FROM THE CHAIR  Scott T. Whittaker

Wishing everyone a healthy, happy and deal-filled 2018!

In a few days many of us will gather at the Montage Resort in Laguna Beach, for the annual stand-alone meeting of the M&A Committee (not to mention a much needed break from the cold winter we are all experiencing!). West Coast sunsets and evenings, combined with our meetings and networking with fellow M&A practitioners, will surely help get 2018 off to a great start.

As in prior years, our subcommittees and task forces will meet throughout the day on Friday and Saturday, 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 sponsors for this weekend: Bloomberg Law, Duff & Phelps, Kira Systems, SRS Acquiom and Doxly. On behalf of the Committee, THANK YOU!

COMMITTEE LEADERSHIP CHANGES

We have several Committee leadership changes that will take effect at our Laguna meeting.

Franziska Ruf will conclude her term as Chair of the International M&A Subcommittee. Franziska has been an active member of the M&A Committee for many years, and has contributed greatly to the success of the Committee, especially through her involvement in our International M&A Subcommittee. Please join me in thanking Franziska. We look forward to her continuing involvement in the Subcommittee and other M&A Committee initiatives. After our meeting in Laguna Beach, Rick Silberstein, who currently serves as Vice-chair, will become sole Chair of the International M&A Subcommittee, and Jeff Labine will step into the role of Vice-chair.

Rita O’Neill has been added as a Vice-chair of the Market Trends Subcommittee. Rita will serve with Claudia Simon, Subcommittee Chair, and Kevin Kyte, Subcommittee Vice-chair, as that subcommittee continues its great work publishing an ever widening array of Deal Points studies (more on that below).

Samantha Horn has been added as a Vice-chair of the Private Equity M&A Subcommittee. Samantha will serve with David Albin, Subcommittee Chair, and Mireille Fontaine, Subcommittee Vice-chair, as that subcommittee continues its evolution into a Joint Subcommittee of the M&A Committee and the Business Law Section Private Equity and Venture Capital Committee, as was announced at our meeting in Chicago.

Chauncey Lane has become Co-editor of our Deal Points newsletter. Chauncey will serve with long-time Editor, Ryan Thomas, to help maintain and enhance the content of our excellent Deal Points newsletter.

Gina Conheady has become Vice-chair of the Membership Subcommittee. Gina will serve with Tracy Washburn Bradley, Subcommittee Chair, to help the M&A Committee, which is already the largest Committee of the ABA Business Law Section, grow even larger!

Here are some additional M&A Committee highlights and reminders:

NEW DEAL POINTS STUDIES

I hope everyone took notice of the release of four new Deal Points Studies over the last few weeks: (1) the Inaugural Deal Points Study on Carveout Transactions, Chaired by Rita O’Neill, (2) the 2017 Private Target M&A Deal Points Study, Chaired by Jessica Pearlman, (3) the 2017 Strategic Buyer/Public Target M&A Deal Points Study, Chaired by Claudia Simon, and (4) the 2017 Canadian Public Target M&A Deal Points Study, Chaired by Cam Rusaw. When added to the Buyer Power Ratio Deal Points Study that was released earlier in the year (Co-chaired by Rick Climan and Paul Koenig, and our first-ever co-branded work product), 2017 was by
far the most prolific year for Deal Points Study publications. Congratulations to everyone who contributes to the great work of the Market Trends Subcommittee!

NEW JOINT TASK FORCE ON SHORT FORM MODEL ACQUISITIONS AGREEMENTS

The M&A Committee will join with the Middle Market and Small Business Committee to form a Joint Task Force on Short Form Model Acquisition Agreements. Jason Balog will be the Task Force Co-chair for the M&A Committee, to serve with Eric Graben, Task Force Co-chair for the Middle Market & Small Business Committee. The goal of this joint task force is to publish a set of “short form” acquisition agreements (with ancillary documents and commentary) which would be more easily adaptable for use in smaller M&A transactions than the “long form” Model Stock Purchase Agreement and Model Asset Purchase Agreement published by the M&A Committee. The inaugural meeting of this joint task force will occur when we meet in Orlando in conjunction with the ABA Business Law Section Spring Meeting.

SPRING MEETING IN ORLANDO

The excitement is already building about our next meeting, which will be April 12 – 14 in Orlando, in conjunction with the ABA Business Law Section Spring Meeting. The planning is well underway for that meeting, where we will have some great programs in addition to our substantive subcommittee and task-force meetings. We are also planning some great dinners and socializing. As the Orlando meeting will be only ten weeks after we return from Laguna Beach, it’s not too early to start planning your attendance.

If you have any questions concerning our upcoming meetings in Laguna Beach or Orlando, or anything else, please don’t hesitate to ask. I look forward seeing many of you in Laguna Beach.
FROM THE EDITORS  Ryan D. Thomas & Chauncey M. Lane

Happy New Year! We hope last year was deal-filled and 2018 is off to a prosperous start. In this issue of Deal Points, we will be highlighting the work of our Jurisprudence Subcommittee, as well as the inaugural release of the 2017 Carveout Transactions Deal Points Study, in our What’s New & Trending section. Additionally, our subcommittees and task forces have been hard at work this past year and recently released great content and numerous Deal Studies. Be sure to give them a look!

As always, please let us know if you would like to submit an article for a future issue or would like to highlight your subcommittee or task force in What’s New & Trending.

We look forward to seeing everyone in Laguna Beach.

Contents

What’s New & Trending .................................................................................................................................. 4

Feature Articles
The Many Meanings of Voting Power ........................................................................................................... 7
Delaware Supreme Court Reverses Court of Chancery’s Dell Appraisal Decision: “Deal Price Deserved Heavy, If not Dispositive Weight” ......................................................................................... 9

Task Force Reports
Task Force on Legal Project Management ....................................................................................................... 11
Task Force on Women in Mergers & Acquisitions ......................................................................................... 11
Task Force on Private Company Model Merger Agreement ........................................................................... 12
Task Force on Revised Model Asset Purchase Agreement ............................................................................ 12
Task Force on Two Step Tender Offers ........................................................................................................ 12
Joint Task Force on Governance Issues Arising in Business Combination Transactions .............................. 13

Subcommittee Reports
M&A Market Trends Subcommittee ................................................................................................................ 12
M&A Jurisprudence Subcommittee ................................................................................................................. 13
International M&A Subcommittee .................................................................................................................. 14
Technology in M&A Subcommittee ................................................................................................................ 15
Joint Private Equity M&A Subcommittee ....................................................................................................... 16

Committee Meeting Materials ........................................................................................................................ 17
Michael O’Bryan – Chair of M&A Jurisprudence Subcommittee
Morrison Foerster, mobryan@mofo.com

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 (http://apps.americanbar.org/dch/committee.cfm?com=CL560000).

- 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.

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.

We need more topics!

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@bradley.com.

