

written opinion as to the financial soundness and of any related purchase of

have a duty to pursue reasonable oversight in connection with the opinion of investment bankers and other investment bankers (that is, an opinion of fairness opinion (that is, an opinion of fairness opinion without giving the factual basis) of an investment banker, sufficient basis for a board decision. An investment banker's conclusion is based on other information known to the directors of SCM Corporation learned from the *ML SCM Acquisition, Inc.*,⁹ an opinion in writing and be reasoned.

of a hostile tender offer by a Hanson Trust PLC. SCM's board of directors management leveraged buyout led by Merrill Lynch. As part of this agreement, SCM entered into a so-called *asset lock-up option* covering its key divisions, or *crown jewels*. As part of this option was exercisable only if the offer was successful in acquiring control

of SCM; depending on how it is priced, a lock-up option can have the effect of deterring other bids. Merrill Lynch represented in negotiations that it would not proceed with its leveraged buyout offer without the lock-up.

SCM's investment banker, Goldman Sachs, issued a written fairness opinion on the overall deal, stating that the sale of SCM to Merrill Lynch was fair to the shareholders of SCM from a financial point of view. A partner at Goldman Sachs also orally advised SCM's directors that the option prices were "within the range of fair value." However, the directors did not inquire what the range of fair value was or how it was calculated. Unfortunately for the directors, the investment banker had not in fact calculated the fair value of the two divisions. Although the directors knew that the two divisions generated more than two-thirds of SCM's earnings, they never asked the investment banker why the divisions were being sold for less than half the total purchase price. The U.S. Court of Appeals for the Second Circuit held that the SCM directors' "paucity of information" and "their swiftness of decision-making" strongly suggested a breach of the duty of care. The asset lock-up was struck down. As in the case of officers' reports, blind reliance on the reports of experts creates a risk that the directors will not receive the protection of the business judgment rule.

In the following case, the court considered whether an investment banker could be held liable as an aider and abettor of a breach of fiduciary duty by the board of directors.

SUMMARY

CASE 20.2

FACTS In December 2010, financial advisors at RBC Capital Markets (RBC) approached directors of Rural Metro Corporation, a provider of emergency transportation and fire protection services, to discuss a merger opportunity occasioned by the sale of its competitor Emergency Medical Services (EMS). EMS was entertaining offers from private equity firms, and RBC anticipated that those potential buyers might be interested in acquiring Rural as well. With RBC positioned as a sale-side advisor to Rural, buyers could find RBC an attractive source of buy-side financing for their acquisition of Rural. RBC did not disclose to Rural its intent to provide financing to potential buyers, for which RBC would earn financing fees.

Rural created a three-person exploratory committee, which in turn engaged RBC and Moelis & Co. (MC) to act as the committee's financial advisors in connection with a possible sale of the company. When the special committee reached out to potential buyers, it found that most were restricted from pursuing Rural because of their confidentiality agreements with EMS. One EMS bidder that dropped out early in the EMS auction process was Warburg Pincus, which turned out to be the only firm to submit a final bid for Rural. CD&R, the ultimate purchaser of EMS, communicated its interest to bid on Rural but required an extension of time due to its commitments in the EMS transaction. The Rural directors ultimately denied CD&R's extension request because of "the risk to the Company's sales process of waiting."

The Rural directors asked RBC and MC to assess the fairness of the Warburg Pincus offer. Because the offer was due to expire on March 28, the bankers had little more than a day to prepare their opinions. Unlike many investment banks, which have standing fairness committees made up of senior bankers, RBC had a fairness committee that comprised "any managing directors who happen[ed] to be available and willing at the time a request for review goes out." One of the two RBC *ad hoc* committee members had never served on a fairness committee before. Based on the fairness opinions from RBC and MC, the Rural board approved Warburg Pincus's \$17.25 per share offer around midnight on March 27, about nine hours before it was due to expire.

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