# THE LAW RELATING TO INVESTMENT BANKERS

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Case law relating to investment bankers and financial advisors has largely centered on (i) analysis of the adequacy of fairness opinions, and (ii) determinations of whether financial advisors engaged by boards of directors have conflicts of interest that call into question the reliability of their advice.[1]

## I. Fairness Opinions

This section catalogues, in reverse-chronological order, state and federal cases discussing investment banker fairness opinions. The cases are then organized into one of three categories: 1) Favorable Discussion; 2) Neutral Discussion; and 3) Unfavorable Discussion

### A. State Cases

#### 1. Favorable Discussion

In *In re MeadWestvaco Stockholders Litigation* the plaintiffs argued that one of the three fairness opinions that the corporation's board of directors received was flawed, thus contributing to an unfair transaction. 168 A.3d 675, 687 (Del. Ch. 2017). The receipt of a fairness opinion favors the inference that a corporation's board of directors conducted a fair transaction. *Id.* The court noted that even though one fairness opinion was flawed, the other two fairness opinions were not flawed; accordingly, the other two fairness opinions outweighed the one flawed fairness opinion. *See id.* n.60. In the totality, the fairness opinions did not weigh against the board. *Id.* at 688. Thus, the court viewed the fairness opinions in a positive light.

In *Gordon v. Verizon Commc'ns, Inc.*, the court decided the viability of a proposed settlement of a putative shareholders' class action, which challenged—based on alleged material omissions from proxy statements—the corporation's acquisition of all the shares of an entity owned by its partner in a joint venture. 148 N.Y.S.3d 557, 561 (N.Y. App. Div. 2017). The proposed settlement contained a provision that required the corporation to obtain a fairness opinion if there was a disposition of greater than five percent of the company's assets. *Id.* at 562. At the fairness hearing an expert testified on behalf of an objector to the settlement stating that "fairness opinions involving small asset sales, although not required to be publicly disclosed, are routine and that the requirement of a fairness opinion would not provide any real benefit" to the corporation's shareholders. *Id.* at 563. The plaintiff countered with an affidavit of her own expert who stated that "the fairness opinion requirement provided a substantial benefit to the shareholders by requiring a valuation analysis that would determine the fairness of the transaction price." *Id.* at 564. The court opined that the fairness opinion requirement was "the most beneficial aspect of the proposed settlement to the shareholders." *Id.* at 569. This is

[1] There is a separate body of case law that discusses when a party engaged to assist in the capital raising activity is required to be registered or whether their limited activity will qualify them to be treated as an unregistered "finder". A similar body of cases exists analyzing the role of financial advisors participating in mergers and acquisitions transactions and whether the registration is required in light of their activities. The two latter categories are not addressed in this discussion. Similarly, this discussion does not address federal or state regulation of broker dealers.

because it provided a benefit to the shareholders "in mandating an independent valuation, without restricting the flexibility of directors in making a pricing determination." *Id.*

In *Norton v. K-Sea Transp. Partners L.P*, the investment banker's fairness opinion did not consider the fairness of any compensation to the respondent's officers, directors, employees, or affiliates, relative to the compensation of public equity holders. 67 A.3d 354, 359 (Del. 2013). The court held that, although the fairness opinion failed to include this information, the investment banker still complied with the limited partnership agreement's requirements, which only required the general partner to consider whether the merger was in the best interests of the partnership. *See id.* at 367. Thus, the fairness opinion was not faulty because it stayed within its scope.

The plaintiffs in *In re Morton's Restaurant Group, Inc. Shareholders Litigation* argued that one of the investment banker's perpetuity growth rate value used to support its fairness opinion was "unreasonably low." 74 A.3d 656, 674 (Del. Ch. 2013). The basis for the plaintiffs' argument was a comparison of the perpetuity growth rate of a secondary fairness opinion. *Id.* However, the court noted that there were no material omissions within the "low value" fairness opinion's analysis. *Id.* Further, "ordinary variations between the two analyses are not well-pled facts that create a reasonable inference that the [investment bankers] colluded with the board to justify a lower price." *Id.* at 675. Thus, Delaware courts accept variations among fairness opinions and treat those variations as ordinary analysis.

In *Clements v. Rogers*, the plaintiff challenged a fairness opinion based on the company's engagement letter to the investment banker that stated $50,000 would be paid as retainer and $200,000 would be paid upon delivery of a fairness opinion for a proposed acquisition. 790 A.2d 1222, 1229 (Del. Ch. 2001). The plaintiff alleged that 80% of the fairness opinion fee was contingent upon the receipt of an opinion affirming—rather than rejecting—the transaction's fairness. *Id.* at 1244. The court held that the plaintiff interpreted the engagement letter unreasonably, and it should instead be read as paying the investment banker for a formal fairness opinion letter, whether good or bad. *Id.* The plaintiff also argued that the engagement letter tainted the fairness opinion because it required the investment banker to update the opinion for inclusion in any proxy statement connected to the transaction. *See id.* The court disagreed with the plaintiff because this clause would naturally occur in a positive opinion, but not a negative one. *Id.* Thus, the engagement letter did not influence the fairness opinion.

