

August 3, 2017

The Delaware Supreme Court Speaks to Market Evidence in Appraisal: *DFC*

The Delaware Supreme Court's ruling this week in *DFC* is its first significant statement on the role of market evidence in appraisal "fair value" determinations in seven years. The wide-ranging and thorough opinion marks a robust affirmation of the primacy of real-world evidence in determining fair value. [*DFC Global Corp. v. Muirfield Value Partners, L.P.*, No. 518, 2016 \(Del. Aug. 1, 2017\)](#).

Citing the statute's command that "all relevant factors" be considered in determining value, the Court declined to adopt an across-the-board presumption in favor of deal prices in appraisal cases. In that regard, the opinion noted, but chose to leave in place, the hugely pro-petitioner judicial gloss on the appraisal statute that—notwithstanding the statute's reference to the "fair value of stockholder's shares of stock"—eschews pre-merger stock market trading prices in favor of a pro rata share of the company's "going concern" value, thus ignoring minority discount. Nevertheless, the Supreme Court noted that the Court of Chancery has a "proven record" of according the deal price "predominant, and indeed exclusive weight" when the record supported that view (as it recently did in [*PetSmart*](#)), and endorsed "the economic reality that sale value resulting from a robust market check will often be the most reliable evidence of fair value." Furthermore, Chief Justice Strine wrote, the Court of Chancery may defer to the deal price even where the target company might have eked out more: fair value "does not mean the highest possible price that a company might have sold for had Warren Buffett negotiated for it on his best day and the Lenape who sold Manhattan on their worst."

Importantly, the Supreme Court also reaffirmed that the object of appraisal is to value the company as a standalone entity, and that Delaware's appraisal statute requires the exclusion of "any portion of value that might be attributed to a synergy premium a buyer might pay to gain control." Thus, when determining fair value, a court must take into account the views of all the "market participants," including equity analysts, stockholders, and other potential purchasers who have chosen not to top the winning bid. In the case of a public company with a "deep base of public shareholders, and highly active trading," the market trading price of the company's stock will be highly informative, as it "reflects the judgments of many stockholders about the company's future prospects."

If your address changes or if you do not wish to continue receiving these memos, please send an e-mail to Publications@wlrk.com or call 212-403-1443.

In so ruling, the Court rejected petitioners' argument that regulatory uncertainty rendered market evidence unreliable, holding that prospective buyers and the equity and credit markets alike were aware of the company's regulatory outlook. In the Court's view, there was no economic basis "to suggest that markets themselves cannot price this sort of regulatory risk," even when, as here, it implicated the very viability of the company. The Court also dismissed petitioners' argument that the deal price was unreliable because the buyer was a private equity firm that "focused its attention on achieving a certain internal rate of return and on reaching a deal within its financing constraints." The Court observed: "Any rational purchaser of a business should have a targeted rate of return that justifies the substantial risk and costs of buying a business. That is true for both strategic and financial buyers." The Court found "especially untenable" the suggestion that private equity financing constraints imply unfair pricing and categorically rejected what it termed a "private equity carve out" from market evidence.

Underlying *DFC*'s holding is the Supreme Court's recognition that when it comes to corporate value, "the collective judgment of the many is more likely to be accurate than any individual's guess." The Court has thus oriented the law back toward reliance on verifiable market-based evidence reflecting the revealed preferences of "folks who had money at stake," rather than litigation-driven experts who often offer "ridiculously varying positions." Appraisal litigation funds are now on authoritative notice that real-world evidence counts, and will often be dispositive, in appraisal proceedings in which arbitrageurs seek returns even higher than the merger premium by invoking Delaware's appraisal statute.

Theodore N. Mirvis
William Savitt
Ryan A. McLeod
Nicholas Walter