Disputes Among Co-Venturers

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I. TYPES OF DISPUTES OR CLAIMS THAT ARISE

- **A. Self Dealing**
- **B. Corporate Opportunities**
- **C. Entitlement to Compensation or Fees**
- **D. Right to Work in Venture**
- **E. Exclusion from Information, Participation, and Decision-Making**
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II. OVERVIEW OF FIDUCIARY DUTIES UNDER MASSACHUSETTS LAW

A. Fiduciary Duties of Joint Venture Parties, Partners, Directors, Managers and Co-Owners of Closely Held Businesses

1. Joint venture parties have the same fiduciary duties as partners. De Cotis v. D'Antona, 350 Mass. 165, 168 (1966); Cardullo v. Landau, 329 Mass. 5, 8 (1952). Partners owe each other the duty of "utmost good faith and loyalty." Id.

2. "Fiduciary duties are essentially the same in general partnerships, limited partnership and joint ventures." Newton v. Moffie, 13 Mass. App. Ct. 462, 464 n.4 (1982). General partners owe other general partners and limited partners the same duties. Starr v. Fordham, 420 Mass. 178, 183 (1995).

3. Directors of a corporation owe to the corporation both a duty of care and a paramount duty of loyalty. "They are bound to act with absolute fidelity and must place their duties to the corporation above every other financial or business obligation…" Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 528 (1997).

4. A closely held company is one which has a small number of owners, no ready market for its shares and substantial majority owner participation in management, direction and operations of the business. Donahue v. Rodd Electrotypes Co. of New England, Inc., 367 Mass. 578 (1975).

5. "In the case of a closely held corporation, which resembles a partnership, duties of loyalty extend to shareholders, who owe one another substantially the same duty of utmost good faith and loyalty in the

operation of the enterprise that partners owe to one another, a duty that is even stricter than that required of directors and shareholders in corporations generally." Demoulas, 424 Mass. at 528-529 citing Donahue, 367 Mass. at 592-594.

6. Stockholders in close corporations must discharge their responsibilities in conformity with this strict good faith standard. Stockholders may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation. Donahue, 367 Mass. at 593.

7. Donahue involved the obligation to treat a minority shareholder equally in connection with the redemption of shares. It did not involve corporate operations. It speaks of prohibiting oppressive measures to "freeze out" the minority by such techniques as refusing to declare dividends, draining corporate earnings by exorbitant salaries and bonuses, paying high rent for property leased from majority shareholders, depriving minority owners of employment or corporate offices, and causing the sale of assets of the company to a majority owner. Donahue, 367 Mass. at 588-589.

8. Minority owners owe the same duties as controlling owners. Zimmerman v. Bogoff, 402 Mass. 650 (1988); Smith v. Atlantic Properties, Inc., 12 Mass. App. Ct. 201 (1981).

B. Wilkes Modifies the Donahue Doctrine

1. In Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842 (1976), a minority shareholder was terminated from employment and removed as an officer and director. The Supreme Judicial Court held that the removal of Wilkes from employment constituted a breach of fiduciary duty owed to Wilkes by the remaining owners. The SJC, however, somewhat modified the scope of Donahue noting that "the untempered application of the strict good faith standard" could result in an inappropriate limitation on legitimate action of the controlling group. Wilkes, 370 Mass. at 850.

2. Wilkes states that the majority "must have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees. Id. at 851.

3. Therefore, in cases involving "business policy" of a corporation, the Wilkes Court indicated it is appropriate to apply the "legitimate business purpose" test which involves shifting burdens of proof. Id. at 851.

4. Under this test, the majority shareholders have the initial burden of demonstrating "a legitimate business purpose for its action." Id.

5. The minority shareholders then have the burden of demonstrating "that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest." Id. at 851-852.

6. The court then weighs the legitimate business purpose, if any, against the practicability of a less harmful alternative. Id. at 852.

C. Recent Cases: The "Reasonable Expectations" of the Parties Approach

Brodie v. Jordan, 447 Mass. 866 (2006)

1. In Brodie v. Jordan, the minority owner had been frozen out from participating in the company, denied access to corporate information and denied any economic benefit from her shares. The trial court found a breach of fiduciary duty and ordered that the defendants purchase plaintiff's shares as a remedy. The SJC reversed the order to buy plaintiff's shares.

2. In Brodie, the SJC viewed many freeze out cases as having in common the fact that "the majority frustrates the minority's reasonable expectations of benefit from their ownership of shares." Id. at 869.

