FROM THE CHAIR  Scott T. Whittaker

I hope that everyone had a great summer, properly balanced between work and fun. With summer officially behind us, I also hope everyone is ready to gather in Boston for what promises to be very productive M&A Committee meetings, to be held on September 9 and 10, as part of the ABA Business Section Annual Meeting.

Our subcommittees and task forces will meet throughout the day on Friday and Saturday at the Marriott Copley Place, concluding with our full Committee meeting Saturday afternoon. A complete schedule is set forth at the end of this issue of Deal Points. The subcommittee and task force meetings will have many highlights, which are described in the subcommittee and task force reports below. If you are unable to attend in person, please consider participating by teleconference. You can find the dial-in information for each task force, subcommittee, and the full Committee meeting at the end of this issue of Deal Points.

A special note of thanks to our sponsor for this meeting: Duff & Phelps. On behalf of the Committee, THANK YOU!

In addition to our substantive subcommittee and task force meetings, the M&A Committee will present two CLE programs and co-sponsor three others. For the details please see George Taylor’s Programs Committee write-up in this issue of Deal Points. Please try to support your fellow M&A Committee members, while you earn CLE credit and stay abreast of important developments affecting your practice, by attending as many of our programs as you can.

The M&A Litigation Task Force will have new leadership starting in Boston. Yvette Austin Smith, who has served as Vice-chair of that task force, will become Co-chair, replacing Myron Steele, whose tenure as Co-chair has ended. The M&A Litigation Task Force is a joint task force of the M&A and the Business and Corporate Litigation Committees. The task force was formed as a forum for collaboration among practitioners and the judiciary, to help tackle some of the thorny issues resulting from the explosion of litigation in public company M&A transactions. Myron, as former Chief Justice of the Delaware Supreme Court, was the perfect choice for the M&A Committee Co-chair position on the task force. Myron contributed greatly as the task force was formed and got off the ground. We thank Myron for his service as Co-chair, and look forward to his continuing involvement in the M&A Committee.

Sadly, we will bid farewell to one of our long-time M&A Committee members in Boston. Jon Hirschoff, who has been a fixture at our meetings for decades, passed away on May 21. Jon was a tremendous contributor to the M&A Committee, both as a practitioner and a friend to many. The projects Jon worked on include both the Model Asset Purchase Agreement and the Revised Model Stock Purchase Agreement publications, and he was a founding Co-chair of the M&A Jurisprudence Subcommittee. Jon will be greatly missed.

I also take this opportunity to remind everyone about our Women in M&A (WiMA) initiative, which is a groundbreaking initiative to attract more women to M&A practice, and to support and retain women who choose an M&A practice. For details regarding the Women in M&A Task Force meeting in Boston, please see Jennifer Muller’s task force write-up in this issue of Deal Points. Jennifer and Rita O’Neill, Task Force Vice-chair, will also be presenting on Saturday at the Women’s Business Law Network Subcommittee meeting, sharing best practices and lessons learned after two years of effort on the WiMA initiative. The Task Force will also deliver a panel presentation at Boston College Thursday, September 8, encouraging students to attend our M&A Committee meetings and consider M&A as a possible career path. Please support our WiMA initiative by participating, and encouraging others, especially women, to attend.

If you have any questions concerning our upcoming meeting, or anything else, please don’t hesitate to ask. I look forward to seeing many of you next week.
FROM THE EDITOR  Ryan D. Thomas

"Each moment of the year has its own beauty." – Ralph Waldo Emerson

Whether it’s wanderlust satisfied by summer travels, the kick-off of football season or rooting for the Red Sox to make the playoffs for Papi’s last hurrah, I hope you’ve enjoyed everything summer had to offer. We hope you enjoy this issue of Deal Points as well; and many thanks to our contributors, especially our Feature Article authors – Paul Koenig (SRS Acquiom, Denver, CO) and John K. Hughes (Sidley Austin LLP, Washington D.C.). We are continually looking at ways to improve the publication so it is valuable and practical to you – our readers. Please reach out to me if you have any suggestions for improvement, new ideas on value-add content or articles you would like to submit for inclusion in the next issue.

I look forward to seeing you in Boston.

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What to Make of the Great Hill Case – The M&A Bar is Not Yet in Agreement on How Best to Address M&A Privilege Issues

Paul Koenig
SRS Acquiom

Abstract
An analysis of merger agreements closed since the November, 2013 Great Hill ruling reveals no apparent consensus on how selling companies are assigning rights of attorney-client privilege related to pre-closing communications. Some agreements are silent on the issue, while others variously assign the privilege to the target company shareholders as a group, to the shareholder group and their post-closing representative, or to the representative only. We analyzed the frequency of these alternative formulations and discuss their pros and cons. Whichever approach is chosen, this is an important issue that should be considered by all selling companies in a merger and their shareholders.

Background
In most mergers, the buyer and the seller are each represented by legal counsel. The stockholders of the selling company often assume that communications with the law firm that “sat on their side of the table” in the negotiation phase of the transaction will continue to be confidential and unavailable to the buyer since it was the adverse party during the negotiation phase. That analysis, however, fails to take into account the actual nature of the attorney-client relationship. With most deals, the law firm’s client is the selling company, not its stockholders. At closing, the target company typically becomes a wholly owned subsidiary of the buyer. Therefore, there has been some question as to whether rights to the legal privilege and the attorney-client relationship flow to the buyer with respect to pre-closing communications.

In Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, C.A. No. 7906-CS (Del. Ch. Nov. 15, 2013), the Delaware Chancery Court addressed this issue and determined that the selling company’s attorney-client privilege related to pre-closing communications transferred to the buyer following closing. The court focused on the statutory language of Section 259 of the Delaware General Corporation Law, which says that following a merger, “all [of the target company’s] property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation...” (emphasis added).

The court suggested that the target company could have avoided this outcome, if desired, by specifically excluding such privilege right from being transferred to the buyer in the contract language of the merger agreement.

New Data: A Comprehensive Analysis of Post-Ruling Agreements
As shareholder representative on hundreds of private-target transactions annually, SRS Acquiom is uniquely positioned to assess whether and how selling companies are seeking to address the possible transfer of attorney-client privilege rights. We analyzed the merger agreements for over 50 transactions that closed since Great Hill was published.

No Apparent Consensus
Since Great Hill, one-third of merger agreements still have no provisions addressing the issue. While the other two-thirds of transactions did include applicable language, as shown in the following chart, there is not consensus on what such terms should say.

Over half of the agreements assign the privilege to the target company shareholders as a group or the shareholder group and their post-closing representative. We view any language assigning the privilege to a group as potentially problematic since it creates uncertainty regarding how it could later be affirmatively or accidentally waived, assigned or transferred and who would have the right to assert it. Other agreements assign the privilege to the representative only.

An example of privilege assignment language is below:

Ownership, or the right to waive the attorney-client privilege, is vested in:
(Subset: privilege addressed)

- Shareholder Rep: 12%
- Rep: 34%
- SIs: 39%
- SIs and Rep: 15%

Buyer and the Company agree that, as to all communications between or among Firm and the Company, any of the Holders, the Shareholder Rep and/or any of their respective Affiliates relating to this Agreement or the transactions contemplated herein, the attorney-client privilege and the expectation of client confidence belongs to [the Shareholder Rep and the Holders/the Shareholder Rep/the Holders] and may be controlled by [such person, entity or group], and shall not pass to or be claimed by Buyer, Merger Sub, the Surviving Corporation, the Company or any Subsidiary or Affiliate of Buyer, the Surviving Corporation or the Company.

If the privilege is assigned to a single party as opposed to a group to avoid the complications that can come from assignment to a group,
the parties should consider any conflicts that party might have. For instance, if the privilege is assigned to the CEO of the target company and that CEO is going to work for the buyer after closing, problems could arise if he or she now needs to assert a legal privilege against his or her new employer. For that reason, it may be better to assign the privilege to an outside investor or independent shareholder representative that will not have the same inherent challenges.

Another possible solution observed in a minority of agreements we analyzed is to limit what the buyer can do with such communications even if it acquires rights to them. This has the obvious drawback for the selling stockholders that the buyer would be able to see the contents of such communications but may be a solution if the parties either want the privilege to transfer to buyer or determine that there is no clear way to prevent such a transfer from happening. As shown in the chart below, roughly one-third of mergers agreements have attempted to limit the buyer’s post-closing actions or behavior related to the privilege.

Such language could either be instead of, or in addition to, privilege assignment clauses. A provision limiting a buyer’s behavior may include something like the following:

**Buyer agrees not to assert or use privileged communications for the purpose of asserting, prosecuting, or litigating any claim for losses against the Shareholders.**

Since Great Hill did not give guidance on what approach may work best, there remains an issue as to which of these formulations may hold up to a future court challenge or attempted assertion of waiver. Because Great Hill essentially said, “add something” without specifying what that something should be, it leaves a number of other open issues, several of which are summarized below.

A. With transactions structured as mergers, how do the sellers retain the privilege?

When the transaction is structured as an asset purchase, assignment of privilege is relatively simple in most cases. The selling company remains an independent legal entity, and to make clear that the privilege is not transferred, it can be included in the list of assets specifically listed as “excluded assets” in the purchase agreement. In contrast, in a merger the target company typically becomes a wholly owned subsidiary of the buyer, meaning that under Great Hill the buyer would ordinarily acquire control of the privilege via its control of the target. Therefore, the privilege must somehow be transferred out of the surviving corporation and to another sell-side person or entity.

Such a transfer might not be as simple as the Great Hill court seems to imply. An attempted transfer to the target’s former stockholders would at a minimum leave open the question as to whether dozens or hundreds of separate individuals and entities would then each own – and be able to waive – that privilege. The target company may instead desire to have its privilege rights transferred upon closing to a single entity, such as a large stockholder or the post-closing stockholder representative. The Great Hill court did not address how such a transfer could be structured, but we believe it would be more complicated than simply stating in the merger agreement that a party other than the target company or buyer will hold the privilege upon and following closing. A court would have to accept how a new party came to hold the privilege and conclude that such a transfer was effective without itself constituting a waiver. At this time, we do not have clear guidance from any court as to how that analysis would be conducted.

B. Even if the privilege can be transferred, how do the sellers avoid an immediate waiver?

The Great Hill court noted that the target company did nothing to prevent the disclosure of the relevant communications to the buyer for over a year following closing. The court, however, did not address the issue of whether this would have constituted a waiver because it was not necessary to tackle that question once it had already concluded that the buyer owned the privilege following closing.

Therefore, the question remains that even if the target is successful in preventing the privilege from being transferred to the buyer, how can it prevent that privilege from immediately being waived? A waiver could be deemed to have occurred for a number of reasons.

First, the privilege could be deemed waived for the reason implied in Great Hill if the buyer obtains access to such communications following closing. Some agreements are now including language that says the buyer will not have access to such communications, but that probably is not accurate. While it might not have access to the attorney’s files, many communications will exist on servers or in files that the buyer will take over and could access intentionally or inadvertently. Since, in this scenario, a party that does not hold the privilege was able to access the contents of the related communications, a court could find that the applicable privilege has been waived. The parties could include language in the merger agreement similar to “clawback and non-waiver” provisions found in protective orders in the discovery context to try to prevent this. Such language would state that any post-closing access by the buyer to such communications will not waive or otherwise affect the rights of the selling stockholders or their representative with respect to the related privilege. Since Great Hill did not address that issue, it is unclear whether such a “privilege savings clause” would work. We note, however, that we do not see it included in many of the new clauses that are attempting to address this.

The following is an example of a privilege savings clause:

**Buyer understands and agrees that any disclosure of information that may be confidential and/or subject to a claim of privilege will not prejudice or otherwise constitute a waiver of any claim of privilege. Buyer agrees to use reasonable best efforts to return promptly any inadvertently disclosed information to the appropriate Person upon becoming aware of its existence. Notwithstanding the foregoing, in the event that a dispute arises between Buyer, the Company or any of their affiliates and a third party other than a party to this Agreement after the Closing, the Company may assert the attorney-client privilege to prevent disclosure of confidential communications to such third party; provided, however, that to the extent such dispute relates in
any way to this Agreement or the transactions contemplated hereby, the Company may not waive such privilege without the prior written consent of the Shareholder Representative.

Second, unless the courts accept a legal fiction that the target company and all its employees “forget” the privileged information upon transfer to an assignee, pushing them outside the zone of privilege by virtue of a transfer could function as a waiver. Therefore, even if the sellers are successful in preventing the buyer from ever obtaining any relevant communications, the fact that parties who no longer “own” the privilege have actual or constructive knowledge of the contents of such communications may still be deemed to cause a waiver of such privilege upon transfer.

Third, as noted above, if the privilege is assigned to a group, any member of the group could either affirmatively waive the privilege for reasons that might not be acceptable to other members of the group or inadvertently do so through its communications with others.

C. What is the scope of the communications that should be subject to any privilege retained by the sellers?

In Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663 (N.Y. 1996), the New York Court of Appeals ruled that privileged communications related to the merger transaction itself are retained by the sellers, but rights with respect to other attorney-client communications are transferred to the buyer. For instance, if the target company’s law firm had represented it over the years prior to the merger transaction with respect to other matters such as intellectual property or general litigation, the buyer would acquire all rights to all communications associated with those issues, but would not acquire rights to communications related to the merger transaction itself.

