship between shareholder and internal manager, but also about the balance of power between the majority and the minority shareholder. According to the traditional theory of corporate law, shareholders do not assume any other liabilities except the duty of capital contribution. However, as a legal entity, a company cannot directly declare its will just like the natural person and the realization of its decision can only be implemented through its members' declaration of will. The modern corporate law applies democratic decision-making mechanisms to corporate governance and the capital majority rule is the way through which a company unifies its will. That is to say, the system regards the will of the majority shareholders as the implied will of the company binding on all shareholders.[3] Inevitably, the will of the majority shareholders does not necessarily reflect the interests of the company and other shareholders.[4] So when there is in lack of effective mechanisms to balance the rights and power between the controlling shareholders and other stakeholders, many cases emerge in which the controlling shareholders abuse their controlling power to make excess personal profits and then shift the adverse consequences to the minority shareholders. Judicial practices in almost all countries notice the fact that the

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[1] *See generally* Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Private Property (1932).

[2] Rafael La Porta, Florencio López-De-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471, 512 (1999).

[3] *See* Foss v. Harbottle, (1843) 67 Eng. Rep. 189 (Ch.) (establishing the "majority rule principle," which ruled that if a decision or an action is confirmed or ratified by the simple majority shareholders, the court would not interfere with corporate behaviors).

[4] 朱慈蕴 (Zhu Ciyun), 资本多数决原则与控制股东的诚信义务 [*The Capital Majority Rule and Controlling Shareholders' Fiduciary Duty*], 法学研究 [CHINESE J.L.], issue 4, at 110 (2004).

exercise of the controlling power will inevitably lead to conflicts of interests between shareholders.[5] Therefore, establishing a restrictive mechanism which protects the rights of the controlling shareholders has become an important research topic in the field of company law.

Due to the unique historical background, in most stock companies in China, especially public companies, there is the phenomenon of "one shareholder dominance."[6] Originally, excessive concentration of shares is apt to cause the abuse of power. What makes the situation worse in China is the imperfection of the mechanism protecting minority shareholders in the securities market. As a result, the cases happen all the time in which the controlling shareholders "tunneling" company property,[7] unfair self-dealing,[8] interfering in the company management[9] and other behaviors violating the benefits of the company and minority shareholders. Chinese scholars think that the lack of controlling shareholder's fiduciary duty in Chinese Company Law is an important reason leading to controlling shareholder's abuse of their controlling power in stock companies.[10] Therefore, many researches in company law suggest that we should bring in the controlling shareholder's fiduciary duty[11] in Chinese Company

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[5] 徐晓松 (Xu Xiaosong) & 徐东 (Xu Dong), 我国《公司法》中信义义务的制度缺陷 [*Institutional Defects of Fiduciary Duty in Company Law of the People's Republic of China*], 天津师范大学学报 [J. TIANJIN NORMAL U.], issue 1, at 52 (2015).

[6] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), 论股份公司控制股东的义务与责任 [*Studies on Controlling Shareholders' Fiduciary Duty in Listed Companies*], 法学 [L. SCI.], issue 2, at 60 (2002).

[7] 干胜道 (Gan Shengdao), 自由现金流量专题研究 [Monographic Study on Free Cash Flow], at 120 (2009). The book discussed the top 10 controlling shareholder tunneling cases of China in 2005.

[8] 周慧君诉嘉兴市大都市置业有限公司、嘉兴大都市实业集团有限公司盈余分配权纠纷案 [Zhou Huijun v. Dadushi Properties Development Co., Ltd. in Jiaxing City and Dadushi Industry Group Co., Ltd. in Jiaxing] (2005) 浙民二终字第 288 号, (Zhejiang High People's Ct. 2006) CLI.C.179684 Chinalawinfo.

[9] 罗珉 (Luo Min), 猴王集团破产案的启示 [*The Lesson from the bankruptcy case of Monkey King Group*], 人民日报 [PEOPLE'S DAILY], Apr. 13, 2001, at 5.

[10] 徐晓松 (Xu Xiaosong) & 徐东 (Xu Dong), *supra* note 5, at 54.

[11] United States firstly put forward to the notion of fiduciary duty and has exerted a worldwide influence. However, the statute laws and case laws of all states strictly distinguish their governing mechanisms according to different business entities. In the area of close company, state corporation law and case law provides three main relief approaches: controlling shareholder's fiduciary duty, shareholder's oppression system and contractual system between shareholders. In the field of public company, minority shareholders usually passively participate in the corporate governance and the protec-

Law. Controlling shareholder's fiduciary duty is an important concept in American company law. The rule was established by the court with a strong character of openness, which makes it quite difficult to bring in the concept. Whether it is feasible or not should be based on a fully understanding of not only the rule itself but also the reality of China. Although there are plenty of research results relating to the topic in China, it still lacks a systemic introduction on the controlling shareholder's fiduciary duty of the United States. Therefore, a systematic introduction on the American fiduciary duty rule is of great significance in defining our own regulation system toward the controlling shareholders.

By investigating the American fiduciary duty system of controlling shareholder and analyzing the possibility of bringing in the system to China, this paper argues that: the controlling shareholder's fiduciary duty rule, which was established by American courts, is a strongly opening concept. It is still unclear in its content and is narrow in its application. Actually, in the United States, the specific rules relating to the principle diverge seriously among the various states[12] and its rationality is still a controversial topic in its academic field.[13] In addition, the legal system for the regulation of controlling shareholder's abusing their controlling power is complicated and systematic. The effective implementation of the controlling shareholder's fiduciary duty system needs cooperation with and supplement of other related regulations.[14] In the absence of such supporting regulations in China, just introducing the principle in the corresponding regulations is difficult to achieve the same aim as it has in the United States. Without sufficient demonstration and practice,

tion of the public markets. In practice, except in the case of related party transactions, the public company's shareholder bears no obligation to other shareholders.

Although the Chinese scholars did not explicitly point out the specific rules of the controlling shareholders' fiduciary duty in American, the scholars rarely discuss this issue in the context of American public company regulations. Instead, many Chinese scholars mentioned the rule of Donahue case in their current Chinese law researches, which is one of the leading rules in the controlling shareholders' fiduciary duty in close company. This article is a reflection and criticism to these researches, therefore, the author would discuss the preferred rule, controlling shareholders' fiduciary duty in close company, and try to provide an appropriate path and thought for developing the regulation of the controlling shareholders of public companies in China.

[12] This opinion would be discussed in details in Part IV.

[13] This opinion would be discussed in Part V.B

[14] This opinion would be discussed in Part III.

Chinese scholars suggest modifying the company law to make the controlling shareholder's fiduciary duty become a basic principle of corporate governance in our country. It is a suggestion that will certainly shock the existing shareholder system. In fact, legislators and scholars in China cannot reach a consensus on specific rules of the transplantation of controlling shareholder's fiduciary duty.[15] Therefore, this paper argues that it is not suitable for China to bring in the American controlling shareholder's fiduciary duty to Chinese Company Law. However, we can learn from the idea and spirit behind it to enhance the protection of minority shareholders and find solutions from the current company law system.

Part II introduces the basic principles for regulating the controlling shareholder's abuse of their power in Chinese Company Law and the current situation and problems of the research on the controlling shareholder's fiduciary duty among Chinese law scholars. Part III introduces the facts that controlling shareholder's fiduciary duty functions with other rules. Instead, the controlling shareholder's fiduciary duty system, the shareholder oppression system and the shareholder contract system constitute together the legal frame to regulate controlling shareholder's abuse of their controlling power in United States' close company; Part IV introduces the specific application of the American controlling shareholder's fiduciary duty in close companies, and Part V analyzes the feasibility of bringing in the rule to China. Part VI is the conclusion of this paper.

II. CURRENT SITUATION OF REGULATIONS OF CONTROLLING SHAREHOLDERS IN CHINA

A. The Principle of Controlling Shareholder's Duty in Chinese Company Law

In Chinese modern history, the social and economic system has changed frequently. It changed from the feudalism of Qing Dynasty to capitalism of Republic of China, from socialism planned economy of the early stages of the People's Republic of China ("PRC") to the socialist market economic system after the

[15] This opinion would be discussed in Part II.

Chinese economic reform. Although congresses and governments in different periods had issued laws and regulations to regulate controlling shareholders' power, these laws and regulations could not play their role effectively due to the unitability of society. In 1993, PRC established its first Company Law. Thus, China restored the joint-stock company system, laying the foundation for the reform of state-owned enterprises. It greatly promoted the transformation and development of state-owned enterprises. At the same time, the recovery of company system also laid the basis for the rapid development of private enterprises. In the process of rapid economic development in China, especially in the late 1990s, the infringement of controlling shareholders on the interests of the company became increasingly serious, and shocking corporate scandals emerged frequently. In addition, in recent years, in the process of the reform of state-owned enterprises, the shares of state-owned enterprises mainly are state-holding non-tradable shares. It makes controlling shareholders remain unchanged and difficult to be contained by the market. Moreover, private enterprises generally use public subsidiary in financing. Therefore, in many stock companies in China, especially public companies, there is the phenomenon of "one shareholder dominance."[16] Generally, the excessive concentration of shares is easy to cause the abuse of power. What makes the situation worse in China is the imperfection of minority shareholders protection mechanism in the securities market. As a result, cases happen all the time in which the controlling shareholders "tunneling" company property, unfairly self-dealing, interfering with the company management and violating the benefits of the company and minority shareholders in other ways.

