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THE SHIFT IN DELAWARE APPRAISAL LITIGATION

In 2017, the Delaware Supreme Court stressed deal price as a key measure of the fair value of dissenters' shares in M&A transactions with a "robust market check." In other recent decisions, appraisals have led to below-deal-price evaluations. The authors discuss certain Delaware legislation and the cases, which they find reflect a trend unfavorable to dissenters.

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2017 marked a significant shift in Delaware appraisal litigation, as the law turned in favor of publicly held companies and their acquirors, and against appraisal petitioners seeking higher-than-deal-price awards for their dissenting shares. Developments in appraisal cases thus far in 2018 have continued the trend.

Delaware appraisal rights arise from Section 262(h) of the Delaware General Corporation Law, which provides that dissenting stockholders in a merger may seek an appraisal of the "fair value" of their stock from the Delaware Court of Chancery.¹ When determining fair value, the court is to take into account all relevant factors, including "any techniques or methods which are generally considered acceptable in the financial community."² According to the statute, fair value

excludes any element of value arising from the accomplishment or expectation of the merger itself.³ For example, the value attributable to any synergies that the buyer expects to achieve in connection with the merger are not part of the "fair value" to which the petitioner is entitled.

Where there has been a "robust" sale process leading to an arm's length transaction, courts have generally relied on the negotiated deal price as a reliable indicator of fair value.⁴ However, where there has not been an arm's length transaction — or where the court has found

¹ DEL. CODE ANN. tit. 8, § 262(h) (2018).

² *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983).

³ tit. 8, § 262(h).

⁴ See, e.g., *Union Ill. 1995 Inv. L.P. v. Union Fin. Grp., Ltd.*, 847 A.2d 340 (Del. Ch. 2003) (giving full weight to the deal price because there was a competitive and fair auction, which followed a fair sale process).

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