Merger parties that agree that the selling stockholders should retain privilege rights with respect to certain communications but not others might look to the Tekni-Plex ruling as a framework in defining which privileged communications would remain with the selling stockholders and their representative, and which would transfer to the buyer. One challenge with this construct is that there are some communications that would likely fall in a gray area. For instance, if the target asks its attorneys to do an analysis of third-party intellectual property rights because it wants to understand any risks to its operations, but that analysis also turns out to be relevant to what it includes in a disclosure schedule attached to the merger agreement, is that related to the merger or its general operations?

Therefore, even if the merger parties agree that privilege rights to pre-closing communications with counsel related to the merger will not be transferred to the buyer, the line as to what is intended to be included and excluded from that definition may be a little fuzzy.

To address this ambiguity, the merger parties might want to effectively quarantine the pre-closing communications that they intend to be carved out from being transferred to, or accessible by, the buyer. To do this, it may be necessary to set up communications systems that are separate from the target’s email and to specify in the merger agreement that all electronic and hard copies of such communications will be effectively walled off from other company systems and communications. The parties could couple this with a provision in the merger agreement in which the buyer and target covenant not to attempt to access any such communications following closing. This could have the effect that even if the privilege did flow to the buyer upon closing, such communications would be unavailable to it.

Looking Ahead

Our analysis of merger agreements since Great Hill reveal that new language is being included in merger agreements to address rights to the legal privilege and the attorney-client relationship with respect to pre-closing communications. No apparent consensus has emerged and the various solutions adopted have pros and cons. We will continue to monitor this issue and report on the data and how it is addressed changes over time. One certain conclusion is that all selling companies should consider this often overlooked issue and how the merger agreement should address it.

The issues addressed in this article raise new and complex challenges that require sophisticated legal analysis on each transaction. Prior to entering into any such transaction, you should consult with experienced legal counsel.

2 The parties could also consider destroying all such communications, but that could create a host of additional risks and issues for the law firm and the target entity.
**DFC Global and Appraisal of a Fully-Shopped Company Above the Merger Price: The Evolving Framework for Assessing Merger Price in the Search for Fair Value**

John K. Hughes
Sidley Austin LLP

**Introduction**

M&A litigation continues to be in a state of flux in Delaware. Within that field, stockholder appraisal in merger transactions – an area once viewed as somewhat of an afterthought in merger practice – has been getting increasing attention.

Against a backdrop where the number of appraisal petitions filed in connection with merger transactions has been rising in recent years, the debate around the relevance of merger price as a determinant of fair value in appraisal has been stoked by recent rulings by the Court of Chancery, including In re Appraisal of DFC Global Corp. The following provides some selected background on events leading up to the Court’s recent ruling in DFC, briefly deconstructs the ruling, and in the process offers some observations on what appears to be an evolving framework the Court may be looking to when assessing the reliability of merger price as a determinant of fair value in appraisal. In the process, the article also raises whether such an evolving framework may invite an increase in appraisal petitions, including when viewed in conjunction with the recent trajectory of fiduciary duty-based jurisprudence in Delaware.

**Backdrop**

**Appraisal Generally.** A full review of Delaware’s appraisal statute and the appraisal process is beyond the scope of review here. But in brief, the statute confers appraisal rights upon stockholders involved in cash or cash/stock transactions who perfect those rights and petition the Court of Chancery for an independent determination of the “fair value” of their ownership stake instead of those stockholders simply accepting the price offered in the transaction (typically a merger).

After hearing presentations from the parties’ respective experts and considering other factors, the Court is charged with reaching its determination of fair value. That amount could be less than, the same as, or more than the price received by the other stockholders who voted for the merger. The statute provides that, in determining fair value, the Court is to value the company as a going concern, as opposed to valuing the company in the context of a merger or other transaction. This is to compensate stockholders seeking appraisal for what purportedly has been taken from them. As a result, the Court’s determination is to be “exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, . . . [and in determining fair value the Court is to] take into account all relevant factors.” As a result, items such as expected synergies arising from the transaction are to be excluded from the determination of fair value. Importantly, in determining fair value, the Court has “significant discretion” to “consider the data [presented to it] and use [any] valuation methodologies” the Court deems appropriate, as the statute does not prescribe any such methodologies.

Only those seeking appraisal are entitled to receive the Court-determined fair value, which differentiates appraisal from fiduciary duty litigation. Interest accrues on appraised fair value at a prescribed statutory rate and dating back to closing of the transaction. The Court’s determination of fair value also is dollar-specific, which is different than the exercise a board of directors goes through when it decides to enter into a merger with a bidder and agrees to a negotiated price. There, a board typically receives a fairness opinion from the advisor that the negotiated price falls within a range of values viewed as fair from a financial point of view. That opinion in turn is based on financial analyses the advisor has performed and provided to the board where selected valuation methodologies against which the merger price is assessed.

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1. John K. Hughes is a partner in the M&A Group at Sidley Austin LLP. He currently serves as a Vice-Chair of the ABA’s M&A Committee. The views expressed here are his own; are not attributable to his firm, its partners, or its clients; and nothing here represents legal advice applicable to a particular situation.


3. Also beyond the scope of review here, but perhaps not irrelevant to a broader consideration of the current application of the statute, is a detailed review of the legislative history of the statutory provision in terms of the scenarios it was initially intended to address and the goals it was intended to advance.

4. See 8 Del. C. § 262.

5. A note on the use of footnotes: While certain factual matters are set out here or elsewhere in the article in narrative form, whether when referencing certain statutory provisions or case law matters, liberties have been taken in omitting footnotes that cite to the relevant statutory provision, or facts as found by the Court in a particular case, or the Court’s rulings so as to avoid an even greater number of footnotes than is already found in the article.

6. Id. at § 262(h).

7. The statutory mandate to exclude elements of value arising from the merger would also appear to implicate, among other possible items, any control premium paid in the merger.

Trends. During the same decade-long period (2005-2015) that saw a tsunami-like surge in fiduciary duty-based stockholder class action M&A litigation, the number of appraisal petitions filed under Delaware’s appraisal statute also rose – albeit not by the orders of magnitude seen in the climb of fiduciary duty-based litigation. Appraisal petitions rose from just a few petitions in 2000 to 30 or more per year in recent years, or from about 5% of appraisal-eligible transactions to some 15%.11

Among other dynamics contributing to the increase in appraisal petitions during the past decade has been the emergence, in a low-yield economic environment, of appraisal arbitrage as an investment theme.12 The term describes a practice where one or more specialized hedge funds or investors, with the express purpose of asserting appraisal rights, buy into the stock of a target after it has announced a merger and then litigate the case in an effort to have the Court find fair value to be in excess of the deal price so investors can receive any differential, plus statutory interest.13

Selected Events Preceding DFC Global

As had been the case with perceived abuses contributing to the rise of fiduciary duty based stockholder class action litigation, concerns arose over the dynamics contributing to the rise in the number of appraisal petitions and the possible resulting effects on transactional certainty and the ability to maximize shareholder value.14 Others have argued that appraisal arbitrage serves a function to ensure stockholders receive their due.15

Legislative Amendments. To address some of the concerns and drivers identified, and to at least reduce the economic incentive on the part of those pursuing appraisal actions for the purpose of simply engaging in interest rate arbitrage as an investment objective, the Delaware legislature has considered amendments to the appraisal statute. The legislature recently amended Sections 262(g)-(h) of the statute. A full review of the statutory changes is beyond the scope here. But among other things, the changes would eliminate de minimis appraisal cases by limiting the availability of appraisal to cases where the total number of shares entitled to appraisal exceeds 1% of the outstanding shares eligible for appraisal, or the value of the consideration provided in the merger for the total number of shares entitled to appraisal exceeds $1 million.

The changes also would limit the post-merger surviving corporation’s exposure to liability for pre-judgment interest by enabling the corporation to voluntarily prepay, to each stockholder seeking appraisal, a cash amount up to the merger price, at which point interest will cease to accrue on that prepaid amount. In that scenario, interest would accrue only on any incremental amount above the merger price. The changes apply to transactions consummated pursuant to agreements entered into on or after August 1, 2016.

Merger Price in Appraisals and 2015 Merger Price Cases. Historically, in determining fair value, the Court has relied heavily, although not exclusively, on the discounted cash flow or DCF valuation methodology as the most appropriate means for making that determination.16 Other times, the Court has availed itself of other methodologies, such as a comparable companies analysis or a comparable transaction analysis. As noted above, the Court is not restricted in choosing any one technique or between whatever the transaction parties’ may offer as fair value based on reports submitted by their respective experts. Rather, the Court takes a “robust approach” in an attempt to “triangulate a value range,” weighing each approach as it sees fit and ultimately settling on a specific dollar value that may or may not match the petitioners’ or respondents’ suggestion, or the merger price.17

CONTINUED ON PAGE 21

9 That surge has been both well-documented and well-reported by, among others, academics and the general media. See e.g., Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2015 (Jan. 14, 2016) (supplementing authors’ prior research tracking M&A litigation trends since 2005 on transactions of at least $100 million involving publicly traded Delaware and non-Delaware target companies); available at http://ssrn.com/abstract=2715890; Ravi Sinha, Cornerstone Research, Shareholder Litigation Involving Acquisitions of Public Companies - Review of 2015 and 1H 2016 M&A Litigation (August 2, 2016) (supplementing Cornerstone’s prior research on M&A litigation trends using similar dataset parameters as Cain and Davidoff Solomon), available at https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016; and Kevin LaCroix, Why M&A Litigation is a Serious Problem, The D&O Diary (November 28, 2011).


16 See Cede & Co. v. IRC Acq. Corp., 2004 WL 286963, at *2 (Del. Ch. 2004) (Court noting DCF analysis is relied on more than the other analyses because it “merits the greatest confidence within the financial community”).

JOINT TASK FORCE ON
GOVERNANCE ISSUES ARISING IN BUSINESS
COMBINATION TRANSACTIONS

Our Task Force is preparing a handbook covering the governance issues that arise in business combination transactions. This is a joint project of the Corporate Governance Committee and the M&A Committee. We started this project in the fall of 2011 and now we are getting close to the finish line, with a projected completion in late 2017. Our goal is to provide practical advice for all deal participants (counsel, bankers, management and boards) about the most common governance issues that arise in deal-making and mitigate risks from governance problems.

Topics include spotting and anticipating conflicts of interest, engagement and use of financial advisors, the use of special committees, Section 203 issues, and private company issues, to name a few. Since our April meeting in Montreal, we have been making steady progress toward a 2017 publication of our Handbook. Out of 18 chapters, we have drafts of all but three, and we expect those first drafts shortly. Currently six chapters are being redrafted by the authors in response to editorial comments, while five chapters are being edited by the co-chairs. Four chapters are completed, awaiting the final editorial process for cross references and other fine tuning. We also need a pithy title for our handbook – many of you have observed that our task force title doesn’t roll easily off your tongue! Let us know if you have a suggestion for a title the ABA might actually endorse!

The Task Force Co-chairs will meet in Boston to discuss our plans for completing the handbook by mid-2017; our full task force will not meet as we are focused now on the editorial process, but all authors who have outstanding chapters should be getting those completed as soon as possible, ideally by the end of September 2016. We are very excited by the content we have received to date, and based on what we have seen thus far from our authors, we believe this handbook will be a significant resource for all deal participants seeking to navigate the governance issues that confront us during the course of a deal. If you have questions or want to get involved, contact any of our four co-chairs, either at the September meeting in Boston, or through our emails below. We look forward to seeing you all in Boston!

Diane H. Frankle, Co-Chair
Michael J. Halloran, Co-Chair
Lawrence A. Hamermesh, Co-Chair
Patricia O. Vella, Co-Chair

TASK FORCE ON
LEGAL PROJECT MANAGEMENT

The Spring Business Law Section meeting in Montreal coincided with the launch of our new book Using Legal Project Management in M&A Transactions – A Guidebook For Managing Deals Efficiently and Effectively. We have been advised by the ABA’s publications team that sales of the book in its first few months have been extraordinarily strong; some 55 law schools have purchased the book for their libraries. We would like to again extend our sincere thanks to all who contributed to making this ground-breaking publication a reality.

Following the Montreal meeting, members of the Task Force have been actively promoting the new Guidebook and the use of legal project management (LPM) in M&A by appearing in programs and webinars for the ABA, Deal Lawyers, the Association of Corporate Counsel and others, and writing articles for such publications as Acquisition International, Bloomberg BNA, Inside Counsel, Law Practice Magazine, LexisNexis Business of Law Blog and Law360.

Our Task Force will meet in person and by teleconference at the upcoming Annual Meeting in Boston on Friday, September 9 (see schedule on page18 for details). We will be discussing among other things:

• Experience of Task Force members in using the tools;
• New tools under development and suggestions for additional tools and programs;
• Challenges and approaches to implementing LPM within an organization; and
• Additional ways to promote the Guidebook and the work of the Task Force.

We are looking forward to seeing many of you in Boston.