Under such situation, China made large-scale revisions on the Company Law in 2005. In order to regulate the controlling shareholders' misbehavior, the new version specially added the rule of "pierce the corporate veil" (article 20.3), forbad misusage of power principle (article 20.1), added the responsibility to compensate damages for shareholders' abuse of right (article 20.2), added directors' duty of loyalty and diligence (article 147), and allowed shareholder derivation action (article 153).

[16] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6.

Article 20(1) of Chinese Company Law is the general rule of shareholder's duty, which provides:

> The shareholders of a company shall abide by the laws, administrative regulations and bylaw and shall exercise the shareholder's rights under the law. None of them may injure any of the interests of the company or of other shareholders by abusing the shareholder's rights, or injure the interests of any creditor of the company by abusing the independent status of legal person or the shareholder's limited liabilities.[17]

Some scholars argue that this Article is the general rule of controlling shareholder's duty in Chinese law.[18] However, through a quick look at the content of this Article, it is easily discovered that this rule targets at all the shareholders of a company, not only the controlling shareholders. It does not stipulate any special rules for controlling shareholders based on their special status or enumerate any concrete standards for deciding whether the obligation is breached.[19] Neither can shareholder's fiduciary duty to other shareholders be explained nor be deduced from this rule. In addition, the prohibition on abuse of rights is a general obligation deriving from the doctrine of good faith and only requires people not to infringe on others' rights without justification when exercising their own rights. Unlike US law that requires fiduciaries to act for the benefit of beneficiaries, requirements of prohibition on abuse of rights in Chinese law are much looser. Actually, Chinese Company Law has not set forth any clear rules regulating controlling shareholder's duties and responsibilities.

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[17] 公司法 [Company Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Dec. 28, 2013, effective Jan. 1, 2006) art. 20.1, CLI.1.218774 Chinalawinfo.

[18] 范世乾 (Fan Shiqian), 控制股东滥用控制权行为的法律规制：中国公司法相关制度的构建 [Legal Regimes Regarding Controlling Shareholders' Liability: Construction of Chinese Corporation Law], at 23 (2010).

[19] 苏今 (Su Jin), 公司法第二十条第一款不能作为独立判案依据 [*Paragraph 1 of article 20 of Company Law Could Not Be Treated as An Independent Legal Ground of Judgment*], 人民法院报 [PEOPLE'S CT. DAILY], July 23, 2014, at 7.

B. Academic Achievements on Controlling Shareholder's Fiduciary Duty

Currently in China, there are plenty of research achievements focusing on controlling shareholder's fiduciary duty system. Considering the opinions of national scholars, in Chinese academia, main consensus on controlling shareholder's fiduciary duty system can be summarized as four points: (1) controlling shareholder's fiduciary duty should be introduced to China;[20] (2) shareholders in all types of companies should be bound by fiduciary duty, especially controlling shareholders in public companies;[21] (3) controlling shareholder's fiduciary duty includes duty of loyalty and duty of care;[22] (4) regulations on corporation groups such as parent companies and their subsidiaries should

[20] *See generally* 殷召良 (Yin Shaoliang), 公司控制权法律问题研究 [A Study on the Controlling Power in Corporations] (2001); 习龙生 (Xi Longsheng), 控制股东的义务和责任研究 [A Study on the Duties and Responsibilities of Controlling Shareholders] (2010); 汤欣 (Tang Xin), 控股股东法律规制比较研究 [A Comparative Study of Regulations on Controlling Shareholders] (2006); 王保树 (Wang Baoshu), 转型中的公司法的现代化 [Modernization of Chinese Company in the Period of Transformation] (2006); 张圣怀 (Zhang Shenghuai), 中国上市公司控制权法律问题研究：缺陷与改良 [A Study on the Controlling Power of Chinese Public Corporations: Defects and Modifications] (2007); 白慧林 (Bai Huilin), 控股公司控制权法律问题研究 [A Study on the Controlling Power of Parent Corporations] (2010); 王继远 (Wang Jiyuan), 控制股东对公司和股东的信义义务 [Research of Controlling Shareholders' Fiduciary Duties to Corporations and other Shareholders] (2010); 张民安 (Zhang Min'an), 公司少数股东的法律救济 [*Studies on The Legal Remedies to Minority Shareholders*], 法制与社会发展 [L. & SOC. DEV.], issue 3 (1995); 郭富青 (Guo Fuqing), 公司收购中目标公司控股股东的诚信义务探析 [*A Study of Target Company's Controlling Shareholders' Fiduciary Duty in Merger and Acquisition Cases*], 法律科学 [L. SCI.], issue 3 (2002); 朱慈蕴 (Zhu Ciyun), *supra* note 4; Xu Chenggang & Katharina Pistor, *Fiduciary Duty in Transitional Civil Law Jurisdictions: Lessons from the Incomplete Law Theory*, *in* GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 77 (Milhaupt & Curtis J. eds., 2003).

[21] For Public Corporations: 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6; 汤欣 (Tang Xin), 控股股东的受信义务——从美国法上移植 [*Controlling Shareholders' Fiduciary Duty—Educed from the United States*], 清华法律学堂 [TSINGHUA L. NET], Sept. 8, 2012, *available at* http://academic.law.tsinghua.edu.cn/homepage/index.php?r=show/index&id=2435&cate_id=190%2C.

For Limited Liability Corporations: 甘培忠 (Gan Peizhong), 有限责任公司小股东利益保护的法学思考——从诉讼视角考察 [*Minority Shareholders' Protection in Limited Liability Company—From the Perspective of Litigation*], 法商研究 [STUD. L. & BUS.], issue 6 (2002).

[22] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 63; 王继远 (Wang Jiyuan), *supra* note 20.

learn from the German Konzern system.[23]

Additionally, many scholars have conducted research on introducing the framework of controlling shareholder's fiduciary duty. However, they are still in dispute about which concrete rules should be introduced to China.

1. Jurisprudential Basis of Controlling Shareholder's Fiduciary Duty

Scholars in China have not reached an agreement about why controlling shareholders should bear more obligations than other shareholders. Among opinions, Professor Wang Baoshu holds that controlling shareholders of many stock companies play a dual role, both as the decision maker and as the executive officer, who enjoy far more rights than ordinary shareholders.[24] Based on the principle that obligations correspond rights, special obligations should therefore be imposed on controlling shareholders to regulate certain behaviors. Professor Zhu Ciyun considers that due to aberrance of majority rule (decided by capital), controlling shareholders get super power and may abuse this power for their own interest, which will destroy the equality of shareholders.[25] This provides the basis for controlling shareholder's fiduciary duty owed to minority shareholders. Professor He Meihuan believes that control brings obligation and holding more voting rights does not necessarily entail risk unless holders actually control the company.[26] Doctor Xi Longsheng reckons that explicit or implied agency relationship between subject of controlling power and related interested parties are the premise and foundation of former's fiduciary duty.[27]

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[23] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 63; 汤欣 (Tang Xin), *supra* note 20, at 249.

[24] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 61.

[25] 朱慈蕴 (Zhu Ciyun), *supra* note 4, at 109–11.

[26] 何美欢 (He Meihuan), 公众公司及其股权证券 [Public Corporations And Their Securities], at 823 (1999).

[27] 习龙生 (Xi Longsheng), *supra* note 20, at 94.

2. Who Owe Whom Fiduciary Duty

Scholars in China have disagreed on the subjects of fiduciary duty.

With respect of the scope of controlling shareholders, expression used in Chinese Company Law is share-controlled shareholders.[28] This is to emphasize that by means of holding shares; shareholders can influence decisions of shareholder meetings and then get the controlling power. In fact, besides shares, controlling shareholders can also achieve to control companies through other methods, for example controlling power agreements. Compared with current law, almost all the scholars in China unanimously agree to expand the existing scope of controlling shareholders and focus on shareholder's controlling power to companies. They consider people to be controlling shareholders as long as they are able to get and exercise actual controlling power to business affairs.[29] Additionally, other scholars argue that on the grounds of current legislation and judicial practice needs, fiduciary duty aims at controlling power and its abuse problem, and its obligator should point at subject of controlling power. Therefore, subject of fiduciary duty could include controlling shareholders, controlling operators and actual controllers.[30]

Scholars are also in disagreement about whether minority

[28] "A controlling shareholder refers to a shareholder whose capital contribution occupies 50% or more in the total capital of a limited liability company or a shareholder whose stocks occupies more than 50% of the total equity stocks of a joint stock limited company or a shareholder whose capital contribution or proportion of stock is less than 50% but who enjoys a voting right according to its capital contribution or the stocks it holds is large enough to impose an big impact upon the resolution of the shareholders' meeting or the shareholders' assembly." 公司法 [Company Law] (promulgated by the Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014) art. 216.2, CLI.1.218774 Chinalawinfo.

