BUSINESS BREAKUPS: TERMINATING OWNERSHIP INTERESTS IN CLOSELY- HELD BUSINESSES

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When minority owners become dissatisfied with those in corporate control of a publicly traded corporation, those minority owners can simply sell their shares and immediately terminate their relationship with the corporation. Such is not the case for closely-held businesses.

The market for minority interests in closely-held businesses is negligible. Very often, the only persons interested in acquiring a minority ownership interest are the majority owners of that business.

Likewise, when majority owners become unhappy with minority owners, there are only a few recognized methods for forcing the minority owners to relinquish their ownership interests in the business entity.

This article will explore a few of the methods available for terminating the relationship between majority and minority owners in closely-held businesses.

1. Negotiated resolution

The simplest and least costly method for severing the business relationship is through negotiations. Many of the methods discussed in this article are very costly in terms of legal fees, as well as in terms of the time and emotional involvement of the owners themselves. Negotiating an acceptable deal between the parties – even though the end result may not be fully satisfactory to either party – is often quicker and less costly than resorting to litigation. There are a number of mediators and professional organizations which deal with closely-held businesses and which can facilitate these negotiations.

Even in a negotiated resolution, there are technical legal, tax and accounting issues which should be addressed fairly early in the negotiation process. Therefore, it is advisable to involve legal, tax and accounting assistance early, even if the parties are negotiating directly with each other.

2. Buy-Sell Agreements and other contracts

It is common for shareholders in closely-held corporations to negotiate and sign a Buy-Sell Agreement at formation.

> **Note:** These types of agreements have many different names, so it is important to examine all of the agreements between the owners, including the Bylaws.

In a limited liability company, the operating agreement often includes a mechanism for terminating the relationship between the members.

2.1 Right of first refusal. A Buy-Sell Agreement usually contains a provision giving the corporation (and sometimes other shareholders) a "right of first refusal," that is, the right to match any third party offers to purchase the shareholder's shares. This provision exists primarily to make it virtually impossible for a shareholder to sell shares to a third party.[3] A right of first refusal provision does not usually help in the event of a falling out between the owners.

2.2 Death clauses. Buy-Sell Agreements frequently contain a provision that gives corporation the right – but usually does not require the corporation – to buy out a shareholder's shares in the event in death.

Occasionally a Buy-Sell Agreement does require the corporation to buy out the shares of the deceased shareholder, but this provision is usually coupled with a requirement that the corporation buy life insurance on the shareholders. This provision is usually not helpful in the event of shareholder disagreement.

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[3] There is a long-standing rule against simply saying that property may never be sold. A right of first refusal clause is a mechanism which makes such sales highly unlikely, without actually prohibiting any sale at all. It is very difficult, if not impossible, for a minority owner to find a buyer for his or her shares. Such a sale is even more difficult if, after finding a potential buyer, the sale is suspended for a 30 or 60 day period while the corporation decides whether to elbow aside the third party purchaser and purchase the minority's shares itself at the same price and on the same terms.

2.3 Retirement or disability. Sometimes a Buy-Sell Agreement contains a provision giving the corporation the right – but does not require the corporation – to purchase the shares of a shareholder/employee who retires or becomes disabled. Since this provision does not give the minority shareholder the right to require that his/her shares be purchased, it is not usually helpful in a business divorce. Likewise, the definitions of "retirement" and "disability" in the Buy-Sell Agreement usually restrict this provision to a true retirement or disability.

2.4 Termination of employment. Sometimes Buy-Sell Agreements contain a provision which provides for the purchase of a minority shareholder's shares in the event that employment is terminated. Often this provision is one-sided – only giving the corporation (or controlling shareholders) a limited-time option to purchase the departing shareholder's stock. Sometimes there are distinctions made for termination by the corporation "for cause" and "without cause," and for terminations initiated by the employee. Obviously, the specific wording in the Buy-Sell Agreement will control.

In these circumstances, a Buy-Sell Agreement frequently includes a formula for valuing the shares of the departing shareholder. If such a provision exists, it is very important to periodically revisit that formula to make sure that the formula still makes sense for the business at its current level of development and current economic conditions.

Sometimes a Buy-Sell Agreement provides that the corporation's board of directors will periodically set a buyout price. It has been this author's experience that the board often forgets to set a new price each year and that when the falling out occurs, the last board pronouncement on "value" occurred many, many years earlier. Thus, the last value set by the board bears little relationship to the current value of the company. It is very important for the board of directors to revisit the issue of value each and every year, or to revise the Agreement to have the value set in a manner that does not require periodic reviews of this value by the board (such as having the value of the shares determined by appraisal).

NOTE: Buy-sell Agreements are usually drafted by the corporation's attorney and are usually written more favorably to the corporation than the departing shareholder. While it might seem beneficial to the corporation to make the buy-out optional, this might only trigger very expensive litigation where the trial court will impose a remedy which it equitable. Instead, it might make sense to require the buy-out at a lower price (applying minority and marketability discounts) and long payout period at a low interest rate (the Wall Street Journal prime rate is often used). The case law indicates that such buy-out terms will likely be enforced if not too unreasonable.

2.5 Forced buy-outs clauses. Occasionally when a corporation has two equal owners, a Buy-Sell Agreement may contain a provision that either shareholder can cause a buyout by naming a price and giving the other shareholder a short period in which to decide whether to become the buyer or seller at that price.

Such a provision works best in corporations with two equal owners. It can sometimes be used when the ownership is close, but not exactly equal – for example, when there are 51%/49% owners. But in such a situation, it is important to address the issue of whether or not a control-premium/minority-discount applies.

This forced buy-out mechanism does not work well if the two owners own substantially different percentages of the stock or where there are multiple owners.

2.6 Summary. In the event of a falling out between business owners, contracts between those business owners – such as Buy-Sell Agreements, the operating agreement, and occasionally the bylaws – should be reviewed to see if there is a contractual mechanism for resolving the dispute, or for giving one owner the right to force the other owner to buy or sell his/her ownership interest.

3. Squeeze-out mergers & reverse stock splits

If the majority owners wish to force the minority to sell their shares, there are forms of corporate reorganization which can accomplish this goal. The most common of these reorganizations is known as a squeeze-out merger. Reverse stock splits are also common.

Squeeze-out mergers. In a classic squeeze-out merger, the majority owners contribute their shares in OldCo to a new corporation (NewCo). After this transfer, NewCo becomes the majority owner of OldCo's shares. Next, the two corporations adopt a plan of merger, merging OldCo into NewCo and requiring all individual shareholders (*i.e.,* the minority owners) to be cashed out at the "fair value" of their shares.

Prior to the adoption of the plan of merger, the majority owners usually engage a business valuation firm to determine a “fair value” of the shares. The statute requires those in control to offer a fair price for the minority’s shares only a short time into the process, so a stock valuation is often the first step undertaken. This is also true because soon after the process begins, those in control will be irrevocably committed to buying out the minority at a fair price, making it important to having an idea going in as to what that purchase price will likely be.

Reverse Stock Splits. A reverse stock split is an alternative method used. In a reverse stock split, the corporation adopts a plan proportionately reducing the number of shares held by each shareholder, leaving the minority shareholders with less than one share each. The plan calls for the corporation to redeem all fractional shares for cash, forcing the minority shareholders to sell their fractional shares back to the corporation.

Although there are no reported Oregon cases on reverse stock splits, but there is case law in other states supporting them as a method of cashing or squeezing out minority shareholders. *See for example Sound Infiniti Inc v. Snyder*, 169 Wash 2d 199, 237 P3d 241 (2010); *Wright v. Sutton,* Case No: 1:08-1431 (SD W Va July 5, 2017); *FGS Enterprises, Inc. v. Shimala*, 625 NE2d 1226 (Ind 1993); *Goldman v. Union Bank and Trust,* 765 P2d 638 (Colo App 1988); *Laird v. I. C. C.*, 691 F2d 147 (3rd Cir 1982).

> There is broad consensus that a reverse stock split may validly be used for the sole purpose of removing minority shareholders, subject to the restriction that the removal of the minority shareholders must not constitute a breach of fiduciary duty on the part of the majority shareholders or directors of the corporation. *U.S. Bank N. A. v. Cold Spring Granite Co.*, 802 NW2d 363, 371 (Minn 2011).

A reverse stock split which provides for cashing out of fractional shares gives rise to dissenter’s rights under the Oregon Act. ORS 60.554(1)(a)(B). This in not true in all states. *See U.S. Bank N. A. v. Cold Spring Granite Co.*, 802 NW2d 363 (Minn 2011).