Byron S. Kalogerou, Co-Chair
Dennis J. White, Co-Chair
Aileen Leventon, Project Manager
TASK FORCE ON FINANCIAL ADVISOR DISCLOSURE

The Financial Advisor Task Force will meet on Saturday, September 10 in Boston. We plan to discuss recent developments in Delaware relevant to financial advisors. First, we will discuss several recent cases, including Singh v. Attenborough, In re PLX Technology Inc., In re Volcano Corp., and Larkin v. Shah addressing aiding and abetting liability and the application of Corwin. Second, we will discuss emerging trends in the stockholder litigation – inside and outside Delaware – that gives rise to aiding and abetting claims.

T. BRAD DAVEY, CHAIR

TASK FORCE ON PRIVATE COMPANY MODEL MERGER AGREEMENT

The Task Force to prepare a model private company merger agreement with commentary held its third meeting in Montreal and has gathered a critical mass of enthusiastic volunteers, including many who are new to the ABA. The goal of the Task Force is to produce a merger agreement with commentary that will be a practical resource for practitioners and that will highlight the key issues that arise primarily in the private company merger context. The draft will be a reasonable buyer’s first draft. During the Montreal meeting, we discussed recent cases construing non-reliance clauses (and the impact of the failure to include a non-reliance clause). We also had a good discussion of the underlying factual assumptions for the merger agreement and we continue to refine them at each meeting based on input from attendees.

In Boston, Paul Koenig (SRS Acquiom, Denver, CO) will speak on the topic of what happens to the attorney client privilege in an acquisition (the subject of a recent SRS Acquiom publication). At the meeting, we will also receive an update on the various sections of the merger agreement and continue to refine the fact pattern. We encourage anyone who is interested in getting involved as a drafter or in participating in interesting discussions on private company deal issues to attend. We hope you will join us in person or by phone at our meeting in Boston.

LEIGH WALTON, CHAIR
MELISSA A. DEVINCENZO, VICE-CHAIR
AMY SIMMERMAN, VICE-CHAIR

JOINT TASK FORCE ON M&A LITIGATION

The Joint Task Force on M&A Litigation is a collaborative project between the M&A Committee and the Business and Corporate Litigation Committee. The purposes of the Joint Task Force include facilitating programs, projects and interactive dialogue on matters of interest to M&A deal lawyers, litigators and members of the judiciary. The Joint Task Force seeks to facilitate a better understanding on the part of our transactional lawyer members of various aspects of M&A litigation that affect their practice, to provide litigators with a better perspective on deal dynamics, and to assist both in gaining a better understanding of judicial perspectives on mergers and acquisitions.

At our Task Force meeting in Boston, we plan to host an interactive discussion on recent developments in appraisal litigation. We plan to discuss takeaways from the Delaware Court of Chancery’s recent decision in In re Appraisal of Dell Inc. (Del. Ch. May 31, 2016), in which the Court, applying a discounted cash flow analysis, determined that the appraised value of Dell’s common stock was 30% higher than the negotiated merger price in a $25 billion merger in which a financial sponsor and Dell’s CEO and founder, Michael Dell, took the company private. The merger was negotiated by a special committee of Dell’s board, the committee conducted a post-signing go-shop process, and the deal price was increased in response to a topping offer. Despite finding that the sales process would easily have passed muster for purposes of fiduciary duty analysis, the Court declined to utilize the merger price as an indicator of “fair value.” Key questions we will discuss at our meeting include:

- Under what circumstances will the Delaware courts use the merger price as a reliable indicator of fair value?
- Can the merger price ever serve as a proxy for fair value in a transaction with a financial buyer?
- Is a well-run go-shop process relevant to whether the merger price is a reliable indicator of “fair value”?
- Even where the merger price does not serve as a reliable indicator of “fair value,” can it nonetheless have relevance to an appraisal analysis?
- Should fair value represent a price an acquirer would have paid?
- Can valuation analysis correct for market inefficiency?
- Is an efficacious sales process “one-size-fits-all?”

We also plan to discuss other recent appraisal decisions, as well as the recently enacted amendments to Section 262 of the Delaware General Corporation Law, which provide for dismissal of “de minimis” appraisal claims in connection with certain types of mergers and enable a surviving corporation to make a payment to stockholders who have exercised appraisal rights in order to cut off the accrual of interest.

We hope you will be able to join us for what we anticipate will be a lively dialogue.

MICHAEL A. PITTENGER, CO-CHAIR
YVETTE AUSTIN SMITH, CO-CHAIR
At the Spring Meeting, the Revised Model Asset Purchase Agreement Task Force met and had presentations from several working groups on the status of their various drafting projects. We had a discussion by the group working on the miscellaneous provisions on including a mandatory arbitration provision in the draft agreement. Members of the Task Force also gave a presentation at the Full Committee on key points that have been discussed/learned while updating the Model Asset Purchase Agreement.

Our Task Force plans to meet at the Annual Meeting to push toward finalizing drafts of the commentary by the various working groups. We can always use additional volunteers interested in working on the Task Force, especially anyone interested in working on the commentary on privilege issues. Please contact either of the co-chairs if you are interested.

JENNIFER MULLER, CHAIR
RITA-ANNE O’NEILL, VICE-CHAIR

The Women in M&A Task Force (WiMA) meeting will be held on Friday, September 9 (see schedule on page18 for details).

We have arranged a robust agenda for the Task Force meeting. Given one of the greatest challenges of the M&A profession, lack of free time, six Task Force members have volunteered to do the hard work for you, each summarizing a different book that aims to help women become more successful in their careers. Each summary will provide the salient points from the book and will help attendees target which books they think might be most helpful or relevant to them. Don’t forget to pick up a WiMA sports bottle at the meeting as well, a limited number of which will be available.

Rita O’Neill and Jennifer Muller will also be presenting on Saturday at the Women’s Business Law Network Subcommittee meeting sharing best practices and lessons learned after two years of effort on their WiMA initiative. A group of women from the WiMA Task Force will also be speaking on a WiMA panel at Boston College Law School that Thursday and will encourage students to attend the ABA meetings.

We look forward to seeing you all at the Task Force meeting.

JENNIFER F. FITCHEN, CHAIR

Many thanks to all of you who attended our Subcommittee meeting in Montreal and contributed to the discussions on the recently announced amendments to Canada’s takeover bid rules and the future of deal-related litigation. Particular thanks to our panelists for these topics: Delaware Chief Justice Strine and Vice Chancellor Laster, Patricia Vella, Gilles Leclerc (Superintendent, Securities Markets of the Autorité des marchés financier - Quebec’s securities commission), John Leopold and Warren Katz. Having set our bar high at the last meeting, we’ve endeavored to put together another set of engaging and cutting-edge topics for Boston. I believe we’ve succeeded.

Our Boston meeting will first focus on the view from Delaware. We are fortunate that Chief Justice Strine and Vice Chancellor Laster will share their thoughts on several topics ranging from KKR/Corvin and the new paradigm post-Trulia to appraisal actions. We will then turn to news from Washington, D.C., with Ted Yu, Chief of the Office of Mergers and Acquisitions of the SEC to bring us up to speed on the latest from the OMA. Finally, Melissa DiVincenzo (Morris Nichols, Wilmington, DE) and John Hughes (Sidley Austin, Washington, D.C.) will discuss the issues that practitioners should be on the look-out for under Section 203 of the DGCL in connection with an acquisition. Melissa and John will walk through the deemed ownership concept in Section 203 and then discuss how that concept can have practical implications on deal structure and financing, including the issues that arise, and ways to address them, when a bidder teams up with existing stockholders or funding sources.

I’m looking forward to a robust discussion on all these topics and hoping that my greatest challenge will not be lack of participation, but rather keeping us on track so we can get to it all! Safe travels and see you in Boston.
The International M&A Subcommittee met on Friday, April 8, 2016, in connection with the ABA Business Law Section Mergers & Acquisitions Spring Meeting in Montréal, Québec, Canada.

1. **Introductions**

   Franziska Ruf, one of the co-chairs of the Subcommittee, welcomed the participants and passed along the regrets of her co-chair, Freek Jonkhart, who was unfortunately unable to attend the meeting. The participants present introduced themselves to the group.

2. **Cross-Border M&A Trends**

   Jennifer Muller (Houlihan Lokey, San Francisco, CA) gave a very informative presentation on the latest trends in cross-border M&A. This presentation was similar to those Jennifer regularly provides during the Market Trends Subcommittee meetings as well as to the full M&A Committee meetings in respect of the U.S. M&A updates, but adapted to the international audience that regularly works on transactions that cross over one or several borders.

3. **Different Treatment of Select M&A Topics in the U.S. and in Europe**

   Wilson Chu (McDermott Will & Emery LLP, Dallas, TX) chaired a panel with Melissa DiVincenzo (Morris, Nichols, Arsht & Tunnell LLP, Wilmington, DE), Robert Burns (Burness Paul LLP, Glasgow, UK) and Jan-Willem van Rooij (Loyens & Loeff N.V., Rotterdam, Netherlands), that entailed a mock negotiation between U.S. lawyers and European lawyers on selected topics that we know are viewed quite differently in the U.S. and Europe. The topics included:
   - General vs. Specific Disclosures
   - Sandbagging
   - Representations vs. Warranties
   - Locked Box Pricing
   - TUPE vs. Acquired Rights Directive
   - Special vs. Ordinary Resolutions

   The negotiation brought out in a very informative manner the significant differences in how the foregoing seemingly very standard topics are dealt with in different parts of the world. A general discussion ensued which contrasted the U.S. experience in respect of the foregoing matters with that elsewhere.

4. **Subcommittee Website**

   Our website at [http://apps.americanbar.org/dch/committee.cfm?com=CL560002](http://apps.americanbar.org/dch/committee.cfm?com=CL560002) contains:
   - Presentation by Jennifer Muller on Cross-Border M&A Overview.
   - Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.

**Next Meeting**

The Subcommittee’s next meeting will be held on Saturday, September 10, in connection with the annual meeting of the ABA Business Law Section, Mergers and Acquisitions Committee in Boston. See schedule on page 18 for details.

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**MEMBERSHIP SUBCOMMITTEE**

The M&A Committee continues to be the largest committee of the Business Law Section, now comprised of 5,071 members, a 7% increase from January 2016 (latest numbers were from August 2016).

The M&A Trends Subcommittee led by Hal J. Leibowitz has overtaken the Private Equity M&A Subcommittee led by David I. Albin by growing to 2,112 members, or by 23%. The Private Equity M&A Subcommittee grew 8% to 1,532 members. Another very active subcommittee is the International M&A Subcommittee with 1,013 members, which is co-chaired by Freek Jonkhart and Franziska Ruf.

The membership of the Revised Model Stock Purchase Agreement Subcommittee led by Murray Perelman rose an astonishing 143%, going from 336 to 816 members – well done! Another notable increase can be found within the WiMA Task Force (co-chaired by Jennifer Muller and Rita-Anne O’Neill), whose membership increased from 59 to 78, a 32% increase. Their initiatives, events and topics attract both men and women, so please join us if you want to forge the future. The Programs Subcommittee led by George M. Taylor, III also rose from 253 to 306 members.

Governance Issues in Business Combinations (co-chaired by Diane H. Frankle, Michael J. Hallorah, Lawrence A. Hamermesh and Patricia O. Vella) increased to 311 members (up 13%), M&A Litigation (co-chaired by Michael A. Pittenger and Yvette Austin Smith) increased to 155 members (up 11%), and Two-Step Auction (co-chaired by Michael G. O’Bryan and Eric S. Wilensky) increased to 152 members (up 11%).

Here are a few other subcommittees and their membership results as of August 2016:
   - Acquisitions of Public Companies 921 members (up 8%)
   - Technology 341 members (up 8%)
   - Membership 221 members (up 8%)
   - M&A Dictionary 663 members (up 6%)

As you can see, we’ve had significant improvement in membership this year. We encourage you to get involved and help recruit new members – there is plenty of room for new ideas and publications for 2017.
M&A JURISPRUDENCE SUBCOMMITTEE

The M&A Jurisprudence Subcommittee will meet in Boston on Friday, September 9 (see schedule on page 18 for details).

At the meeting we will discuss:

- As many recent court decisions as we can get to in our allotted time
- Some of the topics under review by the Judicial Interpretations Working Group, including presentations by the authors who are drafting memoranda on the topics of sandbagging (Robert W. Dickey and Max Heuer) and successor liability in asset acquisitions (Daniel Peters and John Lawrence).

A summary of Hyatt and Gore v. Al Jazeera, dealing with the interplay between D&O advancement rights and obligations to indemnify a buyer, is attached below and will be discussed at the full Committee meeting.

More generally:

For those of you who don’t know us, the M&A Jurisprudence Subcommittee keeps its members and the Committee up-to-date on judicial developments relating to M&A. Our Subcommittee includes:

- The Annual Survey Working Group – identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the “Annual Survey of Judicial Developments Pertaining to M&A,” which is published in The Business Lawyer. The Annual Surveys also are posted in the online M&A Lawyers’ Library, which Committee members can access from the Committee’s home page on the ABA website.
- The Judicial Interpretations Working Group – examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking for recent cases and also examining the deeper body of case law. The Working Group produces memoranda summarizing our findings, which are circulated to Subcommittee members and, when finished, posted in the M&A Lawyers’ Library.
- The Library Index Project Group – is creating a topic index for the M&A Lawyers’ Library, which will allow online visitors to the library to search the material in the Library by topic.
- The Damages Project Group – is preparing a comprehensive analysis of the types of damages recoverable in common M&A litigation contexts, and the methods that courts have used, or allowed the parties to use, to calculate damage awards.
- The M&A Lawyers’ Library Publication Project Group – is compiling the contents of the M&A Lawyers’ Library into an ABA Publication.

