

# Detailed Table of Contents

	<i>Main Volume</i>	<i>Supple- ment</i>
Chapter 1: What Is Business Divorce?.....	1-1	—
I. Privately Held Business Entities.....	1-2	—
II. Legal Separation of Owners .....	1-3	—
III. Conclusion.....	1-4	—
Chapter 2: Pre-Suit Considerations .....	2-1	—
Introduction .....	2-2	—
I. Gathering Information Before Filing .....	2-4	2-2
A. Corporations.....	2-4	—
1. Public Information .....	2-5	—
2. Statutory and Contractual Methods of Obtaining Information.....	2-5	—
3. The Litigation Component.....	2-10	—
B. Alternative Entities .....	2-12	2-2
1. Public Filings.....	2-12	2-2
2. Statutory and Contractual Methods of Obtaining Information.....	2-13	2-2
3. The Litigation Component.....	2-16	—
II. Where to File Suit.....	2-17	2-3
A. Jurisdiction for Specific Claims .....	2-17	2-3
1. Dissolution.....	2-18	2-3
2. Control Litigation .....	2-22	—
3. Actions Seeking Appointment of a Receiver .....	2-23	—
4. Books and Records Actions.....	2-24	—
B. Forum Selection Clauses.....	2-25	—
III. Applicable Law .....	2-30	2-4
A. Corporations.....	2-30	—
B. Alternative Entities .....	2-34	2-4
IV. Changing the Composition of the Board or Management.....	2-36	2-5
A. Corporations.....	2-36	2-5
B. Alternative Entities .....	2-42	2-6

C.	The Litigation Component.....	2-44	—
D.	A Sample Plan.....	2-45	2-6
V.	Contractual Considerations and Limitations .....	2-46	2-6
A.	Forum Selection Provisions .....	2-47	—
B.	Capital Contributions & Repayment.....	2-48	—
C.	Distributions .....	2-50	2-6
D.	Buy/Sell Provisions.....	2-52	—
1.	Stock Transfer Restrictions. ....	2-56	—
E.	Restrictive Covenants .....	2-61	—
F.	Disclaimers and Waivers.....	2-68	—
1.	Fiduciary Duties .....	2-69	—
2.	Judicial Dissolution.....	2-70	—
3.	Waiver of the Operating Agreement Itself.....	2-72	—
G.	Advancement and Indemnification.....	2-72	2-7
1.	Corporations .....	2-74	—
2.	Alternative Entities.....	2-78	2-7
	Chapter 3: Effectuating a Split.....	3-1	—
	Introduction .....	3-2	—
I.	Dissolution .....	3-3	3-3
A.	Voluntary Dissolution.....	3-3	3-3
1.	Corporations .....	3-3	—
2.	Alternative Entities.....	3-5	3-3
B.	Involuntary Dissolution .....	3-7	3-4
1.	Delaware .....	3-7	3-4
a.	Corporations.....	3-8	—
b.	Alternative Entities .....	3-13	3-4
2.	Other States.....	3-18	3-4
a.	New York .....	3-19	—
b.	California .....	3-22	—
c.	Texas .....	3-25	—
d.	Pennsylvania.....	3-28	3-4
e.	Florida .....	3-29	—
f.	Illinois.....	3-31	—
g.	Massachusetts.....	3-35	—
h.	New Jersey.....	3-38	—
3.	Issues of Standing .....	—	3-4
a.	Acting Manager .....	—	3-6
b.	Assigning Member or Assignee.....	—	3-7
c.	Member of a Member .....	—	3-9
d.	Resigned Member .....	—	3-10
e.	Judgment Creditor .....	—	3-10
II.	Dissociation.....	3-43	—

