

## Negotiated Deal Price is Best Evidence of Fair Value — Delaware Dispels the Dell Appraisal Overhang

### PENpoints

*Private equity buyers may take comfort in the Delaware Supreme Court's strong rejection of the position that the participation of private equity and/or management makes deal price inherently suspect as a measure of fair value for appraisal purposes.*

Last week the Delaware Supreme Court issued its long-awaited decision on the appeal of the appraisal case filed in connection with the 2013 Dell take-private led by Michael Dell and Silver Lake (click [here](#) for the opinion). Private equity sponsors have been watching this case with interest, as the trial court had determined that the “fair value” of Dell shares was 28% higher than the final negotiated deal price (which itself was a 35+% premium to market price), despite the fact that Dell had followed a good pre- and post-signing process. In an opinion likely to provide comfort to buyers, the Supreme Court reversed the appraisal award and sent the case back to the trial court, with unambiguous instructions to give “heavy, if not dispositive, weight” to the deal price when determining fair value of the Dell shares.

### Background

Under Delaware corporate law, a stockholder who does not vote in favor of a merger has the right to dissent, foregoing payment of the merger consideration at closing and petitioning a Delaware court to determine the “fair value” of its stock. Once the court determines fair value — which can be less than, equal to or greater than the deal price — the surviving company must pay the petitioner that amount for its shares, including interest from closing at 500 basis points over the federal funds rate. Recent years have seen a significant increase in appraisal claims arising out of Delaware mergers, as hedge funds and other investors seek to exploit the option value of the appraisal process with the added benefit of a fairly attractive interest rate regardless of the outcome of the claim.

The possibility of appraisal claims from significant stockholders can complicate a private equity sponsored LBO. While a buyer will not need to pay for dissenting shares at closing, it will eventually — at a price that

cannot be predicted. This uncertainty as to the equity purchase price must be addressed in lending arrangements to allow the surviving company to satisfy its appraisal liabilities in a manner that doesn't violate financing covenants.

### The Dell Case

In reaching its decision, the trial court bucked a developing trend and gave *no weight* at all to the market price or the deal price. The judge believed that the deal price is not good evidence of fair value because:

- (1) the buyer group included a private equity sponsor, who (according to the judge) typically seeks to earn a roughly 20% internal rate of return and therefore, as compared to a strategic buyer, won't pay full price for the target's stock, and
- (2) management participated in the buyer group, which (according to the judge) vitiates pre- and post-signing efforts to shop a deal.

The judge also found that “investor myopia” meant that the pre-deal market price did not properly reflect Dell's “intrinsic value.” The trial judge instead undertook his own discounted cash flow analysis to determine fair value, resulting in an additional 28% premium to the deal price, notwithstanding that at trial experts engaged by the parties argued for DCF valuations ranging from less than to more than two times the deal price.

### INSIDE KIRKLANDPEN

<i>PEN</i> briefs . . . . .	2
<i>Upcoming Events</i> . . . . .	2

The Supreme Court decisively rejected the trial court's reasoning, in particular its theory that deal price is inherently suspect in mergers involving a private equity sponsor-buyer and/or management participation. While it declined to create a presumption in favor of the deal price, the Supreme Court's opinion was unequivocal in its view that in *Dell* the deal price was the best indicator of value.

### Takeaway

Private equity buyers may take comfort in the Supreme Court's strong rejection of the position that the participation of private equity and/or management makes deal price inherently suspect as a measure of fair value for appraisal purposes — at least in cases where (as here) the target follows a solid pre- and post-signing market check process.

If you have any questions about the matters addressed in this *KirklandPEN*, please contact the following Kirkland authors or your regular Kirkland contact.

**Norbert B. Knapke II**

<http://www.kirkland.com/nknapke>

+1 312-862-3350

**Daniel E. Wolf, P.C.**

<http://www.kirkland.com/dwolf>

+1 212-446-4884

## PENbriefs

# SEC Chairman Statement on Cryptocurrencies and Initial Coin Offerings

The U.S. Securities and Exchange Commission Chairman recently reiterated the SEC's views that so-called initial coin offerings (ICO) and certain virtual currency activities could be subject to U.S. securities laws. Investment advisers should examine their investment strategies and current disclosures to determine if an investment in a cryptocurrency or ICO is permissible and in the best interest of their clients. To learn more, see our recent [Alert](#).

# Washington's New Asia Map: Five International Risk Themes to Watch

Recent developments in U.S. foreign, trade and economic policies with respect to Asia present boardrooms, general counsel and compliance officers with unique challenges in the new- and medium-term. In our recent *Kirkland Alert*, we discuss five Asia-related international risk themes with the potential to materially impact risk management, corporate development strategy, business operations and legal compliance. To learn more, see our recent [Alert](#).

