

## M&A Activity Increased in 2004

After three years of cautious deal-making, the global volume of deals announced in 2004 was up 41% from 2003 and reached \$1.95 trillion, the highest level since 2000. The big deals came from a variety of sectors including health care, software, utilities and telecommunications.

In the U.S., announced merger volume surged more than 50% from 2003, to \$875 billion. European merger activity rose more than 28% and Asian activity was up more than 59%.

Big companies ceded deal work to private-equity firms. Buyout shops accounted for 15% of overall deal volume in 2004. With interest rates low, the private-equity firms were able to take advantage of inexpensive financing. Additionally, they were helped by a strengthening market for initial public offerings that enabled them to sell their investments at a profit. They are expected to play a larger role in M&A in the future. There are substantial amounts of private-equity funds waiting on the sidelines.

Corporate buyers were more cautious. Burned by an overload of deals in the late 1990s that went sour, boards and managements were more disciplined. While they examined a lot of deals, many were never completed.

Across Wall Street, bankers are predicting increases in merger volume for 2005. A survey jointly conducted by the Association for Corporate

Growth and Thomson Financial states that 72% of dealmakers surveyed said M&A conditions are good or excellent, up from 45% at this time last year.

For this year, Wall Street expects that technology companies, which have been quiet recently as dealmakers, will be active. These companies are confronting maturing businesses with slowing growth and are likely to combine in an attempt to cut costs. Other sectors expected to experience increased activity include health care and financial-service firms.

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# Court Case Updates

## Not having expert puts husband in doghouse

*Baker v. Baker*, 2004 Pa. Super. LEXIS 3875 (October 26, 2004). *Judge Gantman*.

The issue in this marital dissolution was the value of husband's veterinary practice.

### **Valuation evidence**

Only the wife presented expert witness testimony at trial. **David Bohlander** testified that he valued husband's equity interest in the practice at \$99,000 and that husband's annual income was \$74,100. A portion of that equity interest was valued as enterprise goodwill. Bohlander noted that enterprise goodwill included the customer list and the location of the practice.

Husband presented no expert testimony but did testify that he commingled business and personal expenses.

### **Holding and rationale**

The trial court adopted wife's expert's valuation of the practice. The court of appeals affirmed the trial court's ruling, noting that because the husband presented no expert witness testimony during trial, the trial court was well within its discretion to adopt the wife's expert's testimony.

## Minority discount plays key role in appreciation valuation

*Haentjens v. Haentjens*, 2004 Pa. Super. LEXIS 3836 (October 15, 2004). *Judge McCaffrey*.

The issue in this marital dissolution was the appreciation amount of husband's minority interest in **Barrett, Haentjens and Company**. The couple was married in 1976 and separated in 1996. Husband inherited 44.47% interest in the company in 1987 from his father. The company was sold in 1996 and husband received \$2,194,031 for his interest. Because the sale of the company had already occurred, the issue at trial was the value of the company in 1987.

### **Valuation evidence**

Wife's expert testified that the 1987 value was \$711,459 based on the 1987 after-tax valuation conducted by the IRS, which included a minority discount. Wife's expert then subtracted the 1987 value from \$1,861,268, which was the after-tax undiscounted amount received as a result of the sale in 1996. This resulted in an appreciation amount of \$1,149,611.

Husband's expert testified that a different valuation, the 1987 IRS valuation—which did not account for a minority interest—was the accurate starting point. That IRS valuation concluded husband's interest was worth \$2,181,268 as of 1987. Husband's expert then subtracted this 1987 IRS value from the pre-tax sales proceeds in 1996, resulting in an appreciation amount of \$12,763.

### **Holding and rationale**

The trial court adopted husband's expert's valuation. The trial court noted that the financial data supported this view and showed that the value of the company had been very stable over this period of time. The court of appeals affirmed the valuation portion of the decision but remanded on other grounds.

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## Buy-sell agreement's terms dismissed, LOM applicable

*Estate of HA True v. Commissioner*, 2004 U.S. App. LEXIS 24844 (10th Cir. December 2, 2004). *Judge Seymour*.

The issue in this tax case focused on the ability of the taxpayer's restrictive buy-sell agreement to reduce the value of the family business by its terms. The tax court ruled that it was unable to do so because the buy-sell agreements were not supported by full and adequate consideration and the agreements had testamentary inferences. However, the court held that the agreements were still enforceable and held that a marketability discount could be applied.

The True family conducted multiple businesses in the industries of oil, cattle and environmental clean-up. Although some of the enterprises were more successful than others, on average the True family was very successful. When the patriarch, H.A. True died, the buy-sell agreements were activated.

### **Buy-sell agreement**

The court noted the terms of the buy-sell agreements:

The agreements dictated that an owner or partner could not transfer or encumber his or her interests in the business, and each owner or his or her spouse had to work in the business. Failure to work in the business, any attempt to transfer an interest in the business, death, and disability were each treated as if the holder of the interest had notified the other owners of his or her intent to withdraw from ownership. Upon the occurrence of such an event, the other owners were required to purchase the departing owner's interests at a formula price listed in the buy-sell agreement.

# Court Case & Other Updates

In addition, the True family used the tax book method of accounting and not GAAP. The Court of Appeals noted that although this was reasonable, it was not a proper method of valuing the business.

