

Special Issues Involving Executives In Privately Held Companies: The Impact of Minority Shareholder Disputes

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TABLE OF CONTENTS

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I.	Fiduciary Duties and Relationships	1
II.	Court's Broad Equitable Authority to Remedy Shareholder Oppression	3
	A. The Key Statutes	4
	B. Enforcing Reasonable Expectations	5
	C. The Rights of Employee-Shareholders	7
III.	Potential Remedies	9
	A. Dissolution	9
	B. "Fair Value" Buy-Out	10
	1. Procedure	10
	2. Valuation Methods/Factors	11
	3. What is "Fair Value?"	12
	4. Valuation Date	15
	5. Terms/Security Interest	16
	6. The Effect of a Valuation Formula Under an Existing Buy-Sell Agreement	16
	C. Sale of Company	17
	D. Breach of Fiduciary Duty "Damages"	17
	E. Injunctive Relief	18
	F. Appointment of Receiver, Custodian, or Provisional Director	19
	G. Other Equitable Relief	20
	H. Attorneys' Fees	21
	I. Punitive Damages	21
	J. Joint and Several Liability	22
	K. Equitable Remedies Against Minority Shareholders	22
	L. Indemnification Under Minn. Stat. § 302A.521	23

RIGHTS AND REMEDIES OF THE SHAREHOLDER – EMPLOYEE IN CLOSELY HELD CORPORATIONS

Executives in closely held¹ private corporations are often shareholders in the companies employing them, and may serve on the Board of Directors and/or in officer positions. As such, they may have rights and obligations under Minnesota law beyond the four corners of their executive employment contract or employment relationship. Issues regarding these rights and obligations often arise when the executive's relationship with the company is terminated, particularly when the termination is involuntary. However, executives (and their legal counsel) should understand and consider these issues when negotiating the terms of their relationship and carrying out their duties as employees, officers, directors, and/or shareholders of closely held companies.

I. Fiduciary Duties and Relationships

An executive employee who wears the hat of shareholder, officer and/or director has the benefit and burden of important rights and obligations relating to his or her relationship to the corporation and shareholders. These fiduciary relationships lie at the heart of the law governing the relationship among close corporation shareholders.

Under Minnesota law, the legal relationship between and among shareholders in a closely held corporation is similar to that of partners in a partnership. Such shareholders owe one another a fiduciary duty, which “imposes on them the highest standard of integrity and good faith in their dealings with each other.” Pedro v. Pedro, 489 N.W.2d 798 (Minn. Ct. App. 1992). See

¹ Under the Minnesota Business Corporation Act, a closely held corporation is defined somewhat arbitrarily as one with 35 or fewer shareholders. Minn. Stat. § 302A.011, subd. 6a. However, common law principles governing relationships within closely held companies can apply in corporations that, despite having more than 35 shareholders, have the attributes of closely held companies. These include: (1) a small number of shareholders; (2) no ready market for corporate stock; and (3) active shareholder participation in the business. Berreman v. West Publishing Co., 615 N.W.2d 362, 367-68 (Minn. Ct. App. 2000).

Minn. Stat. § 302A.751, subd. 3a (identifying “the duty which all shareholders in a closely held corporation owe one another to act in an honest, fair and reasonable manner in the operation of the corporation”). This duty includes both substantive obligations that focus on the outcomes of shareholder conduct and procedural obligations that focus on process. Gunderson v. Alliance of Computer Professionals, Inc., 628 N.W.2d 173, 185 (Minn. Ct. App. 2001).

In addition, shareholders who serve in director or officer positions have further statutory and common law duties.

- Minn. Stat. § 302A.251, subd. 1: A director shall discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.
- Minn. Stat. § 302A.361: An officer shall discharge the duties of an office in good faith, in a manner the officer reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

A director’s personal liability to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director may be eliminated or limited by specific provision in the articles of incorporation. However, the articles cannot limit liability for several categories of conduct, including: breach of the duty of loyalty; acts or omissions not in good faith; intentional misconduct or knowing violations of law; transactions involving an improper personal benefit; securities violations; and illegal distributions. Minn. Stat. § 302A.551, subd. 4.

- Under common law, directors and officers owe a fiduciary duty to the corporation. Matter of Villa Maria, Inc., 312 N.W. 921 (Minn. 1981) (one entrusted with the active management of a corporation, such as an officer or director, occupies a fiduciary relationship to the corporation).

Share ownership alone does not always mean that a minority shareholder is subject to the benefit or burden of fiduciary duties. For example, the Minnesota Court of Appeals has held that partnership fiduciary principles do not apply to the benefit of an employee who was not a founder and did not invest in the company, but only acquired a small percentage of stock as a part of his employment compensation package. Harris v. Mardan Business Systems, Inc., 421

N.W.2d 350 (Minn. Ct. App. 1988); see also, Brennan v. Chestnut, 973 F.2d 644 (8th Cir. 1992) (a majority shareholder does not owe a fiduciary to an employee minority shareholder who acquires a small percentage of stock as part of his or her employment compensation). But see, McCallum v. Rosen's Diversified, Inc., 153 F.3d 701 (8th Cir. 1998) (granting shareholder relief to CEO who had received shares as compensation for outstanding service and as an inducement to remain at the company and foster continued growth).

