



CORNERSTONE RESEARCH

Economic and Financial Consulting and Expert Testimony

Appraisal Litigation in Delaware: Trends in Petitions and Opinions

2006–2022

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Executive Summary

Appraisal petitions filed by shareholders in the Delaware Court of Chancery peaked at 76 in 2016. In 2022, 20 appraisal petitions were filed, a reversion back to the annual levels observed prior to the 2013–2017 filings boom.

For the 43 appraisal cases that went to trial between 2006 and 2022,¹ the data show substantial variation in the awards granted by the Delaware Courts.² However, after the *Dell* decision in 2016, opinions have placed particular scrutiny on the quality of the sales process via “objective indicia,”³ and, if sufficient, the Delaware Courts have generally deferred to market evidence, including the deal or market price, thereby creating a clear break in trends of premiums awarded from 2017 onward.

Number of Appraisal Petitions

- Between 2006 and 2022, a total of 495 appraisal petitions were filed, comprising 375 unique cases. (page 5)
- In 2022, shareholders filed 20 appraisal petitions in the Chancery Court—a 186% increase from the decade low of seven filings in 2021. This represents a reversion back to the annual average of 21 petition filings between 2006 and 2012. (page 5)
- Since 2017, appraisal arbitration funds have become less active. One-time appraisal petitioners increased from 19.8% of total unique appraisal petitions from 2013 to 2017, to 46.4% from 2018 to 2022. (page 6)

Valuation Methodologies

- Over the 17-year sample period, the Delaware Courts have relied heavily on discounted cash flow (DCF) analyses in lieu of comparable company or precedent transactions analyses, despite large differences in the specific DCF implementation employed by petitioner and respondent experts. (pages 12–13)
- After *Dell* in 2016, however, the Delaware Courts have generally deferred to market evidence in the form of the unaffected market price or the deal price, minus synergies with adjustments for any value change between deal signing and closing. (pages 12–13)

Sales Process

- The robustness of the sales process has become a defining factor in explaining the premiums to deal price awarded, with the Delaware Courts frequently citing “objective indicia” to determine whether a sales process produced a deal price reliable enough to be used in calculating fair value. (page 14)
- The data show that a robust sales process, in which an auction or “go-shop” process is used and the acquiring party is not related to the target, results in lower premiums to deal price awarded on average. (page 14)

Premium to Deal Price Awarded

- While the premiums awarded have varied substantially, the average premium across all 43 opinions was 13% above the deal price. For the 20 cases in which a positive premium was awarded, the average premium was 39%. (pages 9–10)
- However, there has been a clear change in trends after *Dell* in 2016. Between 2006 and 2016, court-awarded premiums averaged 27.2% *above* the deal price, while from 2017 onward, court-awarded premiums have averaged 8.4% *below* the deal price. (pages 9–10)

Trial Opinions and Case Timing

- Of the 43 cases decided by the Delaware Courts between 2006 and 2022, the average case took over two years from the filing of the petition to the beginning of trial. The average time from trial to the issuance of the initial opinion was approximately eight months. (page 8)

Author Commentary

Between 2006 and 2022, the premiums to deal price awarded in appraisal actions decided by the Delaware Courts have varied substantially—from negative 57% for *Sprint/Clearwire* to positive 158% for *ISN Software*.⁴

Since 2017, the Courts have placed emphasis on market evidence, leading to lower average awarded premiums.⁵ Recent opinions have examined “objective indicia” for what constitutes a robust sales process and, provided those indicia were met, deferred to the deal price, with adjustments for synergies not owed to petitioners and for any changes in value between deal signing and closing.

Valuation Methodologies Proposed by Experts

Experts primarily present three main methodologies to determine fair value—DCF analyses, valuation based on comparables (including comparable companies and precedent transactions), and, particularly for respondent experts post-2016, a deference to the deal price. The data show that from 2006 to 2022, the Delaware Courts eschewed valuation approaches based on comparables, and either deferred to the deal price (with certain adjustments), relied on the unaffected market price, or relied on DCF analyses to determine fair value.

While DCF is one of the most used valuation methods, the Delaware Courts are aware of its potential pitfalls, such as:

- The use of many inputs and the fact that even slight differences in these inputs can produce large valuation gaps.⁶
- The reliability of management projections, such as the neutrality of projections made in expectation of impending litigation or a management buyout.
- Concerns about the selection of the discount rate, including which risk factors are included and the appropriate determination of an equity risk premium.⁷
- The reliability of the company’s expected long-term growth rate and its impact on the terminal value of the firm.

Recent Rulings

The Delaware Supreme Court’s 2020 rulings in *Jarden* and *Stillwater* clarified several points left open for interpretation after its prior rulings in *Dell*, *DFC Global*, and *Aruba*. The Supreme Court’s current view of fair value appears to be based on the presumption that sophisticated market participants with real stakes in a transaction would arrive at a fair value.

In an appraisal context, the fair value to petitioners under Delaware law does not include any synergies attributable to the deal that flowed to the sellers, but would include any valuation changes that arise between the deal signing and closing. In cases where the deal process failed to meet “objective indicia” for what constitutes a sufficiently robust sales process, the unaffected market price of a stock trading in an efficient market is sometimes considered as an estimate of fair value.

For the last six years, court-awarded premiums for public targets have averaged -7.9%, a stark change from the 17.3% average award between 2006 and 2016.

In rulings since *DFC Global*, *Dell*, and *AOL*, the Delaware Courts have more frequently cited “objective indicia” used to determine whether the deal price in a merger is a reliable indicator of fair value.⁸ A list of some of these “objective indicia” is presented in Appendix A. Importantly, the deal price has been used as the best indicator of fair value even when the sale process was deemed partially flawed. While the majority of recent opinions have relied on deal price as the most reliable indicator of fair value, those which have rejected deal price, such as *Jarden* and *Synapse*, have generally not met one or more of the Delaware Courts’ “objective indicia.”

Given a reliable deal process, the Delaware Courts' current view of fair value can be summarized as:



Deal Prices Have Gained Precedence in Recent Years as a Measure of Fair Value

Recent decisions have signaled that deal price continues to receive substantial weight in determining fair value in appraisal cases even if the deal process contained some flaws.

