

Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

What is the valuation standard for valuation of a minority interest in an Illinois LLC?

BY GEORGE BELLAS & JILLIAN TATTERSALL

When a minority interest holder leaves an Illinois limited liability company, determining the value of that former member's share presents counsel and courts with questions of methodology. The issue usually centers around whether to apply a discount for the minority interest value. Changes to the Illinois LLC Act¹⁵ in 2017 clarify the matter:

In a proceeding under

subdivision (4) or (5) of subsection (a), the court may order a remedy other than dissolution including, but not limited to, a buyout of the applicant's membership interest.¹⁶

In other words, the ILLCA now specifically provides that a court may order a buyout of an applicant's membership interest when the applicant petitions for relief due to alleged illegal, oppressive, or

fraudulent conduct by the LLC's managers or controlling members.¹⁷

The 2017 ILLCA amendments abolished the prior provisions for purchasing the interest of a minority member. The ILLCA formerly provided that "a limited liability company shall purchase a distributional interest of a member for its fair value."¹⁸

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Snow and ice: Natural and obvious?

BY JASON G. SCHUTTE

Here in Illinois, winter weather such as snow and freezing rain, often create conditions that lead to slips and falls by patrons of businesses, invitees to personal residences or members of the general public. These slips/falls inevitably lead to personal injury claims and lawsuits.

The most common, go-to defense against these type of claims involving snow and ice is the argument that the injured party slipped or fell over a "natural accumulation" of snow/ice. The injured party inevitably argues that the property owner acted in some fashion so as to create an "unnatural accumulation" of ice or

sno, which created the conditions causing their fall. As a general rule, the natural accumulation defense provides very good protection to property owners in Illinois, and inevitably, their liability insurers.

There are situations where the property owner does create an unnatural accumulation of snow and the aforementioned natural accumulation defense cannot be utilized to defeat the plaintiff's claim; however, that does not mean that the property owner is without defenses to the personal injury claim. Oftentimes, attorneys, property owners and insurers may overlook one of the most

common defenses to premises liability claims, the open and obvious doctrine, when evaluating these claims.

The application of the open and obvious condition doctrine was recently analyzed in the Fourth District Appellate case *Winters v. Mimglii Arbors at Eastland, LLC*.

Facts of the Case

In *Winters*, the plaintiff claimed that he slipped on an unnatural accumulation of snow at the apartment complex where he resided.¹ He asserted that in January of 2014, Defendant Changing Seasons

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The court shall “determine the fair value of the distributional interest.”¹⁹ When determining the fair value of the interest, the court would consider, among other relevant evidence, the “going concern value of the company.”²⁰ These provisions no longer exist.

So, how does a court value the interest of a departing member who qualifies for a judicial ordered buyout?

In *Lincoln Provision, Inc. v. Puretz*, 775 F.3d 1011 (2015), the United States Court of Appeals for the Eighth Circuit determined that the ILLCA instructs courts on the value of a dissociating member of an LLC distributional interest. When determining the value of the member’s interest, the “court must calculate the fair value of the interest after taking into account all ‘relevant evidence,’ including, for example, the value of the LLC as a going concern and any agreement between the members fixing the price or specifying a formula for calculating the price of a distributional interest in the LLC.” The court further stated, “an LLC’s operating agreement governs relations among the members, but to the extent the operating agreement does not otherwise provide, the ILLCA governs those relations.” In addition, the court noted that principles of law and equity supplement the ILLCA.

The volumes dedicated to Business Organizations found in the Illinois Practice Series further support this interpretation of the ILLCA stating:

In determining the fair value of the interest, the court is instructed to consider the going concern value of the LLC. This is consistent with the legislation referenced above which speaks of the “proportionate interest of the shareholder in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack

of marketability.” The court may also appoint an appraiser and, if this is done, it is important that the appraiser understand the difference between a “fair market value” standard of value and a “fair value” standard of value. The court shall also take into account any legal constraints on the ability of the LLC to purchase the interest.²¹

The ILLCA does not provide a definition for the fair value of a distributional interest, nor is there any case law directly interpreting “fair value” in relation to the distributional interests of LLC members. Other courts also provide very little authority regarding how this “fair value” should be applied under the ILLCA. The use of the term “fair value” by the Illinois Business Corporation Act (“IBCA”), however, provides some insight.

Under the IBCA, fair value “means the proportionate interest of the shareholder in the corporation, without discount for minority status or, absent extraordinary circumstance, lack of marketability.”²² This IBCA clarification can serve as a basis for determining the fair value of a departing Illinois LLC member’s minority interest. This is consistent with the interpretation of a majority of courts throughout the country that have held that neither liquidity nor minority discounts are permissible in fair value proceedings.

