



Here's a tip from the sixth edition of our popular publication [\*\*\*The Public Company Handbook\*\*\*](#), which is an easy-to-read guide that provides practical insights regarding legal and other board management issues facing public—or soon-to-be-public—companies.

This tip involves fairness opinions. Courts give special deference to Boards that seek truly independent third-party advice, such as that of an investment bank, valuation consultant or law firm, to assist disinterested directors in assessing a transaction. An opinion from a reputable third-party financial advisor that a transaction is fair to the company and its shareholders from a financial point of view may substantially reduce the risk of a successful challenge to the Board's decision under any standard of review. A fairness opinion can also help independent directors make an informed decision.

Without a fairness opinion, you may find yourself in the same unfortunate position as the directors of Trans Union Corporation. In the 1980s, Trans Union's Board approved a sale of the company. In the case *Smith v. Van Gorkom*, a Delaware court held that the Board breached its fiduciary duties by acting without adequate information or independent third-party advice. The court concluded that the Board's decision to accept a market premium without first determining the intrinsic value of Trans Union's shares left the directors vulnerable to personal liability to the company's shareholders to the extent a fair price exceeded the sale price.

By contrast, in the 2005 *Disney* case, a Delaware court placed weight on the Disney Compensation Committee's reliance on an independent compensation expert. The Committee was entitled to rely on the expert even though his analysis may have been incomplete or flawed. The Committee had selected the expert with reasonable care, the analysis was within his professional competence, and the directors had no reason to question his conclusions.

Directors should remember, however, that a fairness opinion is only one item in a Board's toolbox for satisfying directors' fiduciary duties in a sale-of-the-company transaction, and is not an automatic defense to a fiduciary duty claim. Directors should closely review the supporting analyses for the fairness opinion and make sure they understand the various inputs. In any case, the Board's reliance upon a fairness opinion must be reasonable.

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