Shareholder Duties and Disputes in Closely-Held Corporations in Massachusetts

by Marc C. Laredo

Marc C. Laredo is a partner at Laredo & Smith LLP in Boston. He concentrates his practice in business litigation and general business law.

Over thirty years ago, the Supreme Judicial Court ("SJC") issued its landmark ruling in *Donahue v. Rodd Electrotype Co. of New England, Inc.*,[1] in which it established standards for the governance of closely held corporations in Massachusetts and held that each shareholder in a closely-held corporation owes a fiduciary duty to the other shareholders.[2] In the years since the *Donahue* decision, and in conformance with that landmark ruling, the Massachusetts courts have analyzed an array of issues involving the management and control of closely-held corporations.

This article first will review the *Donahue* ruling itself. It then will discuss significant developments in the *Donahue* doctrine, including: (a) the tension between running the corporation and protecting the interests of minority shareholders; (b) employment issues when a shareholder also is an employee; (c) the improper use of corporate opportunities; (d) the applicability of *Donahue* to non-Massachusetts corporations; (e) applying the *Donahue* rules to limited liability companies and limited liability partnerships; (f) drafting around the *Donahue* requirements; and (g) special issues for disputes involving professional services firms. Third, the article will provide an overview of available remedies, both by resort to the courts and through negotiation. Lastly, the article will note trends in the case law after *Donahue* and suggestions for further refinements in the balance between the needs of entities and the rights of individual shareholders.

I. The *Donahue* Ruling

Euphemia Donahue was the widow of Joseph Donahue, who had been employed by Rodd Electrotype Company of New England, Inc., starting out as a "'finisher' of electrotype plates" and rising to "the positions of plant superintendent (1946) and corporate vice-president (1955)," although he "never participated in the 'management' aspect of the business."[3] Over time, Mr. Donahue bought stock in the company and, by 1955, was the owner of 20 percent of the company's stock, with Harry Rodd owning the remaining 80 percent.[4] During the ensuing years, Mr. Rodd gave some of his stock to his children and, in 1970, the corporation purchased the remaining stock that he owned.[5] Mrs. Donahue learned of this purchase in 1971 and demanded that the company buy her stock on the same terms; the company refused, and a lawsuit was filed later that year.[6] The superior court ruled in favor of the company and its officers and directors and, in a brief opinion, the Appeals Court affirmed.[7] The SJC reversed the two lower courts, ruling that the company, Mr. Rodd, and its other individual officers and directors breached their fiduciary duties to Mrs. Donahue by not allowing her the opportunity to have the corporation buy her stock on the same terms that had been given to Mr. Rodd.[8]

The court then used this rather narrow internal dispute to provide a broad framework for the governance of "close corporations" in Massachusetts, dealing with the basics (formation, allocation of power, employment, stock purchase and sale) and then how operations, management and compensation can change over time.[9] First, the

1. 367 Mass. 578 (1975).
2. *Id.* at 593.
3. *Id.* at 581.
4. *Id.* at 581-82.
5. *Id.* at 582-83.
6. Mr. Donahue gave his wife joint ownership of his stock in 1962, they transferred five shares to their son in 1968 and, when Mr. Donahue died, Mrs. Donahue became the sole owner of the remaining shares. *Id.* at 583 n. 8, 584.
7. *Id.* at 580; Donahue v. Rodd Electrotype Co. of New England, Inc., 1 Mass. App. Ct. 876, 877 (1974), *S.C.*, 367 Mass. 578 (1975).
8. *Donahue*, 367 Mass. at 585.
9. *Id.*

court defined the term "close corporation," ruling that a corporation will be considered closely held when there are "(1) a small number of shareholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operation of the corporation."[10]

Then came the heart of what would become the *Donahue* doctrine. Noting that "the close corporation bears striking resemblance to a partnership," the court held that "[j]ust as in a partnership, the relationship among the stockholders must be one of trust, confidence, and absolute loyalty..." and the same standard applies to both large and small closely held entities.[11] Building on the concepts of trust and fairness, the court recognized that while there were many advantages for using the corporate form, "it also supplies an opportunity for the majority stockholders to oppress or disadvantage minority stockholders."[12] In such cases, the oppressed minority shareholder has few remedies since "[h]e cannot easily reclaim his capital, cannot readily sell his stock and cannot force a dissolution."[13] Thus, the court ruled, shareholders owe one another a strict fiduciary duty.[14] Shareholders must act with "utmost good faith and loyalty."[15] "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[16] Furthermore, the court ruled that these rules applied not just to majority stockholders but to "*all* stockholders in close corporations."[17] In doing so, the court applied well-settled trust and partnership law to corporations which traditionally had been governed, for the most part, by statutory and contract law.

Having established the standards to be applied to shareholders in closely-held corporations, the court then addressed the issues of equal opportunities for all shareholders.[18] Thus, if a shareholder who is a member of the group controlling the corporation has had his stock repurchased, the other shareholders must be given the same opportunity to have the same percentage of their shares repurchased at the same price.[19] An effort by a shareholder to "issue stock in order to expand his holdings or to dilute holdings of other stockholders" is a similar breach of duty.[20] Based on these rules, the court concluded that either Mr. Rodd had to return the money he had received (with interest) to the company, or Mrs. Donahue had the right to sell her stock to the company at the same price that Mr. Rodd had received (without interest).[21]

II. Significant Developments in the *Donahue* Doctrine

A. Legitimate Business Interest and Other Basic Rules

In its first decision after issuing its broad pronouncements in *Donahue*, the SJC recognized that problems might be caused in the legitimate governance of closely held corporations by the "untempered application" of the *Donahue* standards.[22] Thus began a series of appellate decisions over the next thirty years that have attempted to balance the rights of minority shareholders against the needs of controlling shareholders to run their businesses.[23]

In *Wilkes v. Springside Nursing Home, Inc.*,[24] four men, including the plaintiff Wilkes, bought a building and began operating it as a nursing home through a corporation that they formed.[25] Each of the four served as a director of the corporation, undertook responsibility for certain tasks associated with running the business, and eventually began to withdraw money regularly from the business.[26] After a number of years, disagreements arose between Wilkes and one of the other shareholders.[27] As a result, at directors' and shareholders' meetings in 1967, Wilkes was forced "out of active participation in the management and operation of the corporation" and the company "cut off all corporate payments to him."[28] Wilkes then filed suit for breach of fiduciary duty.[29] The court ruled that

10. *Id.* at 586. This standard provides guidance regarding when a corporation will be considered closely held without establishing a rigid test. The standard also allows for a corporation's status to change over time. A corporation that starts out as being closely held may change to a non-closely-held corporation as a result of events such as going public, having non-active majority ownership, or having a large number of shareholders. Left unsaid by the court, but of significance, is the fact that most Massachusetts corporations, at least at their inception, fit this definition and many remain closely held for their entire existence. Hence, *Donahue* is important to any practitioner dealing with businesses.

11. *Id.* at 586-87.

12. *Id.* at 588.

13. *Id.* at 591-92.

14. *Id.* at 593 & n. 18.

15. *Id.* at 593.

16. *Id.* at 594 (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).

17. *Id.* at 597 (emphasis added). While seeming to announce a bold new set of rules for closely-held corporations in Massachusetts, the court sought to link these rules to existing law by citing to a series of its prior cases and stating that "[a]pplication of this strict standard of duty to stockholders in close corporations is a natural outgrowth of the prior case law." *Id.* at 595; *see, e.g.*, Wilson v. Jennings, 344 Mass. 608, 614-15 (1962); Samia v. Cent. Oil Co. of Worcester, 339 Mass. 101, 112 (1959); Silversmith v. Sydeman, 305 Mass. 65, 68 (1940).

18. *Donahue*, 367 Mass. at 597-600.

19. *Id.* at 598. The only exceptions, held the court, are if the articles of organization, the bylaws, or a shareholders' agreement provide otherwise or the transaction is ratified by all other shareholders. *Id.* at 598 n. 24. (As discussed below, *infra* Part II. F., these exceptions have proven to be quite significant and demonstrate the flexibility and durability of the *Donahue* doctrine.).

20. *Id.* at 600 n. 25.

21. *Id.* at 603-04. In a concurring opinion, Justice Herbert P. Wilkins noted that he did not "join in any implication ... that the rule concerning a close corporation's purchase of a controlling stockholder's shares applies to all operations of the corporation as they affect minority shareholders." *Id.* at 604 (Wilkins, J., concurring). (As we shall see below, Justice Wilkins' cautionary note was soon adopted by the court.).

22. Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850 (1976). (Interestingly, Justice Wilkins did not participate in the decision.).

23. While this article focuses primarily on the appellate decisions that have applied *Donahue*, a substantial body of law also has developed at the trial level since the launch of the business litigation session in the superior court. The topic also has been the subject of continuing education seminars. *See, e.g.*, *Litigating Closely-Held Corporation Disputes in Massachusetts*, Boston Bar Ass'n Continuing Legal Education (Apr. 25, 2007) (the author was one of the panelists).

24. 370 Mass. 842 (1976).

25. *Id.* at 844-45.

26. *Id.* at 845-46 & n. 8.

27. *Id.* at 846-47. In the interim, there had been some shift in the ownership of the corporation. *Id.* at 846.

28. *Id.* at 847.

