

# BANKER & TRADESMAN

THE REAL ESTATE, BANKING AND COMMERCIAL WEEKLY FOR MASSACHUSETTS

A PUBLICATION OF THE WARREN GROUP

## LAW of the LAND

### Mad About Merger

#### Prestigious Law Firms Must Answer Minority Owners' Suit

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SPECIAL TO BANKER & TRADESMAN

Lawyers who choose sides in disputes among owners of closely held businesses do so at their peril, as attorneys at WilmerHale and Gunderson Dettmer learned this summer in *Baker v. Wilmer Cutler Pickering Hale & Dorr LLP*. The plaintiffs' allegations in that case are outlined below.



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Robert Allison and Elof Eriksson founded Applied Tissue Technologies LLC (ATT-MA) in 2000 as a Massachusetts limited liability company to develop wound therapies. Eriksson and Allison originally owned 75 percent and 25 percent of ATT-MA's membership interests, respectively.

ATT-MA's operating agreement included minority owner protections for Allison. He was entitled to participate in company management by vote proportionate to his percentage interest. The operating agreement could not be amended, or Allison's percentage interest reduced, without Allison's consent. He could examine the company's books and records at reasonable times. Members' additional investments in the company would be treated as loans, not equity. Most importantly, the operating agreement im-

posed on all members "a duty of utmost loyalty and good faith" regarding the company's affairs.

Eventually Eriksson and his family trust came to own 75.5 percent of the company, with Allison, his family trust and another owning the remaining 24.5 percent. The company faced a cash shortfall in 2012. Eriksson had financed past shortfalls with loans, but this time he demanded an increase to his percentage ownership. Allison refused to accept a dilution of his interest without additional contributions from outside investors.

Facing a stalemate, Eriksson sought to neutralize Allison. He caused ATT-MA to secretly engage his daughter, Emma Eriksson Broomhead, and her colleague Gary Schall as attorneys for the company. Both attorneys originally worked at Gunderson Dettmer, but Schall soon relocated to WilmerHale.

Eriksson offered to buy out Allison, under the attorneys' guidance. When Allison declined, Eriksson and the attorneys activated a backup plan. Without notice to Allison, they organized a Delaware limited liability company, also known as Applied Tissue Technologies LLC (ATT-DE), and merged ATT-MA into ATT-DE. The Massachusetts limited liability company statute generally allows mergers, if approved by a simple majority of the members. The attorneys established a new operating agreement for ATT-DE without minority protections.

ATT-DE's operating agreement also eliminated the requirement that members conduct the company's business with utmost loyalty and good faith. The minority owners' interests in ATT-DE were later diluted.

#### Continued Vexation

Eriksson proudly disclosed the merger and reorganization to Allison as a *fait accompli*. Allison and other minority owners predictably sued Eriksson for this subterfuge. They later filed a separate lawsuit in Superior Court against Broomhead, Schall and their law firms for breach of fiduciary duty, aiding and abetting tortious conduct, civil conspiracy and unfair and deceptive trade practices.

Without answering the minority owners' allegations, the defendant attorneys moved to dismiss the lawsuit, arguing that their attorney-client relationship with ATT-MA did not create a fiduciary relationship between themselves and minority owners whom they had never met. The Superior Court judge agreed with the attorneys, and dismissed Allison's claims. The minority owners appealed.

In considering this appeal, the Appeals Court assumed the truth of all allegations in the minority owners' complaint. The court acknowledged the lack of attorney-client relationship and communications between the defendant attorneys and the minority owners, but also noted that lawyers who repre-

sent closely held corporations and limited liability companies may owe fiduciary duties to minority owners under some circumstances.

Assuming that the defendant attorneys knew about the minority owners' protections in ATT-MA's operating agreement, including the members' duty of utmost loyalty and good faith, the court held that the

minority owners should have been able to trust that the company's attorneys would not assist Eriksson with his plan to freeze out Allison. The court had little difficulty ruling that Allison's claims against the defendant attorneys could move forward, under this reasoning. It reversed the Superior Court's dismissal.

Whether ATT-MA's attorneys are ulti-

mately held legally responsible for damages to the minority owners remains to be seen, but in the meantime, this litigation will continue to vex the attorneys, their law firms and their professional liability insurers. ■

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