

Gillis, Diana L.

Subject: FW: Rule 801.10 (Acquisition Price)

From: Gillis, Diana L.
Sent: Wednesday, May 13, 2015 2:20 PM
To: [REDACTED]
Cc: Walsh, Kathryn E.
Subject: RE: Rule 801.10 (Acquisition Price)

Only a FMV can be relied on for 60 days. If the acquisition price in an asset deal cannot be determined before close, you simply rely on the FMV. If the acquisition price will become determined prior to close, it must be taken into account. If the buyer is unsure whether the acquisition price may be over the threshold, they can of course file or else assume the risk of not doing so.

From: [REDACTED]
Sent: Tuesday, May 12, 2015 3:05 PM
To: Gillis, Diana L.
Cc: Walsh, Kathryn E.
Subject: RE: Rule 801.10 (Acquisition Price)

Yes. The idea is that – in most cases -- at some point prior to close the parties can reasonably estimate variable components of the acquisition price (such as closing date transaction expenses, and post-closing working capital adjustments).

Under Rule 801.10(c)(3), the parties can use a FMV determination made at any point within 60 days before close, even where, had they done an updated analysis at close, it would have been higher. So, the parties will know if FMV is OK.

Absent PNO dispensation, I'm concerned the parties cannot also rely on an acquisition price determination unless it's done at the closing.

I am not focusing on the case where the parties genuinely are unable to reasonably estimate variable components of the acquisition price until the actual closing date itself. I'd think that case would be extremely rare. And, in the case where it was impossible to estimate it even at the closing, then acquisition price would certainly be undetermined.