The Roles of the Investment Banker and the Valuation Analyst in M&A Transactions and Litigation

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Valuation analysts ("analysts") are often retained to provide testifying expert services in disputes related to merger and acquisition ("M&A") transactions. Such analysts may also provide transaction fairness opinions as part of the M&A deal process. This discussion focuses on the roles of the investment banker and the valuation analyst—both during the M&A transaction and after the M&A transaction. This discussion also considers flaws in the M&A process and, particularly, in the transaction fairness opinion that can lead to post-transaction shareholder litigation. Lastly, this discussion considers how various courts have viewed the fairness of certain M&A transactions that suffered from a flawed process.

Introduction

As illustrated by recent Delaware Chancery Court and Delaware Supreme Court decisions on shareholder appraisal rights, merger and acquisition ("M&A") disputes often include elements of breach of fiduciary duty by the target company's board of directors or its special committee. Such alleged breaches often relate to the board's oversight of the M&A deal process. These disputes may also involve allegations of proxy violations related to inadequate disclosure of material information that investors should have been provided in order to make an informed decision when casting their votes.

In litigation, the parties to the lawsuit each typically retain a valuation analyst to estimate the fair value of the target company stock and to provide expert testimony.

Investment bankers and valuation analysts may also be retained to provide a fairness opinion related to a pending M&A transaction. A fairness opinion is a determination of whether or not the transaction consideration paid to the target's shareholders is fair from a financial point of view.

This discussion focuses on the following topics:

- The differences in the roles of the valuation analyst and the investment banker
- Events that can lead to M&A disputes and examples of when a court decided that the M&A deal process was flawed
- The typical fairness opinion process performed by the investment banker
- The use of management-prepared financial projections and examples of when these financial projections were accepted or rejected by a court
- The role of the investment bank in M&A transactions

The Roles of the Valuation Analyst and the Investment Banker

This discussion focuses on the roles of the independent valuation analyst and the investment banker under two circumstances. The first is the role of

each party in preparing a fairness opinion for an M&A transaction. The second is the role each party serves in preparing valuation opinions to used in post-transaction shareholder disputes.

Fairness Opinions for M&A Transactions

Valuation analysts are often retained to provide fairness opinions for private company M&A transactions. Rather than retain an investment banker, many private companies either retain a business broker or conduct the transaction with in-house staff. Many private companies may also be owned by private equity firms that have M&A expertise.

In instances where the private company is experienced in negotiating M&A transactions, the company may be capable of handling the deal process, especially if it was already approached by a potential acquirer. In those circumstances, only a fairness opinion may be needed for a particular transaction. If that is the case, the transaction financial advisory fees may be much less than what an investment banker would charge to provide both investment banking services and a fairness opinion.

Valuation analysts are not advocates for either the potential acquirer or the target company. Consequently, analysts do not accept contingency or performance-based fees. Instead, fees are typically based on an agreed-upon budget or standard hourly rates. And, such fees are usually lower than the success-based fees charged by investment bankers.

Since valuation analysts are not advocates, the role of the analyst is usually confined to providing a professional opinion regarding the fairness of the proposed or agreed-upon transaction consideration. The fairness opinion typically consists of a written opinion that may be accompanied by a financial analysis that concludes a range of value. The business valuation approaches (i.e., income approach, market approach, and asset-based approach) applied by the analyst are often the same approaches applied by the investment banker.

Unlike the investment banker, the development and the reporting of the analyst's valuation analysis typically complies with promulgated professional standards. These promulgated standards may include the Statement on Standards for Valuation Services or the International Valuation Standards.

In some cases, publicly traded companies, or private companies that are targets of a public company acquisition, may retain an investment banker to provide M&A advisory services. This retention may relate to a myriad of factors which may include mitigating litigation risk and the need for certain investment-banker-provided services. These services may include managing the deal process, soliciting bids, and negotiating the terms of the transaction.

Valuation analysts, on the other hand, generally do not provide such services, due in part to their inability to charge success fees which otherwise may undermine the analyst's independence. An additional explanation of the role of the investment banker in M&A is presented later in this discussion.