The plaintiffs in *In re Unocal Exploration Corp. Shareholders Litigation*, claimed that the investment bank's "contingent" fee structure adversely influenced the fairness opinion. 793 A.2d 329, 333–34 (Del. Ch. 2000). The "contingency fee" was structured that it would pay the investment bank $600,000 if it rendered an opinion or $150,000 if it did not. *Id.* at 333 n.10. The court held that that the fee structure did not give the investment bank a direct incentive to render a "favorable" opinion because it would be paid the same regardless of the opinion's outcome. *Id.* Thus, this contingent fee structure did not make the fairness opinion suspect.

The plaintiffs in *Crescent/Mach I Partners, L.P. v. Turner* alleged that the investment bank's fairness opinion was defective. 846 A.2d 963, 984 (Del. Ch. 2000). The court held that this claim was solely conclusory because the investment bank relied upon the "accuracy, completeness and fairness" of the financial information provided by public sources or by the company's directors. *Id.* at 985. Thus, when a fairness opinion's findings are derived from public sources or from the receiving company, a Delaware court will likely hold the fairness opinion is non-defective.

In *In re General Motors Class H Shareholders Litigation*,[2] the plaintiffs challenge the claim that the investment banker considered the potential negative impacts of a recapitalization provision because the fairness opinion was conditioned upon the requirement that the recapitalization provision was not applicable to the transaction. 734 A.2d 611, 628 (Del. Ch. 1999). The court held that this was wrong because the investment banker "*did in fact*" consider the recapitalization provision. *Id.* (emphasis in original). Further, the court held that even if the investment banker did not consider the recapitalization provision, the stockholders were provided with the necessary financial information to make an informed judgment for themselves. *Id.* at 629.

### 2. Neutral Discussion

In *Gerber v. Enterprise Product Holdings, LLC*,[3] the court gave hypothetical examples where an investment banker might provide a false fairness opinion. 67 A.3d 400, 420 (Del. 2013). The first example was when a qualified investment banker finds that a transaction is fair even though (without the investment banker's knowledge) the company intentionally concealed material information that, if disclosed, would result in an unfair transaction. *Id.* The court gave a more extreme example where the company bribes an investment banker to falsely find that the transaction is fair. *Id.* Lastly, the court gave a third example where an investment banker, eager for future business, compromises its professional valuation standards to conform to the company's standards. *Id.* at 421–22.

The court in *Golden Telecom, Inc. v. Global GT LP* succinctly clarified that the primary purpose of fairness opinions is "to convince the stockholders to whom the tender offer [i]s to be made that the price offered [i]s fair." 11. A.3d 214, 218 (Del. 2010).

In *In re Netsmart Technologies, Inc. Shareholders Litigation*, the court examined the structure of the investment banker's fairness opinion. 924 A.2d 171, 205 (Del. Ch. 2007). The fairness opinion simply stated the conclusion that the merger consideration was financially fair to the shareholders but did not state whether the merger was advisable or the best deal reasonably available. *Id.* Also, most of the fairness opinion emphasized the limitation on the bank's liabilities. *Id.* The court held that the "bare bones" fairness opinion was the "reason why the disclosure of the [investment] bank's actual analyses is important to stockholders; otherwise, they can make no sense of what the bank's opinion conveys." *Id.* Without the analysis disclosure, the fairness opinion is simply a "stamp of approval that the transaction meets the minimal test of falling within some broad range of fairness." *Id.*

In *Gradient OC Master, Ltd. V. NBC Universal, Inc.* the plaintiffs argued that the reason why three investment banks refused to issue a fairness opinion on an exchange offer was because it was an unfair offer. 930 A.3d 104, 129 (Del. Ch. 2007). The plaintiffs based their reasoning on an inference from the absence of a fairness opinion and each investment banks' refusal to issue one. *Id.* The court concluded that the "mere" absence of a fairness opinion does not mean that an exchange offer is unfair. *Id.*

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[2] Although the case primarily discusses the plaintiffs' allegations against the board of directors' solicitation statement, the plaintiffs indirectly challenge the investment banker's fairness opinion. As a result, the content of this analysis is basic.

[3] Note that this case is explicitly overruled by *Winshall v. Viacom Intern., Inc.*, 76 A.3d 808 (Del. 2013), but only on procedural grounds.

