

To Our Clients

Investment Bankers' Fairness
Opinions in Going Private Transactions

The reference to investment bankers' fairness opinions in today's memo about the Woods case deserves special note. Woods held only that where a fairness opinion is not premised on sale to a third party or liquidation value that fact must be disclosed. Woods did not hold that anything less than third-party sale or liquidation value would be unfair. However, it is quite likely that the banker's failure to consider third-party sale or liquidation would, as a matter of state law, be considered to negate the fairness opinion.

We continue to believe that except in unusual situations, investment bankers should not give limited fairness opinions in going private transactions. The banker should consider historical market prices, investment value and liquidation or third-party sale value. The investment banker should perform the due diligence review (and if appropriate obtain the advice of other experts) necessary to form an opinion as to each of the three traditional elements of value -- market value, investment value and liquidation value. The ultimate determination of fairness is then a judgment based on three elements and the banker's opinion as to current economic and financial conditions. In going private transactions third-party sale or liquidation value should not be discounted or ignored on the ground that the controlling insiders would not sell or liquidate; it should be taken into account along with the other valuation factors and in appropriate cases should be the principal factor.

The Woods case stresses the need for a well-drawn engagement letter, a fully understood valuation and due diligence program and advice of counsel before an investment banker undertakes a fairness opinion.

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