[29] 赵晓华 (Zhao Xiaohua) & 赵宝奇 (Zhao Baoqi), 控制股东:公司法框架下的责任重构 [*Controlling Shareholder: Obligation under Corporation Law*], 河北法学 [HEBEI L. SCI.], issue 5, at 101–02 (2004); 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 60; 范世乾 (Fan Shiqian), *supra* note 18, at 28.

[30] 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), 公司控制权滥用规制的法理基础与司法判断 [*The Legal Basis and Judicial Judgment of Controlling Shareholder's Abuse of Power*], 社会科学战线 [SOC. SCI. FRONT], issue 5, at 190 (2011); "Actual controller refers to anyone who is not a shareholder but is able to hold actual control of the acts of the company by means of investment relations, agreements or any other arrangements." 公司法 [Company Law] (promulgated by the Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014) art. 216.3, CLI.1.218774 Chinalawinfo.

shareholders should owe fiduciary duty to corporation and other shareholders. To those holding only controlling shareholders have fiduciary duty, their argument is that fiduciary duty derives from the controlling position so only subject of controlling power should bear fiduciary duty.[31] By contrary, other scholars believe that even minority shareholders should bear fiduciary duty. Because good faith doctrine applies to all civil and business activities, all the shareholders should not act to harm other shareholders—this requirement is for not only controlling shareholders, but ordinary minority shareholders as well.[32]

As for object of shareholder's fiduciary duty, scholars in China generally consider that controlling shareholders should bear fiduciary duty as to companies and other shareholders. Because controlling shareholders are actual executive officers and operators, they should be bound by certain obligations when enjoying the managing power.[33] As for minority shareholders, they are the main source of companies' capital.[34] But when they trust controlling shareholders and invest their capital, their interest is always at risk during the company operation. However, some scholars claim to expand the application of fiduciary duty and believe that all the interested parties could be regarded as object of fiduciary duty in theory as long as they may have reasonable reliance on subject of controlling power, such as other shareholders, creditors and employees.[35]

3. Contents of Controlling Shareholder's Fiduciary Duty

Scholars in China thought the shareholder's fiduciary duty including both duty of loyalty and duty of care.[36] The more influential shareholders/directors are to companies, the more obligations should they undertake. However, some scholars believe that it will impose too strict obligations on controlling

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[31] 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), *supra note 30*, at 191.
[32] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 62.
[33] *Id.* at 61.
[34] 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), *supra* note 30, at 191.
[35] 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), *supra* note 30, at 192.
[36] 朱慈蕴 (Zhu Ciyun) & 郑博恩 (Zheng Boen), 论控制股东的义务 [*Studies of The Controlling Shareholder's Obligation*], 政治与法律 [POL. SCI. & L.], issue 2, at 15–16 (2002); 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 62; 傅穹 (Fu Qiong) & 王志鹏 (Wang Zhipeng), *supra* note 30, at 192.

shareholders if they are required to bear the same duty of loyalty and duty of care as directors for the benefit of the companies. To these scholars, controlling shareholder's fiduciary duty should be limited to abuse of controlling power and injury minority's rights.[37]

4. Judicial Judgment

In order to impose legal liability correspondingly on the controlling shareholders, rules about abuse of controlling power must be set up to decide whether the fiduciary duty of controlling shareholders is breached. Nowadays, rules adopted by different countries are divided mainly in two groups: one is subjective, including fraud, business judgment rule; the other one is objective, including due process rule and objective damage rule.[38]

In China, scholars have different views on this issue. Some insist that the business judgment rule, which is the rule for judging the breach of directors' fiduciary duty in US Law, should be taken as reference, when we consider how to judge the breach of fiduciary duty.[39] The business judgment rule means that controlling shareholders will not be imposed with legal liabilities, if they perform their duties for the interests of the whole company, or act in a manner, with their knowledge and experiences at that time, the directors reasonably believe to be in the best interests of the company, even though that manner causes damages to the company.[40] Some others recommend objective damage rule, because this rule mainly focuses on actual damages and liabilities, which is more objective and easier to practice.[41]

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[37] 邓小明 (Deng Xiaoming), 控制股东义务法律制度研究 [The Legal System of Controlling Shareholder's Obligation] 11 (April 2005) 清华大学博士论文 [(unpublished Ph.D. dissertation, Tsinghua University)].

[38] 冯果 (Feng Guo) & 艾传涛 (Ai Chuantao), 控制股东的诚信义务及民事责任制度研究 [*Studies on Controlling Shareholder's Fiduciary Duty and Liability*], 商事法论集 [COM. L. REV.], issue 6, at 83–86 (2002).

[39] 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 63.

[40] Krasner v. Moffett, 826 A.2d 277, 284–85 (Del. 2003); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 42 (Del. 1993); Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 DEL. J. CORP. L. 787, 791–92 (1999).

[41] 冯果 (Feng Guo) & 艾传涛 (Ai Chuantao), *supra* note 38, at 85.

C. Problems

Fiduciary duty of controlling shareholders is a rule rooted in US Law. When this rule is highly recommended, actively introduced into China, and detailed discussed, most scholars nonetheless ignore to basically learn this rule. In China today, there are still few study focusing on fiduciary duty of controlling shareholders in US Law. The introduction in many articles about this rule in US Law are rough, partial or even misleading.

First, the legal system of regulating controlling shareholder's abuse of controlling power in US is complicated and comprehensive. The effective execution of fiduciary duty needs other related rules as cooperation or supplement. In US Law, the system of rules regulating controlling shareholder's abuse of controlling power itself is quite complex and full of conflicts. Actually, the reasonableness of this system is still a question being disputed by many scholars in America. Scholars in China have mainly focused on the rule of fiduciary duty itself, while ignoring the study of other important related rules.

Moreover, Chinese scholars discuss the fiduciary duty of controlling shareholders in US Law as a whole. However, legal issues about corporation in America are regulated under state statutes. That is to say, every state has its own rule to regulate controlling shareholder's abuse of controlling powers, and there is no such a uniform rule. The current research on this field has not reached the details in state law level. Most scholars have only supposed the introducing of shareholder's fiduciary duty from US Law. They have not elaborated the detailed rules for transplanting. Some studies even mistakenly took the rule derived from a specific case in someone state law as the rule applied in all the states in US

Additionally, the rules of fiduciary duty of controlling shareholders in US Law are applied quite narrowly. Usually, only shareholders of close company are imposed with fiduciary duty. For shareholders of public company, the fiduciary duty will only be imposed under some specific circumstances. However, most scholars in China have ignored the different application of the rule between different types of companies. They even suggest that

the rule of fiduciary duty should be expressly written into Chinese Company Law as a general rule.[42] Even though some scholars realize that fiduciary duty of controlling shareholders is mainly applied to close companies, they still insist that fiduciary duty should also be applied to controlling shareholders in public companies.[43]

Finally, in terms of the regulation for controlling shareholders, especially for those in the public company, most of the Chinese scholars hold the attitude of "borrowlism" and mainly focus on the regulation on American and German, but ignore the rules in some Asian countries. Moreover, although the current Chinese company law is imperfect, it creates a system which involves many provisions of substantive law and procedural law. Most of the Chinese scholars have ignored to review the existing law in China.

III. THE STATUTORY FRAMEWORK FOR CONTROLLING SHAREHOLDER IN US

A. Introduction

Generally, state statues and common law in US treat shareholders in regular public corporation differently from those in close corporations.[44] In public companies, minority shareholders usually passively and powerlessly participate in the corporate governance[45] "without expectation of participation in corporate management or employment."[46] In addition, they can protect themselves from controlling shareholder's oppressive conducts and recover their investments by selling their shares in the active

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[42] 汤欣 (Tang Xin), *supra* note 21.

[43] 范世乾 (Fan Shiqian), *supra* note 18, at 5.

[44] Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 384 (2004); Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. CORP. L. 371, 382 (2003).

[45] Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1267 (2008); Douglas K. Moll, *Shareholder Oppression in Texas Close Corporations: Majority Rule (Still) Isn't What It Used to Be*, 43-SPG TEX. J. BUS. L. 21, 24 (2009).

[46] Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 560 (N.J. Super. Ct. Law Div. 1979).

capital market.[47] By contrary, shareholders in closely held corporations typically intend to participate in the corporate operation and recover their investment by salaries or dividends.[48] Because of the lack of market protection, minority shareholders in close firms are more vulnerable than their counterparts in public corporations.[49] If the majority shareholder in a close corporation refuses to pay dividends and terminates minority shareholder's employment, the minority shareholder is "frozen-out" from the financial return on their investments and "locked-in" in the corporation.[50]

In order to provide minority shareholders with rights to relief from controlling shareholder's oppressed conduct, there are two core avenues in state statutes and common law.[51] First, some states include "oppression" in their dissolution statutes.[52] Second, for those states without "oppression-triggered dissolution statute,"[53] courts allow oppressed shareholders to challenge the improper majority control as a breach of fiduciary duty. However, courts also encourage shareholders to negotiate their rights and positions advanced by shareholder agreements.