Moreover, the Minnesota Supreme Court has stated that, generally, only a majority or controlling shareholder owes a fiduciary duty to the corporation or the other shareholders. Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285, 293-94 (Minn. 2000). At least where the minority shareholder has no significant ability to control corporate decision-making, the Court held that the minority shareholder did not owe a fiduciary duty to the company or the other shareholders. Id. (The facts of Follett on which this holding was based were fairly unique. The minority shareholder was a corporate employee, but had never served as a director or officer. Moreover, he owned only non-voting shares, and thus played no meaningful role in company decisions.)

II. Court's Broad Equitable Authority to Remedy Shareholder Oppression.

Minority shareholders in closely held corporations often occupy a vulnerable position. As minority owners, they are subject to the will of the controlling shareholders on important matters affecting their business, their role in the company, and their investment return. Yet, since there is no ready market for the stock, as there is with public companies, a minority shareholder cannot simply go out and sell his or her shares and move on. Because of this vulnerable position, Minnesota law is designed to protect minority shareholders from what is often referred to as

shareholder “oppression.” In short, courts have been granted broad equitable power to remedy unfair treatment of minority shareholders.²

A. The Key Statutes

The key statutes governing minority shareholder rights reflect the broad discretion granted to judges to consider all of the facts and circumstances to determine whether relief is appropriate and, if so, to fashion relief that is “just and reasonable” in light of the facts and circumstances.

Minn. Stat. § 302A.751 (“Section 751”)³ expressly authorizes the Court to grant “any equitable relief it deems just or reasonable in the circumstances” in any one of several circumstances, including:

- the directors or those in control of the corporation have acted in a manner “unfairly prejudicial” toward a shareholder.
- the directors or those in control of the corporation have acted fraudulently or illegally toward a shareholder.
- the directors are deadlocked and the shareholders cannot break the deadlock.
- corporate assets are being misapplied or wasted.

Most minority shareholder litigation focuses on whether the controlling owners have engaged in “unfairly prejudicial” conduct toward a minority shareholder. Courts have held that even a

² The primary focus of this outline is on direct claims brought by shareholders in closely held corporations. Some shareholder lawsuits are based on shareholder derivative claims – that is, claims by a shareholder asserting a right that really belongs to the corporation. When asserting such claims, which involve direct injury to the corporation, the pleading requirements for derivative claims under Minn. R. Civ. P. 23.06 must be followed. Wessin v. Archives Corp., 592 N.W.2d 460 (Minn. 1999).

³ This outline deals specifically with closely held corporations, which are governed by Minn. Stat. Ch. 302A. The key statutes have parallel provisions in the Minnesota Limited Liability Company Act, Minn. Stat. Ch. 322B. The LLC provision similar to Section 751 is Minn. Stat. § 322B.833.

single instance of such conduct may justify relief to a minority shareholder. Sawyer v. Curt & Company, Inc., 1991 WL 65320 (Minn. Ct. App. Feb. 12, 1991).

Minn. Stat. § 302A.467⁴ similarly provides the Court with broad equitable authority to remedy a violation of the Business Corporations Act:

If a corporation or an officer or director violates a provision of this chapter, a court in this state may in an action brought by a shareholder of the corporation, grant any equitable relief it deems just and reasonable in the circumstances and award expenses, including attorneys' fees and disbursements, to the shareholder.

B. Enforcing Reasonable Expectations

In determining whether to order relief, Courts are directed to consider “the reasonable expectations of all shareholders” as they existed at the inception of the relationship and developed during the course of the parties’ relationship. Section 751, subd. 3a. In light of this statutory direction, “unfairly prejudicial” conduct has been interpreted to mean conduct that frustrates the reasonable expectations of shareholders. Berremán, 615 N.W.2s at 374; Gunderson v. Alliance of Computer Professionals, Inc., 628 N.W.2d 173, 184 (Minn. Ct. App. 2001). While what constitutes “reasonable expectations” will depend upon the facts and circumstances of each case, a shareholder’s reasonable expectations may often include a job, a salary, and a significant place in management. Sawyer, 1991 WL 65320; McCallum v. Rosen’s Diversified, Inc., 153 F.2d 701 (8th Cir. 1998) (reasonable expectations often include a “significant voice in management and an opportunity to work”); Haley v. Forcelle, 669 N.W.2d 48, 59 (Minn. Ct. App. 2003) (shareholders in closely held corporations typically have an expectation of continuing employment).

⁴ The parallel provision of the LLC Act is Minn. Stat. § 322B.38.

Courts will consider a number of factors in determining whether a shareholder's "reasonable expectations" have been violated. First, under the express terms of Section 751, written agreements are presumed to reflect the parties' reasonable expectations.

For the purpose of this section, any written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between one or more shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements.