3. The Brodie Court viewed the "reasonable expectations" approach as consistent with the Wilkes decision, where the Court had found the denial of employment in Wilkes had frustrated the purpose for which Wilkes entered into the venture. Id.

4. Brodie also cited Bodio v. Ellis, 401 Mass. 1, 10 (1987) where the "thwarting [of a] minority shareholder's 'rightful expectation' as to control of the close corporation was [a] breach of fiduciary duty." Id. at 869.

5. While the only issue on appeal in Brodie was the appropriateness of the trial court's remedy ordering a buy out of the minority's ownership interest, the Court observed that it viewed the analysis of the "reasonable expectations" of the parties as "useful at both the liability and the remedy stages of freeze-out litigation." Id. at 870.

O'Brien v. Pearson, 449 Mass. 377 (2007)

1. In O'Brien v. Pearson, the plaintiff, O'Brien, owned a 48% interest in a company established to acquire and develop a subdivision with the defendants promising to fund the project to the extent it was economically feasible. The company held a note and mortgage on the subdivision property. Instead of seeking to acquire the property, the defendants changed their minds and, over plaintiff's objections, turned away from the pursuit of the agreed objective. Instead, the defendants allowed the owner of the property to pay off the note on a discounted basis through the sale of the subdivision to a third party. Plaintiff, O'Brien, brought suit for breach of fiduciary duty. A jury found for O'Brien in the amount of $900,000. The trial court denied motions for judgment notwithstanding the verdict and new trial. The Appeals Court reversed. The SJC affirmed the denial of the motion for judgment notwithstanding the verdict, reversed the denial of the motion for a new trial, and ordered a new trial on damages.

2. The SJC, in affirming the denial of the motion for judgment notwithstanding the verdict , stated that the evidence virtually compelled the conclusion that the defendants made a decision to shift away from the purpose for which the corporation was created toward a much narrower, if legitimate, purpose of pursuing a risk-averse effort to recoup the initial investment plus some return on the investment.

3. The SJC also noted that a "reasonably practical alternative would have included a more open, communicative and inclusive manner of engagement between the defendants and O'Brien. Without such a dialogue, the corporate sea change that occurred in [the] negotiations [with the owner of the subdivision] could be interpreted…as a breach of fiduciary duty." Id. at 385.

4. The breach of fiduciary duty "occurred when [the defendants] unilaterally decided, after promising to fund the project to the extent it was economically feasible, to turn away from the pursuit of the agreed-on objective in favor of their preferred alternative." Id. at 386.

5. The Court found, while it was not a typical freeze-out situation, the defendants frustrated O'Brien's purpose in entering the venture, citing Wilkes, and denied O'Brien his "reasonable expectations of benefit," citing Brodie. Id.

6. A finding that the defendants acted out of "avarice, expediency or self-interest" was justified despite the fact the venture made a profit. Id.

D. Impact of Fiduciary Duties in Situations Involving Corporate Opportunities and Self-Dealing

1. A "corporate opportunity" is "[a]ny opportunity to engage in a business activity of which a director or senior executive becomes aware, either in connection with performing the functions of those positions or through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should be reasonably expected to believe would be of interest to the corporation." Demoulas, 424 Mass. at 530.

2. A corporate opportunity is generally an opportunity "within the sphere of, or somehow related to, the corporation's own activities." Haseotes v. Cumberland Farms, Inc., 284 F.3d 216, 228 (1st Cir. 2002) citing Durfee v. Durfee & Canning, Inc., 323 Mass. 187 (1948).

3. To meet a fiduciary's duty of loyalty, a director or officer who wishes to take advantage of a corporate opportunity or engage in self-dealing must first disclose the material details of the venture to the corporation, and then either receive the assent of disinterested directors or shareholders, or otherwise prove that the decision is fair to the corporation. Id. at 532-533.

4. Self-dealing is subjected to "vigorous scrutiny." Johnson v. Witkowski, 30 Mass. App. Ct. 697, 710 (1991). See Crowley v. Communications for Hospitals, Inc., 30 Mass. App. Ct. 751 (1991) (excessive compensation).

5. The burden is on "those who benefit from the venture to prove that the decision was fair to the corporation." Demoulas, 424 Mass. at 531.