Historically, Illinois courts have been inconsistent on the applicability of discounts to fair value determinations. While the Illinois Supreme Court has discouraged the use of discounts in fair value determinations, they have also left their application to the discretion of the trial courts.²³

Conversely, Illinois appellate courts have repeatedly allowed discounts to affect fair value determinations.²⁴ These Illinois appellate court cases conflict with the national trend that “neither liquidity nor

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minority discounts are permissible in fair value proceedings.²⁵ Recent Illinois law, however, has begun to follow the national trend of disallowing minority discounts when interpreting fair value. In addition, the Illinois legislature addressed the historically divided Illinois courts' decisions on the applicability of fair value by amending the IBCA in 2007 to mirror the American Law Institute's definition of fair value.²⁶

By prohibiting the use of minority shareholder discounts in a fair value determination, Illinois law now accurately reflects the prevailing national treatment of minority discounts. A minority discount adjustment is based on the theory that non-controlling shares are not worth their proportionate share of the company's value because they lack voting power to control corporate actions.²⁷ When applied to third parties, the discount is proper because the third party does not gain a right to control or manage the corporation.²⁸ Conversely, when applied to other shareholders, or the corporation itself, the interests of those already in control increases, resulting in a windfall to buyers.²⁹ This theory easily applies to the membership interest of an LLC where the dissociating member's interest is being purchased by the remaining members of an LLC.

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pushed snow from Arbors' (property owner/landlord) parking lot onto a sidewalk. Plaintiff left his apartment to walk to a laundry facility located on site at the apartment complex. He walked on the sidewalk that he alleged was blocked by the snow pushed by Changing Seasons and slipped due to the snow blocking the sidewalk.²

Plaintiff filed suit against his landlord, Arbors, asserting that Arbors was negligent in various ways that resulted in the unnatural accumulation of snow which caused plaintiff's injuries.³ Plaintiff filed suit against Changing Seasons, asserting that they had contracted to remove snow from Arbors' property, and did so in a negligent fashion, resulting in the unnatural

In *Brynwood Co. v. Schweisberger*, 393 Ill.App.3d 339 (2009), the court held that the "term 'fair value' require[s] the trial court to value the dissenting shares by looking at what they represent – a percentage ownership in the intrinsic value of the corporation as a going concern." Although the court in *Brynwood* interpreted the definition of fair value prior to the 2007 IBCA, the holding reflects Illinois's movement towards the national majority definition of fair value. Following this trend towards the prohibition of minority deductions when determining fair value, the provisions found in §60-70 of the ILLCA, which allow for the court's determination of fair value, were repealed effective July 1, 2017.

Although Illinois has historically allowed fair value to be adjusted by minority discounts, recent trends and changes in Illinois law demonstrate a movement towards the national prohibition of minority discounts when determining fair value. Although not specifically defined under the ILLCA, Illinois courts and statutes have taken the position of prohibiting the application of minority discounts when determining fair value in strikingly similar corporate circumstances. ■

accumulation of snow that caused plaintiff's injuries.⁴

Plaintiff admitted that he observed the large pile of snow on the sidewalk before reaching it and that his visibility was not limited.⁵ He further stated that there was a "cutout in the snow pile" where it appeared that other individuals had walked through the snow pile. He decided to proceed, laundry basket in hand, and walked through the snow pile. Plaintiff further admitted that he was able to see where he was walking and was aware that he was walking on snow and ice. Plaintiff slipped and broke his ankle while walking across the snow pile.⁶ Lastly, plaintiff admitted that there were alternative paths he could have taken to reach the laundry facility that was his destination.⁷

1. Public Act 99-0637 went into effect on July 1, 2017 and dramatically changed the provisions regarding the buyout of a minority member. 805 ILCS 180/35-1, *et seq.*

2. 805 ILCS 180/35-1(b).

3. 805 ILCS 180/35-1(a)(5).

4. 805 ILCS 180/35-60(a).

5. *Id.*

6. 805 ILCS 180/35-65(a)(1).

7. Charles W. Murdock, *Illinois Business Organizations* § 5.17 (2d. ed. 2016)(citing 805 ILCS 5/12.56(e)).

8. 805 ILCS 5/11.70(j)(1).

9. *Stanton v. Republic Bank of S. Chi.*, 581 N.E.2d 678 (Ill. 1991).