29. *Id.* at 848.

the exclusion of Wilkes constituted a corporate "freeze out" and recognized that termination of employment can effectively prevent a minority shareholder from getting any return on his investment.[30]

While recognizing the power that majority shareholders had, however, the court also expressed concern that the *Donahue* standards, applied literally, might be too stringent and inhibit legitimate management of the entity.[31] Thus, the court set some limits on the application of the *Donahue* doctrine and rules as to who bears the burden of proof concerning an alleged *Donahue* violation. In each case involving a challenge by a minority shareholder, the court must first ask "whether the controlling group can demonstrate a legitimate business purpose for its action."[32] If the majority meets this initial test, then the burden shifts to the minority shareholder to show "that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest."[33] The courts "must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative."[34] Here, there was no legitimate business purpose for the corporation's action and, therefore, Wilkes was entitled to relief.[35]

In cases following *Donahue* and *Wilkes*, the appellate courts have charted a basic series of rules concerning such issues as burden of proof, the duty of disclosure, problems that ensue when shareholders take on multiple roles in a corporation, and the principle that these rules apply to all shareholders of the entity. These rules generally follow logically from the basic premise that shareholders in a closely-held corporation owe an enhanced duty of fairness to one another.

Thus, in breach of fiduciary duty cases, the burden of proof is on the alleged wrongdoers, at least in the first instance, to justify their actions. A corporate insider whose transaction with the corporation is challenged "has the task of showing that the deal was not in breach of his fiduciary obligations toward directors, stockholders, and corporation."[36] The director or shareholder must "prove that his or her actions were intrinsically fair, and did not result in harm to the corporation or partnership."[37] Likewise, the burden is on the party whose action is challenged to show that its action had a legitimate business purpose.[38]

The corporate insider is bound to make "full contemporaneous disclosure" of a transaction to the other directors and shareholders so they can review and approve it in order for the transaction to withstand a later challenge that it violated a duty owed to the other shareholders or to the corporation itself.[39] In *O'Brien v. Pearson*,[40] for example, the court ruled that a breach of fiduciary duty had occurred when the defendants unilaterally decided to change the enterprise's objective without consulting the minority shareholder.[41] Self-dealing by a fiduciary may not be ratified by a corporation without full disclosure.[42] Moreover, the deference (more so in Delaware than in Massachusetts) given to corporate actions under the business judgment rule, namely that actions will not be subject to judicial scrutiny if they are an exercise of legitimate business judgment, "does not apply if the plaintiff can show self-dealing."[43] For example, "[s]etting one's own level of compensation, without corporate approval, is a form of self-dealing."[44] As such, it will be subjected to close scrutiny by the court."[45] Even silence alone can constitute a breach of a fiduciary duty.[46] Thus, a shareholder's failure to disclose to his fellow shareholders the amount of rent payments he was receiving was a breach of his fiduciary duty.[47]

Fiduciaries must be particularly careful when they assume multiple roles, such as when serving as "trustees of a trust [as well as] stockholders, directors, and officers of a close corporation involved in transactions in which they st[and] on both sides and in which they ha[ve] a self-interest."[48] As the Appeals Court observed, "[w]earing more than one hat --here, at least three-- requires a fiduciary to be very nimble as well as most prudent. While the fiduciaries may purport to wear one hat at a particular moment, in truth all hats are worn together at all times."[49]

These rules apply to all shareholders, not just minority owners.[50] Even though a 50 percent shareholder, for example, can pursue the remedy of dissolution, he also can avail himself of the *Donahue* protections.[51] Thus, in *Smith v. Atlantic Properties, Inc.*,[52] the court

30. *Id.* at 849-50.

31. *Id.* at 850-51.

32. *Id.* at 851.

33. *Id.* at 851-52.

34. *Id.* at 852.

35. *Id.* at 852-53.

36. Cooke v. Lynn Sand & Stone Co., 37 Mass. App. Ct. 490, 496 (1994).

37. Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 530 (1997) (quoting Meehan v. Shaughnessy, 404 Mass. 419, 441 (1989)). *Demoulas* involved a family dispute over allegedly improperly "transfer[ed] assets and divert[ed] business opportunities…." *Id.* at 505. The appeal after a lengthy trial led to several significant legal rulings by the SJC.

38. Zimmerman v. Bogoff, 402 Mass. 650, 658 (1988).

39. *Cooke*, 37 Mass. App. Ct. at 497.

40. 449 Mass. 377 (2007).

41. *Id.* at 386. As discussed below, *infra* text accompanying notes 188-91, however, the remedy ordered by the court meant that the plaintiff gained little for his efforts.

42. Puritan Med. Ctr., Inc. v. Cashman, 413 Mass. 167, 172 (1992).

43. Johnson v. Witkowski, 30 Mass. App. Ct. 697, 711 (1991).

44. Charlette v. Charlette Bros. Foundry, Inc., 59 Mass. App. Ct. 34, 43 (2003).

45. *Id.* (stating that, while it was wrong not to get corporate approval for compensation, there was no breach of fiduciary duty where "actual amounts were well within the range of reasonable compensation").

46. *Puritan*, 413 Mass. at 175-77.

47. *Id.* at 176-77.

48. *Johnson*, 30 Mass. App. Ct. at 704.

49. *Id.*

50. Zimmerman v. Bogoff, 402 Mass. 650, 657 (1988); Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 593 n. 17 (1975).

51. *Zimmerman*, 402 Mass. at 658. Dissolution is discussed *infra* text accompanying notes 204-07.

52. 12 Mass. App. Ct. 201 (1981).

applied *Donahue* to a minority shareholder who, through provisions in the entity's articles of organization and bylaws, was able to veto certain corporation actions (in this case by voting against declaring a dividend which resulted in an adverse tax consequence to the entity).[53]

At the same time that the courts have outlined the basic rules for shareholders to follow, they also have recognized that not every situation that may harm a shareholder constitutes a violation of the *Donahue-Wilkes* standards. For example, in a case involving the recapitalization of a publicly-held company that had the attributes of a closely held corporation, the recapitalization passed scrutiny because the minority shareholders failed to show that legitimate business purpose could have been reached with "less drastic alternatives...."[54] In *Goode v. Ryan*,[55] the court refused to order a corporation to repurchase a deceased shareholder's stock.[56] There was nothing in the corporate documents or any agreement among the shareholders that required repurchase nor was the refusal to buy back the shares part of a freeze-out; "the plaintiff's predicament... [was] merely one of the risks of ownership of stock in a close corporation."[57] Thus, unlike *Donahue*, the corporation was not benefiting one shareholder while refusing to do the same for another. The entity was simply exercising its legitimate right not to undertake an activity that is was not obligated to do. In this regard, no *Wilkes* situation was presented because there was no harm to a minority interest. Rather, the court simply refused to create an affirmative right that the parties had not chosen to create.[58]

Moreover, while a minority shareholder owed *Donahue* duties to the majority, the majority can legitimately "take its own interest into account" in deciding how to act.[59] Thus, "self-interest may be a proper motive for a stockholder's actions, so long as that interest does not result in acts in derogation of the stockholder's fiduciary duty."[60] This right of "'selfish ownership'" extends "at least in part, to minority stockholders, although their interests are somewhat different in character."[61] So a minority shareholder's decision to vote against a merger was legitimate where it had not been given requested financial information and it had a reasonable suspicion that the proposed transaction "was based on unrealistic assumptions...."[62] Voting for the merger was not "a reasonable and practicable alternative...."[63]

In *In re Mi-Lor Corp.*,[64] the United States Court of Appeals for the First Circuit faced the question whether a release signed "by a close corporation and its directors and shareholders" barred a later claim of unjust enrichment.[65] In *Mi-Lor Corp.*, all of the directors and shareholders of a closely held corporation, and the entity itself, entered into a global settlement agreement among themselves that included mutual releases.[66] Later, when the entity filed for bankruptcy, the creditor trustees brought claims on behalf of the entity against certain shareholders.[67] The court held that "where there is unanimous and fully informed shareholder approval in a close corporation," even if all of them were "interested," that was sufficient to uphold a release and no further showing of fairness was necessary.[68] The court further ruled "that Massachusetts would place the burden of showing the enforceability of a release on the corporate fiduciary who relies on that release to extinguish any recovery for the underlying breach."[69]

B. The Shareholder-Employee

Often in a closely-held corporation, the minority shareholder is an employee and the effort to harm him is to deprive him of employment.[70] In *Merola v. Exergen*,[71] the court was confronted with the problem of how to balance the competing principles of duties to fellow shareholders with the general right to terminate an at-will employee with or without cause.[72] Steven Merola, an employee who was not a founder of the company, purchased shares of stock in his employer, a closely-held corporation, when the company allowed its employees to make such stock purchases.[73] When Merola was terminated, he sued the company and its president and majority

53. *Id.* at 205-07.

54. Leader v. Hycor, Inc., 395 Mass. 215, 221-23 (1985).

55. 397 Mass. 85 (1986).

56. *Id.* at 92.

57. *Id.* The court also noted that "the deceased shareholder...never held corporate office, or served on the board of directors or received any salary from Gloucester, and there is no indication that she or her estate was aggrieved by the absence of involvement in corporate management." *Id.* at 91.

58. *See* Adelson v. Adelson, 60 Mass. App. Ct. 753, 767-68 (2004) (noting that nothing in *Donahue* or *DeMoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501 (1997), "suggested that shareholders in a closely-held corporation owe one another a duty of the utmost good faith and loyalty in any dealings beyond the operation of the corporate enterprise").

59. Med. Air Tech. Corp. v. Maruan Inv., Inc., 303 F.3d 11, 21 (1st Cir. 2002).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 22. One justice of the superior court has ruled that it was not a breach of a fiduciary duty for a shareholder to "'plan and prepare for creation of a competing business' if he continues to carry out his commitments to" the original company. Data Cable Networks, Inc. v. Gogan, No. 05-02479, 2007 Mass. Super. LEXIS 178, at *5-*6 (Mass. Super. Ct. June 8, 2007)(Gershengorn, J.). Once the shareholder was terminated (because the other shareholders had learned of his actions in creating a new entity) he was free to compete. *Id*, at *6-*9.