Most courts which have considered reverse stock splits have essentially applied the *Weinberger* [457 A2d 701 (Del 1983)] standard, that is, appraisal is the exclusive remedy unless there is "fraud, illegality, or fundamental unfairness." *Sound Infiniti Inc v. Snyder*, 169 Wash 2d 199, 237 P3d 241 (2010).

> In our view, the fairness rule is the appropriate test under these circumstances, i.e., a reverse stock split in a closely held corporation with the effect of eliminating a minority stockholder, because it permits intervention on the facts of any given case when intervention is justified. As compared to business purpose, courts have a long history of assessing concepts of fairness. Moreover, in most cases, a plausible business purpose would not be difficult to demonstrate. See Ralph A. Peeples, The Use and Misuse of the Business Judgment Rule in the Close Corporation, 60 Notre Dame L. Rev. 456, 499 (1985)(citing F. Hodge O'Neal, O'Neal's Oppression of Minority Shareholders§ 3.05 (1975)). As a result, the fairness rule, in many if not most instances, will provide courts with greater ability to fashion appropriate relief. *Lerner v. Lerner Corp.*, 132 MD App 32 , 750 A2d 709, 722 (2000).

The subject of reverse stock splits is discussed in the following: Paul H. Dykstra, *The Reverse Stock Split–That Other Means of Going Private*, 53 Chi-Kent L Rev 1 (1976); Michael J. Lawson, Comment, *Reverse Stock Splits: The Fiduciary's Obligations Under State Law*, 63 Cal L Rev 1226 (1975); and Michael R. Rickman, Note, *Reverse Stock Splits and Squeeze-outs: A Need for Heightened Scrutiny,* 64 Wash U L Q 1219 (1986).

Both squeeze-out mergers and reverse stock splits give rise to “dissenter’s rights,” and a process covered by statute.[4]

3.1 Steps required by statute. In Oregon,[5] if a corporation proposes a squeeze-out merger, reverse stock split or similar reorganization, the corporation must notify its shareholders of the right to dissent before the shareholder meeting when the vote to the proposed corporate action will occur.[6] In order to dissent under such circumstances, a dissenting shareholder must deliver a written notice to the corporation before the vote is taken. The written notice must include a demand for payment in exchange for the shareholder's shares in the event the action is effectuated at the shareholder meeting.

If the shareholders fail to take the proposed action, the corporation need do nothing more with regard to any dissenting shareholder.[7]

But if the shareholders then vote and authorize an action giving rise to

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[4] ORS 60.551 *et seq.*

[5] Most states have similar provisions for dissenter’s rights, although timelines and other specifics may vary by state. It is important to read the statute that applies.

[6] ORS 60.561(1).

[7] ORS 60.561(1).

dissenters' rights, the corporation must send a "dissenters' notice" to all shareholders who previously dissented and must do so within 10 days of the shareholder vote authorizing the act. This notice must: (I) state where the shareholder must send a payment demand; (ii) state where and when the shareholders’ stock certificates must be deposited; (iii) describe any transfer restrictions applicable to uncertificated shares; (iv) supply a form for demanding payment; and (v) set a date by which the corporation must receive the payment demand (which can be no less than 30 and no more than 60 days after the date the dissenters' notice is delivered to the dissenters).[8]

If the proposed action is taken without a shareholder vote, the corporation must inform its shareholders of the action taken and deliver this "dissenters' notice" to all shareholders entitled to assert dissenters' rights.[9]

Dissenters desiring payment are then required to demand payment and deposit their shares with the corporation.[10]

Upon receipt of a proper payment demand, the corporation is required to pay each such dissenter the amount the corporation estimates to be the "fair value" of the dissenters' shares, plus accrued interest.[11] Payment must be accompanied by a copy of the corporation's balance sheet, the corporation's estimate of fair value, an explanation of how interest was calculated, a statement of the dissenters' rights under ORS 60.587, and a copy of ORS 60.551 through 60.594.[12] If a dissenter disagrees with the corporation's estimate of "fair value," the dissenter may notify the corporation in writing of the dissenter’s own estimate of fair value and demand payment of this (presumably higher) amount.[13] Unless the dissenter does so within 30 days, however, the dissenter waives the right to demand an amount higher than was originally offered by the

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[8] ORS 60.567.

[9] ORS 60.561(2).

[10] ORS 60.571.

[11] ORS 60.577(1).

[12] ORS 60.577(2).

[13] ORS 60.587(1).

corporation.[14]

Once a dissenting shareholder sends a proper demand for the dissenter's estimate of "fair value," the corporation may either: (I) pay the amount demanded; or (ii) commence a proceeding in circuit court for the appraisal of the shares.[15] If a corporation fails to initiate such a proceeding within 60 days of receiving the dissenters' estimate of fair value, the corporation is required to pay each dissenter the amount previously demanded by the dissenter.[16]

It would appear that even if the shareholder dissents and demands a higher price, the corporation must pay the undisputed amount – even if the corporation initiates litigation for the judicial determination of price. ORS 60.577(1) provides:

> **Payment.** (1) Except as provided in ORS 60.584, as soon as the proposed corporate action is taken, or upon receipt of a payment demand, the corporation **shall pay** each dissenter who complied with ORS 60.571, the amount the corporation estimates to be the fair value of the shareholder's shares, plus accrued interest. (emphasis added).

This provision comes verbatim from §13.25 of the RMBCA, which states:

> **§13.25. Payment**
> (a) Except as provided in section 13.27, as soon as the proposed corporate action is taken, or upon receipt of a payment demand, the corporation shall pay each dissenter who complied with section 13.23 the amount the corporation estimates to be the fair value of his shares, plus accrued interest.

The Official Comments to §13.25 make clear that the intent of this section is to require the corporation to immediately pay the shareholder the undisputed amount even though the parties may disagree over whether an additional sum must be paid later.

> Section 13.25 changes the relative balance between corporation and dissenting shareholders by requiring immediate payment by the corporation upon the completion of the transaction or (if the transaction did not need shareholder approval and has been completed) upon receipt of the demand for payment. The corporation may not wait for a final agreement on value before making payment, and the shareholder has the immediate use of the amount determined by the corporation to represent fair value without waiting for the conclusion of appraisal proceedings.

[14] ORS 60.587(2).

[15] ORS 60.591.

[16] ORS 60.591(1).

> This obligation to make immediate payment is based on the view that since the person's rights as a shareholder are terminated with the completion of the transaction, he should have immediate use of the money to which the corporation agrees it has no further claim. A difference of opinion over the total amount to be paid should not delay payment of the amount that is undisputed.
>
> Since the shareholder must decide whether or not to accept the payment in full satisfaction, he must be furnished at this time with the financial information specified in section 13.25(b), with a reminder of his further rights and liabilities, and with a copy of this chapter.

Other commentators agree that immediate payment of the undisputed amount is required even though the parties continue to disagree on the ultimate price. *Dissenters' Right and Fundamental Changes Under the New Iowa Business Corporation Act*, Donald J. Brown and M. Daniel Waters, 40 Drake L Rev 733, 748-49 (1991); *Reform of Vermont's Corporate Law: A Call For Much Needed Reform*, Linda O. Smiddy, 17:3 Vermont L Rev 3, 48, 49 (1992).

3.2 Fair value. As discussed above, once a shareholder dissents and demands payment for his/her shares, the corporation is required to pay "fair value" in exchange for the shareholder's shares. If, using the procedures discussed above, the corporation and the shareholder are unable to agree on an amount constituting "fair value," the corporation must file a lawsuit in circuit court seeking to have the court determine the "fair value" of the corporation's shares.

"Fair value" is not the same as "fair market value." Fair market value – what a willing buyer and willing seller will pay – is only one factor in determining fair value. *Columbia Management Co. v. Wyss*, 94 Or App 195, 199, 765 P2d 207, 210 (1988).

There is no "one size fits all" method for determining fair value. *Matter of Seagroatt Floral, Co., Inc.*, 78 NY2d 439, 583 NE2d 287, 290 (1991). Rather, the circumstances of each case will determine the weight given to each of several methods. In a case involving dissenters' rights, the Washington Supreme Court has noted:

> No universal formula for determining the value of shares of a corporation can be stated. No two corporations are precisely alike, and a consideration that may be very influential in evaluating the shares of one may be meaningless with reference to another. *In re West Waterway Lumber Co.*, 59 Wash 2d 310, 320, 367 P2d 807, 813 (1962).

"Fair value" is defined in ORS 60.551(4) as follows:

> "Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless

exclusion would be inequitable.

