

Remedies: What are We Fighting For?

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**REMEDIES IN SHAREHOLDER DISPUTES:
WHAT ARE WE FIGHTING FOR?**

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Minority shareholders seeking relief through the courts for claimed violations of their rights argue that they only want what is “fair.” Majority owners and corporations respond with a similar refrain: any remedy must be “fair” to us. Of course, what is fair and equitable in a particular case is often in the eye of the beholder – more importantly, in the eye of the trial court judge – and, is generally highly dependent on the facts and circumstances of the case. One of the primary remedies utilized in shareholder oppression and deadlock cases is the so-called “fair value” buy-out of the complaining shareholder’s stock in the corporation. But determining “fair value” of stock in a closely held company is itself an exercise that involves substantial discretion by the trial court. Moreover, a buy-out is not the exclusive available remedy. Rather, courts are granted broad discretion to grant “any equitable relief it deems just and reasonable in the circumstances.” Minn. Stat. § 302A.751, subd. 1. Since granting equitable relief is within the sound discretion of the trial court, such relief will be reversed on appeal only if there has been a clear abuse of that discretion. Henricksen v. Big League Game Co., 1995 WL 550935 (Minn. Ct. App. Sept. 19, 1995); see also, Bolander v. Bolander, 703 N.W.2d 529 (Minn. Ct. App. 2005) (appellate court will not disturb grant of equitable relief unless trial court abused its discretion); Shoemaker v. Murnane, Conlin, White, 1999 WL 970381 (Minn. Ct. App. Oct. 26, 1999) (no abuse of discretion for denying buy-out remedy under Minn. Stat. § 302A.751); Wiltse v. Boarder Financial Services, Inc., 2004 WL 771493 (Minn. Ct. App. Apr. 13, 2004).

I. The Key Statutes.

Minnesota’s Business Corporations Act contains specific statutory authority for a variety of potential remedies in cases involving minority shareholder disputes in closely held corporations. Most important are Minn. Stat. § 302A.751 and § 302A.467. (The parallel provisions of the Minnesota Limited Liability Company Act are found at Minn. Stat. § 322B.833

and § 322B.83. This outline will generally refer to the corporate statutes and related case law. However, the principles addressed herein are generally applicable to limited liability companies, as well, under Chapter 322B.)

A. Minn. Stat. § 302A.751/§ 322B.833 (“Section 751”).

Entitlement to relief under Section 751 is predicated on the establishment of the existence of one or more triggering events. This usually involves a finding that controlling owners have engaged in conduct that is “unfairly prejudicial” toward one or more shareholders in their capacity as shareholders, directors, officers, and/or employees of the corporation, but relief can also be granted in cases of fraud or illegal conduct, deadlock, and misapplication or waste of corporate assets. Upon establishment of one or more triggering events, a court may grant:

- “any equitable relief [the court] deems just and reasonable in the circumstances”
- dissolution of the corporation
- a buy-out (on motion or following trial)
- attorneys’ fees and litigation expenses

In determining whether to order equitable relief, dissolution, or a buy-out, Section 751 directs the court to take into consideration “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 and the reasonable expectations of all shareholders as they exist at the inception and develop during the course of the shareholders’ relationship with the corporation and with each other.” Section 751, subd. 3. Moreover, any written agreements, such as employment agreements and buy-sell agreements, “are presumed to reflect the parties’ reasonable expectations concerning matters dealt with in the agreement.” Id.

B. Minn. Stat. § 302A.467/§ 322B.38 (“Section 467”).

Under Section 467, if a corporation, or its officer or director, violates a provision of Chapter 302A,¹ the Court may, in an action brought by a shareholder:

- “grant any equitable relief it deems just and reasonable in the circumstances”
- award attorneys’ fees and litigation expenses

Violations of a provision of Chapter 302A that give rise to a remedy under Section 467 can also be 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).

II. Potential Remedies.

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

¹ A breach of a company’s by-laws, as opposed to violation of a provision of Chapter 302A, does not trigger relief under Section 467. *Isaacs v. American Iron*, 690 N.W.2d 373 (Minn. Ct. App. 2004).

