



**FIDUCIARY LIABILITY IN CLOSELY HELD BUSINESSES:
ALL FOR ONE AND ONE FOR ALL**

By Shannon Raye Martinez

Given the day-to-day rush and challenges of running a small closely held business, corporate formalities between the business and its owners may sometimes get forgotten. Although the business may be smaller, owners of family and closely held businesses need to be just as concerned about corporate formalities as officers and directors in larger corporations with diverse ownership. In fact, under Oregon law, controlling shareholders, directors and officers of small businesses can actually be held to higher standards of fiduciary duty than in a larger company.

Any individual with control over the affairs of the small business owes a fiduciary duty to the business and the owners. A “fiduciary duty” means that the individual should place the interests of the business over his or her own self-interest, and always act with the best interests of the business in mind. In a small closely held business, this duty is imposed on controlling shareholders, directors and officers. A “controlling shareholder” is not necessarily a shareholder who owns a majority of the stock. A “controlling shareholder” can also be a person with a controlling vote, or some form of domination or control over the business decisions, such as where unanimous consent is required. These fiduciary duties include the duties of good faith, fair dealing and full disclosure. Under these duties, the director, officer or controlling shareholder must proceed with caution when considering entering into a transaction that may create a conflict of interest. There are two common scenarios where this may come into play.

Self-Dealing

As an example, consider the small catering company owned by three brothers, Jack, John and Mike. Jack’s friend, Tom, owns a food distribution company. Tom offers to give the catering company a 10% discount in exchange for buying all of its supplies from his company. As an added incentive, Tom offers to pay Jack a 2% “commission” on all sales to the catering company. To avoid fiduciary liability, Jack should disclose all of the facts involved in this transaction to his brothers, including how he knows the distributor, the nature of the commission, and all other relevant facts. Jack should not proceed with the contract unless his two brothers, after being fully informed, consent to the deal.

Corporate Opportunity

There are also times where a director, officer or controlling shareholder must be careful when entering into a new competing, or even related, business for him or herself. Directors, officers and controlling shareholders have a fiduciary duty to offer any potential opportunity to the business first, before taking it for him or herself. For example, Betty is a shareholder and director in a corporation comprised of eight shareholders. The corporation owns and operates grocery stores. The corporation is looking to expand its business and open another store somewhere on the south side of town. Betty recently purchased a sporting goods store. She is also looking to expand and open another location for her store. Betty learns of a large retail location which has just become available on the south side of town. She would like this location for her sporting goods store, but she knows that her corporation has been looking for a location like this one. Betty must offer this

opportunity to her corporation first, to see if they would like to lease the location for their new grocery store.