Section 751, subd. 3a (emphasis added). Note that even as to matters expressly addressed in a written agreement, the agreement is only presumed to reflect reasonable expectations. Such agreements are not always dispositive in determining shareholder expectations. Haley v. Forcelle, 669 N.W.2d at 58; Gunderson, 628 N.W.2d at 186. There may be expectations that contradict a written agreement. Or, the written agreements may not expressly apply to the circumstances giving rise to the dispute.

Shareholder expectations often arise from understandings that are not expressly stated in the corporation's agreements or governance documents. Therefore, courts may look to other factors or touchstones in determining the parties' reasonable expectations, including:

- a course of dealing that implies an agreement. Gunderson, 628 N.W.2d at 185;
- an assessment of the understandings that would be expected to result from "associative bargaining." Gunderson, 628 N.W.2d at 185; Berreman, 615 N.W.2d at 374. In other words, what would the parties have agreed to had they bargained over how their investment would be protected?;
- the fiduciary duties owed by shareholders to one another – including substantive obligations, such as withholding dividends or using corporate assets preferentially, and procedural obligations, such as refraining from engaging in oppressive or unfair negotiation tactics or arbitrarily exercising discretion or veto power. Gunderson, 628 N.W.2d at 185-86.

Corporate governance rules can also form the basis for reasonable expectations, the violation of which can give rise to minority shareholder relief. Violations of Chapter 302A can

give rise to a remedy under Section 467 and can also be a triggering events for relief under Section 751. See, Henrickson v. Big League Game Co., 1995 WL 550935 (Minn. Ct. App. Sep. 19, 1995) (violation of Minn. Stat. § 302A.401, involving issuance of stock without authority, and § 302A.551, involving distribution of corporate funds without authorization of the Board, constituted breach of fiduciary duty and justified buy-out under Section 751). However, the Court of Appeals has held that breach of a company's bylaws, as opposed to a violation of Chapter 302A, does not trigger relief, at least under Section 302A.467. Isaacs v. American Iron, 690 N.W.2d 373 (Minn. Ct. App. 2004).

C. The Rights of Employee-Shareholders.

The rights and remedies of a shareholder-employee are often based both on their contractual relationship with the company and/or other shareholders and the statutory and common law protections afforded shareholders in closely held corporations. As a result, the analysis of the rights and remedies available to an executive may depend upon which hat he or she is wearing – employee or shareholder. Where an employee (in his capacity as employee) claims wrongful termination, the threshold question is whether a contractual agreement or promise inducing reliance existed which is breached by the termination. Gunderson, 628 N.W.2d at 190. However, a shareholder-employee also has the protections of the shareholder oppression doctrine. The threshold question in the context of a shareholder oppression claim based on termination of employment is whether a minority expectation of continuing employment is reasonable. Id.

The employment relationship is often governed by a written employment contract, which is governed by contract principles. The employment contract may be for a definite term or may set forth limited bases on which the executive may be terminated. It may also expressly allow

termination on an “at-will” basis. Moreover, where there is no written contract, Minnesota law will presume that the employment is at-will. *Id.*, at 181-82. A terminated executive employee subject to an at-will employment relationship may be unable to successfully pursue a claim for breach of an employment contract.

Courts will engage in a separate analysis, however, where the employee is a close corporation shareholder to determine whether the shareholder-employee had a reasonable expectation to continuing employment that was violated. *Id.* Factors courts will consider in assessing this issue include the following:

- whether there is a buy-out agreement permitting termination of employment for any reason and obligating shareholders to sell their shares upon termination.
- whether the employee has made a capital investment.
- whether the expectation of continuing employment is known and accepted by the other shareholder.
- whether the termination of employment is caused by the shareholder-employee’s own conduct or incompetence.

Id., at 190-91. Courts will also balance expectations of continuing employment against the need of the controlling shareholder need for flexibility in running the business. *Id.*, at 191-92.

Employment termination can often be accompanied by other conduct that adversely affects a shareholder-employee. Examples include: removal from the Board and/or other management role; cutting off dividends and/or refusing to make a good faith attempt to buy-out the shareholder at a fair price or to alter the income distribution mechanism following termination to provide the terminated shareholder-employee a fair investment; using a buy-sell agreement manipulatively to force the sale of the shareholders stock at a low price; cutting off the shareholder from access to company information. See generally, Gunderson; Sawyer; Pedro; Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834 (Minn. Ct. App. 1994) (although

termination of employment was appropriate for bad-acting shareholder-employee, removal of shareholder from the Board and freezing him out of a business in which he reasonably expected to participate violated shareholder's reasonable expectations). These examples and others can be the basis for claims of unfairly prejudicial conduct. In evaluating such claims, courts will engage in an assessment of the "reasonable expectations" of the shareholders.

III. Potential Remedies.

Disputes involving executive employees (who are also shareholders) often involve breach of contract claims for alleged violations of employment agreements and/or other contracts. But Minnesota law provides for an extensive array of other potential remedies to remedy oppressive conduct toward a minority shareholder. As reflected by the broad language of Section 751 and Section 467 – providing for "any equitable relief" the court finds to be "just and reasonable" under the circumstances – the range of potential remedies available to a court to resolve shareholder oppression claims and other shareholder disputes is exceedingly broad. While a "fair value" buy-out is often the remedy sought in Section 751 cases, courts can (and do) grant other relief instead of or in addition to a buy-out remedy.