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

Rita-Anne O’Neill
Sullivan & Cromwell LLP, oneillr@sullcrom.com

Katherine Baudistel
Sullivan & Cromwell LLP, baudistelk@sullcrom.com

Tyler Rosenbaum
Sullivan & Cromwell LLP, rosenbaumt@sullcrom.com

The Market Trends Subcommittee is proud to announce the inaugural release of Deal Points Study on Carveout Transactions. Carveout transactions, also known as divisional sales, involve the sale of a business line, division or other portion of a larger company, with the seller remaining a separate business operating as a going concern. These transactions, which combine elements of both public- and private-company M&A deals, have not previously been the subject of their own deal points study. This study, announced in 2015 and 2016, seeks to fill this void in the literature by providing a helpful resource to junior and more experienced practitioners alike.

One of the new features of this study is the inclusion of explanatory background information and practice pointers. These aim to contextualize the data points by explaining their significance where it may not be apparent and highlighting potential applications of the information presented. Hopefully these innovations help to make the study more accessible to all practitioners and to expand its use as a resource in negotiating agreements and understanding the market.

Among the study’s noteworthy findings are:

• Equity purchases among carveout transactions reviewed outnumbered those involving solely asset sales by a nearly 3:1 ratio (58% to 22%).

• Over three-quarters of carveout transactions reviewed contained sufficiency of assets representations, with asset purchase agreements containing such representations only incrementally more frequently (88% of the time) than transactions involving solely an equity purchase (78% of the time).

• Although carveout transactions, by their nature, involve the breaking up of a seller’s business, only 28% of the carveout transactions reviewed contained a covenant addressing the division of commingled contracts between the carved-out business and the continuing business of the seller.

• Although most carveout transactions, unlike transactions involving the acquisition of whole public companies, provide for seller indemnification, only 23% of the carveout transactions reviewed contemplated the use of escrow or holdback mechanisms to cover a seller’s indemnification obligations, compared with the finding of the Subcommittee’s 2016-17 private deal points study that 76% of comparable private-company transactions did.

• The data for carveout transactions was consistent with the continued trend shown in the private study away from tipping baskets and in favor of true deductibles as limitations on the sellers’ indemnification obligations (with true deductibles being favored in 76% of transactions studied in the carveout study and 70%, 65% and 59% of transactions in the 2016-17, 2014 and 2012 private studies, respectively).

• Although the seller made representations with respect to the financial statements of the carved-out business in 86% of the carveout transactions reviewed, in only 41% of those transactions were the financial statements required to be audited.

You may access the Deal Points Study on Carveout Transactions by visiting the ABA website.
NEW FEATURES IN THE 2017 PRIVATE TARGET DEAL POINTS STUDY

Jessica C. Pearlman
K&L Gates LLP, jessica.pearlman@klgates.com

We’re excited to release the 2017 Private Target Deal Points Study – a publication of the Market Trends Subcommittee. Some of the new features include:

• **More recent data.** This iteration includes not only 2016 transactions but also transactions from the first half of 2017 (and deals signed during those periods, not just closed then).

• **New data points.** Most notably, an entire new section on reps and warranties insurance with correlated data in the indemnity section, but there are other new data points scattered throughout with “new data” flags (see sample below) to make them easy for you to recognize.

• **Excludes divisional sales.** The ABA is also about to publish a special brand-new study of carveout sales, so by excluding them from this study we can better compare results for given data points.

The Private Target Deal Points Study may be accessed on the ABA website. Please join me in extending a big thank you to everyone who worked tirelessly on this study – they are all listed in the credits pages.

GOT NEWS & TRENDS?

Ryan D. Thomas — Co-editor
Bass, Berry & Sims PLC, rthomas@bassberry.com

Chauncey M. Lane — Co-editor
Husch Blackwell, chauncey.lane@huschblackwell.com

Are you following any new deal trends or have other news relevant to our committee? If so, we want to share your content. Simply contact us via email at dealpoints@bassberry.com
The Many Meanings of Voting Power

By James J. Black
Morrison & Foerster


In Special Situations Fund III QP, L.P. v. Overland Storage, Inc., the Supreme Court of New York, New York County, applying California law, found that a transaction pursuant to which a third party acquired a majority of the shares in Overland Storage, Inc., but simultaneously entered into a voting agreement restricting its right to nominate and vote for members of Overland’s board of directors did not constitute the acquisition of more than 50% of “voting rights” that would trigger a payment obligation toward the plaintiffs under a separate agreement, as the term “voting rights”, construed in accordance with California law and based on the relevant agreements and extrinsic evidence, referred only to the ability to vote for candidates for the company’s board of directors.

In so holding, the court found that this construction of the term “voting rights” was consistent with the parties’ intent and that the term “voting rights” in most cases refers to the power of shareholders to actually vote for directors of their choice and not to an attribute inherent to the shares themselves.

Background

The Special Situation Funds brought suit against Overland seeking payment of $6 million based on an agreement with Overland under which they had acquired an interest in any cash payout from a patent infringement claim that Overland had asserted against a competitor. That agreement required Overland to pay the Funds $6 million in the event that any third party acquired more than 50% of the “voting power” in Overland prior to the final resolution of the infringement claim. The Funds’ claim for payment was based on the acquisition, during the pendency of the infringement suit, of a majority of the outstanding shares in Overland by FBC Holdings S.á.r.l. (FBC). Overland claimed that FBC had not acquired more than 50% of the voting power despite its majority shareholding and that the payment obligation had, therefore, not been triggered, as FBC had entered into a voting agreement with Overland under which FBC was limited to nominating two out of Overland’s seven directors and was to vote its shares for the remaining five directors in the same proportion as the non-FBC shareholders.

Overland ultimately settled its infringement claim by way of a cross-license without the payment of any money, and shortly thereafter, Overland entered into a business combination that, had it occurred prior to the settlement of the infringement claim, would have triggered the $6 million payment to the Funds. Based on this sequence of events, the Funds further alleged that Overland had breached the implied covenant of good faith and fair dealing under California law by intentionally entering into a non-cash settlement shortly prior to the closing of the business combination in order to avoid the payment obligation to the Funds. Overland rejected this claim based on the fact that its agreement with the Funds gave Overland the right, in its sole discretion, to decide whether and on what terms to settle the patent infringement claim. Overland further argued that its decision to settle the infringement claim was based on legitimate business considerations.

Analysis

On the Funds’ claim that the FBC transaction constituted the acquisition of more than 50% of the voting power in Overland, the two basic questions presented were (i) whether the term “voting power” refers only to the ability to elect corporate directors or more broadly to the ability to vote on fundamental matters of corporate governance, and (ii) whether “voting power” is an attribute inherent in stock or whether it instead refers to the ability of a stockholder to actually exercise the voting rights inherent in the stock.

The court initially noted that, since the agreement between the Funds and Overland did not define “voting power” or state how it should be calculated, the court would look to extrinsic evidence to determine the meaning of the term. After reviewing the usage of the term in the context of California corporate law, federal tax law and other sources, the court found that the default rule in California (and the general usage elsewhere) is that the term “voting power” refers only to the ability to elect directors and not more broadly to the right to vote on other matters of corporate governance. The court explained that this view is based on the assumption that the directors manage a corporation’s business, and a stockholder’s ability to vote for the election of directors was, therefore, the essential manner in which the stockholder could influence the management of the business. The court found that, since the parties did not claim that there were any unusual provisions in Overland’s governing documents giving the shareholders (as opposed to the board) control over basic management functions, the default rule in California controlled.

