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BUSINESS LAW ALERT
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Dissenter Was Not Victim in Sale of Real Estate Holdings

***Brynwood Co. v. Schweisberger*, 2009 WL 2218728 (Ill. App. 2 Dist.)(July 23, 2009)(unpublished)**

Several professional tenants in a commercial office formed a C corporation to purchase the property in 1979. The owner of an accounting firm took a lead interest (26%), served on the board of directors, and provided the company's accounting services until he retired in 1996. The company owned and operated the building as its sole asset for nearly 25 years when the directors considered converting to an S corporation, primarily to avoid double taxation (at the corporate and shareholder level). The board also discussed selling the building and dissolving the company. In 2000, the company repurchased the shares of two non-tenant owners at $42.50 per share. During the next year, it offered to repurchase the interests of all non-tenant owners, including the retired accountant, for $48.50 to $50.00 per share.

The accountant held out for $60.00 per share, but the board declined. Because an IRA held some of his stock and the lead shareholder/accountant would have to transfer these holdings in the event of a conversion to an S corporation, he did not agree to the conversion either.

In August 2002 the remaining shareholders voted to sell the property for $1.4 million. After payment of all debts, fees, and taxes, the company dissolved and disbursed $30.08 per share to shareholders. The accountant filed a formal dissent and demanded fair value for his shares.

Valuing the company. After considering the $1.4 million sale and all related costs, the company's expert concluded a fair value for the company on a net asset value basis of $36.15 per share. The dissenting shareholder testified as his own expert. He calculated the fair value of company stock the day before the

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sale, concluding a value of $66.31 per share. He argued that because he dissented to the sale, he should not have been obliged to pay his share of the transactional costs, including capital gains taxes. The dissenting shareholder also offered a CPA/ABV who testified that the court should conduct a business valuation of the company using a going concern value as of the date the shareholders approved the sale. The court found that although the company's decision to sell the building was legal, there was no compelling reason to go through with it other than the majority's desire. Thus the court adopted a going concern, net asset value of $60.68 per share for his 26% interest.

Dissenter can't reap benefits without sharing burdens. The company appealed, arguing that the dissenting shareholder reaped the benefits of the building's sale at fair market value without sharing any of its burdens. The appellate court agreed, finding that the dissenting shareholder had, in effect, 'trapped-in' the capital gains tax liability for all of the shareholders when he declined to allow [the company] to convert from a C corporation to an S corporation," despite his ability to avoid IRA-related penalties. His decision triggered the sale, and thus the tax and cost consequences. By not including these costs, the trial court's appraisal of his shares "thwarted" the equitable purpose of the fair value statute.

Finally, the dissenting shareholder was not a victim of the majority's efforts to force him from the company. The company offered to repurchase his shares at prices that exceeded prior payments to departing shareholders. It ultimately sold the building after arm's length negotiations with an independent third party at a price the remaining shareholders believed to be fair. Thus, "a fair value calculation of all of the shares in [the company] as a going concern and immediately before the closing on the building, must include an adjustment to the net asset value of the corporation to account for the known, foreseeable, and ascertainable capital gains taxes, professional fees, and other costs incurred as a result of the shareholders obtaining their investment value…through the sale of the building." The case was remanded for recalculation of fair value.