Insights: Top Disputes & Investigations

Valuation, Solvency and Acquisition Disputes

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FTI CONSULTING

Valuation, Solvency and Acquisition Disputes

We expect the recent economic downturn to have wide-ranging impacts on M&A and valuation disputes. Share prices have fallen dramatically, particularly in certain industries, and parties will seek to nullify purchase agreements. We also expect that many companies will examine options to remain solvent in the face of the pandemic.

We have professionals with a proven track record of helping our clients navigate complex valuation issues. We combine a deep expertise in valuation with the ability to evaluate specific company, industry, and economic factors. In this section, of our **2020 Insights: Top Disputes & Investigations**, we highlight our work helping clients resolve disputes on major Valuation, Solvency and Acquisition Disputes projects.

Accounting Arbitrator in a Working Capital Dispute

FTI Consulting served as the Accounting Arbitrator in a working capital dispute in which more than $40 million was in dispute. The dispute involved the appropriate accounting treatment under U.S. GAAP of certain items such as the valuation of inventory, the calculation of inventory reserves, appropriateness of accruals, and cutoff issues for accounts payable and accounts receivable.

We assisted the parties in determining the timeline and framework for the arbitration considering discovery, interrogatories, and other submissions of critical information made by the parties. After analyzing the company's historical financial and transactional data and researching authoritative guidance, in addition to other industry-specific research, we issued a detailed written determination that successfully resolved all disputed items.

Subject Matter Experts

Gary Kleinrichert
Senior Managing Director

Jeremy McGannon
Managing Director

Assessing Damages from Alleged Breach of Stock Purchase Agreement

FTI Consulting was retained on behalf of a private equity fund to provide expert testimony in Delaware Chancery Court in response to a purchase price adjustment calculation based on an alleged breach of representations in the Stock Purchase Agreement (SPA). The opposing expert calculated net damages of $18 million due to the failure to disclose information regarding five customers, who either materially changed or terminated their service contracts after the closing date of the SPA.

FTI's rebuttal analysis demonstrated how the opposing expert failed to consider crucial information around the customer contracts as well as information regarding what was communicated about customers prior to the SPA. FTI demonstrated that the net damages were essentially zero, as calculated damages did not exceed the threshold (the "Basket") established by the SPA.

In November 2018, the Delaware Chancery Court ruled in favor of our client, finding that there was no breach of the SPA and even if there had been, the Plaintiff failed to prove its damages. The Court further commented that the methodology used by the opposing expert to measure damages based on an EBITDA multiple was not appropriate as Plaintiff did not show that a permanent diminution in the value of the business post-acquisition had occurred. The Delaware Chancery Court further noted that FTI's damage expert "proffered three credible damages scenarios, each tied to the evidence, proving that the realized damages would not exceed the Basket."

Subject Matter Experts

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Performing a Solvency Analysis Based on Large Contingent Liabilities

Counsel for a non-operating subsidiary with contingent liabilities from past loan originations retained FTI Consulting to perform a solvency analysis. After selling its operations, the subsidiary paid some of the proceeds to the parent company as a dividend. Recently, the subsidiary lost a lawsuit and, with its bankruptcy imminent, creditors alleged that the dividend was fraudulent because it caused the subsidiary to become insolvent at the time.

At the direction of counsel, FTI was tasked with performing a contemporaneous fair value solvency analysis. We assembled a team, including a former Big 4 banking audit partner and experts in mortgage finance and bankruptcy/solvency valuation, and performed an independent analysis based on what was known and knowable at the time of the dividend. Our solvency analysis included industry research of loan breach rates and other analytics in securitization databases and complex data modeling. We also performed probabilistic analysis of decision trees based on the stages of multiple litigation matters pending at the time of the dividend. Counsel ultimately utilized our findings as a basis for settlement discussions.

Subject Matter Experts

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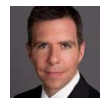

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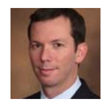

Tim Sherman
Senior Director

Ability to Pay: Department of Justice v. Health Care Provider

A health care provider was under investigation by the U.S. Department of Justice for potential violations of the False Claims Act. Based on its preliminary investigation, the DOJ proposed a fine that exceeded the company's market capitalization and would have jeopardized the company's continued viability.

FTI Consulting was retained and we assembled a multi-disciplinary team of healthcare and ability-to-pay experts to demonstrate the excessiveness of the DOJ's proposal and calculate a more reasonable fine under the DOJ's new guidelines. We performed an extensive ability-to-pay analysis for our client after considering the company's competitive challenges, strategic plans, and cost-cutting initiatives. We modeled future financial performance and incorporated the limitations of the company's borrowing capabilities through both its acquisition line and revolving credit facility. FTI's team presented its findings to the DOJ attorneys and financial analysts demonstrating that the proposed fine was beyond our client's ability to pay.

With the aid of FTI's compensation experts, we provided additional support that resulted in a favorable settlement for our client. While the DOJ sought an eight-figure fine, our analysis helped secure a fine that was 62 percent lower.

Subject Matter Experts

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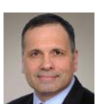

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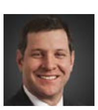

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Defense of Parent-Sub Veil-Piercing Claim

FTI Consulting was engaged by counsel to analyze a U.S.-based subsidiary of a global food distributor, focusing on the characteristics of financial separateness considered by courts when evaluating alleged alter ego and corporate veil piercing over a multi-year period. FTI's analysis centered on the issues of separateness of assets and resources, adequacy of capital, and solvency.

As part of its work, FTI reviewed operating agreements, corporate records, loan documents, historical financial statements, budgets, operating forecasts, transfer pricing studies, and myriad other financial records to assess certain financial indicia of separateness, adequacy of capital independent of the subsidiary's parent company and affiliates, and its solvency during the relevant period.

Based on our analysis, FTI was able to demonstrate that the subsidiary maintained assets and resources separate and distinct from its parent, was adequately capitalized for the business in which it was engaged and had no indication of distress or insolvency.

Subject Matter Experts

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FTI Consulting is an independent global business advisory firm dedicated to helping organizations manage change, mitigate risk and resolve disputes: financial, legal, operational, political & regulatory, reputational and transactional. FTI Consulting professionals, located in all major business centers throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges and opportunities.

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