Valuation Opinions for Disputed Transactions

When a valuation analyst is retained as a testifying expert in a disputed M&A transaction, the work product typically consists of a written valuation expert report with exhibits. The valuation expert report and exhibits may be more comprehensive than either (1) the investment banker's work presented in the proxy materials or (2) the investment banker's materials presented to the board of directors or the special committee.

Settlement discussions may occur in the litigation after the exchange of expert reports. If a settlement is not reached after the exchange of expert reports, each expert may be asked to analyze the work of the opposing expert—and to prepare a rebuttal report. Rebuttal reports respond to the analyses, inputs, and opinions of the expert hired by the counterparty to the litigation.

Following the issuance of rebuttal reports, each expert may be allowed to respond to the rebuttals prepared by the other expert. If a settlement still has not been reached, then deposition testimony, and potentially trial testimony, will proceed.

There may be differences in the valuation inputs selected by valuation analysts serving as experts in litigation versus those selected by investment bankers retained for M&A. Among these differences is the valuation date. The valuation date applied by the valuation analyst may be the date the subject transaction closed. The valuation date applied by the investment bankers may be the date the transaction was approved by the board of directors. Due to the passage of time between the two valuation dates, there may be differences in the valuation variables applied by the investment banker versus the valuation variables applied by the valuation analyst.

Some of these differences, such as the present value discount rate, may be material. That may be the case if the target company's market capitalization from one date to the other leads to a material difference in the debt to equity ratio used for calculating the weighted average cost of capital.

Another difference is the quality of the analysis and the work product. The investment banker's

work product may be produced by bankers who do not have technical training in valuation practices and standards. This lack of valuation training may lead to unsupported judgments.

As an example, an investment banker's selected cost of debt (for the weighted average cost of capital calculation) may lack support. The banker may ask one of the bank's fixed-income traders or credit analysts what rate they would charge to the target company. In contrast, the analyst may estimate a cost of debt based on an extensive analysis of market-based yields of guideline debt securities.

The valuation analyst may also estimate a weighted average market-based yield if the target company has diverse business units with different credit profiles and different costs of capital.

Investment banks are not typically retained to prepare expert analyses and expert reports—or to provide expert testimony—in connection with shareholder disputes that arise from M&A litigation. However, the banker may be required to testify as a fact witness if the bank provided advisory work and/or a fairness opinion in the disputed M&A transaction.

Events That May Lead to M&A Disputes

Some observers believe that a robust pre-signing market check may result in a higher final bid than otherwise. Some observers believe that a post-signing, go-shop period yields little transaction pricing benefit.

This is because any new bidder in a go-shop period has a ticking clock to submit a higher bid. That new bidder often lacks the necessary time to conduct the same level of due diligence that was conducted by earlier bidders.

Deal processes may be considered as flawed if there appears to be too much reliance on a go-shop period—rather than the pre-signing period—to extract the highest price. This was one area of dispute in the *In re Appraisal of Dell Inc.* judicial decision.[1]

Legal counsel sometimes find it challenging to identify flaws in the deal process prior to the litigation discovery procedure. This is because proxy statements do not always provide sufficient detail about the deal process.

To avert disputes, sometimes proxies provide a detailed time line of all discussions. The level of disclosure may be an area of contention between counsel who represent entities involved in a transaction and counsel who represent shareholder plaintiffs.

The following discussion summarizes several judicial decisions where the court determined that the M&A deal process was flawed.

Blueblade Capital Opportunities LLC v. Norcraft Companies, Inc.[2]

- The deal price was previously rejected as too low by the target's board of directors.
- The chief executive officer seemed more interested in obtaining post-merger employment and in receiving payment under a tax receivable agreement than in securing the highest price for the shareholders.
- There was no robust, pre-signing market check. No other pre-signing bidders were sought by the board of directors or by the board's financial adviser.
- The stock was thinly traded, which made the efficient (or semi-efficient) market theory less relevant.
- The go-shop period was fruitless due to the existence of a sizable break-up fee, an unlimited right to match any higher offer, and the right of the suitor to begin tendering shares during the go-shop period.

