

Corporate Finance/M&A - USA

Delaware court rejects attempt to stop accrual of statutory interest in appraisal action

Contributed by **Ropes & Gray LLP**

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In a statutory appraisal action⁽¹⁾ arising out of Apollo Global Management's 2011 acquisition of CKx, Inc, the Delaware Court of Chancery refused to order Huff Fund Investment Partnership, a 15% stockholder of CKx, to accept the undisputed minimum value of its stock in order to stop the running of interest at Delaware's above-market statutory rate. Given the current low interest rate environment, this decision leaves open the risk of appraisal actions, including how plaintiffs choose to litigate such actions, being motivated by the Delaware General Corporation Law's statutory above-market interest rate.

In November 2013 Vice Chancellor Glasscock determined that the fair value of Huff Fund's shares in CKx was the negotiated merger price. However, for potential appeal-related purposes he permitted the parties to supplement the record with additional information regarding the merger price. Given that the proceedings were still active (and interest was still accruing), CKx filed a motion requesting a partial judgment whereby CKx would immediately pay the minimum amount that Huff Fund would be entitled to receive (plus accrued interest to date) in order to stop the statutory accrual of interest on that minimum amount. CKx argued that although Section 262 of the Delaware General Corporation Law does not contemplate this partial judgment mechanism, the court should approve its request for an order because of Delaware's statutory interest rate for appraisal claims of 5% over the Federal Reserve discount rate creates an arbitrage opportunity in appraisal actions in the current low interest rate environment.

In its decision, the court held that it has limited discretion in determining interest awards in appraisal actions. Section 262(h) of the Delaware General Corporation Law provides that unless "good cause" is shown, interest "shall accrue at 5% over the Federal Reserve discount rate". The court asserted that its discretion to adjust the statutory interest rate for good cause is limited to instances of "bad faith or vexatious litigation", circumstances that were not present in this action.

Some commentators have noted that the availability of an above-market statutory interest rate in Delaware appraisal actions may have contributed to a recent spike in appraisal claims, particularly those driven by new hedge funds specialising in appraisal rights.

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Endnotes

(1) *Huff Fund Inv P'ship v CKx, Inc*, CA No 6844-VCG (Del Ch February 12 2014).

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