The language of ORS 60.551(4) is taken from Revised Model Act § 13.01(3), the Comment to which states in relevant part:

> The definition of "fair value" in section 13.01(3) leaves to the parties (and ultimately to the courts) the details by which "fair value" is to be determined within the broad outlines of the definition. This definition thus leaves untouched the accumulated case law about market value, value based on prior sales, capitalized earnings value, and asset value. It specifically preserves the former language excluding appreciation and depreciation in anticipation of the proposed corporate action, but permits an exception for equitable considerations. The purpose of this exception ("unless exclusion would be inequitable") is to permit consideration of factors similar to those approved by the Supreme Court of Delaware in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), a case in which the court found that the transaction did not involve fair dealing or fair price: "In our view this includes the elements of rescissory damages if the Chancellor considers them susceptible of proof and a remedy appropriate to all the issues of fairness before him." Consideration of appreciation or depreciation which might result from other corporate actions is permitted; these effects in the past have often been reflected either in market value or capitalized earnings value.
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> "Fair value" is to be determined immediately before the effectuation of the corporate action, instead of the date of the shareholder's vote, as is the case under most state statutes that address the issue. This comports with the plan of this chapter to preserve the dissenter's prior rights as a shareholder until the effective date of the corporate action, rather than leaving him in a twilight zone where he has lost his former rights, but has not yet gained his new ones.

In order to determine fair value, several methods or values are usually considered: market value, net assets value, and a third value, varyingly referred to as the earnings value, investment value, or enterprise value. "[T]he relative weight given each will depend on the circumstances of the case." *Columbia Management Co. v. Wyss*, 94 Or App 195, 199, 765 P2d 207, 210-11 (1988).

In an appraisal action, the investment value will often be the value given the most importance by the courts.

> The most important factor in most cases, it pointed out, is investment or enterprise value, because that value reflects the business' worth as a going concern. The purpose of the appraisal statute is to ascertain what the dissenter actually loses because of his or her unwillingness to go along with the controlling shareholders' desires. The court refused to accept a minority discount because it would be a departure from that purpose. Such a discount affects market value more than investment value. The statute allows the majority to override the minority so long as it adequately protects the minority's interests. There would be no protection if the minority could be squeezed out for less than the real value of its interest. *Columbia Management Co. v. Wyss*, 94 Or App 195, 201-12, 765 P2d 207, 212 (1988) (discussing *Woodward v. Quigley*, 257 Iowa 1077, 133 NW2d 38 (1965)).

ORS 60.551(4) provides that fair value is to be determined "immediately before the effectuation of the corporate action to which the dissenter objects." Factors which might be relevant to fixing fair value include, but are not limited to, the following:

> the price at which the shares had been selling; the amount, if any, of present share value increase or decrease because of anticipated future earnings of the corporation; corporate assets; corporate earnings or losses; corporate reputation; anticipated competition. ORS 60.551(4) excludes consideration of appreciation or depreciation in anticipation of the corporate action, unless it would be inequitable to exclude such appreciation or depreciation. *Stringer v. Car Data Systems, Inc.*, 314 Or 576, 587-8, 841 P2d 1183, 1189 (1992), *reconsideration denied*, 315 Or 308, 844 P2d 905 (1993).

3.3 Minority & marketability discounts. In determining fair value, a court must determine whether to apply a "minority" and/or a "marketability" discount.

> A "minority discount" is a reduction in value "which recognizes that controlling shares are worth more in the market than are noncontrolling shares." *Columbia Management Co. v. Wyss*, 94 Or App 195, 204, 765 P2d 207, 213 (1988); *Tyron v. Smith*, 191 Or 172, 229 P2d 251 (1951).

A "marketability discount" is a reduction in value which recognizes that "interests in closely held business enterprises cannot readily be sold, they are less marketable and, therefore, less valuable than equivalent interests in companies whose securities are regularly traded in a recognized market." Haynesworth, *Valuation of Business Interests*, 33 MERCER L REV 457, 489 (1982).

Although not always true, most courts today do not apply a minority discount in the dissenters' rights context. *Brown v. Arp and Hammond Hardware Co.*, 141 P3d 673, 683 (Wyo 2006). Unlike Oregon, many courts also refuse to apply marketability discounts in a dissenter right context. *Id.; Shawnee Telecom Res., Inc. v. Brown,* 354 SW3d 542, 555 (Ky 2011); *First Western Bank Wall v. Olsen,* 621 NW2d 611 (SD 2001). But not all cases agree. *See for example Robblee v. Robblee*, 68 Wash App 69, 841 P2d 1289 (1992).

Oregon likewise applies marketability discounts in the dissenter rights context. *Columbia Management Co. v. Wyss*, 94 Or App 195, 765 P2d 207 (1988) involved a corporate event which essentially squeezed-out a shareholder in a close corporation and gave him the right to dissent. The Court of Appeals upheld the trial court's decision to apply a marketability discount, but overturned the trial court's application of a minority discount.

> [B]ecause a dissenting shareholder is exercising a right designed for his or her protection, and because the purchaser of the shares will be the corporation, not an outsider, this recognition of decreased market value may not be appropriate. "It is contrary to the purpose of the statute to discount the minority interest because it is a minority. This in effect would let the majority force the minority out without paying its fair share of the value

> of the corporation." (citation omitted) *Columbia Management Co. v. Wyss*, 94 Or App 195, 204, 765 P2d 207, 213 (1988).

But see Perlman v. Permonite Manufacturing Co., 568 F Supp 222, 232 (ND Ind 1983), *affirmed*, 734 F2d 1283 (7th Cir 1984)(although discounts for minority interest, lack of marketability and lack of diversity are proper, a discount for capital gains tax liability is not).

The discounts which apply may vary by the context of the appraisal. For instance, in actions by minority shareholders for oppressive conduct and breach of fiduciary duty, courts sometimes force the corporation to buy out the minority's shares. In several such cases, courts have declined to apply either a minority or a marketability discount. *Hayes v. Olmsted & Associates, Inc.*, 173 Or App 259, 276, 21 P3d 178 (2001); *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 115, 7 P3d 717 (2000); *Chiles v. Robertson*, 94 Or App 604, 767 P2d 903, *reconsideration allowed in part, opinion mod*, 96 Or App 658, 774 P2d 500, *rev den*, 308 Or 592, 784 P2d 1099 (1989); Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation,* 54 DUKE L J 293 (2004).

Hard and fast rules do not apply. Fair value is a question of fact, and as such, it "will depend upon the circumstances of each case; there is no single formula for mechanical application." *Matter of Seagroatt Floral, Co., Inc.*, 78 NY2d 439, 583 NE2d 287, 290 (1991).

3.4 Jury trials permitted; burden of proof. In an appraisal action filed under ORS 60.591, either side may demand a jury. *GI Joe's, Inc. v. Nitzam*, 183 Or App 116, 123, 50 P3d 1282 (2002). This is in contrast to actions for oppression pursuant to ORS 60.952 or actions alleging breach of fiduciary duty – actions which also sometimes result in the valuation of the minority shareholder's shares – which are equitable proceedings tried to a judge, not a jury.

ORS 60.591 requires the corporation to initiate an appraisal action and the burden of proof is arguably on the corporation to prove fair value. *Chrome Data Systems, Inc. v. Stringer*, 109 Or App 513, 517, 820 P2d 831 (1991).

Some courts hold that both sides bear the burden of proof saying that in "a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of evidence." *M.G. Bancorporation, Inc. v. Le Beau,* 737 A2d 513, 520 (Del 1999); *see also Highfields Capital, Ltd. v. AXA Financial, Inc.*, 939 A2d 34, 42 (Del Ch 2007).

"Even if one side fails to satisfy its burden of proving its valuation position, the court is not free to accept the competing valuation by default, but must use its own independent judgment to determine a fair value." 18 CJS Corporations § 394 (citing *Montgomery Cellular Holding Co., Inc.*, 880 A2d 206, 221 (Del 2005).

3.5 Attorney fees. ORS 60.594 permits a court to assess attorney fees against either the corporation or the dissenters if the court finds that such party acted arbitrarily, vexatiously or not in good faith or, in the case of the corporation only, if it did not comply with the dissenters' rights provisions of the statute. *Chrome Data Systems, Inc. v. Stringer*, 109 Or App 513, 518, 820 P2d 831, 834 (1991). Attorney fees are not available under ORS 60.952(6) (involving a forced buy-out during in an oppression lawsuit).

3.6 Appraisal actions - exclusive remedy? Many if not most courts will use their equitable powers to protect minority shareholders in a squeeze-out situation. Oregon is among the few states where the appraisal statute is usually the sole remedy for the minority. *Stringer v. Car Data Systems, Inc.*, 314 Or 576, 841 P2d 1183 (1992), *reconsideration denied*, 315 Or 308, 844 P2d 905 (1993); Spencer, *The Oregon Supreme Court Grants Majority Shareholders in Close Corporations a License to Steal: Stringer v. Car Data Systems, Inc.*, 30 WILL L REV 373 (1994). *But see: Noakes v. Schoenborn*, 116 Or App 464, 841 P2d 682 (1992).