The court then analyzed the second question: whether the restrictions in the voting agreement meant that FBC had not acquired the majority of the “voting power”, or whether, conversely, the acquisition of the majority of the outstanding shares in Overland by itself sufficed to give FBC the requisite “voting power” to trigger the payment obligation to the Funds despite the voting agreement. More simply stated, is “voting power” an inherent attribute of stock or is it a possession of shareholders?

After examining a variety of authorities, primarily drawn from federal tax law, the court noted that authorities exist to support either interpretation of the term “voting power” and that neither interpretation appears to predominate. While acknowledging that the divergence of authorities might leave room for either the Funds’ or Overland’s interpretation, the
court held that it did not have to resolve this divergence, as the extrinsic evidence of the parties' actual intent was sufficiently clear in indicating that the purpose of the contractual provision at issue was to protect the Funds from a change in Overland's management that could pose a threat to the Funds' interest in the infringement claim. Since the court determined that this was the undisputed intent of the parties, it held that the term "voting power", for purposes of the agreement between the Funds and Overland, must be construed to mean the power to actually elect directors who could replace Overland's management and not merely to the ownership of shares that, absent the voting agreement, would confer the power to do so.

Additionally, the court held that, to the extent that any ambiguity remained as to the meaning of "voting power", that ambiguity had to be resolved against the Funds, as they had been responsible for drafting the provisions containing that term and "cannot now profit from the infirmity of their own... language".

Based on these rulings, the court granted Overland summary judgment on the Funds' breach of contract claims.

The court then turned to the Funds' claim of breach of the implied covenant of good faith and fair dealing. The court began by noting that it was undisputed that the business combination that Overland consummated shortly after entering into the non-cash settlement of its infringement claim would have triggered the $6 million payment to the Funds had it occurred before the settlement. After examining California precedent interpreting the scope of the implied covenant, the court held that, while the agreement between the Funds and Overland unambiguously gave Overland the right, in its sole discretion, to decide whether and on what terms to settle the infringement claim, an implied covenant of good faith and fair dealing had to be read into the agreement because Overland had the power to improperly deny the Funds the value of their investment if Overland exercised its discretion in bad faith.

However, the court granted Overland summary judgment on this claim, as it found that the evidence submitted by Overland and the testimony of its CFO relating to the course of negotiations that led up to the settlement and the business considerations that were behind Overland's decision to settle had established a prima facie showing that Overland had exercised its discretion in good faith, and the Funds had failed to present any evidence to support their claim that Overland could have achieved greater value than the non-cash settlement provided for or that Overland's motive for settling at that point in time was to avoid the payment obligation to the Funds.

**Conclusion**

When using "voting power" or a similar term in a critical contractual provision, it is unwise to leave the term undefined. Given the range of meanings that can be attributed to the term, courts applying California law may rely on extrinsic evidence of the parties' intent in order to determine the meaning of the term in the context of a specific transaction. Additionally, the onus is on the drafting party to ensure that the term is clearly defined in a manner that is consistent with its intent, as the court may favor the interpretation of the non-drafting party in resolving any ambiguity.
Delaware Supreme Court Reverses Court of Chancery’s Dell Appraisal Decision: “Deal Price Deserved Heavy, If Not Dispositive, Weight”

By Christopher N. Kelly, Ryan M. Murphy, and Jay G. Stirling

On December 14, 2017, in a much-anticipated decision in the appeal from the Court of Chancery’s above-deal price appraisal of Dell Inc.’s stock following a buyout of the company by its founder and a private equity firm, the Delaware Supreme Court, sitting en banc, held that the Court of Chancery, which had given no weight to the $13.75 per share deal price and instead used exclusively a discounted cash flow analysis to find that the fair value of Dell was $17.62 per share (or 28 percent higher than the deal price), “erred in not assigning any mathematical weight to the deal price” because “the record as distilled by the trial court suggested[ed] that the deal price deserved heavy, if not dispositive, weight.”

The Supreme Court’s Dell opinion caps a noteworthy seven years of appraisal jurisprudence since its 2010 decision in *Golden Telecom Inc. v. Global GT LP,* in which the Court rejected the respondent corporation’s request that Delaware courts employ “a standard requiring conclusive or, in the alternative, presumptive deference to the merger price in an appraisal proceeding,” at least where that price resulted from a “pristine, unchallenged transactional process.” While the Delaware courts historically had relied on the deal price as evidence of fair value of appraised stock when that price resulted from arm’s-length negotiations in an open market, the deal price in such circumstances. The Supreme Court explained that, “[a]lthough there is no presumption in favor of the deal price, under the conditions found by the Court of Chancery, economic principles suggest that the best evidence of fair value was the deal price, as it resulted from an open process, informed by robust public information, and easy access to deeper, non-public information, in which many parties with an incentive to make a profit had a chance to bid.” Pertinently, the Court rejected the trial court’s two principal reasons for not affording more weight to the deal price—the facts that the Court of Chancery should give significant (if not dispositive) weight to the deal price in such circumstances. The Supreme Court confirmed that the Court of Chancery should give significant (if not dispositive) weight to the deal price in such circumstances.

But, notwithstanding this rise of “appraisal arbitrage,” which resulted in a significant increase in appraisal litigation in the Court of Chancery, the court largely continued the practice of relying on the deal price as the primary or sole evidence of fair value of appraised stock when that price resulted from arm’s-length negotiations in an open market.

In *DFC Global Corp. v. Muirfield Value Partners, L.P.*, an appeal from one of the few decisions in which the Court of Chancery did not rely heavily on the deal price for its fair value determination, the Supreme Court reversed the trial court’s above-deal price appraisal award, holding that it abused its discretion by giving only one-third weight to the deal price despite finding that the sale process was robust and free of conflicts of interest. In so holding, the Supreme Court confirmed that the Court of Chancery should give significant (if not dispositive) weight to the deal price in such circumstances.

The Delaware courts historically had relied on the deal price as evidence of fair value of appraised stock when that price resulted from arm’s-length negotiations in an open market.

1 Christopher N. Kelly is a partner, Ryan M. Murphy is counsel, and Jay G. Stirling is an associate, in the Corporate Group of Potter Anderson & Corroon LLP. The views expressed by the authors are not necessarily the views of Potter Anderson & Corroon LLP or any of its clients.


4 11 A.3d 214 (Del. 2010).

5 Id. at 217-18.


8 172 A.3d 346 (Del. 2017).

9 Id. at 372.

10 Id. at 349.

11 Id.

12 Id. at 362.
expect in exchange for taking on the large risk of a merger” and a buyer’s focus “on hitting its internal rate of return has no rational connection to whether the price it pays as a result of a competitive process is a fair one.” In remanding the case, the Supreme Court instructed the trial court to “reassess the weight [it] chooses to afford various factors potentially relevant to fair value,” and suggested that it should “conclude that [its] findings regarding the competitive process leading to the transaction” support the determination “that the deal price was the most reliable indication of fair value.”