B. Shareholder Oppression Statutes

In order to protect minority shareholders in close corporations from the abuse of control power by majority shareholders,[54] legislators in some states issue the shareholder oppression statutes, which treats shareholder oppression as one of the legal reasons for dissolution of the company. However, neither state statutes

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[47] Moll, *supra* note 45, at 24.

[48] *Id.* at 23.

[49] Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L. Q. 1099, 1100 (1999).

[50] Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 431 (1990).

[51] Moll, *supra* note 45, at 24; Siegel, *supra* note 44, at 379–87; Art, *supra* note 44, at 25–26.

[52] Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 709 (1993); Douglas Moll, *Shareholder Oppression and Reasonable Expectations: Of Change, Gifts, Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717, 729 (2002).

[53] Moll, *supra* note 52, at 728.

[54] Art, *supra* note 44, at 372.

nor Model Business Corporation Act clearly defines what behavior constitutes oppressive conducts. Generally, oppression means a "harsh, dishonest, or wrongful conduct, a visible departure from the standards of fair dealing."[55] Whether there are oppression conducts is decided by a case-by-case analysis.[56]

There are three judicial interpretations of the meaning of shareholder oppression, which sometimes are used in parallel or combined.[57] First, some states explain the shareholder oppression in general and vague ways. To be more specific, courts usually rephrase the term of "oppression" as wrongful conducts, rather than provide a clear definition.[58] Second, instead of providing a definition of oppression, courts link the judicially invented shareholder fiduciary duty to shareholder oppression. Oppressive conduct is found by courts when the majority shareholders breach their fiduciary duty owed to the minorities.[59] Third, some states interpret oppression as a violation of those minority shareholder's reasonable expectation. It is an interpretation that to some extent differentiates from the view which pays attention to those controlling shareholder's wrongdoing.[60]

Traditionally, courts would offer company dissolution as the remedy for shareholder oppression claim. Due to the dissolution is drastic to corporations, courts are more likely to provide harmless remedies, like receivers, buyouts and dividend orders.[61]

C. Shareholder's Fiduciary Duty

Additionally, some states, without shareholder oppression statutes, leave the issues to the fiduciary duty analysis in common law.[62]

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[55] *Id*. at 377.

[56] Thompson, *supra* note 52, at 711.

[57] Art, *supra* note 44, at 376.

[58] *Id*. at 377.

[59] *See* Cooke v. Fresh Express Foods Corp., 7 P.3d 717, 721 (Or. Ct. App. 2000); *see also* Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 394 (Or. 1973).

[60] Art, *supra* note 44, at 376.

[61] George Parker Young, Vincent P. Circelli & Kelli L. Walter, *Fiduciary Duties and Minority Shareholder Oppression from the Defense Perspective: Differing Approaches in Texas, Delaware, and Nevada*, 45-Fall TEX. J. BUS. L. 257, 320 (2013).

[62] Siegel, *supra* note 44, at 386.

For those states without oppression statute, courts allow oppressed shareholders to challenge the improper majority control as a breach of fiduciary duty. Initially, shareholders of a company owe no duty to other shareholders. Traditionally, American corporate statutes generally recognize that directors owe fiduciary duty to the entity, including duty of care and duty of loyalty, while shareholders are typically not liable to others. However, "shareholder democracy" is one of the most significant trends of corporate governance.[63] As shareholders have enjoyed greater power than before, the controlling shareholders have been given new power to influence corporate transaction, decide share dividends, intervene the employee employment. Controlling shareholders play a director-like role in corporations, as well as, have the same risks as directors to act on behalf of other shareholders and damage corporations and other members by obtaining personal benefit. Moreover, courts found a striking resemblance between close corporations and partnerships. Like partnership, members in close corporations trust and depend on each other and contribute their "capital, skills, experience and labor" to the corporations, as well as, trust and loyalty between members are prerequisite of the close corporation to survive and develop.[64] Therefore, state legislatures and courts couple the more powerful controlling shareholders with greater shareholder responsibility, the fiduciary duty.

In 1919, the United States Supreme Court established and defined the fiduciary obligations between or among shareholders in the leading case, *Southern Pac. Co. v. Bogert*.[65] In this case, the plaintiff, Bogert and others, brought a breach of fiduciary duty action on behalf of minority shareholders of the Houston & Texas Central Railway Company because the defendant, as the controlling shareholder of Houston Company, participated in a reorganization agreement, prevented the minority shareholders from any participation the reorganized company and obtained the whole fruits of sale for itself.[66] In holding for minority share-

[63] Anabtawi & Stout, *supra* note 45, at 1255.

[64] *See* Kruger v. Gerth, 210 N.E.2d 355, 356 (N.Y. Ct. App. 1965); Ricci Consultants, Inc. v. Bournival, 87 Mass. App. Ct. 1132, 1133 (2015).

[65] Southern Pac. Co. v. Bogert, 250 U.S. 483 (1919).

[66] *Id*. at 486.

holders, the Supreme Court of United States reasoned that controlling shareholder's right of control is subject to the fiduciary duty.[67] This opinion is widely accepted by many following cases.

However, in order to avoid the expansion of the fiduciary obligation, only limited types of shareholders are bound by fiduciary duties in limited types of circumstances.[68] In practice, courts, especially Delaware courts, are more likely to find that only controlling shareholders are generally bound by fiduciary duty. Moreover, beyond the two-limited contexts of corporate "freeze-outs" and closely held companies, many scholars insist that shareholders owe no fiduciary duties.[69]

D. Shareholder Agreement

It is true that the oppression principles do respond to the problems that the fiduciary duty principles intend to resolve, and also provide another feasible method to protect the benefits of the minority shareholders. But the courts' decisions on fiduciary duty, together with oppression principles, mix the judicial approach with the legislative approach on this particular problem.[70] The freedom of contract makes it practicable to exclude the fiduciary duties from their relationship, but not just to impose restrictions on them. The courts of Delaware should apply the principle of the freedom of contract under Delaware entity statutes.[71]

Even courts usually use fiduciary duties to describe the relationship between or among shareholders; shareholder agreement provides another judicial protection of minority shareholders. Based on the assumption that reasonable investors would bargain all provisions at one arm's length before the investment,[72] many state statutes leave a "significant degree of contractual or

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[67] *Id*. at 487–88.

[68] Anabtawi & Stout, *supra* note 45, at 1266.

[69] David A. Hoffman, *The "Duty" to Be a Rational Shareholder*, 90 MINN. L. REV. 537, 537 (2006); Roberta S. Karmel, *Should a Duty to the Corporation Be Imposed on Institutional Investors?*, 60 BUS. LAW. 1, 2 (2004).

[70] Siegel, *supra* note 44, at 389–90.

[71] Symposium, *The Convergence of Fiduciary Duties in Unincorporated and Incorporated Entities: The Issue, Its Implications, Its Limitations*, 28 DEL. J. CORP. L. 999, 1012–13 (2003).

[72] Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161, 1163 (2010).

organizational freedom"[73] to shareholders and allow them to sign a contract to modify the relationship between minority and majority shareholders, even the content of the agreement deviate from the standard model of governance.[74] In Delaware, for example, the statutes enable the shareholders in closed corporation to reshape their relationship by shareholder agreement.[75] In addition, Delaware courts have a clear tendency to enable the minority shareholders to bargain for protection and acquire a better position.

If a shareholder agreement is against public policy,[76] violate the statute of frauds or damage the interests of creditors, the contract is binding between the shareholders. However, the content of the agreement cannot infringe director's rights and direction of business judgment, even though it is a regular public company.[77]

E. Summary

These three methods offer minority shareholders different reliefs, which are not exclusive to each other, but mutually coexistent. In some jurisdictions, one approach even becomes the course of action of another approach. There are few examples to illustrate this point. In Texas, statutory and fiduciary duty analyses are dualistic coexisting. The courts allow minority shareholders to file a breach of fiduciary duty action against the controlling shareholder for oppressive conducts.[78] In some cases, the courts even allow the plaintiff claims for both breach of fiduciary duty and shareholder oppression.[79]

Furthermore, some commentators assert that shareholder agreements provide minority shareholders with a more justified judicial protection and would be the future development of

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[73] Thomas M. Madden, *Do Fiduciary Duties of Managers and Members of Limited Liability Companies Exist as with Majority Shareholders of Closely Held Corporations?*, 12 DUQ. BUS. L.J. 211, 219 (2010).

[74] Siegel, *supra* note 44, at 385; Art, *supra* note 44, at 410.