We welcome all M&A Committee members to join our Subcommittee. The Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary.

We need cases!

We ask all members of the M&A Committee to send us judicial decisions they think would be of interest to M&A practitioners. Submissions can be sent by email either to Nate Cartmell at nathaniel.cartmell@pillsburylaw.com or to Mike O’Bryan at mobryan@mofo.com. Please state in your email why you believe the case merits inclusion in the survey. We rely on members to help identify important cases from all jurisdictions, so we need you to help identify cases!

To be included, a decision must:

1. Involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control.
2. (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim.

We are currently excluding cases dealing exclusively with federal law, securities law, tax law and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant please send it, even if it does not meet the foregoing criteria.

In addition, the Judicial Interpretations Working Group is actively soliciting suggestions for topics for new memoranda for the M&A Lawyers’ Library and seeking volunteers to research and draft memoranda. If you have ideas for new topics or would like to work on a memorandum, please contact Frederic Smith at fsmith@babc.com.

To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.

MICHAEL G. O’BRYAN, SUBCOMMITTEE CHAIR
NATHANIEL M. CARTMELL, CHAIR
ANNUAL SURVEY WORKING GROUP
FREDERIC L. SMITH, JR. CHAIR
JUDICIAL INTERPRETATIONS WORKING GROUP

PROJECT GROUP CHAIRS:
RIKKI L. BAGATELL
LIBRARY INDEX PROJECT
BRIAN S. NORTH
PUBLICATION PROJECT
USA J. HEDRICK
DAMAGES PROJECT
Deborah Chancery Court Finds Buyer’s Covenant to Honor Directors’ and Officers’ Advancement Rights Covers Sellers’ Costs
Defending Representation Breach Claims Relating to Actions Taken as Officers and Directors

In Hyatt and Gore v. Al Jazeera, C.A. No. 11465-VCG (Del. Ch. March 31, 2016), 2016 WL 1301743, the latest dispute arising out of Al Jazeera’s 2013 acquisition of Current Media, LLC, the Delaware Chancery Court was asked to harmonize two provisions commonly found in private company merger agreements:

i. the first, an agreement by target (more specifically, target equityholders) to indemnify buyer post-closing for breaches of target’s representations and warranties from an escrow fund established for such purpose;

ii. the second, an agreement by buyer to honor target's obligations under its organizational agreements to indemnify/advance expenses to target’s officers and directors for claims relating to pre-closing matters.

At the heart of the dispute was whether, and in what circumstances, the parties intended the latter (the “advancement rights”) rather than the former to control the reimbursement of fees and expenses incurred by such officers and directors when defending, in their capacities as sellers’ representative or indemnifying equityholders, claims by the buyer for indemnification alleging breach of the target’s representations. In the opinion of the Delaware Chancery Court, they did, thus requiring the buyer bringing such suit to fund the sellers’ cost of defense.

Joel Hyatt and Al Gore were former members, directors and officers (Hyatt serving as CEO, Gore as executive chairman) of Current Media. Each resigned their positions prior to closing of the merger. Hyatt, however, was appointed Members’ Representative under the Merger Agreement, thus requiring his involvement in any claim by Al Jazeera for indemnification from the escrow fund.

Following closing, Al Jazeera submitted five such indemnification claims, a majority of which related to allegations that, contrary to Current Media’s representations in the Merger Agreement, the company had breached the most-favored-nations clauses in three of its distributor agreements (the “MFN Representations”). Hyatt, as Members’ Representative, rejected those claims, and in August 2014 initiated (together with Gore, who as an indemnifying former member had a financial interest in preserving the escrow) an action in Delaware Chancery Court contending that such claims were improper and thus themselves a breach of the Merger Agreement. In response, Al Jazeera counterclaimed to compel indemnification, following which Hyatt and Gore amended and supplemented their original filing and sought advancement from Al Jazeera of the litigation costs associated with defending such counterclaims. All parties moved for summary judgment on the issue of whether Hyatt and Gore were entitled to, and Al Jazeera liable for, such advancement.

At the core of Al Jazeera’s arguments was the contention that the litigation costs being incurred by Hyatt and Gore were being so incurred not in their capacity as officers and directors but rather in their capacity as sellers seeking to defend their rights to the escrow fund. Since it was only suing Hyatt in his capacity as Members’ Representative (and Gore in his capacity as an indemnifying former member), Al Jazeera claimed that the advancement rights had no application. In support of that position, Al Jazeera cited the Merger Agreement’s “loser pays” treatment of costs and expenses associated with deal indemnification disputes, which it contended was the exclusive manner in which the parties intended to address liability for such litigation costs.

The court disagreed. The court first observed that indemnification and advancement, while related, are distinct legal rights, and that the right to advancement is not ordinarily dependent upon whether or not the requesting party will ultimately be entitled to be indemnified. Reading the agreement as a whole “to give effect to each term and harmonize seemingly conflicting terms,” the court concluded that the “loser pays” provision could not be viewed as supplanting the express provisions for advancement. Similarly, the court observed that Hyatt’s role as Members’ Representative is separate from his role as a former officer and director, and that his rights in each role are preserved as provided in the Merger Agreement. (The court expressly noted that the parties could have, but chose not to, exclude Hyatt from any advancement rights.)

The court then turned to determining exactly what those advancement rights were. The operative language provided that an officer or director who was made a named defendant in a proceeding was entitled to advancement of expenses incurred “by reason of the fact” that he was an officer or director. Noting that such standard tracks the language of Section 145 of the Delaware General Corporation Law, and that both parties had invoked Section 145’s case law in their briefings, the court determined that the advancement rights should be interpreted in accordance with Section 145. The court further noted that Delaware courts as a general rule favored such indemnification and advancement.

Consistent with prior case law, the court determined that an action was brought “by reason of the fact” that someone was an officer or director if their exercise of “decision-making authority” was causally connected to the commission of the alleged misconduct. Although the counterclaims brought by Al Jazeera appeared on their face merely to implicate Hyatt’s role as Members’ Representative in rejecting Al Jazeera’s indemnification demands, to the extent those claims were based on the alleged breach of the MFN Representations, resolution of the validity of such claims required determination of whether there had in fact been any breach. Such an examination necessarily required Hyatt and Gore to defend their actions as former officers and directors. As a result, as to those matters, Hyatt and Gore were entitled to advancement.
PRIVATE EQUITY M&A SUBCOMMITTEE

We had a very productive meeting in Montreal in April. Taking advantage of our north of the border location, Sophie Lamonde (Stikeman Elliot, Montréal, Canada) and Samantha Horn (Stikeman Elliot, Toronto, Canada) led a panel discussion on “Canadian Private Equity M&A for U.S. Deal Lawyers,” in which they were joined by Dominic Chalifoux (Axium Infrastructure, Montréal, Canada) and Kiron Mondal (RBC Capital Markets, Montréal, Canada). Joel Greenberg (Kaye Scholer, New York, NY) and Tom Thompson (Buchanan Ingersoll, Pittsburgh, PA) then helped me continue our Private Equity Nuts and Bolts series with a mock negotiating of the non-compete clause in a deal with a private equity seller. Finally, we ended the meeting with The Honorable Myron Steele (Potter Anderson, Wilmington, DE) joining me for a discussion about FdG Logistics v. A&R Logistics (Del. Ch. Feb 23, 2016) and the Anti-Reliance Provisions of an acquisition agreement.

We are scheduled to meet in Boston on Friday, September 9 (see schedule on page18 for details). Once again, I think we will have a jampacked meeting. I know that we are competing against other meetings and programs, both of the M&A Committee and other Committees, so we will do whatever is possible to make the meeting as interesting, productive and entertaining as possible.

Our Private Equity Nuts and Bolts series will continue with me being joined by Tarik Hoskins (Morris, Nichols, Arsht & Tunnell, Wilmington, DE) for a discussion on what it means in the context of a private equity seller when the contractual statute of limitations for breaches of “Fundamental Representations” and various covenants exceeds the period for which the private equity seller is required and/or contemplated to stay in existence. Does this contractual statute of limitation longer than that applicable to the general representations and warranties actually give the buyer any additional protection, and if so what? We will also continue our practice of having a panel where we hear from investment bankers and/or private equity professionals. In Boston, our Vice-Chair, Mireille Fontaine (BCF, Montréal, Canada) and Dennis White (Verrill Dana, Boston, MA) will chair a panel where they will be joined by Dan Weintraub (Audax Group, Boston, MA) (and hopefully a second private equity person) to discuss “What Private Equity Firms Really Want From their M&A Counsel.” We will also make time to discuss whatever case law, regulatory, market, political or other topics are worth mentioning and discussing. This portion will include Daniel Rosenberg (Charles Russell Speechlys, London, England) discussing what Brexit will mean for private equity, and my colleague at Reed Balmer (Finn Dixon, Stanford, CT) discussing some regulatory issues facing private equity funds that M&A lawyers should know about.

As I’ve stated before, I remain interested in YOUR feedback as to how you like the meetings, what you would like to have covered at the meetings, and what activities you would like to see our subcommittee perform between meetings. I also would love to hear ideas for programs you would like to be a part of, or developments you would like to present, or even that you would like to speak at a future meeting but you don’t have a particular topic you want to speak about. Please don’t be shy – I promise you that I am not spending too much time between meetings having these discussions with other members.

DAVID I. ALBIN, CHAIR

M&A MARKET TRENDS SUBCOMMITTEE

At our last meeting in Montreal we reviewed the status of recent and pending publications:

- Tasha Hutchins (Thompson Reuters, Washington, D.C.) reviewed the state of the M&A market.
- Steve Kotran (Sullivan & Cromwell LLP, New York, NY) shared highlights from the 2016 PLC Reverse Break-up Fee and Specific Performance Study.
- Paul Koenig (SRS Acquiom, Denver, CO) shared a summary of case law relating to the role of shareholders’ representatives.
- Kevin Kyte (Stikeman Elliot, Montreal, QC) lead a “Tales From the Trenches” discussion regarding indemnification for non-meritorious third party claims and the right to assume the defense of third party actions.

Our next meeting will be held on Saturday, September 10 at the ABA Business Section Annual Meeting in Boston (see schedule on page18 for details). The agenda includes:

- A review of recent and pending publications.
- An update on the state of the M&A market.
- A sneak peek at new market data on voting agreements in public target M&A deals.
- An introduction to a new deal points study on divisional carve out transactions.
- A presentation on developments and market trends in respect of appraisal rights.
- An analysis of certain key deal points based on the size of the buyer.

HAL J. LEIBOWITZ, CHAIR
The M&A Committee is sponsoring two major presentations at the Boston meeting, one a role-playing negotiation session and one a forum with in-house counsel. Neither of these follow our ABA standard “talking head” presentation format and should offer some variety to the Boston participants. We especially appreciate the effort that the chairs of each of these groups has put into ensuring an informative experience for the attendees. Please do your best to support these members by attending their presentations. In addition, we are co-cosponsoring three other panels.

In developing ideas for future meetings, our subcommittee is following a matrix that calls for presentations in four different categories. The categories are:

- M&A basics
- Advanced M&A topics
- General topics of interest outside the M&A area but geared for the M&A practitioner (labor, tax, regulatory, etc.)
- International

We also are considering a larger omnibus category which would include topics not normally covered in any of the Business Law Section areas. At the Boston meeting, we had seminars planned in M&A basics and Advanced M&A topics as well as the general counsel presentation, but our advanced topics seminar did not take shape.

In proposing panels for the Business Law Section meetings, we are particularly mindful of our charge to promote diversity. The diversity effort not only accomplishes its intended purpose (i.e. diversity) but has also pushed us to reach beyond the usual suspects (i.e. those who do so much of the regular and recurring work of our Committee) to add to our panels. In that regard, please give thought to those in your firm who are not active in our Committee but who may make great speakers.

GEORGE M. TAYLOR, III, CHAIR
In this issue of Deal Points, we continue to introduce new Committee members to the M&A Committee.

Caitlin Rose is a partner in the Montreal office of Fasken Martineau. She attended her first M&A Committee meeting in April 2016, at the Spring Meeting.

Caitlin is a self-proclaimed deal junkie, splitting her time between M&A and public financing work. She has worked on IPOs and cross-border transactions, PE fund set up and subsequent investments and divestures, and start-ups. She loves to talk shop with entrepreneurs, learning the ins and outs of their business, and participating in strategy sessions.

This curiosity explains her position as president and board member of Young Canadians in Finance (YCIF); the organization’s mission is to bring together young Canadians working in the financial community, in order to promote collaboration and education of its members with the goal of helping to foster a more competitive Canadian financial community.

An avid “Pink Project” supporter, she is a co-founder of the women’s initiative of YCIF and the Fasken Martineau’s Feminine Force (F3), which promotes the success of professional women in Montreal.

