

February 17, 1982

To Our Clients

Investment Bankers Fairness Opinions

Weinberger v. UOP, Inc., decided by the Supreme Court of Delaware on February 9, 1982 contains interesting language about investment bankers fairness opinions. Both the majority opinion and the dissent find that a banker who renders a merger fairness opinion has a duty not just to the corporation, but to the shareholders as well. The following quotation from the dissent is an apt illustration of two of the pitfalls to avoid in rendering a fairness opinion:

"As to Lehman Brothers: The question as to liability of this defendant is one of first impression in this Court, namely: does an investment banker who gives an opinion as to the value of stock, knowing that it will be used to help persuade minority public stockholders to transfer their shares to the majority stockholder at the price offered by the majority, owe any duty to the minority stockholders? In Denison Mines, Ltd. v. Fibreboard Corp., D. Del., 388 F.Supp. 812, 821 (1974), Judge Stapleton identified the significance of such an opinion by an investment banker when he wrote

'Because of the independence of Lehman Brothers, as well as its reputation in the investment banking field, its opinion added persuasive support for management's view. In the context of this Proxy Statement, the Court believes the impact of the reference to Lehman Brothers' opinion on a substantial number of stockholders would be difficult to overestimate'.

In my view, Lehman Brothers had a duty to exercise reasonable care or competence in obtaining or communicating the information as to the value of the UOP shares (that is, in giving its opinion that the proposed merger was 'fair and equitable to the stockholders of UOP other than Signal'); any failure to perform in accordance with that standard would make Lehman Brothers liable to the public stockholders for negligent misrepresentation under the circumstances stated in the Restatement of the Law, Torts 2d § 552. See also Prosser, Law of Torts (4 ed) § 107, pp. 704-708; § 109, pp. 720, 721.

Given (a) the haste with which Lehman Brothers assembled its opinion on the value of the UOP stock and, (b), the disregard of its own internal memorandum, which had concluded that the stock was worth as much as \$21 to Signal in 1976 after UOP had a \$35 million operating loss in 1975, 426 A.2d at 1347, and its failure to explain why the price was a fair one to the minority after UOP had a significantly improved performance in 1976 and 1977, there is at least enough in the case to require a trial on the issue of reasonable care or competence".

M. Lipton