



THE KWGC NEWS

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From The Editors:

Kalina, Wills, Gisvold & Clark, P.L.L.P. is proud to present the Spring 2006 edition of *The KWGC News Brief*. This publication is intended to open a line of communication to our clients and friends on various legal matters we think may have an impact on them. Naturally, these materials should not be regarded or relied upon as individual legal advice or opinion. Our attorneys will be pleased to consult with you on these and other matters.

Carole Clark Isakson

PENDING LEGISLATION AIMS TO PROTECT LANDOWNERS BY CAROLE CLARK ISAKSON

The United States Supreme Court's decision in *Kelo v. City of New London (Kelo)* last year caused much concern over the government's eminent domain power to take private property for a "public use." The Minnesota legislature recently took up the issue in an effort to protect Minnesota landowners from a *Kelo* like situation.

In *Kelo*, the City of New London approved a development plan projected to increase tax revenues and revitalize the economically distressed city. New London purchased most of the property earmarked for the project from willing sellers, but initiated condemnation proceedings under its eminent domain powers when some owners refused to sell.

Private companies—namely Pfizer, Inc.—were to develop (and benefit from) the condemned property. The unwilling owners challenged New London's actions arguing that turning the property over to private interests is not a "public use." In a split 5 to 4 decision, the Court disagreed holding that New London's development plan, although beneficial to private interests, serves a "public purpose." Public outcry fueled by a media firestorm ensued, as did the introduction of "anti-*Kelo*" legislation.

Courts have historically embraced a broad definition of "public use," giving deference to the government when it exercises eminent

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THE FEDEX LESSON: CONTRACTOR OR EMPLOYEE

BY JILL A. JAMES

In a recent California decision, *Anthony Estrada, et al. v. FedEx Ground (Estrada)*, a Los Angeles superior court judge held that certain FedEx Ground (FedEx) fleet drivers were employees and not independent contractors. Although currently on appeal, the decision has broad implications for companies who use independent contractors across the country.

In *Estrada*, the superior court determined

that the drivers, despite their contractor agreements with FedEx, were employees and not independent contractors. The Court based its decision on the fact that FedEx had the right to and did control the manner in which the drivers performed their work. Specifically, FedEx integrated the drivers into FedEx's operations, made drivers accountable under FedEx's standard policies and procedures, did not give drivers the opportunity for profit or loss based

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FOCUS ON: BUSINESS LAW

CORPORATE DIVORCE: SHARE VALUATION IN SHAREHOLDER SPLITS AND THE BUY-SELL AGREEMENT

Shareholders in Minnesota closely held corporations, like families, commonly disagree. Many times shareholders can work through their disagreements and move forward. Other times, a shareholder split or “corporate divorce” is the only solution. Shareholder splits can be civil. Shareholder splits, like divorce, can also be nasty and expensive. One thing is for certain—the corporation is always trapped in the middle. Common shareholder split scenarios involve shareholder deadlock and minority shareholder disputes. Under both scenarios, a share buy-out is the most common resolution. This article will focus on how contentious share valuation issues might be avoided to protect the corporation before the relationship turns sour.

DEADLOCK Shareholders in closely held corporations are many times equal owners—50/50. Equal ownership can result in a deadlock. Deadlock on minor issues is usually not much of an issue. However, deadlock over major management decisions can be the impetus for a shareholder split.

When directors are deadlocked in the management of the corporation and the shareholders cannot break the deadlock, a court can grant whatever relief it believes is fair under the circumstances. For example, a court can order the dissolution of the corporation. A court can also order the corporation (or the other shareholder) to buy-out a shareholder. Important here, Minnesota statutes require the buy-out be for “fair value.”

Although not addressed in the deadlock provisions, “fair value” is ambiguously defined elsewhere in the Minnesota statutes as the “value of the shares of a corporation immediately before the effective date of the corporation action...” What is certain is that “fair value” most often results in a higher per share price than “fair market value” or “book value.” This, in turn, means more money out of the corporation and into the selling shareholder’s pocket book. So how can a corporation avoid having to pay fair value? A Buy-Sell Agreement can be the answer.

Minnesota statutes require a court to follow written

shareholder agreements—commonly known as shareholder “Buy-Sell Agreements.” As long as its value provisions are reasonable, courts will defer to the Buy-Sell. A Buy-Sell allows shareholders to agree on a common value, whether that be fair market value, book value, or some other reasonable value. This creates certainty, makes deadlocks easier to deal with and eases the burden on the corporate checkbook. Unfortunately, deadlock is not the only scenario where “corporate divorce” and share value is an issue. In minority shareholder disputes, the stakes can be much higher.

MINORITY SHAREHOLDER DISPUTES Shareholders in closely held corporations often hold unequal ownership rights—70/30. Minnesota statutes protect minority shareholders with less voting power who “dissent” from certain corporate action. A dissenting shareholder can demand that the corporation buy his or her shares for fair value. However, and unlike a deadlock, Minnesota statutes do not state whether a court is required to follow a Buy-Sell in a dissenting shareholder scenario. It is equally unclear to what extent, if any, a court would even defer to a Buy-Sell. In fact, and based on Minnesota statute commentary, a Court may completely disregard a Buy-Sell that seeks to provide for dissenting share value. Regardless, and with the difference between “fair value” and a much lesser value at stake for the corporation, having the Buy-Sell set share value in a dissenter scenario is certainly a good idea.

