

# In Appraisal Cases, Court of Chancery Increases Deal Price-Based Valuation if Evidence Shows Pre-Closing Change

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> See page 3 for key takeaways

For the purposes of a statutory appraisal under Delaware law, a corporation's fair value is determined "on the date of the merger"<sup>1</sup> — in other words, at closing, not signing. However, deal terms, including price, are typically agreed upon months in advance of completion, and the value of the corporation can change during that span. In 1996 the Delaware Supreme Court addressed this issue in the appraisal context for the first time, holding that changes in value to the corporation as a going-concern prior to closing must be included in the valuation.<sup>2</sup>

When the Delaware courts began using the deal value as a starting point in valuing companies (as opposed to the traditional discounted cash flow method),<sup>3</sup> they had to determine whether the deal price should be adjusted to account for any changes in circumstances between signing and closing. Until recently, there have been only a handful of cases addressing this valuation issue, and the courts in most cases declined to adjust the deal price, finding there was a lack of evidence to show a change in value.<sup>4</sup>

Then, in 2019, the Court of Chancery issued back-to-back decisions that suggested expert evidence may be helpful in that context. In the first case, appraising the value of Columbia Pipelines Group, Inc.,<sup>5</sup> the court declined to make an adjustment because petitioners failed to "suggest a means of adjusting the deal price,"<sup>6</sup> but said that "[p]erhaps an expert could have constructed a metric."<sup>7</sup>

Nine days later, the Court of Chancery appraised Stillwater Mining Company based on the deal price less applicable synergies.<sup>8</sup> The court declined to adjust the deal price in large part because, much like in *Columbia Pipeline*, the *Stillwater* petitioners failed to present expert testimony regarding how the increased price of some metals increased Stillwater's value.

## Court of Chancery Adjusts Deal Price Due to Post-Signing Increases in Value

In two cases in 2021 and 2022, however, the Court of Chancery increased a deal-price-less-synergies valuation due to a change in corporate value between signing and closing. In both cases, the court relied on expert evidence where the potential change in corporate value may not have been reflected in the deal price. These cases, discussed below, provide guidance for directors, officers and advisors negotiating transactions.

<sup>1</sup> *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 299 (Del. 1996).

<sup>2</sup> *Technicolor*, 684 A.2d 289 at 299.

<sup>3</sup> See our May 8, 2019, client alert, "[Supreme Court Reinforces Deal Price Minus Synergies as 'Strong Indicator' of Fair Value](#)," and our May 9, 2020, client alert, "[Court of Chancery Continues To Rely on Market-Based Metrics in Appraisal Decisions](#)."

<sup>4</sup> *Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340 (Del. Ch. 2004); *In re PetSmart, Inc.*, C.A. No. 10782-VCS (Del. Ch. May 26, 2017).

<sup>5</sup> *In re Appraisal of Columbia Pipeline Grp., Inc.*, Consol. C.A. No. 12736-VCL (Del. Ch. Aug. 12, 2019).

<sup>6</sup> *Columbia Pipeline Group*, C.A. No. 12736-VCL, Slip Op. at 95.

<sup>7</sup> *Columbia Pipeline Group*, C.A. No. 12736-VCL, Slip Op. at 95.

<sup>8</sup> *In re Stillwater Mining Co.*, Consol. C.A. No. 2017-0385-JTL (Del. Ch. Aug. 21, 2019).

In 2021, *In re Appraisal of Regal Entertainment Group*,<sup>9</sup> the court determined that the deal price (\$23.00) minus synergies (yielding a fair value of \$19.23) was the most reliable indicator of fair value. However, after the merger agreement was signed but before the transaction closed, U.S. corporate tax rates were lowered. Regal agreed that the tax reform increased the corporation's value, but argued that the increase was not as large as the petitioners claimed.

Both parties relied on expert testimony regarding the increase in value. The court agreed that the lowered tax rate was part of the "operative reality" of Regal at closing and that an upward adjustment was warranted. Regal argued that the upward adjustment should be discounted because a portion of the increase was factored into the deal price, but the court disagreed. Although Regal provided evidence of market commentary about the impact generally of the lower tax rates, the court required specific evidence about Regal.<sup>10</sup> The court added \$4.37 to result in a fair value of \$23.60, slightly above the deal price.

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<sup>9</sup> *In re Appraisal of Regal Entm't Grp.*, Consol. C.A. No. 2018-0266-JTL (Del. Ch. May 13, 2021), judgment entered, (Del. Ch. May 28, 2021).

<sup>10</sup> *Regal*, Consol. C.A. No. 2018-0266, JTL Slip Op. at 125.

In 2022, the Court of Chancery again adjusted a deal-price-less-synergies valuation (\$44.29), this time due to outperformance of projections and analysts' expectations. In *BCIM Strategic Value Master Fund, LP v. HFF, Inc.*,<sup>11</sup> after signing, the corporation had a significant earnings beat and there was evidence that the increased performance would continue into the future.

Relying in part on expert evidence, the court found that the corporation's "outperformance was both more significant and durable,"<sup>12</sup> distinguishing it from *In re PetSmart*.<sup>13</sup>

The court noted that the projections the board relied on when it negotiated and approved the transaction at \$49.16 per share did not anticipate the increased performance, and the valuation analysis of the corporation's financial advisor "did not incorporate value from the Company's pipeline of deals, which suggested that the Company would perform better than budgeted."<sup>14</sup> The court increased the deal price less synergies number by \$2.30 for a fair value determination of \$46.59.

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<sup>11</sup> *BCIM Strategic Value Master Fund, LP v. HFF, Inc.*, C.A. No. 2019-0558-JTL (Del. Ch. Feb. 2, 2022).

<sup>12</sup> *HFF*, C.A. No. 2019-0558-JTL, Slip Op. at 70.

<sup>13</sup> *In re PetSmart, Inc.*, 2017 WL 2303599 (Del. Ch. May 26, 2017).

<sup>14</sup> *HFF*, C.A. No. 2019-0558-JTL, Slip Op. at 25.

## Takeaways

- In recent appraisal cases, the Chancery Court has shown a willingness to find fair values in excess of the deal price if petitioners can prove that a corporation increased in value between signing and closing. On the other hand, the court has indicated that a company's value may also *decrease* if new information is negative.
- A petitioner must provide sufficient evidence, including possibly expert analysis, in order to convince the court an adjustment is warranted. On the company side, meanwhile, absent explicit evidence, the court may decline to find that a board considered possible future increases in value when negotiating a deal price. Defense lawyers should consider this in formulating their fact and expert discovery strategies, as both sides carry the burden of proving their cases in an appraisal action.
- If a board negotiating a transaction is aware of a pending market or legal change that has the potential to alter a corporation's value, it should consider that and document its deliberations regarding that issue, particularly where appraisal rights may be available.

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