[75] Del. Code. Ann. tit. 8, §§ 354–355 (2000).

[76] *See generally* Ramos v. Estrada, 8 Cal. App. 4th 1070 (1992); Schimel v. Berkun, 264 A.D.2d 725 (N.Y. App. Div. 1999).

[77] Matter of Glekel (Gluck), 30 N.Y.2d 93, 97 (Ct. App. 1972).

[78] Moll, *supra* note 45, at 30.

[79] *Supra* note 61, at 287.

shareholder protection.[80] First, in terms of fiduciary duty doctrine, like Delaware, courts have a clear tendency to enable the minority shareholders to bargain for protection and acquire a better position,[81] which makes fiduciary duties easier to distinguish in practice. Some cases even find the contract dispositive in shareholder relationships.[82] Second, shareholder agreement doctrine offers a coherent explanation and increases the operability of shareholder oppression[83] because it is much easier for courts to find a written reasonable expectation of shareholders.[84]

Overall, in addition to controlling shareholder fiduciary duty, state statutes and common law offer shareholders other confluent protection pathways, which constantly develops and perfects the minority shareholder protection system in United States. It is impossible to distinguish which approach is better. Also, their predominant position is dynamic and varies from different states. Therefore, when we introduce fiduciary duty doctrine into China, we should see the whole forest rather than just a tree. Thus, we cannot ignore other related factors in the system.

IV. THE FIDUCIARY DUTY IN CLOSE CORPORATE LAW

The controlling shareholder's fiduciary duty was originated and mainly developed in the field of close corporation. By investigating the judicial practice of different states in United States, state courts widely acknowledge that controlling shareholder in close corporations owe fiduciary duty to minority shareholder.[85] However, there is not a clear and uniform interpretation for controlling shareholder's fiduciary duty in United States. Usually, commentators focus on the practices of two representative states: Delaware and Massachusetts.

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[80] *Supra* note 72, at 1161.

[81] Nixon v. Blackwell, 626 A.2d 1366, 1380 (Del. 1993).

[82] *See generally* Fox Fire Dev. Co. v. Hans, 618 A.2d 90 (Del. 1992); Riblet Products Corp. v. Nagy, 683 A.2d 37 (Del. 1996).

[83] Means, *supra* note 72, at 1199.

[84] *Id.* at 1199–203.

[85] *See generally* Morrison v. Gugle, 142 Ohio App. 3d 244 (10th Dist. 2001); McLaughlin v. Beeghly, 84 Ohio App. 3d 50 (10th Dist. 1992); Norman v. Elkin, 726 F. Supp. 2d 464 (D. Del. 2010); McMorrow v. Specht, 344 Wis. 2d 696 (App. Ct. 2012).

A. The Basic Rule: Partnership-Heightened Duties v. Corporate Monitors

In the field of company law, especially in public company areas, the Delaware law is crucial, leading the development of the company law of US. But in terms of the controlling shareholder fiduciary duty rules of close corporation, Delaware rule is not the majority. The majority rule, represented by Massachusetts, believes that shareholders in capacity of management are fiduciaries to each other. They are subjected to a heightened fiduciary duty, similar to the partnership-heightened duties. Some states follow the footstep of the Massachusetts.

In 1975, the Massachusetts Supreme Judicial Court established the landmark rule of shareholder's fiduciary duty in *Donahue v. Rodd Electrotype Co. of New England, Inc.*,[86] which stepped out of the traditional barriers and created the partnership-heightened duties of controlling shareholders. The Donahue rule is used even in today. The Massachusetts Supreme Judicial Court put forward the core opinion of the case, held that the shareholders in close corporations owe other shareholders partnership fiduciary duties for two reasons. First, the court found a striking resemblance between close corporations and partnerships for two reasons. A close corporation is usually a small firm, even smaller than an "incorporated or chartered partnership."[87] In reality, some close corporations are really partnerships that members are dependent on each other and contribute their "capital, skills, experience and labor."[88] Hence, the trust, confidence

[86] *See* Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578 (1975). In this case, Harry Rood was the majority shareholder of the corporation, who own of eighty percent of corporation's stock. The minority shareholder of the company, Joseph Donahue had the remaining twenty percent. Over time, Rood gave some his shares to his children. In 1970, the board of director of the corporation, mainly made up of Rodd and his children, decided and purchased his remaining shares. Euphemia Donahue, the widow of minority shareholder, demanded the corporation to purchase her shares on same conditions, but the corporation refused her demands. Therefore, Mrs. Donahue brought an action against the defendants for breach of the fiduciary duty. The Massachusetts Supreme Judicial Court reversed the opinions of the two lower courts and held that the majority shareholder and directors breached their fiduciary duties to minority shareholder by not offer an equal opportunity for the minority shareholder to resell her shares to corporation at the same conditions.

[87] *Id.* at 586.

[88] *Id.*

and loyalty are extremely important and essential to such enterprises.[89] Second, the minority shareholders in close corporations are inherently in a dangerous and disadvantage position.[90] The corporate form not only supplies limited liability and other advantages for shareholders, but also provides opportunities for controlling shareholder to employ a variety of "freeze-outs" conducts to other shareholders who are in disadvantage positions.[91] However, even minority shareholders' interest in a corporation would be their livelihoods, it is difficult for them to recoup their investments and change the controlling shareholder's misbehaviors. Because it is hard to prove and win litigation, there is no open market for their stocks and; they do not have enough authority to force a dissolution.[92] Therefore, the court ruled the shareholder is subject to a heightened fiduciary duty and should operate the corporation in a strict good faith standard—"utmost good faith and loyalty."[93] It is important to note that the court expand strict good faith standard to all the stockholders, including the minority shareholders.[94] Moreover, the court pointed out that fiduciary duty requires the company provide equal opportunities for all stockholders. Applying the rule, when the corporation had repurchased the controlling shareholder's shares or distributed the corporation assets, the minority shareholder should be provided the equal opportunity on the same term to access these benefits, unless all other shareholder advanced consent or ratify the purchase arrangement.[95]

However, the "utmost good faith and loyalty" standard has no intent to excessively interfere corporate behavior. The court tried to find a balance between shareholders' right of selfish ownership and their fiduciary duty. In 1976, the Massachusetts Supreme Judicial Court abandoned equal opportunity rule in *Wilkes v. Springside Nursing Home, Inc*.[96]

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[89] *Id*.
[90] *Id*. at 592–93.
[91] *Id*. at 588–89.
[92] *Id*. at 591–92.
[93] *Id*. at 593.
[94] *Id*. at 597.
[95] *Id*. at 598.
[96] *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976). In this case, Wilkes was one of the four equal shareholders who participated in the

The Massachusetts Supreme Judicial Court followed the Donahue rule, but made another explanation of the standard of "utmost good faith and loyalty," because of considering the efficiency of the corporate decision-making.[97] It is necessary leave large rooms of discretion for majorities to establishing corporate policy. Additionally, the majority shareholders had the rights of "selfish ownership" which should balance against their fiduciary duties.[98] Therefore, the court ruled that a shareholder's conducts with a legitimate business purpose would not violate the fiduciary duty, unless the minorities prove the majority could use a less harmful approach to achieve the same goal.[99] Having the "rebuttable legitimate business purpose test" to be applied, the court then mentioned the issues of shareholder's expectation. The court rejected majorities' declaration of having dislike of Wilkes as a legitimate business purpose. By contrary, the court found Wilkes' expectation of employment, because he was one of the four founders of the nursing home business; he participated in corporate management and operation for fifteen years and looked forward to continue to involved in corporate decision-making; and he had no way to reclaim his investment expect the salary.[100] Based on this idea, majority's legitimate business purposes are irrelevant whenever minority shareholder are deprived something which has been bargained in advance.[101] The "rebuttable legitimate business purpose test" makes the Massachusetts approach much closer to the traditional corporate monitors, which require the fiduciaries consider the best interests of the company. However, I should note that this modification did not change the core nature of the partnership-like fiduciary duty.

However, not all sates have accepted the Massachusetts ap-

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corporate management as directors and gained corporate payment in Springside Nursing Home. After a dispute, other shareholders forced Wilkes out the corporate management and refused to pay any further salary, which was the principle return he got from his investment. The court reiterated its rule in Donahue case, that is, shareholders owe fiduciary duty to other members and, they should act at "utmost good faith and loyalty." Then, Wilkes filed a breach of fiduciary duty action to against the other three shareholders.

[97] *Id*. at 663.

[98] *Id*.

[99] *Id*.

[100] *Id*. at 664.