III. Freeze-Out Mergers.....	3-49	—
A. Mergers Are Authorized by Statute .....	3-49	—
B. Judicial Treatment of Cash-Out Mergers in Delaware.....	3-51	—
1. History of Judicial Treatment of Freeze-Out Mergers in Delaware .....	3-51	—
a. <i>Singer</i> – Development of the Business Purpose Rule .....	3-51	—
b. <i>Weinberger</i> – Rejection of the Business Purpose Rule and Adoption of Entire Fairness.....	3-54	—
C. The Evolution of Entire Fairness in Freeze-Out Mergers.....	3-56	—
1. The <i>Siliconix</i> Test.....	3-58	—
2. The <i>Pure Resources</i> Test.....	3-59	—
3. The <i>Cox Communications</i> Test .....	3-59	—
4. The Final Test .....	3-60	—
D. The Application of Entire Fairness in Freeze-Out Mergers.....	3-60	—
1. Fair Dealing.....	3-62	—
a. Timing.....	3-62	—
b. Initiation .....	3-63	—
c. Structure .....	3-64	—
d. Negotiation .....	3-65	—
e. Disclosures .....	3-65	—
f. Approvals .....	3-66	—
2. Fair Price .....	3-66	—
a. The Elements of Fair Price .....	3-66	—
b. <i>Revlon</i> Duties .....	3-68	—
E. Defending a Freeze-Out Merger.....	3-69	—
1. The Burden of Proof .....	3-69	—
2. Defensive Measures.....	3-70	—
a. Utilizing an Independent Committee.....	3-70	—
b. Fairness Opinion .....	3-73	—
c. Canvassing the Market .....	3-74	—
d. Approval by Majority of Minority .....	3-75	—
3. Other Defenses .....	3-75	—
a. Estoppel or “Acquiescence” .....	3-75	—
b. Fraud or Illegality .....	3-76	—
c. Statutory Limitations on the Right to Attack the Merger .....	3-77	—
IV. Reverse Stock Split .....	3-77	—
A. Standard of Review.....	3-79	—
1. Minority Oppression.....	3-82	—
2. Fair Value .....	3-83	—
3. Good Faith and Fair Dealing.....	3-86	—

Chapter 4: Challenging a Split.....	4-1	—
I. Introduction .....	4-1	—
II. Challenging a Freeze Out.....	4-2	—
A. Effect of a Split on Derivative Standing .....	4-2	—
1. Continuous Ownership Requirement .....	4-3	—
2. Pursuing Direct Claims.....	4-4	—
3. Exceptions Under <i>Lewis v. Anderson</i> .....	4-5	—
B. Appraisal .....	4-7	—
1. Appraisal Generally.....	4-7	—
2. Statutory Appraisal.....	4-10	—
3. Quasi-Appraisal Action and Common Law Appraisal .....	4-13	—
4. Exclusivity of Appraisal Remedy .....	4-15	—
5. Alternative Entities.....	4-16	—
C. Accounting.....	4-17	—
1. Nature of an Accounting Action.....	4-17	—
2. Pleading a Claim for an Accounting.....	4-18	—
3. The Burden of Proof in an Accounting Action .....	4-20	—
4. Remedies in an Accounting .....	4-21	—
D. Injunction .....	4-22	—
1. Injunctions Are Relatively Rare.....	4-23	—
2. Injunctions May Be Granted for Irreparable Harm.....	4-24	—
3. Permanent Injunctions.....	4-25	—
E. Rescission .....	4-26	—
1. Rescission Is Rarely the Equitable Remedy.....	4-27	—
2. Rescission May Be Granted in Exceptional Cases .....	4-29	—
F. Monetary Damages .....	4-30	—
1. Bad Faith, Fraud, or Breach of Fiduciary Duty .....	4-30	—
2. Compensatory Damages vs. Rescissory Damages .....	4-32	—
3. Quasi-Appraisal .....	4-34	—
III. Challenging Involuntary Dissolution [New Topic].....	—	4-3
A. Challenging Liberal Application of Dissolution .....	—	4-4
B. Challenging Claims of Not “Reasonably Practicable” .....	—	4-6
1. Challenging Management’s Inability to Fulfill Entity Agreement .....	—	4-7
2. Challenging That the Entity Is Financially Unstable .....	—	4-10
C. Challenging Claims of Owner Deadlock.....	—	4-11
1. Challenging Claims of Corporate Shareholder Deadlock.....	—	4-11
2. Challenging Claims of Alternative Entity Partner or Member Deadlock .....	—	4-13

