

Shareholders in Closely Held Corporations May Bring Direct Actions Against Other Shareholders

Generally, an aggrieved shareholder of a corporation must bring a derivative action on behalf of the corporation pursuant to Trial Rule 23.1 to enforce rights of the company against other shareholders, directors, and officers. Furthermore, pursuant to I.C. § 23-1-32-4, a derivative action may not be brought against a corporation unless the plaintiff shareholder has first made a written demand on the corporation to take suitable action with reference to the shareholder's complaint. Additionally, once the shareholder files a complaint in court, the shareholder's complaint must allege with particularity the demand made, or must explain why no demand was made.

While the general rule is to require a shareholder to bring a derivative rather than direct action when seeking redress for injury to the corporation, the Indiana Supreme Court observed two reasons why this rule will not always apply in the case of a closely held corporation. *Barth v. Barth*, 659 N.E.2d 559, 561 (Ind. 1995). A closely held corporation is one which has relatively few shareholders and whose shares are not generally traded. *Cutshall v. Barker*, 733 N.E.2d 973 (Ind. Ct. App. 2000). First, "shareholders in a close corporation stand in a fiduciary relationship to each other, and as such, must deal fairly, honestly, and openly with the corporation and with their fellow shareholders." *Id.* Second, "shareholder litigation in the closely held corporation context will often not implicate the policies that mandate requiring derivative litigation when more widely held corporations are involved." *Id.* In the case of a closely-held corporation, the court, in its discretion, may treat an action raising derivative claims as direct actions, exempt it from those restrictions and defenses applicable only to derivative actions (including the demand requirement), and order individual recovery, *if*, the court finds that to do so will not (1) unfairly expose the corporation or any defendant to a multiplicity of actions, (2) materially prejudice the interests of creditors of the corporation, or (3) interfere with the fair distribution of recovery among all interested persons. *Barth*, 659 N.E.2d at 562.

Further, in *G&N Aircraft, Inc.*, 743 N.E.2d at 236, the court, citing *Barth*, stated that a shareholder in a close corporation need not always bring claims of corporate harm as derivative actions. Rather, in such an arrangement, the shareholders are more realistically viewed as partners, and the formalities of corporate litigation may be bypassed." *Id.*