64. 348 F.3d 294 (1st Cir. 2003).

65. *Id.* at 302; *see* Barry Ravech, *Close Corporations: Unanimous Consent of Shareholders to a Release of Breach of Fiduciary Duty by a Shareholder*, 89 Mass. L. Rev. 91, 91 (2004).

66. *In re Mi-Lor Corp.*, 348 F.3d. at 296, 298.

67. *Id.* The court commented that, in certain instances, "some claims of this sort may trigger a successful laches defense." *Id.* at 300 n. 9. (No such defense was asserted in this instance.).

68. *Id.* at 304. The court noted that *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501 (1997), was ambiguous on this issue but concluded that its decision was the "wiser rule." *In re Mi-Lor Corp.*, 348 F.3d at 303-04 & n. 13.

69. *Id.* at 306.

70. *See generally* David E. Belfort and Michael L. Mason, *The Employee – Shareholder: At the Frontier of Business and Employment Law*, 9 Mass. Bar Ass'n Sec. Rev. 27 (2007).

71. 423 Mass. 461 (1996).

72. *Id.* at 463-66.

73. *Id.* at 462-63.

stockholder, Francesco Pompei, alleging that there was no legitimate business purpose for his termination and, therefore, it was a breach of fiduciary duty to fire him.[74] The SJC ruled that:

> [a]lthough there was no legitimate business purpose for the termination of the plaintiff, neither was the termination for the financial gain of Pompei or contrary to established public policy. Not every discharge of an at-will employee of a close corporation who happens to own stock in the corporation gives rise to a successful breach of fiduciary duty claim.[75]

Important factors in *Merola* were that (a) the employee got a fair price for his stock; (b) the employee did not help to form the company; (c) there was no expectation by any other employee-stockholders of continued employment with the company; (d) the value of the stock increased while the employee was employed; and (e) buying stock in the company was not a condition of employment.[76] Furthermore, termination of employment pursuant to the terms of an employment contract is permissible and therefore, does not give rise to a *Donahue* inquiry.[77]

In other cases, the courts also have balanced the issue of the rights of employers to freely terminate their employees (subject to certain limited exceptions) in at-will employment situations with the fiduciary duties owed to those same employees in their capacities as shareholders. For example, termination of an employee for participating in a shareholder derivative suit does not constitute a violation of public policy.[78] But when a company terminated a shareholder-employee, thereby depriving him of a lifetime employment situation, triggering a stock redemption, and, by removing him from the company, denied him information relevant to the diversion of corporate assets, and, the day after the termination, had its employees sign a "confidentiality agreement" "whose only apparent purpose was to prevent these employees from disclosing to" the discharged employee what was going on at the company, the court entered a preliminary injunction ordering the employee reinstated to his position.[79] It should be noted that an employee-shareholder who is wrongfully terminated cannot just sit back and wait for her rights to be vindicated; she still has an obligation to attempt to mitigate her damages.[80]

The balance that must be struck between recognizing the rights of management to run the entity and protecting the minority shareholder from losing perhaps the only tangible benefit of stock ownership – her job -- is difficult to achieve. In *Wilkes* and then in *Merola*, the court seems to have struck the appropriate balance, enhanced but not absolute protection for the shareholder who helps found or fund the company and diminished rights for the shareholder who receives stock incident to employment.

C. Diverting Corporate Opportunities

The rules concerning diversion of a corporate opportunity flow naturally from the general principles enunciated in *Donahue*, *Wilkes* and their progeny. A shareholder (like a corporate officer or director) breaches "his fiduciary duty by acquiring or diverting a corporate business opportunity for his personal profit...."[81] Before diverting a corporate opportunity for his own use, a shareholder must fully disclose that opportunity to the corporation.[82] As with other allegations of shareholder wrongdoing, full disclosure is the critical issue.[83] In order to avoid later challenges, it is better to make the disclosure in writing and even better to get written consent for the action.

74. *Id.* at 461.

75. *Id.* at 466.

76. *Id.* at 465.

77. Blank v. Chelmsford Ob-Gyn, P.C., 420 Mass. 404, 408-09 (1995) *But see* King v. Driscoll, 418 Mass. 576, 585-87 (1994) (shareholders liable for conduct in connection with termination of employee who was fellow shareholder and events leading up to termination). Employment agreements and other contractual agreements are discussed further *infra* Part II. F.

78. *King*, 418 Mass. at 583. In *King*, the court ruled that despite a statutory "right to participate in a derivative suit" termination of employment for such participation "did not violate any public policy." *Id.* at 583. However, the termination was a breach of fiduciary duty owed to the employee under *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578 (1975), and *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842 (1976), even though the ultimate purchase of his stock was governed by a shareholders' agreement. *King*, 418 Mass. at 585-87.

79. Massmanian v. DuBose, No. 05-1727-BLS2, 2005 Mass. Super. LEXIS 488, at *24 (Mass. Super. Ct. Sept. 23, 2005) (Gants, J.)(issuing injunction for discharged employee); *see* O'Connor v. U.S. Art Co., No. 03-1728 BLS, 2005 Mass. Super. LEXIS 308, at *24-*26 (Mass. Super. Ct. June 27, 2005) (Van Gestel, J.) (termination of minority shareholder-employee improper).

80. Pulsifer v. Bitflow, Inc., No. 97-4508, 2001 Mass. Super. LEXIS 30, at *46-*47 (Mass. Super. Ct. Jan. 23, 2001) (McHugh, J, *aff'd*, 60 Mass. App. Ct. 1103 (2003)). The termination of an employment agreement may also give rise to a claim against individual shareholders for malicious interference with contractual relations. To prevail on such a claim is difficult. The employee must show that the "requisite improper motive or malevolence is a spiteful, malignant purpose unrelated to the legitimate corporate interest." *Pulsifer*, 2001 Mass. Super. LEXIS 30, at *52 (quoting *King*, 418 Mass. at 587). *See* Blackstone v. Cashman, 448 Mass. 255, 268-70 (2007) (actual malice must be shown in claim by employee against company director). Moreover, to maintain such an action, the decision-maker must be distinguishable from the corporate entity itself. Harrison v. Netcentric Corp., 433 Mass. 465, 477-78 (2001).

81. Puritan Med. Ctr., Inc. v. Cashman, 413 Mass. 167, 177 (1992); *see* Demoulas v. DeMoulas Super Mkts., Inc., 424 Mass. 501, 528-33 (1997); Samia v. Cent. Oil. Co. of Worcester, 339 Mass. 101, 122 (1959); Cain v. Cain, 3 Mass. App. Ct. 467, 473-76 (1975).

82. Wartski v. Bedford, 926 F.2d 11, 13 (1st Cir. 1991); *Demoulas*, 424 Mass. at 530-31; Dynan v. Fritz, 400 Mass. 230, 242-44 (1987); Energy Res. Corp. v. Porter, 14 Mass. App. Ct. 296, 302 (1982). Full disclosure in and of itself is not enough when the directors who decide whether to permit the pursuit of the opportunity are "self interested...." *Demoulas*, 424 Mass. at 531. In such cases "the burden is on those who benefit from the venture to prove that the decision was fair to the corporation." *Id.*

83. *See Wartski*, 926 F.2d. at 19.

Whether there has been a breach of duty in diverting an opportunity depends on the particular facts of the situation.[84] But it is a defense to a claim of usurping a corporate opportunity that the corporation would be unable to avail itself of that opportunity.[85] Thus, in *Energy Resources Corp. v. Porter,*[86] the Appeals Court held that in a "refusal to deal" defense, that is, the argument that there was no corporate opportunity if someone was refusing to transact business with the company, the refusal must be disclosed to the company along with a fair statement of the reason for the refusal.[87] Only with full disclosure can a claim of diversion of a corporate opportunity be avoided.[88] "The nondisclosure of a corporate opportunity is, in itself, unfair to a corporation and a breach of a fiduciary duty."[89] A director who usurps or diverts a corporate opportunity "is personally liable even where the profits or benefits accrue to a third party, whether or not it is under the control of the director."[90]

D. To Whom Do These Rules Apply? - Choice of Law Issues

While the *Donahue* standard applied to Massachusetts corporations, until the 1990s it was not clear how it applied to "foreign" corporations. This was a particularly important issue because Delaware is often the choice of forum for corporate lawyers looking to create a new entity. In *Demoulas v. Demoulas Super Markets, Inc.,*[91] the corporation had been formed in Delaware but then merged into a new Massachusetts corporation.[92] The SJC held that only one state's laws should apply (even though some of the wrongdoing occurred while the entity was a Delaware corporation) and so it applied Massachusetts law.[93] Four years later, in *Harrison v. Netcentric Corp.,*[94] the court shifted course, rejecting any suggestion that it would adopt a functional approach to determining which state's law applied, and holding that "the State of incorporation dictates the choice of law regarding the internal affairs of a corporation."[95] In reaching this conclusion, the court noted that "[t]o avoid the imposition of 'conflicting demands,' 'only one State should have the authority to regulate a corporation's internal affairs....'"[96] The court reconciled its ruling in *Demoulas* by noting that the "case was an exceptional one, as it concerned a company that has changed its State of incorporation as well as conduct that spanned both periods...."[97] Interestingly, the breach of fiduciary duty claim involved the company buying back the stock under a stock restriction agreement, which agreement provided that it would be governed by Massachusetts law. Yet, the court ruled that this choice of law provision did "not mean that the plaintiff's breach of fiduciary duty claim must also be governed by the law of this State."[98]

There seems to be some element of unfairness in allowing an entity that, except for its state of incorporation, is based entirely in Massachusetts to be able to deprive its minority shareholders of the protections of *Donahue*. While, as discussed below, a well-crafted shareholders' agreement can limit this inequity (and by the same token modify the *Donahue* duties for a Massachusetts entity), the fairer rule would be to look at least in some instances not just to the entity's forum state but also to its principal place of business.