City of Miami General Employees' and Sanitation Employees' Retirement Trust v. C&J Energy Services, Inc.[3]

- C&J Energy Services, Inc. ("C&J"), did not engage in any market check prior to agreeing to merge with Nabors Industries Ltd.
- The C&J board of directors delegated the primary responsibility for negotiations to its chief executive officer.
- No special committee was formed, and four members of the C&J board of directors were guaranteed five-year terms with the merged entity.
- The court enjoined the shareholder vote for another 30 days to further attempt to solicit interest from other bidders. This judicial order was premised on the lack of other bidders emerging during the five months following announcement of the deal. There was no judicial ruling on the fairness of the merger price.

Dunmire v. Farmers & Merchants Bancorp of Western Pennsylvania, Inc.[4]

- The merger was not the product of a robust sale process. The transaction was undertaken at the insistence of the

Snyder family, which controlled both Farmers & Merchants Bancorp of Western Pennsylvania, Inc. ("F&M"), and NexTier Bank N.A. ("NexTier"), and stood on both sides of the transaction. No other bidders for F&M were considered.

- The transaction was not conditioned on obtaining the approval of a majority of the minority of F&M stockholders.
- Two of the three members of the special committee had business ties with the Snyders.
- F&M engaged Ambassador Financial Group as its financial adviser, but only to "render an opinion as to the fairness of the exchange ratio that would be proposed by [FinPro] to the NexTier board."

Flawed Deal Process and Investment Banker Fee Structure

Sometimes the terms of the investment banker compensation can give rise to a flawed deal process. In an article published in the *Harvard Law Review*, Guhan Subramanian cites one example of a properly structured fee arrangement and one example of an improperly structured fee arrangement for a target company's investment banker. The investment banker usually receives an incentive fee based on the final deal price.

In the properly structured fee arrangement example, Subramanian cites Merrill Lynch serving as financial adviser to the Sports Authority, Inc., during its leveraged buyout.[5]

The fee was the sum of 0.50 percent of the purchase price up to a price of $36.00 per share and an additional 2 percent above $36.00 per share. The acquirer initially offered $34.00 per share, but Merrill Lynch then negotiated a higher price of $37.25 per share, thereby collecting 2 percent of the incremental $1.25 per share.

In the improperly structured fee arrangement example, Subramanian cites Evercore serving as financial adviser to Dell Inc. during its leveraged buyout.

Evercore received a monthly retainer fee of $400,000, a flat fee of $1.5 million for the fairness opinion, and a fee equal to 0.75 percent of the difference between the initial bid during the pre-signing phase and any subsequent higher bid Evercore could obtain during the go-shop period.

This structure gave Evercore the incentive, if it opted to do so, to minimize the negotiated price during the pre-signing phase so as to widen the difference between the pre-signing price and any higher price during the go-shop period, upon which the 0.75 percent contingency fee was based.

Considerations with Regard to the Fairness Analyses

In many transactions, the investment banker presentation to the special committee or to the entire board of directors—often referred to as the "banker book"—is not required to be disclosed to investors. However, in a merger dispute, the discovery process often reveals both the final banker book and any prior drafts. Differences between drafts and the final analysis may be justified, but these differences may also raise questions.

It is typical for the target company and its suitor to revise financial projections during the deal process. In these situations, it is often the latest set of financial projections, prior to the signing of the deal, that are relied upon by both the financial adviser and—if the transaction is litigated—by the courts.

Occasionally, the valuation inputs used by the investment banker in the fairness opinion analysis may be challenged by the financial expert retained by a shareholder plaintiff.

The following list presents some of the potential disagreements with respect to the selected valuation inputs:

- Justification for the selected beta—If the target company was publicly traded, there may be a question as to why the investment banker selected a beta based on either comparable or guideline publicly traded companies—rather than the target company's own beta. The time horizon for the selected beta (i.e., one-year, two-year, five-year) may also be a question. Statistical analysis is often conducted to support—or rebut—a selected beta.
- Target capital structure—The capital structure used by the investment banker may be questioned. For example, the investment banker may select the capital structure on the industry-based capital structure at the time the deal was approved. In contrast, another analyst may base the analysis on the target company's actual capital structure as of the unaffected date.
- Long-term growth rate—Investment bankers and valuation analysts may disagree about the expected long-term growth rate. Whether the expected long-term growth rate should reflect only inflationary growth or include real growth may be debated.

