

MERGERS & ACQUISITIONS

Wounded Bear: New York Judge Hears Arguments in Bear Stearns Merger Case

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There's interesting stuff in the 80-page transcript of Monday's argument in the shareholders challenge to the JPMorgan-Bear Stearns merger. In the case, argued before Manhattan state supreme court justice Herman Cahn, Bear shareholders claim that Bear Stearns and its directors breached their fiduciary duty when they agreed to be bought by JPMorgan for \$2 a share and then later \$10 a share. Shareholders also say JPMorgan aided and abetted those breaches.

Greg Markel of Cadwalader, Wickersham & Taft, who argued for Bear Stearns and the inside directors, offered Justice Cahn a nice overview of the extraordinary circumstances in which Bear found itself in March. Markel argued that the directors fulfilled their fiduciary duties, negotiating a deal that got some money to shareholders as an alternative to bankruptcy, which would have brought them nothing.

"They had four major and respected law firms advising them, as well as Lazard," said Markel. "And all of them, all of them were advising the board that there was zero value in a bankruptcy for shareholders, as well as losses to creditors."

Daniel Krasner of Wolf Haldenstein Adler Freeman

& Herz, who represents the plaintiffs, argued that Bear directors made a mistake by "turning over the keys of the bank to JPMorgan," which put Bear in a weakened position when it renegotiated the \$2 a share price. "And had they not been in a position where JPMorgan was in effect in control, they could have said to JPMorgan, 'We like that first agreement, we know the price is inadequate, but we expect that someone is going to come along, another bank.' And there were other banks out there that given sufficient time could have come in and acquired them for closer to fair value."

Marc Wolinsky of Wachtell, Lipton, Rosen & Katz argued that his client, JPMorgan, couldn't be sued for aiding and abetting when the Bear board didn't violate its duties. "There was a crisis," said Wolinsky. "The board acted properly. And faced with . . . the prospect of not one bankruptcy, but bankruptcies . . . in which the shareholders would have gotten nothing and the bondholders would have lost billions, there's no basis for this court to second guess the board's judgment."

We'll let you know when Cahn issues a ruling.