84. *Id.* at 18; *Puritan*, 413 Mass. at 177 (where shareholder's ownership of real estate predated his involvement with corporation, he was under no obligation to renew lease to corporation); *compare* Fronk v. Fowler, 71 Mass. App. Ct. 502, 507-10 (2000) (limited partnership "not a general purpose enterprise" but was rather "quite limited" and therefore no diversion of corporate opportunity).

85. *Puritan*, 413 Mass. at 178; *Energy Res. Corp*, 14 Mass. App. Ct. at 300.

86. 14 Mass. App. Ct. 296 (1982). Although not a *Donahue* case, its principles are applicable to the closely-held entity.

87. *Id.* at 300.

88. *Id.* at 300-02.

89. Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 535 (1997). The records of the corporation, particularly minutes of meetings, may be very important in regard to determining whether disclosure was adequate. *Id.* at 539-40.

90. *Id.* at 544. Restitution is an appropriate remedy. *Id.* at 556.

91. 424 Mass. 501 (1997).

92. *Id.* at 511.

93. *Id.*

94. 433 Mass. 465 (2001).

95. *Id.* at 471.

96. *Id.* at 470.

97. *Id.* at 471.

98. *Id.* at 472 n. 10. If the entity in question is a Delaware corportation then careful analysis of Delaware law will be necessary. See Clemmer v. Cullinane, 62 Mass. App. Ct. 904 (2004) (rescript) ("Despite the sweeping clieta" in at least one Delaware case, "a cause of actionfor minority shareholder freeze-out" involving a Delaware corporation was allowed to survive a motion to dismiss under Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure.).

E. The Applicability of Donahue to New Types of Legal Entities

Since *Donahue* was decided in 1975, the legislature has authorized two new types of legal entities: limited liability partnerships and limited liability companies.[99] Although no Massachusetts appellate case has squarely addressed the issue, it appears that the *Donahue* principles will be equally applicable to these new types of entities. In *Billings v. GTFM, LLC*,[100] for example, the court applied the rules relating to derivative actions brought by shareholders to members of a limited liability company.[101] In so ruling, the court applied the word "member" in Rule 23.1 of the Massachusetts Rules of Civil Procedure to include members of limited liability companies even though the text of Rule 23.1 refers to "member" as a part of an "unincorporated association…."[102]

The extension of *Donahue* and its progeny to these new entities seems logical. The *Donahue* principles are derived from general partnership law, so requiring members of limited liability partnerships to continue to abide by these duties while enjoying the primary benefit of a limited liability partnership, the ability to engage in business with others with at least some shield from personal liability, is reasonable. Likewise, since limited liability companies are designed to be a more flexible form of the corporate legal entity, it also is fair to require members of limited liability companies that share the attributes of closely-held corporations to follow the *Donahue* rules.

F. Shareholder and Other Agreements

Agreements among shareholders are enforceable.[103] An agreement to purchase stock, for example, even if the price is less than market value, is enforceable if the agreement was entered into by all shareholders in advance.[104] "The validity of such agreements will be upheld absent any fraud, overreaching, undue influence, duress or mistake at the time the deceased entered into the agreement…."[105] Thus, "[q]uestions of good faith and loyalty do not arise when all the stockholders in advance enter into an agreement concerning termination of employment and for the purchase of stock of a withdrawing or deceased stockholder."[106] The crucial issue then is the circumstances and the disclosures at the time the agreement was negotiated, not what may subsequently appear fair in hindsight. The requirements of *Donahue* will have been met if the parties knew what they were doing at the time they entered into the agreement. What seems fair later on does not come into play.[107]

Blank v. Chelmsford Ob-Gyn, P.C.,[108] is particularly instructive. There, the court ruled on a motion to dismiss that, where three individual shareholders had established a corporation and prepared and signed written employment agreements allowing the company to terminate employment on six-months notice (which, in turn, triggered a shareholder's stock buy back agreement), the termination was valid and not a breach of fiduciary duty.[109]

Absent such an agreement, one would have expected the court to readily conclude that there had been a *Donahue* violation. Indeed, termination of employment of a founder without cause is a classic example of a freeze-out. Yet, the existence of the employment agreement negated any potential *Donahue* breach. Certainly, a shareholder-employee in a closely held entity will need to be very careful about such agreements lest he essentially sign away the protections otherwise owed to him under *Donahue* standards.

While a discussion of the intricacies of drafting shareholder agreements (including tax ramifications which may be of critical importance) is beyond the scope of this article, some general comments are appropriate. Shareholder agreements should include, if possible, provisions on to how to deal with death, disability and termination of employment (whether for cause, voluntary termination or by retirement). They also should include, where appropriate, protections for minority shareholders (such as imposing obligations for super-majority votes for certain events) while not unduly limiting the ability of the majority to run the enterprise. Counsel plays an important role in the creation of such agreements, although care must be taken to make it clear who the attorney does

99. MASS. GEN. LAWS ch. 156C, §§ 1-69 (2006) (limited liability companies); MASS. GEN. LAWS ch. 108A, §§ 45-49 (2006) (limited liability partnerships).

100. 449 Mass. 281 (2007).

101. *Id.* at 289-90; MASS. R. CIV. P. 23.1.

102. *Billings*, 449 Mass. at 289-90. Rule 23.1 states, "[I]n a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association…." MASS. R. CIV. P. 23.1. Nowhere does this rule refer to limited liability companies (the rule was adopted in 1973, many years before such companies were recognized in Massachusetts). *See* First Taunton Fin. Corp. v. Arlington Land Acquisition-99, LLC, No. 03-4449 BLS, 2006 Mass. Super. LEXIS 98, at *9-*10 (Mass. Super. Ct. Feb. 27, 2006) (Van Gestel, J.) (Rule 23.1 is not limited to traditional companies).

103. Concord Auto Auction, Inc. v. Rustin, 627 F. Supp. 1526, 1531 (D. Mass. 1986); Evangelista v. Holland, 27 Mass. App. Ct. 244, 248-49 (1989). The Massachusetts Business Corporation Act, the revamped corporate statute that was enacted in 2004, specifically allows shareholders to govern their relationships through agreements. MASS. GEN. LAWS ch. 156D §§ 6.27, 7.30-7.32 (2006). Whether such agreements can totally eliminate all fiduciary duties, however, seems to be an open question.

104. *Evangelista*, 27 Mass. App. Ct. at 248-49.

105. *Concord Auto Auction, Inc.*, 627 F. Supp. at 1531.

106. *Evangelista*, 27 Mass. App. Ct. at 248-49.

107. Blank v. Chelmsford Ob-Gyn, P.C., 420 Mass. 404, 408 (1995).

108. 420 Mass. 404 (1995).

109. *Id.* at 404-06.

(and does not) represent, to advise individual shareholders to seek independent counsel where appropriate, and to obtain informed consent regarding potential conflicts of interest. While even a well-crafted shareholders' agreement will not stop the errant shareholder from usurping a corporate opportunity or wrongfully terminating a founding shareholder's employment, it will, in many instances, help to avoid disputes in the first instance or provide guidance for their resolution when they do arise. There are also other contractual means to deal with the *Donahue* standards, including employment agreements and provisions in the articles of organization or bylaws.

G. Special Issues for Professional Services Firms

Disputes among shareholders of a professional firm present additional issues. While the *Donahue* standards certainly apply, they must be balanced with and, indeed, may at times be outweighed by the ethical rules governing the conduct of these professionals. So, for example, in the case of attorneys, the general prohibition against taking a corporate opportunity is balanced against the ethical concept that an attorney's client has the right to choose her own counsel.[110] A joint letter from both the firm and the departing attorney is the proper way to proceed.[111] Whether similar considerations affect other professional corporations has not been addressed at the appellate level in Massachusetts.[112] Counsel representing professionals in shareholder disputes in closely-held businesses must consult not only the general duties set forth in this article but also the applicable professional codes of ethics as well as any statutes that may affect that particular type of professional.

III. Remedies

A. Statutes of Limitations

In seeking legal recourse for an alleged wrongdoing, one of the first questions to ask is: is it timely?[113] In cases involving shareholders in a closely-held corporation, the issue can be particularly difficult because the wrongdoing may have been going on for a long time and there may be a mix of contract and tort claims. Generally, the statute of limitations for tort claims is three years.[114] The general statute of limitations for breach of contract claims is six years (although for contracts under seal it is extended to twenty years).[115] Thus, a claim for breach of fiduciary duty is governed by the three-year statute of limitations.[116]

But determining the applicable statute of limitations is only the beginning of the analysis. In *Demoulas*, the court had to grapple with alleged wrongdoing that had occurred over many years.[117] Recognizing that a shareholder's derivative action was a tort claim subject to the three-year statute of limitations, the court had to consider whether actions that had occurred outside of the three-year window nevertheless could be maintained by virtue of General Laws chapter 260, section 12, the so-called "fraudulent concealment" exception to the statute of limitations.[118] Relying on trust law concerning claims of breach of fiduciary duty by a trustee, the court held that the statute begins to run when a trustee "repudiates the trust *and* the beneficiary has actual knowledge of that repudiation."[119] The SJC ruled:

> [w]hen a defendant fraudulently conceals a cause of action from the knowledge of the plaintiff, the statute of limitations is tolled under . . . §12, for the period prior

110. *See* Meehan v. Shaughnessy, 404 Mass. 419, 431-34 (1989)(discussing procedures to be followed regarding clients when lawyers leave a law firm); Lampert, Hausler & Rodman, P.C. v. Gallant, No. 03-1977 BLS, 2005 Mass. Super. LEXIS 118, at *15-*16 (Mass. Super. Ct. Apr. 4, 2005) (Van Gestel, J.) ("There is a serious conflict in the law as established in *Meehan* between what lawyers may do when preparing for and planning to leave a law firm and the fiduciary duties that both *Meehan* and *Donahue* impose on partners in the law firm or shareholders in a closely held corporation.").