## **Holding and rationale**

The IRS challenged the agreements at the tax court level and the court sided with the IRS. The Court of Appeals agreed, stating that:

[T]he transactions at issue here were neither conducted at arm's length nor without donative or testamentary intent. We noted the lack of arm's length negotiations between the True family members when entering into the various buy-sell agreements, as well as the inferences properly drawn from those agreements: they served, in part, to fulfill Dave and Jean True's overall testamentary plan to pass the family business on to their sons. The tax court did not clearly err in finding that these transactions could not aptly be construed as occurring within the ordinary course of business.

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## **PA Divorce Law Update**

Act 175 was recently signed into law by Governor Edward Rendell and became effective on January 30, 2005. Previously in divorce proceedings, the cost to convert an asset to cash

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and the personal income taxes related to the gain were not considered unless sale or liquidation of the marital assets was imminent. This Act, however, now mandates that the cost of converting assets into cash be considered.

For non-cash assets (i.e. real estate, stocks, etc.), the impact of transaction costs and taxes must be considered. A realtor or business broker's commission may now be subtracted from the value of an asset. Additionally, consideration must be given to the tax impact of conversion to cash. These changes can cause a significant downward adjustment to value.

Act 175 provides that asset values closest to date of trial be the controlling value. Previously, the date of separation was also considered. For additional guidance on this Act, contact an experienced divorce attorney.

## **Great Resources for Compensation Information**

**America's Career Infonet**, a component of **CareerOneStop**, [www.acinet.org](http://www.acinet.org).

Finding detailed information about wages and employment trends is only a click away. America's Career Infonet provides this free information organized by occupation, industry, and state.

The Web site is the portal to CareerOneStop, a set of free integrated Internet resources initiated by the U.S. Department of Labor. Career information is broken into General Information, Wages & Trends, What It Takes, State Information, and Customized Reports. The Wages & Trends link on the home page contains some of the most instrumental information for appraisers. This information includes: occupation reports, detailed wages, metro wages, detailed trends, industry trends, and customized reports.

A search is based on "job family," specific job (title), and state of job location. On entering this information, detailed tables are created for each report mentioned above. The only exception is metro wages, which requires the user to enter the metro location of the job. The Customized Reports section enables the user to choose more than one report and adds the features of What It Takes and State Information reports from the home page. This Web site can be a great asset in determining appropriate compensation.

### **Other compensation Web sites**

Following is a listing of several other compensation Web sites:

**www.bls.gov:** This free government site provides detailed wage and benefit information from a national level to a regional level.

**www.careerjournal.com:** This site is a cohort of *The Wall Street Journal*. It provides wage and salary information primarily as a tool for career development.

**www.erieri.com:** Economic Research Institute provides salary survey analysis through their Web site. They have a variety of products ranging from salary and geographic assessors to an executive compensation assessor.

**www.compgeo.net:** This fee-based online resource contains detailed compensation information that covers ten regions within the United States and the Caribbean.

**www.worldatwork.org:** Wagesweb provides national data on salary and benefit information for free, and has a yearly subscription price for metropolitan salary and benefit information.

# VMI Highlights

Congratulations to **Andrew Wilusz, ASA**. The Philadelphia Estate Planning Council ("PEPC") recently announced that Andrew is the recipient of the 2005 Mordecai Gerson Meritorious Service Award. This award will be presented at the March 15 luncheon program at The Union League.

This award is presented to a PEPC member with a minimum of five years of membership who has rendered extraordinary service to further the work of the PEPC. Past recipients include Mordecai Gerson, Joseph H. Bachtiger, Joseph H. Yohlin, William T. Walsh, Karen A. Fahrner, Clifford D. Schlesinger, Robert J. Weinberg, David Watson, Thomas Forrest, Vincent Mitchell, Stephen Frishberg and Madeline Janowski.

Andrew is a member of the Board of Directors of the Philadelphia Estate Planning Council. He is Co-Chair of its Ethics Committee and has been active on several other committees including: Programs, Membership, Member Services and Long Range Planning.

The PEPC, the largest estate planning council in the nation, is a highly recognized interdisciplinary organization for professionals involved in estate planning, providing its members with opportunities to enhance their skills and expand

their network through programs and interaction.

Additionally, Andrew will give an ethics CE/CLE presentation entitled "The Five C's of Ethics for Estate Planning Practitioners" on April 20 to the Mercer County Estate Planning Council. If you are interested in the program or having Andrew speak in-house to your firm, please contact him at [amw@valuemanagementinc.com](mailto:amw@valuemanagementinc.com).

**Ed Wilusz, ASA, CFA**, will be making a presentation to the West Chester Bar Association on Friday, April 22, 2005. His presentation will be on the valuation of business entities. He will also be speaking at the Montgomery County Estate Planning Council's annual seminar on June 1. The seminar will be on Business Continuity.

Ed was also recently appointed Treasurer of Pearl S. Buck International (PSBI). PSBI is a private non-profit organization with the mission of improving the quality of life and expanding opportunities for children, promoting and understanding the values and attributes of other cultures, the injustice of prejudice, and the need for humanitarianism throughout the world.

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