### 3. Unfavorable Discussion

In *Higgins v. New York Stock Exchange, Inc.*, the plaintiffs argued that the board of directors' breach of fiduciary duty was partly based on the investment bank's flawed fairness opinion. 806 N.Y.S.2d 339, 356 (N.Y. App. Div. 2005). The plaintiffs allege that the fairness opinion was flawed due to its miscalculated value of revenue generated by seat holders who lease their seats. *Id.* The investment bank based its calculations on 1,000 seats at $25,000 per seat when the correct calculation was 1,366 seats at $60,000 per seat. *Id.* at 362. The court agreed with the plaintiffs and noted that the investment bank's fairness opinion "contained serious omissions." *Id.*

*Oberly v. Kirby* confirmed that, although Delaware required corporate directors to evaluate the propriety of a transaction based on a "full complement of information," formal fairness opinions were not required. 592 A.2d 445, 472 (Del. 1991). The court, however, stated that in some situations a formal fairness opinion might be helpful, while in other situations they likely would "not significantly amplify the information already available to directors." *Id.* Thus, the court held that it was not worth the high cost of a fairness opinion for the board to hire an investment banker to make precise estimates of various alternative transactions, when ultimately it would not have affected the basic conclusion that the selected transaction was the best available option. *Id.*

## B. Federal Cases[4]

### 1. Favorable Discussion

*In City of Hialeah Emps' Ret. Sys. v. FEI Co.*, the plaintiff alleges that the investment bank's fairness opinion was misleading because it purportedly overestimated the discount rate in the discounted cash flow analysis. 2018 WL 561848, at *12 (D. Or. Jan. 25, 2018). However, the court deferred to the fairness opinion because a "discount rate in a discounted cash flow analysis reflects a financial analyst's judgment." *Id.* The investment bank's analysis and methodology was fully available in the proxy statement, and the analysis did not omit or misrepresent any information. *Id.* Further, even if the investment bank applied "shoddy analysis," the investment bank's analysis was available for shareholders to consider their decision. *Id.*

The plaintiffs in *Ridler v. Hutchinson Tech. Inc.*, argued that the investment bank omitted material information from its fairness opinion, reasoning that the omitted information revealed the investment bank manipulated its analysis, the share price ranges do not accurately reflect the value of the shares, and the merger consideration was inadequate. 216 F. Supp.3d 982, 987 (D. Minn. 2016).The court noted that it must consider whether "under all circumstances, the omitted fact would have assumed actual significant in the deliberations of the reasonable shareholder" and if that omitted information would have "altered the total mix of information made available." *Id.* However, because the fairness opinion only required a "fair summary of a financial advisor's work," it did not require a heightened level of detail that shareholders need to "independently examine the financial advisor's work." *Id.* Further, the fact that one fairness opinion might contain information that another opinion omits, is not by itself evidence that the omitted information was material. *Id.* at 988. Moreover, because the plaintiffs neither provided any statute, regulation, or case that required the disclosure of the omitted revenue and EBITDA

[4] No federal cases have been identified as having been critical of fairness opinions.

multiples nor proved subjective and objective falsity, the court held that the investment bank's fairness opinion was not misleading. *Id.*

In *Varjabedian v. Emulex Corporation*, the plaintiff argued that because the investment bank omitted a "premium analysis" it raised an inference of scienter. 152 F. Supp.3d 1226, 1237 (C.D. Cal. 2016). However, the court was not persuaded because "the mere omission of information" does not lead to scienter unless there is a showing that the "*content* of the omitted material renders the omission 'an extreme departure from the standards of ordinary care'". *Id.* The court also noted that a fairness opinion is simply a summary that is not expected to include "every relevant or meaningful bit of analysis." *Id.* The public policy behind this is that investors are not expected to "sift through the mess" caused by large volumes of financial analysis. *Id.* In summary, the court notioned that a fairness opinion is an investment bank's "judgment call." *Id.*

In *Calleros v. FSI Intern. Inc.*, the plaintiff argued that he was entitled to specific inputs and data that the investment bank used in its fairness opinion. 892 F. Supp.2d 1163, 1175 (D. Minn. 2012). However, the court established that a "shareholder is not entitled to disclosures sufficient to make his own independent assessment of a stock's value." *Id.* Further, the shareholder is not entitled to information merely because he believes it is useful. *Id.* The shareholder is only entitled to a 'fair summary" of an investment bank's work. *Id.* The court refused to acknowledge a "mechanical checklist" that must be disclosed relating to fairness opinions. *Id.*