D.	Challenging Claims of Director or Manager Deadlock .....	—	4-15
1.	Challenging Claims of Corporate Director or Manager Deadlock .....	—	4-15
2.	Challenging Claims of Alternative Entity Director or Manager Deadlock .....	—	4-17
E.	Challenging Claims of Minority Shareholder Oppression .....	—	4-18
1.	Challenging Frustration of Petitioners’ “Reasonable Expectations” .....	—	4-19
2.	Challenging Petitioner’s Claim of “Freeze-Out” .....	—	4-20
F.	Challenging Waste, Mismanagement, and Breach of Fiduciary Duty .....	—	4-23
1.	Challenging Corporate Mismanagement, Waste, and Breach of Fiduciary Duty .....	—	4-24
2.	Challenging Corporate Mismanagement .....	—	4-25
3.	Challenging Corporate Waste and Breach of Fiduciary Duty .....	—	4-26
4.	Challenging Entity Mismanagement, Waste, and Breach of Fiduciary Duty .....	—	4-28
G.	Challenging Claims of Illegality and Fraud .....	—	4-30
H.	Challenging on Grounds of Standing .....	—	4-33
1.	Challenging Judicial Dissolution on Lack of Standing .....	—	4-33
2.	Challenging Equitable Dissolution .....	—	4-35
I.	Challenging on Grounds of Petitioner’s Inequitable Conduct .....	—	4-36
Chapter 5: Common Claims .....		5-1	—
Introduction .....		5-2	—
I.	Fiduciary Duty Doctrines and Limitations .....	5-3	—
A.	Direct vs. Derivative Suits .....	5-5	—
1.	Background .....	5-5	—
2.	Direct or Derivative? The <i>Tooley</i> Test .....	5-7	—
a.	Derivative Claims .....	5-7	—
b.	Direct Claims .....	5-9	—
c.	Dual-Natured Claims .....	5-11	—
B.	The Delaware Standard – Maintaining a Derivative Claim .....	5-15	—
1.	Adequate Representation of the Interests of the Shareholders .....	5-17	—
2.	Standing to Maintain a Derivative Suit .....	5-20	—
3.	Demand .....	5-23	—
C.	Limitations on Breach of Fiduciary Duty Claims .....	5-30	—
1.	Exculpatory Provisions .....	5-30	—
2.	Contractual Limitations to Fiduciary Duty .....	5-33	—
3.	Implied Covenant of Good Faith and Fair Dealing .....	5-39	—

D.	Limitations on Use of Derivative Claims as Tools .....	5-41	—
1.	Derivative Claims Frequently Cannot Be Remedied by a Buyout.....	5-41	—
2.	A Derivative Recovery Is Paid to the Company.....	5-42	—
3.	The Court Must Approve Settlement of Derivative Claims .....	5-42	—
a.	Notice to Non-Party Shareholders.....	5-43	—
b.	Court Approval of the Settlement Is Required.....	5-44	—
c.	Attorneys' Fees and Expenses.....	5-45	—
II.	Breach of Fiduciary Duty Claims .....	5-45	—
A.	Waste .....	5-45	—
1.	History and Origin.....	5-46	—
2.	The Delaware Standard .....	5-47	—
B.	The Duty of Oversight and <i>Caremark</i> Claims.....	5-55	—
C.	Misappropriation of Corporate Opportunities .....	5-63	—
1.	Four-Factor Analysis.....	5-63	—
2.	Use of Company Assets .....	5-65	—
3.	Interest or Tangible Expectancy.....	5-66	—
4.	Equity and Fairness .....	5-68	—
5.	Remedies .....	5-69	—
D.	Misappropriation of Corporate Funds .....	5-69	—
E.	Claims Challenging Compensation.....	5-70	—
1.	The Scope of a Compensation Claim .....	5-71	—
2.	Standard of Review of a Compensation Claim .....	5-74	—
a.	Fair Dealing .....	5-75	—
b.	Fair Price .....	5-78	—
c.	The Expert Problem.....	5-80	—
3.	Defending a Compensation Claim .....	5-82	—
a.	Ratification.....	5-82	—
b.	Waiver and Acquiescence .....	5-84	—
F.	Minority Oppression .....	5-86	—
1.	Three Competing Approaches or Definitions for “Oppressive Conduct” .....	5-88	—
a.	Reasonable Expectations of the Shareholder Test .....	5-89	—
b.	Burdensome, Harsh, and Wrongful Conduct.....	5-90	—
c.	Enhanced Good Faith and Fair Dealing Approach .....	5-90	—
2.	Oppression Cause of Action Applies Only to “Closely Held” Companies.....	5-91	—
3.	Who May Assert the Cause of Action? .....	5-92	—
4.	Remedies .....	5-93	—
5.	Discounts Where a Buyout Is Ordered.....	5-95	—

