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Illinois Appraisal and Valuation Rights: An Overview

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In Illinois, a shareholder has the right to dissent from certain corporate actions such as a merger, sale of substantially all of the company’s assets or organizational changes that materially and adversely affect shareholder rights. 805 ILCS 5/11.65(a). A corporation that takes an action giving rise to the right to dissent must provide shareholders with a statement of value of the company’s shares in addition to certain corporate financial statements. 805 ILCS 5/11.70(a).

If a shareholder disagrees with the company’s valuation, he or she must submit his or her own estimate of the fair value of company shares. 805 ILCS 5/11.70(e). Assuming the corporation disputes the dissenting shareholder’s valuation, the corporation must file a petition in the circuit court where its registered office is located “requesting the court to determine the fair value of the shares and interest due.” 805 ILCS 5/11.70(f).

“Fair value,” with respect to a dissenter’s shares, “means the proportionate interest of the shareholder in the corporation . . . immediately before the consummation of the corporate action to which the dissenter objects excluding any appreciation or depreciation in anticipation of the corporate action, unless

exclusion would be inequitable.” 805 ILCS 5/11.70(j)(1). “Fair value” is calculated “without discount for minority status or, absent extraordinary circumstance, lack of marketability.” *Id.*

Although the statute defines “fair value,” reviewing courts interpreting this provision have observed that “there is no precise formula for valuing the stock in a corporation, and a trial court is to consider ‘[e]very relevant evidential fact and circumstance entering into the value of the corporate property and reflecting itself in the worth’ of a dissenter’s shares.” *Brynwood Co. v. Schweisberger*, 913 N.E.2d 150, 162 (2d Dist. 2009) (quoting *Stewart v. D.J. Stewart & Co.*, 37 Ill.App.3d 848, 853, 346 N.E.2d 475 (1976).) Illinois courts have found that a relevant factor can be “anything that might impact on the stock’s intrinsic value.” *Id.* Those factors include the stock’s market price, the corporation’s earning capacity, the investment value of the shares, the nature of the business and its history, the economic outlook of the business and the industry, the book value of the corporation, the corporation’s dividend paying capacity, and the market price of stock of similar businesses in the industry. *Id.* Further, while the statute defines “fair value” to eliminate the marketability and minority discounts typically associated with “fair market value” valuations, courts in Illinois have found that “fair market value” is a relevant factor to be considered when determining “fair value.” *Id.* (citing *Weigel Broadcasting Co. v. Smith*, 682 N.E.2d 745 (Ill. App. Ct., 1st Dist. 1996))

Thus, a pivotal question in a valuation proceeding is: After accounting for the unique nature and history of the corporation and its business, what was the intrinsic or inherent value of the company as a going concern on the day before corporate action from which the dissenter objected? *Id.* at 166. So, for example, in *Brynwood*, 913 N.E.2d at 162, the majority of shareholders voted to sell the company’s sole asset, a commercial office building. The dissenting shareholder argued that the value of his shares should be calculated without regard to capital gains taxes, closing costs or professional fees associated with the sale because these costs were incurred after the company decided to sell.

Id. at 163-64. The trial court generally agreed and determined the fair value of the dissenting shareholder's shares without deducting capital gains taxes or other costs. Id. at 161.

The Appellate Court of Illinois reversed, finding that when determining "fair value" courts should consider investment or other costs that are reasonably foreseeable when monetizing corporate shares. Id. at 163. Taxes and closing costs/fees were foreseeable and would have to be accounted for in valuing company shares. To do otherwise would inequitably treat the dissenting shareholder more favorably than non-dissenting shareholders. Id. at 165 (citing *Rainforest Café, Inc. v. State of Wisconsin Investment Board*, 677 N.W.2d 443, 450 (Minn.App.2004) and observing that courts valuing company shares must do so equitably).

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