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IT AIN'T OVER TILL IT'S OVER: REVIEW OF DOJ M&A SETTLEMENTS UNDER THE TUNNEY ACT

By Michael A. Gleason, Lauren Miller Forbes, William Coglianese, and Tommy Rucker

Michael Gleason is a partner, and Lauren Miller Forbes, Bill Coglianese, and Tommy Rucker are associates, in the Washington, D.C. office of Jones Day. Contact: magleason@jonesday.com, lmillerforbes@jonesday.com, wcoglianese@jonesday.com, or trucker@jonesday.com.

Following a long antitrust review, you successfully negotiated a divestiture with the U.S. Department of Justice Antitrust Division ("DOJ") that allows your company to close its multibillion dollar acquisition, subject to a divestiture in one line of business. The DOJ filed its settlement papers with the court, and you have made your divestiture to a buyer that the DOJ approved. All that's left is court approval under the Tunney Act. Surely, you can move on from antitrust and focus on merger integration? One court has raised doubts.

Last month, the U.S. District Court for the District of Columbia approved a settlement between the DOJ and CVS related to its acquisition of Aetna. The approval comes 21 months after CVS' announcement of the transaction and nearly a year after the transaction closed. The court's decision ended one of the longest and most in-depth judicial reviews of a merger settlement under the Tunney Act in U.S. history. The case also is a rare example of a court requiring live testimony to inform its decision about the merits of the settlement under the Tunney Act.

This article details requirements of the Tunney Act and the role that the parties, the DOJ, and the court play in merger settlements that must undergo Tunney Act review. We also detail the likelihood that your transaction will be subject to a long Tunney Act review.

Why Do We Have the Tunney Act?

The Tunney Act, officially the Antitrust Procedures and Penalties Act, subjects civil antitrust settlements with the DOJ, including merger settlements, to federal district court review. The Tunney Act does not apply to settlements with the Federal Trade Commission.

At its core, the Tunney Act is a sunshine law. Before the Tunney Act, there was no formal judicial review of the DOJ's settlements in merger cases. Then, as now, consent decree settlements comprised the overwhelming majority of the DOJ's enforcement activity, approximately 80% of its civil antitrust suits in the decades leading up to the passage of the Tunney Act.[1]

In 1971, during the Nixon Administration, the DOJ settled litigation with International Telephone & Telegraph Corporation ("ITT") that required divestiture of three subsidiaries of the Hartford Fire Insurance Company. Subsequent confirmation hearings revealed controversial reasons for the

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in cases where the assigned judge has not previously reviewed a DOJ settlement under the Tunney Act, it may be advisable to contact (jointly with DOJ staff) the court to discuss the procedures.

Likewise, lengthy public interest proceedings are rare, and relatively few merger cases generate substantial or serious public comments that are likely to draw interest from the court. Federal courts have busy dockets. When presented with a settlement between the DOJ and merging parties that resolves competitive concerns, and there are no public comments, courts are not likely to conduct an independent investigation.

Between 2013 and 2018, the average length of a Tunney Act review was 122 days, excluding the CVS case. By comparison, the Tunney Act review in the CVS case was 329 days. The longest Tunney Act review in that period was 345 days, and Tunney Act review was longer than 6 months (roughly 180 days) in less than 15% of cases. Moreover, in the last few years (2016 through 2018), the length of Tunney Act review has trended downward, lasting just 106 days on average. These data demonstrate that the lengthy Tunney Act review in the CVS case was an outlier.

4. Is My Transaction Likely to Be the Outlier?

As the court's decision in the CVS case suggests, high profile transactions or transactions that involve a substantial volume of serious public comments are more likely to attract attention during Tunney Act review. Of course, health care has been a sensitive political topic in recent years. However, even transactions with these characteristics will not necessarily lead to a long Tunney Act review. For example, the DOJ received no public comments regarding its settlement in United Technologies' acquisition of Rockwell Collins and Tunney Act review lasted just 64 days. Likewise, the DOJ received just one public comment regarding its settlement in Disney's acquisition of Twenty-First Century Fox and Tunney Act review lasted just 64 days.

Conclusion

In sum, the CVS case may have been the perfect storm of factors that led to an unusually long and detailed Tunney Act review. But in the end, like most Tunney Act reviews, the court permitted the parties to close the transaction shortly after the DOJ's complaint and it ultimately entered the final judgment. Although the CVS case might lead to longer Tunney Act reviews on the margin, merging parties should not expect dramatic change.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they associated.

ENDNOTES:

[1]118 Cong. Rec. at 31,674 (statement of Sen. Tunney). *See generally* Report of the Antitrust Subcomm. of the House Comm. on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Con., 1st Sess., at ix, 7-8 (House Comm. Print 1959).