Caitlin is also involved with a variety of philanthropic causes. In the picture above, you will see her singing her heart out to raise funds for La Fondation Marie-Vincent, an organization that assists children under 12 who are victims of sexual abuse. The theme of the evening was to “break the silence.” More at ease behind the scenes (admittedly, except for the occasional karaoke night!), she is also a member of the board of the Centaur Theatre, a local Anglophone theatre company. This year, she is Co-chair of the Wonderball, an event organized by the Young Professional’s Group of the St.Mary’s Hospital Foundation to raise funds and awareness for the hospital’s cancer care program. She is also a member of the organizing committee of À votre Santé! – a champagne tasting for the benefit of hôpital Maisonneuve Rosemont.

Competitive by nature, Caitlin plays soccer and tennis, tries to golf, and enjoys downhill skiing. You might be surprised to learn that in her life before law (she holds a degree in psychology), she was the captain of the varsity women’s rugby team at Queen’s University, and competed as an all-Canadian for the province of Ontario. Caitlin completed her legal studies back in her hometown at McGill University.

Above all, Caitlin is a proud Montréalaise: fluently bilingual, a self-proclaimed foodie and wine aficionado (the enjoyment part, not the knowledge part), a patron of the arts and a die-hard HABS fan. She is a people person, and now a Deal People person.

About Deal People

Deal People is a feature in Deal Points that highlights members of the M&A Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.

John F Clifford    |    McMillan LLP    |    Toronto, Canada    |    john.clifford@mcmillan.ca
W. Ashley Hess is a partner at Baker & Hostetler LLP where he serves as the Business Group Coordinator in the firm’s Cincinnati, Ohio office. Ashley focuses his practice on middle-market mergers and acquisitions, joint ventures and corporate transactional work.

Outside the practice of law, Ashley enjoys being a dad to two rambunctious boys, ages 5 and 2, as they play sports, bike, hike, swim and stay active. Ashley noted that the most rewarding part of his day is reading to his children at bedtime, a habit he tries to keep even if it means going back to the office for a late night of work.

In the community, Ashley has shown his entrepreneurial side. In 2002, Ashley and two friends founded The Bacchanalian Society, a non-profit wine tasting group for young professionals in Cincinnati. In addition to being a great way to meet people, The Bacchanalian Society brings people to various venues in Cincinnati’s urban core while raising money for charities. The organization is still going strong and has raised approximately $500,000 for charities and arts organizations in Cincinnati.

Additionally, Ashley has served as President of the Cincinnati Chapter of the Association for Corporate Growth and was recently selected for Leadership Cincinnati, the local chamber’s premier leadership program.

Another admitted “deal geek,” Ashley joined the M&A Committee in 2006 and immediately became part of the team producing the Private Target Deal Points Study. Ashley has worked on the Private Target Studies ever since and now serves as an Issue Group Leader for the Private Target Study. Ashley also is actively involved in the Revised Model Asset Purchase Agreement project.

In addition to being a great resource for learning more about the M&A practice and broadening his skills, Ashley stressed that the M&A Committee is full of interesting, dedicated people from whom he has learned a great deal and with whom he has developed true, lasting friendships.

About Deal People

Deal People is a feature in Deal Points that highlights members of the M&A Committee and things that interest them, other than doing deals. Ideas for future features in Deal People are welcomed.

John F Clifford    |    McMillan LLP    |    Toronto, Canada    |    john.clifford@mcmillan.ca
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
BOSTON MARRIOTT COPLEY PLACE  |  BOSTON, MA, USA  |  SEPTEMBER 8-10, 2016

Please note that times listed are EASTERN TIME dial in numbers are meeting-room specific. Please be conscientious of start and end times. Leader pin numbers will be distributed to chairs on site.

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Friday, September 9, 2016

9:00 am – 10:30 am
M&A Jurisprudence Subcommittee
Chair: Michael G. O’Brien
Grand Ballroom FG, Fourth Floor

10:30 am – 12:00 pm
Private Equity M&A
Chair: David I. Albin
Grand Ballroom FG, Fourth Floor

12:00 pm – 1:00 pm
Revised Model Asset Purchase Agreement
Co-chairs: Ed Deibert, John Clifford
Grand Ballroom FG, Fourth Floor

12:00 pm – 1:00 pm
Governance Issues in Business Combinations Joint Task Force Meeting
Co-chairs: Diane H. Frankle, Michael J. Halloran, Lawrence A. Hamermesh, Patricia O. Vella
Orleans, Fourth Floor

1:00 pm – 2:00 pm
Legal Project Management
Co-chairs: Byron S. Kalogerou, Dennis J. White, Aileen Leventon
Provincetown, Fourth Floor

1:00 pm – 2:30 pm
Acquisition of Public Companies
Chair: Jennifer Fitchen
Grand Ballroom FG, Fourth Floor

2:30 pm – 3:30 pm
Women in M&A
Chair: Jennifer Muller
Grand Ballroom FG, Fourth Floor

3:30 pm – 4:30 pm
Two-Step Auction Task Force Meeting
Co-chairs: Michael G. O’Bryan, Eric S. Wilensky
Grand Ballroom FG, Fourth Floor

4:30 pm – 5:00 pm
Leadership Meeting
Chair: Scott T. Whittaker
Grand Ballroom FG, Fourth Floor
### Saturday, September 10, 2016

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<td><strong>International M&amp;A</strong>&lt;br&gt;Co-chairs: Freek Jonkhart, Franziska Ruf</td>
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<td>3:00 pm – 5:00 pm</td>
<td><strong>Mergers &amp; Acquisitions Committee Meeting (Full Committee Meeting)</strong>&lt;br&gt;Chair: Scott T. Whittaker</td>
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<td>7:00 pm Reception</td>
<td>8:00 pm Dinner&lt;br&gt;<strong>M&amp;A Committee Reception &amp; Dinner</strong>&lt;br&gt; Ticket Price: $110&lt;br&gt;Seating is limited. To register, please follow the link below or paste into your browser: <a href="http://www.americanbar.org/groups/business_law/events_cle/annual_2016/cmte_dinners.html">http://www.americanbar.org/groups/business_law/events_cle/annual_2016/cmte_dinners.html</a></td>
<td>The Oceanaire Seafood Room 40 Court Street Boston, MA 02108</td>
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### Programs

**Friday, September 9, 2016 | 10:30 am – 12:30 pm**

**M&A Negotiating Nuggets - An Illustrative Negotiation of Key Provisions in the Acquisition of a Privately Held Company**

**Saturday, September 10, 2016 | 10:30 am – 12:30 pm**

**What General Counsel Expect from M&A Practitioners**

### Co-Sponsored Programs

**Friday, September 9, 2016 | 8:00 am – 9:30 am**

**The SEC vs. the Unicorn: Are High-Cap High-Tech Valuations a Fable?**<br>Presented by: Corporate Governance Committee<br>Co-Sponsoring Committees: Federal Regulation of Securities, Private Equity, Venture Capital, Mergers & Acquisitions

**Friday, September 9, 2016 | 9:00 am – 10:00 am**

**Post-M&A Dispute Arbitrations Appeals: Comparison & Contrast of Arbitrator Discretion, Fundamental Fairness and Witness Independence Versus the Brady-NFL “Deflate-Gate” Court Decisions On Appeal-ability of Arbitrations**<br>Presented by: Dispute Resolution<br>Co-Sponsoring Committees: Mergers & Acquisitions, Business and Corporate Litigation, Judges Initiative, Professional Responsibility

**Friday, September 9, 2016 | 3:30 pm – 5:30 pm**

**Venture-Backed M&A: Special Considerations**<br>Presented by: Private Equity/ Venture Capital<br>Co-Sponsoring Committee: Mergers & Acquisitions
The M&A Committee thanks Duff & Phelps, and Andrew Capitman, its Managing Director and our fellow M&A Committee member.
Prior to 2010, Delaware courts had considered the price achieved in a transaction as a factor to be considered in determining fair value. In 2010, however, in a case where petitioners had argued that a rule should be established requiring the Court of Chancery to defer to the merger price in any appraisal proceeding, the Delaware Supreme Court held the Court of Chancery could not simply defer to the merger price to establish fair value, as that would contravene the unambiguous language of the statutes instructing the Court to use its own independent judgment to determine fair value.

For a period after Golden Telecom, the Court of Chancery declined to rely on merger price in determining fair value. In 2013, however, the Court added an inflection point to the debate when it interpreted the Supreme Court’s ruling in Golden Telecom to mean that, while the Court cannot simply defer to merger price or favor merger price over any other valuation methodology, the Court can and should consider merger price as part of its overall fair value discovery effort – at least in certain settings and especially where the reliability of other valuation methodologies may be called into question.

While a detailed review of post-Huff appraisal jurisprudence is beyond the scope of review here, it appears that appraisal cases decided post-Huff where the reliability of merger price was assessed as a determinant of fair value hinged on whether the situation involved an “interested transaction” (with controller or other insider involved in pricing in non-arm’s length setting) or a “disinterested transaction” (where deal price had been determined at arm’s length in competitive process). Fair value determinations involving the former scenario appear to have resulted in awards significantly above the merger price involved, whereas situations involving the latter scenario yielded fair value determinations that were either at or the award was modestly above the merger price.

In a series of cases in 2015, Vice Chancellors Glasscock, Noble and Parsons issued separate rulings determining, based on the facts and circumstances at hand, that the negotiated merger price involved represented fair value for appraisal purposes. A number of the rulings involved financial sponsor-led transactions. The rulings all suggested that whether merger price would be indicative of fair value hinged on the quality of the sales process.

See generally Jesse A. Finkelstein & John D. Hendershot, Appraisal Rights in Mergers & Consolidations, 38–5th C.P.S. § V (Arm’s Length Transaction Value Less Synergies) (BNA) (citing Highfields Capital, Ltd. v. AXA Fin., Inc., 939 A.2d 34, 42 (Del. Ch. 2007); M.P.M. Enters., Inc. v. Gilbert, 731 A.2d 790, 796 (Del. 1999) (“A merger price resulting from arms-length negotiations where there are no claims of collusion is a very strong indication of fair value.”); Prescott Group Small Cap, L.P. v. Coleman Co., 2004 Del. Ch. LEXIS 131, at *96 (Del. Ch. Sept. 8, 2004) (explaining that “the price actually derived from the sale of a company as a whole…may be considered so long as synergies are excluded”); Van de Walle v. Unimation, Inc., 1991 BL 692, at *18 (Del. Ch. Mar. 6, 1991) (considering merger price and noting that “[t]he fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair”).


At the time, the rulings were read by some as evidence of the Court’s growing reliance on merger price in determining fair value. Some also thought that, notwithstanding differing objectives of an appraisal proceeding and fiduciary duty-based litigation, perhaps the cases represented an emerging effort to more closely align appraisal jurisprudence with the growing body of fiduciary duty-based case law that had begun to place greater deference on the decisions of a sophisticated stockholder electorate that could make economic decisions for themselves, rather than relying on (as referenced by the Court in LongPath), divergent financial valuation analyses conducted by litigants and their experts, or the views of law-trained judges on valuation matters. The rulings also were seen as possibly a means to curtail the rise of appraisal arbitrage in the same fashion that the Delaware courts’ rulings in the fiduciary duty-based litigation area was aimed at curtailing certain types of stockholder plaintiff class action litigation.

In re Appraisal of Dell. Then, in May 2016, the Court of Chancery issued its ruling in the appraisal proceeding involving Michael Dell’s management-led take private transaction for Dell, Inc.25 There, the Court determined that the fair value of the stock subject to appraisal was $17.62 per share – or some 28% above the $13.75 per share ($25 billion) merger price paid by private equity firm Silver Lake Partners and Dell’s founder, CEO and 16% stockholder. The merger price had represented a 37% premium over the trailing 90-day average of Dell’s stock price in a transaction that involved a highly visible, year-long sales process.