III. Contract- and Tort-Based Claims .....	5-96	—
A. Non-Compete Agreements .....	5-97	—
B. Tortious Interference with Contract or Prospective Economic Relations.....	5-101	—
1. Origins and General Principles .....	5-101	—
2. Elements and Damages .....	5-102	—
3. Limitations .....	5-103	—
4. Utility in the Business Divorce .....	5-105	—
IV. Advancement and Indemnification		
Claims [New Topic] .....	—	5-4
A. Background.....	—	5-5
1. Mandatory Indemnification, Permissive Indemnification, and Advancement.....	—	5-5
2. Legislative Intent and Policy .....	—	5-6
B. Sources of Entitlement.....	—	5-7
C. Elements of a Claim to Entitlement .....	—	5-8
1. Core Elements of Claims for Indemnification or Advancement.....	—	5-8
a. Covered Persons .....	—	5-9
b. Covered Proceedings.....	—	5-10
c. Covered Capacity.....	—	5-12
2. Issues Specific to Permissive Indemnification .....	—	5-15
a. Good Faith/Reasonable Belief Standard.....	—	5-15
b. Determination of Entitlement to Permissive Indemnification .....	—	5-17
3. Issues Specific to Mandatory Indemnification .....	—	5-18
4. Issues Specific to Advancement .....	—	5-18
a. Merits of Underlying Proceeding Not at Issue .....	—	5-19
b. Undertaking Typically Required .....	—	5-19
c. Summary Nature of Advancement Claims and Potential Bifurcation of Challenges to the Reasonableness of Expenses .....	—	5-20
d. Termination of the Obligation to Advance Funds.....	—	5-23
e. Claims for “Clawback” of Advanced Amounts.....	—	5-24
D. Affirmative Defenses.....	—	5-24
E. Third-Party and Cross Claims for Contribution .....	—	5-26
F. Entitlement to Fees-for-Fees to the Extent of Successful Prosecution .....	—	5-28
G. Entitlement to Pre-Judgment and Post-Judgment Interest.....	—	5-28

V. Receivership [New Topic] .....	—	5-29
A. The Development and Origins of Receivership .....	—	5-30
1. The Definition of a Receiver .....	—	5-30
2. Origins of Receiverships .....	—	5-30
3. Modern Usage of Receivership in the United States .....	—	5-31
4. Differences and Similarities Between Bankruptcy Trustee and Litigation Receivership .....	—	5-32
B. The Role and Powers of a Receiver .....	—	5-32
1. Reasons for Scope of Power to Vary .....	—	5-32
2. The Receiver's Powers .....	—	5-33
a. Receiver's Powers Defined by the Court's Order of Appointment .....	—	5-33
b. Examples of Powers Exercised by Receivers .....	—	5-34
3. Limitations on Power .....	—	5-35
C. Practical Considerations .....	—	5-36
1. Factors Favoring Appointment of a Receiver .....	—	5-34
2. Factors Against Appointment of a Receiver .....	—	5-37
D. Procedural Steps for Appointment of a Receiver .....	—	5-38
1. Requesting a Receiver .....	—	5-39
2. Extraterritoriality for Federal Receivers .....	—	5-40
3. Notice Usually Required .....	—	5-40
4. Selection of Receiver .....	—	5-41
5. Terminating the Receiver .....	—	5-41
E. Protections Against the Receiver's Conduct .....	—	5-42
1. Receiver Bond .....	—	5-42
2. Receiver Liability .....	—	5-42
F. Conflict of Law Issues for Receiverships .....	—	5-44
1. How the Erie Doctrine Applies to Federal Receiverships .....	—	5-44
2. Receiverships and Restatement (Second) of Conflict of Laws .....	—	5-44
G. Conclusion .....	—	5-45
Appendix 5-1: Nature of Claims Chart .....	5-107	—
Chapter 6: Issues in Damages and Valuation .....	6-1	—
I. The Buy-Sell Agreement .....	6-2	—
A. Price Determination .....	6-2	—
1. Pricing Formula .....	6-3	—
2. Negotiation .....	6-4	—
3. External Appraisers .....	6-4	—