In *In re Bank of America Corp. Securities, Derivative and Employee Retirement Income Sec. Act Litigation*, plaintiffs alleged the investment bankers did not have a reasonable basis to conclude the merger was fair. 757 F. Supp.2d 260, 331 (S.D.N.Y. 2010). To prevail, the plaintiffs must have proved that the fairness opinions were actually false (objective prong), and that the speaker did not actually hold the opinion expressed (subjective prong). *See id.* The court held that the plaintiffs did not meet the standard of proving the subjective falsity prong because they failed to allege that the investment bankers did not believe their opinions. *Id.*

In *Floyd v. CIBC World markets, Inc.*, the plaintiff alleges that the investment bank's fairness opinion misrepresents that the transaction was fair. 426 B.R., 622, 652–53 (S.D. Tex. 2009). The court held that the plaintiff met the burden of the "who, what, when and where requirements of Rule 9(b)." *Id.* at 653; *see* Fed. R. Civ. P. 9(b). However, the plaintiff did not sufficiently plead the "why" or "how" the investment bank's opinion was false or fraudulent because the pleading must have articulated a plausible factual theory at the outset. *Id.* at 653. Thus, the plaintiff did not meet its burden. *Id.*

In *City Partnership Co. v. Lehman Bros., Inc.*, the court described fairness opinions as a short opinion that states "whether the consideration in a proposed transaction is fair to shareholders from a financial point of view." 344 F. Supp.2d 1241, 1246–47 (D. Colo. 2004). Fairness opinions also "help directors or similarly situated business decision-makers discharge their fiduciary duties." *Id.* at 1247. The plaintiffs alleged that the investment bank wrote a faulty fairness opinion, but the court found this was not a credible accusation; the investment bank gathered all of the financial and nonfinancial information it was provided, it processed the information, did not disregard the provided information, held internal meetings to discuss its fairness opinion, and met with company representatives to share the results. *Id.* at 1249. The court also noted that "an arguably less than ideal or complete valuation analysis does not necessarily constitute a fraudulent or misleading valuation effort." *Id.* at 1250.

In *Minzer v. Keegan*, the court noted that to be successful, the plaintiffs had to allege with particularity, "provable facts" that the fairness opinion was materially misleading and not "fair from a financial point of view." 218 F.3d 144, 151 (2d Cir. 2000). The court listed examples, such as the buying company paying a substantially lower premium, or if the merger price did not provide an adequate reflection of the present value of expected future free cash flows to shareholders. *Id.* Although the plaintiffs did allege that the merger had a lower book value multiple, the proxy statement explained that this was due to "above-average risk." *Id.* Thus, the plaintiffs did not allege facts sufficient to support their claim. *Id.*

The plaintiffs in *In re Reliance Securities Litigation* argued that the investment banks "disregarded numerous red flags" in their fairness opinions, such as the growth of the portfolio, deterioration of the quality of the loans, the increase in the loan loss and delinquency rates, etc. 135 F. Supp.2d 480, 513 (D. Del. 2001). The court held the plaintiffs to a standard that they must show that the investment banks' fairness opinions "were both objectively and subjectively false." *Id.* at 515. The plaintiffs met the objective prong because the relative value of the assets exchanged in the split-off agreement were not equal. *Id.* To satisfy the subjective prong, the plaintiffs must demonstrate that the investment bankers knew or should have known that the fairness opinion was objectively false. *Id.* The plaintiffs did not meet this second prong because they did not identify that the investment bankers actually did not rely on the provided financial statements. *Id.* at 516. Thus, the court held that the investment bankers did not recklessly breach duties to the shareholders in issuing the fairness opinions. *Id.*

In *Berg v. First American Bankshares, Inc.*, the plaintiffs argued that the investment bank's fairness opinion contained material misstatements because it did not include that the investment bank representative inquired about why the offered price for the Class A stock was not the same for the regular common stock. 796 F.2d 489, 500 (D.C. Cir. 1986). However, the representative testified that the inquiry neither implied that the investment bank believed a higher price might be available nor implied the stocks were worth the same amount. *Id.* at 501. The court held that the "remote possibility" that the inquiry might be misinterpreted by a shareholder does not create an issue of materiality. *Id.* The plaintiffs also argued that the investment bank only had two business days to prepare an oral briefing of the fairness opinion. *Id.* at 500. However, because the investment bank had over a month to prepare the written fairness opinion, the court held that there was no imposed time pressure that would materially affect the fairness opinion. *Id.* at 501.

