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HOW VALUATION SHAPES HIGH-STAKES LITIGATION

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HOT TOPIC

HOW VALUATION SHAPES HIGH-STAKES LITIGATION



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Joe Larkin is head of Skadden's Delaware litigation group. He is a nationally recognised litigator and trial lawyer with an impressive track record of success in bet the company disputes in the Delaware Court of Chancery and federal and state courts throughout the country. In recent years, he has successfully represented clients in expedited trials and evidentiary hearings arising from M&A, corporate control battles, commercial contracts, antitrust claims, securities class actions and bankruptcy litigation.

CD: Why has valuation moved from being a supporting consideration to a central battleground in major commercial and insolvency disputes?

Rollins: Courts are increasingly relying on valuation evidence not only to assess damages, but also to resolve threshold questions. In today's modern capital markets, increasingly complex capital structures and competing stakeholder interests mean courts are often asked to decide issues such as solvency, the allocation of enterprise value and whether a transaction resulted in a fair transfer of value under a relevant legal framework. Those are inherently valuation-driven questions. This is especially true in restructurings, shareholder litigation and creditor disputes, where valuation can shape questions of control, priority and recoveries. In that environment, credible valuation evidence is critical. The more clearly and objectively experts can explain our analyses, the better equipped courts are to test competing views and reach sound conclusions.

Larkin: Valuation has become the central focus in major commercial disputes for several interconnected reasons. The stakeholders in these disputes – institutional investors or creditors, private equity sponsors, public companies and strategic acquirers – are highly sophisticated. They tend to

approach litigation commercially and use it as a lever in a broader strategy to maximise the value of their investments or recover losses. This dynamic is particularly pronounced in insolvency or bankruptcy proceedings. Valuation lies at the heart of virtually every material determination in the case, and the court is tasked with determining whether the entity was solvent at the time of a challenged transaction, whether a transfer was made for reasonably equivalent value and how the distributable pie is divided among competing creditor classes. The rise of complex capital structures has only raised the stakes, since small movements in enterprise value can mean the difference between a fulsome recovery and a wipeout for any given constituency. Courts have little choice but to engage deeply with valuation evidence, and litigants have adapted accordingly.

Ferrara: Valuation has shifted from a peripheral tool to a central battleground in commercial and insolvency disputes due to a convergence of legal, financial and procedural factors. From a legal standpoint, in certain jurisdictions, there is a growing reliance on economic criteria as a benchmark for applying statutory provisions and relevant relief. As a result, the determination of value becomes critical for the very access to judicial protection and specific legal mechanisms, transcending its traditional function as mere technical support to the claim. In

this sense, the phenomenon appears less prominent within the Italian legal system. However, like others, it is not immune to global trends which, from an economic and financial perspective, lead to the same outcome, such as the ever-increasing significance of intangible assets, which make appraisal more challenging and place valuation at the very forefront.

CD: How do differing legal, financial and commercial perspectives on 'value' tend to collide in high stakes litigation – and why does that matter?

Ferrara: The three perspectives – legal, financial and commercial – move in different directions and are grounded in distinct assumptions, potentially leading to significantly divergent valuations. The commercial lens may favour valuations aimed at capturing competitive advantage and long-term positioning, taking into account, for instance, intragroup synergies, product range expansion or geographic reach. The financial lens prioritises valuations based on accounting profiles and forward-looking metrics, projecting available data while factoring in known or predictable risks and opportunities. The legal lens frames the valuation within statutory limits, anchoring it to rigid

regulatory or case law standards, yet occasionally struggling to properly capture or value the deal's upside or potential.

“Professional judgment is the bedrock of expert valuation testimony and credibility is everything.”

*Joseph Larkin,
Skadden, Arps, Slate, Meagher & Flom LLP
and Affiliates*

Rollins: Different disciplines approach valuation through different lenses. Legal frameworks often define value by reference to specific dates, statutory tests and other legal constructs. Finance professionals, in contrast, tend to focus on expected cash flows, risk and market-based benchmarks, while commercial parties often emphasise business strategy, operational realities and alignment with longer-term company objectives. Tension can arise when those perspectives are not appropriately reconciled. Expert opinions can become vulnerable when they are not adequately grounded in real-world market data or commercial practice, or when

they fail to respond clearly to the legal question the court must decide. That matters because courts assess valuation evidence through the lens of a particular legal issue, not in the abstract. In my experience, expert evidence is most effective when it incorporates commercial context in a way that is disciplined, analytically sound and responsive to the governing legal framework. It is also important to maintain consistent exposure to real-world deals by staying active in the capital markets both in and outside disputes contexts.

CD: What makes valuation evidence persuasive to judges and tribunals, as opposed to simply sophisticated or complex?