A. Dissolution.

Historically, the Minnesota corporate code provided for dissolution as the primary remedy for resolving disputes involving serious oppression of minority shareholders or irreconcilable deadlock. See, Minn. Stat. § 301.49 (repealed 1981). But even before the adoption of Section 751, courts recognized that involuntary dissolution was a drastic remedy to be used with great caution. In re Lakeland Development Corp., 152 N.W.2d 758, 764 (Minn. 1967). Most typically, decisions to dissolve a corporation were based on deadlock that was irreconcilable, under circumstances that made continuation of the business no longer advantageous to the shareholders. E.g., In re Lakeland, 152 N.W.2d at 764; In re Villa Maria,

Inc., 312 N.W.2d 921, 923 (Minn. 1981); In re Hedberg-Freidheim & Co., 47 N.W.2d 424, 427 (Minn. 1951).

Since the adoption of Section 751 in the early 1980s, courts have been directed that they “shall” consider whether lesser relief, such as a buy-out, would be adequate to permanently relieve the unfair treatment of the plaintiff shareholder. Section 751, subd. 3b.

While involuntary dissolution is not a common remedy, courts will still order dissolution in some cases, generally in cases involving deadlock. Johnson v. Dolphin, 1990 WL 194991 (Minn. Ct. App. Dec. 11, 1990) (dissolution ordered where 50/50 owners were deadlocked); Signal Bank, N.A. v. Kemnitz Sand & Gravel, Inc., 2002 WL 31415422 (Minn. Ct. App. Oct. 29, 2002) (dissolution ordered where there was conflicting testimony regarding ownership and distribution of shares, the two owners were deadlocked, and the corporation was insolvent with creditor suits imminent).

B. “Fair Value” Buy-Out.

The remedy of choice under Section 751 in most cases is a “fair value” buy-out of the complaining shareholder’s stock in the corporation.⁵ What constitutes “fair value” is often one of the most contentious issues in a shareholder dispute.

1. Procedure.

The court may order a buy-out upon the establishment of any of the triggering events identified in subd. 1 of Section 751. While a buy-out is usually ordered following a trial, Section 751 also authorizes a buy-out on motion (subd. 2). If the court orders a buy-out on motion, the parties have the opportunity to agree on the price and terms of the buy-out. If they

⁵ It is usually the plaintiff minority shareholder (or 50% owner) who seeks to have his/her shares purchased by the company and/or the controlling shareholder(s). However, under Section 751, the court can order the sale of shares held by either a plaintiff or a defendant shareholder to the corporation or the opposing shareholder(s). Section 751, subd. 2.

cannot agree within 40 days of entry of the buy-out order, the court will determine the “fair value of the shares.” Section 751, subd. 2.

The court “may appoint appraisers to receive evidence on and to assist by recommending the amount of the fair value of the shares.” Minn. Stat. § 302A.473, subd. 7 (incorporated by reference in Section 751, subd. 2). While the court can rely on the expert’s opinion in making the ultimate determination of value, a judge cannot “delegate [to the appraiser] the court’s equitable power” to determine fair value. Zenanko v. Vukelich, 1991 6379 (Minn. Ct. App. Jan. 22, 1991); see also, Schaub v. Kortgard, 372 N.W.2d 427 (Minn. Ct. App. 1985).

2. Valuation Methods/Factors.

The statutes give the trial court broad discretion in determining fair value. The Reporter’s Notes to Minn. Stat. § 302A.473 (the dissenter’s rights statute, the valuation provisions of which are incorporated into Section 751) puts it this way:

The court has complete control of the proceedings and may use any valuation method or combination of methods it sees fit, as long as the court finds the result to be the fair value of the shares as of the effective date of the action. No method is recommended because the different methods of measuring value (market, book, replacement, capitalization of earnings, etc.) are neither right nor wrong, but merely appropriate in different situations.

The Minnesota Supreme Court has stated that fair value can be calculated by “any technique that is generally accepted in the relevant financial community.” Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285, 290 (Minn. 2000).

Some courts have looked to the Minnesota Supreme Court’s marital dissolution decision in Nardini v. Nardini, 414 N.W.2d 184 (Minn. 1987), for guidance in determining value. Based upon Revenue Ruling 59-60, which addresses valuation for estate and gift tax purposes, the Nardini court identified the following factors to be considered in valuing a business:

- a. The nature of the business and the history of the enterprise from its inception;
- b. The economic outlook in general and the condition and outlook of the specific industry in particular;
- c. The book value of the stock and financial condition of the business;
- d. The earning capacity of the company;
- e. The dividend paying capacity;
- f. Whether or not the enterprise has good will or other intangible value;
- g. Sales of the stock and the size of the block of stock to be valued; and
- h. The market price of stocks of corporations engaged in the same or a similar line of business having their stocks traded in a free and open market.