## PENnotes

### PLI Drafting and Negotiating Corporate Agreements 2018

New York, NY, January 18, 2018

Chicago, IL, January 31, 2018

This PLI seminar will teach the basics of drafting and negotiating corporate agreements — from how the provisions of an agreement fit together, to the fundamental drafting and negotiating principles common to all corporate agreements. Kirkland partners Jonathan Davis and Keith Crow will be panelists at the New York and Chicago events, respectively. Click [here](#) for more information or to register.

### 45th Annual Securities Regulation Institute

Coronado, CA, January 22-24, 2018

Hosted by Northwestern Law, the 43rd Annual Securities Regulation Institute will take place in Coronado, California. One of the most visible and highly regarded securities and corporate law conferences in the country, the Securities Regulation Institute reaches prominent attorneys from both firm and in-house practices. Kirkland partner Scott Falk is on the planning committee and will be a panel member for the Mergers & Acquisitions session. Click [here](#) for more information or to register.

**24th Annual Harvard Business School Venture Capital Private Equity Conference  
Boston, MA, January 27, 2018**

Kirkland is a sponsor of the 24th Annual Harvard Business School Venture Capital and Private Equity Conference, which will address a range of today's most relevant topics. Keynote speakers at this year's event are Kewsong Lee, deputy CIO of private equity and head of global market strategies at The Carlyle Group; Sean Klimczak, global head of infrastructure at Blackstone; and Paul Maeder, co-founder and managing general partner at Highland Capital Partners. Click [here](#) for more details or to register.

**17th Annual Beecken Petty O'Keefe & Company Private Equity Conference  
Chicago, IL, February 23, 2018**

Kirkland is a sponsor of this annual event, which brings together financiers, students and entrepreneurs to network and share insights into the dynamics of investing in a constantly changing economy. This year's conference is themed "Remaining Nimble and Achieving Returns While Facing Uncertainty and Volatility." Click [here](#) for more information.

**25th Annual Columbia Business School Private Equity Conference  
New York, NY, February 23, 2018**

Kirkland will partner with Columbia Business School to sponsor its annual Columbia Business School Private Equity Conference. The event will focus on the emerging challenges and opportunities facing the private equity and venture capital industries in the coming year. The conference will bring together industry professionals, students, alumni and faculty to share their knowledge and experiences. Click [here](#) for more information or to register.

**13th Annual Stern Private Equity Conference  
New York, NY, March 2, 2018**

Kirkland will sponsor New York University's Stern School of Business' 13th Annual Stern Private Equity Conference. The conference will provide a forum for industry leaders to discuss the opportunities and risks of today's private equity and venture capital environment, including how tepid global growth, regulatory dynamics, political pressure and financial market conditions are posing challenges to fundraising, deal financing and operations. Click [here](#) for more information or to register.

**Wharton Private Equity & Venture Capital Conference  
New York, NY, March 16, 2018**

The Wharton School's Private Equity and Venture Capital Conference will showcase several keynote speeches and panel discussions on the state of the private equity and venture capital industries. Kirkland partner Robert Blaustein will moderate the Funds panel and partner Stephen Hessler will moderate the Distressed Opportunities panel. Click [here](#) for more information or to register.

**2018 Kellogg Private Equity and Venture Capital Conference  
Chicago, IL, April 25, 2018**

Kirkland is a sponsor of this annual student-led conference, which brings industry professionals, alumni, students and Kellogg faculty together for a day of discussion on the current state of the industry and its most pressing issues. More information to follow.

# Private Equity Practice at Kirkland & Ellis

Beijing  
 Boston  
 Chicago  
 Hong Kong  
 Houston  
 London  
 Los Angeles  
 Munich  
 New York  
 Palo Alto  
 San Francisco  
 Shanghai  
 Washington, D.C.

Kirkland & Ellis' nearly 500 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and fund formations on behalf of more than 400 private equity firms and hedge funds around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in each of the last six years by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. U.S. News Media Group and Best Lawyers have ranked Kirkland as a Tier 1 law firm for Leveraged Buyouts and Private Equity Law for seven consecutive years and as a top-tier firm for Private Funds/Hedge Funds Law since 2012. The Firm was recognized as the #1 law firm for private equity in the 2017 Vault 100 rankings, and, in 2016, Private Equity International named the Firm "Law Firm of the Year in North America: Fund Formation" for the third year in a row.

In 2012-2016, Chambers and Partners ranked Kirkland as a Tier 1 law firm for Investment Funds in the United States, United Kingdom, Asia-Pacific and globally. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011-2016*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

*The Lawyer* magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

## KIRKLANDPEN

## KIRKLAND & ELLIS

### EDITORS

Jack S. Levin, P.C.  
 Margaret A. Gibson, P.C.  
 Norbert B. Knapke II

### SUBSCRIPTIONS

To subscribe to *KirklandPEN*, please email  
[kirklandpen@kirkland.com](mailto:kirklandpen@kirkland.com)  
 +1 (312) 862-3356

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.