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 Chapter 302A in the early 1980s, courts have been directed by statute to consider less drastic remedies. As stated in the Reporter's Notes to Section 751, dissolution can be a "drastic remedy," and one purpose of Section 751 was to cause courts to consider remedies with less drastic effects than dissolution while protecting the interests of shareholders seeking relief. Section 751 expressly directs that in deciding whether to order dissolution, the court "shall consider whether lesser relief, suggested by one or more parties, such as any form of equitable relief, a buy-out, or a partial liquidation, would be adequate to permanently relieve the circumstances [establishing the triggering event(s)]." Section 751, subd. 3b (emphasis added). The express statutory recognition of a buy-out and other less drastic remedies has undoubtedly contributed to the breakdown of the traditional reluctance of courts to grant relief where there is dissension among shareholders. 2 F. O'Neal and R. Thompson, O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members, § 7:20 (Thompson/West 2005).

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.² The issue for the court is one of fairness based upon the circumstances – the court can order a buy-out “if the court determines in its discretion that an order would be fair and equitable to all parties under all the circumstances of the case.” Section 751, subd. 2 (emphasis added). The issues relating to a buy-out – whether there is a right to a buy-out and, if so, the amount and terms of the buy-out – are central issues in most minority shareholder lawsuits.

1. Procedure.

The court may order a buy-out upon the establishment of any of the triggering events identified in subd. 1 of the statute. While usually ordered following a trial, Section 751 also authorizes a buy-out on motion (subd. 2). The Minnesota Court of Appeals has held that the court can order a buy-out on motion upon a showing of “at least one uncontroverted incident of unfairly prejudicial conduct . . . toward a shareholder.” Sawyer v. Curt & Co., Inc., 1991 WL 65320 (Minn. Ct. App. 1991) (buy-out on motion granted where shareholder’s reasonable expectations were frustrated by termination of her employment without any attempt to

² 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.

compensate her for the loss of status within the corporation). 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 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 WL 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) put 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); see also, Rainforest Cafe, Inc. v. State of Wisc. Inv. Board, 677 N.W.2d 443, 450 (Minn. Ct. App. 2004).

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).

Fair value is usually the subject of competing testimony by experts in shareholder cases. Consistent with the flexibility and discretion afforded trial court judges, Minnesota courts do not require the trial judge to choose between the competing expert valuation opinions. Rather, the valuation statute (Section 473) specifically permits the court to reject both (or all) expert valuation opinions if the court determines that the opinions are not helpful because they are overly optimistic or overly pessimistic. Rainforest Cafe, Inc. v. State of Wisc. Inv. Board, 677 N.W.2d 443, 451 (Minn. Ct. App. 2004) (relying on Section 473, subd. 7, which calls on the court to determine fair value taking into account all factors deemed relevant, "whether or not used by the corporation or the dissenter").

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 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. This 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 adjustment 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 determine 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.

In some cases, 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. In that situation, 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. Under this approach, there is no battle of the experts over valuation, and value is instead determined by the value placed on the company by the parties themselves. Id., at 6.

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 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.)

In a recent decision, 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. A court order requiring dissolution

of a corporation will often be accompanied by the appointment of a receiver. 2 R. Thompson, O'Neal and Thompson at §7.15. Minnesota statute expressly authorizes appointment of a receiver, 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, Hennepin County Judge Diana S. Eagon appointed a receiver without dissolving the company. Beutler v. Dekker (Henn. Cty. File No. 05-2368), Order Appointing Receiver, dated May 26, 2005. Judge Eagon 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 to preserve the corporate assets and, if possible, to continue the ongoing business given the impasse between the two 50/50 owners. The court relied upon Section 751, subd. 1(b)(1) as authority for her order. Arguably, the appointment should have been for a custodian rather than a receiver. See, O'Neal and Thompson, § 7:22 (custodian differs from a receiver in that the custodian is authorized to manage the business rather than wind it up and liquidate the corporation).

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, O’Neal and Thompson, § 7:24.