111. *Meehan*, 404 Mass. at 442 n. 16. (A very different result might have ensued in a non-professional entity where the taking of customers could be deemed a breach of fiduciary duty).

112. *But see* Falmouth Ob-Gyn Assocs., Inc. v. Abisla, 417 Mass. 176, 179-81 (1994) (Mass. Gen. Laws ch. 112, § 12X (2006) makes non-competition agreements among physicians unenforceable). A separate issue that is of particular concern to attorneys but beyond the scope of this article is multiple representation by an attorney of both the entity and some of its shareholders and breach of fiduciary duty claims that could be brought against the attorney. *See* Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C., 405 Mass. 506, 512-14 (1989) (declining to reach the issue while noting that "there is logic in the proposition that, even though counsel for a closely held corporation does not by virtue of that relationship alone have an attorney-client relationship with the individual shareholders, counsel nevertheless owes each shareholder a fiduciary duty"); Cacciola v. Nellhaus, 49 Mass. App. Ct. 746, 750-54 (2000) (breach of fiduciary claim against attorney survived motion to dismiss). A claim that an attorney improperly received funds for representing a shareholder's interest is a derivative claim. *Schaeffer*, 405 Mass. at 513. Other states, of course, may have other statutes of limitations.

113. Of course, a statute of limitations is a defense, not an element of a case. Mass. R. Civ. P. 8(c). Still, the prudent plaintiff's attorney will need to ask this question.

114. Mass. Gen. Laws ch. 260, §2A (2006). Note that the statute of limitations for claims against trustees, guardians and conservators is two years and the statute for claims against executors or administrators is one year. Mass. Gen. Laws ch. 260, §11 (2006). Claims against deceased persons generally must be brought within one year of death. Mass. Gen. Laws ch. 197, §9 (2006). As with many statutes of limitations, there are exceptions to these rules that must be studied carefully.

115. Mass. Gen. Laws ch. 260, §§1-2 (2006). Contract claims for professional malpractice by lawyers and accountants are governed by a three year statute of limitations. Mass. Gen. Laws ch. 260, §4 (2006).

116. *See* Shane v. Shane, 891 F.2d 976, 985 (1st Cir. 1989) (applying three-year statute of limitations and ruling that it was tolled due to evidence of fraudulent concealment and that claim was "inherently unknowable"); Sugarman v. Sugarman, 797 F.2d 3, 28-31 (1st Cir. 1986) (freeze-out was a tort for purposes of determining interest); Houle v. Low, 407 Mass. 810, 812-13 (1990) (claims against individual defendants were barred by the three-year statute where there was no fraudulent concealment or continuing tort and it was not inherently unknowable); Kirley v. Kirley, 25 Mass. App. Ct. 651, 652-53 (1988) (freeze-out claim governed by three-year statute of limitations). Careful pleading is in order if faced with an anticipated statute of limitations defense.

117. DeMoulas v. DeMoulas Super Mkts., Inc., 424 Mass. 501, 517-24 (1997) (emphasis in original).

118. *Id.*

119. *Id.* at 518.

to the plaintiff's discovery of the course of action. Where a fiduciary relationship exists, the failure adequately to disclose the facts that would give rise to knowledge of a cause of action constitutes fraudulent conduct and is the equivalent to fraudulent concealment for purposes of applying §12.[120]

Applying "[a]n actual knowledge standard," the court held that "a plaintiff need only show that the facts on which the cause of action is based were not disclosed to him by the fiduciary."[121] It rejected the "reasonable diligence standard" used in most tort cases involving "the so-called discovery rule."[122] Furthermore, the court ruled that in a derivative action, the statute of limitations does not begin to run "until knowledge is gained by those who have the power and responsibility to act on the corporation's behalf and who are not themselves involved in the wrongdoing that is the basis for the cause of action."[123] Thus, using the "adverse domination doctrine," "the statute of limitations is tolled while a private plaintiff continues under the domination of the wrongdoer.[124]

Nearly a decade after deciding *Demoulas*, the SJC, in *Aiello v. Aiello*,[125] set some bright-line rules regarding the so-called "doctrine of adverse domination," namely whether the domination of a board of directors by interested directors tolls the statute of limitations.[126] In *Aiello*, the plaintiff was a director and a shareholder of the corporation.[127] Thus, once she had actual knowledge of the wrongdoing, she could not avail herself of the adverse domination doctrine to further toll the statute.[128] As the court ruled:

> we now adopt the "doctrine of adverse domination" as a form of equitable tolling in the Commonwealth. We also conclude that the complete domination test - - and not the disinterested majority test - - was appropriately chosen and applied by the judge in the circumstances of these cases. Under the former test, the statute of limitations is not tolled by reason of adverse domination unless the plaintiff can show the absence of any corporate director or shareholder who had actual knowledge of the alleged wrongdoing and the ability (and motivation) to sue the wrongdoers on behalf of the corporation or induce such a suit.[129]

Before the issue of adverse domination is considered, however, plaintiff must have actual knowledge of the claim.[130] Only when an aggrieved shareholder has actual knowledge of the wrongdoing does the statute of limitations start to run (unless it is tolled by the "adverse domination" rule).[131]

There are two reasons for the "adverse domination" rule: (a) it is not fair to have the statute of limitations bar a claim where the alleged wrongdoers will not let the corporation act, and (b) knowledge by wrongdoers of the claim should not be imputed to the corporation.[132] Under the *Aiello* court's "complete domination" test, "only where a plaintiff can show that the culpable directors (or officers) completely or exclusively controlled the corporation" will the adverse domination doctrine apply.[133] In so ruling, the court rejected the "disinterested majority" test, which holds that, as long as a board of directors is controlled by wrongdoers (i.e., they are in the majority), the statute of limitations is tolled.[134]

Statutes of limitations can be claim or even case dispositive in shareholder disputes. Yet, determining when the statute started to run may involve considerable discovery. The vigilant plaintiff's counsel will need to carefully consider when a claim arose and, if some claims are barred, whether others will survive. Counsel for the defendant will need to plead the statute as an affirmative defense, if appropriate, and then engage in careful discovery to build support for the defense.

B. Direct versus Derivative Actions

One choice that a shareholder must make before bringing a case is whether the action is direct or derivative -- an action in her personal capacity or on behalf of the corporation -- or some combination of the two. The choice is significant since there are special rules for bringing derivative actions and the available remedies differ. In a direct action, the shareholder brings, and pays for, the suit in her individual capacity against other individual shareholders. In a derivative action,

120. *Id.* at 519. This holding follows logically from the court's ruling in *Puritan* that a contract statute of limitations was tolled because of fraudulent concealment or failure to make full disclosure. Puritan Med. Ctr., Inc. v. Cashman, 413 Mass. 167, 175 (1992).

121. *Demoulas*, 424 Mass. at 519.

122. *Id.* at 520-21 & n. 26. The "reasonable diligence" standard provides that the statute starts to run "on the happening of an event likely to put the plaintiff on notice of facts giving rise to the cause of action." *Id.* at 520.

123. *Id.* at 522-23.

124. *Id.* at 523.

125. 447 Mass. 338 (2006).

126. *Id.* at 389-90; *see* Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123, 130-31 (1st. Cir. 1987) (plaintiff could not avail himself of arguments of "inherently unknowable" or "fraudulent concealment" to overcome statute of limitations defense where plaintiff had means to uncover facts that would have been basis for his claim).

127. *Aiello*, 447 Mass. at 389.

128. *Id.* at 405-06.

129. *Id.* at 390-91.

130 *Id.* 401 n. 22.

131. *Id.*

132. *Id.* at 402.

133. *Id.* at 404.

134. *Id.* at 401 n. 23.

in contrast, the shareholder sues on behalf of the corporation and may seek reimbursement of her legal fees from the corporation.