Numerous cases have held that courts retain their historic equitable power to protect minority shareholders from the majority's fraud and self-dealing, despite enactment of an appraisal statute. These cases have recognized equitable remedies other than appraisal. *Coggins v. New England Patriots Football Club*, 397 Mass 525, 492 NE2d 1112 (1986)(appraisal statute does not deprive courts of their equitable powers); *Bayberry Associates v. Jones*, 783 SW2d 553 (Tenn 1990) (despite appraisal statute, courts retain equitable right to assure fairness, including fair price and fair dealing); *Mullen v. Academy Life Ins. Co.*, 705 F2d 971 (8th Cir 1983)(appraisal not only remedy despite N.J. appraisal statute); *Joseph v. Shell Oil Co.*, 498 A2d 1117 (Del

Ch 1985)(minority shareholders not limited to appraisal remedy which precludes imposition of adequate remedy for serious breaches of fiduciary duty); *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A2d 1099 (Del 1985) (allegations of bad faith manipulation and grossly inadequate price state claim for damages beyond appraisal); *Cede & Co. v. Technicolor, Inc.*, 542 A2d 1182 (Del Ch 1988) (damage claim and appraisal claim both permitted to go to trial).

Oregon, however, holds that the appraisal remedy is the sole remedy when the dispute is merely over price, even where the transaction involves self-dealing by the majority and the price offered is only a fraction of the true value of the shares.

> Where the allegations show only a disagreement as to price, however, with no allegations that permit any inference of self-dealing, fraud, deliberate waste of corporate assets, misrepresentation, or other unlawful conduct, the remedy afforded by ORS 60.551 to 60.594 is exclusive. That is true even if the majority shareholders acted arbitrarily or vexatiously or not in good faith.
>
> It may be that the $0.002 offer was insulting to plaintiffs, and it may even have been motivated by bad faith. But, because the facts alleged in the complaint, if established, support no claim for damages apart from the fair value of the shares, we believe that the legislature intended that dissenting shareholders in the position of plaintiffs be limited to their remedies under the appraisal statutes. *Stringer v. Car Data Systems, Inc.*, 314 Or 576, 590-1, 841 P2d 1183, 1190-1 (1992), *reconsideration denied*, 315 Or 308, 844 P2d 905 (1993).

See also Fleming v. International Pizza Supply Corp., 676 NE2d 1051 (Ind 1997)(appraisal action is exclusive remedy but minority can litigate fraud and breach of fiduciary duty claims in that action as affecting fair value); *Brandt v. Travelers Corp.*, 44 Conn Sup 12, 665 A2d 616 (1995)(minority could not enjoin merger because appraisal is exclusive remedy); *Stepak v. Schey*, 51 Ohio St3d 8, 553 NE2d 1072 (1990) (remedy for breach of fiduciary duty involving only price that a shareholder receives is limited to appraisal statute); *Schloss Associates v. C & O Ry.*, 73 Md App 727, 536 A2d 147 (1988) (appraisal remedy wholly adequate in dispute essentially over price); *Green v. Santa Fe Industries, Inc.*, 70 NY2d 244, 514 NE2d 105 (1987) (appraisal adequate in dispute over mere inadequacy of price); Spencer, *The Oregon Supreme Court Grants Majority Shareholders in Close Corporations a License to Steal: Stringer v. Car Data Systems, Inc.*, 30 WILL L REV 373 (1994). *But see Noakes v. Schoenborn*, 116 Or App 464, 841 P2d 682 (1992) (minority shareholder may have direct action against majority if squeeze-out occurred in breach of majority's fiduciary duty).

4. Actions arising out of oppression & deadlock

ORS 60.661(2) has long permitted a shareholder to seek judicial dissolution of a corporation when the majority's conduct is "illegal, oppressive or fraudulent" or when there is a voting deadlock. Specifically, a shareholder may seek court intervention if:

> (a) 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 the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;
>
> (b) The directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive or fraudulent;
>
> © The shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; or
>
> (d) The corporate assets are being misapplied or wasted.

A similar provision exists in the newer ORS 60.952, which applies only to non-public corporations. However unlike ORS 60.661(2) (which will now likely be invoked only against corporations which are public), ORS 60.952 gives the corporation and/or the controlling shareholders that right to force the complaining shareholder to sell all of his/her shares at a price and on terms set by the court. This non-revocable election to buy-out must be made within 90 days after the lawsuit is filed.

Although ORS 60.661 only provides for dissolution as a remedy, courts have usually fashioned other remedies for oppressive conduct – relying on their traditional equitable power to protect minority owners. *Browning v. C & C Plywood Corp*, 248 Or 574, 434 P2d 339 (1968); *Baker v. Commercial Body Builders, Inc.*, 264 Or 614, 507 P2d 387 (1973); *Delaney v. Georgia-Pacific Corp.*, 278 Or 305, 564 P2d 277, *supplemented*, 279 Or 653, 569 P2d 604 (1977), *appeal after remand*, 42 Or App 439, 601 P2d 475 (1979).

On the other hand, the newer ORS 60.952 (non-public corporations only) includes a long list of possible remedies and leaves open the door for the court to fashion other remedies as well.

Even though not mentioned as a remedy under ORS 60.661, a remedy commonly imposed by the courts in oppression cases is an order for the controlling shareholders to purchase the shares of the oppressed minority at the “fair value” of those shares.

> Under ORS 60.661, the trial court had the authority to choose a remedy for defendants' actions; we agree with it that requiring defendants to purchase plaintiff's shares is the preferable option. A purchase will disentangle the parties' affairs while keeping the corporation a going concern; dissolution would not benefit anyone, and plaintiff did not seek it at trial. *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 114, 7 P3d 717 (2000).

See also Tifft v. Stevens, 162 Or App 62, 78, 987 P2d 1 (1999).

More recently, the Oregon Court of Appeals said:

> In sum, under Oregon case law prior to the enactment of ORS 60.952, remedies consistently matched the specific acts constituting breach of a controlling shareholder's fiduciary duties and the particular circumstances of the closely held corporation affected. In considering appropriate relief, judicial practice avoided penalizing controlling shareholders' ownership interests in a manner that significantly departed from what was required to relieve minority shareholders from the oppressive conduct, and also avoided increasing any value or benefit from a minority shareholders' interest beyond what minority shareholders could reasonably expect or the fair value of the shares. *Hickey v. Hickey*, 269 Or App 258, 274-75, 244 P3d 512 (2015).

ORS 60.661 applies to all corporations – close corporations, publicly-traded corporations, and everything in between. That said, all of the cases in Oregon on judicial dissolution – and maybe all cases everywhere – involve close corporations.

In 2001, ORS 60.952 took effect. This statute applies only to non-public corporations. It mirrors the language of ORS 60.661(2) for triggering events (oppression, voting deadlock, corporate waste), but sets out a long, non-exclusive list of possible remedies that a court might apply. This statute gives the corporation the right to buy out the complaining shareholder at a price and terms set by the court.

It is likely that much of the case law interpreting the older ORS 60.661 will apply to the new statute as well.

4.1 Illegal, oppressive or fraudulent conduct. "The legislature has not defined "oppression" for present purposes. . . Rather, courts must determine on a case-by-case basis whether the conduct complained of rises to the level of oppression." *Hayes v. Olmsted & Associates, Inc.*, 173 Or App 259, 265, 21 P3d 178 (2001). "'Minority shareholder oppression' is not defined by statute, and the case law indicates that the concept is rather nebulous, such that a definitive definition may not be possible." *Davis v. Brockamp & Jaeger, Inc.*, 216 Or App 518, 530, 174 P3d 607 (2007).

In interpreting the similarly-worded, former ORS 57.595, the Oregon Supreme Court held that the terms "illegal," "oppressive," and "fraudulent" are to be read in the disjunctive:

> While general definitions of "oppressive" conduct are of little value for application in a specific case, perhaps the most widely quoted definitions are that "oppressive conduct" for the purposes of such a statute is:
>
> > "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."
>
> We agree, however, that the question of what is "oppressive" conduct by those in control of a "close" corporation as its majority stockholders is closely related to what we agree to be the fiduciary duty of a good faith and fair dealing owed by them to its minority stockholders.
>
> Thus, an abuse of corporate position for private gain at the expense of the stockholders is "oppressive" conduct. Or the plundering of a "close" corporation by the siphoning off of profits by excessive salaries or bonus payments and the operation of the business for the sole benefit of the majority of the stockholders, to the detriment of the minority stockholders, would constitute such "oppressive" conduct as to authorize a dissolution of the corporation under the terms of ORS 57.595. (footnotes omitted) *Baker v. Commercial Body Builders, Inc.*, 264 Or 614, 628-9, 507 P2d 387, 393-4 (1973).

