

By Kristin B. Heebner



Kristin Heebner is a business litigator who enjoys helping businesses resolve their disputes. She applies a solutions-based approach to advising her clients, recognizing that one size does not fit all. Kristin counsels corporations, limited liability companies, and individuals in a wide variety of business disputes, including minority shareholder disputes, contract disputes, environmental cleanup actions, and eviction proceedings. She may be reached at HeebnerK@moss-barnett.com or 612.877.5381.

IN THIS ISSUE

Page 1:

Protecting The MN Closely-Held Corporation: Avoiding Minority Shareholder Claims

Page 2:

Greetings from President Tom Shroyer

Page 3:

Powers of Appointment

Page 4:

The Return of Seller Financing: Contracts for Deed as an Option in Today's Struggling Real Estate Market

Page 7:

Various Accolades

PROTECTING THE MINNESOTA CLOSELY-HELD CORPORATION: AVOIDING MINORITY SHAREHOLDER CLAIMS

"The best defense is a good offense." - Vince Lombardi

Disputes between shareholders of closely-held corporations present some of the most emotionally charged disputes in the law. This is likely because closely-held corporations — which are defined under Minnesota law as corporations with no more than 35 shareholders — are often formed by friends, family members, or business associates who have close relationships with one another but who do not always have similar business or leadership styles.

In these challenging economic times, the stress levels of the shareholders, officers, and directors of closely-held corporations may be soaring. The conflict associated with this stress can give rise to an increased number of shareholder disputes.

In Minnesota, closely-held corporations are governed by the Minnesota Business Corporations Act ("MBCA"). Since its original enactment in 1991, the MBCA has provided a fertile breeding ground for claims by, against, and between corporations and their shareholders. Much of the litigation in this area relates to claims brought against the corporation by one or more "minority shareholders," who are persons that own less than 50% of the corporation's stock. Minority shareholder claims may be direct claims, which are claims asserted against the corporation or its officers and directors by the minority shareholder, or derivative claims, which are claims asserted by the minority shareholder on behalf of the corporation.

Minority shareholder claims typically fall into three broad categories: breach of fiduciary duty claims, unfairly prejudicial conduct claims, and claims for corporate waste. Breach of fiduciary duty claims arise when shareholders or those in control of the corporation breach their duty "to act in an honest, fair, and reasonable manner in the operation of the corporation." Unfairly prejudicial conduct claims are asserted when a closely-held corporation or those in control of the corporation have acted "in a manner unfairly prejudicial toward one or

more of the shareholders." Corporate waste means that the corporation has "misapplied or wasted" corporate assets.

The Minnesota legislature has given courts broad authority to resolve minority shareholder disputes. A court is allowed to grant the aggrieved shareholder "any equitable relief it deems just and reasonable in the circumstances." The aggrieved shareholder may seek monetary damages, a court-ordered buy-out of his or her shares, or, in extreme cases, dissolution of the corporation and liquidation of the corporate assets.

The Minnesota courts have decided a number of cases in recent years that have both bolstered and diminished minority shareholder rights. For example, in *Gunderson v. Alliance of Computer Professionals, Inc.* (Minn. Ct. App. 2001), the court held that the corporation did not engage in unfair prejudice towards the plaintiff shareholder by voting him out as officer and director and offering to repurchase his stock at a low price consistent with the terms of a buy-sell agreement. The thrust of the court's decision in *Gunderson* was that the corporation's actions were authorized by corporate agreements signed by the shareholder.

In *Wiltse v. Boarder Financial Services, Inc.* (Minn. Ct. App. 2004), the court held that the corporation did not treat the minority shareholder in a manner unfairly prejudicial when all shareholders were provided with notice of meetings and the company engaged in practices to which the minority shareholder had raised no objections during the time he was actively involved in the business. Moreover, the fact that the shareholders had offered to sell their shares to the minority shareholder at the same price they offered to purchase his shares undermined any claim that the offer was unfairly prejudicial.