6. An agreement among owners should minimize claims. If it is a joint venture, make sure the scope of the venture is narrowly defined. Fronk v. Fowler, ___ Mass. App. Ct. ___ (April 4, 2008). In Fronk, the Appeals Court held that the general partners of a limited partnership set up to develop one parcel of real estate did not violate the terms of the partnership agreement or breach a fiduciary duty by acquiring an adjacent and nearby property through separate limited partnerships in which the plaintiffs were not given an opportunity to participate. Plaintiffs were limited partners in the initial limited partnership. The Court determined that the limited partnership agreement executed by the plaintiffs allowed the actions of the general partners and that the case should be decided as a matter of contract law, not fiduciary principles. The Court stated that even if the limited partnership did not specifically authorize the general partners' actions, there would still be no breach of fiduciary duty, since the development of the additional properties were not within the sphere of activity of the limited partnership.

E. Contractual and Statutory Provisions Limiting the Application of Fiduciary Duties

1. How Far Can You Go To Modify Or Eliminate Fiduciary Duties By Contract?

Massachusetts courts have indicated the duties owed between joint venturers (partners/members in an LLC/shareholders in a corporation) may be limited or waived by contractual provisions. At the same time, there also has been an unwillingness to allow for the total elimination of fiduciary duties through contract.

(a) When the rights of shareholders arise under a contract, the obligations of the parties are determined by reference to contract law, and not by the fiduciary duties that would otherwise govern. Chokel v. Genzyme Corp., 449 Mass. 272, 278 (2007) (case concerned a publicly traded corporation, but it has been cited in the closely held business context by the Appeals Court in the Fronk case).

(b) Questions of good faith and loyalty with respect to rights on termination or stock purchase do not arise when all the stockholders in advance enter into agreements. Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 408 (1995) (employment termination); Evangelista v. Holland, 27 Mass. App. Ct. 248-249 (1989) (stock purchase).

(c) The fact that a stockholder has entered into an employment agreement or the fact that stockholders execute a valid stock purchase agreement does not relieve stockholders of the high fiduciary duty owed to one another in all their mutual dealings. King v. Driscoll, 418 Mass. 576, 584 (1994) (procedures for terminating employment were not part of the agreement).

(d) Although a voting trust agreement is a legitimate device for carrying out corporate purposes, an exculpatory provision in the trust, which precludes a beneficiary from suing for breach of trust will not be enforced to relieve a trustee of liability for breach of trust that is committed in bad faith or to relieve a trustee of liability for any profit that the trustee derived from the breach of trust. Demoulas v. Demoulas, 424 Mass. 501, 515 (1997).

(e) A partnership agreement cannot nullify the fiduciary duty a partner owed to the general partnership. Wartski v. Bedford, 926 F.2d 11, 20 (1st Cir. 1991).

2. Statutory Provisions for Limited Liability Corporations (LLCs)

(a) M.G.L. c. 156C, § 8(b) permits the certificate of organization or written operating agreement to eliminate or limit the personal liability of a manager or member for breach of any duty to the LLC or to another member or manager.

(b) M.G.L. c. 156C, § 63(b) provides that to the extent that a member or a manager has duties, including fiduciary duties to the LLC or to other members or manager, (a) any such member or manager acting under the operating agreement shall not be liable to the LLC or any other member or manager if he acts in good faith reliance upon any provision of the operating agreement, and (b) the member's or manager's duties and liabilities may be expanded or restricted by provisions in the operating agreement.

3. Statutory Provisions for Business Corporations

(a) M.G.L. c. 156D, § 2.02 permits the inclusion in the articles of organization provisions eliminating or limiting the personal liability of a director of a corporation for monetary damages for breach of fiduciary duty but the provision may not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its shareholders; (ii) for acts of omissions not in good faith which involve intentional misconduct or a knowing violation of law; (iii) for improper distributions under section 6.40; or (iv) for any transaction from which the director derived any improper personal benefit.

(b) When corporate joint ventures are being formed, special consideration should be given to the inclusion of provisions designed to limit or avoid the unexpected application of the doctrines of corporate opportunity and conflict of interest. While this type of clause will not provide total protection, it may be given limited effect, for example by shifting the burden of proving unfairness or "exonerating" an arrangement from "adverse influences." Official Comments to M.G.L. c. 156D, § 2.02.

III. CHOICE OF LAW ISSUES

A. The Law of the State of Incorporation Will Apply to Fiduciary Duty Claims

1. Massachusetts courts will apply the law of the state of incorporation to claims concerning the internal affairs of a corporation, including claims for breach of fiduciary duty. Harrison v. Netcentric Corp., 433 Mass. 465, 469 (2001).