See also Iwasaki v. Iwasaki Bros., Inc., 58 Or App 543, 649 P2d 598 (1982).

A breach of the fiduciary duty owed by controlling shareholders to minority shareholders is likely to also constitute oppressive conduct. *Naito v. Naito*, 178 Or App 1, 20-1, 35 P3d 1068 (2001).

> Although there is not, and probably cannot be, a definitive definition of oppressive conduct under the statute, at least in a closely held corporation conduct that violates the majority's fiduciary duties to the minority is likely to be oppressive. *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 108, 7 P3d 717 (2000).

But where there are both fiduciary duty breaches and oppressive conduct and where the remedy is a court ordered buy-out of the minority, the breach of fiduciary duty claim “is essentially subsumed under the oppression claim” and there is not separate remedy for the fiduciary claim. *Tifft v. Stevens*, 162 Or App 62, 78, 987 P2d 1 (1999).

But not all conduct which negatively impacts the minority will give rise to a remedy under ORS 60.661 and 60.952.

> The existence of one or more of these characteristic signs of oppression does not necessarily mean that the majority has acted oppressively within the meaning of ORS 60.661(2)(b). Courts give significant deference to the majority's judgment in the business decisions that it makes, at least if the decisions appear to be genuine business decisions. As we have noted, attempts to define what oppressive conduct is, instead of what it is not, have proved elusive, and cases of this sort depend heavily on their specific facts. *See Weiner Investment Co. v. Weiner,* 105 Or App 339, 342-43, 804 P2d 1211 (1991). The court must evaluate the majority's actions, keeping in mind that, even if some actions may be individually justifiable, the actions in total may show a pattern of oppression that requires the court to provide a remedy to the minority. *Cooke v. Fresh Express Foods*

Corp., 169 Or App 101, 110, 7 P3d 717 (2000).

See also Davis v. Brockamp & Jaeger, Inc., 216 Or App 518,174 P3d 607(2007)

Usually, in order to trigger a remedy under ORS 60.661, the controlling shareholder must engage in some pattern of wrongful conduct or a single instance of wrongful conduct which is particularly egregious.

Conduct which constitutes "oppressive conduct" is necessarily fact dependent and summary judgment on this issue is usually inappropriate. *Weiner Inv. Co. v. Weiner,* 105 Or App 339, 804 P2d 1211 (1991).

The other types of conduct which trigger ORS 60.661(2) and 60.952(1) – fraudulent and illegal conduct – have not been separately discussed in this context by the Oregon courts.

4.2 Deadlock. ORS 60.661 and 60.952(1) also permit a court to intervene and dissolve a corporation (or fashion another remedy) in the event of shareholder or director deadlock.

"Deadlock is the inaction which results when two equally powerful factions stake out opposing positions and refuse to budge." (footnote omitted) *Wilcox v. Stiles*, 127 Or App 671, 678, 873 P2d 1102, 1105 (1994). If one shareholder owns a majority of the shares, the corporation is not necessarily deadlocked simply because its board is deadlocked since ORS 60.661(2)(a) also requires that "the shareholders are unable to break the deadlock." *See also Gregory v. J. T. Gregory & Son, Inc.,* 176 Ga App 788, 338 SE2d 7 (1985).

Likewise, even though shareholders are deadlocked, a corporation is not necessarily deadlocked if the board is not deadlocked or if shareholder deadlock has not lasted through at least two consecutive annual meeting dates. ORS 60.661(2)© & 60.952(1)©; *Jackson v. Nicolai-Neppach Co.*, 219 Or 560, 348 P2d 9 (1959).

4.3 Power to dissolve is discretionary. Under the statutes, a court's power to dissolve is discretionary and a power courts are reluctant to exercise.

> The shareholder deadlock provisions of the Illinois Business Corporation Act, of the Model Business Corporation Act, and of the Oregon Business Corporation Law are clearly couched in language of permission. It is incredible that the many able lawyers who worked from time to time on these three identical acts would have used such phraseology to express a mandate. The statute contemplates that the court of equity shall take jurisdiction once a requisite showing of fact is made and contemplates further that having taken jurisdiction it will bring its discretion to bear in granting or refusing to grant equitable

> relief. The very fact that the legislature has made the remedy of liquidation a matter of discretion for the courts is a mandate to us to use discretion, and we would not be carrying out the legislative will by simply decreeing liquidations as a matter of course once the jurisdictional facts and nothing more are proven. The common law rule was thought to be an insufficient safeguard of the rights of the half-owner of a corporation who happened to be out of power. As we read the statute its intent is to obligate the courts to thread their way from case to case without the assistance of sweeping generalizations. *Jackson v. Nicolai-Neppach Co.*, 219 Or 560, 574-5, 348 P2d 9, 16 (1959).

In *Baker v. Commercial Body Builders, Inc.*, 264 Or 614, 507 P2d 387 (1973), the court noted the power granted by the judicial dissolution statute was discretionary and pointed out that this statutory power did not limit the court's more general equitable power to protect minority shareholders by fashioning remedies other than dissolution.

Historically, courts have been disinclined to intervene to dissolve a corporation – even in cases involving deadlock or oppressive conduct. This author has been unable to find any Oregon appellate decision in which judicial dissolution was ordered.

Under ORS 60.661, a court may find inequitable conduct, but order relief short of dissolution. *Browning v. C & C Plywood Corp.*, 248 Or 574, 434 P2d 339 (1968); *Delaney v. Georgia-Pacific Corp.*, 278 Or 305, 564 P2d 277, *supplemented*, 279 Or 653, 569 P2d 604 (1977), *appeal after remand*, 42 Or App 439, 601 P2d 475 (1979); *Agronic Corp. of America v. deBough*, 21 Wash App 459, 585 P2d 821 (1978).

> **NOTE:** Despite language in many earlier cases that indicates that courts are reluctant to intervene in internal corporate disputes, there has been an increasing tendency for the Oregon Court of Appeals to intervene and fashion some remedy to protect minority shareholders. *See Tifft v. Stevens,* 162 Or App 62, 78, 987 P2d 1 (1999); *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 108, 7 P3d 717 (2000) *Hayes v. Olmsted & Associates, Inc.*, 173 Or App 259, 265, 21 P3d 178 (2001). The remedy chosen is often the forced buy-out of the minority's shares.

4.4 Mismanagement alone usually does not constitute oppression. Courts will usually not intervene in the case of alleged director incompetence and mismanagement. *Beeler v. Standard Inv. Co.*, 107 Wash 442, 181 P 896 (1919). One decision recognized the right of the board to shift the balance of voting power, stating that "directors . . . may in the exercise of their honest business judgment adopt a valid method of eliminating what appears to them a clear threat to the future of their business by any lawful means." *Hendricks v. Mill Engineering & Supply Co.*, 68 Wash 2d 490, 495, 413 P2d 811, 813-4 (1966).The Oregon Supreme Court has said:

> In the absence of a fraudulent or coercive design or purpose on the part of the management neither the judgment of the court nor that of a minority stockholder can properly be substituted for the judgment of the majority of the directors and stockholders of a corporation. *Horner v. Pleasant Creek Mining Corp.*, 165 Or 683, 699, 107 P2d 989, 995, 109 P2d 1044 (1941).

Another court put it more bluntly:

> No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs. *Regenstein v. J. Regenstein Co.*, 213 Ga 157, 159 97 SE2d 693, 695 (1957).

Usually, either bad faith or fraud must be present in order for a court to intervene in internal corporate affairs.

4.5 Statutory provisions for non-public corporations. The remedy for oppressive conduct set out in ORS 60.661 is the dissolution of the corporation. This author knows of no Oregon cases where this statutory remedy was actually imposed, although in one recent Multnomah County case, the court ordered the corporation split between the two warring factions.

In recent years, shareholder lawsuits alleging illegal, oppressive or fraudulent conduct have become increasingly common. Although courts have frequently found that those in control of the corporation have acted in a manner which is “illegal, oppressive or fraudulent,” courts rarely, if ever, order the drastic remedy of dissolution of the corporation. Rather, most courts have disregarded the statutory remedy of dissolution and instead exercised their equitable power to fashion some other remedy.

In response to this increase in litigation, the OSB Business Law Section created a task force to make proposals for new legislation addressing oppression cases in close corporations. The task force’s recommendations were enacted into law as ORS 60.952 and took effect on January 1, 2002.