### 2. Neutral Discussion

The court in *Louisiana Mun. Police Employees' Retirement System v. Continental Resources, Inc.* clarified that a fairness opinion only requires an "adequate and fair summary" of the work resulting in the opinion. 886 F. Supp.2d 1255, 1264 (W.D. Okla. 2012). Further, omitted facts are not necessarily material just because "they might be helpful." *Id.*

In *In re McKeson HBOC, Inc. Securities Litigation*, the plaintiff argued that the fairness opinion was not "fair, from a financial point of view" to the shareholders because the company's revenue, earnings, and assets were improperly stated. 126 F. Supp.2d 1248, 1264 (N.D. Cal. 2000). The court established that it is not unreasonable to hold a professional investment bank to a standard of reasonable care, and that a plaintiff must prove both objective and subjective falsity. *Id.* at 1265. Because the plaintiff failed to offer proof of subjective falsity, the court ruled against the plaintiff. *Id.*

In *Freedman v. Value Health, Inc.*, the court adopted the standard derived from *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1092 (1991), that a fairness opinion is a material statement if it is 1) a statement of subjective fact (e.g., the directors *believe* the merger is fair), and 2) a statement of objective fact (e.g., the merger *is* fair). 958 F. Supp. 745, 752 (D. Conn. 1997).

## II. Cases Addressing Investment Banker Conflict of Interest

### A. State Cases

#### 1. Conflict of Interest Found

In *RBC Capital Markets, LLC v. Jervis*, the investment bank lowered the analysis in its fairness presentation to make a company's bid more attractive. 129 A.3d 816, 842 (Del. 2015). The investment bank was motivated to obtain a buy-side financing role. *See id.* Despite communicating to the board that it did not rely on comparable company analysis for valuation purposes, the investment bank used the analysis in its fairness opinion. Also, the investment bank modified its precedent transaction analysis by reducing the low end multiples. *Id.* Finally, the investment bank lowered the adjusted EBITDA to make a particular option look more attractive. *Id.* at 843. These actions, paired with multiple deceptive emails from the investment bank's Managing Director, resulted in the court ruling that the investment bank manipulated the valuation process due to a conflict of interest. Furthermore, the Delaware Chancery Court noted that the investment bank's potential offer of staple financing would present potential approaches of conflicts. *In re Rural Metro Corp.*, 88 A.3d 54, 68 (Del. Ch. 2014). The court recognized that it is only necessary to disclose the conflict of interest where the investment banker's "opinion was actually affected by the conflict." The court must not only evaluate the amount and nature of a contingent fee, but also the longstanding business relationship between the investment bank and the clients. *Id.* at 105. Thus, the investment bank served its own interests in the transaction.

In *In re El Paso Corporation Shareholder Litigation*, the plaintiffs sought a preliminary injunction to delay a merger. 41 A.3d 432, 433 (Del. Ch. 2012). The seller employed a "powerfully influential" investment bank to assist with a merger. *Id.* at 434. However, the investment bank owned 19% of the buyer's company ($4 billion worth) and controlled two of the buyer's board seats. *Id.* To address this conflict, the seller employed a secondary investment bank, but this ultimately failed because the primary investment bank manipulated the terms to ensure that the secondary bank would only be paid if it chose the primary bank's preferred option. Further, the lead banker did not disclose that he personally owned approximately $340,000 of the buyer's stock. *Id.* The court recognized that when investment bankers conceal their self-interest, "it is far harder to credit [its] assertion that that self-interest did not influence [its] actions." *Id.* at 445. The court noted that "the plaintiffs have a reasonable probability of success on a claim that the Merger is tainted by breaches of fiduciary duty." *Id.* at 444. Although the court denied the plaintiffs' motion for preliminary injunction because it wanted the seller's stockholders to decide for themselves about the merger, the court described the investment banker's behavior as a "disturbing nature" that led to the merger's terms. *Id.* at 452.

In *In re Del Monte Foods Co. Shareholders Litigation*, the investment bank urged Del Monte Foods Co. ("Del Monte") and potential buyers to consider a merger, despite clear instructions from Del Monte to "shut the process down" because it was not in the best interest of shareholders. 25 A.3d 813, 822 (Del. Ch. 2011). The court noted that the investment bank had a direct financial conflict due to its sell-side role (earning $2.5 million from its fairness opinion and would earn $21 million if the deal closed) as well as its buy-side financing role (potentially

earning them another $21 to 24 million). *Id.* at 828. The court held that the investment bank's conflicts tainted the board's process. *Id.* at 832. One reason is because the investment banker structured its own private process to secure acquisition financing after it secured its sell-side role. *Id.* at 833. Another reason is the investment bank made a "late-stage request" for permission to provide acquisition financing. *Id.* at 834. Accordingly, the investment banker withholding information about its buy-side intentions, its involvement with the potential buyer, and it structuring its own private process to obtain the buy-side role resulted in the direct financial conflict.