To bring a derivative action, one must follow the requirements of the Massachusetts business corporation statute (the "Business Corporation Act"),[135] which went into effect in 2004, as well as Rule 23.1 of the Massachusetts Rules of Civil Procedure, which provides that:

> the complaint shall be verified by oath and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law from one who was a stockholder or member at such time.[136]

Although an analysis of the specific requirements of the statute and Rule 23.1 is beyond the scope of this article, it is important to note that the statute has an explicit procedure for making demand on the corporation before an action is brought and careful attention must be paid to the requirements of the statute, including those that pertain to the review by independent directors or shareholder or independent persons and their ability to determine that such an action should not proceed.[137]

In regard to remedies, in direct actions, damages are awarded to the wronged shareholder, while in derivative actions they belong to the corporation. The difference may be quite significant. For example, if a minority shareholder who owns 25 percent of a company's stock claims that an owner of 75 percent of the company's stock paid himself an excessive salary (a typical derivative claim), the money goes back to the *corporation*, not to the minority shareholder. If the funds are then distributed to the shareholders, the minority shareholder's proportionate share is only one-quarter of the recovery. Another significant difference is in regard to attorneys' fees. While a plaintiff in a derivative action can recover them, a plaintiff in an individual action probably cannot.[138] The rationale for the differing rules is that a derivative action is really brought for the benefit of the corporation. In addition, the difference in the two rules mitigates the fact that a plaintiff in a derivative action may only have a limited personal benefit for her actions.[139]

Donahue and some of its early progeny did not do much to distinguish between direct and derivative claims, preferring to simply right a wrong.[140] Beginning with *Bessette v. Bessette*,[141] however, the Massachusetts appellate courts began to draw sharp lines between the two types of actions. In *Bessette*, minority shareholders sued the individual majority shareholder, claiming that she had received "an excessive salary and payments on notes for which the corporation received no consideration."[142] The action was brought as an individual claim rather than a derivative action because the corporation had filed for bankruptcy and the bankruptcy trustee had not brought a claim on behalf of the corporation.[143] The court distinguished *Donahue*, ruling that a direct action under *Donahue* could be brought only if "it would be difficult for the plaintiff... to establish breach of a fiduciary duty *owed to the corporation*...."[144] Since the only breach was of the duty owed to the entity, the direct action failed.[145]

In subsequent cases, the courts have attempted to refine the lines between direct and derivative actions. For example, the refusal of the majority of shareholders to offer equal opportunity for a stock repurchase to a minority shareholder is an individual claim.[146] Individual claims also arise when there is an attempt to freeze out a minority shareholder through efforts to wrongfully withhold money due, deny employment in the corporation, or remove him as an officer or director.[147]

Certain claims may only be brought by minority shareholders as derivative actions; that is, actions brought for the benefit of the corporation.[148] Claims that a majority shareholder received an

135. Mass. Gen. Laws ch. 156D, §§7.40-7.47 (2006).

136. Mass. R. Civ. P. 23.1.

137. The requirement that demand must be made in all cases is a change from prior case law which held that in certain cases demand was excused if it would be futile due to the alleged wrongdoer's control of the entity, as was often the case in a closely-held corporation. Blake v. Friendly Ice Cream Corp., No. 03-0003, 2005 Mass. Super LEXIS 694, at *13 (Mass. Super. Ct. July 26, 2005) (Agostini, J.) ("With the enactment of G.L. c.156D, §7.42, Massachusetts joined a growing number of so-called 'universal demand' states, whose derivative demand requirements permit no exception for futility."). Even before the enactment of the statute, Massachusetts permitted corporations to form special litigation committees to determine whether the corporation should pursue a particular action. A case decided before the enactment of the new statute, *Houle v. Low*, 407 Mass. 810 (1990), held that if a special committee recommends that a corporation not pursue a claim, the decision of a special committee will be upheld, and the derivative action will be dismissed, if (1) "the committee was independent and unbiased" and (2) the committee's decision was "reasonable and principled...." *Id.* at 826. How the courts interpret the requirements of the new statute remains to be seen.

138. *See infra* text accompanying notes 192-203.

139. Moreover, there is no right to a jury trial in a derivative action since it is a claim in equity. Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 526-27 (1997).

140. Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 579 & n. 4 (1975). In *Donahue*, for example, the court noted that "[i]n form, the plaintiff's bill of complaint presents, at least in part, a derivative action" while "seeking redress because of the alleged breaches of the fiduciary duty owed to *her*..." *Id.* at 579 n. 4 (emphasis in original). The court treated the case as a direct claim, stating that "[i]n this instance we prefer substance over form..." *Id.* at 579.

141. 385 Mass. 806 (1982).

142. *Id.* at 806.

143. *Id.* at 807 n. 2; *see In re* Mi-Lor Corp., 348 F.3d 294, 301 n. 11 (1st Cir. 2003) (citing Richard W. Southgate & Donald W. Glazer, Massachusetts Corporation Law & Practice §16.5(b) (2003 Supp.)).

144. *Bessette*, 385 Mass. at 809 (citations omitted).

145. *Id.* A derivative action may be brought not just by an actual shareholder but also by the beneficiary of a trust that owns such shares. *Demoulas*, 424 Mass. at 516-17. A trust did not have to be a party to such an action. *Id.*

146. *Bessette*, 385 Mass. at 808-09; *Donahue*, 367 Mass. at 593.

147. Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C., 405 Mass. 506, 513 (1989); Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842, 850-51 (1976).

148. *See Bessette*, 385 Mass. at 809; Crowley v. Commc'ns for Hosps., Inc., 30 Mass. App. Ct. 751, 764-65 (1991); Mastromatteo v. Mastromatteo, No. 06-1329C, 2006 Mass. Super. LEXIS 582, at *4-*6 (Mass. Super. Ct. Nov. 22, 2006) (Locke, J.). Only directors and officers who engage in misconduct or are directly responsible for the misconduct of others are proper defendants. *Demoulas*, 424 Mass. at 562-63.

excessive distribution and salary are corporate claims and therefore need to be brought in a derivative action.[149] Claims that funds were improperly diverted from the corporation are corporate claims.[150] The prudent plaintiff will plead, if appropriate, both direct and derivative claims and follow the procedural requirements for both.[151]

Of particular importance in a derivative action is the issue of standing. In *Billings v. GTFM, LLC,*[152] the court allowed some creative lawyering to deprive a plaintiff of the ability to assert a derivative claim. Mr. Billings, a member of a limited liability company, brought a derivative action against the company.[153] After the suit was filed, the company sold its assets and liabilities to another entity and then dissolved the company.[154] Although as a member of a limited liability company, Billings had the right to maintain a derivative action, the court ruled that he lost that right once the entity was dissolved.[155] The court held that only if there is "some misconduct such as fraud" will the member be able to continue to maintain his claim.[156] The company had sold its assets to a new entity, which was owned by most of the members of the limited liability company.[157] The court concluded that this transaction was proper "in order to solve a business problem, the need to remove Billings from the management and ownership of their venture".[158] The court stated that the trial "judge found that this was a rational business decision, taken in good faith based on legitimate concerns about Billing's performance."[159] Since Billings did not argue that the transaction was fraudulent, he could not argue fraud on appeal.[160] In addition, not only did the court rule that Billings had lost standing but it also allowed claims against him that had been assigned to the new company to continue to go forward.[161]

The *Billings* ruling, while understandable in a purely legal sense, seems at odds with the general *Donahue-Wilkes* principles of fairness. In many of these types of cases there is a perceived need on the part of the majority to remove a dissenting shareholder from the business. It is the abuse of that right that *Donahue, Wilkes* and their progeny were designed to prevent. Now, under *Billings*, there is a vehicle available to majority shareholders to reach a result that might not otherwise seem to pass muster.

C. Rights to Information

Often in closely-held corporations, it is a lack of information that (a) can prevent a shareholder from knowing his rights or (b) in and of itself can be a breach of fiduciary duty.[162] Relief for some of these problems can be found in the Business Corporation Act.[163]

For example, a shareholder is entitled to a list of all shareholders in advance of a shareholders' meeting.[164] There also are procedures for shareholders meetings that may be relevant. [165] In addition, the statute provides for a shareholder's right to inspect various records of the corporation, including certain financial records.[166] Both counsel for a minority shareholder and counsel for the company need to carefully consult the statute to determine what is legitimately subject to inspection and what may be properly withheld.[167]

149. Sugarman v. Sugarman, 797 F.2d 3, 7-8 (lst Cir. 1986); *Bessette*, 385 Mass. at 809; *Crowley*, 30 Mass. App. Ct. at 756-59. "What is reasonable compensation for officers of a corporation is a question of fact...." *Crowley*, 30 Mass. App. Ct. at 756. The *Crowley* court noted that there was "manifest unfairness" for all of the income to be paid yearly for salaries leaving nothing for the shareholders. *Id.* at 758-59. The court added that "[t] here is also the question whether *Donahue's* higher standard is applicable in a derivative action." *Id.* at 759 n. 10.

150. *Schaeffer*, 405 Mass. at 513; *see Crowley*, 30 Mass. App. Ct. at 764-65; Cain v. Cain, 3 Mass. App. Ct. 467, 477 n. 12 (1975).

151. It is not always clear whether the *Donahue* standard applies to a derivative claim. Dynan v. Fritz, 400 Mass. 230, 243 (1987). "The two concepts tend to merge, however, when a shareholder's alleged self-aggrandizement, if true, hurts both the corporation and the interests of the other stockholders." *Id.*

152. 449 Mass. 281 (2007).

153. *Id.* at 282. Billings also asserted direct claims "against his fellow members and managers of the company." *Id.* At trial, those claims were decided "substantially in favor of the defendants." *Id.*

154. *Id.* The transaction "had begun before the action was initiated...." *Id.* It is not clear whether this fact was considered by the court in reaching its decision.

155. *Id.* at 291-94; *compare* Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 511 n. 13, 512-13 (1997) (the merger of an existing corporation into a newly formed entity "did not extinguish the plaintiff's right to bring a shareholder derivative suit for claims arising from occurrences during the first corporation's existence" when he remained a shareholder in the new entity).