A Buy-Sell should specifically address dissenter rights, acknowledge the corporate actions where dissenter rights arise, and provide for a sensible value for a dissenter’s shares. Following the language of the statute verbatim is advisable. Moreover, the corporation should advise the shareholders to have their own personal attorney involved in the preliminary Buy-Sell discussions and negotiations. Like deadlock, if the corporation is able to demonstrate the dissenter’s value is “reasonable,” there seems to be a good possibility that a court would follow the Buy-Sell. This, again, could ease the burden

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FOCUS ON: TRANSPORTATION

THE SCHOOL OF HARD NOCs: NEW RULES FOR RESPONDING TO A NOTICE OF CLAIM

Here is the scenario: The United States Department of Transportation (USDOT) just finished an audit of your motor carrier operation and found violations. The violations may be minor. The violations might be more serious. Regardless, you know what comes next – the USDOT Notice of Claim (NOC) which is the initial document issued by the USDOT to assert civil penalties for the alleged violations. Now what do you do?

The USDOT recently revised its rules under 49 C.F.R. 386.14 regarding how a motor carrier should respond to NOCs. First and foremost, you must remember to respond to a NOC in a timely manner. Failure to do so may result in a default finding and penalty against your company. With the new rules, you have four options: (1) Payment of a Civil Forfeiture; (2) Settlement of a Civil Forfeiture; (3) Binding Arbitration; or (4) Request an Administrative Hearing. In deciding how to proceed, there are a number of practical considerations you should note.

PAYMENT OF A CIVIL FORFEITURE

This option allows you to resolve the NOC without incurring any attorneys' fees. However, paying the fine would be an admission of guilt on the record. This admission may affect your company's safety rating. Moreover, a questionable charge may cause larger problems with subsequent violations and does not allow the USDOT to take into consideration any corrective measures you may have taken to remedy the violations.

SETTLEMENT OF A CIVIL FORFEITURE

Settlement allows you to negotiate and reduce the penalty for taking corrective measures. You may also be able to achieve settlement without admitting any guilt. This protects your safety rating. A structured settlement over time may also be an option. However, you will incur attorneys' fees and the penalty, if recorded on your record, may affect future violations.

BINDING ARBITRATION

Binding arbitration gives you an expedited method to argue the reasonableness of the fine—not the merits of the NOC. This option will help avoid large attorneys' fees and time wasted arguing the merits. You must, however, admit guilt. Any defenses you may have to the charges are irrelevant. You may also not appeal the arbitrator's findings—the decision is final.

ADMINISTRATIVE HEARING

You may also request an administrative hearing to dispute the merits of the NOC. You have three options here. First, an administrative hearing can be conducted without submitting evidence to support your position. This can save time and attorneys' fees. However, you do not get a chance to review or respond to other written submissions, nor can you give testimony or make arguments. Second, you may request an informal administrative hearing which also save you legal fees, though not as much as compared to the previous options. With this option, you may submit both written and oral testimony. However, you will spend more money and time traveling and testifying at the hearing. Third, you may request a formal administrative hearing. This option provides you with an opportunity to directly challenge the NOC charges placing the burden on the USDOT to "prove" the charges. This is the most expensive and time consuming option, but gives you your "day in court."

Under all circumstances, the procedure to request a hearing is very specific. The request must be in writing and state the specific grounds upon which you are contesting the charges along with any affirmative defenses you intend to raise. Strict compliance is required or you will forfeit your right to challenge the NOC charges and penalty assessment.

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domain powers. At the risk of over generalizing, it was considered “public use” to clean up an area or facilitate projects that the public would use and own (roads, parks, etc.). *Kelo* went further allowing condemnation of unblighted property for public use, but private ownership.

The Minnesota legislature responded to *Kelo* by proposing eminent domain reform bills to make it harder for the government to take private property for economic redevelopment. The bill currently garnering the most attention is the Johnson / Bakk Eminent Domain Reform Bill, SF 2750. The companion bill is HF 2846. Both bills passed in the last

month. While the differences between the two versions must now be worked out in committee, likely provisions will include:

- “Public Use” redefined and clarified;
- Public benefits of economic development (as in *Kelo*) will not constitute a “public use”;
- Limitations on taking property to mitigate “blight”; and
- Award of attorneys’ fees and costs to prevailing prop-

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upon their own skills, and the drivers were essential to FedEx’s core business operation.

At stake in *Estrada* is the danger of FedEx having to pay drivers overtime, withhold taxes, and maintain workers’ compensation insurance. If upheld on appeal, FedEx will be required to reimburse these drivers for work-related expenses, including, but not limited to: fuel; maintenance and repairs; cleaning costs; insurance; licensing and registration fees; and costs associated with logos, colors, marks and insignia. An expensive lesson.

This case offers good examples of the kinds of practices com-

panies should avoid to maintain and protect the status of its employees and/or independent contractors. Regardless of your type of business, the concept is the same. Treat independent contractors as a separate and “independent” entity or business. This means that when performing work for your business, and in addition to having written independent contractor agreements in place, the independent contractors should:

- Own their own equipment or tools.
- Have the freedom to set their own hours.

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