- In August 2019 in *Stillwater*, the Chancery Court concluded that the deal price was “the most persuasive indicator of fair value” and that “[r]elying on any of the other valuation metrics would introduce error.”⁹
- Likewise, in *Columbia*, also in August 2019, the Chancery Court noted the petitioner expert’s “opinion that the value of Columbia materially exceeded the deal price [i.e., conflicted] with the market behavior of other potential strategic acquirers who had shown interest in Columbia, and who did not step forward.”¹⁰
- In January 2020 in *Panera*, the Chancery Court found “that the process by which the company was sold bore several objective indicia of reliability, which were not undermined by flaws in that process.”¹¹
- In *Regal*, in May 2021, the Chancery Court looked “to the deal price as the most reliable evidence of Regal’s value at the time of signing.”¹²
- In February 2022 in *HFF*, the Chancery Court commented that “[HFF] proved by a preponderance of the evidence that the sale process was sufficiently effective” and as a result, “[t]he deal price . . . operates as [a] ceiling on the fair value of [HFF] at the time of signing.”¹³

However, in two recent cases the Chancery Court also found that flaws in the deal process were severe enough to question the reliability of the deal price.

- In *Jarden* in July 2019, the Chancery Court found that “flaws in the sale process, coupled with the fact that there was no effort to test the Merger Price through any post-signing market check, raise[d] legitimate questions regarding the usefulness of the Merger Price as an indicator of fair value.”¹⁴

- Likewise, in *Synapse* in July 2020, the Chancery Court concluded that the merger “was either the product of Synapse’s officers’ misleading inflation of the company’s value, or the product of [the acquirer’s] failure to perform adequate due diligence regarding Synapse’s revenue recognition model.”¹⁵ As a result, the Chancery Court ascribed 100% weight to the DCF value proffered by Synapse’s expert.¹⁶

When the Deal Price Is Unreliable, Unaffected Trading Price Gains Traction

In February 2018 in *Aruba*, the Chancery Court found that the most reliable indicator of fair value was the 30-day average unaffected trading price of Aruba’s stock on the Nasdaq exchange.¹⁷ However, in April 2019, the Delaware Supreme Court reversed the Chancery Court’s decision and found that the fair value should have been the deal price minus synergies, thus failing to endorse the Chancery Court’s novel use of the 30-day average unaffected trading price.¹⁸

However, the Chancery Court once again accepted the unaffected trading price as indicative of fair value in 2020. In *Jarden*, the Chancery Court found that unaffected market price was the best indicator of Jarden’s value at the time of the merger.¹⁹

Adopting Deal Prices as Measures of Fair Value Necessitates Adjustments for Synergies and Value Differences between Signing and Closing

Removal of Synergies

The deal price paid by an acquirer will typically include some amount of synergies the acquirer expects to realize. The percentage of synergies captured by the acquirer and seller in the negotiation, and ultimately reflected in the transaction price, differs for each transaction.

As the fair value owed to petitioners in an appraisal action is the value of the shares absent a transaction, such synergies arising from the transaction must be removed from the fair value when relying on the deal price metric. Delaware Courts have sought to apportion the value of synergies based on an analysis of the evidence.

In several recent decisions the Chancery Court has adjusted the transaction price to remove synergies from the deal price.

- In *Panera* the “[r]espondent [proved] deduction of cost and tax synergies of \$11.56 per share by a preponderance of the evidence.”²⁰
- In *Regal* the Chancery Court’s “decision . . . subtract[ed] \$3.77 per share, representing the portion of Cineworld’s anticipated synergies that the deal price allocated to Regal’s stockholders.”²¹
- Finally, in *HFF* the Chancery Court “deducted its best estimate of shared net synergies to generate an estimate of the fair value of the Company at signing.”²²

Value Differences between Signing and Closing

Value in an appraisal proceeding is determined at the time of closing, yet deal terms are often determined at the time of signing, months before closing. Recent opinions have suggested that Delaware Courts are amenable to adjustments to deal price for events occurring between signing and closing if sufficient expert testimony on an adjustment is provided.

In *Columbia*, petitioners argued that Columbia’s value increased in the three months between signing and closing, but the Chancery Court stated that petitioners “did not suggest a means of adjusting the deal price to reflect the increases in value that resulted from the factors they cite.” However, the Chancery Court also stated that “[p]erhaps an expert could have constructed a metric” to do so.²³

Similarly, in *Stillwater*, while the Chancery Court noted that “[b]etween signing and closing, the prices of palladium and platinum increased materially, with a direct effect on Stillwater’s value,” it rejected an adjustment to deal price as petitioners had not analyzed its impact on Stillwater’s value.²⁴

However, in *Regal*, the Chancery Court did accept an adjustment to deal price based upon post-signing/pre-closing changes in U.S. corporate tax rates that increased the value of the corporation. To account for changes in tax law, the Court added \$4.37 to its fair value estimate of \$19.23 for Regal, yielding a value of \$23.60, slightly above the deal price of \$23.00.²⁵

Similarly, in *HFF*, the Chancery Court also accepted an adjustment to deal price based on post-signing/pre-closing developments, noting that, “[o]n April 24, 2019, after signing and before closing,” HFF “reported results for the first quarter of 2019 that dramatically exceeded analyst expectations.”²⁶ As a result of this outperformance, the Chancery Court accepted an analysis that adjusted HFF’s deal-price-less-synergies valuation, noting that HFF’s outperformance was both “significant and durable.”²⁷

Chancery Court Petitions

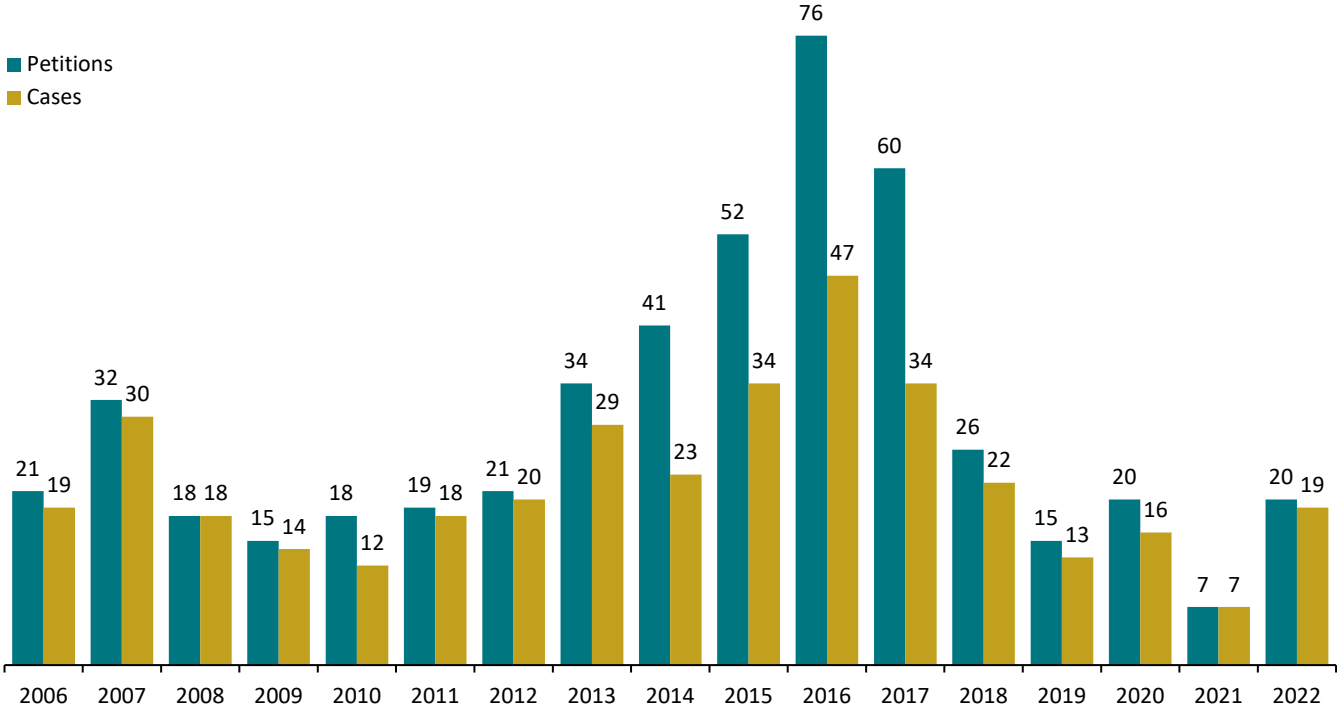
In 2022, appraisal petitions filed in Delaware Courts increased to 20, up from seven in 2021.