[101] Ragazzo, *supra* note 49, at 1106.

proach, which demands the shareholders owe partnership-like fiduciary duty to each other.[102] In fact, Delaware court tried to adopt the rule of Massachusetts' in the *Ueltzhoffer v. Fox*.[103] However, in *Nixon v. Blackwell*,[104] the Delaware Supreme court moved in the opposite direction. As in Donahue case, the Nixon judges faced similar facts that the company planned to selectively repurchase the shares owned be the employee shareholders by an Employee Stock Ownership Plan, except other non-employee shareholder. Unlike the Massachusetts Supreme Judicial Court analyzing Donahue case under partnership law and providing special rule in close company, the Delaware Supreme Court asserted that Delaware corporation law should not provide minority shareholders in close corporation a special protection.[105] Special judicially-created protection for the minorities is an inappropriate judicial legislation.[106]

Since the case involving corporation governance issue, the court decided to use corporate monitors to analyze the case. Instead of using Business Judgment Rule, the court believed the "entire fairness test" was the proper and correct judicial approach.[107]

B. Specific Differences

1. Who Owe the Fiduciary Duty

The two approaches, Massachusetts approach and Delaware approach, both recognized that the controlling shareholder in close company should assume the fiduciary duty. However, as for the minority shareholder, two regulations are very different on whether the minority shareholder should assume the fiduciary duty or not.

Massachusetts courts believe that not only controlling

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[102] Mark J. Loewenstein, *Wilkes v. Springside Nursing Home, Inc.: A Historical Perspective*, 33 W. NEW ENG. L. REV. 339, 363 (2011).

[103] Ueltzhoffer v. Fox Fire Dev. Co., Civ. A. Nos. 9871, 9900, 1991 WL 271584, at *6 (Del. Ch. Dec. 19, 1991).

[104] *See* Nixon v. Blackwell, 626 A.2d 1366 (1993).

[105] *Id.* at 1379–81.

[106] *Id.*

[107] *Id.* at 1375–76.

shareholders bear the fiduciary duty, but also the minority shareholders may assume the partnership-like fiduciary duty.[108] In *Smith v. Atlantic Properties Inc.*,[109] when 80% voting rights are necessary, those minority shareholders possessing 25% shares have the veto power or negative controlling power. Therefore, the minority shareholders cannot arbitrarily or unreasonably or absolutely concern only their own interests and veto down the transaction of the company, regardless of the company's interest, or else they will also violate the fiduciary duty among shareholders.[110] In addition, the suit for the violation of shareholder's fiduciary duty can be filed only against the shareholder, but not the company.[111]

However, Delaware insists only controlling shareholders should assume the fiduciary duty. The court holds that the shareholder owning less than 50% shares of the company, if there is no other special conditions, should not bear the fiduciary duty.[112] However, the assumption is not absolute. If the plaintiff can prove the existence of factual control of the company by minority shareholders, they can also be the obligors of the duty.

2. Freeze-out Cases: Reasonable Expectation Principle v. Substantial Fairness Principle

The key of the fiduciary duty is the specific rules on how to judge if there is any conduct in violation of the fiduciary duty. Because of the cognitive difference on the basic nature of the controlling shareholder's fiduciary duty, states also various in specific judgment standards.

Freeze-out means the conduct through which the controlling shareholders abuse their controlling power to force the minority shareholders to sacrifice the minority's interests.[113] In the

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[108] Zimmerman v. Bogoff, 402 Mass. 650, 657 (1988).

[109] Smith v. Atlantic Properties, Inc., 422 N.E.2d 798 (Mass. 1981).

[110] *Id.* at 801.

[111] *Zimmerman*, 402 Mass. at 660–61; Merola v. Exergen Corp. 423 Mass. 461, 464 (1996).

[112] Cafcas v. DeHann & Richter, P.C., 699 F. Supp. 679, 683–84 (N.D. Ill. 1988); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989).

[113] James M. Van Viet, Jr. & Mark D. Snider, *The Evolving Fiduciary Duty Solution for Shareholders Caught in a Closely Held Corporation Trap*, 18 N. ILL. U. L. REV. 239, 258 (1998).

field of close corporation, freeze-out is the most important way the controlling shareholders use to abuse their controlling power and to illegally harm the minority shareholder's legal interests.[114] It is also the main reason for the minority shareholders to bring the fiduciary duty suit. This paper introduces the different specific rules under different natures of fiduciary duty from the perspective of cases involving the conduct of freeze-out, which is the most important and most common behavior in fiduciary duty cases.

In the freeze-out cases, Massachusetts always applies the "reasonable expectation" rule.[115] To be more specific, illegal termination of the employment and re-purchase of the shares of the minority are the main approaches for the majority shareholders to freeze-out the minority. In the cases of illegal termination of employment, the Massachusetts courts apply the "reasonable expectation" principle, holding that the controlling shareholders cannot violate the reasonable expectation of continuing employment of the minority shareholders. The court of course set strict conditions for the reasonability of the expectation. It is satisfied only when (1) the corporation has its long-term policy on ownership and employment and (2) the corporation has never declared its dividend, the minority shareholders can make no interests from the company other than their salary, or the corporation requires its employees to buy stocks as the condition of employment.[116] Therefore, in the case of Wilkes, the plaintiff was one of the originators of the company and had contributed capital and labor for fifteen years to the company.[117] More importantly, the company had never declared its dividend and Wilkes could no longer receive any salary, which led to the fact that he couldn't get any interests from the corporation any more.[118] Therefore, he had the reasonable expectation that he would continue participat-

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[114] *See generally*, David E. Belfort & Michael L. Mason, *The Employee-Shareholder: At the Frontier of Business and Employment Law*, 9 MASS. BAR ASS'N SEC. REV. 27 (2007).

[115] *See* Bodio v. Ellis, 401 Mass. 1, 9 (1987); Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 852–53 (1976).

[116] Siegel, *supra* note 44, at 394.

[117] *Wilkes*, 353 N.E.2d at 664.

[118] *Id.*

ing in the company's management.[119] However, in *Merola v. Exergen Corp*, the court holds that even if the minority shareholders had the reasonable expectation of continuing employment, if the corporation had no policy on stock ownership and employment, the other shareholders also have no expectation of employment.[120]

Additionally, the majority shareholders can also freeze-out the minority shareholders by repurchase their stocks in practice. In these freeze-out cases, minority shareholders have no other options but to receive cash or bound as the consideration of repurchasing their stocks, even though the price of repurchase may be lower than their due price.[121] If the controlling shareholders violate the expectation of the minority shareholders and their expectations is objectively reasonable, or the expectation is the important decisive factor of the minority shareholder's joining in the corporation, the controlling shareholders may violate their fiduciary duty to the minority shareholders.[122] The facts that whether the shareholder has the reasonable expectation or not are under courts' discretion case by case. Among these cases, courts apply the "reasonable expectation" principle not only to decide whether the shareholder violates the fiduciary duty or not, but also to determine the remedy for it, namely the compensation of minority shareholder's profits of their reasonable expectation, but the compensation should be in proportion.[123]

Different from Massachusetts courts which apply special "reasonable expectation" principle to protect the minority shareholders from being freezing-out, Delaware courts provides no special protection for minority shareholders in close corporation. However, its "entire fairness" principle plays a similar protective role.[124] This principle requires not only procedural fairness but also substantial fairness.[125] Procedurally, the time and procedures of the transaction, framework, information disclosure and deci-

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[119] *Id.*

[120] *Merola*, 423 Mass. at 465.

[121] Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 Yale L.J. 1354, 1357 (1978); *supra* note 49, at 1104.

[122] In re Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984).

[123] Brodie v. Jordan, 447 Mass. 866, 873 (2006).

[124] Ragazzo, s*upra* note 49, at 1150–51.

[125] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

sion-making process should all be fair and in good faith.[126] Substantially, a fair price requires consideration of factors such as assets of the corporation, market price, future prospects and any other economic factors to determine the real price of the company stock.[127] The party involving in related transaction should prove the substantial fairness of the transaction,[128] which is a hard standard to meet.

V. ANALYSIS OF THE FEASIBILITY OF TRANSPLANTING THE CONTROLLING SHAREHOLDER'S FIDUCIARY DUTY IN CHINA

A. Model Selection Problem

Chinese scholars only proposed the idea of introducing the controlling shareholder's fiduciary duty from US, but failed to demonstrate which rules to transplant. In American legal system, the regulations of controlling shareholder's fiduciary duty are quite complicated. In fact, it is very difficult to choose the specific rules fitting the situation of China.

1. No Representative Model

As mentioned above, states have the power to regulate corporation affairs. In fact, the rules of regulating controlling shareholder are different and not uniform in US. The approaches of Massachusetts and Delaware are representative in practice. American academia used to treat the former model as the majority rule and the latter as the minority rule.[129] However, with the development of the judicial practice, scholars demonstrated that the division of the majority and minority rules is a misunderstanding.[130] Actually, the states that follow Massachusetts are not in absolute majority, whereas the states that follow Delaware are

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[126] *Id.*

[127] *Id.*

[128] *Id.* at 703.