[2]119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney).

[3]15 U.S.C.A. § 16.

[4]*United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C.).

[5]*United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

[6]*Id.*

[7]*Id.* at 1460.

[8]Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub.L. No. 108-237 § 213, 118 Stat. 661 (2004).

APPRAISAL AFTER *ARUBA NETWORKS*: WHAT DO *JARDEN, COLUMBIA PIPELINE,* AND *STILLWATER MINING* TEACH US?

by S. Michael Sirkin

Mike Sirkin is a partner at Ross Aronstam & Moritz LLP in Wilmington, Delaware. The views below belong to the author alone and do not necessarily represent those of Ross Aronstam & Moritz LLP or its clients. Contact: msirkin@ramllp.com.

About six months ago, the Delaware Supreme Court issued its long-awaited decision in the *Aruba Networks* appraisal action.[1] Since then, the dust has settled, and the Court

of Chancery has applied the lessons of *DFC*, *Dell*, and *Aruba Networks* to a new batch of appraisal cases, involving Jarden Corporation,[2] Columbia Pipeline Group,[3] and Stillwater Mining Company.[4]

The post-trial opinions are long and dense, but they don't plow new doctrinal ground. These cases (plus a Superior Court decision in the Solera coverage dispute) shed light on lingering questions about what the post-*Aruba Networks* landscape looks like in the world of appraisal litigation. In short, it's a relatively safe place to be a public company respondent or an acquiror, and only getting safer.

Rather than summarize each case, this article attempts to synthesize them and addresses the questions that they call to mind for an appraisal practitioner.

Is There a *De Facto* Deal Price Presumption? It Appears So

In *Golden Telecom*, the Delaware Supreme Court conclusively rejected the respondent's argument in favor of a judicial presumption setting fair value equal to the merger price in appraisal cases.[5] The Court's primary reasoning was statutory: "Requiring the Court of Chancery to defer—conclusively or presumptively—to the merger price, even in the face of a pristine, unchallenged transactional process, would contravene the unambiguous language of the statute and the reasoned holdings of our precedent."[6] And because the statutory language endures, the Delaware Courts cling to the holding from *Golden Telecom* that no presumption exists.[7]

And yet, with *Columbia Pipeline* and *Stillwater Mining* as the latest additions, the list of public company appraisal decisions anchored by the deal price now comprises more than a dozen cases.[8] This list excludes *Jarden* and at least two other appraisal decisions that used the deal price instrumentally to anchor a fair value determination reached some other way.[9]

As a legal matter, there remains no presumption in favor of the deal price, and principles of stare decisis and statutory interpretation make that clear. But this decade of litigation outcomes demonstrates the gravitational pull of the deal price in a public company appraisal action.

Thus, as a matter of litigation reality, if it hasn't established a *de facto* presumption, the triumvirate of *DFC*, *Dell*, and *Aruba* has allocated the burdens of production and persuasion regarding sale process evidence such that the result is effectively the same.[10] In this regime, the respondent bears the initial burden of producing evidence that the deal price represents an "unhindered, informed and competitive market valuation."[11] If the respondent makes this requisite showing of "objective indicia of deal-price fairness," the burden of persuasion falls heavily on the petitioner, who must prove flaws in the process severe enough to break free from the deal price.[12]

This has proven to be a heavy lift for petitioners. For example, a conflicted, sell-side CEO front-running the board isn't enough.[13] Neither is a pair of conflicted sell-side financial advisors.[14] As a result, if the respondent points to "objective indicia of deal price fairness," including an arm's-length transaction involving a third-party, an unconflicted sell-side board, an acquiror with access to confidential information about the target, active negotiation between the parties, and the opportunity for other interested bidders to make a topping bid,[15] then the deal price is likely "at least first among equals of valuation methodologies in deciding fair value" in an appraisal case.[16]

Do I Need A Market Efficiency Expert? Probably Yes

On the heels of the Supreme Court's *Aruba Networks* decision, in which the high court reversed the Court of Chancery's determination of fair value by reference to an unaffected stock price, it seemed that the reversed Court of Chancery decision would remain a historical artifact—"*obiter dictum* and without precedential effect."[17] But then *Jarden* happened, and, once again, market efficiency is "a thing"[18] for purposes of appraisal litigation.