Larkin: There is a stark difference between persuasive valuation evidence and technically proficient valuation evidence, and it can be the difference between winning and losing. Valuation experts that present a clear and cogent thesis that is well supported by the underlying record are generally well received, but experts who lead with model complexity – even if correct – can lose the factfinder early. In my experience, what makes expert evidence genuinely persuasive is the degree to which it is grounded in, and fully consistent with, the underlying factual record. The

contemporaneous documents, financial projections, board materials and management communications should form the basis of the analysis. An expert who has done their homework and can speak clearly to the company's own internal assessments, and

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who anticipates the opposing expert's critiques and addresses them head-on is far more credible than one who hides behind methodology. Courts are also acutely aware of experts who appear to have reverse-engineered their conclusions to serve the client's litigation position. Overly aggressive methodological choices, questionable use of comparables, or conclusions that push well outside the range of what the company's own advisers contemporaneously believed are all red flags that get discounted or discredited.

Rollins: In my experience, persuasive valuation evidence is rooted in clarity, coherence and analytical discipline rather than technical sophistication for its own sake. Courts tend to respond well when experts explain why we reached a conclusion, and show how the conclusion is grounded in accepted methodologies and information known or knowable at the relevant measurement date. In contrast, valuation analyses that are highly sophisticated but do not clearly support their assumptions, inputs or relevance to the issues before the court often carry limited weight. In short, this comes down to effectively balancing technical credibility with intelligibility, so the expert analysis remains rigorous, but also clear and useful to the trier of fact.

Ferrara: Assuming the economic-financial accuracy of the models and documents used, as well as their strict adherence to regulatory and case law boundaries, the persuasiveness of valuation evidence hinges on strategic factors. First and foremost is the selection of the right expert, who is not necessarily the most technically proficient. A state court or an arbitrator may favour different profiles of experts – for instance, an academic versus an international structured accounting firm – or they may prefer different expert communication strategies or require only the submission of an expert report rather than a cross-examination or an

expert conferencing session – all options demanding distinct skillsets. A second pivotal element is consistency, both internal to the expert report itself and external in relation to the legal pleadings and the core narrative of the claim. Thirdly, the expert must convey independence and authority, without hesitating to make minor concessions to bolster overall credibility.

CD: In contentious cases, how important is the story behind the numbers compared with the technical valuation methodology itself?

Ferrara: The narrative is always central to a dispute, and litigation involving valuation is no exception, even when the apparent objectivity of numbers, accounting standards and historical financial data might seem overriding. The issues presented to judges and arbitrators in high-stakes litigation are inherently complex and objectivity is often merely illusory – as universally correct valuation methodology rarely exists to the exclusion of others and accounting standards themselves allow for a certain degree of discretion. This is why the qualitative element can be decisive and the technical evidence contained within the expert report must closely align with the defence arguments. To achieve this, it is essential to involve

the expert in the early stages of the dispute – from the very inception of the legal strategy.

Rollins: I see narrative and methodology as intricately connected rather than competing considerations. Valuation involves judgment, and courts often want to understand whether an expert's assumptions fairly reflect the subject company's business outlook, operating environment and risks. A technically sound framework is not enough if it produces an outcome that sits uneasily with the broader factual record or market realities. In my experience, valuation evidence is strongest when the story behind the numbers and the analytical framework are aligned so each reinforces the other.

Larkin: In virtually every case I have litigated, the factual narrative is more important than the technical methodology. Expert valuation testimony does not exist in a vacuum. It must be anchored in, and fully corroborated by, the contemporaneous record. What did management believe about the company's prospects at the time? What did the board's financial advisers say? What do the internal projections show, and how were they prepared? These are the questions that courts focus on, and the answers tend to be far more determinative than a dispute over discount rates or terminal value multiples. An independent valuation opinion that floats free of the underlying facts is a liability, not an

asset. Courts treat such testimony sceptically, and opposing counsel will exploit every gap between the expert's assumptions and the documentary record. Conversely, when the factual narrative powerfully supports the valuation conclusion, the expert's testimony becomes much harder to attack.

CD: How does uncertainty – whether economic, operational or regulatory – change the way value should be assessed when disputes arise?

Rollins: Higher levels of economic, operational or regulatory uncertainty may place greater emphasis on considering a range of potential outcomes, and testing how sensitive value is to key inputs. In those circumstances, courts may focus less on a single estimate and more on whether the expert has identified, evaluated and addressed uncertainty in a disciplined and objective way. Rigid forecasts or point estimates in uncertain environments can attract challenge if they appear insufficiently supported. In my experience, transparency about uncertainty is an essential part of producing credible, objective expert valuation work.

Larkin: Uncertainty is one of the most contested battlegrounds in valuation disputes because it cuts in multiple directions. Economic headwinds, operational risks and regulatory exposure can

all affect the value of an asset or enterprise, and competing experts will likely spar over how much weight to assign them. What often proves decisive is whether the company itself, at the relevant time, was aware of and accounting for these uncertainties. A strong contemporaneous record will lend significant credibility to an expert who relies on those same factors because it shows that the uncertainty was real, recognised and not manufactured for litigation purposes.

approach where the expert calibrates the valuation across distinct and alternative scenarios can also sometimes facilitate a compromise solution – an outcome often favoured by adjudicators and typically by arbitrators.