[129] *See generally* George W. Dent, Jr., *Gap Fillers and Fiduciary Duties in Strategic Alliances*, 57 BUS. LAW. 55, 86 (2001); Shannon Wells Stevenson, *The Venture Capital Solution to the Problem of Close Corporations Shareholder Duties*, 51 DUKE L.J. 1139, 1148 (2001); Mark Meinhardt, *Investor Beware: Protection of Minority Shareholder Interests in Closely Held Limited Liability Organizations: Delaware Law and its Adherents*, 40 WASHBURN L.J. 288, 289–90 (2001).

[130] Siegel, *supra* note 44, at 435–39.

not minority.[131] Consequently, neither of the models can be in the majority and the representative of the American controlling shareholder's fiduciary duty as a whole. With the development of state statutes and common law, scholars have different comments of the effect of the two approaches and cannot clearly deduce the future trend of the two models. For instance, the Delaware supporters claim the Delaware model would be the mainstream model of American controlling shareholder's fiduciary duty.[132] While the opponents consider the Delaware model, not providing sufficient protection for minor shareholders, would be approaching the Massachusetts special protection model.[133]

2. The Analyses in State Level

Since there is no representative approach of American controlling shareholder's fiduciary duty, the Chinese scholars must find out the most suitable model for China's current situation by studying the specific rules in separate states.

(a) The Feasibility of the Massachusetts' Rule

As discussed above, Massachusetts' approach has following characteristics: 1. partnership-like fiduciary obligations between close corporation shareholders, namely utmost good faith and loyalty; 2. all the shareholders owe fiduciary duty to each other, like partners; 3. "reasonable expectation standard" is applied in freeze-out cases.

Chinese scholars claim that the American controlling shareholder's fiduciary duty rule should be educed into article 20 of the Chinese Company Law, as the result, this rule would be a general corporate governance of all types of corporations in China. One important reason of introducing the shareholder's fiduciary duty rule is that the interest of corporations and minority shareholders have been greatly harmed by controlling shareholders in public companies. The phenomenon is very serious.[134]

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[131] *Id.*

[132] *Id.* at 467–70.

[133] Ragazzo, *supra* note 49, at 1150–51.

[134] *See* 王保树 (Wang Baoshu) & 杨继 (Yang Ji), *supra* note 6, at 60; 汤欣 (Tang Xin), *supra* note 21.

Therefore, our scholars have paid much attention to the inducement of controlling shareholder's fiduciary duty for managing public companies. Some scholars even proposed the Donahue case fiduciary duty for public companies.[135]

It has been discussed that the American controlling shareholder's fiduciary duty is a very strict duty and has a narrow range of application, which originated and developed from the field of close corporations. There are two reasons for judges to limit the fiduciary duty in close corporations. One is that the shareholders in close corporations lacks protection of free market and salary is the main process of recouping their investment. Another reason is that most shareholders participate in the management of corporation for the limit of faculties in close corporations.[136] Trust and loyalty are the basis of development for this type of business organization.[137]

The application of controlling shareholder's fiduciary duty has been extended to Limited Liability Corporations and Limited Liability Partnership.[138] However, the common characteristics of these commercial organizations are closure and collaboration of human resource. Because of these features, reasonable expectation standard and the regulation of all shareholders as fiduciaries is applicable. On the contrary, public companies have much more shareholders without corporation participation expectation. More importantly, they can easily protect themselves by selling stocks in the capital market. Because the minorities could vote by feet, in order to save or attract capital from the market, controlling shareholders will be friendly and generous to the minor shareholders.[139] Interference into major shareholder's private interests by fiduciary duty do not accord with the interest of corporation and shareholders.

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[135] 汤欣 (Tang Xin), *supra* note 21.

[136] *Donahue*, 367 Mass. at 587.

[137] *Id.*

[138] *See generally* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1 (2007); Madden, *supra* note 73, at 211.

[139] Sang Yop Kang, *Re-Envisioning the Controlling Shareholder Regime: Why Controlling Shareholders and Minority Shareholders Often Embrace*, 16 U. PA. J. BUS. L. 843, 881–82 (2013–2014); Mancur Olson, Power and Prosperity: Outgrowing Communist and Capitalist Dictatorship 7 (2000).

In terms of Chinese public corporations, the shareholding is concentrative and the stock market and shareholder protection mechanism are not quite sound.[140] But it is still not convincing for Chinese legislators to educe controlling shareholder's fiduciary duty rules from American close corporations into Chinese public corporations' corporate governance, because Chinese public corporations do not have the two fundamental reasons for the generation of controlling shareholder's fiduciary duty in close corporation. In fact, it is unrealistic to satisfy every shareholder's expectation in public corporations, which is consisted of large numbers of shareholders. It is also impossible to ask those benefit orientation shareholders to obey the utmost good faith and loyalty standard to others.

Therefore, the Massachusetts model is unsuitable for China to satisfy the urgent demand for regulating controlling shareholder's controlling power abuse in public corporations.

(b) The Feasibility of the Delaware Rule

The Delaware model has the following characteristics: 1. without statutes, it is improper for courts to set special protection rules for minority shareholders, instead, court should use the corporate monitors; 2. only the controlling shareholders have more obligation; 3. the "entire fairness test" (or intrinsic fairness standard) is usually used as a criteria for whether the shareholder violates fiduciary duty or not. Particularly, in shareholder self-dealing cases in Delaware, the entire fairness test is also applicable to public corporations.[141]

The policy in Delaware seems to satisfy the urgent demand for regulating controlling shareholder's control power abuse in Chinese public corporations. However, the Chinese scholars still have to face two problems:

First, controlling shareholders in Delaware carry out their duties in the capacity of directors or administrators and fiduciary duty does not extend to the capacity of shareholders.[142] It is

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[140] 汤欣 (Tang Xin), s*upra* note 21.

[141] James D. Cox & Thomas Lee Hazen, Corporations 253 (2d ed. 2002); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

[142] Mary Siegel, *The Erosion of the Law of Controlling Shareholders*, 24 DEL. J.

reasonable for Delaware court not to distinguish the fiduciary duty between directors, administrators and shareholders. Since Delaware state corporation law adopts the "board of director center doctrine,"[143] most of the operating decisions are made by directors and authorized administrators. The role of shareholders has been limited to voting on director election and corporation structure changes.[144] There are essential differences for shareholders from different identifications. When they are in the capacity of shareholders, they can vote for their own interest rather than being other shareholder's fiduciary.[145] However, when they are voting in the capacity of directors, they are becoming shareholder's trustees. On this occasion, they represent all the shareholders and cannot seek personal gains. Therefore, they can take fiduciary duties. Actually, the authority of shareholder is limited. Only when controlling shareholders control the corporation indirectly in the capacity of directors or by electing dependent directors, he has the power to harm the interest of corporations and minor shareholders.[146] Compared with Massachusetts approach, Delaware lessens the regulating range of controlling shareholder's fiduciary duty.[147]

According to the regulations of general meeting of stockholders and power of board of directors in Chinese Company Law, the "Shareholder Center Doctrine" is established.[148] Stockholders can make decisions without being in the capacity of director or controlling the board of directors. Therefore, if the Delaware model were educed, this rule could fail to provide full protection for minority shareholders because it had only regulated some misbehavior of controlling shareholder.

Second, there are no supporting system and cultural soil for educing controlling shareholder's fiduciary duty in China.

When involving the fiduciary duty in corporation law, the

CORP. L. 27, 33–34 (1999).

[143] 陈蕾 (Chen Lei), 高伟 (Gao Wei) & 王振东 (Wang Zhendong), 公司治理理论与实践 [The Theory and Practice of Corporate Governance], at 10 (2006).

[144] *Id.*

[145] Jedwad v. MGM Grand Hotels, Inc., 509 A.2d 584, 598 (Del. Ch. 1986).

[146] McDaniel v. Painter, 418 F.2d 545, 547 (10th Cir. 1969).

[147] Viet & Snider, *supra* note 113, at 242.

[148]陈蕾 (Chen Lei), 高伟 (Gao Wei) & 王振东 (Wang Zhendong), *supra* note 143, at 9.

Delaware courts would first decide whether the appeal is applicable to "business judgment rule" or "inherent fairness test" into consideration.[149] Although "inherent fairness test" is usually suitable in cases of controlling shareholder's fiduciary duty, it doesn't mean the Business Judgment Rule and Entire Fairness Test can be separated, educing the entire fairness by itself. As discussed above, the identifications of shareholder and director are overlapped and non-separated in many cases. Even though the controlling shareholder is judged abusing control power, the protection of business judgment rule for his general managing operation cannot be deprived when he is in the capacity of a director.[150] Besides, other mechanisms of shareholder protection maintain the effective implementation of controlling shareholder's fiduciary duty, such as derivative action, class action, appraisal rights and litigation system of stockholder general meeting (board of directors) decision flaw. While in Chinese Company Law, there is no Business Judgment Rule, no market mechanism and other mechanisms of shareholder protection, and no external supervision from habit strength. Without these supporting systems for controlling shareholder's fiduciary duty, it is difficult to achieve the results like in America when China transplants the rule.

