



California Corporate & Securities Law

Nevada Supreme Court Adopts Delaware Approach To Fair Value Burden Of Proof

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Recently, the Nevada Supreme Court answered several questions concerning how to determine the “fair value” of shares under Nevada’s dissenters’ rights statutes (found in NRS [Chapter 92A](#)). [American Ethanol, Inc. v. Cordillera Fund, L.P.](#) (May 5, 2011).

Nevada’s dissenters’ rights statutes are primarily based on the Model Business Corporation Act (MBCA), which is in turn based on Delaware and New York case law. See [Minutes of Assembly Committee on Judiciary, May 14, 2009](#). This case was decided based on the definition of “fair value” in NRS 92A.320 before it was amended in 2009. [2009 Nev. Stat., ch. 361, § 64](#).

Fair Value – Flexibility and no Details

Noting that determining fair value “is not easy”, the Supreme Court concluded that a trial court may rely on “proof of value by any technique that is generally accepted in the relevant financial community and should consider all relevant factors, but the value must be fair and equitable to all parties”. (Citing *Advanced Communication Design v. Follett*, 615 N.W.2d 285, 290 (Minn. 2000)). This language is substantially similar to language that the Legislature added to the definition of “fair value” in 2009: “customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal”. NRS 92A.320(2).

Burden of Proof – Following Delaware

Next, the Court noted that Nevada’s Legislature had not assigned the burden of establishing fair value to either the shareholder or the corporation. In the absence of any legislative mandate, the Court adopted Delaware’s approach: “both sides have the burden of proving their respective valuation positions by a preponderance of evidence.” *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (1999). Final responsibility, however, for determining fair value lies with the court, which must make its own independent determination of fair value.

Standard of Review – Abuse of Discretion

Citing cases in Delaware and other jurisdictions, the Court determined that appellate review of a trial court’s determination of fair value is subject to an abuse of discretion standard.

For more information about Nevada’s dissenters’ rights statutes, see [Bishop & Zucker on Nevada Corporations and Limited Liability Companies](#).

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