In *Higgins v. New York Stock Exchange*, an investment bank provided services to the New York Stock Exchange ("NYSE) for a proposed merger with Archipelago Holdings, LLC. The plaintiffs alleged that the investment bank was conflicted because of its "substantial relations" with Archipelago and it improperly provided investment banking services to both Archipelago and NYSE in the same transaction, ultimately leading to the board's breach of fiduciary duty. 806 N.Y.S.2d 339, 345–46 (N.Y. App. Div. 2005). The investment bank argues that it did not provide substantial assistance or aid and abet the NYSE breach of fiduciary duty because it disclosed the potential conflicts of interest; however, "simply disclosing the potential conflicts to the NYSE Board does not necessarily absolve" potential liability for a role in breach of fiduciary duty. *Id.* at 289. The court concluded that the investment bank did in fact have a conflict of interest, but whether the conflicts was a breach of fiduciary duty is meant for a jury. *Id.*

In *In re Tri-Star Pictures, Inc., Litigation*, an investment banker rendered a fairness opinion encouraging a merger between Tri-Star and Coca-Cola. 634 A.2d 319, 323 (Del. 1993). The investment banker had "inextricably tied" relationships with Coca-Cola because the banker owned over 1.1 million shares of Coca-Cola stock, was a director of Coca-Cola, and was scheduled to become a director of the newly-merged entity. *Id.* The court noted that the fairness opinion had "questionable reliability under the circumstances" of the transaction because some of the information that the investment banker used were from Coca-Cola. *Id.* Thus, although the court did not primarily focus on the fairness opinion, the court held it had questionable reliability.

#### 2. No Conflict of Interest Found

The plaintiff company in *In re Volcano Corporation Stockholder Litigation* raised funds through a convertible note offering to its investment bank. 143 A.3d 727, 730 (Del. Ch. 2016). The plaintiff company also sold call options to the investment bank and bought warrants from it. *Id.* at 731. The options and warrants were set to expire after a certain amount of days, or alternatively, they would terminate immediately upon the consummation of a change in control transaction that required redemption of the convertible notes. *Id.* As a result of a merger, the convertible note, call options, and warrants were terminated, resulting in a $24.6 million payment from plaintiff company to its investment bank. *Id.* at 736. The plaintiff argued its investment bank was "highly conflicted" because it served as the plaintiff company's counterparty in a series of hedging transactions and profited at the plaintiff company's expense when the call options and warrants were terminated after the Merger. *Id.* The plaintiff reasoned that the investment bank was motivated to rush a change in control transaction because the warrants' value decreased "exponentially." *Id.* at 748–49. However, the court held that this was not an appropriate breach of fiduciary duty claim that affected the merger because a reasonable stockholder had sufficient information to evaluate this before the merger. *Id.* at 749. Accordingly, the investment bank did not abet the board's supposed breach of fiduciary duty because the plaintiffs failed to argue a successful claim. *Id.* at 750.

The plaintiffs in *In re Morton's Restaurant Group, Inc. Shareholders Litigation* argued that the board of directors' decision to allow the investment banker to finance the buy-side company resulted from bad faith. 74 A.3d 656, 673 (Del. Ch. 2013). The board claimed they allowed this because the buy-side company was having difficulty securing financing for its bid. *Id.* The board also set certain restrictions, such as forcing the investment bank to recuse itself from further negotiations, reduce its fee by $600,000, and still give a fairness opinion on whether the transaction was fair. *Id.* The court held that the board's decision to let the investment banker provide non-conflicting advice, rather than risk losing a high premium bid, does not create the inference of bad faith. *Id.*

In *Crescent/Mach I Partners, L.P. v. Turner*, the plaintiffs alleged that the director defendants failed to secure an independent fairness opinion. 846 A.2d at 984. The plaintiffs reasoned that the investment bank was influenced by financial interests in the merger's consummation and by the managing director's affiliation with the investment bank. *Id.* Addressing the financial interests claim, the court held that the investment bank was entitled to compensation for its efforts in consummating the merger. *Id.* In terms of the managing director's affiliation with the investment bank, the court held that the "mere existence" of a director's affiliation with an investment bank is insufficient to invalidate a fairness opinion. *Id.* Thus, the investment bank did not submit a fairness opinion tainted by conflict of interest.