414 N.W.2d at 190.

According to the Minnesota Supreme Court, a “sound valuation” involves not only consideration of the relevant facts but also application by the trial court of “common sense, sound and informed judgment, and reasonableness to the process of ‘weighing those facts and determining their aggregate significance.’” *Id.* (citations omitted). The statutory scheme in governing court-ordered buy-outs provides the court with “maximum flexibility” to fashion a remedy that is “fair and equitable to all parties.” Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285, 292 (Minn. 2000), quoting Minn. Stat. § 302A.751, subd. 2. See also, Diebold v. Diebold, 1997 WL 309366 (Minn. Ct. App. June 10, 1997) (broad discretion of trial court to determine fair value).

3. What is “Fair Value?”

- Fair value is generally defined as a shareholder’s “pro rata share of the value of the corporation as a going concern without discount for lack of

marketability [absent extraordinary circumstances].” Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285 (Minn. 2000).

- A fair value buy-out must be “fair and equitable to all parties.” Section 751, subd. 2. According to Hennepin County Judge Richard Solum (Retired), in an in-depth analysis of Section 751 liability and valuation issues in Minnesota, this means the determination of fair value is “to protect the true value of the [minority shareholder’s] shares, it [is] not to bestow at Company expense, windfalls never achievable to other shareholders in the real world.” Jundt Associates, Inc. v. Knappenberger (Henn. Cty. File No. 95-1498), Order and Memorandum, dated Sept. 13, 1997, at 34.
- Discounts. One Minnesota court identified four discounts commonly used in valuation proceedings: minority discount; marketability discount; key person discount; and discount for contingent liabilities. Doerr v. Arundel (Henn. Cty. File EM 97-013502), Order dated October 1, 1999, at 14 (Judge William R. Howard).
- Minority discounts are not allowed in determining fair value. See, MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383 (Minn. Ct. App. 1991); Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834 (Minn. Ct. App. 1994). While minority status of shares has a real world impact on the value of the shares, and is therefore relevant to a determination of value, such a discount is disallowed by law because applying a minority discount would be contrary to the aim of the statute to protect minority shareholders. MT Properties, 481 N.W.2d at 387; Jundt Associates at 51-52.
- Marketability discounts (DLOM) are only allowed in “extraordinary circumstances.” Follett, 615 N.W.2d 285. The extraordinary circumstances exception applies where failing to apply a marketability discount would result in an unfair wealth transfer from the remaining shareholders to the departing shareholder. Follett, 615 N.W.2d at 292. In assessing whether extraordinary circumstances exist, the court is to exercise “maximum flexibility” by taking into account factors relevant to fair value, including:

whether the buying or selling shareholder has acted in a manner unfairly oppressive to the other or has reduced the value of the corporation, whether the oppressed shareholder has additional remedies such as those available pursuant to Minn. Stat. § 302A.467 (1998), or whether any condition of the buy-out, including price, would be unfair to the remaining shareholders because it would be unduly burdensome to the corporation.

Follett, 615 N.W.2d at 292-93.

In Follett, a marketability discount was allowed because: rejecting the discount would result in a valuation of the minority shareholder's stock at more than five times the net worth of the company and almost seven times its average annual cash flow, and the company's policy of reinvesting cash flows to finance growth was a primary consideration in the appraisers' valuation of the company. Id., at 293. Rejecting a marketability discount therefore would give the plaintiff value for his stock based on past growth, while leaving the remaining shareholders with stock in a corporation with extremely doubtful prospects for growth. Id.

When a marketability discount does apply, it can be significant – the Supreme Court in Follett directed the trial court to apply a marketability discount in the range of 35% to 55%. Id. On remand, the trial court applied a 35% marketability discount, and this was affirmed on appeal. Advanced Communication Design, Inc. v. Follett, 2001 WL 569013 (Minn. Ct. App. May 29, 2001). See also, Jundt Associates, supra at 23 (marketability discount of 20% applied where most, but not all, evidence indicated no likelihood of a future liquidity through a sale or public offering of the company).

- Other Discounts?

While most judicial attention has focused on minority discounts and marketability discounts, courts have addressed other discounts and adjustments in determining fair value. One such discount is the so-called “key person” discount, designed to recognize the risk associated with heavy dependence upon a key person in the company. In Billigmeier v. Concorde Marketing, Inc., 2001 WL 1530356 (Minn. Ct. App. Dec. 4, 2001), the trial court applied, and the court of appeals affirmed, a 10% “key-person discount” and a 40% discount based on the fact that revenues generated by the company were concentrated with a narrow group of vendors. Other courts in shareholder cases have discussed, but declined to apply, a key person discount. Doerr, supra, at 15; Jundt Associates, supra, at 24. The appropriateness of a key-person discount has also been addressed by Minnesota courts in marital dissolution cases. E.g., Feldick v. Feldick, 2004 WL 1093501 (Minn. Ct. App. May 18, 2004) (denying key-person discount), Tourniar v. Tourniar, 2002 WL 2004645 (Sep. 3, 2002) (district court did not abuse its discretion by denying use of the key-person discount); Georges v. Georges, 1992 WL 138614 (Minn. Ct. App. June 23, 1992) (no error where court denied a key-person discount); Nelson v. Nelson, 411 N.W.2d 868 (Minn. Ct. App. 1987) (30% discount for key-man/marketability was arbitrarily low); Rogers v. Rogers, 296 N.W.2d 849 (Minn. 1980) (marital property limited to that portion of the value of the company not dependent upon the continued service of appellant,

who was the key-man on which much of the corporation's profitability was dependent).