Number of Appraisal Petitions and Merger Cases

- From 2006 to 2022, a total of 495 appraisal petitions were filed in Delaware Courts. These petitions correspond to 375 unique merger cases, as the Delaware Courts frequently consolidate multiple filings against the same respondent.
- The number of unique merger cases for which shareholders filed appraisal actions increased from a low of 12 in 2010, to a peak of 47 in 2016, before reaching a new low of seven in 2021.

The 20 appraisal petitions filed in 2022 represent a reversion back to the average of 21 petition filings per year between 2006 and 2012.

Figure 1: Appraisal Petitions and Merger Cases Filed in the Delaware Court of Chancery 2006–2022



Source: Cornerstone Research; *Courthouse News Service*
 Note: Delaware appraisal petitions are identified as those filed in the Chancery Court. Appraisal cases are identified as petitions with a unique respondent name.

Most Frequently Observed Petitioners and Most Frequently Used Counsel

- The 10 most frequently observed petitioners accounted for 161 of the 495 appraisal petitions filed between 2006 and 2022.
- The concentration in petitioners was largely driven by hedge funds and private equity firms that actively pursue a strategy of appraisal arbitrage.²⁸ This strategy involves purchasing shares after the record date and filing appraisal petitions with the goal of receiving an award greater than the deal price as well as statutory interest.
- After the 2007 *Transkaryotic* decision (see page 15), which first permitted appraisal of shares purchased after the record date, appraisal arbitrage became a viable strategy for asset management firms.
- The data also indicate substantial concentration in the counsel used by repeat filers. In the 161 appraisal petitions filed by the 10 most frequently observed petitioners, those petitioners were represented by their most frequently used counsel approximately 80% of the time on average.
- However, since 2017, appraisal arbitrage funds have been less active. One-time appraisal petitioners, defined as petitioners that have filed a single appraisal petition in the entire 17-year dataset, increased from 19.8% of total unique appraisal petitions from 2013 to 2017, to 46.4% from 2018 to 2022.

Appraisal arbitrage funds have been less active since 2017.

Figure 2: Most Frequently Observed Petitioners and Most Frequently Used Counsel 2006–2022

Petitioner	Most Frequently Used Counsel	Percentage of Petitions with Most Frequently Used Counsel
AAMAF LP (Ancora Merger Arbitrage Fund LP)	Prickett, Jones & Elliott PA	97%
Blueblade Capital Opportunities LLC	Smith, Katzenstein & Jenkins LLP	100%
Blue Mountain Capital Management LLC	Grant & Eisenhofer PA	58%
Farallon Capital Management LLC	Grant & Eisenhofer PA	95%
Merion Capital LP	Ballard Spahr LLP	41%
Merlin Partners LLP	Prickett, Jones & Elliott PA	97%
Muirfield Value Partners LP	Grant & Eisenhofer PA	80%
Quadre Investments LP	Prickett, Jones & Elliott PA	80%
Verition Fund Management LLC	Grant & Eisenhofer PA	82%
Water Island Capital	Rosenthal, Monhait & Goddess PA	66%

Source: Cornerstone Research; *Courthouse News Service*

Note: Delaware appraisal rights petitions are identified as those filed in the Chancery Court. The most frequently observed petitioners are determined according to the total number of petitions filed by each petitioner between 2006 and 2022, and are displayed alphabetically.

Most Frequently Observed Petitioner and Respondent Counsel

- Between 2006 and 2022, the 10 most frequently observed petitioner counsel were involved in 340, or 69%, of the 495 appraisal petitions filed.
- The three most frequently observed petitioner counsel accounted for 42% of all filings.
- Similarly, the 10 most frequently observed respondent counsel were involved in 388, or 78%, of total petitions filed.
- The three most frequently observed respondent counsel represented over 57% of all respondents.

Counsel representing petitioners and respondents in appraisal actions are highly concentrated among a few firms.

Figure 3: Most Frequently Observed Petitioner and Respondent Counsel 2006–2022

Most Frequently Observed Petitioner Counsel	Most Frequently Observed Respondent Counsel
Abrams & Bayliss LLP	Abrams & Bayliss LLP
Anderson Sleater Sianni LLC	Greenberg Traurig LLP
Ballard Spahr LLP	Morris, Nichols, Arsht & Tunnell LLP
Friedlander & Gorris PA	Paul, Weiss, Rifkind, Wharton & Garrison LLP
Grant & Eisenhofer PA	Potter Anderson & Corroon LLP
Heyman Enerio Gattuso & Hirzel LLP	Richards Layton & Finger PA
Morris James LLP	Ross Aronstam & Moritz LLP
Prickett, Jones & Elliott PA	Skadden, Arps, Slate, Meagher & Flom LLP
Rosenthal, Monhait & Goddess PA	Wilson Sonsini Goodrich & Rosati
Smith, Katzenstein & Jenkins LLP	Young Conaway Stargatt & Taylor LLP

Source: Cornerstone Research; *Courthouse News Service*

Note: Delaware appraisal rights petitions are identified as those filed in the Chancery Court. The most frequently observed petitioner and respondent counsel are determined according to the total number of petitions that each petitioner and respondent counsel was involved in between 2006 and 2022, and are displayed alphabetically.