10. See, e.g., *Weigel Broadcasting Co. v. Smith*, 682 N.E.2d 745, 750 (Ill. App. Ct. 1st Dist. 1996); *Institutional Equipment & Interiors, Inc. v. Hughes*, 562 N.E.2d 662, 667-68 (Ill. App. Ct. 2d Dist. 1990). *Independence Tube Corp. v. Levine*, 535 N.E.2d 927 (Ill. App. Ct. 1st Dist. 1988) (finding that in a closely held corporation, the "minority interest factor" and the "lack of marketability" are intrinsic factors to use for evaluation purposes even when the real buyer is the corporation).

11. Charles W. Murdock, *Squeeze-outs, Freeze-outs and Discounts: Why is Illinois in the Minority in Protecting Shareholder Interests*, 35 Loy. U. Chi. L.J. 737 (2004), reprinted 47 Corporate Practice Commentator 547 (2005).

12. Principles of Corp. Governance § 7.22 (1994).

13. Derek P. Usman, *Minority Shareholders Receive a Christmas Gift from the Governor*, Usman L. Blog (Apr. 2009) <http://dusmanlaw.com/wp-content/uploads/2009/04/usmancorparticle.pdf>.

14. *Id.*

15. *Id.*

Defendants filed motions for summary judgment asserting that the snow pile in question was an open and obvious condition, hence they owed no duty to plaintiff. Plaintiff opposed the motions, asserting that there were genuine questions of fact on this issue and alternatively, that the deliberate encounter exception applied, defeating the open and obvious rule.⁸ The trial court granted defendants' motions.

The Basics of the Open and Obvious Doctrine

The open and obvious doctrine can preclude any duty being owed to a particular plaintiff if the condition causing the injury qualifies as "open and obvious." A condition on land is considered "open and obvious" when a reasonable person in the plaintiff's

position, exercising ordinary perception, intelligence and judgment, would recognize the condition and the risk involved.”⁹

Common open and obvious conditions are fire and bodies of water, but defects on sidewalks can qualify.¹⁰

There are two commonly recognized exceptions to the open and obvious doctrine. First, the *distraction exception*, which applies when the possessor of land has reason to suspect that invitees to the property may be distracted and will fail to discover or protect themselves against the open and obvious condition. This exception only applies when evidence is presented that the plaintiff was actually distracted.¹¹

Second, the *deliberate encounter exception*, applies when the possessor of land has reason to expect that the invitee will proceed to encounter the known or obvious danger because a reasonable person in the invitee’s position would do so. This exception most commonly is applied in cases involving some kind of economic compulsion, but its presence is not a *per se* requirement.¹²

Appellate Findings in *Winters*

The appellate court in *Winters* found that the snow on the side walk was, in fact, an open and obvious condition in light of the fact that all parties were aware that it was present. The court further found that the deliberate encounter exception not apply as plaintiff knew there were alternative routes to his destination, the laundry facility, which he could have taken to avoid traversing the snow pile.¹³ Further, there were no economic factors compelling plaintiff to traverse the snow pile in question.¹⁴

The court did not analyze whether the distraction exception applied; however, it is clear that it would not as plaintiff admitted that he could see the snow pile in question, and, was aware of its presence. The court affirmed the trial court’s granting of Defendants’ motion for summary judgment.

Analysis

These types of cases are certainly fact specific and dependent. When evaluating the viability of a personal injury claim arising from injuries related to ice or snow accumulation, it would behoove attorneys,

property owners, claims representatives and other interested parties to consider not only the natural accumulation rule but also, whether a viable defense is presented through the open and obvious condition doctrine.

The two may be able to be asserted simultaneously or, as in the *Winters* case, it may be very clear that the snow/ice accumulation in issue is unnatural; however, it may be equally clear that the accumulation is an open and obvious condition which would not place any duty upon the property owner to remove or remediate the condition.

1. *Winters v. MIMG LII Arbors at Eastland, LLC, et. al.*, 2018 IL (4th) 170669, ¶ 1.

2. *Id.* ¶ 9.

3. *Id.* ¶ 10.

4. *Id.* ¶ 11.

5. *Id.* ¶ 18.

6. *Id.*

7. *Id.* ¶¶ 19-20.

8. *Id.* ¶¶ 36-37.

9. *Id.* ¶ 51, citing *Olson v. Williams All Seasons Co.*, 2012 IL app (2nd) 110818 ¶ 42.

10. *Id.*

11. *Id.* ¶ 52.

12. *Id.* ¶ 53.

13. *Id.* ¶ 69.

14. *Id.* ¶ 74.

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