The Court of Appeals has also permitted a discount or reduction in value (approximately 33%) for contingent corporate liabilities based on concerns over possible labor and environmental litigation not reflected on the corporation's financial statements. MT Properties, 481 N.W.2d at 389.

- Other Equitable Valuation Adjustments.

Courts have utilized their equitable authority in the basic calculations of value. For example, in Foy v. Klapmeier, 992 F.2d 774 (8th Cir. 1993), one of two shareholders had transferred a product line to a separate corporation in which the plaintiff shareholder had no interest. Relying upon its broad authority to grant equitable relief under Section 467, the court ordered that the diverted business be treated as if it were a division of the main business for the purposes of valuation.

4. Valuation Date.

The presumptive valuation date under Section 751 is "the date of the commencement of the action." However, the court may utilize another valuation date "found to be equitable by the court." Section 751, subd. 2. An alternative to the presumptive date is sometimes the date when the parties' relationship was effectively terminated (e.g., the date of termination). Pooley v. Pooley, 513 N.W.2d 834 (Minn. Ct. App. 1994) (valuation date was date plaintiff was voted off the Board and removed as an officer); Jundt Associates, supra (valuation date was date parties reached oral agreement under which one shareholder would resign and the other would buy him out); Billigmeier, 2001 WL 1530356 (valuation should, to the extent possible, reflect value on the date the plaintiff was terminated). In determining value, courts may exclude post-valuation date evidence, particularly where there is a concern that defendants could manipulate financial performance and/or the company is in a market that is constantly changing. American Sharecom, Inc. v. LDB International Corp., 1995 WL 321540 (Minn. Ct. App. May 30, 1995).

5. Terms/Security/Interest.

In addition to the determination of the buy-out price, the court can establish the terms of the buy-out. The court has explicit authority to provide that the payments for the purchase of the departing shareholder's stock be made in installments over time and to require the payment of prejudgment interest. If the judge orders installment payments, the selling shareholder does not lose his rights or status as a shareholder (and/or officer or director) until the company or purchasing shareholder posts a bond "in adequate amount with sufficient sureties or otherwise satisf[ies] the court that the full purchase price of the shares, plus additional costs, expenses, and fees as may be awarded, will be paid when due and payable." Section 751, subd. 2.

6. The Effect of a Valuation Formula under an Existing Buy-Sell Agreement.

One limit on the court's ability to order a "fair value" buy-out is contained in Section 751, subd. 2:

The purchase price of any shares so sold shall be the fair value of the shares as of the date of commencement of the action or as of another date found equitable by the court, provided that, if the shares in question are then subject to sale and purchase pursuant to the bylaws of the corporation, a shareholder control agreement, or otherwise, the court shall order the sale for the price and on the terms set forth therein, unless the court determines that the price or terms are unreasonable under all the circumstances of the case. (emphasis added).

Even this directive to apply governing contracts relating to a buy-out price allows the court to use its equitable powers to reject the contractual valuation if it is not fair. A number of cases address the applicability of contractual buy-out formulas in Section 751 cases. See, e.g., Gunderson v. Alliance of Computer Professionals, Inc., 628 N.W.2d 173 (Minn. Ct. App. 2001); Drewitz v. Walser, 2001 WL 436223 (Minn. Ct. App. May 1, 2001); Miller Waste Mills v. Mackay, 520 N.W.2d 490 (Minn. Ct. App. 1994); Dullea v. Dullea Company, 1991 WL 271479 (Minn. Ct. App. Dec. 24, 1991).

C. Sale of Company.

Courts may consider the sale of the company as a remedy. For example, where both sides may have both the interest in continuing to operate the company (without the other), and the ability to purchase the other's interest, the court may consider conducting a sale or auction under which any of the parties (or even a third party) could bid on the purchase of the company, with the highest bidder buying out the interest of the other party. See, Afremov v. Amplatz, et al. (Henn. Cty. File No. CT02-017734) Order, dated Aug. 3, 2004. In that deadlock case, Judge Patricia Kerr Karasov ordered that each 50% owner submit a detailed proposal to buy-out the other, including the terms and sources of financing and a business plan for operating the company. Based on these proposals, the court would then determine which party would be allowed to buy-out the other or, if neither party could perform on their proposal within 90 days, appoint an expert to sell the corporation to an outside third party. Among the advantages of a sale of the company as a potential remedy are that the valuation will not be determined in a battle of experts, but instead will be the value placed on the company by the parties themselves or by a third party making a real world investment decision.