Delaware Courts' Trial Opinions

There were 43 appraisal cases that went to trial and were decided by the Delaware Courts between 2006 and 2022. These cases varied with respect to their life cycle and timing, the specific awards granted by the Courts, and the methodologies applied to determine fair value.

Life Cycle and Timing

- The data show considerable variation in the timing of Delaware appraisal cases that went to trial. These cases took on average about 25 months from the filing of the petition to trial, with the longest case taking just over seven and a half years to reach the trial stage, and the shortest case taking just over one year.
- In addition, the average trial lasted six calendar days, and the average time from trial to the issuance of the initial opinion was approximately eight months.
- Finally, for the eight cases in which the Delaware Supreme Court issued an opinion on appeal, there were, on average, just over 13 months between the date of the initial Chancery Court opinion and the Delaware Supreme Court opinion.

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On average, cases took approximately two years between the filing of the petition and the start of trial, with an additional eight months until the initial decision was released by the Chancery Court.

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Figure 4: Delaware Appraisal Opinions Case Timeline Summary 2006–2022

	Filing of Petition to Beginning of Trial	End of Trial to Initial Opinion	Initial Opinion to Supreme Court Opinion
Minimum (in months)	13	3	9
Median (in months)	20	7	13
Average (in months)	25	8	13
Maximum (in months)	93	17	19
Number of Cases	43	43	8

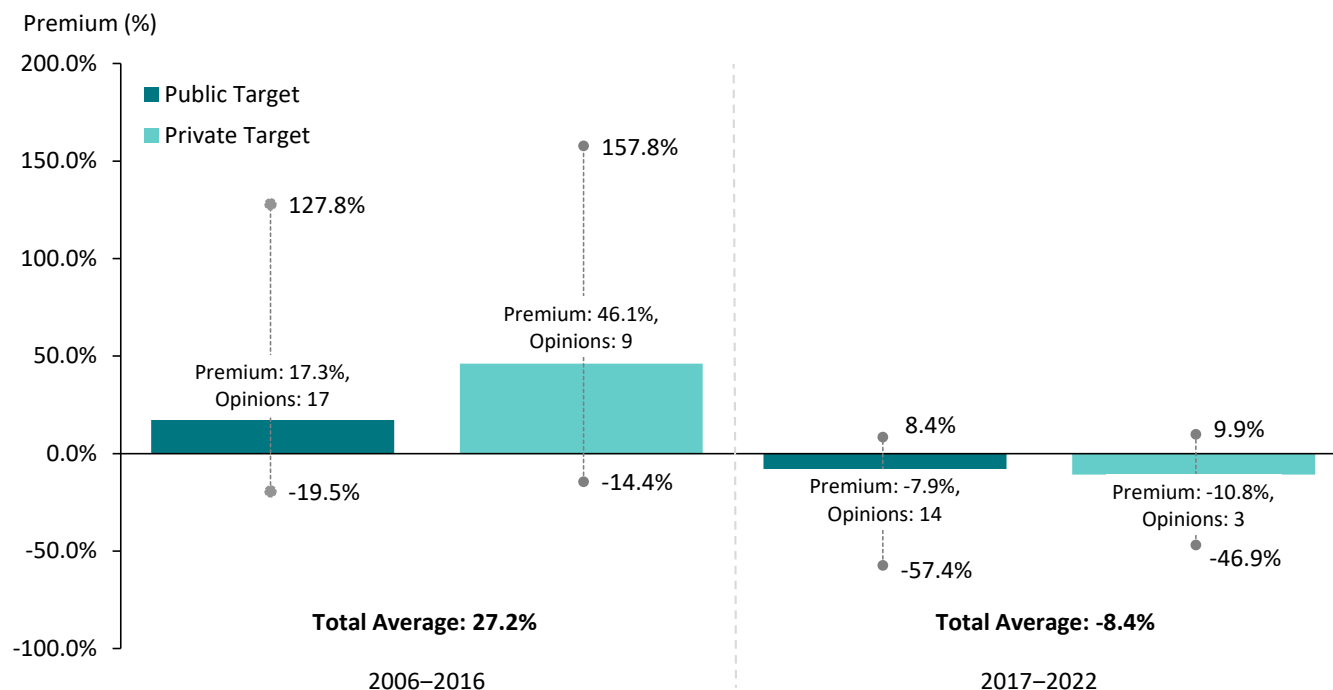
Source: Cornerstone Research; Delaware Chancery Court; Delaware Supreme Court; *Thomson Reuters Westlaw*
 Note: All timeline values shown are in months. The average trial duration is six calendar days.

Premium to Deal Price Awarded

- Of the 43 cases examined that went to trial between 2006 and 2022, 20 resulted in awards above the deal price and 23 resulted in awards at or below the deal price.
- On average, the premium to deal price across all 43 opinions was 13.1%, with 12 cases with awards below deal price, 11 cases in which the deal price was accepted as fair value, and 20 cases with awards above deal price. Among the 20 cases with awards above deal price, the average premium was 38.6%.
- There has been a clear change in trends after *Dell* in 2016. As shown in Figure 5, between 2006 and 2016, court-awarded premiums averaged 27.2%. However, from 2017 onward, court-awarded premiums have averaged -8.4%.
- The court-awarded premiums for public targets have averaged -7.9% since 2017, compared to 17.3% between 2006 and 2016. The court-awarded premiums for private targets have averaged -10.8% since 2017, compared to 46.1% between 2006 and 2016.
- Since 2017, 17 cases have seen awards, with nine cases having awards below deal price, three cases in which the deal price was accepted as fair value, and five cases with awards above deal price.
- Notable cases include the *Sprint/Clearwire* merger, in which a bidding war drove up the deal price, where the Chancery Court awarded the largest negative premium to deal price of -57%. At the opposite end, the award in *ISN Software* had a positive premium of 158%.

The average premiums awarded by Delaware Courts have been substantially lower since 2017, making appraisal arbitrage a riskier and less lucrative investment strategy.