Moreover, the duty of care and loyalty, especially the latter, can be observed primarily due to deeper cultural reasons. The idea of other-regarding behavior has imperceptibly merged into American social culture basis. Therefore, the transplantation of controlling shareholder's fiduciary duty is not likely to be successful unless the local society and parties can observe the principles consciously, namely have local inclinations toward other-regarding behavior.

(c) Problems of the Hybrid Rule

Considering neither the approach of Massachusetts nor the approach of Delaware fits our China's situation, some people may suggest that we can combine the most suitable and reasonable

[149] Cox & Hazen, *supra* note 141, at 253.

[150] Arthur R. Pinto, *Corporate Governance: Monitoring the Board of Directors in American Corporations*, 46 AM. J. COMP. L. SUPP. 317, 331–32 (1998).

elements of different approaches to make a hybrid rule that is useful to China. However, the suggestion may not be feasible in practice.

First, it is hard to know the validity of the piece-together of the rules in different approaches. If not be tested by practice, educing those rules without careful consideration is lack of reasonableness.

Second, those specific elements or rules developing from controlling shareholder's fiduciary duty of different natures are not independent with each other. They cooperate with each other to achieve the total and inner balance of rights and obligations in the whole system. For example, in Massachusetts' approach, the utmost fiduciary duty between shareholders reaches an internal balance in the system with the rule that all shareholders are trustees. The requirements of utmost good faith and loyalty are so strict and they provide good protection to shareholders. If all shareholders are fiduciaries of the duty and get equal protection, but meanwhile they also assume the deterrence of the same strict obligations, then internal balance between different rules can be realized. By contrast, if only one of the rules is changed, for example, just one or few shareholders assume the fiduciary duty and only one or few shareholders get protection, this will definitely violate the principle of "shareholders equality." To amend a rule, we must continually amend other rules for keeping consistency and balance between rules.

In conclusion, the rules concerning majority shareholder's fiduciary duty are complex in American legal system. Because of the complexity and non-uniformity, it is hard for us to identify the rules that may be suitable to China.

B. Doubt on the Validity

Even if we can find an available specific system from the available approaches mentioned above, Chinese scholars should further consider the validity of the transplanted fiduciary duty. At present, the reasonableness of the controlling shareholder's fiduciary duty is still debatable.

Many scholars have doubts on the validity of controlling shareholder's fiduciary duty itself.[151] In early stages, the company law of US was deeply affected by U.K. company law. U.K. company law has established shareholder oppression legal system to avoid controlling shareholder's abusing their power.[152] Some states of US adopted the system but some not. The suits of controlling shareholder's fiduciary duty developed from the states without shareholder oppression legal system and it is a special rule to meet unique needs of the governance of close company.[153] In a sort of sense, the controlling fiduciary duty rule is policy-driven creation. In some cases, even the existence of the relationship of fiduciary duty cannot be proved; the fiduciary duty can be applied to provide an all-purpose claim to litigation without any cause of action.[154] According to the principle of the "Reunification of Powers and Responsibilities," different legal subjects will have different rights and obligations because of different legal relationships. Fiduciary duty imposes strict liability to obligor, and it does not correspond to all conducts of abusing. For example, members in partnership organization should certainly assume the fiduciary duty, but if the partnership organization is changed to the form of company, the shareholders can on the one hand get protections by limited liability; on the other hand, they are free from fiduciary duty to each other. The expanding of fiduciary duty will cause the violation of the fundamental right of selfish ownership.[155] In fact, there are still debates about whether shareholders have fiduciary duty between each other. To conclude the opinions of many scholars, no fiduciary duty does not mean no restraint is imposed on the shareholders' controlling power. The restraints can be imposed by particular rules of company law, rather than the principle fiduciary duty.

Noticing the deviation from the principle of fiduciary duty

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[151] Jens Dammann, *The Controlling Shareholder's General Duty of Care: A Dogma That Should Be Abandoned*, 2015 U. ILL. L. REV. 479, 506 (2015).

[152] 汤欣 (Tang Xin), s*upra* note 21.

[153] Thompson, *supra* note 52, at 726.

[154] Malcolm D. Talbott, *Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies*, 20 OHIO ST. L.J. 320, 323–24 (1959).

[155] Sandra K. Miller, *How Should U.K. and U.S. Minority Shareholder Remedies for Unfairly Prejudicial or Oppressive Conduct Be Reformed*, 36 AM. BUS. L.J. 579, 627 (1997).

during the application, some American scholars hold the opinions that fiduciary duty should be abandoned.[156] As a substitution, scholars think the shareholders contract is a good choice to protect minority shareholders.[157] Company Contract theorists hold that the main rights of shareholders should be decided by themselves, rather than interfered by courts.[158] Moreover, they can identify their protections and remedies through negotiation. In order to avoid the uncertainty of future risks and litigation, reasonable amending system of contract and the implied principle of contract law (such as good faith and fair dealing) can also help the parties form a stable contract to protect their current and future interest. The written contract is also good for deducing shareholder's reasonable expectation and avoids the possibility that judge may take sides with minority shareholders and violates majority shareholder's expectation, reaching a balance between the interests of majority and minority shareholders.[159] In practice, courts tend to attach more importance on the shareholders' contract. The courts of Massachusetts and Delaware also show their tendency of settling the disputes by contract in recent cases. Shareholders should solve problems of employment and liquidity by back and forth negotiations and contractual protections.[160] Under this principle, even though the shareholders have fiduciary duty between each other, if they abide the contract in good faith, the fiduciary duty will not be violated.[161]

C. The Conflicts with the Current Legal System in China

Regardless of the validity of the controlling shareholders' fiduciary duty, the rule is difficult to melt into the current China's legal system, because, controlling shareholder's fiduciary duty is an US common law obligation. Even German only transplanted

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[156] Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporation*, 138 U. PA. L. REV. 1675 (1990).

[157] Means, *supra* note 72, at 1161.

[158] Paula J. Dalley, *The Misguided Doctrine of Stockholder Fiduciary Duties*, 33 HOFSTRA L. REV. 175, 221 (2004); Edward B. Rock & Michael L. Wachter, *Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in Close Corporations*, 24 J. CORP. L. 913, 915 (1999).

[159] Means, *supra* note 72, at 1203.

[160] Arthur R. Pinto & Douglas M. Branson, Understanding Corporate Law 326 (3d ed. 2009).

[161] Selmark Assoc. Inc. v. Ehrlich, 467 Mass. 525, 537 (2014).

the rule in case law due to the difficulties in codifying the rule. Judges have to apply the rule based on case by case inquiries. However, China is a civil law country, all the rules are written in laws and statutes. Since precedents are not binding in China and it is difficult to codify the case law of controlling shareholders' fiduciary duty, there would be more problems in transplanting the rule to China.

Some Chinese scholars suggest that the legislator need to adapt article 20 of the Chinese Company Law by transplanting the controlling shareholder's fiduciary duty rule. However, article 20 of the Company law belongs to the General Rules, which means it would be applied for both limited liability companies and stock companies (including close companies and public companies). As discussed above, the controlling shareholder's fiduciary duty was originated and developed in the field of close companies. Whether this rule should apply in public company, limited liability company is still in dispute. Besides common shareholders, the specific positions of state-owned controlling shareholders are also assignable in China. A general transplantation, without distinguishing the different needs of diverse corporations, will be difficult to fit with the current development in China.

VI. CONCLUSION

Rules concerning controlling shareholders' fiduciary duty are within the states' jurisdiction in the United States. Rules not only vary from one state to another but also are narrowly applied within the scope of closely hold corporations. Also, , the regulatory regime is complicated. For these reasons, China needs more time to reflect upon whether it makes sense to transplant on a wholesale basis US law on controlling shareholder fiduciary duty. The intermediate solution, which the author advocates for, is to learn from the idea and spirit of the US law, but recognize that the reforms need to be rooted in the Chinese company law.

To be more specific, no fiduciary duty does not mean there is no restraint imposed on the shareholders' controlling power. Restraints can be imposed by particular rules of company law, rather than the principle fiduciary duty. Facing so many cases in which the controlling shareholder harms the interests of the mi-

nority shareholder, Chinese scholars need to focus on the reference of the concept and experience of controlling shareholder's fiduciary duty, rather than bringing in the specific rules. The legislators of China could learn to attach great importance on the protection of minority shareholder and categorize the conducts of controlling shareholder's abuse of their controlling power and then provide the court with different choices of remedies according to different categories of conducts. To solve the urgent and existing problem, Chinese scholars should not limit our solution to just refer to the rules of other countries, but try to solve the problem by interpreting existing. Considering the current situation in China, this paper suggests that, according to the different needs of different types of companies, the legislator should define in the specific laws or relevant laws or regulations the categories of the conducts by which controlling shareholder's abuse of their controlling power, then develop and refine the rules and liabilities corresponding to those categories of conducts. In terms of some extreme cases, we can apply article 20 of Chinese Company Law to regulate controlling shareholder's abuse of their controlling power and protect the interests of minority shareholder.