> The legislative history of ORS 60.952(6) shows that the legislature intended to discourage litigation between shareholders, with its potential for acrimony and harm to the firm and others, by providing an incentive for shareholders to resolve their disputes in some way other than a "proceeding under subsection (1). *Graydog Internet, Inc. v. Giller,* 362 Or 177, 198, 406 P3d 45 (2017).

ORS 60.952 applies new procedures for non-public corporations, while leaving ORS 60.661 unchanged and applicable to public corporations.

The major points of ORS 60.952 are:

The threshold statutory issue of “illegal, oppressive or fraudulent” conduct remains unchanged and has been left for further judicial development.

Under ORS 60.952, in the event a court finds the threshold oppressive conduct exists, the statutory remedies available to the court are expanded beyond the drastic remedy of dissolution. The statute lists 12 other permissive statutory remedies – including the forced purchase of the oppressed minority's shares, the appointment or removal of directors, the appointment of a custodian to manage the business, the submission of the dispute to mediation and the award of damages. All of these statutory remedies have previously been applied by various courts – some in Oregon, some elsewhere – exercising their equitable power to regulate corporations. ORS 60.952(3) provides that the remedies listed in the statute are not exclusive and that the court may fashion other legal and equitable remedies.

Except for the remedies of an accounting, damages or dissolution, the shareholders may agree to limit or eliminate any of the listed remedies through an agreement meeting the requirements of ORS 60.265.

ORS 60.952(4) provides that in fashioning a remedy, a court may take into consideration the "reasonable expectations of the corporation's shareholders as existed at the time the corporation was formed and developed during the course of the shareholders' relationship with the corporation and with each other." The statute continues: "the court shall endeavor to minimize the harm to the business of the corporation."

> **NOTE:** There has been a trend in other states to look to the "reasonable expectations" of the shareholders at formation in order to determine whether a triggering event of oppression has occurred. In such states, if the court finds the shareholders had "reasonable expectations" of continued employment at formation, the termination of one shareholder's employment might be a triggering to an oppression claim.
>
> The task force which proposed the Oregon statute (a task force on which this author served) rejected efforts to include "reasonable expectations" language in the triggering event provisions of ORS 60.952 – leaving this issue to further development by the Oregon courts. However, the task force did include "reasonable expectations" language in the remedy section. Thus, a corporate act which disregards the subjective expectations of the shareholders is not necessarily a triggering event for an oppression suit, but ORS 60.952(4) requires the court to take these expectations into account in fashioning a remedy. This may be consistent with prior case law. *See Cooke v. Fresh Express Foods Corp.*,

169 Or App 101, 7 P3d 717 (2000)(which took into account lost wages of the oppressed shareholder in awarding damages).

If a court orders either the corporation or its controlling shareholders to purchase the minority's shares, ORS 60.952(5) provides that the court shall determine the "fair value" of the shares – a value which shall take "into account any impact on the value of the shares resulting from the actions giving rise to the proceeding." The court is also required to "consider any financial or legal constraints on the ability of the corporation or the purchasing shareholder to purchase the shares."

4.6 Forced buy-out provisions. Up to this point, ORS 60.952 contains no significant departure from prior case law. Its only radically new provision – ORS 60.952(6) – provides that within 90 days after a minority shareholder initiates an oppression-type lawsuit, either the corporation or one or more of its controlling shareholders may force the plaintiff minority shareholder to sell his/her shares. Should the corporation or its controlling shareholders make such an election, the minority's lawsuit for oppressive conduct is suspended and the court need only determine the "fair value" of the minority's shares.

NOTE: This forced buy-out provision is drawn from § 14.34 (2001) of the Model Business Corporation. Several other state oppression statutes contain provisions giving the corporation and/or controlling shareholders the option of staying the original proceeding while the court sets a price for the forced buy-out of the complaining shareholder – although the actual mechanism for doing so varies widely. *See* Ala Code § 10-2B-14.34 (1999); Alaska Stat § 10.06.630 (West 2010); Ariz Rev Stat § 10-1434 (1999); Cal Corp Code § 2000 (2000); Conn Gen Stat § 33-900 (1999); Fla Stat Ann § 607.1436 (West 2010); Idaho Code § 30-1-1434 (West 2010); 805 Ill Comp Stat Ann 5/12.56(f) (West 2010); Minn Stat Ann § 302A.751, subd 2 (West 2010); Miss Code Ann § 79-4-14.34 (1999); Mont Code Ann § 35-1-939 (1999); Neb Rev Stat Ann § 21.20,166 (West 2009); NH Rev Stat Ann § 293-A:14.34 (1999); NJ Stat Ann § 14A:12-7(8)© (West 2010); NY Bus Corp Law § 1118 (McKinney 1999); RI Gen Laws § 7-1.2-1315 (2009); Utah Code Ann §16-10a1434 (1999); W Va Code § 31D-14-1434.

In theory, if the corporation elects to buy-out the minority under this provision, the minority need no longer prove oppression. But this issue ***may*** come in through the back door.

First, ORS 60.952(5)(a) provides that in determining the buy-out price, the court shall:

> (A) Determine the fair value of the shares, with or without the assistance of appraisers, taking into account any impact on the value of the shares resulting from the actions giving rise to a proceeding under subsection (1) of this section;

So evidence of the conduct that gave rise to the initial claim may be admitted to show how that conduct impacted the value of the stock – but not as an independent basis for damages. There is no case law in Oregon on this issue, *but see Friedman v. Beway Realty Corp*., 87 NY2d 161, 638 NYS2d 399, 403 (1995); *G & G Fashion Design, Inc. v. Garcia,* 870 So2d 870 (Fla App 2004); *Go v. Pacific Health Services, Inc*., 179 Cal App4th 522, 101 Cal Rptr3d 736 (2009); *Jahn v. Kinderman,* 351 Ill App3d 158, 14 NE2d 116, 123 (2004); *Cox Enterprises, Inc. v. News-Journal Corp,* 510 F3d 1350 (11th Cir 2007).

Second, in the dissenter rights context existing case law indicates "fair value" is the value of the minority's share *with* a marketability discount, but *without* a minority discount. *Columbia Management Co. v. Wyss*, 94 Or App 195, 204, 765 P2d 207, 213 (1988). But in cases involving oppression and breaches of fiduciary duty, the Oregon courts often refuse to apply either discount. *Cooke v. Fresh Express Foods Corp.*, 169 Or App 101, 115, 7 P3d 717 (2000).

It is unclear whether the Oregon courts will apply both discounts in a forced buy-out under ORS 60.952(6) or whether the issue of wrongdoing will come in on the discount issue. In a law review article published soon after the adoption of this statute, the Chair of the task force who wrote this new provision assumed – without analysis – that the marketability discount would not apply. Robert Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations,* 28 J Corp L 371, 416-7 (Spring 2001). Another commentator argues forcefully against applying marketability discounts. Rabbit, *Application of Share-Price Discounts and Their Role in Dictating Corporate Behavior: Encouraging Elected Buy-Outs Through Discount Application*, 43 Willamette L Rev 107 (2007). Other states go both ways on the marketability discount issue. *Charland v. Country View Golf Club, Inc*., 588 A2d 609 (RI 1991); *Blake v. Blake Agency, Inc.,* 107 AD2d 139, 486 NYS2d 341, *appeal denied,* 65 NY2d 609, 484 NE2d 671, 494 NYS2d 1028 (1985).

ORS 60.952(6) likely takes away the court's ability to fashion a remedy other than the buy-out of the unhappy shareholder. If the corporation or controlling shareholders elect to repurchase the plaintiff's shares, the only issues left for the court's determination are fair value and terms.

4.7 Jury trials; attorney fees. An action under ORS 60.661 – and presumably under ORS 60.952 – is an equitable action. *GI Joe's, Inc. v. Nitzam*, 183 Or App 116, 123, 50 P3d 1282 (2002); *Naito v. Naito*, 178 Or App 1, 4, 35 P3d 1068 (2001). As such, there is likely no right to a trial by jury.

Neither ORS 60.661 nor 60.952 provide for the award of attorney fees. At least in Oregon, there does not appear to be a common law right to attorney fees in breach of fiduciary duty or oppression actions.

Attorney fees may be awarded in derivative lawsuits. *Crandon Capital Partners v. Shelk,* 342 Or 555, 157 P3d 176 (2007).

Under ORS 60.594, attorney fees may also be awarded in a squeeze-out merger against either the corporation or the dissenters if the court finds that such party acted arbitrarily, vexatiously or not in good faith or, in the case of the corporation only, if it did not comply with the dissenters' rights provisions of the corporate statute. *Chrome Data Systems, Inc. v. Stringer*, 109 Or App 513, 820 P2d 831 (1991).