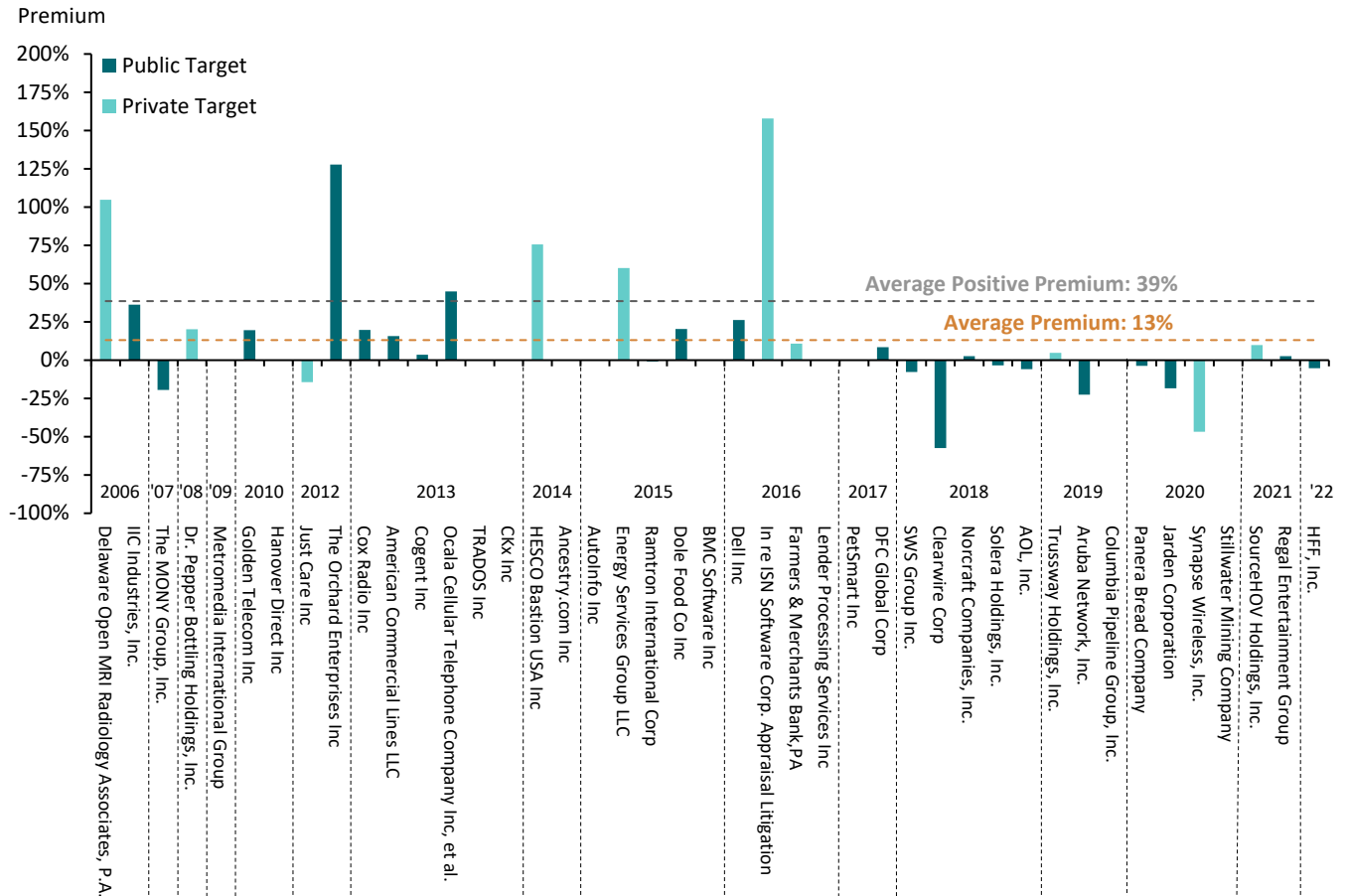
Figure 5: Average Premium to Deal Price Awarded 2006–2016 and 2017–2022



Source: Cornerstone Research; Delaware Chancery Court; Delaware Supreme Court

Note: Dotted lines connect the minimum and maximum premiums within each bucket. A premium award less than or equal to zero occurs when the case is decided in favor of the respondent. A premium award greater than zero occurs when the case is decided in favor of the petitioner.

Figure 6: Premium to Deal Price Awarded
2006–2022



Source: Cornerstone Research; Delaware Chancery Court; Delaware Supreme Court

Note: A premium award less than or equal to zero occurs when the case is decided in favor of the respondent. A premium award greater than zero occurs when the case is decided in favor of the petitioner. With the exception of *In re ISN Software Corp. Appraisal Litigation*, all cases are labeled by the target company involved in the at-issue merger/acquisition. Although the target in the *In re ISN Software Corp. Appraisal Litigation* was the wholly owned subsidiary of ISN Software Corp., 2013 Sub Inc., the appraisal action was initiated to determine the fair value of the shares of ISN Software Corp. at the time of the merger.

Premiums Implied by Experts and Awarded by Judges

- Among private target firms, the average premium to deal price implied by the fair value estimates of petitioner experts was 365%, with the petitioner’s expert in one case estimating a fair value 1,800% above deal price.
- Among publicly traded target firms, the average fair value estimates of petitioner experts implied a 65% premium above deal price.
- In contrast, respondent experts overwhelmingly estimated fair values below the deal price. Their average implied awards for public and private target firms were -16% and -22%, respectively.
- The awards determined by the Delaware Courts between 2006 and 2022 reflected the public or private status of the target, with public targets receiving on average only an 6% award to deal price, in comparison to the 32% for private firms, reflecting the lack of market evidence for private targets.

There was substantial variation between the premiums to deal price implied by petitioner and respondent experts and those determined by the Delaware Courts.

Figure 7: Expert-Implied and Court-Awarded Premium to Deal Price, Public vs. Private Firms 2006–2022

	Total	Public Target	Private Target
Number of Opinions	43	31	12
Petitioner Premium			
Minimum	15%	15%	22%
Median	55%	45%	96%
Average	147%	65%	365%
Maximum	1800%	222%	1800%
Respondent Premium			
Minimum	-100%	-62%	-100%
Median	-14%	-13%	-16%
Average	-18%	-16%	-22%
Maximum	21%	0%	21%
Court-Awarded Premium			
Minimum	-57%	-57%	-47%
Median	0%	0%	10%
Average	13%	6%	32%
Maximum	158%	128%	158%

Source: Cornerstone Research; Delaware Chancery Court; Delaware Supreme Court

Note:

1. Two cases involving public target companies did not have petitioner expert prices reported in their opinions. One case involving a private target company had a deal price of zero. These cases were excluded from the relevant calculations.
2. One case involving a public target company did not have a respondent expert price reported in its opinion. One case involving a private target company had a deal price of zero. These cases were excluded from the relevant calculations. One case involving a public target company had two respondent expert prices reported that were both considered in its opinion. Therefore, the average of the two was taken for the relevant calculations.