Against this backdrop, the Supreme Court issued its Dell decision. By way of background, dissenting stockholders sought appraisal following a management buyout at $13.75 per share led by Dell’s founder and affiliates of a private equity firm. The Court of Chancery observed that the buyout resulted from a thorough sale process that “easily would sail through if reviewed under enhanced scrutiny.” An independent special committee negotiated with the buyout group, and evaluated alternatives through pre-signing and post-signing market checks that yielded rival bids from other PE firms. Throughout the process, Dell’s founder expressed willingness to partner with any of the bidders and to supply as much of his own equity as needed to complete a going-private transaction.

Nevertheless, the Court of Chancery found that a confluence of factors justified assigning no weight to the deal price, and instead relied exclusively on its own DCF analysis, which resulted in a fair value of $17.62 per share. The Vice Chancellor concluded that both the market and the sale process did not reflect the company’s intrinsic value: the market was too focused on Dell’s short-term prospects and the participation of only financial bidders in the process resulted in a deal priced to clear internal rate of return hurdles. The court also found that factors “endemic” to MBO go-shops cast doubt on the reliability of the deal price, because rival bidders could be discouraged from making topping bids due to perception that management had an informational advantage, fear that there was “no realistic pathway to success,” or risk of overpaying for the company (i.e., the putative “winner’s curse”).

In its appeal, Dell argued, and the Supreme Court agreed, that the Court of Chancery’s “decision to give no weight to any market-based measure of fair value [ran] counter to its own factual findings.” The evidence pointed to an efficient, rather than myopic, market for Dell shares. The Supreme Court observed that the lack of strategic bidders during the pre- and post-signing phases suggested that the deal price was not too low: if the deal price had substantially undervalued the company, then strategic competitors would have had strong incentives to bid. Furthermore, there was nothing in the trial record to suggest the presence of the putative features of MBOs that theoretically could undermine the reliability of deal price as evidence of fair value: Dell mitigated any informational asymmetry between the buyout group and other bidders by providing go-shop participants extensive due diligence and access to Dell’s founder; and, contrary to any “winner’s curse phenomenon,” two rival bidders submitted competing proposals during the go-shop period. In sum, the Court found “the market-based indicators of value—both Dell’s stock price and deal price—have substantial probative value” and “deserved heavy, if not dispositive, weight.”

Following Dell, DFC Global, and multiple decisions by the Court of Chancery deferring to the deal price, it is now clear that, in a statutory appraisal of stock of a public company acquired by merger, Delaware courts will give substantial, if not exclusive, weight to the deal price when it is derived through arm’s-length negotiations in an open market. In effect, while the deal price is not presumed to be fair value as a matter of Delaware law, such a presumption may in fact exist in that context. Dell further suggests that the Delaware courts may in certain cases give heavy weight to a deal price in an interested-party buyout when the sale process is proven to have removed any putative insider advantage.

CONTINUED ON PAGE 22
TASK FORCE ON LEGAL PROJECT MANAGEMENT

The September meeting of the Task Force in Chicago featured a discussion of a draft Multi-Jurisdictional Acquisition Checklist. This tool lists additional issues to consider in a transaction that crosses borders. The discussion was led by Task Force members Dr. Rainer Loges (Gleiss Lutz, Munich, Germany) and Dag Fredlund (World Services Group, Goteborg, Sweden) who generated this highly useful tool.

The Multi-Jurisdictional Acquisition Checklist is just one of the five new tools that will appear in the second edition of our highly successful Guidebook on Using Legal Project Management in Merger and Acquisition Transactions. The Guidebook is the first publication of the Business Section to enable purchasers to download the materials found in hardcopy. We continue to be on track to publish the Second Edition of the Guidebook in conjunction with the April meeting of the Business Section in Orlando. If you have any suggestions for improving our existing tools, please send them our way.

Our Task Force will hold its next meeting in person and by teleconference on Friday, April 26 from 1:00 pm – 2:00 pm (Pacific Time) in connection with the standalone meeting of the M&A Committee at the Montage Resort in Laguna Beach, California. See schedule on page 17 for room location and dial-in details. Details of the meeting may also be found online at the website for the M&A Committee.

At our Laguna Beach meeting we will focus on how concepts of scheduling and Gantt Charts, well established in other business disciplines, are relevant to handling M&A deals efficiently. In a presentation led by Task Force members Aileen Leventon and John Murdock, we will cover topics such as:

- How to develop a timeline and work plan that shows when tasks, milestones and other events should occur.
- How to best manage work which is contingent upon other events occurring or which may be done in parallel.
- Is it ever too soon to start work on an aspect of a deal, like preparing for closing, or conducting due diligence?
- Is it ever too late to start work that may result in failure to meet critical deadlines, when the client may not be willing to pay for it?

The program will reference some of the tools the Task Force has already developed. Timing is everything, so please be sure to join us for this interesting session.

We look forward to seeing many of you in Laguna Beach.

BYRON S. KALOGEROU, CO-CHAIR
DENNIS J. WHITE, CO-CHAIR
AILEEN LEVENTON, PROJECT MANAGER

TASK FORCE ON WOMEN IN MERGERS & ACQUISITIONS

The last Women in M&A Task Force meeting, held at the Sheraton Grand Chicago last September, was our best attended meeting with over 60 attendees. The meeting was primarily focused on a panel of in-house female lawyers who discussed their experience hiring women lawyers for M&A services and provided useful tips for female lawyers in their business development efforts.

Our next meeting will be in Laguna Beach, California on Friday, January 26, from 2:30 pm–3:30 pm. This upcoming meeting will give an opportunity to provide input and make a contribution to our efforts. Our meeting will be divided into three breakout sessions that will help to further our primary initiatives.

- **Breakout 1:** The Task Force created a presentation on the steps law firms can take to increase the participation and retention of women in M&A. This session will make suggestions and changes to this presentation in order to finalize and release it to Task Force members who can share with their respective firms.

- **Breakout 2:** One of our initiatives is to increase the dissemination of information related to our cause. This includes studies, tools, articles, etc. This session will determine a process for identifying what materials should be posted to the WiMA website; and how they will be identified, posted and updated.

- **Breakout 3:** Currently, we survey 25 law firms in North America every two years to track women in M&A percentages and trends. This session will attempt to answer the following questions: How can we expand our survey to obtain broader statistics? What additional statistics should we collect and how can they be collected? Should we continue to canvas law school statistics as well and how should they be obtained?

If you have an interest in participating, please send an email to jmuller@hl.com and oneillr@sullcrom.com and indicate your preferred breakout session (in order of preference). We look forward to seeing you at the meeting and thank you in advance for your efforts.