Briefly, the Court of Chancery had little confidence in the deal price for Jarden because of flaws in the sale process, the lack of a post-signing market check, and the difficulty in estimating the allocation of significant synergies between the parties in the deal.[19] But rather than rely on discounted cash flow or comparable companies analyses, the Court of Chancery held that Jarden's unaffected stock price was "a powerful indicator of Jarden's fair value."[20] The Court reached its determination on the strength of the "credible

and persuasive" analysis of Jarden's expert witness, Dr. Glenn Hubbard, which was unrebutted by the petitioners.[21]

Notably, for a large, widely held, publicly traded company, the evidence in support of the unaffected price in *Jarden* was not unusually strong. "As Dr. Hubbard explained, several factors support the conclusion that Jarden's stock traded in a semi-strong efficient market," including high daily and weekly trading volume, a $10 billion market cap, a 94% public float, a narrow bid-ask spread, and significant analyst coverage.[22]

To some degree, the same could be said about many public company appraisal targets. But here, the Court seemed to want more from the petitioners in the way of expert testimony.[23] The result is a paradoxical result in which the petitioners' prize for proving the sale process was flawed and the resulting price unreliable is an unaffected stock price decision below the deal price. Going forward, *Jarden* shows respondents that an unaffected stock price argument remains viable. And it shows petitioners that they should be prepared to meet it head on with expert testimony.

Does Our D&O Policy Cover Costs Associated with Appraisal Litigation? It Might (for Now)

In a July 31 decision, the Delaware Superior Court held that an appraisal action was a "Securities Claim" and that attorney's fees and prejudgment interest met the definition of "Loss" in Solera's D&O insurance policy.[24] As a result, Solera may look to its excess insurers to cover its defense costs plus $38 million in prejudgment interest incurred during its successful defense of an appraisal action. But the Court has since acknowledged that its opinion addressed questions of first impression under Delaware law, and has certified an interlocutory appeal of its coverage decision to the Delaware Supreme Court.[25]

This appeal bears watching, as it could affect whether other D&O policies in place cover costs incurred defending appraisal proceedings.

Conclusion

In the early part of this decade, public company appraisal arbitrage emerged as a viable investment strategy, and thus a meaningful legal risk to acquirors. Its legal roots traced back to the 2007 *Transkaryotic* decision, which permitted stockholders who acquired after the record date to seek appraisal.[26] As an asset class, an appraisal position gives holders a claim on the judicially determined fair value of the stock, plus interest at the legal rate of 5% above the federal reserve discount rate compounded quarterly.

In the first wave of post-trial appraisal decisions applying the Supreme Court's guidance from *DFC*, *Dell*, and *Aruba Networks*, the deal price remains a sticky upper bound on fair value in many cases, limiting the perceived upside of the strategy. *Jarden's* use of the unaffected stock price may be unusual, but the trend of fair value determinations at or below the deal price continues unabated. And now, there is hope that in certain cases, D&O coverage may shift the defense costs and prejudgment interest expenses away from respondents (and acquirors) and onto their insurance carriers.

Altogether, these cases diminish, but do not eliminate, the perceived risk to acquirors of appraisal going into the next decade.

ENDNOTES:

[1]S. Michael Sirkin, "*Verition v. Aruba Networks:* Some Answers and Some Questions About Market Efficiency in Delaware Courts," *The M&A Lawyer*, May 2019, Vol. 23, Issue 5.

[2]*In re Appraisal of Jarden Corp.*, 2019 WL 3244085 (Del. Ch. July 19, 2019).

[3]*In re Appraisal of Columbia Pipeline Group, Inc.*, 2019 WL 3778370 (Del. Ch. Aug. 12, 2019).

[4]*In re Appraisal of Stillwater Mining Co.*, 2019 WL 3943851 (Del. Ch. Aug. 21, 2019).

[5]*Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 216 (Del. 2010) ("Golden requests that this Court adopt a standard requiring conclusive or, in the alternative, presumptive deference to the merger price in an appraisal proceeding.").

[6]*Id.* at 218; *see also Huff Fund Inv. P'ship v. CKx, Inc.*, 2013 WL 5878807, at *12 (Del. Ch. Nov. 1, 2013) ("The Supreme Court's holding is clear. The Court of Chancery has a statutory mandate to consider 'all relevant factors' in conducting an appraisal proceeding, and, accordingly, the Supreme Court declined to impose a presumption systematically favoring one of those factors—merger price—over the others.").

[7]*DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 348 (Del. 2017) ("In this appraisal proceed-

ing . . . the respondent argues that we should establish, by judicial gloss, a presumption that in certain cases involving arm's-length mergers, the price of the transaction giving rise to appraisal rights is the best estimate of fair value. We decline to engage in that act of creation, which in our view has no basis in the statutory text . . ..").