International exposure can be a factor that influences the expected long-term growth rate. Another factor may be the target company's recent and anticipated trends for market penetration and market share.

- Financial projections—If the M&A transaction is disputed, the parties may question whether the investment banker—or the analyst—adjusted management's financial projections and, if so, what was the basis for making such an adjustment.
- Selection of comparable or guideline companies and transactions—The investment banker and the analyst may disagree on the companies that should be considered in a market approach analysis. In litigation, the court has the final say on which, if any, of the guideline companies are appropriate.

Use of Management-Prepared Financial Projections

It is generally accepted that the target company's management is in best position to prepare company financial projections. This is particularly true if the target company regularly prepares financial projections during its annual planning process. This conclusion is based on the belief that nobody knows the company better than its own management.

A special committee formed for the purpose of overseeing the deal process and negotiating deal terms with a potential acquirer may amend the financial projections. This may occur when (1) the special committee concludes that the financial projections are either optimistic or pessimistic or (2) multiple sets of financial projections are prepared that are contingent on various scenarios.

The target company's board of directors is responsible to obtain the best possible price. There may be occasions when the company financial projections may be too optimistic—in order to achieve that goal. In these situations, financial projection revisions may be made by the special committee or by the investment banker at the direction of the special committee.

Alternatively, there may be occasions when the target company's financial projections are too downward-biased. There may be parties who are more focused on choosing the deal at any price than on preparing credible financial projections.

Examples of when parties are driven to complete the deal may include (1) a chief executive officer who has negotiated a higher pay package during the deal process to remain with the merged company or (2) an executive of the suitor who also has a board seat with the target company or a close relationship with some of the target's executives.

The investment bank serving as financial adviser to a target company's board of directors may assist in making or revising financial projections. This may occur when the target company is not well versed in making projections. The target company management may provide financial projections based on generally accepted accounting principles ("GAAP"). The banker may convert the GAAP-based net income projections to cash flow projections in order to develop a discounted cash flow valuation.

When provided with multiple financial projections, the analyst rendering the fairness opinion may apply judgment in determining the reliability of each financial projection.

The following discussion summarizes several judicial decisions where financial projections were an issue in the dispute.

Judicial Rejection of Management Financial Projections

- *In re Appraisal of PetSmart Inc.*—Vice Chancellor Slights of the Delaware Chancery Court noted that financial projections in prior cases were found to be unreliable

when "the company's use of such projections was unprecedented, where the projections were created in anticipation of litigation, where the projections were created for the purpose of obtaining benefits outside the company's ordinary course business, where the projections were inconsistent with a corporation's recent performance, or where the company had a poor history of meetings its projections."[6]

The Chancery Court also observed that the company management had no history of creating financial projections beyond short-term earnings guidance.

Judicial Acceptance of Management Financial Projections

- *Cede & Co. v. Technicolor, Inc.*—Chancellor Chandler of the Chancery Court accepted the company financial projections and rejected the petitioner expert's alteration of those projections, writing that, "When management projections are made in the ordinary course of business, they are generally deemed reliable."[7]

  The judicial opinion also noted that the subject company management had a very good track record of meeting earnings guidance (i.e., financial projections).

Judicial Rejection of Third-Party Financial Projections

- *In re Radiology Assocs., Inc.*—The Chancery Court rejected the petitioners' valuation analysis because the prospective financial inputs were too speculative. The Chancery Court reached this conclusion due to the fact that the company management neither created the financial projections nor gave any guidance to the third party that created the projections.[8]

Judicial Acceptance of Second Set of Projections

- *Delaware Open MRI Radiology v. Kessler*—Vice Chancellor Strine of the Chancery Court opined about the fairness opinion's exclusion of financial projections that were based on the company's expansion plans: "In essence, when the court determines that the company's business plan as of the merger included specific expansion plans or changes in strategy, those are corporate opportunities that must be considered part of the firm's value"[9] as a going concern (also citing *Cede & Co. v. Technicolor*, 684 A.2d 289 at 298-99, and *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206 at 222 (Del. 2005)).