JENNIFER MULLER, CHAIR
RITA-ANNE O’NEILL, VICE-CHAIR
M&A MARKET TRENDS SUBCOMMITTEE

The M&A Market Trends Subcommittee has been hard at work! We recently released four new Deal Points Studies. A big thank you to our project chairs and working groups for their time and dedication.

- 2017 Canadian Public Target M&A Deal Points Study
- 2017 Carveout Transactions M&A Deal Points Study
- 2017 Strategic Buyer/Public Target M&A Deal Points Study
- 2017 Private Target M&A Deal Points Study

MELISSA A. DEVINCENZO, CO-CHAIR
AMY SIMMERMAN, CO-CHAIR
TATJANA PATERNO, VICE-CHAIR

TASK FORCE ON REVISED MODEL ASSET PURCHASE AGREEMENT

The Task Force has now moved to the editorial stage. A group of Task Force members has consolidated the work of the small groups and is now reviewing the draft updated model agreement and commentary. With this work underway, the Task Force will not be meeting in the immediate future.

ED DEIBERT, CO-CHAIR
JOHN CLIFFORD, CO-CHAIR

TASK FORCE ON TWO STEP TENDER OFFERS

We have made a lot of progress on the Model Tender Offer Agreement over the past four months, and the project is nearing completion. We are pleased to announce that Mike Duncan of Computershare will be present at this meeting to discuss with our Task Force some of the nuts and bolts of the mechanics of a tender offer. Please join us as we learn what we don’t know we don’t know about these mechanics! We will also discuss where the document has landed on some outstanding open issues, including benefit of the bargain damages, acceleration of equity awards, defining the minimum tender condition on a fully diluted or shares outstanding basis and other fun issues! We wish everyone a happy New Year and look forward to seeing you in Laguna Beach shortly.

MICHAEL G. O’BRYAN, CO-CHAIR
ERIC S. WILENSKY, CO-CHAIR

THE TASK FORCE TO PREPARE A MODEL PRIVATE COMPANY MERGER AGREEMENT CONTINUES TO ADD VOLUNTEERS TO OUR PROJECT AND WE HOPE THAT YOU WILL JOIN US FOR OUR MEETING IN LAGUNA BEACH. THE GOAL OF THE TASK FORCE IS TO PRODUCE A MERGER AGREEMENT WITH COMMENTARY THAT WILL BE A PRACTICAL RESOURCE FOR PRACTITIONERS AND HIGHLIGHT THE KEY ISSUES THAT ARISE PRIMARILY IN THE PRIVATE COMPANY MERGER CONTEXT. THE DRAFT WILL BE A REASONABLE BUYER’S FIRST DRAFT. AT THE MEETING IN CHICAGO, WE DISCUSSED DIFFERENT APPROACHES TO CREATING A "REASONABLE" BUYER’S FIRST DRAFT, AS WELL AS CASE LAW AND CONSIDERATIONS RELATING TO ANTI-RELIANCE PROVISIONS AND FRAUD ISSUES. IN ADVANCE OF THE LAGUNA BEACH MEETING, WE HAVE CIRCULATED A WORKING DRAFT OF A MODEL AGREEMENT, REFLECTING SOME OF THE IMPORTANT WORK THAT HAS BEEN DONE TO DATE.

At the upcoming meeting in Laguna Beach, we will have some of the authors of sections of our model agreement lead a discussion about drafting issues they are confronting as their drafting continues. We also expect to continue our traditional meeting format of reviewing any recent Delaware case law relevant to private company acquisition issues that might affect the drafting of our agreement and discussing issues that have come up in practice. Finally, we will discuss a plan for having our volunteers augment and build out our working draft.

MELISSA A. DEVINCENZO, CO-CHAIR
AMY SIMMERMAN, CO-CHAIR
TATJANA PATERNO, VICE-CHAIR

TASK FORCE ON PRIVATE COMPANY MODEL MERGER AGREEMENT

The Task Force to prepare a model private company merger agreement continues to add volunteers to our project and we hope that you will join us for our meeting in Laguna Beach. The goal of the task force is to produce a merger agreement with commentary that will be a practical resource for practitioners and highlight the key issues that arise primarily in the private company merger context. The draft will be a reasonable buyer’s first draft. At the meeting in Chicago, we discussed different approaches to creating a “reasonable” buyer’s first draft, as well as case law and considerations relating to anti-reliance provisions and fraud issues. In advance of the Laguna Beach meeting, we have circulated a working draft of a model agreement, reflecting some of the important work that has been done to date.

At the upcoming meeting in Laguna Beach, we will have some of the authors of sections of our model agreement lead a discussion about drafting issues they are confronting as their drafting continues. We also expect to continue our traditional meeting format of reviewing any recent Delaware case law relevant to private company acquisition issues that might affect the drafting of our agreement and discussing issues that have come up in practice. Finally, we will discuss a plan for having our volunteers augment and build out our working draft.

MELISSA A. DEVINCENZO, CO-CHAIR
AMY SIMMERMAN, CO-CHAIR
TATJANA PATERNO, VICE-CHAIR

CLAUDIA SIMON, CHAIR
M&A JURISPRUDENCE SUBCOMMITTEE

The M&A Jurisprudence Subcommittee will meet soon in Laguna Beach:

Friday, January 26, 2018
9:00 am to 10:30 am

Dial-in information for the meeting is included in the schedule at the end of this issue of Deal Points.

At the meeting we will discuss:

• as many recent court decisions as we can get to in our allotted time.
• topics under review by the Judicial Interpretations Working Group.

A summary of the recent Overland opinion, dealing with the potential interpretation in an agreement of “voting power” when not otherwise defined (by a New York court applying California law), is attached below. We’ll discuss that and more at the meeting.

The cases and other materials will be distributed by email. If you don’t get the email, but would like to, please let one of us know.

JOINT TASK FORCE ON GOVERNANCE ISSUES ARISING IN BUSINESS COMBINATION TRANSACTIONS

Our Task Force is close to publication of our handbook covering the many governance issues confronted by boards of directors engaged in an M&A transaction.

At our Chicago meeting in September 2017, we offered a “sneak preview” of the chapter in our handbook covering the Sales Process for a Sale of Control. Our program, entitled “Spotting Traps and Tripwires in the M&A Sales Process – M&A Governance Handbook Comes to the Rescue,” provided a look at the types of issues a board must consider as a target company considering an acquisition proposal. Our panelists were Task Force Co-chairs, Larry Hamermesh, Michael Halloran, Patricia Vella and Diane Holt Frankle, along with Task Force member Richard DeRose of Houlihan Lokey. We had fun putting on this program together, and we hope those of you who attended got a feeling for the types of issues we cover in our handbook and the value the chapters offer in advising boards.

Thanks to the hard work of our many authors, we are very near completion of our handbook. Our goal is to publish in 2018. The four co-chairs are serving as the editorial board and we have completed editorial review for 12 chapters.

Three additional chapters have had significant editorial work done and are close to co-chair editorial review. The content submitted by our authors has been excellent quality and we know you will all find this handbook to be a tremendous resource for directors and their advisors.

