

# ***More Problems With Fairness Opinions: Analyst ‘Pleads the Fifth’ and Bank Faces Gross Negligence***

***Ha-Lo Industries, Inc. v. Credit Suisse Boston, 2005 U.S. Dist. LEXIS 23505 (October 12, 2005)***

Fairness opinions are rife with potential conflicts of interest, none so obvious as when an investment firm’s fee is tied directly to the completion of a deal, which in turn depends upon that same firm issuing an opinion that the deal is financially “fair.”

That’s what happened here, when plaintiff Halo-Industries, a promotional products company, wanted to acquire a technology platform for internet expansion, and hired defendant investment banking firm as financial advisor. Defendant’s fee was specifically tied to the purchase price; if the deal fell through, defendant would end up with no more than its retainer and a modest “break-up” fee.

As defendant had no specific expertise in technology systems, it advised plaintiff to hire Ernst and Young to assess this aspect of the deal. E&Y’s report came back negative, indicating that the target’s systems were incomplete, requiring significant investments. Plaintiff’s CEO allegedly presented a positive picture to the Board, however, and the company proceeded with the acquisition; defendant, who disputed receiving E&Y’s report, issued its fairness opinion and earned a \$2.5 million fee.

Despite investing millions post-merger, plaintiff later filed Chapter 11 bankruptcy—and filed suit against defendant for “gross negligence” in rendering its fairness opinion.

Among its claims: 1) the investment bank had valued the target using a methodology that would overstate its value; 2) it had disregarded relevant information about value and public information about the target’s management practices; and 3) it had permitted self-interest in a lucrative fee and future business to override reasonable judgment.

## **‘Simple mistakes’ in valuation lead to Fifth Amendment plea**

Before the facts went to a jury, defendant filed a motion for summary judgment, arguing that the claims lacked legal merit. In denying the motion, the U.S. District Court (N. Dist. Illinois) touched on several undisputed facts, primary among them defendant’s admission that any errors in its valuation of the target resulted from “simple mistakes.”

Given that the analyst who’d gathered the data had asserted his Fifth Amendment right to avoid self-incrimination rather than testify how the “simple mistakes” occurred, the Court could not, as a matter of law, absolve defendant from bad faith.

For now, the case is moving forward—while fairness opinions are headed for further scrutiny. If more “independent” opinions are called for, then certainly business analysts may be among the more experienced professionals to answer the call.