5. Break-ups among members in a LLC

Limited liability companies share some characteristics with corporations and some characteristics with partnerships.

At least in some circumstances, courts in Oregon and other states have interpreted the LLC statutes in a manner consistent with corporate law. *Bernards v. Summit Real Estate Management*, 229 Or App 357, 213 P3d 1 (2009); *Tzolis v. Wolff*, 10 NY3d 100, 884 NE2d 1005, (2008); *VGS, Inc. v. Castiel*, 2003 WL 723285 (Del Ch 2003).

5.1 Expulsion of a member. While there may be roundabout methods of doing so, generally a corporation cannot expel a shareholder and a partnership cannot expel a partner. An LLC, however, can expel a member, unless the operating agreement provides otherwise (which is often the case). ORS 63.209 provides:

63.209 Expulsion of member.

(1) A member may be expelled from a limited liability company:

(a) In accordance with a written provision in the articles of organization or any operating agreement; or

(b) Except as otherwise provided in writing in the articles of organization or any operating agreement, by a court, upon application of any member, if the court determines that:

(A) The member has been guilty of wrongful conduct that adversely and materially affects the business or affairs of the limited liability company; or

(B) The member has willfully or persistently committed a material breach of the articles of organization or any operating agreement or otherwise breached a duty owed to the limited liability company or the other members to the extent that it is not reasonably practicable to carry on the business or affairs of the limited liability company with that member.

(2) The power of a limited liability company to expel a member pursuant to this section does not limit or adversely affect any right or power of the limited liability company to recover any damages or to pursue any other remedies provided for in the articles of organization or any operating agreement or permitted under applicable law or at equity. The limited liability company, in addition to any of its other remedies, may offset any such damages against any amounts otherwise distributable or payable to the expelled member.

Although an LLC may expel a member, fiduciary duty considerations may apply. For example, in a Tennessee case where the controlling LLC members expelled minority members – paying $150 per ownership interest and then selling all the units for $250 per unit – the Tennessee Court of Appeals held that the LLC's majority members owed the same fiduciary duties to minority members as do controlling shareholders in a corporation. *Anderson v. Wilder,* 2003 WL 22768666, 2003 Tenn App LEXIS 819 (2003), *aff'd after trial*, 2007 Tenn App LEXIS 582 (2007). *See also Brazil v. Rickerson*, 268 F Supp2d 1091 (WD Mo 2003). On the other hand, a Texas court held that an 80% owner of an LLC did not owe a fiduciary duty to the other members under Texas law. *Suntech Processing Systems, LLC v. Sun Communications, Inc*., 2000 WL 1780236 (Tex App 2000).

Under Virginia law, managers and members owe a fiduciary duty to the LLC, but not to the members themselves. *Remora Investments, LLC v. Orr,* 673 SE2d 845 (Va 2009); *WAKA, LLC v. Humphrey,* 2007 Va Cir LEXIS 96 (Cir Ct 2007). In *Gowin v. Granite Depo*, *LLC*, 634 SE2d 714 (Va 2006), the court upheld a trial court's finding that a majority LLC member did not breach his fiduciary duty by amending the articles of organization to permit eliminating a member's interest for nonpayment of a capital contribution and then seeking to eliminate the member. The court found that the amendment did not adversely affect the company and had a proper purpose ensuring that the LLC received the member's capital contribution.

In *Bell v. Walton,* 861 A2d 687 (Me 2004), the court held that in order for a member to withdraw from an LLC, the member must strictly comply with the notice requirements in the statute. The Court was unwilling to judicially impose a doctrine of constructive notice of withdrawal upon the statutory scheme.

In *Love v. Fleetway Air Freight & Delivery Service, LLC,* 875 So2d 285 (Ala 2003), the court held that the members' vote to remove the LLC's manager did not also constitute his removal as a member under the wording of that LLC's operating agreement.

Although the Louisiana LLC statutes do not set out the procedure for terminating a member, the expulsion of a member made in accordance with the operating agreement have been upheld. *See e.g., Mixon v. Iberia Surgical, LLC*, 956 So2d 76, 82 (La App 2007); *Weinmann v. Duhon,* 818 So2d 206 (La App 2002); *Rudney v. Int'l Offshore Servs., LLC,* 2007 US Dist LEXIS 75441 (ED La 2007).

> **NOTE:** In the corporate context, a shareholder in a closely held corporation has statutory authority to try to force the corporation to cash out his/her shares if the corporation acts in a manner that is "illegal, oppressive or fraudulent." ORS 60.952(1)(b). No similar statutory right exists for members of an LLC. ORS 63.661. Instead, the LLC statute gives the LLC the right to expel a member who is acting wrongfully. Clearly the balance of power is different in the corporate and LLC contexts.

5.2 Right to withdraw. ORS 63.205 permits a member to withdraw from the LLC. There is no similar provision in the Oregon Business Corporation Act. The withdrawal may subject the withdrawing member to liability. ORS 63.205 provides:

> (1) A member may voluntarily withdraw from a limited liability company:
>
> (a) At the time or upon the occurrence of events specified in the articles of organization or any operating agreement; or
>
> (b) Upon not less than six months' prior written notice to the limited liability company, unless the articles of organization or any operating agreement expressly provide that a member has no power to withdraw voluntarily from the limited liability company or otherwise expressly limit or condition such power.
>
> (2) If a member with the power to withdraw voluntarily from a limited liability company exercises that power, but the withdrawal is in breach of any provision of the articles of organization or any operating agreement, then, unless otherwise provided in the articles

> of organization or any operating agreement, the limited liability company, in addition to any other remedy available at law or in equity, may recover from the withdrawing member damages incurred by the limited liability company as a result of the breach and may offset the damages against any amounts otherwise distributable or payable to the withdrawing member.
>
> (3) Unless otherwise provided in the articles of organization or any operating agreement, in the case of a limited liability company for a definite term or particular undertaking, a voluntary withdrawal by a member before the expiration of that term or completion of that undertaking is a breach of the applicable articles of organization or any operating agreement.

Even though a member may "withdraw" as a member, this does not mean that the LLC is obligated to cash out the withdrawing member's interest. ORS 63.365 provides that "following the cessation of the member's interest, the holder of the former member's interest shall be considered an assignee of such interest and shall have all the rights, duties and obligations of an assignee under this chapter."

This is also true in Wyoming. Absent provisions in the operating agreement addressing this issue, the withdrawing member loses the right to participate in management, but retains his/her economic interest (much like an assignee). *Lieberman v. Wyoming.com, LLC,* 2004 WY 1, 82 P3d 274 (Wyo 2004). This is also true under Delaware law when it is the bankruptcy of a member that causes an implied withdrawal. *Milford Power Co., LLC v. PDC Milford Power,* 866 A2d 738 (Del Ch 2004).

In *Lamprecht v. Jordan, LLC,* 139 Idaho 182, 75 P3d 743 (2003), an LLC's operating agreement provided that the termination of a member's employment constituted the withdrawal of that member, entitling the member only to payment of an amount equal to the balance in his capital account, not the fair market value of his interest in the LLC. The court upheld this provision.

New York's LLC statute does not allow a member to withdraw. In New York, "a member may withdraw from a limited liability company only as provided in its operating agreement. If the operating agreement is silent, a member may not withdraw prior to the dissolution of the company." *Matter of Horning v. Horning Constr., LLC,* 12 Misc3d 402, 408, 816 NYS2d 877 [Sup Ct, Monroe County 2006], *Klein v. 599 Eleventh Ave. Co. LLC,* 14 Misc3d 1211, 836 NYS2d 486; 2006 NY Misc LEXIS 3937 (2006).

Some state LLC statutes not only allow a member to withdraw, but also require the LLC to buy out the withdrawing member's interest at its fair value. *See Cox v.*

Southern Garrett, LLC, 245 SW3d 574 (Tex App Houston [1st Dist] 2007); *Sage v. Radiology and Diagnostic Services, LLC,* 831 So2d 1053 (La App 1st Cir 2002).

5.3 Actions for dissolution; oppression. A limited liability company can be dissolved upon the occurrence of those events specified in the articles of organization or by vote of the members. ORS 63.621. An LLC may also be dissolved by the circuit court. ORS 63.647 sets forth grounds for judicial dissolution, as follows:

> The circuit courts may dissolve a limited liability company:
>
> (1) In a proceeding by the Attorney General if it is established that:
> (a) The limited liability company obtained its articles of organization through fraud; or
> (b) The limited liability company has continued to exceed or abuse the authority conferred upon it by law.
>
> **(2) In a proceeding by or for a member if it is established that it is not reasonably practicable to carry on the business of the limited liability company in conformance with its articles of organization or any operating agreement.**
>
> (3) In a proceeding by the limited liability company to have its voluntary dissolution continued under court supervision.

