

## BOOK REVIEW

### ***Buy-Sell Agreements for Closely Held and Family Business Owners: How to Know Your Agreement Will Work Without Triggering It***

By Z. Christopher Mercer, ASA, CSA<sup>1</sup>  
Peabody Publishing, Memphis, 2010 (paperback, 234 pages, \$29.95)

***Reviewed by Richard A. Crane, Attorney at Law***

Because the author, Z. Christopher Mercer, is a financial adviser who is writing about a subject involving legal issues, the editor of *The Value Examiner* asked me to assess, as part of this review, whether Mercer's ideas and advice in *Buy-Sell Agreements* are legally sound.<sup>2</sup>

Indeed, Mercer's opinions are consistent with applicable laws and well founded legal advice. Mercer also refrains from engaging in the unauthorized practice of law (providing legal advice by a non-attorney), not an easy task considering the subject matter.

This book should be read by: (1) owners of a closely held or family-owned business,<sup>3</sup> whether they have or don't have a buy-sell agreement, and (2) members of an owner's team of trusted advisors (both Mercer and I are big believers in a team concept), including corporate, tax and estate/succession planning attorneys; CPAs and financial planners; life and disability insurance brokers; and valuation professionals who represent closely held and family-owned businesses.

I agree with Mercer that the absence of a buy-sell agreement is far more likely to wreak havoc with a business and its owners than a poorly drafted one. However, both the absence of a buy-sell agreement and a poorly drafted one can lead to catastrophic results for a business, the business owners, and their families. This is well illustrated when there is a corporate deadlock, which I discuss later in this review.

#### **Pete and Sam**

The running dialogue between Sam, one of the owners of a closely held business, and business appraiser Pete (Mercer's alter ego), is the stream through which the book courses. Sam represents the far too many businesspeople who don't have a buy-sell agreement, or have a buy-sell agreement that they don't understand and has been tucked away in a file since its execution many years ago. Through their discourse, Pete helps Sam see the errors of his way, and encourages him to talk with his fellow owners, then with a team of trusted advisors, in order to

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<sup>1</sup> Editor's note: Z. Christopher Mercer is a member of the Editorial Board of *The Value Examiner*. Peabody Publishing, the publisher of the book under review, is Mercer's company.

<sup>2</sup> The opinions expressed by the author of this review are for general information purposes only, and should not be construed as legal, tax, financial, or other advice. Anyone seeking legal advice should consult with an attorney.

<sup>3</sup> For purposes of this article, I sometimes refer to a closely held or family owned business as a corporation and its owners as shareholders. However, in general, my comments are valid for other business entities and their owners, including a partnership and its partners, and a limit liability company and its members.

have a buy-sell agreement that works—that is, an agreement that they are reasonably certain will work when the trigger event occurs.

Pete speaks in plain language, not the legalese sometimes used by lawyers to confuse others. By asking questions, Pete guides Sam down the path of understanding just how important a properly drawn buy-sell agreement is to him and his loved ones. Pete does an excellent job of educating Sam about the perilous results that may occur by not having a viable buy-sell agreement. If anything, Mercer understates the risks. For example, a poorly drafted buy-sell agreement may lead to one of a businessperson's worse nightmares: having the spouse of a former partner as a co-owner of the business.

### **Deadlock**

A corporate deadlock is a crucial triggering event for closely held corporations, and should be addressed in many buy-sell agreements. Unfortunately, Mercer merely mentions a deadlock in passing. I consider this as inadequate treatment of this very important issue. A deadlock of the board of directors or shareholders may make it impossible to conduct the business of the corporation. Absent a viable buy-sell agreement that addresses the deadlock issue, all too frequently the shareholders end up in court. Under the Illinois Business Corporation Act of 1983<sup>4</sup> and similar statutes in other jurisdictions, a court may resolve the deadlock by mandating that the other shareholders purchase all of the shares of the petitioning shareholder. The purchase price is to be the “fair value of the shares, *with or without the assistance of appraisers*” (emphasis added). The court may even order the dissolution of the corporation. I surmise that few business owners would choose to cede the future of their business to a court of law. After reading this, hopefully the possibility of a deadlock triggering event should provide the owners of a closely held business with sufficient reason to execute a properly drawn buy-sell agreement.

### **Single or Multiple Appraisers**

Mercer devotes half of the book to the valuation process for buy-sell agreements. One of his primary tenets is that a single appraiser is best suited to determine the fair market value of the shares when a triggering event occurs, and he cogently supports this position. In particular, he suggests many parameters for inclusion in a buy-sell agreement that by using a single appraiser will produce a fair market value for the shares in question.

In my practice, I've almost always used a variation of the multiple-appraiser approach when drafting a buy-sell agreement. My primary concern was that with a single appraiser determining the fair market value of the shares, the result is more likely to be skewed in one direction (the price is too high) or the other (the price is too low). I considered the “averaging” effect of using more than one appraiser more likely to obtain a “true” fair market value. However, based on the case made by Mercer for a single-appraiser approach, I will certainly give this more consideration the next time I draft a buy-sell agreement.

A suggestion in the event the single-appraiser approach is adopted: As with the naming of successor trustees under a trust agreement, at least one successor appraiser should be named in a buy-sell agreement. In the event that the initial appraiser is unwilling or unable to perform the appraisal, the successor appraiser would assume the role of appraiser. As Mercer correctly points out, it is usually the appraiser and not the appraiser's firm that is retained to do the appraisal.

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<sup>4</sup> 805 ILCS 5.

## **Conclusion**

After reading this book, owners of closely held or family-owned businesses should have a better understanding that they may be able to avoid a potential financial and personal quagmire of epic proportions by having a buy-sell agreement in place that is understood by the parties, achieves the goals the owners want to accomplish. Mercer has cleared the path to achieve this result, but as he said at the beginning of the book, it is incumbent upon the owners of the business to follow where he has led.

Nineteen years ago, I prepared buy-sell agreements for a closely held corporation that I represent, and for the limited liability company which holds title to their office building. The agreements have yet to be signed. I am going to send a copy of Mercer's book to each of them. Hopefully, it will provide the impetus to finalize and execute the agreements, and it will not take them another 19 years to do so.

*Richard A. Crane is the principal of the Law Offices of Richard A. Crane, Ltd., in Northbrook, IL. He has been advising closely held businesses for over 30 years.*

*Website: [www.r-cranelaw.com](http://www.r-cranelaw.com)*