

To Our Clients

Investment Bankers' Fairness  
Opinions in Freezeouts

A recent Delaware decision, Weinberger v. UOP, INC., Civ. No. 5642 (Del. Ch. Feb. 9, 1981), clarifies the law with respect to the concept of fair value, and investment bankers' fairness opinions, in freezeouts. The court said:

(1) Fair value in a freezeout is the same fair value as in an appraisal proceeding.

(2) Fair value is determined by the tripartite test of market value, investment value and net asset (liquidation) value.

(3) A minority shareholder is not entitled to net asset or liquidating value in a freezeout.

(4) The fairness of the price paid to the minority is not determined by reference to the value of the acquired corporation to the former majority shareholder as a result of becoming the 100% owner; this is only one of the elements of value to be considered. In rejecting the concept of fair value based on value to the 100% owner, the court explicitly rejected the discounted cash flow method of valuation.

(5) Fair value may be arrived at by determining a price earnings ratio based on the market prices of comparable companies and, to the value resulting from applying that ratio, applying a premium based on the premiums paid in comparable acquisitions.

(6) In rendering a freezeout fairness opinion an investment banker may rely on the usual materials supplied by the acquired corporation and due diligence interviews and need not consider, and may disclaim having considered, net asset or liquidating value. (This should be clearly spelled out in the engagement letter and the opinion.)

(7) That the investment bankers' opinion was arrived at in but two or three days does not in and of itself impeach the opinion. (Here the investment banker had a long standing relationship with the acquired corporation.)

March 9, 1981

(8) It is not necessary for the board of directors of the acquired corporation in order to establish fair value, to demand a higher price than the price first offered by the majority shareholder and then "negotiate" the final price.

(9) Structuring a freezeout so that it must be approved by a majority of the minority shares does not in and of itself establish the fairness of the transaction, but it is a factor to be taken into account. The court implies that the structure of a freezeout is an appropriate factor to be considered by an investment banker in rendering a fairness opinion.

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