Unfortunately, three assigned chapters have not been submitted as of the date of this report. In order to keep to our publication schedule, we cannot delay much longer for missing content. If you are one of the authors who owe us a draft chapter, please call one of the co-chairs or talk to us at the Laguna Beach meeting to let us know your schedule for submitting your draft chapter.

We look forward to seeing many of you in Laguna Beach! We will be the four committee members with squinting eyes and blue-stained fingers from our editorial work!

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’Brien 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!

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’Brien 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!

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
LISA J. HEDRICK
DAMAGES PROJECT
The International M&A Subcommittee met from 10:30 am - 12:00 pm on Saturday, September 16, 2017, in connection with the ABA Business Law Section Mergers & Acquisitions Annual Meeting in Chicago.

1. Introductions
Franziska Ruf, the Chair of the Subcommittee, introduced herself and welcomed the participants. She advised the audience that the Vice-chair of the Subcommittee, Rick Silberstein, was unable to attend the meeting and that he sends his regrets. The Subcommittee members then proceeded to introduce themselves.

2. How US Businesses Can Profit from the Canada EU Free Trade Agreement (CETA)
Didier Culat (BCF LLP, Québec, Canada) and David G. Forgue (Barnes, Richardson & Colburn, Chicago, Il) gave a very interesting presentation on CETA, the free trade agreement between Canada and the European Union which was set to come into force on October 21, 2017. Although it might not be immediately apparent what, if any, impact CETA might have on US businesses, it turns out that there are several manners in which US corporations can use CETA to their advantage. Didier Culat commenced by describing the highlights of CETA, such as the creation of tariff-free areas, the mobility of labour, standards of cooperation and public procurement advantages. David Forgue then explained some of the manners in which these rules can benefit US businesses, such as by permitting the hiring of temporary employees from Europe via Canada for the US, the ability for US businesses to access the European market via Canada and various other manners in which the use of a Canadian company can allow for a US business to leverage the benefits of free trade arrangements to which the US is not itself a party. In summary, Canada can constitute a platform for a US business to trade into Europe, in addition to the physical advantages of being present in Canada, such as the increased proximity to Europe, thereby diminishing transportation times to Europe.

3. Brexit from the Continent
Giovanni Nardulli (Legance, Rome, Italy) and Daniel Rosenberg (Charles Russell Speechlys LLP, London, UK) provided us with a view of Brexit, as seen from the UK as well as from the Continent. Daniel Rosenberg advised that there still remained many questions and that much was still to be determined in respect of the process and the outcome of Brexit and that no one had a very precise idea as to what will actually end up happening with Brexit. Giovanni Nardulli stated that the European view is that the UK must begin by paying all amounts past due before being in a position to negotiate all of the other issues, including the rights of European citizens and border issues. He noted that, unlike the CETA negotiations which took seven years, there were less than two years left to negotiate Brexit. Giovanni Nardulli also noted that although M&A (particularly inbound M&A) had increased in Europe on an aggregate basis, it had actually fallen by 42% in the UK. Daniel Rosenberg noted some of the impacts of Brexit generally, including the currency decline in the UK which has actually had a positive impact on the earnings of some of the largest public companies, lower profit growth forecasts, lower unemployment rates than seen in the past 40 years, the deferral or cancellation of the investment plans of many entities. But, ultimately, Brexit has triggered a lot of M&A activity, with increased focus required on due diligence items relating to labour, tariffs and other matters that will be affected by Brexit.

4. Subcommittee Website
Our website at [http://apps.americanbar.org/dch/committee.cfm?com=CL560002] contains:
- Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.

5. Next Meeting
The Subcommittee’s next meeting will be held on Saturday, January 27 from 10:30 am - 12:00 pm, in connection with the stand-alone meeting of the ABA Business Law Section, Mergers and Acquisitions Committee, in Laguna Beach.
TECHNOLOGY IN M&A SUBCOMMITTEE

The M&A Committee’s newest active subcommittee, the Technology in M&A Subcommittee, was relaunched in September 2017 at the Section’s Spring Meeting in Chicago with a significantly expanded mission, namely to assist M&A Committee members keep up-to-date with the increasing use of technology in the practice of M&A.

At our Chicago meeting, Joshua Fireman of leading technology consultants Fireman & Co and Rich Robbins, the Director of Knowledge Management at Sidley Austin LLP, gave a wide-ranging presentation on the technologies currently being used in M&A. At that same meeting Will Norton of SimplyAgree launched our first project, a directory of technologies currently being used by M&A practitioners that he is helping the subcommittee to develop.

Will has made significant progress with the directory since our Chicago meeting and will be sending a copy of the latest version of it to subcommittee members ahead of our forthcoming meeting in Laguna Beach. The directory is also available on our subcommittee webpage (https://apps.americanbar.org/dch/committee.cfm?com=CL560026), but because it is a work in progress it is only available to subcommittee members (you can join through the “Join a Committee” button on the Section’s main “Committees” page).

Tom and I would like to thank Will for all his hard work in getting the directory to its current state and also to thank those members of our subcommittee who have given us initial comments on it.

In summary, the directory divides the relevant technologies into the following categories and subcategories, with links to and brief descriptions of the relevant products we are aware of in each area:

- **Diligence**
  - Data rooms
  - Diligence automation

- **Drafting**
  - Document assembly
  - Contract review
  - Document manipulation
  - Market comparisons

- **Negotiation**
  - Document comparison
  - Negotiation platforms

- **Closing**
  - Digital signatures
  - Closing management

- **Organization**
  - Capitalization table management
  - Knowledge Management
  - Collaboration
  - Experience automation
  - Analytics

We welcome the active participation of subcommittee members in this project. If having reviewed the latest version of the directory you are aware of additional technologies not listed please let us know. Please also let us know if you have practical experience of any of these technologies and, if so, whether you would be prepared to share your experiences with subcommittee members in connection with our planned development of a series of case studies on these technologies.

Please join as at our forthcoming meeting, which will take place from 1:00 pm - 2:30 pm on Saturday, January 27, at the Stand-Alone Meeting of the M&A Committee in Laguna Beach. That meeting will primarily comprise an overview of the project as well as presentations on the above five main categories from members of our subcommittee – those members are Kevin Kyte of Stikeman Elliott LLP (Diligence), Rich Robbins of Sidley Austin LLP (Drafting), Will Norton of SimplyAgree (Negotiation), Matt Kittay of Fox Rothschild LLP (Closing) and Steve Obenski of Kira Systems (Organization).

Being a member of our Subcommittee is the only way to ensure that you receive updates on our Technology in M&A project and other relevant materials from our Subcommittee. If you are not already a member we warmly invite and encourage you to join, through the “Join a Committee” button on the Section’s main “Committees” page.

If you have ideas for how we might take the Subcommittee forward, please share them with us. Please come to our forthcoming meeting in Laguna Beach and if you can’t do that please email either my Vice-chair Tom Romer (romert@gtlaw.com), our Project Leader Will Norton (will@simplyagree.com) or me (daniel.rosenberg@crsblaw.com).