Instead of following the Court’s most recent precedents relying on the merger price as the best indicator of fair value, the Court set merger price aside altogether and used a DCF analysis to determine Dell’s fair value, noting that “depending on the facts of the case, a variety of factors may undermine the potential persuasiveness of the deal price as evidence of fair value.”26 The Court concluded that, in this case, and unlike the determinations in recent precedents, the merger price was not a reliable indicator of fair value notwithstanding the Court determined the “[s]ales process easily would sail through if reviewed under enhanced scrutiny [and] the Committee and its advisors did many praiseworthy things...[and] [t]his court could not hold that the directors breached their fiduciary duties...”27

As a predicate, the Court noted that “[t]he weight of authority suggests that a claim that the bargained-for price in an MBO represents fair value should be evaluated with greater thoroughness and care than...a transaction with a strategic buyer in which management will not be retained.”28 Again, a full deconstruction of the Court’s ruling in Dell and a detailed review of its analysis and possible considerations flowing from that is beyond the scope of review here. But in brief, in declining to rely on merger price as the or even a determinant of fair value, the Court determined a number of factors undercut such reliance,29 including, among other things, that:

- There had been limited pre-signing bidding competition, which only involved financial sponsors (strategic bidders choose not to participate); 30
- While there had been a broad post-signing market check via a go-shop provision, the go-shop was not a particularly effective mechanism to produce a topping bid given the view MBOs rarely produce topping bids, and given that the size and complexity of the company meant that it was unlikely anyone would jump such a deal;31
- Price negotiations by the various sponsor bidders along the way and leading to the negotiated merger price were based primarily on the financial sponsors’ willingness and ability to pay as determined by the LBO pricing model, a tool financial sponsors use in determining bidding parameters (which the Court highlighted solves for the range of prices that a financial sponsor can pay while still achieving certain internal rates of return rather than fair value), and such a model may not accurately uncover a company’s fair value (as does a DCF analysis);32
- There was a significant valuation gap between the market’s perception of Dell given the broader market’s focus (and analyst focus) only on short-term results, versus Dell’s operative reality and intrinsic value, which gap suggested the deal price, as a subset of market value, undervalued Dell as a going concern33 and that “the deal market is unavoidably less efficient at valuing entire companies (including the value of control) than the stock market is at valuing minority shares”;34 and
- There was a time delay between signing and closing (the latter being the date for measuring fair value in appraisal).35

On its broadest level, Dell reminds that, notwithstanding the series of appraisal cases in 2015 determining merger price to be representative of fair value, the Court will not simply defer to merger price and fair value discovery under Delaware appraisal is a facts and

26 Id. at *24.
27 Id. at *29.
28 Id. at *28. The Court’s statement does not appear to be limited to just MBOs, which are just a species of other financial sponsor-led transactions, so the statement appears to have broader implications for the financial sponsor community generally.
29 The Court also throughout its ruling referenced significant supporting authorities in reaching its conclusions as to the referenced factors, and for the same reasons referenced elsewhere herein, a complete review and assessment of those authorities also is not included here.
30 Dell at *36-*37.
31 Id. at *37-*39.
32 Id. at *29-*32.
33 Id. at *32-36.
34 Id. at *24.
35 Id. at *21.
circumstances determination. In Dell’s aftermath, some expressed surprise that fair value could represent a price far higher than what any buyer was willing to pay in a setting where the company had been on the market for a year and available to all-comers, and questioned how a merger price derived from a sales process that was viewed admirably by the Court from a fiduciary duty perspective could be accorded no weight whatsoever in an appraisal proceeding. Others questioned whether the 2015 appraisal cases represented an aberration or simply a temporary bubble as opposed to an emerging trend toward greater reliance on merger price that was now getting interrupted, or whether there was – or is – a split within the Court on approach in appraisal proceedings (resulting in a lack of consistency and predictability for deal participants), or whether Dell should be read as limited only to MBO scenarios – even though language in the ruling might suggest otherwise.

But what may be more interesting about Dell is not so much the headline story that the Court declined to defer to merger price or take it into account at all – which on one level may have been unsurprising as a conceptual matter given the historical sweep of appraisal jurisprudence, especially where a quasi-controller or insider was involved. Rather, it is that the analytical framework that the Court used in concluding merger price was not indicative of fair value was not limited to just those traditionally-reviewed sale process factors previously looked to in appraisal precedents (such as the rigor of the pre-signing market check, whether there were limits on bidding competition, whether the sales process was arm’s length, or whether there were any checks on the post-closing go-shop). Beyond those factors (which are also commonly explored in fiduciary duty-based litigation and are fairly fact-based), the Court relied on more opaque or theoretical factors in assessing merger price, such as, among others, how merger price stacks-up against a perceived valuation gap between the broader market’s view of company value (which view at least in the Court’s mind was driven by all market participants’ focus solely on the short-term), as compared to the company’s operative reality and intrinsic value as assessed by the Court; or whether the deal market accurately values companies; or how to solve valuation puzzles where transactions are viewed as being opportunistically timed (and when it is unknowable at the time whether the opportunity will ever be realized); or whether any party using an LBO pricing model in setting bidding parameters should be presumed to have not paid fair value. Also worthy of consideration is how the appraisal statute’s instruction that fair value is to be exclusive of any element of value arising from the accomplishment or expectation of the merger factors into the foregoing.

Read in this context, Dell puts a klieg light on the inherent tension between, on the one hand, the Court looking at certain factors it has looked to in the recent past (e.g., whether dealer price was determined at arm’s length in a competitive and unconflicted process) in assessing if merger price is a determinant of fair value, and, on the other hand, the Court using that criteria as well as the broad discretion it has in fulfilling the appraisal statute’s mandate to consider “all relevant factors” to also take into consideration far broader theories and considerations involving value (e.g., whether a value gap exists between a company’s market price and why as compared to the company’s operative reality as seen by the Court). Also in tension here would appear to be the degree to which concepts of “reliability” must necessarily bleed into, or are implicit in, the statutory mandate calling for the Court to consider all “relevant” factors when determining fair value.

In re Appraisal of DFC Global

Background. Shortly after its ruling in Dell, the Court issued its ruling in DFC, where it determined that the appraised fair value of DFC, which had been acquired by private equity firm Lone Star Funds in June 2014, was $10.21 per share – or approximately 7.5% more than the $9.50 merger price agreed-to by the parties. While both Dell and DFC were sponsor-backed transactions, DFC was not an MBO. As such, DFC represented the second ruling in two months where the Court had held the appraised fair value of a company acquired by a private equity firm after a long sales process was higher than the merger price – although DFC appears to be more in line with the disinterested line of precedents than the interested line of cases that Dell appears to fall into.

Also, while the Court in Dell gave merger price no weight when discovering fair value, and relied solely on a DCF analysis, the Court in DFC accorded the merger price a one-third weighting with other valuation methods (discussed below). Although the aggregate additional payout to DFC stockholders who had sought appraisal would be relatively small (approximately $3.3 million plus statutory interest, which raised the potential payout to more than 20% above the merger price), DFC appears to raise a number of broader themes and concerns disproportionate to the actual dollar amounts involved and that build on some of the conceptual approaches raised in Dell.

DFC’s appraisal proceeding arose from Lone Star’s June 2014 merger with DFC for $9.50 per share ($1.3 billion). The Court found that, by 2013, DFC (a payday lending firm operating in 10 countries) and concerns disproportionate to the actual dollar amounts involved and that build on some of the conceptual approaches raised in Dell.

The Court also found that, during the two-year period 2012-13, with the sales process starting, stopping, and then restarting, DFC had been shipped to 43 financial sponsors and three strategic parties. That process yielded only a few preliminary indications of interest, none of which advanced. In October 2013, after the sales process had been underway for some time, Lone Star expressed interest, first offering $12.16 per share, but then lowering its offer during the process to $11.00 in February 2014 and then to $9.50 in April 2014. The descending offers were said to be attributable to (i) ongoing U.S. and U.K. regulatory changes; (ii) DFC’s repeated downward adjustment of its projections during the extended sales process in response to the ongoing regulatory uncertainties; (iii) reduced availability of deal financing premised on DFC’s deteriorating performance and projections; (iv) DFC stock price volatility; (v)
Canadian dollar weakness (affecting DFC’s business interests there); and (vi) recently-filed class action litigation against DFC.

After a sales process where Lone Star was the only remaining bidder, the parties entered into their merger agreement on April 1, 2014. The merger price represented approximately a 6% premium to DFC’s then-current market price and a 12% premium to DFC’s trailing 30-day stock price. DFC stockholders with 11.5% of the outstanding shares petitioned to have the Court appraise the fair value of their stock, alleging the company was sold at a discount to its fair value during a period of regulatory uncertainty that temporarily depressed its market value.

Court’s Ruling and Review of Methodologies. The Court began its analysis by reviewing Delaware’s appraisal statute, and reminded that, in using “all relevant factors” to determine fair value, the Court has significant discretion to use “the valuation methodologies it deems appropriate, including the parties’ proposed valuation frameworks, or one of the Court’s own making.” The Court also highlighted that in the past it has relied on a number of different approaches and analyses to determine fair value, including comparable company and transaction analyses, discounted cash flow analyses, and the price of the relevant transaction if that price was struck pursuant to an arm’s length process.

DCF Analysis. The Court then proceeded to review in detail the expert reports submitted on behalf of the parties. The Court noted that petitioners’ expert, using only a DCF model based on management’s most recent five-year projections, calculated a fair value of $17.90 per share, whereas DFC’s expert used a DCF model (calculating fair value at $7.81 per share) as well as a multiples-based comparable companies analysis (valuing the company at $8.07 per share), and DFC’s then blended the two (weighting them equally) to arrive at a fair value of $7.94 per share. Respondents’ expert also urged the Court to consider the $9.50 per share merger price as most reliably evidencing fair value.

The Court noted the wide gap of more that $10.00 per share in the experts’ respective DCF analyses, which the Court indicated was the result of many disagreements regarding various inputs and methods used by the experts in building their respective DCF models. The Court then spent nearly 40 of its 65-page ruling analyzing in detail the parties’ respective positions on each of the various DCF model inputs. A detailed review of each of the experts’ DCF model inputs and the Court’s position on each of them is beyond the scope here. But in the end, the Court determined petitioners’ DCF analysis was not reliable and discarded it, and the Court disagreed with aspects of respondents’ DCF model. The Court then constructed its own DCF model, incorporating inputs from one or another of the two experts’ DCF models while also reaching conclusions on certain elements on its own, and arrived at a DCF model that estimated the fair value to be $13.07 per share (or $3.57 or 37% above the merger price – which determination as to DCF on a percentage basis was 10% more than the increase over merger price that the Court awarded in Delf.

Comparable Companies Analysis. In essentially less than a page of its ruling, the Court then reviewed the multiples-based, comparable companies analysis respondents’ expert included in his analysis (which put fair value at $8.07 per share), and which analysis the expert had averaged with his DCF analysis as noted above. The Court found respondents’ expert had used a reasonable methodology in his multiples-based analysis, and it adopted that analysis as it found the methodology useful in determining fair value, which only left the question of how much weight to accord that methodology.

Merger Price and the Concept of a Well-Functioning Market. The Court then spent about three pages of its ruling considering the merger price of $9.50 per share as a valuation input, indicating the parties had heatedly disputed whether that price was an appropriate indicator of fair value. The Court acknowledged that “merger price in an arm’s-length transaction that was subjected to a robust market check is a strong indication of fair value in an appraisal proceeding as a general matter, and this Court has attributed 100% weight to the market price in certain circumstances.”

The Court noted that “the advantage of an arm’s-length transaction price as a reliable indicator of fair value is that it is “forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) . . .” The Court also noted that this insight was particularly apt here, “where the subjective thought processes of two well-credentialed valuation veterans have led to chasmic differences in their estimated fair values, despite their using similar methodologies and the same baseline set of financial projections.”

Then, in a significant passage, and without citing to any authority for the proposition, the Court noted that “[b]y the same token, the market price is informative of fair value only when it is the product of not only a fair sale process, but also of a well-functioning market.” At the outset of the ruling, the Court noted that “[transaction] price is reliable only when the market conditions leading to the transaction are conducive to achieving a fair price.” The Court then determined that the merger price was an appropriate factor to consider in this case since DFC was purchased by a third-party buyer in an arm’s-length sale pursuant to a sale process lasting approximately two years where dozens of financial sponsors as well as several potential strategic buyers were solicited, and the deal did not involve the potential conflicts of interest inherent in a management buyout.

39 Id. at *5.
40 The Court did not reference in its ruling the DCF analysis that DFC’s own financial advisor’s performed and provided to DFC’s board of directors as part of the board’s consideration of the transaction, which analysis indicated a range of values of $8.50 to $15.50 per share according to DFC’s merger proxy statement, or whether such analyses as a general matter are suspect given various considerations (e.g., created partially at least to assist in getting bidders to maximize bids).
41 Id at *23.
42 Id at *20.
43 Id. at *21.
44 Id.
45 Id.
46 Id. at *1.
or negotiations to retain existing management (as was present in Dell) and that, indeed, Lone Star took the opposite approach here by replacing most key executives. Thus, the Court determined the circumstances provided it with a reasonable level of confidence that the deal price could fairly be used as a measure of DFC’s value.

But having noted the predicate need for there to be a well-functioning market and market conditions conducive to achieving a fair price, Chancellor Bouchard determined that deference here solely to the merger price as a determinant of fair value would be improper since “[t]he transaction was negotiated and consummated during a period of significant company turmoil and regulatory [change and] uncertainty,”45 which the Court notes elsewhere could have had the negative effect of either rendering DFC’s business not viable, or had the positive effect of reducing DFC’s competition in certain markets.

Weighing Different Valuation Methodologies. The Court then reminded that it has relied from time-to-time on multiple valuation techniques to determine fair value, giving greater weight to the more reliable methodologies in a particular case. The Court noted that here, each of the three valuation inputs it had reviewed [the DCF analysis (incorporating aspects from each expert’s model and some of the Court’s own assumptions); respondents’ multiples-based comparable company analysis; and the transaction price] merited consideration.

The Court noted that as a general matter, a DCF analysis may deserve significant emphasis or sole reliance over the merger price where the Court has more confidence in the reliability of the underlying projections and associated assumptions underpinning such an analysis. But the Court observed that, at the time of its sale, DFC was navigating turbulent regulatory currents that imposed considerable uncertainty on its future profitability, and even its viability, and that some of its competitors faced similar challenges. The Court noted the “potential outcome could have been dire, leaving DFC unable to operate its fundamental businesses, or could have been very positive, leaving DFC’s competitors crippled and allowing DFC to gain market dominance.”