D. Breach of Fiduciary Duty "Damages."

Minnesota courts have relied upon the "any equitable relief" provisions in Section 751 to award what is, in reality, akin to money damages. In the well known case of Pedro v. Pedro, one of three brothers who owned and operated a family business was fired after he raised issues about apparent financial discrepancies in the company's books. The shareholders were party to a stock retirement agreement containing a formula purchase price of 75% of net book value. The terminated shareholder/employee was awarded the contract value for his shares. However, since fair value was substantially greater than the purchase price under the share retirement agreement,

he was also awarded the difference between fair value and contract value as breach of fiduciary duty damages. In addition, the plaintiff was awarded lost wages through the age of 72.

Although the court concluded that under the unique facts of the case, the plaintiff essentially had an agreement to lifetime employment, the court of appeals also concluded that the award of future damages for lost wages “is wholly consistent with the court’s broad equitable powers found in § 302A.751, subd. 3a.” Pedro v. Pedro, 489 N.W.2d 798, 803 (Minn. Ct. App. 1992); see also, Pedro v. Pedro, 463 N.W.2d 285 (Minn. Ct. App. 1990).

E. Injunctive Relief.

In some cases, a court will consider entering temporary injunctive relief to avoid irreparable injury during the course of a lawsuit. For example, in Haley v. Forcelle, 669 N.W.2d 48 (Minn. Ct. App. 2003), Haley was removed from the board and demoted from his officer position to a lower level staff position, and subsequently terminated altogether. Not only did Haley lose his sole source of income, he lost the ability to manage and watch over the company he had founded. He was subject to financial hardship that would likely force him to sell his shares. In addition, Haley had personally guaranteed \$4.3 million of company debt in a company in which he no longer had any voice. Under these circumstances, the trial court applied a Dahlberg analysis and entered a temporary injunction, affirmed on appeal, requiring the company to continue to employ Haley and pay him a salary, and to make a monthly accounting to Haley.

Similarly, the Hennepin County trial court in Afremov v. Amplatz, 2004 WL 77851 (Minn. Ct. App. Jan. 13, 2004), issued a temporary injunction, pursuant to Section 751, restraining the defendants from creating and/or transferring any of the company’s assets or operations without certain conditions being met. The trial court subsequently modified the order

by appointing a receiver to take action where the shareholders could not agree. The Court of Appeals affirmed the injunctive relief in light of the trial court's broad authority under Section 751 (although the Court of Appeals held that the trial court abused its discretion by not addressing the issue of security under Rule 65.03.) Id. In another recent Hennepin County decision, the Court entered an injunction reinstating the plaintiff shareholder as President and keeping his compensation intact. Sandvik v. Slattery, et al., (Hennepin County File No. 27-CV-06-03363), Order dated July 28, 2006.

The Rice County District Court ordered injunctive relief requiring the defendant to return to the plaintiff those shares that she fraudulently induced plaintiff to transfer to her. Markegard v. Van Ruden (Rice Cty. File CX-01-1797), Order dated Jan. 7, 2004.

F. Appointment of Receiver, Custodian, or Provisional Director.

Injunctive relief can include the appointment of a receiver or custodian to liquidate and/or oversee some or all of the operations of the company. Minnesota statute expressly authorizes appointment of a receiver in dissolution proceedings, either on a preliminary basis until a hearing can be held or after a full hearing. Minn. Stat. § 302A.753. Such a receiver generally will be authorized to continue the operation of the business, and preserve and then sell or otherwise dispose of the company's assets. Id., subds. 1 and 2.

But a dissolution order is not a requirement for appointment of a receiver. In a recent decision, the Hennepin County Court appointed a receiver without dissolving the company. Beutler v. Dekker (Henn. Cty. File No. 05-2368), Order Appointing Receiver, dated May 26, 2005. The Court recognized that it is not common to appoint a receiver without a pending dissolution. However, the Court concluded that it was necessary and appropriate to appoint a receiver during the pendency of the litigation (involving an impasse between 50/50 owners) to

preserve the corporate assets and, if possible, to continue the ongoing business given the impasse between the owners. The Court relied upon Section 751, subd. 1(b)(1) as authority for its order.

Similarly, in Afremov v. Amplatz, *supra*, a receiver was appointed in connection with the issuance of a temporary injunction. Essentially, the injunction prohibited the parties from taking corporate actions unless all the shareholders agreed. If there was no unanimity, the receiver was required to evaluate the proposed action and authorize the action if the receiver decided it was in the best interests of the company. The court of appeals held that the trial court did have authority under Section 751 to appoint the receiver.

In another case, following trial, the court enjoined the defendant shareholders from transferring assets – both company assets and personal assets – until the full award to the plaintiff shareholders was fully paid and satisfied. Billigmeier, 2001 WL 1530356.

G. Other Equitable Relief.

There is a wide range of other equitable relief that can be considered by the court, including:

1. an accounting;
2. ordering access to company records (See, Minn. Stat. § 302A.461);
3. requiring declaration of dividends;
4. rescinding corporate actions;
5. enjoining continuing acts of oppressive conduct;
6. defining as constructive dividends amounts paid to controlling shareholder(s) as salary or otherwise;
7. ordering stock to be cancelled or redeemed; and
8. permitting a minority shareholder to purchase additional shares.