156. *Billings*, 449 Mass. at 292. In its ruling, the court cited to both a Massachusetts case, *Mendelsohn v. Leather Mfg. Corp.*, 326 Mass. 226 (1950), and a Delaware case, *Lewis v. Ward*, 852 A. 2d 896 (Del. 2004). *Billings*, 449 Mass. at 290-94. *Mendelsohn* suggested that any type of fraud would suffice while *Lewis* "requires that the fraud be perpetuated 'merely to eliminate derivative claims.'" *Id.* at 293 n. 25. The court left open the question of which rule applied. *Id.* In *Kolancian v. Snowden*, 532 F. Supp.2d 260 (D. Mass. 2008), the court applied *Billings* in ruling that since a merger was not undertaken 'merely to eliminate derivative claims'" it was not fraudulent. *Id.* at 263 (citation omitted). According to *Kolancian,* the fraud must be "not only on the part of the acquired corporation, *but also on the part of the surviving entity.*" *Id.* (emphasis in original).

157. *Billings*, 449 Mass. at 284-85.

158. *Id.* at 294.

159. *Id.*

160. *Id.*

161. *Id.* at 295-96.

162. *See* O'Brien v. Pearson, 449 Mass. 377, 383-86 (2007).

163. Mass. Gen. Laws ch. 156D, §1.01-17.04 (2006).

164. *Id.* § 7.20(b).

165. *Id.*§§7.01 and 7.03; Gardner v. Applied Geographics, Inc., No. 04-2783, 2004 Mass. Super. LEXIS 240, at *9-*11 (Mass. Super. Ct. July 2, 2004) (Van Gestel, J.).

166. Mass. Gen. Laws ch. 156D, §§16.01-16.04 (2006).

167. One could argue that in a *Donahue* situation, with *all* shareholders owing fiduciary duties, a minority shareholder should never be denied information. However, such a broad rule would seem to be at odds with post-*Donahue* cases such as *Merola* which recognized legitimate limits on these rights. Merola v. Exergen Corp, 423 Mass. 461, 465-66 (1996).

D. Damages, Equitable Relief and Attorneys' Fees

Generally, many of the claims arising out of shareholder disputes in closely-held corporations are equitable, leaving the courts free to craft appropriate relief.[168] A court has considerable discretion in fashioning remedies.[169] For example, an award of damages may not be necessary if a lesser remedy is appropriate.[170]

In a derivative action, it is proper for those who profited from wrongdoing to have to repay the corporation those profits less what they invested personally in the new entities and less taxes that had been paid.[171] Thus, in one appellate case, the remedy was to have the money be repaid by the wrongdoing shareholders to the entity and then a dividend issued to all shareholders (after consideration of the rights of creditors and claims by the Internal Revenue Service).[172] In another case, the Appeals Court remanded for a further hearing in the superior court after which, if appropriate, it permitted the court to order the corporation to issue a dividend.[173]

Interest also is an important consideration. In *Demoulas*, for example, an award of interest on cash distributions that had been made "was well within [the judge's] power to frame the relief so as to avoid unjust enrichment."[174]

In certain instances, injunctive relief may be warranted. Thus, in *Cain v. Cain*,[175] the court enjoined the wrongdoing shareholder from engaging in improper competitive activity.[176]

Two recent cases have focused on the remedies available to an aggrieved shareholder and, in both decisions, the SJC has imposed limits on the relief that may be awarded. *In Brodie v. Jordan*,[177] the SJC was faced with the question of whether a court could order a defendant to buy back "the plaintiff's shares in the corporation at a price equal to her share of the corporation's net assets, as valuated by a court-appointed expert, plus prejudgment interest" in the absence of any contract providing for such relief.[178] The court ruled that such a remedy was improper.[179]

Mary Brodie was the widow of Walter Brodie, a founder of Malden Centerless Grinding Co., Inc., a company that ran "a small machine shop...."[180] After Mr. Brodie ceased being involved in the company's regular operations, he and the other shareholders had disagreements and he asked to be bought out; the others refused.[181] In the ensuing years after Mr. Brodie's death, the other shareholders refused to provide Mrs. Brodie (as his heir) with relevant information about the company.[182]

Relying on theory of "reasonable expectations," the court ruled that while the *Donahue* duties to Mrs. Brodie had been breached, the remedy of a "forced buy-out" was improper.[183] "The proper remedy for a freeze-out is to restore [the minority shareholder] as nearly as possible to the position [s]he would have been in had there been no wrongdoing."[184] "The remedy should neither grant the minority a windfall nor excessively penalize the majority."[185] While "[c]ourts have broad equitable powers to fashion remedies for breaches of fiduciary duty in a close corporation, . . . and their choice of a remedy is reviewed for abuse of discretion," that right is not unfettered.[186] Thus, a court's order that a closely-held business buy out a minority shareholder, in the absence of anything requiring such a buy-out in the corporation's articles of organization, bylaws or a shareholders'

168. One law that is not available in connection with these disputes is General Laws chapter 93A, the unfair and deceptive practices act. Puritan Med. Ctr., Inc. v. Cashman, 413 Mass. 167, 179-80 (1992); Zimmerman v. Bogoff, 402 Mass. 650, 663 (1988); *see generally* Thomas P. Billings, *Remedies for the Aggrieved Shareholder in a Close Corporation*, 81 MASS. LAW REV. 3, 11 (1996).

169. *See, e.g., Zimmerman*, 402 Mass. at 660-62 (court properly ordered defendant shareholder to personally pay plaintiff fellow shareholder for value of latter's business that had been "totally destroyed").

170. Johnson v. Witkowski, 30 Mass. App. Ct. 697, 714-15 (1991) (company entitled to reimbursement only if consideration paid by it was "inherently unfair" and more than the assets were worth). One issue that courts face in awarding damages is how to value the stock of a closely-held business. In *Bernier v. Bernier*, 449 Mass. 774 (2007), a divorce case, the court provided significant guidance in this area, although a detailed discussion of the various methods is beyond the scope of this article. *Id.* at 781-93; *see* Leader v. Hycor, Inc., 395 Mass. 215, 224 (1985) (upholding use of so-called "Delaware block method" as one means of valuing company). The issue is important not only in cases involving disputes among shareholders but also in divorces where the parties are trying to value the business. Generally "[v]aluation is a question of fact calling for the considered judgment of the trier of fact whose determination should not be disturbed unless clearly erroneous." *Leader*, 395 Mass. at 223 (quoting Natural Gas Co. v. United States, 470 F.2d 1107, 1110 (8th Cir.) (1973)); *see Bernier*, 449 Mass. at 785 ("Valuation of a business is a question of fact" and the judge's decision will be upheld unless "clearly erroneous.").

171. Crowley v. Commc'ns for Hosps., Inc. 30 Mass. App. Ct. 751, 765 (1991).

172. *Id.* at 766-68.

173. Smith v. Atlantic Props., Inc., 12 Mass. App. Ct. 201, 210-11 (1981).

174. Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 543-44, 555-59 (1997). In *Demoulas*, the wrongdoers were ordered to transfer the assets and liabilities from companies they had wrongly founded to the initial corporations. *Id.* at 544, 559.

175. 3 Mass. App. Ct. 407 (1975).

176. *Id.* at 478.

177. 447 Mass. 866 (2006); *see* Margaret H. Paget, *Corporate Law – Shareholder Breach of Fiduciary Duty in Close Corporations*, 91 MASS. LAW REV. 32 (2007).

178. *Brodie*, 447 Mass. at 867.

179. *Id.* In *Crowley*, the Appeals Court had, in somewhat different circumstances, overturned a judge's order requiring a company to repurchase all of the plaintiff's stock. Crowley v. Commc'ns for Hosps., Inc., 30 Mass. App. Ct. 751, 765-66 (1991).

180. *Brodie*, 447 Mass. at 867.

181. *Id.*

182. *Id.* at 868.

183. *Id.* at 869-70.

184. *Id.* at 870 (citation omitted).

185. *Id.* at 871.

186. *Id.* The court distinguished *Donahue* by noting that in *Donahue* the unfairness was that one shareholder was able to have his stock repurchased by the corporation while the other shareholder was not. *Id.* at 871 n. 5. No such disparate treatment existed here. *Id.*

agreement, was not a permissible remedy.[187] The court's ruling underscores the tension between balancing fairness and avoiding the imposition of judicially created remedies. In this case, the court took the more hands-off approach.

Following *Brodie*, in *O'Brien v. Pearson*,[188] the court confronted the question of the appropriate monetary "remedy for the freeze-out of a minority shareholder..."[189] The court cited to the rule set forth in *Brodie*:

> the appropriate remedy, "should, to the extent possible, restore to the minority shareholder those benefits which [he] reasonably expected, but has not received because of the fiduciary breach." Such a remedy seeks to place the injured party in the same position as he would have been but for the breach.[190]

Unfortunately for the *O'Brien* plaintiff, the court held that his theory of lost profits was too speculative and that the only reasonable expectation that he had "would be involvement in the information sharing and decision-making...."[191] While the court remanded for a determination of damages, its ruling appears to make it difficult for the plaintiff to recover anything. Thus, while he achieved victory insofar as the court ruled that a fiduciary duty had been breached, the result may be hollow if there are no damages.

These two cases, while reaffirming the rules of *Donahue*, represent an obstacle for minority shareholders. After all, it is not enough to pursue a case simply to prove wrongdoing. To make it viable, there also must be a meaningful recovery. The *Brodie* and *O'Brien* plaintiffs may have "won," but at what price and for what result?