Importantly according to the Court, was that DFC was unable to chart its own course, and its fate rested largely in the hands of multiple regulatory bodies. As a result, the Court determined the DCF analysis here did not merit a disproportionate weighting given that the same tumultuous regulatory uncertainties and environment that the Court found undercut reliance on the merger price as the sole determinant of fair value when compared to a market determined not to be “well-functioning,” also undercut the reliability of DFC’s projections, given the projections had been cut back repeatedly during the sales process and had been attributable for deterring bidders from bidding at all.

The Court determined DFC had cut its fiscal year 2014 adjusted EBITDA forecast from $200-240 million to $151-156 million in the span of a few months, while noting that regulatory uncertainty made it impractical to even project earnings per share. The Court noted that the series of adjustments called into question the reliability of DFC’s financial projections, and necessarily reduced confidence in the projections on which the experts’ discounted cash flow models and its own DCF analysis were based. Consequently, although the Court noted a DCF analysis may deserve significant emphasis or sole reliance in cases where the Court has more confidence in the reliability of the underlying projections than in the transaction price, but that it not merit disproportionate weighting here.

The Court further noted the same uncertainty inherent in the projections underlying the discounted cash flow analysis also was present in the sale process. The Court noted that, although the sale process extended over a significant period of time and appeared to be robust, DFC’s performance also appeared to be in a trough, with future performance depending on the outcome of regulatory decision-making that was largely out of the company’s control. The Court determined that Lone Star was aware of DFC’s trough performance and uncertain outlook, and that these attributes were at the core of Lone Star’s investment thesis to obtain assets with potential upside at a favorable price. In another significant passage from the ruling, the Court concluded that, “to the extent Lone Star understood DFC’s unique position and potential value but the market of other potential bidders did not, then the transaction price would not necessarily be a reliable indicator of DFC’s intrinsic value.”46

The Court also referenced (as had the Court in Dell but in more detail) Lone Star’s status as a financial sponsor, and that as such it “focused its attention on achieving a certain internal rate of return and on reaching a deal within its financing constraints, rather than on DFC’s fair value.”47 While the Court raised these points, it did not point to evidence from the record supporting its determinations, other than the observation that one of the reasons Lone Star reduced its offer to $9.50 was that its available financing for the transaction had fallen by another $100 million (to a total reduction of $300 million) due to DFC’s additional reductions in projected EBITDA. The Court indicated that, in light of this mix of the foregoing factors, it could not conclude that the merger price alone should be relied upon to determine appraised fair value.

The Court also noted the uncertainty surrounding DFC’s financial projections also affected the reliability of the multiples-based comparable companies valuation, because that valuation relied on two years of management’s projected EBITDA. The Court did note, however, that the multiples-based valuation might be less prone to long-term uncertainty compared to the DCF model, because it relied only on projections through 2015 rather than through 2018 (as that outlook was more uncertain), and because one-third of the comparables valuation relied on historical EBITDA data. In addition, because this methodology relied on the multiples of several peer companies, the Court determined it was less susceptible to the firm-specific issues that could hinder a competitive bidding environment and reduce the reliability of market price as an indicator of fair value. The Court concluded that, although the multiples-based approach may have been less frequently relied upon than merger price or a DCF valuation, the Court nevertheless found it to be a valuable source of information.

47 Id.
48 Id. at *21.
49 Id. at *22.
50 Id. at *22 (citing to petitioners’ expert report).
In sum, after determining that none of the DCF analysis, the merger price, or the multiples-based comparables companies analysis was inherently more reliable than the other, the Court concluded the three “imperfect” metrics (the Court’s own $13.07 per share DCF analysis; the $9.50 per share merger price; and the $8.07 per share comparable companies analysis from DFC’s expert) each offered insight into fair value, so it blended them, according each equal weight, to arrive at an appraised fair value of DFC of $10.21 per share. Adding statutory interest on the blended amount, it appears appraised fair value approximated $11.50 per share (or 21% above the merger price).

Post-DFC Considerations

On one hand, DFC can be seen as one in a series of appraisal rulings where the Court reviewed a number of appraisal-related concepts, analyzed the facts presented against valuation methodologies it commonly uses to discover fair value, and then took an even-handed approach by according each methodology equal weight to arrive at a fair value determination slightly above the merger price on a transaction that would generally fall into the line of cases involving disinterested buyers (notwithstanding the buyer’s financial sponsor status).

On the other hand, as does Dell, the ruling serves to highlight the broad discretion the Court has under the appraisal statute’s to review “all relevant factors” in its discovery of fair value. And in that context, the ruling raises a number of considerations, including whether (as in Dell), the Court is broadening the analytical framework by which it will assess the viability of merger price as determinative of fair value. The following reviews some of those considerations.

1. **DCF v. Merger Price.** DFC reminds that whether merger price will be viewed as the best indicator of appraised fair value will be assessed contextually and will depend on the facts and circumstances, including but not limited to the Court’s view of the competitiveness of the sales process. As noted, in the cases (pre-Dell) where the Court determined merger price was the best indicator for assessing fair value, meaningful pre-signing market checks were present and there also were concerns expressed regarding the DCF analyses. What is new in DFC (and Dell) is that the Court will look beyond surface-level items such how long the process ran, how many parties may have been involved, whether there was competitive bidding, to see if broader market conditions are conducive to the transaction process leading to a merger price reflecting fair value.

2. **Differing Standards for Fiduciary Duty Claims v. Appraisals.** As did Dell, DFC highlights the different lens through which the Court evaluates whether directors have satisfied their fiduciary duties from a sales process perspective, as compared to whether a negotiated merger price is the best evidence of fair value for purposes of Delaware’s appraisal statute.

   In each of Dell and DFC, the Court found that, as a process matter, the transaction passed muster for fiduciary duty purposes. But in Dell, the Court determined the sales process with only financial sponsors “lacked meaningful competition,” the go-shop there may not have been effective given Dell’s size and complexity, and the use of an LBO pricing model by financial sponsors to set bidding parameters were such that it led to merger price being less reliable as a determinant of fair value. In DFC, meanwhile, the Court found that while the sales process was sufficiently robust, it posited — without citing legal authority for the proposition but presumably using the wide discretion available to it under the appraisal statute — that merger price “is reliable only when the market conditions leading to the transaction are conducive to achieving a fair price,” and when the merger price is the product “of a well-functioning market.”

Leaving aside the breadth of the concepts the Court articulated, and all that may be entailed in reaching reliable conclusions regarding over market conductivity and functionality, there is something seemingly incongruous in the notion that the exact same deal features surrounding a board of director’s consideration and approval of a transaction (e.g., pre-signing market check; go shop; evaluation of financial analyses received from financial advisor as to fairness of negotiated transaction) can be looked at in the context of fiduciary duty-based class-action litigation and determined to be exemplary so as to deny stockholder plaintiffs any relief against director defendants (those constructing and running a sales process), but yet the exact same deal features and elements can be looked at through the prism of appraisal and determined to be completely lacking and result in a buyer — or at least certain types of buyers — having to pay more for the company they acquired based on a process they did not run. At a minimum, this raises the importance that financial sponsors should place in fully understanding the contours of sales processes they are involved and whether any aspects of those processes might create appraisal risk exposure.

It is also interesting that, in a string of recent rulings, the Delaware courts have determined that, where fully informed, independent and disinterested stockholders have approved a challenged transaction, the directors’ actions should be assessed under the deferential business judgment standard of judicial review. In Corwin, the Supreme Court noted that such a position is grounded in the long-standing policy of Delaware law to avoid the uncertainties and costs associated with judicial second-guessing when disinterested stockholders have had the free and informed chance to decide the economic merits of a transaction for themselves.

It appears somewhat asymmetrical that the policy rationale that underpins a determination that the business judgment standard of review should apply in transactions approved by fully informed and disinterested stockholders – which is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information – would be applicable to one aspect of a transaction (process), but not another (determination of appraised fair value). Of course, such a distinction can be easily explained by reference to the statutory mandate found that the judiciary has under the appraisal statute as compared to the exercise the Court undertakes when assessing fiduciary duty-based litigation. But that does not eliminate the asymmetry.
Moreover, given what appears to be an expanding framework within which to assess appraisal actions, it remains to be seen whether analyses the Court may employ and determinations it may reach in such actions start to bleed back in to fiduciary duty-based litigation claims. For example, when assessing the utility and effectiveness of the go-shop provision involved in the Dell transaction, the Court raised a number of concerns and made a number of comments concerning go-shop provisions that would not appear limited solely to analyzing that technology in the context of an appraisal claim. In addition, will the Court’s reasoning concerning the use of the LBO pricing model by financial sponsors have any implications when the Court assesses fiduciary duty-based claims against boards that have approved merger transactions with financial sponsors in terms of whether an adequate price was obtained?

3. **Judicially Determined Market Conditions and Market Functionality.**

Moreover, the Court’s assessment in DFC – that market price is informative of fair value only when it is the product of not only a fair sale process, but also of a well-functioning market, and that transaction price is reliable only when the market conditions leading to the transaction are conducive to achieving a fair price – would appear to put Delaware judges in a unique role of assessing various aspects of market conductivity and market functionality. That would appear to raise a host of other, second-order implications and considerations, including perhaps some of the following:

- Exactly what set of criteria is to be used for determining whether market conditions are conducive enough to conclude that the market backdrop leading to a negotiated merger price is reflective of fair value?
- Are market experts needed to assess market conductivity and functionality?
- Are market conditions around particular companies or industries ever fully conducive or well-functioning such that there is no room for argument in terms of the backdrop against which a negotiated merger price is reached?
- Cannot appraisal petitioners always assert market conditions were not conducive in some order of magnitude such that it can be argued a negotiated merger price does not reflect fair value and claim will lie that a target was sold at a discount during a period of regulatory (or other) uncertainty that temporarily depressed the market value of the company?
- If the Court is going to assess whether the market is conducive and well-functioning (with the implicit assumption the market under-prices a company’s stock and is not accurately reflecting a company’s operative reality), would an argument ever stand that the opposite is true, that the market was over-heated or was hyper-active, or that the merger price over-priced fair value based on market conditions?
- Is merger price derived between willing buyers and sellers (assuming no significant sales process or conflict issue), after those parties have taken into account all relevant macro and micro inputs a more direct reflection of “market conditions” than one determined by the judiciary second-guessing market efficiency?
- Are buyers – whether financial or strategic – supposed to pursue merger transactions only when market conditions are anticipated to be viewed (in hindsight by the judiciary) as being conducive to getting a price that will be viewed in hindsight to be fair value, or where market price is perceived as aligning with what is viewed as the long-term intrinsic value (again as determined in hindsight by the judiciary) or else such parties will expose themselves to appraisal risk?
- Is every company sold, whose share price may be viewed as depressed due to cyclical or secular “uncertainty” or some other uncertainty (and which one doesn’t think that) now subject to heightened appraisal risk?
- Given the regulatory uncertainties (and many other types and degrees of uncertainties) surrounding a host of industries and individual companies within those industries in ever-changing global markets, is the Chancery Court now required in every appraisal instance to read that uncertainty (and along with it presumably all associated perceived market inefficiencies) into its determinations of appraised fair value, and if so, what parameters will it use to make such determinations?

4. **Opportunistic Acquisitions and Result on Appraisals.**

The Court also found in DFC that Lone Star was aware of DFC’s trough performance and uncertain outlook, which attributes the Court found were central to Lone Star’s investment thesis of obtaining assets with potential upside at a favorable price amid the disruption caused by weak financial performance and regulatory uncertainty. The Court determined that, since Lone Star understood DFC’s unique position and potential value, but others did not, this necessarily must have meant the merger price was not a reliable indicator of DFC’s intrinsic value.

One of the hallmarks of the private equity business model is that different firms bring different analyses, skill-sets, risk assessments, and market observations to investment opportunities. The same can be said for strategic buyers as well. Where one firm sees risk above a certain bid level, another looking at the same facts through its own prism may see opportunity based on a more finely-honed assessment of how industry events may evolve and play out, including how future results can be molded by the value-creating skill-sets that the particular financial sponsor can bring to bear itself – after it acquires the target. In the absence of such assessments, value maximizing transactions for all stockholders would be fewer.

The Court’s analysis, however, appears to cast such buyers in the pejorative for appraisal purposes (as “exploiting” a situation), even though the Court goes out of its way to note in a footnote...
Based on the disclosure in DFC’s merger proxy, it appears DFC’s financial advisor did not include an LBO analysis in the financial analyses it provided DFC’s board in support of its fairness opinion (or at least one was not disclosed in the merger proxy).

More importantly, the Court appears to have taken what it saw as Lone Star’s own value creation proposition or opportunity going into the transaction and then imputed it to, not only all the other bidders (who evidently did not see that same value creation proposition when they stood down), but also to DFC itself (and through DFC to its dissenting stockholders) as somehow representing or being emblematic of DFC’s “intrinsic” value. This compared to DFC’s market price set by any number of market participants and analysts, the views of 45 other financially sophisticated bidders whose life-work it is to uncover such value gaps, and a series of financial analyses (of questionable utility).