The corporate judicial dissolution statute contains essentially the same provisions regarding dissolution initiated by the state (ORS 60.661 & 60.952), but the provisions regarding dissolution proceedings initiated by owners is worded significantly differently. Unlike the corporate statutes, the LLC statute contains no provisions for dissolution in the event of deadlock or where the corporation acts in a manner that is "illegal, oppressive or fraudulent."

Rowlett v. Fagan, 262 Or App 667, 327 P3d 1 (2014), *rev'd on other grounds*, 358 Or 639, 369 P3d 1132 (Or., 2016) (2016) raised the possibility that the LLC members may have claims for oppression.

Although "oppression" language is not used, the LLC statute uses the phrase: "if it is established that it is not reasonably practicable to carry on the business."

There are no Oregon cases interpreting this language and no consistent interpretation by other courts interpreting this "reasonably practicable to carry on the business" language. A good review of various interpretations by various cases is set forth in *Kirksey v. Grohmann*, 2008 SD 76, 754 NW2d 825 (2008), which begins:

> A consistent view in other jurisdictions is that a limited liability company is governed by its articles of organization and operating agreement. *See Horning v. Horning Const., LLC*, 12 Misc3d 402, 816 NYS2d 877, 881 (NY Sup Ct 2006); *Historic Charleston Holdings, LLC v.*

> *Mallon*, 365 SC 524, 617 SE2d 388, 393 (SC Ct App 2005); *Dunbar Group, LLC v. Tignor*, 267 Va 361, 593 SE2d 216, 219 (2004). Beyond this, however, there is no prevailing interpretation of the terms "not reasonably practicable" and "economic purpose . . . unreasonably frustrated" in relation to dissolution of limited liability companies. *See* SDCL 47-34A-801.
>
> Nevertheless, the cases interpreting language similar to our statutory terminology, whether involving a partnership or a limited liability company, are instructive. In defining what it means for it to "not be reasonably practicable" for a company to continue, one court consulted a dictionary to apply a plain and ordinary meaning. *Taki v. Hami*, 2001 WL 672399 (Mich Ct App.) (unpublished) (dissolution of a partnership). The *Taki* court held that "'reasonably practicable' may properly be defined as capable of being done logically and in a reasonable, feasible manner." *Id* at 3. Another court emphasized that "[t]he standard set forth by the Legislature is one of reasonable practicability, not impossibility." *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assoc., LP,* 1989 WL 63901, 6 (Del Ch) (unpublished) (dissolution of a partnership). Under this view, the standard does not require that the purpose of the company, as set out in the operating agreement, be completely frustrated to warrant judicial dissolution. Rather, the term "reasonably practicable" signifies a company's ability to continue the purpose identified in the operating agreement. (footnotes omitted) *Kirksey, supra,*, 754 NW2d at 828.

See also In re Hefel Case No. 10-02787(Bankr ND Iowa, Sept 19, 2011).

The Delaware LLC statute does not provide for judicial dissolution of an LLC in the event of deadlock – a court may dissolve an LLC only when "it is not reasonably practicable to carry on the business in conformity with a limited liability agreement." In the case of *In re Silver Leaf, LLC,* 2005 WL 2045641 (Del Ch), the court judicially dissolved the LLC, reasoning that this business was unable to go forward since the LLC had no assets other than a chose in action against another company which had defrauded it.

One New York court has said that it is inappropriate to import dissolution standards from corporate or partnership law; the courts must look only to the New York LLC statute:

> Phrased differently, since the Legislature, in determining the criteria for dissolution of various business entities in New York, did not cross-reference such grounds from one type of entity to another, it would be inappropriate for this Court to import dissolution grounds from the Business Corporation Law or Partnership Law to the LLCL.
>
> * * *
>
> After careful examination of the various factors considered in applying the "not reasonably practicable" standard, we hold that for dissolution of a limited liability company pursuant to LLCL 702, the petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible. *In the Matter of 1545 Ocean Ave., LLC v. Crown Royal Ventures, LLC*, 2010 NY Slip Op 00688 (NY App Div 1/26/2010), 2010 NY Slip Op 688 (NY App Div 2010)

In *Dunbar Group, LLC v. Tignor,* 267 Va 361, 593 SE2d 216 (2004), one of two

LLC owners sought expulsion of the other owner based on alleged acts of misconduct. The trial court ordered the expulsion and the LLC's dissolution. The Virginia Supreme Court found that expulsion of the member was proper, but dissolution was not proper because the evidence failed to demonstrate that it was not reasonably practicable to carry on the LLC's business.

In *Investcorp, LP v. Simpson Investment Co., LLC,* 267 Kan 840, 267 Kan 875, 983 P2d 265 (1999), members of a Kansas LLC owning a single property were deadlocked over decisions about that property. The Kansas statute contained no provision regarding dissolution as the basis of deadlock, but the operating agreement provided that the withdrawal of members would trigger dissolution. Half the members withdrew, but the LLC refused to dissolve. Withdrawing members sued to force dissolution and the appointment of receiver. The court ruled the LLC must dissolve, but refused to appoint a receiver, holding that the LLC controlled the dissolution process.

> **NOTE:** Despite the absence of a statutory basis for judicial intervention in the case of "oppressive" conduct, Oregon courts have long held that they have traditional equitable powers to protect minority owners and to fashion appropriate remedies. *GI Joe's, Inc. v. Nitzam*, 183 Or App 116, 123, 50 P3d 1282 (2002); *Naito v. Naito*, 178 Or App 1, 4, 35 P3d 1068 (2001). It is an open question whether this equitable power will also be applied to LLCs.

Interpreting language similar to that in the Oregon LLC statute ("it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement"), a New York court held that judicial dissolution of an LLC will be ordered "only where the complaining member can show that the business sought to be dissolved is unable to function as intended, or else that it is failing financially." *Schindler v. Niche Media Holdings, LLC,* 1 Misc3d 713, 716, 772 NYS2d 781 (2003). The court stated that the only grounds for judicial dissolution were those set out in the LLC statute, implying that the court had no inherent equitable power to protect minority owners. *Id; See also Matter of Jeffrey M. Horning v. Horning Constr. LLC,* 12 Misc3d 402, 816 NYS2d 877; 2006 NY Misc LEXIS 555 (2006); *Artigas v. Renewal Arts Realty Corp.*, 22 AD3d 327; 803 NYS2d 12, 2005 NY App Div LEXIS 10902 (2005).

In *Haley v. Talcott,* 864 A2d 86 (Del Ch 2004), the two 50% owners of an LLC were deadlocked over how to manage the LLC's property. The court found that it was not practicable to carry on business and ordered dissolution and sale of the LLC's property. The court considered other "equitable" remedies based on provisions of the operating agreement, but did not find those remedies "equitable" under the facts of this case.

In *Venture Sales, LLC v. Perkins,* 86 So3d 910 (Miss 2012), the court affirmed the trial court's decision to dissolve and LLC which "is not fulfilling the purpose stated in its operating agreement" when the LLC "was formed for the purpose of developing and selling its property, and no development has taken place during the more than ten years since the company's formation." *Id* at 916.

One court held that the Kansas LLC statute allows members to assert an oppression claim. *Ayres v. AG Processing Inc.*, 345 F Supp2d 1200 (D Kan 2004).

5.4 Arbitration agreements. It is very common for operating agreements to contain the requirement that any disputes between the members, or between the LLC and the members, are subject to arbitration, rather than a lawsuit in court.

Courts give broad application to arbitration clauses in operating agreements. *CAPROC Manager, Inc. v. Policemen's & Firemen's Retirement System of City of Pontiac,* 2005 WL 937613 (Del Ch 2005) (a broadly worded arbitration agreement required arbitration of a dispute over the removal of the manager by the members); *Douzinas v. American Bureau of Shipping, Inc.,* 888 A2d 1146 (Del Ch 2006) (broad arbitration provision in an LLC agreement could encompass breach of fiduciary duty claims by a member.)

Even though it is customary for only LLC's members to sign the operating agreement (not for the LLC itself to sign), most courts hold that the LLC is also bound by the arbitration provisions of the operating agreement. *Elf Atochem North America, Inc. v. Jaffari,* 727 A2d 286 (Del 1999). *But see Trover v. 419 OCR, Inc.*, 337 Ill Dec 111, 921 NE2d 1249 (Ill App 2010).