Valuation Methodologies Used by Experts and the Delaware Courts

- The three main methodologies used to determine fair value are DCFs, valuation based on comparables (including comparable companies and/or precedent transactions), and reliance on the deal price.
- As shown in Figure 8, petitioner experts overwhelmingly relied on DCF analyses, preparing a DCF model in 100% of the public transactions that reached an opinion. In 32% of the public transactions, petitioner experts considered a form of comparables analysis. As shown in Figure 9, petitioner experts applied the methodologies at similar rates in private transactions.
- Respondent experts also employed DCF analyses in the vast majority (77%) of public cases, considered comparable companies and/or precedent transactions in 39% of these cases, and relied in part or fully on the deal price in 45% of these cases.

Since 2017, respondent experts and the Delaware Courts have relied mainly on the deal price and market evidence, when available, to determine fair value.

- From 2006 to 2022, 42% of the public transaction opinions issued by the Delaware Courts used a DCF analysis, while 55% relied on the deal price in determining fair value. For private transactions over the same period, 83% of the opinions used a DCF analysis, while only 17% relied on the deal price in determining fair value. No opinions relied on comparable companies and/or precedent transactions for either public or private transactions.
- Since 2017, 11 cases involving publicly traded firms have seen awards, with the Delaware Courts relying on market evidence to determine fair value in seven of those cases. Of those seven cases, five have seen further adjustments for synergies and/or changes in the company's value between signing and closing.

Figure 8: Heat Map of Valuation Methodologies by Year of Opinion—Public Targets 2006–2022

	Average 2006–2022	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Methodology Adopted by Court																		
Discounted Cash Flow (DCF)	42%	100%	0%	N/A	0%	100%	N/A	100%	80%	0%	25%	50%	0%	80%	0%	0%	0%	0%
Comparable Companies and/or Precedent Transactions	0%	0%	0%	N/A	0%	0%	N/A	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Deal Price	55%	0%	100%	N/A	100%	0%	N/A	0%	20%	100%	75%	50%	100%	20%	100%	67%	100%	100%
Unaffected Market Price ⁴	3%	0%	0%	N/A	0%	0%	N/A	0%	0%	0%	0%	0%	0%	0%	0%	33%	0%	0%
Methodology Adopted by Petitioner Expert																		
Discounted Cash Flow (DCF)	100%	100%	100%	N/A	100%	100%	N/A	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Comparable Companies and/or Precedent Transactions	32%	0%	100%	N/A	0%	100%	N/A	0%	40%	0%	50%	0%	0%	40%	0%	67%	0%	0%
Deal Price	0%	0%	0%	N/A	0%	0%	N/A	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Methodology Adopted by Respondent Expert																		
Discounted Cash Flow (DCF)	77%	100%	100%	N/A	0%	100%	N/A	100%	100%	100%	100%	100%	50%	80%	50%	67%	0%	0%
Comparable Companies and/or Precedent Transactions	39%	0%	100%	N/A	0%	100%	N/A	100%	80%	0%	50%	0%	50%	20%	0%	33%	0%	0%
Deal Price	45%	0%	100%	N/A	0%	100%	N/A	0%	20%	0%	50%	0%	100%	40%	50%	67%	100%	100%
Total Number of Cases	31	1	1	0	1	1	0	1	5	1	4	2	2	5	2	3	1	1

Legend: 0% 1–25% 26–50% 51–75% 76–100%

Source: Cornerstone Research; Delaware Chancery Court; Delaware Supreme Court; *Thomson Reuters Westlaw*

Note: A party is considered to have adopted a methodology if it placed any weight on the methodology when determining fair value. As a result, yearly percentages do not add up to 100% because petitioner and respondent experts commonly adopt multiple valuation methodologies within a single case. If a decision by the Chancery Court was overturned by the Delaware Supreme Court, the methodology adopted by the Delaware Supreme Court is considered, while the methodology adopted by the Chancery Court is ignored. If a decision by the Chancery Court was reaffirmed by the Delaware Supreme Court, the methodologies used are included in the year of the Delaware Supreme Court decision.

**Figure 9: Heat Map of Valuation Methodologies by Year of Opinion—Private Targets
2006–2022**

	Average 2006–2022	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	
Methodology Adopted by Court																			
Discounted Cash Flow (DCF)	83%	100%	N/A	100%	N/A	0%	N/A	100%	0%	100%	100%	100%	N/A	N/A	100%	100%	100%	N/A	
Comparable Companies and/or Precedent Transactions	0%	0%	N/A	0%	N/A	0%	N/A	0%	0%	0%	0%	0%	N/A	N/A	0%	0%	0%	N/A	
Deal Price	17%	0%	N/A	0%	N/A	100%	N/A	0%	100%	0%	0%	0%	N/A	N/A	0%	0%	0%	N/A	
Methodology Adopted by Petitioner Expert																			
Discounted Cash Flow (DCF)	83%	100%	N/A	100%	N/A	0%	N/A	100%	0%	100%	100%	100%	N/A	N/A	100%	100%	100%	N/A	
Comparable Companies and/or Precedent Transactions	50%	0%	N/A	0%	N/A	100%	N/A	0%	100%	0%	0%	100%	N/A	N/A	100%	100%	0%	N/A	
Deal Price	0%	0%	N/A	0%	N/A	0%	N/A	0%	0%	0%	0%	0%	N/A	N/A	0%	0%	0%	N/A	
Methodology Adopted by Respondent Expert																			
Discounted Cash Flow (DCF)	100%	100%	N/A	100%	N/A	100%	N/A	100%	100%	100%	100%	100%	N/A	N/A	100%	100%	100%	N/A	
Comparable Companies and/or Precedent Transactions	50%	0%	N/A	0%	N/A	100%	N/A	100%	0%	100%	0%	100%	N/A	N/A	0%	100%	0%	N/A	
Deal Price	17%	0%	N/A	0%	N/A	0%	N/A	0%	0%	100%	0%	50%	N/A	N/A	0%	0%	0%	N/A	
Total Number of Cases	12	1	0	1	0	1	0	1	1	1	1	2	0	0	1	1	1	0	

Legend: 0% 1–25% 26–50% 51–75% 76–100%

Source: Cornerstone Research; Delaware Chancery Court; Delaware Supreme Court; *Thomson Reuters Westlaw*