On the other hand, in *Blohm v. Kelly* (Minn. Ct. App. 2009), the court held that genuine issues of fact existed requiring a trial on the minority shareholder's claim that the corporation violated the MBCA by refusing to provide the minority shareholder access to certain



corporate records. The court concluded that the corporation's refusal to provide the records raised enough questions about the corporation's conduct to allow the claim to go to the jury.

Minority shareholder disputes can be expensive and exhausting to litigate. They quickly can drain corporate assets that are better left invested in the corporation. Even as stress levels skyrocket and tensions among business partners run high, there are important steps that closely-held corporations can take in an effort to avoid minority shareholder claims. Consider the following:

1. **Enter into a shareholder control agreement.** Shareholder control agreements are agreements that govern the relationships between the shareholders and the corporation. These agreements govern "any phase of the business and affairs of the corporation, its liquidation and dissolution, or the relations among shareholders of or subscribers to shares of the corporation..." How to determine the purchase price for a buy-out of a shareholder's shares and how to deal with a shareholder's shares in the event of the death of a shareholder are just two examples of topics included in shareholder control agreements. Agreeing to such terms in writing can help minimize future disputes.

Shareholder control agreements also are important because, according to the MBCA, they "are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements." This means that when a shareholder asserts a claim against the corporation alleging that his or her "reasonable expectations" have been frustrated, the court must look to the shareholder control agreement to determine the reasonable expectations of the shareholder.

2. **Communicate with all shareholders equally and in writing.** The concept is simple. Do not include certain shareholders to the exclusion of other shareholders. Communicate with all shareholders equally and in writing, and keep a record of the correspondence. Invite all shareholders to important corporate meetings and allow them to participate. Send written meeting notices to all shareholders, and require them to R.S.V.P. Inform shareholders of major corporate decisions. Although the officers and directors may ultimately be the arbiters of major corporate decisions, it is important that the corporation notify minority shareholders of important corporate business.
3. **Keep records of significant communications and a corporate minute book.** Keep copies of all letters, facsimiles, and email communications to, from, and between the corporation and its shareholders. Write down the details of significant corporate events. Prepare minutes of corporate meetings and written actions of significant corporate events and decisions. Save all such documents in the corporate minute book. The corporate

minute book should contain important corporate records such as the articles of organization, bylaws, minutes, shareholder control agreements, buy-sell agreements, written actions of the shareholders, and other key documents and agreements. Request that the shareholders ratify certain corporate decisions and retain copies of the ratifications.

4. **Respond promptly to shareholder requests for company records.** The MBCA provides that within ten (10) days of making a written demand of the corporation, shareholders have "an absolute right" to examine and copy the following corporate records: the corporate share register, records of all proceedings of shareholders for the last three (3) years, records of all proceedings of the board for the last three (3) years, the corporation's articles and all amendments currently in effect, the corporation's bylaws and all amendments currently in effect, annual financial statements and the financial statement for the most recent interim period prepared in the course of the operation of the corporation for distribution to the shareholders or to a governmental agency as a matter of public record, reports made to shareholders generally within the last three (3) years, a statement of the names and usual business addresses of the corporation's directors and principal officers, voting trust agreements, shareholder control agreements, and a copy of certain corporate agreements and contracts. It is important to respond to a minority shareholder's request for corporate records promptly, as the corporation's refusal to provide the minority shareholder with corporate records may give rise to a claim under the MBCA.
5. **Consult with legal counsel.** If one or more shareholders of your closely-held corporation threatens a minority shareholder claim against the corporation, immediately seek legal counsel. Strategy decisions can be tricky. The sooner you get your counsel up to speed on the issues, the sooner your counsel can assist you in responding to the minority shareholder claim.

Although no closely-held corporation is impervious to minority shareholder claims, incorporating these steps into your business practices may significantly minimize your corporation's exposure to such claims. If you have questions about minority shareholder disputes, please contact your attorney at Moss & Barnett.

Correction to Summer 2009 Newsletter

The legislative amendment to the voting leave statute referenced in the "Employment Law Alert" of our Summer 2009 Newsletter was ultimately vetoed by Governor Pawlenty. Although the amendment is likely to be included in future election reform bills, the prior statutory language, which provides for time off work during the morning to vote, is currently still in effect.