DANIEL P. ROSENBERG, CHAIR
THOMAS B. ROMER, VICE-CHAIR
JOINT PRIVATE EQUITY M&A SUBCOMMITTEE

The Joint Private Equity M&A Subcommittee met for the first time as a joint subcommittee of both the M&A Committee and the Private Equity and Venture Capital Committee in Chicago in September 2017.

We continued with our “The Experts Speaks” segment with Jeff Hoffmeister, a Managing Director of Morgan Stanley in New York, discussing “Private Equity M&A in the Trump Administration.” We then had our “Nuts and Bolts Segment,” which consisted of a panel put together by our Subcommittee’s Vice Chair, Mireille Fontaine (BCF, Montréal, Québec), discussing “Cross-Border and Other Hot Topics in Private Equity M&A.” The panel was chaired by Jake Bullen (Cassels Brock, Toronto, Ontario). Jake was joined on the panel by Kimberly Smith (Katten, Chicago, Illinois) Bryan Bylica (McGuireWoods, Chicago, Illinois), Phillip D. Bronsteatter (Pfingsten Partners, Chicago, Illinois), Jeffrey Kolke (Monroe Capital, Chicago, Illinois) and Michael Norton (Houlihan Capital, Chicago, Illinois). Finally, I was joined by Brad Davey (Potter Anderson, Wilmington, Delaware), for our Recent Developments segment focusing on The Frederick Hsu Living Trust v ODN Holding Corporation, et. al., an April decision by Delaware Vice Chancellor Laster.

The Private Equity M&A Subcommittee will meet again on Friday, January 26 in Laguna Beach, California, as part of the M&A Committee’s standalone meeting at 10:30 a.m. local time. I am both proud and pleased to let you know that, as our Expert Speaks segment, The Honorable Leo Strine, Chief Justice of the Delaware Supreme Court, has agreed to join us and address topics of interest to our membership. I will be joined by Lisa Stark (K&L Gates, Wilmington, Delaware) in asking the Chief Justice to comment on various topics of interest. If you have any particular issues you would like addressed, please feel free to email me in advance of the meeting and we will try to work them in. Next, as our “Nuts and Bolts Segment,” one of our Vice- chairs, Mireille Fontaine, will participate in a panel discussion of “The New Deal Points Private Company Study – what it means to Private Equity M&A Attorneys.” Mireille will be joined on the panel by Wilson Chu (McDermott Will & Emery, Dallas, Texas), one of the creators of the Deal Points surveys, Jessica Pearlman (K&L Gates, Seattle, Washington), and Dennis White (Verrill Dana, Boston, Massachusetts). Finally, if time permits, Lisa Stark and I will discuss the Delaware Chancery’s May, 2017 decision EMSI Acquisition, Inc. v. Contrarian Funds.

You may have noticed that I referred to Mireille Fontaine in the prior paragraph as “one of our Vice-chairs.” (Most of you are deal lawyers – presumably you read every word of anything you read carefully!). Now that we are a subcommittee of not just the M&A Committee but also the Private Equity and Venture Capital Committee, Samantha Horn (Stikeman Elliot, Toronto, Ontario), a former Chair of the Private Equity and Venture Capital Committee, has agreed to serve as an additional Vice- chair of this Subcommittee. We are thrilled to have her.

I continually seek YOUR feedback as to the meetings and the Subcommittee, either by talking to me in Laguna Beach or reaching out to me afterward. We are always looking for ideas for future programs, presentations and projects, as well as volunteers for all of them. And, as I’ve said before, if you don’t know me and you are at the Laguna Beach meetings, please feel free to come by and introduce yourself.

I look forward to seeing many of you in Laguna Beach. If you are unable to be there, please feel free to dial in and listen using the instructions set forth elsewhere in Deal Points.
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
MONTAGE LAGUNA BEACH  |  LAGUNA BEACH, CA, USA  |  JANUARY 26-27, 2018

Please note that times listed are PACIFIC 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.

<table>
<thead>
<tr>
<th>Meeting Room</th>
<th>Toll-Free US Number</th>
<th>International Number</th>
<th>Conference Code</th>
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<tr>
<td>Grand Ballroom</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>5842737852</td>
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<tr>
<td>Gallery I &amp; II</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>7184872096</td>
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Thursday, January 25, 2018

3:00 pm – 5:00 pm  
Meeting Registration  
Grand Ballroom Foyer

Friday, January 26, 2018

8:00 am – 5:00 pm  
Meeting Registration  
Grand Ballroom Foyer

8:00 am – 10:00 am  
Continental Breakfast
***Included in registration fee for registered meeting attendees. Guest passes are available for purchase.  
Outdoor Courtyard

9:00 am – 10:30 am  
M&A Jurisprudence Subcommittee  
Chair: Michael O’Bryan  
Grand Ballroom

10:30 am – 12:00 pm  
Joint Private Equity M&A Subcommittee  
Chair: David I. Albin  
Grand Ballroom

12:00 pm – 1:00 pm  
Buffet Luncheon  
***Included in registration fee for registered meeting attendees. Guest passes are available for purchase.  
Studio

1:00 pm – 2:00 pm  
Legal Project Management Task Force  
Co-chairs: Byron S. Kalogerou and Dennis J. White  
Gallery I & II

1:00 pm – 2:30 pm  
Acquisitions of Public Companies Subcommittee  
Chair: Jennifer F. Fitchen  
Grand Ballroom

2:30 pm – 3:30 pm  
Women in M&A Task Force  
Chair: Jennifer Muller  
Gallery I & II

3:30 pm – 4:30 pm  
Private Company Model Merger Agreement Task Force  
Co-Chairs: Melissa A. DiVincenzo and Amy Simmerman  
Grand Ballroom
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<tr>
<th>Time</th>
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<tr>
<td>3:30 pm – 4:30 pm</td>
<td><strong>Two-Step Auction Task Force</strong>&lt;br&gt;Co-chairs: Michael G. O’Bryan and Eric Klinger-Wilensky</td>
<td>Gallery I &amp; II</td>
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<tr>
<td>4:30 pm – 5:30 pm</td>
<td><strong>Meeting of Committee Chair and Vice Chairs, Subcommittee and Task Force Chairs</strong>&lt;br&gt;Chair: Scott T. Whittaker</td>
<td>Grand Ballroom</td>
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<td>7:00 pm – 10:00 pm</td>
<td><strong>Reception &amp; Dinner</strong>&lt;br&gt;“Sponsored by: Doxly and Kira Systems&lt;br&gt;***Ticket Required. Buses depart from Main Lobby at 6:45 pm”</td>
<td>Dana Point Chart House&lt;br&gt;34442 Street of the Green Lantern, Dana Point, California</td>
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**Saturday, January 27, 2018**