B.	State Statutes in the Absence of a Buyout Agreement.....	6-5	—
II.	Business Valuation .....	6-5	—
A.	Valuation Date .....	6-6	—
B.	Standard of Value .....	6-7	—
1.	Fair Value .....	6-7	—
2.	Fair Market Value .....	6-9	—
C.	Premise of Value.....	6-11	—
D.	Valuation Approaches and Methods.....	6-11	—
1.	Income Approach.....	6-11	—
a.	Projections .....	6-12	—
b.	Discount Rate.....	6-13	—
c.	Terminal Year Assumption .....	6-16	—
2.	Market Approach.....	6-18	—
3.	Asset-Based Approach.....	6-19	—
E.	Non-Operating Assets.....	6-19	—
F.	Funding Mechanism.....	6-21	—
G.	Discovery .....	6-22	—
III.	Discounts and Premiums .....	6-23	—
A.	Levels of Value .....	6-23	—
B.	Valuation Methods and Levels of Value.....	6-24	—
C.	Discounts and Premiums in the Courts .....	6-25	—
IV.	Bad Actors and Damages .....	6-28	—
A.	Cash Is King and the Theory of Economic Damages.....	6-29	—
B.	Proving Damages Claims Under Alternative Causes of Action .....	6-30	—
C.	Common Challenges in Business Divorce Damages.....	6-31	—
1.	Defining the Damages Period.....	6-31	—
2.	Proximate Cause .....	6-32	—
3.	Alternative Remedies.....	6-32	—
V.	Personal Goodwill In Damages .....	6-34	—
A.	Personal Goodwill as an Economic Asset.....	6-35	—
B.	A Brief Review of Personal Goodwill in Matrimonial and Federal Taxation Law.....	6-39	—
VI.	Issue Spotting 101: Issues to Spot in Valuation Reports [New Topic] .....	—	6-2
A.	Once Is Enough: Double-Counting Real Estate.....	—	6-3
B.	GIGO and Professional Skepticism .....	—	6-4
C.	The Match Game: Matching Cash Flows and the Discount Rate.....	—	6-6
D.	Two 60-Percent Discounts Do Not Equal a 120 Percent Discount: Applying DLOMs and DLOCs .....	—	6-9
E.	Value at the Expense of Expenses: A Revenue-Only DCF.....	—	6-11

F. The So-Called Fudge Factor: Customer Specific Risk Premium .....	—	6-11
Appendix 6-1: Statutory Definitions of Value .....	6-41	—
Chapter 7: Protective Measures—A Practical Guide .....	7-1	—
I. The Statutory Framework .....	7-3	—
A. Model Business Corporation Act.....	7-3	—
B. Uniform Limited Liability Company Act .....	7-4	—
C. Core Issues .....	7-5	—
1. Disassociation .....	7-5	—
2. Notices .....	7-5	—
3. Voting Requirements.....	7-5	—
a. Deadlock Provisions .....	7-6	—
b. Numerical Voting Requirements.....	7-6	—
D. Dissolution or Termination of the Company’s Existence .....	7-7	—
E. Dispute Resolution .....	7-7	—
1. All Issues or Just Some Issues?.....	7-8	—
2. Where Will We Meet to Resolve the Issues? ....	7-8	—
3. Arbitrability .....	7-9	—
4. Limitations of Discovery .....	7-9	—
5. Mediation Before Arbitration?.....	7-10	—
6. Allocation of Costs .....	7-10	—
F. Choice of Law .....	7-11	—
G. Employee-Owner Issues.....	7-11	—
1. Covenants Not to Compete .....	7-12	—
2. Ownership of Intellectual Property .....	7-12	—
3. Transfers of Ownership .....	7-12	—
H. Lack of Capital and Liquidity .....	7-13	—
I. Disputes Arising Under Buy-Sell Agreements.....	7-13	—
1. Equity.....	7-14	—
2. Type of Agreement .....	7-14	—
3. Trigger Events .....	7-14	—
4. Retention of Control .....	7-15	—
5. Future Owners .....	7-15	—
6. Valuation .....	7-15	—
7. Funding the Buy-Sell Agreement.....	7-16	—
8. Insurance as a Funding Vehicle .....	7-17	—
II. Conclusion.....	7-17	—
Appendix 7-1: Voluntary Corporate Dissolution Checklist ...	7-18	—
Appendix 7-2: Dispute Resolution Checklist.....	7-20	—
Appendix 7-3: Buy-Sell Agreement Dispute Avoidance Checklist.....	7-22	—
Table of Cases .....	T-1	—
Index.....	I-1	—