2. On the particular facts of Demoulas, a "functional approach was used and Massachusetts law applied to a company originally formed in Delaware but later merged into a Massachusetts corporation. Demoulas, 424 Mass. at 511.

3. Agreements can generally decide the choice of law. Harrison.

B. Scope of Fiduciary Duties Can Be Different

For example, in Harrison, the SJC noted that Delaware does not impose the heightened fiduciary duty of utmost good faith and loyalty on shareholders in a close corporation. Harrison, 433 Mass. at 469.

C. Statute of Limitations, Burdens of Proof, and Available Remedies May Vary

IV. DIRECT V. DERIVATIVE CLAIMS

A. Derivative Claims

1. A derivative action must be brought to recover for breach of duties owed to the corporation. Bessette v. Bessette, 385 Mass. 806, 809-810 (1982).

2. Because a derivative action is brought on the grounds of breach of duty owed to the corporation, any recovery will benefit the corporation. Shaw v. Harding, 306 Mass. 441, 448 (1940); Crowley, 30 Mass. App. Ct. at 764-765. (excessive compensation).

3. Examples of claims which are derivative:

   (a) excess salary or payments to the majority under promissory notes held by the majority for which the company received no consideration, Besette, 385 Mass. 806;

   (b) excess compensation, Crowley; and

   (c) challenging sale of substantially all the assets for inadequate consideration, Pupecki v. James Madison Corp., 376 Mass. 212 (1978).

B. Direct Claims

1. Claims for breach of duty owed to a shareholder may be brought by a direct action by the aggrieved minority shareholder.

2. Certain claims by a majority shareholder that the majority is engaged in "freeze out" techniques have been held to be direct claims which the minority shareholder may personally bring against majority shareholders. Such claims include:

   (a) claims challenging loss of employment, Wilkes;

   (b) equal treatment regarding redemption, Donahue; and

   (c) freeze-out, Brodie and O'Brien.

C. Why Does It Matter Whether the Claim is Derivative?

1. Necessity of complying with pre-suit procedural requirements discussed below.

2. Settlement or dismissal of derivative claims must be approved by the Court. Mass. R. Civ. P. 23.1.

3. Case law has established that when derivative actions succeed on behalf of the corporation, courts may grant the plaintiff an award of attorney's fees from the fund created as a result of the action. Crowley, 30 Mass. App. Ct. at 767. Under Chapter 156D, attorney's fees can now be awarded for and against the plaintiff under certain circumstances. M.G.L. c. 156D § 7.46. Under M.G.L. c. 109, 59, a limited partner may be awarded attorney's fees in a successful derivative action.

4. Tax issues can arise if money must be returned to the business as part of a derivative remedy. See Demoulas, 424 Mass. at 558-559 (explaining the tax analysis that may be required in such a case).

D. Demand Requirements Under Chapter 156D

1. Chapter 156D, effective July 1, 2004, requires a written demand on the corporation (but not separately on its shareholders) in all cases before commencing suit. M.G.L. c. 156D, § 7.42. The demand must be at least 90 days (or in some cases 120 days) before suit is filed unless irreparable injury to the corporation would result. Id.

2. The statute requires the dismissal of a derivative suit if independent directors or shareholders have determined the maintenance of the suit is not in the best interests of the corporation. M.G.L. c. 156D, § 7.44.

E. Demand Requirements for Other Business Entities

1. For entities not subject to Chapter 156D, Massachusetts Rule of Civil Procedure 23.1 governs the procedural requirements to bring a derivative action on behalf of the entity. Billings v. GTFM, LLC, 449 Mass. 281, 289-290 (2007).

2. Requirements Under Rule 23.1

   (a) Complaint must (i) be verified; (ii) allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that the shares devolved to him by operation of law by one who was a member at the time; and (iii) allege with particularity the efforts, if any, made to obtain the action desired from the directors or comparable authority and, if necessary, the shareholders or members; and (iv) allege the reasons for the failure to obtain the action or for not making the effort.

   (b) Prior to filing the derivative action, the shareholder must first make a demand on the corporation's board of directors for action, unless such a demand would be futile.

   (c) If directors refuse to act, the shareholder must also make demand upon the corporate shareholders, unless such demand would be futile because the other shareholders are interested or where the number of shareholders is very large. Cote v. Levine, 52 Mass. App. Ct. 435, 442 (2001).