- *In re United States Cellular Operating Company*—Vice Chancellor Parsons of the Chancery Court concluded that financial projections should include reasonably anticipated capital expenditures, stating that "This is not a situation where projecting capital expenditures to account for conversion to 2.5G and 3G is speculative. Industry reports included such expenditures and the Companies themselves 'anticipated' it. Therefore, Harris should have incorporated the effects of this expected capital improvement in his projections."[10]

  The judicial decision also noted that, under other circumstances, the court "should avoid, however, speculative costs that are not part of the company's operative reality" (citing *Paskill Corp. v. Alcoma Corp.*, 747 A.2d 549, 552 (Del. 2000)).

  This decision notes that the company management had no prior experience with preparing long-term financial projections. The fairness opinion was rendered by a firm that worked alongside management developing a set of projections. The financial projections were based on such factors as anticipated subscriber growth driven by population growth and market penetration and customer churn.

  Consequently, the two testifying experts in this dispute had no financial projections prepared solely by company management. Instead, the testifying experts had financial projections that were created by the investment bank with the assistance of company management. Both testifying experts applied these financial projections as a starting point and made their own adjustments to the financial projections.

Judicial Rejection of Second Set of Projections

- *In re PLX Technology Inc. Shareholders Litigation*—Vice Chancellor Laster of the Chancery Court rejected the use of a second set of financial projections that were based on growth initiatives. The Chancery Court reached this decision despite the financial projections having been prepared in the ordinary course of business.

In reaching its decision, the Chancery Court reasoned that, "to achieve even higher growth rates, particularly in 2017 and 2018, the December 2013 Projections contemplated a third layer of future revenue. It depended on PLX introducing a new line of 'outside the box' products that would use the ExpressFabric technology to connect components located in different computers, such as the multiple servers in a server rack. To succeed with this line of business, PLX would have to enter the hardware market and compete with incumbent players like Cisco."[11]

- *In re Micromet, Inc. Shareholders Litigation* —The Chancery Court addressed the claim that the board had breached its fiduciary duty of disclosure by failing to disclose certain financial projections that were ultimately not relied upon for the fairness opinion. The Chancery Court stated, "Similarly, I find that Micromet was not required to disclose the 'Upside Case' projections that Micromet's management provided to Goldman. Again, these projections were not relied upon by Goldman in its fairness opinion and at least some of the directors found the projections to be unreliable and overly optimistic."[12]

The Role of the Investment Bank in M&A

The investment bank's role in M&A transactions may vary based on many factors. The following discussion summarizes some of these factors.

- Were the wheels already set in motion when the investment bank was hired, and was an acquirer nearly decided upon?

  If so, the investment banker's role may be confined to managing the rest of the deal process and providing a fairness opinion. Sometimes, when the overture is from a strategic acquirer, the target company already knows the suitor company well.

  In this case, the investment banker will be used more as a sounding board and as a reality check:

  1. to provide confirmatory analysis and
  2. to evaluate the risk and reward of competing offers.

  When the investment bankers are more involved than this, they may make introductions to other potential suitors. These introductions are not always with the intent of a merger at the outset, but may lead to merger discussions later.

- Was the target company desirous of being acquired, and has it already been approached by a suitor company?

  If the client intends to be sold and no suitors have been identified, or they have but discussions have not commenced, then the investment banker's role will be far more extensive.

  Investment bankers will evaluate bids. This is referred to as buyer qualification. Buyer qualification may involve determining whether the bidders are:

  1. experienced with making acquisitions, which can affect the speed of the deal process;
  2. a good strategic fit, which may lead to a higher bid; and
  3. including contingencies in their offer.

  During the due diligence process, the target company's investment banker may weed out bidders who may be "phishing." This is a term used for companies that have no intention of making the acquisition, but rather just want access to competitive information.

  One procedure for rooting out this type of potential suitor is monitoring the data room for how long they spend on particular documents, such as the customer lists, and how little time they spend on other documents that an acquirer would ordinarily want to inspect.

