

**[J-91-2010][M.O. – McCaffery, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

FIZZANO BROTHERS CONCRETE PRODUCTS, INC.	:	No. 29 MAP 2010
	:	
v.	:	Appeal from the Order of the Superior Court at No. 1896 EDA 2007, dated 5/15/09, reversing the order of the Delaware County Court of Common Pleas, Civil Division, entered on 9/14/07 at No. 01-11752
XLN, INC. SUCCESSOR IN INTEREST TO SYSTEM DEVELOPMENT GROUP, INC.	:	
	:	
v.	:	
	:	
SHORE CONSULTANTS, LTD., GREGG A. MONTGOMERY, DAVID BINDER AND XLNT SOFTWARE SOLUTIONS, INC.	:	
	:	
	:	ARGUED: November 30, 2010
APPEAL OF: FIZZANO BROTHERS CONCRETE PRODUCTS, INC.	:	
	:	

**DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: March 26, 2012**

I have difficulty with the looseness of the test the majority devises to govern de facto mergers, as I believe it diminishes the degree of certainty attaching to corporate transactions. On the merits, were this entirely a paper transaction, I might support the result obtained (albeit such a paper scenario would seem more similar to mere continuation rather than de facto merger, assuming absolute continuity of ownership should not be required under either theory). Here, however, the purchaser -- a corporation with shareholders independent of the seller -- paid more than \$250,000 as part of the consideration in the relevant asset purchase transaction. Cf. 19 C.J.S. CORPORATIONS §911 (2011) (opining that “[t]he crucial factor in determining whether there has been a de facto merger or continuation of business, resulting in successor

liability, is whether adequate cash consideration was paid for the predecessor corporation's assets"). To the extent the Court dilutes the continuity of ownership inquiry, I believe it should include an element focusing on the cash consideration to guard against unfairness to stockholders in a purchasing company. Notably, there is no discussion in the briefs of any claim that the consideration provided by XLNT was inadequate in this regard.

On this record, to me, Appellant's claim against XLNT should rise or fall on the merits of its theory that the asset purchase transaction entailed a fraudulent transfer. Notably, such theory was rejected by the trial court and is outside the scope of the present appeal.