H. Attorneys’ Fees.

A statutory award of attorneys’ fees can be an important and significant remedy in Section 751 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. Blesj, 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, of course, governed 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 slow 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.

III. Settlement Considerations.

A. Tax Allocation Issues.

The characterization of claims and settlement payments can have a significant impact on the after-tax cost to the company and after-tax benefit to the selling shareholder.

1. For the corporation, is the settlement (or any portion of it) deductible?
 - Damage claims v. stock purchase
 - use of non-competes and consulting agreements
 - attorneys' fee payments
2. For the shareholder, is the payment treated as ordinary income or capital gain?
3. Tax treatment of payment for attorneys' fees?

Recent case law, primarily in the area of employment and personal injury litigation, has given attention to the tax treatment of contingent fees paid directly from the defendant to plaintiff's counsel as part of a settlement. Courts had been divided on the issue, which is important primarily because of the existence of the alternative minimum tax (AMT) which, if applicable to the taxpayer, does not allow a deduction for taxpayer's payments of attorneys' fees.

As a result, the attorneys' fee payment is income to the taxpayer (although the lawyer, and not the taxpayer, receives the money) on which the taxpayer will have tax liability because there is no offsetting deduction.

The United States Supreme Court in 2005 addressed the issue in Commissioner v. Banks, 125 S. Ct. 826 (2005). There, the Supreme Court held that "as a general rule, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee." Interestingly, one of the parties in the Banks litigation and *amici* proposed certain theories under which such fees could be excluded from income or permitted deductibility. These included arguments that contingent fee agreements established a Subchapter K partnership under 28 U.S.C. §§ 702, 704 and 761; litigation recoveries are proceeds from disposition of property, so the attorneys' fees should be subtracted as a capital expense; and the fees are deductible reimbursed employee business expense under 26 U.S.C. § 62(a)(2)(A). Because these arguments were raised for the first time to the Supreme Court and because they were novel propositions with broad implications for the tax system, the Supreme Court declined to comment on them. The Court also declined to address whether fee awards under fee shifting statutes that authorized fee awards to prevailing plaintiff's attorneys, as opposed to fees paid pursuant to a contingent fee contract, constitute income.³

B. Tax Issues Relating to Timing of Settlement.

If the company is a Subchapter S corporation or limited liability company, parties settling a shareholder dispute should consider the tax impact on the departing shareholder during the year of the settlement. Generally, Subchapter S corporations and LLCs distribute funds sufficient to

³ With respect to employment discrimination claims, Congress adopted legislation which eliminates attorney fee awards from a prevailing plaintiff's gross income. See, Civil Rights Tax Relief, 26 U.S.C. § 62; P.L. 108-357, § 62(a)(20).

cover the tax liability of company income that flows through to the tax return of the individual owners. If no provision is made in the settlement agreement, the departing shareholder may be exposed to substantial tax liability due to income attributable to him during the year of the settlement, but not have any money to pay the tax liability on that income. (Likewise, he could be the beneficiary of losses suffered by the company.) Addressing this in the settlement agreement will eliminate that uncertainty.

C. Continuing Indemnification.

Under Minn. Stat. § 302A.521, officers and directors are entitled to indemnification and payment of attorneys' fees with respect to certain claims against them in their capacity as officers or directors. Although these protections may well continue after a minority shareholder receives a buy-out and has departed the company, the very broad releases written into most settlement agreements may allow the company to argue that a former officer/director has no indemnification rights as to claims asserted in the future. To eliminate this potential ambiguity, attorneys representing parties to a settlement agreement should consider including an explicit provision in the agreement with respect to continuing indemnification rights.

D. Special Consideration for Settling Claims by a Shareholder-Employee.

If the shareholder dispute includes any potential for discrimination claims, one should consider whether it is necessary or appropriate to include in a settlement agreement and release certain statutory rescission rights. See, Age Discrimination in Employment Act ("ADEA") 29 U.S.C. § 621-634 and Minnesota Human Rights Act, Minn. Stat. § 363.031, subd. 2.