In *Brooks v. Key Trust Co. Nat. Ass'n*, the plaintiff argued that defendants breached their fiduciary duty as an investment banker. 809 N.Y.S.2d 270, 272 (N.Y. App. Div. 2006). Plaintiff and defendant entered into an investment management agreement where plaintiff transferred his securities investment retirement account for defendant to actively manage it. *Id.* at 271. Plaintiff alleged "self-dealing, conflict of interests, and failure to advise plaintiff and prudently manage and diversify his portfolio, and encouraging improper loans." *Id.* at 272. However, the court held on a technicality that this was not a valid fiduciary claim because this claim was already expressly raised in the plaintiff's breach of contract claim and the allegations were already encompassed within a contractual relationship implicit in all contracts of fair dealings and good faith. *Id.* Accordingly, the plaintiff did not allege things that, "apart from the terms of the contract", created a relationship with defendant that permits a claim for breach of fiduciary duty that was independent of contractual duties. *Id.*

In *In re Toys "R" US, Inc. Shareholder Litigation*, the investment banker raised the possibility of providing buy-side financing to bidders because it had experience with late-round financial buyers. 877 A.2d 975, 1005 (Del. Ch. 2005). After initially declining that idea, the board of directors agreed to the investment banker's idea after the merger was finalized. *Id.* at 1005–06. The court noted that the board's decision was "unfortunate" because it created the appearance of "impropriety, playing into already heightened suspicions about the ethics of investment banking firms." *Id.* 1006. However, the court held it was not its job to "police the appearances of conflict that, upon close scrutiny, do not have a causal influence on a board's process." *Id.* Accordingly, there was "simply no basis" that the investment bank's desire to provide buy-side financing influenced the board. *Id.*

The plaintiffs in *In re Unocal Exploration Corp. Shareholders Litigation* argued that an investment bank's fairness opinion was unreliable because of an alleged interest in obtaining future business from the opposing merging company. 793 A.2d at 334. The plaintiffs reason that the investment historically solicited underwriting business from the opposing company. *Id.* n.11. However, the court noted that this was a routine solicitation of many potentially interested companies and it was an unsuccessful solicitation *Id.* Thus, the investment bank did not have a conflict of interest.

The plaintiff in *Weinberger v. Rio Grande Industries, Inc.*, argued its investment bank had a conflict of interest that tainted its fairness opinion. 519 A.2d 116, 124 (Del. Ch. 1986). This is because the investment bank acted as an advisor to a separate company on a "legally unrelated" deal that would ultimately harm the plaintiff company. *Id.* at 120, 123. The court noted that this is not sufficient evidence that these two distinct roles as an investment bank were in conflict; there was nothing to show that the investment bank, as financial advisor to the two separate companies, would be "anything other than objective and fully devoted" to plaintiff company in evaluating the merger's fairness. *Id.* at 123. Accordingly, the plaintiff failed to establish a conflict of interest. *Id.*

#### 3. General Development of the Law

In *Trousdale v. Henry*, the court briefly noted factors to consider when evaluating whether a financial advisor breaches the fiduciary duties owed to its client. This occurs when it 1) fails to put its client's interests above its own; 2) treats its clients unfairly; 3) fails to make reasonable use of the confidence its clients place in it; 4) fails to act in the utmost good faith and fails to exercise the most scrupulous honesty toward its clients; or 5) fails to fully and fairly disclose all important information to its clients concerning a transaction. 261 S.W.3d 221, 228 n.2 (Tex. Ct. App. 2008).

### B. Federal Cases

#### 1. Conflict of Interest Found

In *Smith v. Robbins & Meyers, Inc.* the plaintiff argues the investment bank was conflicted in bad faith because it "significantly undervalued" the acquired company in order to make the merger appear fair to shareholders, when it was not fair. 969 F. Supp.2d 850, 858 (S.D. Ohio 2013). For example, the investment bank "utilized a grossly inflated 'weighted average cost of capital'", which significantly drove down the valuation of the company. *Id.* The investment bank also used a range of multiples of 7.0x to 12.0x from the range of multiples of 7.9x to 14.6x from "most comparable" transactions. *Id.* The investment bank also departed from custom and did not incorporate a control premium value in its analysis, which would have resulted in "significantly higher valuation" and would result in an unfair merger. *Id.* at 859. The court held that the culmination of these manipulations resulted in a bad faith conflict of interest. *Id.* at 875.

In *In re Healthco Intern., Inc.,* the investment bank for the selling company considered its only responsible was to issue an opinion as to whether the transaction was "fair, from a financial point of view, to the stockholders." 208 B.R. 288, 297 (Bankr. D. Mass. 1997). However, this was contrast to the engagement letter as the company's "exclusive financial advisor." *Id.* at 297–98. Further, the investment bank never analyzed any particular cash flow projections. *Id.* at 298. The investment bank's fee arrangement was primarily computed as a percentage of the sales price. *Id.* at 307. Thus, the court held that the investment bank's "fee arrangement placed it in a conflict of interest." *Id.*

#### 2. No Conflict of Interest Found

In *City of Hialeah Emps' Ret. Sys. v. FEI Co.*, the investment bank for the acquired company disclosed that it had received approximately $7 million in fees from the acquiring company over the past two years. ---F. Supp.3d ----, 2018 WL 561848, at *2 (D. Or. Jan. 25, 2018). The board of directors did not view this as a conflict of interests that would "jeopardize"

the investment bank's ability to efficiently act as an advisor. *Id.* Although the court did not discuss these facts, this case is included in the memorandum to demonstrate an example of fees not resulting in a bad faith conflict of interest.

