

BLB&G Represents 21 of the Nation's Leading Finance and Law Professors in *Amicus* Brief Opposing Corporate Effort to Undermine Stockholder Appraisal Rights

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Almost two dozen of the most accomplished economics, corporate finance and corporate law experts in the country submitted an important *amicus* brief as the Delaware Supreme Court considers an appeal that seeks to rewrite a Delaware statute and undo decades of settled corporate law.

DFC Global Appraisal Appeal Raises Red Flags for Experts

In this appraisal, DFC Global stockholders petitioned the Delaware Chancery Court to appraise the fair value of their shares when the company was sold to a private equity buyer. Following trial, the Court issued a fact-intensive, 65-page decision explaining that given the unreliable market conditions for DFC Global when the company was sold, the Court would use a blended analysis of the transaction price, a discounted cash flow analysis and a comparable company analysis to determine the fair value of DFC Global shares at the time of the closing of the transaction. Based on this fact-driven assessment, the Court concluded that the fair value of DFC Global was \$10.21 per share -- a modest premium over the \$9.50 per share merger price.

Rather than just pay the judgment and give the former DFC global investors who sought statutory appraisal the fair value of their shares, DFC Global pursued an ideologically driven appeal that is premised on urging the Delaware Supreme Court to rewrite Delaware's appraisal statute by requiring the Chancery Court to effectively always accept the merger price as the "Fair value" if a public merger appears to arise from an arms' length negotiating process. If adopted, this would undermine the right of stockholders to obtain a fair value appraisal in all but the most unusual of cases.

The right to seek a fair value appraisal is a fundamental right of shareholders whose stock is taken from them against their will in a corporate transaction. Shareholders who want to preserve this right must make a demand for appraisal on the company before the shareholders vote on the transaction *and* either abstain or vote against the transaction themselves. In an effort to preserve this fundamental stockholder right and critical balance in Delaware law, Bernstein Litowitz Berger & Grossmann LLP ("BLB&G") was honored to be retained by a group of some of the nation's most prominent finance and business law academics, who bring a wide variety of data, study and analysis to this issue. Uniformly, they have come together to raise their concerns with Delaware's top court in an *Amicus Curiae* ("Friend of the Court") brief filed this past Friday.

A Solution in Search of a Problem -- and an All-Too-Familiar Pattern: Corporate America Seeking to Erode Investor Rights

Section 262 of the Delaware General Corporate Law has long directed the Court of Chancery to "take into account all relevant factors" in determining fair value. DFC Global's appeal seeks to rewrite this statute and eliminate a critically important investor protection. Its argument would require the Court of Chancery to no longer take into account all

relevant factors, but to *automatically* force the merger price of a transaction on a dissenting shareholder merely because the transaction may appear to involve an arm's length buyer in a public sale.

The *Amici* professors' extensive academic work addresses this issue, and they strongly disagree with DFC Global's proposed argument as being bad law, bad economics, and bad policy. For example, sound economic theory demonstrates that the credible threat of appraisal plays a critical role in obtaining a fair price. Adoption of a categorical merger price presumption nullifies this threat and harms all dissenting stockholders in future public transactions.

Moreover, the brief makes a compelling case for upholding the statute and continuing the decades-old practice of allowing the Court of Chancery to exercise its judgment in considering "all relevant factors" in an appraisal proceeding. Valuation is a fact-intensive inquiry. The Chancery Court has often considered the merger price as a factor in determining "fair value." The merger-price presumption advanced by DFC Global would, however, require the Chancery Court to defer to the merger price (and only the merger price) without any independent analysis, even though unique sales processes, market conditions, and deal protections (no-shop provisions, matching rights, asset lock-ups and termination fees) may and often do distort a true auction dynamic. Moreover, even a process free from any shortcomings may still result in a price that is inadequate as of the closing date, for example, because of company-specific or industry-wide changes between the announcement and the closing of the transaction.

A copy of the *amicus* brief can be viewed [HERE](#). A copy of the Motion for Leave to file the *amicus* brief, which includes brief biographies of the illustrious group of professors we represented, can be viewed [HERE](#).

If you are interested in learning more about this case and about any further developments, please contact:

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