Ferrara: Whether driven by economic, operational or regulatory factors, uncertainty inevitably forces the expert to reflect counterfactual scenarios within their valuation. In such events, focus may shift from the accuracy of the data to the reasonableness of the valuation methodology selected to appraise uncertain future outcomes. It becomes paramount to anchor the analysis to reliable assessments that do not appear merely speculative, grounding them as much as possible in past historical data or evidence from comparable cases. An



CD: What role does professional judgment play in valuation disputes? How do courts typically respond to competing judgments from experts?

Larkin: Professional judgment is the bedrock of expert valuation testimony and credibility is everything. When two qualified experts offer materially different conclusions based on the same underlying body of evidence, courts must decide which expert appears more objective, more rigorous and more honest about the limitations of their own opinion. An expert who acknowledges uncertainty where it exists, engages fairly with the other side's methodology and grounds their conclusions in the facts is more likely to be credited. Significant effort goes into the vetting of expert witnesses before retention and into building a comprehensive dossier on opposing experts prior to trial. The proverbial 'deep dive' into an expert's background and prior opinions in other matters can all be powerful tools for impeachment. Extensive pre-trial work can expose methodological inconsistencies or omissions that prove decisive to the outcome. In a close case, successfully discrediting the opposing expert can be the single most important event at trial.

Ferrara: If valuation were a matter of pure arithmetic, valuation disputes would clearly not exist. Consequently, the professional judgment

of experts is pivotal. When this judgment leads to wildly divergent and incompatible valuations, courts and arbitrators generally deploy different solutions. First, they may instruct the experts to meet and narrow the gap between their valuations, debating the issues and producing a joint report to identify uncontested points. Second, they can use the evidentiary hearing and the examination of the experts to test the party-appointed reports, challenging the reasonableness of the methodology and the accuracy and reliability of the data. Third, they may appoint their own independent expert.

Rollins: Professional judgment is inherent to valuation, particularly where market data is limited or conditions are atypical or especially nuanced. Courts generally recognise judgment is necessary, but they examine carefully how that judgment is exercised. When opposing experts reach materially different conclusions, courts often focus on the logic behind those competing judgments – whether the analyses are internally consistent and supported by the available evidence, and whether the reasoning is explained clearly enough for the court to test it. The quality of the explanations often matters as much as the conclusions themselves.

CD: Looking across recent cases, what aspects of valuation analyses seem to

undermine credibility most often in litigation settings?

Larkin: Courts see a great deal of expert testimony, and judges have a strong instinct for analysis and opinions that have been reverse-engineered to reach a desired outcome. The red flags are familiar – questionable comparables, aggressive assumptions that find no support in the company’s own contemporaneous documents and conclusions that sit well outside the range that any of the company’s advisers reached at the time. Other recurring vulnerabilities include experts who have not genuinely mastered the underlying facts and stumble on cross-examination when pressed on documentary details. It shows the factfinder that the expert has not really done the work to support their bottom line conclusions, calling into question their overall credibility.

Rollins: Issues that continue to attract scrutiny include hindsight bias, overreliance on untested financial projections and selective or inconsistent use of market evidence. Credibility can also be undermined when experts apply measurement dates that are not clearly justified or rely on information that would not have been reasonably available at

the relevant valuation date. More broadly, courts tend to be sceptical of valuation evidence when it is unmoored from contemporaneous facts or applied inconsistently across the valuation analysis. Above all, credibility suffers when the evidence does not appear objective, balanced and well-supported.

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Ankura*

Ferrara: One of the elements that most frequently undermines the credibility of valuation analyses – even before the reliability of sources and the accuracy of numbers and data – is systemic inconsistency. The opportunistic and atomised use of isolated data points, detached from their context and the narrative being presented, transforms the valuation into a mere accounting exercise, permanently damaging the judge’s trust. Another factor is the perceived bias of the expert: the

impression that the expert excessively bends to the demands of the defence.

CD: Looking ahead, where do you see valuation methodology becoming most contested in legal disputes as private credit, creditor control and cross-border complexity continue to grow?

Ferrara: A context of severe geopolitical uncertainty and market volatility, which in turn impacts corporate operational profiles, suggests that the weight of counterfactual scenarios in valuation disputes is set to increase. This will likely become a point of fierce contention, given that minor differences in assumptions can lead to vastly divergent outcomes. The growth of private credit brings about more complex financial structures compared to traditional lending, which can also impact the determination of enterprise value: hybrid instruments, sophisticated intercreditor agreements and bespoke financing arrangements. This complexity is further heightened in a cross-border context, where different valuation rules

and standards may apply from one jurisdiction to another, potentially favouring one stakeholder over another.

Rollins: I expect continued debate around issues such as the appropriate valuation premise, the allocation of enterprise value across increasingly complex and layered capital structures, and the way contractual control rights are reflected in valuation analyses. Those issues are likely to become ever more contested as private credit continues to expand and creditor influence becomes more pronounced. Cross-border disputes are also likely to raise added challenges where different legal regimes, market practices or regulatory constraints can materially affect value monetisation. In that environment, expert evidence will be tested not only for technical robustness, but also for whether it can be applied coherently across legal contexts. As capital structures and jurisdictions intersect more frequently, disputes will increasingly turn on complex valuation evidence and the allocation of value and economic rights under differing legal frameworks.

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