Attorneys' fees are not considered damages in a breach of fiduciary case.[192] However, an award of attorneys' fees as a separate element of recovery is appropriate for a successful shareholder in derivative actions.[193] Under the Business Corporation Act, not only may a successful shareholder recover her attorney's fees in a derivative action but the corporation can recover its attorneys' fees from a plaintiff if the court "finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose."[194] Under the statute, the plaintiff may recover her attorneys' fees if the cour "finds that the proceeding has resulted in a substantial benefit to th corporation."[195] An award of attorneys' fees appears to be discretionar given the use of the word "may" in the statute.[196]

The pre-Act cases may provide guidance as to when an award o attorneys' fees is appropriate. Whether a defendant in a derivativ action acted in good faith or bad faith is a factor a trial court ma consider, "a finding of the defendant's bad faith is not essential tc a lawful award of counsel fees in such an action."[197] "The most important, but not dispositive, factor... is whether the plaintiffs have benefited the corporation in some way by the result obtained in the lawsuit."[198] Thus, where plaintiffs did not get any money for the corporation but "created... the opportunity to save corporate funds by identifying corporate misconduct" (even though the corporation chose "not to accept the benefits of the litigation"), an award of attorneys' fees was appropriate.[199] Furthermore, since the defendants' counsel fees had been paid by the corporation, it was equitable for the plaintiffs also to have their fees paid by the corporation.[200] The court specifically avoided the question of "whether intangible corporate benefits, such as raising the standards of fiduciary relationships (corporate therapeutics), could ever justify an award of attorneys' fees in a stockholders' derivative action."[201] Such fees are at the discretion of the court and it was not error for a court to decide not to award fees.[202] But attorneys' fees probably are not recoverable at all in individual actions.[203]

E. Dissolution of the Entity

In certain extreme instances, dissolution of the entity may be appropriate.[204] Under the corporate dissolution statute, an action to dissolve a corporation may be brought in the superior court by any shareholder owning 40 percent or more of the shares of an entity if:

> (i) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered; or

187. *Id.* at 872-73. The court, however, did leave open a number of other remedies to be considered on remand, including "the propriety of compelling the declaration of dividends." *Id.* at 874.

188. 449 Mass. 377 (2007).

189. *Id.* at 389.

190. *Id.* (quoting, in part, *Brodie*, 447 Mass. at 870-71).

191. *Id.*

192. Beers v. Tisdale, 33 Mass. App. Ct. 621, 624-25 (1992).

193. Cain v. Cain, 3 Mass. App. Ct. 467, 479 (1975).

194. Mass. Gen. Laws ch. 156D, § 7.46(2) (2006).

195. *Id.* § 7.46(1).

196. *Id.* § 7.46.

197. Dynan v. Fritz, 400 Mass. 230, 247 (1987).

198. *Id.*

199. Martin v. F.S. Payne Co., 409 Mass. 753, 759 (1991) (a later proceeding in Dynan v. Fritz, 400 Mass. 230 (1987)).

200. *Id.* at 761.

201. *Id.* at 759 n. 4.

202. Smith v. Atlantic Props., Inc., 12 Mass. App. Ct. 201, 211-12 (1981). The ability to recover attorneys' fees may also serve as an incentive for attorneys to bring cases that otherwise might not be brought.

203. *See* Sugarman v. Sugarman, 797 F.2d 3, 15-16 (1st Cir. 1986) (no attorneys' fees in direct action even though recoverable in derivative action); Beers v. Tisdale, 33 Mass. App. Ct. 621, 625 (1992) (no authority for allowing for recovery of attorneys' fees in individual action); Crowley v. Commc'ns for Hosps., Inc., 30 Mass. App. Ct. 751, 767 n. 21 (1991) (did not reach the question). A separate but related issue is whether the corporation may pay the attorneys' fees of individual officers and directors who are defendants in a case. The rules governing such payments are beyond the scope of this article. *See Dynan*, 400 Mass. at 246 & n. 24; Mass. Gen. Laws ch. 156D, § 8.50 (2006). If a party seeks appellate attorneys' fees, it must make such a request in its brief. Beal Bank SSB v. Eurich, 448 Mass. 1, 7 (2006) (if party fails to request appellate fees in brief, court may still consider waived request but "should exercise its discretion sparingly"); Fabre v. Walton, 441 Mass. 9, 10 (2004) (same).

204. Mass. Gen. Laws ch. 156D, §14.30 (2006).

(ii) the shareholders are deadlocked in voting power and have failed, for a period that includes at least 2 consecutive annual meeting dates, to elect successors to directors whose terms have expired, or would have expired upon the election of their successors, and irreparable injury to the corporation is threatened or being suffered....[205]

Although there has been little case law on dissolution of a closely-held entity under the new statute, it has been the subject of at least one superior court opinion.[206] In that case, the court was "relatively comfortable" with allowing the dissolution of a small entity with two 50 percent shareholders but deferred any "final decision" to allow the parties to attempt to reach a settlement and noted that:

> Comment 2 to c. 156D, sec. 14.30, cautions that "involuntary dissolution should be available as a mechanism for resolving internal corporate disputes only in the case of true deadlock, and even then only when continuation of the deadlock will impose real and serious harm, and . . . significantly broader availability of this remedy in such circumstances invites gamesmanship in the negotiation of internal corporate disputes and makes the dissolution remedy available in circumstances in which nothing so extreme is required, or in the end, normally consummated." Significantly, the Comment goes on to say: "The 'irreparable injury' requirements of both clauses of sec. 14.30(2) are more strongly worded than the 'best interests of the shareholders' requirement of BCL sec. 99, reflecting the strength of the belief that the availability (or potential availability) of dissolution to a disgruntled shareholder is rarely desirable, normally has material adverse effects on other constituencies (such as employees and vendors), and normally leads in the end to a buyout and not dissolution even after dissolution is entered."[207]

While dissolution is an appropriate remedy in certain circumstances, it will not be granted lightly, particularly if other constituencies may be adversely affected.

F. Negotiated Resolutions

In any shareholders' dispute, one of the starting points is the Business Corporation Act and the corporate documents and agreements: articles of organization, bylaws, employment agreements, shareholder agreements and corporate votes. As the courts have repeatedly held (and the Act now provides), these agreements are enforceable and can alter the fiduciary duties that might otherwise be owed. Even if these documents do not precisely address all of the issues at stake, they can be used as a guide to help counsel negotiate appropriate resolutions.[208]

Shareholder disputes in a closely-held business can be described as the business equivalent of a divorce. Family law practitioners can recount the tales of soon-to-be ex-spouses spending considerable energy and legal fees fighting over an item of little value. In the business dispute, the fights can lead to the destruction of the business itself.

Counsel involved in these cases can and should exercise creativity in helping parties resolve these cases. The appropriate resolution will vary depending on the type of business. For example, a professional services business such as a law or accounting firm will be relatively easy to divide between or among shareholders since the firms' primary assets are clients or cases, both of which are very mobile. In such cases, the best agreements will allow the shareholders to work out a mechanism for retaining clients (subject to appropriate ethics rules), sharing or dividing staff, and dividing computers, furniture and other similar assets. Other types of businesses, such as companies that manufacture or sell a product, may be difficult if not impossible to divide. There, the best solution may be to facilitate a buy-out of a shareholder or to sell the entire business. Regardless of the form of resolution, whether a division of assets, a buyout or a sale, no one benefits (except perhaps the shareholder whose only goal is revenge or destruction) on the value of the business diminishing.

If the parties cannot agree, even with the assistance of counsel and other professional advisors, regarding how to proceed, then other forms of alternative dispute resolution, such as mediation, neutral valuators, arbitration or limited discovery are particularly appropriate. Of course, it will take the guidance of skilled counsel to help clients reach such results.

205. *Id.* §14.30(2).

206. Constantine v. Lawnicki, No. 07-0498 BLSI, 2007 Mass. Super. LEXIS 328, at *5 (Mass. Super. Ct. August 13, 2007) (Van Gestel, J.). (The author represented the petitioner in that case.)

207. *Id*, at *5-*6.

208. The Appeals Court has noted the benefit of such efforts, stating that "[i]t would obviously be appropriate, before a court-ordered solution is sought or imposed, for both sides to attempt to reach a sensible solution of any incipient impasse in the interests of all concerned after consideration of all relevant circumstances." Smith v. Atlantic Props., Inc., 12 Mass. App. Ct. 201, 208-09 (1981); *see also In re* Mi-Lor, 348 F.3d 294, 308 (1st Cir. 2003) ("The underlying sum involved here is approximately $380,000, and considerable counsel fees have been spent to this point. We urge the parties to settle this case before the additional costs of further proceedings becomes a reality.").

IV. Trends and Further Refinements

Donahue is alive and well in the 21st century in Massachusetts, and it should be. Its fundamental holdings still form the basis for how owners of closely-held businesses must deal with one another. But its teachings are not unfettered - not every action that hurts a minority shareholder is unfair or oppressive. Nor are the remedies that a court may impose without limit. Still, the courts have broad latitude in fashioning just results. The Business Corporation Act also will be important as case law develops that interprets its provisions. Nevertheless, basic fairness remains the standard. Indeed, many shareholder disputes are inherently fact-intensive and the equities associated with each case often drive the result.

Lawyers for closely-held businesses and their shareholders, particularly those who advise them in their formation and ongoing operations, have a critical role to play in this regard. They must have a full understanding of the facts of each case as well as a knowledge of the *Donahue* body of law in order to represent their clients effectively. Many of the disputes that have ended up in the courts since *Donahue* could have been avoided, or their outcomes changed, with good advice. Of course, that presupposes that corporations and their shareholders consult with their attorneys when they form their businesses and then before they act, a course of conduct that unfortunately is often absent. Still, the prudent attorney can steer her client through the thicket of *Donahue* law with carefully crafted agreements, having clients make full disclosure, and creative efforts to resolve disputes when they do arise.