   (d) Plaintiff must fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

   (e) Case cannot be dismissed or compromised without the approval of the Court and notice shall be given to shareholders or members in such manner as the Court directs.

F. The Requirement That One Remain An Owner.

A derivative Plaintiff loses standing to pursue derivative claims if he loses his interest in the business unless his interest is lost due to misconduct such as fraud by the defendants. Id. at 294. This is true even if the loss of interest is involuntary and caused by the LLC's sale of all of its assets and liabilities and dissolution. Billings, 449 Mass. at 291-296.

G. Statutory Rule for Bringing Suit in the Name of An LLC:

Suit on behalf of an LLC may be brought in the name of the LLC by any member or members of the LLC who are authorized to sue by the vote of members who own more than 50% of the unreturned contributions to the LLC provided in determining the vote, the vote of any member who has an interest in the outcome of the suit that is adverse to the interest of the LLC shall be excluded. The operating agreement may provide a different rule. M.G.L. c. 156C, § 56 Id. at 289.

V. STATUTE OF LIMITATIONS

A. Basic Rules

1. Breach of fiduciary duty through diversion of corporate opportunities and self dealing sound in tort which is subject to a three year statute of limitations. Demoulas, 424 Mass. at 517; M.G.L. 260, § 2A.

2. Certain claims sounding in contract may be subject to a six year statute of limitations. M.G.L. c. 260, § 2.

B. Theories for Tolling the Statute of Limitations In Fiduciary Cases

Repudiation of Trust Doctrine

1. The repudiation of trust doctrine, concerning the breach of fiduciary duties of a trustee, applies to the conduct of corporate officers and directors who stand in a fiduciary relationship to the corporation. Demoulas, 424 Mass. at 518.

2. Under this theory, "a cause of action will not accrue until the trustee repudiates the trust and the beneficiary has actual knowledge of that repudiation." Id.

3. The doctrine does not apply when a shareholder and director has actual knowledge of the wrongdoing. Aiello v. Aiello, 447 Mass. 388, 406, Fn. 27 (2006).

Fraudulent Concealment

1. A cause of action will also be tolled under a theory of fraudulent concealment until the plaintiff discovers the cause of action. M.G.L. c. 260 § 12.

2. Where a fiduciary relationship exists, the failure to adequately disclose the facts giving rise to knowledge of a cause of action constitutes fraudulent concealment. Demoulas, 424 Mass. at 519.

3. Thus, the plaintiff need not conduct an independent investigation; he need only show that the facts forming the cause of action were not disclosed by the wrongdoer. Id. at 519-520.

4. Aiello indicates there can be no fraudulent concealment of a derivative claim where a shareholder and director has actual knowledge of the wrongdoing. Aiello, 447 Mass. at 406, Fn. 27.

Adverse Domination Doctrine

1. In a derivative action, a further basis for tolling the limitations period exists when the corporation is under the control of the alleged wrongdoers and the corporation may not be able to act on its own behalf. Demoulas, 424 Mass. at 522.

2. Aiello adopted the "complete domination test" under which the statute of limitation will toll only where a plaintiff can prove the absence of any corporate director or shareholder who had actual knowledge of the wrongdoing and the ability and motivation to sue the wrongdoers on behalf of the company or induce such a suit. Aiello, 447 Mass. at 391.

3. "[T]he relevant inquiry is whether the informed director or shareholder… can induce herself (as a representative of the corporation) to sue. To determine this, a judge must explore the ability and willingness of the party to bring suit, which often involves consideration of practical factors, including the party's financial wherewithal to sue, the extent of the party's interest or investment, and, perhaps, any emotional and physical intimidation on the part of the culpable officers or directors that might cause the party to refrain from proceeding." Id. at 405-406.

4. In Aiello, which involved the DeLuca Supermarket family, the complaining shareholder and director failed to prove that she was unable or unwilling to sue on behalf of the corporation. Therefore, she did not meet her burden of establishing that her brothers completely dominated the company in the manner necessary to toll the statute of limitations on her claims.

VI. COMMON LAW REMEDIES

A. General Principles

1. Courts have broad equitable powers to fashion remedies where there has been a breach of fiduciary duty. Brodie v. Jordan, 447 Mass. 866, 871 (2006). Particular remedies chosen by the trial judge are reviewed for abuse of discretion. Id.

2. Courts attempt to restore as nearly as possible the wronged party to the position they would have been in had there not been wrongdoing. Zimmerman, 402 Mass. at 651.