In *Dixon v. Ladish Co., Inc.* the plaintiff alleged the investment banker had a conflict of interest because it owned shares of the buy-side company, which then compromised the sell-side's board's ability to act in the best interests of the company. 785 F. Supp.2d 746, 755 (E.D. Wis. 2011). The court disagreed with the plaintiff because the investment banker actively disclosed the potential conflict to the board. *Id.* at 755–56. Also, disagreed with the argument that a conflict in an investment banker, disclosed by the board, imputes a conflict on the board. *Id.* at 756. Accordingly, without any other facts to impute an investment banker's alleged conflict to a board, the plaintiff's argument is no more than a suspicion of bad faith. *Id.*

In *City Partnership Co. v. Lehman Bros., Inc.*, the plaintiffs alleged that the investment bank's conflict of interest resulted in a bad faith transaction. 344 F. Supp.2d 1241, 1252 (D. Colo. 2004). This is because the investment bank "received sizeable sums" from the opposing company for financial services and expected future compensation for subsequent work. *Id.* The court, however, found that this conflict of interest did not adversely affect the transaction because the investment bank "duly disclosed such potential or actual conflicts of interest in the proxy materials" and there was no evidence that the ongoing relationship affected its conclusions in the fairness opinion. *Id.* ("this is an instance of businesses and professionals intertwined in myriad disclosed relationships . . . yet there is no special reason to show that [the investment bank] acted with improper scienter in doing what it did.").

## III. Table of Relevant Secondary Sources

| Name | Source | Relevance |
|---|---|---|
| Corporate Acquisitions, Mergers & Divestitures by Aaron D. Rachelson<br><br>Corporate Acquisitions, Mergers & Divestitures § 1:121 and 1:125 (December 2017). | Treatise | § 1:121 primarily discusses a general background of fairness opinions and how they are useful to corporate fiduciaries.<br><br>§ 1:125 focuses the discussion on how fairness opinions reduce the risk of litigation. The section also includes "planning tips" for investment bankers to implement into their fairness opinions. |
| Rural Metro Corp and Ensuring Fairness in a Fairness Opinion by Riley J. Combelic<br><br>92 Denv. U. L. Rev. Online 79 (2015). | Law Review Article | This Article discusses the implications of *In re Rural Metro Corp. Stockholders' Litigation* for a board of directors in Delaware. |
| Fair Summary: Delaware's Framework for Disclosing Fairness Opinions by Blake | Business Lawyer Article | This Article describes the general duty of disclosure, discusses the principles behind the cases on fairness opinions, and sets out a |

| Name | Source | Relevance |
|---|---|---|
| Rohrbacher & Mark Zeberkiewicz<br><br>63 Bus. Law. 881 (2008). | | framework for predicting the information that must be disclosed with respect to fairness opinions under Delaware law. |
| Fair Summary II: An Update on Delaware's Disclosure Regime Regarding Fairness Opinions by Blacke Rohrbacher & Mark Zeberkiewicz<br><br>66 Bus. Law. 943 (2011). | Business Lawyer Article | This Article updates Fair Summary I to demonstrate how Delaware courts have begun to focus not only on the disclosure of underlying financial analyses broadly, but also on specific and discrete issues involving fairness opinions and projections as well as on issues beyond the fairness opinion itself (like the financial advisor's potential conflicts and incentives). |
| Fairness Opinions by Steven M. Davidoff Solomon<br><br>55 Am. U. L. Rev. 1557 (2006). | Law Review Article | This Article takes a *highly critical* approach to fairness opinions, arguing for a conditioned place in corporate control transactions for the fairness opinion. |
| Investment Banking Fairness Opinions: When Is Fair Not Really Fair? By Frank M. Placenti<br><br>November 2004 | *Director's Monthly* (NACD) | This Article discusses challenges to investment banker fairness opinions. |
| Fairness Opinions as Magic Pieces of Paper by Dale A. Oesterle<br><br>70 Wash. U. L. Q. 541 (1992). | Law Review Article | This Article proposes reform the address the then-lack of liability associated with investment bankers who provide fairness opinions in corporate acquisitions. It aims to strike a balance between two approaches: The Professor Fiflis approach—where a remedy would be to hold investment bankers liable directly to shareholders under a fiduciary duty standard—and the Professor Carney approach, where the solution is to change the "excessive meddling of state courts and the SEC." |