Such a methodology – of using the bidder’s designs on value creation resulting from its “opportunistic” investment as somehow contributing to or evidencing a determination of fair value today – also appears to be taking into account value and synergies that the buyer will bring to the company post-closing, not measuring the company as a going concern. It also appears to include the control premium such an opportunistic bidder may be willing to pay to acquire the value creation opportunity as part of the fair value determination. This view appears to run counter to the appraisal statute’s mandate that fair value is to be determined “exclusive of any value arising from the accomplishment or expectation of the merger...” Indeed, when including these synergies (which the winning bidder believes it alone can achieve and might be willing to pay more for) in its determination of fair value, it would appear to suggest that the negotiated merger price may overstate fair value as opposed to understate it. The Court’s analysis also appears to assume that the winning bidder will, in fact, successfully execute on its value-creation thesis based on its own skill set, so the analysis does not appear to factor in any execution risk, let alone whether it would be considered something arising from the merger and should be excluded. The Court’s ruling, however, does not include a discussion of what value elements arising from the accomplishment of the merger were excluded.

LBO Pricing Model. As noted, when examining whether Lone Star’s merger price was a reliable indicator of appraised fair value, the Court also noted that, as a financial sponsor, Lone Star was focused “on achieving a certain internal rate of return and on reaching a deal within its financing constraints, rather than on DFC’s fair value.” To support that statement, the Court noted that “one of the reasons Lone Star reduced its offer to $9.50 was that its available financing for the transaction had fallen by another $100 million (to a total reduction of $300 million) due to DFC’s additional reductions in projected EBITDA.” As mentioned, in Dell, the Court reviewed at length the interplay between the use of LBO pricing models by the financial sponsors involved in the bidding, the relationship to merger price, and efforts to discover fair value for appraisal purposes.

Post-DFC and Dell, financial sponsors appear left with greater appraisal risk exposure than other buyers, or at least that appears to be the case when negotiating price off of an LBO pricing model given the position of the judicially. It is no secret that, as a general matter, many investment partnerships may seek to achieve certain IRR hurdle rates. Those rates vary from firm-to-firm, deal-to-deal, encompass a host of assumptions, and can change during ownership of any portfolio company based on a variety of post-closing developments. It also is true that such firms may use such financial modeling tools to assist in assessing bidding parameters and limitations. What would appear not true, however, is that use of such a financial modeling device automatically means that a financial sponsor’s merger price must not be reflective of fair value.

Moreover, although the Court in Dell spent considerable space reviewing and comparing the factual background as to the derivation of the bidding figures the financial sponsors were putting forward as the sales process progressed, the Court in DFC does not appear to have analyzed the generalized concept it articulated – that since this was a financial sponsor-led deal, and given financial sponsors typically use an LBO pricing model, the winning bid here must be assumed to be not reflective of fair value – against the facts of the case at hand. The Court does not mention whether, or to what degree, there was a divergence between whatever pricing model may have been used or whether one was used. Nor did the Court establish that the LBO pricing model or Lone Star’s quest for some level of IRR (which the Court does not reference) was the driver for Lone Star lowering its bid during the multi-month negotiation period, or the reason debt financing was reduced, whereas such a lowering of the debt financing available could have just as easily have been due to the sponsor’s financing source concern over the ongoing reductions in projected EBITDA that DFC itself was making during the same period (including further reductions in projected EBITDA announced the day after the deal was announced), which the Court points to in the same sentence.

The Court’s treatment of the LBO pricing model also appears to imply that strategic acquirers do not use their own form of pricing model (by whatever moniker it may travel), and do not have similar (if not identical) concerns around IRRs, return-on-investment, return-on-capital, debt financing costs, and all of these factors. It also is not clear how those factors were assessed as part of a going concern determination.

Also, if the appraisal statute’s mandate is that the applicable company is to be valued on a going concern basis and excluding the effects of the merger, that would suggest a valuation of DFC immediately prior to the merger where DFC was apparently facing the same concerns that led its hiring a financial advisor to explore a sale of the company in the first place, which factors according to the Court included not only the uncertain regulatory environment and whatever impact that flux would have on future performance over some time period, but also “the company’s high leverage and questions regarding management succession.” See DFC at *3. But it is not clear how those factors were assessed as part of a going concern determination.
the other typical financial ratios and measurements identified as of concern to financial sponsors when developing pricing parameters in bid formulation exercises.

6. **Weighting of Methodologies.** As noted, to determine fair value in DFC, the Court took the three valuation methodologies that were each viewed as sufficiently "imperfect" to preclude relying on any one of them over the other, and averaged them to arrive at appraised fair value. While this triangulation certainly appears one way to combine the different approaches and within the Court’s broad discretion, the ruling itself appears to suggest that certain of the methodologies may have been more "imperfect" than others. Admittedly, this sort of review may be seen as simply quibbling with the clear discretion the Court has to make the determination it wishes.

But for example, while the Court noted that it has "less frequently" relied on comparable company analyses than DCF or merger price when assessing fair value, the Court also noted that respondents' multiples-based comparable companies analysis was valuable in offering insight into fair value. The Court essentially did not raise any substantive concerns over the comparable company analysis or note any "imperfections" with it. Instead, the Court generally agreed with the expert's analysis yielding an $8.07 per share determination: agreed the peer group of companies selected was appropriate; determined the analysis was perhaps more reliable than the DCF analysis given it relied on only two years of projections (versus five in the DCF that was seen as more uncertainty) and one-third of the valuation was based on historical data; and that it relied on multiples derived from several peer companies and thus "was less susceptible to [DCF]-specific issues that could hinder a competitive bidding environment and reduce the reliability of market price as an indicator of fair value."

Meanwhile, the Court noted that the sales process had been arms-length and sufficiently robust given that it extended over two years and involved dozens of potential bidders and devoid of conflicts. The Court reminded that a transaction subjected to a robust market check is a strong indication of fair value as it is "forged in the crucible of objective market reality," although as noted the perceived drawback with the merger price approach was that the "market conditions" forming a backdrop to the process leading to the merger price were viewed as not conducive to achieving a fair price such that the merger price was not seen as worthy of being looked to as the sole determinant.

On the other hand, the Court noted significant "imperfections" as to any DCF analysis given the repeated significant reductions in DFC's projections throughout the sales process, the regulatory uncertainties facing DFC that the Court points to throughout its ruling such that it was unclear whether the company would survive or whether it would flourish, and the significant differences between the experts' DCF analyses that the Court needed 38 pages to analyze and recalibrate in order to create its own DCF analysis. The issues identified by the Court with the DCF analysis (including difficulties in establishing an appropriate discount rate as a result) at least raise the question whether DCF here may have been more "imperfect" than the other methodologies, especially given the Court's own observations as to the reliability of such analyses that are "subjective thought processes of valuation experts," and deserved less than equal weight.

7. **Deal Term Implications.**

At a minimum, DFC and Dell remind that, when formulating bidding strategies ad price parameters, financial sponsors as well as other bidders will want to factor appraisal dynamics into those considerations by closely assessing the sales process that a particular seller may be engaged in, as well as the broader environment and backdrop against which a proposed transaction may be occurring that could come back to haunt a buyer in appraisal.

For some time, standard dissenting stockholder closing condition clauses granting a buyer a walk-away right if holders above a specified percentage of the seller’s stock have exercised appraisal rights had become somewhat of an afterthought in merger agreement negotiations, although historically there has been more focus on the topic in financial sponsor transactions. There are multiple vendors that provide data around the frequency with which certain deal point clauses, including as pertains to appraisal rights, are found in definitive deal documentation.

For example, one recent deal point study indicated that there were 123 announced acquisitions of U.S. publicly traded target companies by strategic acquirers in 2014 valued in excess of $100 million, and 55 of those were all cash transactions. This study found that none of those transactions contained an appraisal rights closing condition, whereas 13% (five deals) of transactions that were cash/stock (39 deals) during that period did include such a condition (where the appraisal rights cap generally was 10%).

Others, using different sorting parameters, offer other data on the usage of such clauses. As data on the chart at Annex A suggests, the percentage of transactions where such closing conditions have been included has been relatively low over time, although again there are distinctions where sponsor-backed transactions are involved.

**Conclusion**

It remains to be seen whether, in the never ending quest to construct claims or exploit new angles out of nuances in the latest rulings, appraisal proponents will be emboldened post-DFC (and Dell) to bring more appraisal challenges. But the Court’s recent rulings, with what appears to be an expanding framework for how the Court may choose to assess merger price in appraisal, could invite that. The volume of appraisal proceedings also could be affected by the continuing evolution of fiduciary duty-based M&A litigation in Delaware, where it has become harder for stockholder plaintiffs to obtain pre-closing remedies, and recover post-closing damages after a transaction has been approved by informed stockholders. The confluence also raises whether appraisal proceedings will become the path of least resistance for challenging M&A transactions, given that

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55 See ABA Strategic Buyer/Public Target M&A Deal Points Study (For Transactions Announced in 2014) at Slide 43 (also showing percentages were 97% in 2013 and 94% in 2012).
Still another recent survey looking at 2016 transaction trends found that, as of June 30, 2016, of the 76 public merger agreements entered
into in 2016 for the acquisition of U.S. reporting companies valued at $100 million or more where cash was involved, 72 deals (95%) did not
contain an appraisal rights closing condition, and only four (5%) included a closing condition that allowed the buyer to avoid closing if holders
of more than a maximum percentage of the issued and outstanding shares exercised their appraisal rights (with the maximum dissenting shares
percentage specified at no more than 10% (two deals); 20% or more (one deal); and no more than 25% (one deal, which involved a financial
sponsor whereas all others involved strategic buyers). The survey noted no public company merger agreement entered into in June 2016
included an appraisal-rights closing condition, despite the widely publicized Dell ruling on May 31. The same survey revealed that of 36 private
company merger agreements entered into in 2016 and publicly filed with the SEC and valued at $25 million or more, 19 (53%) did not contain
an appraisal rights closing condition, and 17 (47%) had a closing condition allowing buyer to avoid closing if holders of more than a maximum
percentage of shares exercised their appraisal rights (with cap on exercise of appraisal rights significantly lower than caps observed in the four
public merger agreements with appraisal rights closing conditions referenced above, with the maximum percentage of shares exercising appraisal
rights ranging from 2% to 15%, but 15 out of 17 agreements limiting the exercise of appraisal rights to 10% of the outstanding shares or lower.)


As noted, given a number of statements contained in the rulings, financial sponsors appear to face increased appraisal risk exposure,
even if the sales process is viewed as arm’s-length. Future rulings will help clarify whether merger price in a financial sponsor-led
transaction will be viewed inherently more skeptically as an indicator of fair value for appraisal purposes, or whether the cases here get
distinguished. It also remains to be seen post-DFC the extent to which and the manner in which the Court will continue to look at
underlying “market conditions” and whether the market is “well-functioning” and whether such conditions “hinder a competitive
bidding environment and reduce the reliability of market price as an indicator of fair value.” But in a post-Corwin, post-Dell, and
post-DFC world, financial sponsors (and all buyers for that matter) may want to stress-test (and recalibrate where appropriate) the
dimensions of any standard dissenting stockholder closing condition clause they include in deal documentation as well as factor potential
eventualities into their acquisition pricing models.

Finally, it also remains to be seen whether prospective purchasers modify bidding strategies to hold back possible purchase price
increases if they foresee appraisal risk and so as to build a reserve with which to defray any potential down range appraisal award.
While such a dynamic could benefit the limited numbers pursuing appraisal arbitrage strategies, it could reduce value maximizing
opportunities for the broader universe of stockholders given the associated value leakage that would inure to only those seeking
appraisal.

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rights ranging from 2% to 15%, but 15 out of 17 agreements limiting the exercise of appraisal rights to 10% of the outstanding shares or lower.)


58 Cf. “February 2, 2015 Delaware Supreme Court Oral Arguments,” where, during oral argument on appeal of the Court of Chancery’s ruling in
Huff, which ruling was subsequently affirmed, Chief Justice Strine made comments evidencing regard for market price, and noting: “you can think
you’re smarter than the market, but you better go read Burt Malkiel’s book called “A Random Walk Down Wall Street,” because you’re not, and
the best indication of market value is in fact a market check”), available at http://new.livestream.com/DelawareSupremeCourt/events/3801168/
videos/76805879.
## Appraisal-Based Closing Conditions

<table>
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<tr>
<th>Year</th>
<th>Number of Deals</th>
<th>% of Deals with Appraisal Rights Condition</th>
<th>Number of Financial Buyer Transactions</th>
<th>% of Financial Buyer Transactions with Appraisal Rights Condition</th>
<th>Number of Management Buyouts</th>
<th>% of Management Buyouts with Appraisal Rights Condition</th>
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<td>2008</td>
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<td>9</td>
<td>44.4%</td>
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<tr>
<td>2009</td>
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<tr>
<td>2010</td>
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<td>10.3%</td>
<td>46</td>
<td>8.7%</td>
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<tr>
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<td>6.1%</td>
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<tr>
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<tr>
<td>2014</td>
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<td>20</td>
<td>5.0%</td>
<td>1</td>
<td>100.0%</td>
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<td>8.1%</td>
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<tr>
<td>2016 - YTD</td>
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<td>24</td>
<td>4.2%</td>
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</tbody>
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**Source:** Deal Point Data, LLC.

**Notes:**
1. Data as of August 19, 2016 and tracking transactions valued at more than $100 million announced since 2008.
2. Includes only public targets headquartered in the U.S.
3. Includes only transactions involving definitive agreement.
4. Does not include appraisal rights conditions in tender offers.