See generally, 2 F. O’Neal and R. Thompson, O’Neal and Thompson’s Oppression of Minority Shareholders and LLC Members, § 7:20 (Thompson/West 2005).

H. Attorneys' Fees.

A statutory award of attorneys' fees can be an important and significant remedy in shareholder cases. Under Section 751, subd. 4, the court can award attorneys' fees if it finds that a party has acted arbitrarily, vexatiously, or otherwise not in good faith. Section 751, subd. 4. Likewise, under Section 467, the court can award attorneys' fees upon a finding that there has been a violation of any provision of Chapter 302A. For cases discussing the right to an award of attorneys' fees, see, Pedro, 489 N.W.2d at 804 (award of fees within trial court's discretion where there is a finding that defendants' breached their fiduciary duty and acted arbitrarily, vexatiously, and/or not in good faith); Swanson v. Upper Midwest Industries, Inc., 2002 WL 857744 (Minn. Ct. App. May 7, 2002) (fee award within court's discretion for conduct in the litigation and/or underlying conduct before filing of suit); Mooney v. Burtress, 1998 WL 218189 (Minn. Ct. App. May 5, 1998) (attorneys' fees awarded where there was "an air of bad faith" surrounding shareholder's conduct throughout the action, shareholder had not properly investigated claims, and shareholder had acted contrary to his own assertions in the litigation).

I. Punitive Damages.

There is some precedence for allowing punitive damages in Section 751 cases. In Evans v. Blesi, 345 N.W.2d 775 (Minn. Ct. App. 1984), the court allowed an award of punitive damages where a shareholder had used intimidating tactics to get his co-shareholder to transfer shares to give him majority control and then forced the co-shareholder's resignation. See also, Markegard, supra, Orders dated Jan. 7, 2004 and Dec. 17, 2004 (plaintiff shareholder awarded \$50,000 in punitive damages in Section 751 case as a result of defendant's fraud in inducing plaintiff to transfer shares to defendant and other willful misconduct). Punitive damage claims are governed procedurally and substantively by Minn. Stat. §§ 549.191 and 549.20.

J. Joint and Several Liability.

Considering the broad discretion given to the trial court under Section 751, courts have in some cases been willing to order that any liability to the complaining minority shareholder should be joint and several, meaning that both the corporation and its majority owner(s) are liable for the obligation. E.g., Billigmeier v. Concorde Marketing, Inc., 2001 WL 1530356 (Minn. Ct. App. Dec. 4, 2001). The Court in Billigmeier went so far as to impose a constructive receivership to the majority owner's personal assets and permanently enjoined him from transferring any company or personal assets until the judgment was satisfied, and this was affirmed on appeal. Id. See also, Henricksen, 1991 WL 550935 (affirming joint and several liability for buy-out against corporation and its officers/directors); Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834 (Minn. Ct. App. 1994) (company and defendant shareholder ordered to buy-out minority shareholder); Foy v. Klapmeier, 992 F.2d 774 (8th Cir. 1993) (finding that company and shareholder liable for award to dissenting shareholder); Pedro, 489 N.W.2d at 803; Ness v. North Star Imaging, Inc. (Ramsey Cty. File C9-99-2158), Order dated March 29, 2000.

K. Equitable Remedies Against Minority Shareholders.

While claims under Section 751 and Section 467 usually involve a minority shareholder seeking relief from the company or majority shareholder(s), wrongdoing minority shareholders may also be exposed to liability. Bolander v. Bolander, 703 N.W.2d 529 (Minn. Ct. App. 2005). In Bolander, a minority shareholder had been terminated as President, and was awarded severance under an employment agreement in a jury trial. Following a subsequent bench trial on shareholder claims, the court found that the plaintiff had himself acted contrary to the best interests of the company and inconsistent with his own statutory and common law duties by unilaterally taking large amounts of money out of the company at a time when it was struggling

financially. Noting the broad latitude a court of equity has in fashioning remedies to meet the needs of each case, the Minnesota Court of Appeals reversed dismissal of the claim by the majority shareholders for relief under Section 467. The appellate court directed the trial court to enter relief against the plaintiff, which “may include, but is not limited to, equitable forfeiture” of compensation awarded to the plaintiff as a result of the termination of his employment. *Id.*, at 548-49. Even where there is clear fault by the minority shareholder, however, courts are reluctant to deny a shareholder a buy-out where he has been squeezed out of any meaningful involvement in the corporation. Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834 (Minn. Ct. App. 1994) (shareholder given fair value buy-out even though he was convicted of assaulting his co-shareholder and intentionally damaging a customer’s truck).

L. Indemnification under Minn. Stat. § 302A.521.

Another remedy potentially available to both a minority shareholder and majority owners is indemnification and/or advance of defense costs relating to claims asserted against them in their capacity as officers and/or directors. Minn. Stat. § 302A.521 sets forth several specific methods by which requests for indemnification or advance of attorneys’ fees must be considered and approved by the corporation. In general, directors and shareholders who are parties to the litigation cannot be counted toward a quorum and cannot vote on those issues. Since often most or all of the directors and shareholders are parties to the action, special legal counsel may need to be retained to address the requests for indemnification or advances of fees.