[8] *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019); *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017); *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017); *In re Appraisal of Stillwater Mining Co.*, 2019 WL 3943851 (Del. Ch. Aug. 21, 2019); *In re Appraisal of Columbia Pipeline Group, Inc.*, 2019 WL 3778370 (Del. Ch. Aug. 12, 2019); *In re Appraisal of Solera Hldgs., Inc.*, 2018 WL 3625644 (Del. Ch. July 30, 2018); *In re PetSmart, Inc.*, 2017 WL 2303599 (Del. Ch. May 26, 2017); *Merion Capital L.P. v. Lender Processing Servs., L.P.*, 2016 WL 7324170 (Del. Ch. Dec. 16, 2016); *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 6164771 (Del. Ch. Oct. 21, 2015); *LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443 (Del. Ch. June 30, 2015); *Merlin P'rs LP v. AutoInfo, Inc.*, 2015 WL 2069417 (Del. Ch. Apr. 30, 2015); *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726 (Del. Ch. Jan. 30, 2015); *Huff Fund Investment Partnership v. CKx, Inc.*, 2013 WL 5878807 (Del. Ch. Nov. 1, 2013).

[9] *In re Appraisal of Jarden Corp.*, 2019 WL 3244085 (Del. Ch. July 19, 2019) (using $59 per share deal price less substantial synergies to anchor $48.31 per share fair value award, as determined by unaffected stock market price); *Blueblade Capital Opportunities LLC v. Norcraft Cos.*, 2018 WL 3602940 (Del. Ch. July 27, 2018) (using $25.50 per share deal price to anchor $26.16 per share fair value award, as determined by discounted cash flow analysis); *In re Appraisal of AOL Inc.*, 2018 WL 1037450 (Del. Ch. Feb. 23, 2018) (using $50 per share deal price to anchor $48.70 per share fair value award, as determined by discounted cash flow analysis).

[10] To be clear, these are practical observations about the Court of Chancery's case-by-case efforts to faithfully apply the teachings of the Supreme Court. As a legal matter, there remains no presumption, and the burden of proof in an appraisal case is borne by each party equally.

[11] *Jarden*, 2019 WL 3244085, at *23.

[12] *See Columbia Pipeline*, 2019 WL 3778370, at *24-26.

[13] *See Columbia Pipeline*, 2019 WL 3778370, at *24-26.

[14] *See Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 2018 WL 922139, at *42-44 (Del. Ch. Feb. 15, 2018).

[15] *Stillwater Mining*, 2019 WL 3943851, at *22-23.

[16] *In re Appraisal of AOL Inc.*, 2018 WL 1037450, at *1 (Del. Ch. Feb. 23, 2018).

[17] *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010).

[18] *Jarden*, 2019 WL 3244085, at *31.

[19] *Jarden*, 2019 WL 3244085, at *24.

[20] *Jarden*, 2019 WL 3244085, at *29.

[21] *Jarden*, 2019 WL 3244085, at *26 ("Jarden supports its position that the Unaffected Market Price is indicative of fair value with detailed analysis from Dr. Hubbard. Petitioners elected not to counter that evidence with expert evidence of their own. Instead, they attacked Dr. Hubbard's opinion as lacking in doctrinal and factual foundation. For reasons explained below, I find Dr. Hubbard's analysis of the reliability of Jarden's Unaffected Market Price as an indicator of fair value both credible and persuasive.").

[22] *Jarden*, 2019 WL 3244085, at *27.

[23] *Jarden*, 2019 WL 3244085, at *26.

[24] *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 2019 WL 3453232 (Del. Super. Ct. July 31, 2019).

[25] *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 2019 WL 4733431 (Del. Super. Ct. Sept. 26, 2019).

[26] *See In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345 (Del. Ch. May 2, 2007).

NO FREE PASS ON NO-SHOP BREACHES

By Michael Darby

Michael Darby is a partner in the Philadelphia office of Dechert LLP. Contact: Michael.Darby@dechert.com. The views expressed herein are the author's and do not necessarily represent the views of the author's law firm or its other lawyers.

On September 9, 2019, the Delaware Court of Chancery ruled that Genuine Parts Company, a service organization and distributor, had adequately alleged that its proposed merger partner, Essendant, Inc., an office supply wholesaler, had breached its contractual obligation not to solicit competing bids from third parties while their deal was pending.[1] In denying Essendant's motion to dismiss Genuine Parts' suit, the Court found that Genuine Parts had pled sufficient facts to infer "a wrongful and furtive pattern" of Essendant conduct that breached the parties' merger agreement and led to Essendant being acquired by office supplies retailer, Staples, Inc. The Court closely scrutinized the parties' merger agreement, concluding that although Genuine Parts had received the required $12 million termination fee, the merger agreement allowed Genuine Parts to pursue other

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