3. In Donahue, the SJC ruled that the trial court on remand should either a) require the defendant to return the money to the company that had been paid for the shares previously redeemed with interest, or b) require the company to purchase all of the plaintiff's share for the same amount as that paid to the defendant.

4. In Wilkes, the SJC ordered that the trial court enter a declatory judgment and money damages in the amount that Wilkes would have received had he remained an officer and director.

B. The "Reasonable Expectations" Standard

1. "Because the wrongdoing in a freeze-out is the denial by the majority of the minority's reasonable expectations of benefits, it follows that the remedy should, to the extent possible, restore the minority…those benefits which she reasonably expected, but has not received because of the fiduciary breach." Brodie, 447 Mass. at 870-871.

2. "The remedy should neither grant the minority a windfall nor excessively penalize the majority. Rather, it should attempt to reset the proper balance between the majority's…rights to… 'selfish ownership,' [citing Wilkes] and the minority's reasonable expectations of benefit from its shares." Id. at 871.

3. The SJC in Brodie reversed the remedy ordered by the trial court, finding it placed the plaintiff in a significantly better position than she would have been in if no wrongdoing had occurred and exceeded her reasonable expectations of benefit from her ownership interest. The SJC observed that, in effect, the buy out remedy created an artificial market for the minority owner. Id. at 872.

4. The SJC remanded the case for an evidentiary hearing to consider

   (a) plaintiff's reasonable expectations of ownership;

   (b) whether such expectations have been frustrated; and

   (c) if such expectations have been frustrated, the means to vindicate her interests, including money damages to the extent the breach can be quantified. Id. at 873.

5. The SJC also noted that the trial court on remand may consider the fact that the plaintiff has received no economic benefit from her shares. If the defendants have denied her any return on her investment while draining

the company's earnings for themselves, the judge may consider the propriety of compelling the declaration of a dividend, among other possibilities. Id. at 874

6. In O'Brien, the SJC, as in Brodie, focused on O'Brien's reasonable expectations of benefits. The majority shareholders excluded O'Brien from information, participation and decision-making which led to a change in the business purpose of the venture without his involvement. The jury awarded the plaintiff $900,000. The SJC ordered a new trial on damages.

7. The Court determined that while O'Brien had a reasonable expectation of "involvement in the information sharing and decision-making [process]", he did not have a reasonable expectation in profits he would have received had the board completed the project as originally planned. Id. at 389. O'Brien was a minority owner and the defendants could have outvoted O'Brien even if he was allowed to participate in the decision-making process. Id. at 390. Also, there had never been a firm agreement as to how to develop the site. Id. at 389, Fn. 10.

8. Therefore, the SJC determined that O'Brien had not established with reasonable certainty that the defendants' breach proximately caused O'Brien compensable loss.

9. "On remand, the fact finder must determine what damages were proximately caused by the fiduciary breach, i.e. the exclusion of O'Brien from the business of the corporation, and award 'to the minority…those benefits which [he] reasonably expected, but has not received because of the fiduciary breach.'" Id. at 390-391 citing Brodie, 447 Mass. at 871.

10. The SJC also noted that O'Brien, on remand, could not recover both the forty-eight percent of the net profits from the investment and assert his claim for lost profits. The SJC stated O'Brien could "recover one of the other…". Id. at 391, Fn. 13. "If he proceeds to trial on damages, the fact finder should be precluded from consideration of the forty-eight percent of mortgage discharge proceeds to which O'Brien is otherwise entitled." Id.

VII. STATUTORY REMEDIES

A. The Limited Liability Company Act

1. Inspection of records and documents, M.G.L. c. 156C, §§ 9 and 10; and

2. Dissolution, M.G.L. c. 156C, §§ 43 and 44.

B. Uniform Partnership Act

1. Right of inspection and disclosure of information, M.G.L. c. 108A, §§ 19 and 20;

2. Right to formal accounting, M.G.L. c. 108A, § 22; and

3. Dissolution, M.G.L. c. 108A, §§ 29-35.

C. <u>Limited Partnership</u>

1. Right of inspection of records. M.G.L.c.109, §21.

2. Dissolution. M.G.L.c.109, §44-45

D. <u>Business Corporations Act</u>

1. Dissent and appraisal rights, M.G.L.c. 156D, § 13.01 - § 13.31;

2. Dissolution, M.G.L.c. 156D, § 14.01 - § 14.40; and

3. Inspection of records and financial statements, M.G.L.c.156D, § 16.01-16.06 and §16.20-16.22.