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<th>Time</th>
<th>Event</th>
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<td>8:00 am – 5:00 pm</td>
<td><strong>Meeting Registration</strong></td>
<td>Grand Ballroom Foyer</td>
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<tr>
<td>8:00 am – 10:00 am</td>
<td><strong>Continental Breakfast</strong>&lt;br&gt;“**Included in registration fee for registered meeting attendees. Guest passes are available for purchase.”</td>
<td>Outdoor Courtyard</td>
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<tr>
<td>9:00 am – 10:30 am</td>
<td><strong>Market Trends Subcommittee</strong>&lt;br&gt;Chair: Claudia K. Simon</td>
<td>Grand Ballroom</td>
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<tr>
<td>10:30 am – 12:00 pm</td>
<td><strong>International M&amp;A Subcommittee</strong>&lt;br&gt;Chair: Franziska J. Ruf</td>
<td>Grand Ballroom</td>
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<td>12:00 pm – 1:00 pm</td>
<td><strong>Buffet Luncheon</strong>&lt;br&gt;“**Included in registration fee for registered meeting attendees. Guest passes are available for purchase.”</td>
<td>Studio</td>
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<td>1:00 pm – 2:00 pm</td>
<td><strong>M&amp;A Litigation Task Force</strong>&lt;br&gt;Co-chairs: Yvette Austin-Smith and Lewis H. Lazarus</td>
<td>Grand Ballroom</td>
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<td>1:00 pm – 2:30 pm</td>
<td><strong>Technology in M&amp;A Subcommittee</strong>&lt;br&gt;Chair: Daniel P. Rosenberg</td>
<td>Gallery I &amp; II</td>
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<td>2:00 pm - 3:00 pm</td>
<td><strong>Financial Advisor Task Force</strong>&lt;br&gt;Chair: Thomas B. Davey</td>
<td>Grand Ballroom</td>
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<tr>
<td>3:00 pm - 5:00 pm</td>
<td><strong>Mergers and Acquisitions Full Committee Meeting</strong>&lt;br&gt;Chair: Scott T. Whittaker</td>
<td>Grand Ballroom</td>
</tr>
<tr>
<td>7:00 pm – 10:00 pm</td>
<td><strong>Reception &amp; Dinner</strong>&lt;br&gt;“Sponsored by: Bloomberg Law, Duff &amp; Phelps and SRS</td>
<td>Acquiom&lt;br&gt;**Ticket Required.”</td>
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The Delaware courts' much greater willingness to give significant weight to the deal price and their expansion of the transaction contexts in which such deference will be afforded likely will hasten the decline of appraisal arbitrage or at least require that hedge funds engaging in the practice select their litigation investments more cautiously. The primacy of deal price also increases the importance for respondent corporations to establish a record to support a deduction for merger-related synergies (assuming combinatorial synergies exist).

Additional takeaways from Dell (and DFC Global) include, among others, the following:

- **No Private Equity Carve-out.** Building on its decision in DFC Global, which emphatically rejected any hint of a “private equity carve-out” or notion that PE buyouts inherently result in a deal price below fair value because financial sponsors use leveraged buyout pricing models designed to achieve a specific internal rate of return, the Supreme Court in Dell held that the lack of competition from a strategic bidder was not a credible basis for the trial court to disregard the deal price, stating that “if a company is one that no strategic buyer is interested in buying, it does not suggest a higher value, but a lower one,” and that “[c]ompetition limited to private equity bidders does not foreclose the sale price reflecting fair value.” Of course, depending on the facts, a court may not give exclusive weight to a deal price in a PE buyout if, for example, the sale process favored financial sponsors or excluded strategic buyers for improper reasons.

- **Deal Price in MBOs Can Be Fair Value.** The Supreme Court in Dell similarly dispelled any suggestion that MBOs cannot result in a deal price reflective of fair value. In particular, the Court rejected multiple economic theories (i.e., possible structural barriers in an MBO go-shop process, purported information asymmetries between management and third parties, and management’s perceived value to the company) that arguably create an uneven playing field between management and potential third-party bidders that is endemic to MBOs and undermines the probative value of an MBO deal price as a general matter, concluding that, even assuming the theories had validity, the trial record did not support the application of any of these theoretical characteristics of MBOs.

- **Implications for Appraisals of Controller Buyouts.** The Supreme Court’s decision in Dell regarding MBOs potentially can be extrapolated to controlling stockholder buyouts, which arguably involve similar dynamics. Dell indicates that, when there is a robust process, any putative structural pricing inadequacies arguably associated with MBOs can be mitigated to allow deal price to be utilized as the best evidence of fair value. Consistent with recent Delaware cases, specifically Kahn v. M & F Worldwide Corp., which provides for business judgment rule deference and early dismissal in the fiduciary context, if procedural protections are established to eliminate any arguable controller advantage—namely, an independent special committee and approval by a majority of minority stockholders—then it is reasonable to posit that the deal price could be afforded significant (or dispositive) weight in an appraisal because the premise of a fair value determination is that it reflects what would be paid in an arm’s-length deal.

- **Market Data as Indicia of Fair Value.** The Supreme Court held that the Court of Chancery lacked a valid basis to find a “valuation gap” between Dell’s market price and its fundamental value. In so doing, the Supreme Court reaffirmed the efficient market hypothesis, which “teaches that the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client.” Accordingly, absent evidence demonstrating inefficiencies in the market for the stock being appraised, the trading price and deal price likely will be afforded “substantial probative value” in the court’s fair value determination.

- **Increased Skepticism of DCF Valuations.** In Dell, having grown extremely frustrated with the “recurring problem” of appraisal petitioners proffering “highly paid, well-credentialed experts to produce DCF valuations” that dwarf the deal price, ignore the operative reality of the company, and reflect a price no buyer would pay, the Supreme Court indicated that law-trained judges “should be chary” about utilizing “less-than-surefire DCF analyses” because a DCF value inherently is less reliable evidence of fair value than a price an arm’s-length buyer is willing to pay in an open market and can fluctuate wildly based on small changes in its numerous underlying inputs and assumptions (in the case of Dell, for instance, there were “enormous valuation chasms caused by the over 1,100 variable inputs in the competing DCFs”).
Increased Reliance on Comparables-Based Valuation Methods. Conversely, in DFC Global, the Court rejected the petitioners’ cross-appeal challenging the trial court’s decision to give weight to a comparable companies analysis, suggesting (consistent with its reliance in both DFC Global and Dell on market-based indicia of value) that comparables-based valuation methods may regain traction. Though the Delaware courts sometimes have declined to rely on comparable companies and precedent transactions valuation analyses because of a perceived lack of sufficiently comparable peers, finance professionals rely every day on these approaches when making investment decisions with real money, and any potential error resulting from reliance on imperfect comparables may now be viewed by Delaware courts as less of a concern than the inherent flaws in “garbage in, garbage out” DCF analyses.

By confirming the primacy of deal price and other market evidence in appraisal proceedings challenging acquisitions of public companies that resulted from robust processes, the Delaware Supreme Court has provided a powerful incentive to transaction planners to engage in best practices when selling companies. In so doing, the Court establishes the appropriate rule for Delaware law to produce the most value for all long-term target company stockholders rather than reward a limited number of short-term opportunists who rent-seek

37 DFC Global, 172 A.3d at 386-88.