- Is there a need to accelerate the completion of the transaction?

  This factor can be a consideration when deciding whether to conduct an auction or more of a targeted, high-level solicitation. The more entities poking around in the virtual data room, the longer it takes to complete a transaction.

  From the perspective of the acquirer, information technology infrastructure is usually a big part of post-merger integration. Achieving synergies depends on the success of post-merger integration.

- Is the best strategic fit with one or two companies, or is a more competitive bidding process best?

  It is said that the auction process often produces the highest price. However, there are other important considerations, such as

the length of the deal process, which may be longer for an auction.

During that time, unforeseen economic events could lead to a lower stock price and a lower resulting takeout price.

The more bidders that are involved, the higher the risk that the negotiations will be leaked to the public. This could lead to a higher stock price of the target company (if publicly traded) and spook suitors.

A longer sales process can lead to employees resigning out of fear of losing their jobs. This could also kill a deal, because part of the value of any company is its employees.

Another risk is that leaks can stoke fear in a company's suppliers and customers that their treatment under the merged entity will not be the same.

- Is the target company or the suitor company experienced with M&A?

If management is inexperienced, the investment bank will need to spend much more time coaching management, being more involved with negotiations, and assisting with making financial projections.

- Is the investment banker hired to explore multiple strategic options other than just being acquired?

One example of alternative strategic options is a company with significant real estate that could conduct sale/leasebacks to extract untapped value. This may be a viable strategy if the value of those assets is underappreciated by the financial markets.

An investment bank may explore the value of joint ventures or other arrangements, as an alternative to a sale of the company, if it was hired to evaluate multiple strategic options.

- Are private equity funds potential acquirers?

Every private equity fund has a target internal rate of return ("IRR"). Knowing that IRR, the banker can model five to six years of cash flow projections (a typical investment holding period for a private equity company M&A transaction), make an assumption about an appropriate exit multiple, and backsolve for the acquisition price and implied pricing multiple that would allow the fund to achieve its targeted IRR.

Such an analysis would help the target company:

1. to estimate the price that the private equity fund may be willing to pay and
2. to compare that price to offers made by strategic buyers.

- Are one or more of the final bidders insisting on a stock-for-stock transaction?

If so, the investment bank will evaluate both the target company and the acquirer company. Such an analysis requires another set of financial projections.

The range of value of both the target company and the acquirer company will be used to determine the exchange ratio, or if an exchange ratio has already been agreed upon in principle, to determine if the exchange ratio is fair.

Because the acquirer's stock is its currency with which it will pay the merger consideration, the banker will assess whether the acquirer—and the resulting merged company—is a solid long-term investment.

Consideration of projected post-merger synergies may also be important. This is because the target company's shareholders will hopefully benefit from these synergies.

- How is the cultural fit, and how difficult will post-acquisition integration be?

Investment bankers retained by the acquirer company rather than the target company may also assist with identifying pitfalls to post-acquisition integration. Examples include the cultural fit, which is a human resources matter.

Some companies have a "coat and tie" culture while others are more informal. Some have a policy of extending employee bonuses while others do not.

Organizational charts and employees reporting to one versus several higher level executives can differ as well. For example, the target company may have a simple structure where each employee reports to only one superior.

In contrast, the acquirer may have its employees report to multiple higher level executives. Ignoring the cultural fit can lead to employee defections after the merger.

- How much of the synergies are included in the acquisition price premium offered by the preferred bidder?

The highest bid is not always the best bid. The acquirer company will usually pay a price premium that is less than projected synergies (which is a reasonable posture

because otherwise there is no value to the deal for the acquirer).

The principle that fair value equals the deal price less some portion of synergies was addressed in *Verition v. Aruba*.[13] There was no auction process, controlled sale, or targeted high-level solicitation. Instead, there was a closed negotiation (i.e., one bidder).

While the Delaware Supreme Court ruled that this was not an issue, it addressed and rejected the Court of Chancery's ruling that fair value was equal to the unaffected market price of the target stock. Instead, it ruled that fair value (for arm's-length transactions disputed in appraisal rights cases) was equal to the deal price less a portion of synergies.

