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Delaware Supreme Court Issues Important Appraisal Decision

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On August 1, 2017, the Delaware Supreme Court issued an important decision in *DFC Global Corp. v. Muirfield Value Partners, L.P.*, No. 518, 2016 (Del. Aug. 1, 2017), emphasizing the significance of a merger price resulting from a competitive, arm’s-length sale process in determining fair value under Delaware’s appraisal statute. Writing for the first time since the burgeoning trend of appraisal arbitration, the Court refused to establish a bright-line rule that would require deference to the merger price—noting the difficulty in “craft[ing], on a general basis, the precise pre-conditions that would be necessary to invoke a presumption of that kind”—but it emphasized “the economic reality that the sale value resulting from a robust market check will often be the most reliable evidence of fair value.” The Court reversed the Delaware Court of Chancery’s decision determining fair value to be greater than the merger price and remanded the case for further consideration in light of, among other things, the facts that “i) the transaction resulted from a robust market search that lasted approximately two years in which financial and strategic buyers had an open opportunity to buy without inhibition of deal protections; ii) the company was purchased by a third party in an arm’s length sale; and iii) there was no hint of self-interest that compromised the market check.”

In addition, the Court rejected the trial court’s refusal to accord greater weight to the merger price because the financial buyer sought to realize an internal rate of return. The Court stated that “all disciplined buyers, both strategic and financial, have internal rates of return that they expect in exchange for taking on the large risk of a merger,” but that “has no rational connection to whether the price it pays as a result of a competitive process is a fair one.” The Court also held that the trial court erred in its decision to accord equal weight to the deal price, a comparable companies valuation and a discounted cash flow analysis because it did not “explain[], with reference to the economic facts before it and corporate finance principles, why it is according a certain weight to a certain indicator of value.” The decision is also notable for its discussion of the relevance of trading prices in appraisal analysis, stating that “[w]hen . . . the company ha[s] no conflicts related to the transaction, a deep base of public shareholders, and highly active trading, the price at which its shares trade is informative of fair value.”

As we have noted after other recent Delaware appraisal decisions, including *In re Appraisal of PetSmart, Inc.*, C.A. No. 10782-VCS (Del. Ch. May 26, 2017), and *Merion Capital, L.P. v. Lender Processing Services, Inc.*, C.A. No. 9320-VCL (Del. Ch. Dec. 16, 2016), in which Weil successfully convinced the trial court that the merger price was the best evidence of fair value, appraisal litigation is likely to continue to be a source of litigation risk in public company merger transactions. But, combined with a recent statutory amendment enabling acquirors to pre-pay some or all of the merger consideration to

appraisal petitioners in order to limit the accrual of interest on an eventual fair value award in an appraisal proceeding, the Delaware Supreme Court's *DFC* opinion, which builds on cases like *PetSmart* and *Lender Processing*, should give some comfort to acquirors that Delaware courts will be reluctant, absent unusual circumstances, to second-guess that the price resulting from a competitive, arm's-length sale process is the best evidence of the acquired company's "fair value."

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