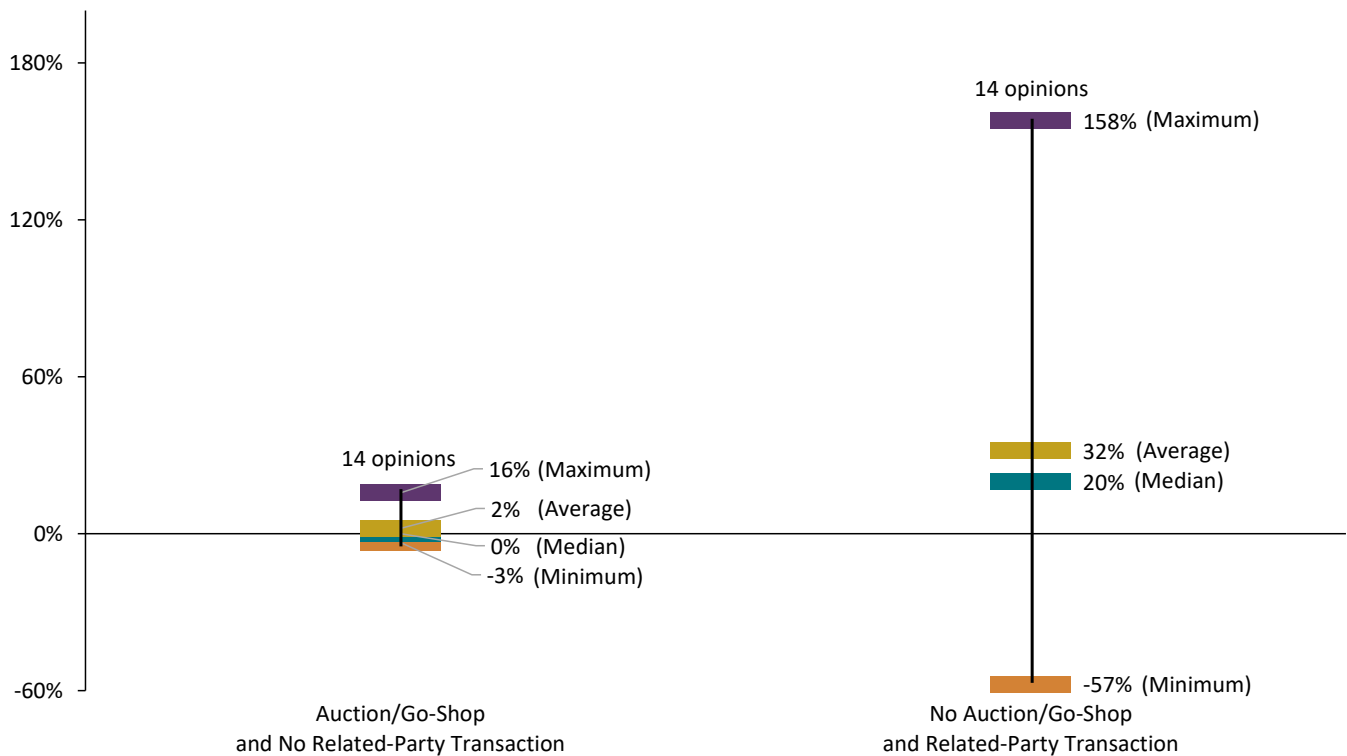
Note: A party is considered to have adopted a methodology if it placed any weight on the methodology when determining fair value. As a result, yearly percentages do not add up to 100% because petitioner and respondent experts commonly adopt multiple valuation methodologies within a single case. If a decision by the Chancery Court was overturned by the Delaware Supreme Court, the methodology adopted by the Delaware Supreme Court is considered, while the methodology adopted by the Chancery Court is ignored. If a decision by the Chancery Court was reaffirmed by the Delaware Supreme Court, the methodologies used are included in the year of the Delaware Supreme Court decision.

Sales Process

- Some transactions included either an auction or a “go-shop” process, in which the target company was allowed to solicit competing bids for a period of time after the merger agreement was signed. If executed properly, the use of such processes can indicate a robust sales process that can meet the “objective indicia” cited in recent rulings. In addition, the absence of related-party involvement in mergers can also be viewed as a proxy for a robust sales process.
- This analysis examines two types of transactions. The first set of 14 opinions concerns mergers that were not related-party transactions and which included an auction or go-shop process. The second set of 14 opinions concerns mergers that involved a related party and which did not include an auction or go-shop process. Given these characteristics, the first set of transactions potentially has a more robust sales process than the second.
- In transactions that included an auction or go-shop process and the acquiring firm was not a related party, the average premium to the deal price awarded was 2% and the median premium was 0%. Among these 14 cases, the premium ranged between negative 3% and positive 16%.
- In transactions without an auction or go-shop process and where the acquirer was a related party, the average premium to the deal price awarded was 32%, with a median of 20%. These transactions had a substantially wider range of premiums, with minimum and maximum premiums of negative 57% and positive 158%, respectively.

The data indicate that the Delaware Courts place strong emphasis on whether the merger was the product of a robust, arm’s-length sales process.

Figure 10: Delaware Appraisal Opinions—Premium Summary by Transaction Type 2006–2022



Source: Cornerstone Research; Delaware Chancery Court; Delaware Supreme Court; *Thomson Reuters Westlaw*
 Note: The premium is the spread between the Court’s determination of fair value and the merger price.

Section 262: Appraisal in Delaware

Minority shareholders of Delaware corporations who disagree with the deal price in a proposed merger or consolidation are allowed to seek appraisal of their shares under certain conditions in accordance with Section 262 of Delaware General Corporate Law.

If they opt to do so, these shareholders forgo their right to exchange shares at the agreed-upon deal price and instead accept the fair value for their shares as determined by the Delaware Courts.

While there are various caveats to the requirements determining the right to petition for appraisal, the majority of cash-out mergers are eligible. Notably, shareholders may also obtain statutory appraisal remedies even if they acquire shares after the record date for determining entitlement to vote on the merger.

A 2007 opinion in *In re: Appraisal of Transkaryotic Therapies Inc. (Transkaryotic)* opened the door for appraisal arbitrage, and the data show that this strategy became more prevalent for a period of time. In *Transkaryotic*, the Delaware Courts determined that an investor who purchases publicly traded shares in the open market may have no way of ascertaining who owned the shares on an earlier date or compelling the unknown prior owner to grant a proxy that would enable the current owner to vote the shares. In essence, the *Transkaryotic* decision allowed appraisal arbitrageurs to purchase shares after the record date for the stockholder vote for the merger in question and submit these shares for appraisal.²⁹

Delaware Courts are instructed to “take into account all relevant factors” in determining the fair value.