In reaching this conclusion, the Delaware Supreme Court pointed to a study that found sellers typically collected an average of 31 percent of expected synergies. However, this percentage varied widely due to transaction value being a matter of negotiations and the number of bidders and their aggressiveness.

The Delaware Supreme Court ruled that fair value was 22 percent below the deal price and 12 percent above the unaffected market price.

Notably, the Delaware Supreme Court did address the issues of synergies sometimes not being achieved and that acquirers usually negotiate a deal price premium that does not include all anticipated synergies.

Summary and Conclusion

Investment bankers are often retained to provide a variety of M&A services—in addition to issuing a fairness opinion. Some of these M&A services may include managing the deal process, soliciting bids, making introductions, evaluating bids and then best offers, and assisting with deal negotiations.

Valuation analysts are also qualified to render fairness opinions. Furthermore, analysts are able to retain their independence because their services are not provided on a contingent fee basis.

M&A transactions may have a flawed deal process that eventually leads to costly shareholder inappropriate litigation. Some of these flaws may result from the fee structure for the investment bank. Retaining a valuation analyst is one way to evaluate the fairness of a particular transaction and potentially avoid future shareholder litigation.

Notes:

1. In re Appraisal of Dell Inc., C.A. No. 9322-VCL, 2016 WL 3186538 at *38-49 (Del. Ch. May 31, 2016). Numerous academic papers were cited to support the credence that the go-shop period following the pre-signing phase rarely results in topping bids. In general, most transaction price competition occurs before the deal is accepted in principle One footnote in the Dell opinion cited the following quote from M&A attorney Martin Lipton during an interview of Mr. Lipton by one of the expert witnesses in this matter, Professor Guhan Subramanian: "The ability to bring somebody into a situation [pre-signing phase] is far more important than the extra dollar a share at the back end [go-shop phase]. At the front end, you're probably talking about 50%. At the back end, you're talking about 1 or 2 percent."
2. C.A. No. 11184-VCS, 2018 WL 3602940 (Del. Ch. July 27, 2018), opinion by Vice Chancellor Slights; synopsis from Jill B. Louis and Rashida Stevens, "Chancery Court Cites Flawed Process in its Resort to Traditional Valuation Methodology," *The National Law Review* (September 6, 2018).
3. C.A. No. 9980-CB, 2018 WL 508583 (Del. Ch. Jan. 23, 2018); synopsis from Yaron Nili, "Delaware Court Preliminarily Enjoins Merger Due to Flawed Sales Process," *Harvard Law School Forum on Corporate Governance* (December 7, 2014).
4. C.A. No. 10589-CB, 2016 WL 6651411 (Del. Ch. Nov. 10, 2016).
5. Guhan Subramanian, "Deal Process in Management Buyouts," *Harvard Law Review* (December 2016): 41.
6. In re Appraisal of PetSmart, Inc., Consol. C.A. No. 10782-VCS, 2017 WL 2303599 at *32 (Del. Ch. May 26, 2017).
7. Cede & Co. v. Technicolor, Inc., C.A. No. 7129, 2002 WL 23700218 at *7 (Del Ch. (Dec. 31, 2003, revised July 9, 2004), citing In re Radiology Assocs., Inc. Litig., 611 A.2d 485, 490-91 (Del. Ch. 1991).
8. In re Radiology Assocs., Inc. Litig., 611 A.2d 485, 490-91 (Del. Ch. 1991).
9. Delaware Open MRI Radiology v. Kessler, 898 A.2d 290 (Del. Ch. 2006), endnote no. 51.
10. In re U.S. Cellular Operating Co., No. Civ.A 18696-NC, 2005 WL 43994 at *37 (Del. Ch. Jan. 6, 2005).
11. In re PLX Technology Inc. Stockholders Litigation, C.A. No. 9880-VCL, 2018 WL 5018353 at *52 (Del. Ch. Oct. 16, 2018).
12. C.A. No. 7197-VCP, 2012 WL 681785 at *13 (Del Ch. Feb. 29, 2012).
13. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128 (Del. 2019).

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