"Fair Is Foul, And Foul Is Fair", But Are "Fair Value" And "Fair Market Value" Synonymous?

Posted In Mergers & Acquisitions,Nevada Corporations

5-23-2011

Last Friday, I wrote in this post about a recent Nevada Supreme Court decision that provides a modicum of guidance on how "fair value" is to be determined for purposes of Nevada's dissenters' rights law.

California's dissenters' rights law doesn't refer to "fair value". Rather, California uses the term "fair market value". According to Professor Harold Marsh, Jr., the use of the term "fair market value" dates back to 1939 when it was substituted for the phrase "fair cash value". H. Marsh, Jr., R. Finkle, & L. Sonsini, Marsh's California Corporation Law § 20.05[A] (4th ed.).

Although "fair market value" has been on the books for nearly four score years, the meaning of the term remains elusive. Unlike Nevada, California has not attempted to define the term (NRS 92A.320 defines "fair value" for purposes of Nevada's dissenters' rights law).

One California Court of Appeal had the following to say about the less than pellucid meaning of "fair market value" and similar terms:

> *We are aware that there exists a considerable literature in the law reviews and elsewhere on the subject of the valuation of the shares of dissenting minorities in mergers and consolidations, as well as considerable case law in other states. There seems to be no state having a statute that uses the same definition of value with similar legislative history, as our statute. Thus decisions in other jurisdictions are not directly in point. Many writers prefer some other definition, such as our former "fair cash value," or as "intrinsic value," or "real value" or "fair value," etc. We do not know what those terms or others like them mean, and we suspect that the writers who advocate them do not know either. They use them because they distrust the market as a gauge of value.*

Gallois v. West End Chemical Co., 185 Cal. App. 2d 765, 733-34 (1960) (footnotes omitted).

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

For one law firm, the distinction between "fair value" and "fair market value" may prove to be critical to whether it will be found liable for malpractice. *Amboy Bancorporation v. Bank Advisory Group, Inc.,* Case Nos. 10-638, 10-1870 (3rd Cir. April 25, 2011).[1]

In this case, a law firm helping a client prepare a proxy statement allegedly failed to "ascertain and advise" the client that "fair value" not "fair market value" was the proper valuation standard in New Jersey. The former client claimed that it would not and could not have proceeded with a merger at the higher "fair value" per share. The Circuit Court's opinion does not address the correctness of this distinction but rather the question of whether the misrepresentations in the proxy statement attributed to the law firm and a consultant can be regarded as the proximate cause of the damages incurred by their client.

---

[1] This is a "Not Precedential" decision. For an description of Not Precedential decisions, See Sarah Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit,* 81 Wash. L. Rev. 217 (2006).

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com