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Failure to Notify Shareholder of Statutory Appraisal Rights is Breach of Fiduciary Duty

In a recent decision from the Business Litigation Session of the Superior Court (*Baldwin v. Connor*), Judge Salinger made clear that, in a close corporation, a majority shareholder's failure to notify a minority shareholder of, and allow that minority shareholder to exercise, his or her statutory rights of appraisal (G.L. c. 156D, § 13.02(a)) constitutes a breach of fiduciary duty. Judge Salinger also stated that the business judgment rule does not apply in such circumstances because the statutory right of appraisal is not discretionary. In addition, the business judgment rule did not apply "because the actions by [the defendants] in depriving [the plaintiffs] of their appraisal rights had a direct impact on the [defendants'] continuing ability to withdraw profits from the Companies and therefore were a form of self-dealing."

Judge Salinger rejected defendants' argument that they should be entitled to invoke an advice of counsel defense to the claim regarding appraisal rights. He explained that the defense of

reliance on advice of counsel is only available to rebut the scienter element of a civil claim but is no defense to a claim that does not require proof of willful or intentional misconduct. Since the plaintiffs did not need to prove deliberate misconduct in order to establish this type of fiduciary breach, the defendants could not defeat the claim by showing that they were reasonably relying on the advice of counsel. The court stated, “[d]enying minority shareholders appraisal rights that are mandated by statute is not excused if done on advice of counsel.” The defendants also could not bring an advice of counsel defense because they did not actually seek advice of counsel before failing to notify the plaintiffs of their appraisal rights – instead, they claimed that counsel never mentioned the need to provide such notice.

In the course of its decision, the court also rejected the defendants’ argument that they were deprived of due process when the court had sua sponte issued summary judgment in plaintiffs’ favor after defendants filed a motion for summary judgment. The court stated that “Rule 56(c) puts civil litigants on notice that if they move for summary judgment the court may decide, based on the summary judgment record, that the non-moving party is entitled to summary judgment in their favor as a matter of law.”

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