In determining fair value, the Delaware Courts are instructed to “take into account all relevant factors.”³⁰ As explained in detail by the Delaware Supreme Court in *Tri-Continental Corp. v. Battye et al.*, “market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders’ interest, but must be considered by the agency fixing the value.”³¹

However, it is important to note that Section 262(h) requires the Delaware Courts to determine fair value “exclusive of any element of value arising from the accomplishment or expectation of the merger, consolidation or conversion, together with interest, if any, to be paid upon the amount determined to be the fair value.”³² This means any synergies expected from the merger should be excluded in determining the fair value of the target company, as the appraisal’s “purpose is to compensate dissenting stockholders for what was taken from them.”³³

The fair value that compensates dissenting shareholders should be the value of dissenters’ shares as of the date the merger closes. As valuation changes not contemplated at the time of the merger signing can occur before the closing, parties can seek an adjustment to the deal price. However, in an appraisal both sides have the burden of proving their respective valuation positions, and therefore “the party seeking an adjustment to the deal price reflecting a valuation change between signing and closing bears the burden to identify that change and prove the amount to be adjusted.”³⁴

Appendix A

“Objective Indicia” Used to Determine a Robust Sales Process

The question of what constitutes a sufficiently robust sales process has been further clarified in recent Delaware Court rulings. In *AOL*, the Chancery Court coined the term “Dell Compliant,” citing decisions in *DFC* and *Dell* in determining that the sales process in *AOL* did not meet the standard set in *Dell*. The Court explained:

Where, however, transaction price represents an unhindered, informed, and competitive market valuation, the trial judge must give particular and serious consideration to transaction price as evidence of fair value. Where information necessary for participants in the market to make a bid is widely disseminated, and where the terms for the transaction are not structurally prohibitive or unduly limiting to such market participation, the trial court in its determination of fair value must take into consideration the transaction prices as set by the market. I will refer to transactions compliant with such conditions by the shorthand “Dell Compliant.”³⁵

In rulings since *DFC Global*, *Dell*, and *AOL*, the Delaware Courts have more frequently cited “objective indicia” used to determine whether the deal price in a merger is a reliable indicator of fair value.³⁶ A list of these indicia, along with their corresponding references in recent opinions, include:

- The merger was an arm’s-length transaction with a third party (*Columbia* at 50, *Stillwater* at 49, *Panera* at 55–56, *Regal* at 62, *HFF* at 36).
- The board did not labor under any conflicts of interest (*Columbia* at 50, *Stillwater* at 50, *Panera* at 56, *Regal* at 62, *HFF* at 43).
- Robust public information existed about the value of the company (*Panera* at 56, *Regal* at 64, *HFF* at 44).
- The acquirer conducted due diligence and received confidential information about the target (*Columbia* at 51, *Stillwater* at 50, *Panera* at 56, *Regal* at 64, *HFF* at 45)
- Prior to signing, the target contacted other potential buyers, and those parties failed to pursue a merger when they had a chance to do so (*Columbia* at 51).
- The target negotiated with the acquirer and extracted price increases (*Columbia* at 52, *Panera* at 57, *Stillwater* at 50, *Regal* at 65, *HFF* at 48).
- No bidder emerged during the post-signing phase (*Columbia* at 52, *Stillwater* at 51, *Panera* at 60, *Regal* at 65, *HFF* at 49–50).

Importantly, deal price has been used as the best indicator of fair value even when the sale process is partially flawed. For example, in *Stillwater*, the Chancery Court stated that “[t]he sale process was not perfect, and the petitioners highlighted its flaws.”³⁷ Petitioners argued that *Stillwater*’s CEO “acted improperly by pursuing Sibanye’s indication of interest without authorization from the Board,” and that “after the Board learned of Sibanye’s expression of interest in July 2016, the Board did not exercise meaningful oversight over the sale process.”³⁸ However, the Chancery Court further noted that while these factors should be considered, they “do not inherently disqualify the sale process from generating reliable evidence of fair value.”³⁹

While the majority of recent opinions have relied on deal price as the most reliable indicator of fair value, those which have rejected deal price, such as *Jarden* and *Synapse*, have generally not met one or more of the Delaware Courts’ “objective indicia.”

Research Sample

Appraisal petitions filed in the Chancery Court are identified through *Courthouse News Service*, a third-party data provider that publishes original news content on civil litigation from the date of filing through the appellate level.⁴⁰

A keyword search is used to identify appraisal cases, followed by a manual review to remove cases that are not appraisal actions. Subsequently, the case docket associated with each appraisal petition is collected. The Data Science Center at Cornerstone Research then performs advanced text analytics to identify relevant information from each appraisal petition.

This search results in a sample of 495 petitions filed between January 1, 2006, and December 31, 2022.

Appraisal petitions that result in trial decisions are identified through a manual review of all opinions and orders from the Chancery Court and the Delaware Supreme Court. The sample of Delaware Court opinions includes opinions issued between January 1, 2006, and December 31, 2022. Opinions dated in 2006 and one opinion dated in 2007 stem from petitions filed before the start of the appraisal petition data. The manual review identified 43 appraisal petitions that resulted in trial decisions.

Each published opinion is reviewed and relevant information is categorized for further analysis. Expert reports in these matters are typically confidential and unavailable for data collection. All information collected on expert valuation methodologies is collected from opinions filed by the Delaware Courts in these matters and is subject to the limitation of the information the judge deemed relevant to discuss in the opinion.

Endnotes

¹ *Happy Child World* is not included in this case count and is excluded from all of the following opinion-based analysis of premiums and methodologies. The case addressed both entire fairness as well as appraisal after a squeeze-out merger was effectuated by the majority stakeholder Boraam Tanyous against his business partners Medhat and Mariam Banoub (together, the “Banoubs”). Vice Chancellor Slight ruled the value of petitioner’s 45 shares to be worth \$36,017.96 or \$800.40 per share, while prior to the merger, the Banoubs’s equity interest was cancelled and converted into the right to receive cash at a value of \$8,457.17 for 45 shares, which equates to \$187.94 per share. This resulted in a premium awarded of 326%. As a result of this abnormally high premium and low nominal valuation, the case has been excluded from these analyses, and the opinion count considered is 43. See *In Re Happy Child World, Inc.*, Consolidated C.A. No. 3402-VCS (Del. Ch. Sep. 29, 2020).

² The Delaware Court of Chancery (“Chancery Court”) and the Supreme Court of the State of Delaware (“Delaware Supreme Court”) are referred to collectively herein as the “Delaware Courts” or “the Courts.”

³ See Appendix A for additional detail on the “objective indicia” considered by the Delaware Courts.

⁴ *ACP Master Ltd. et al. v. Sprint Corporation et al. & ACP Master Ltd. et al. v. Clearwire Corporation*, C.A. No. 8508-VCL & C.A. No. 9042-VCL (Del. Ch. Aug. 8, 2017) (“*Sprint/Clearwire*”); *In re ISN Software Corp. Appraisal Litigation*, C.A. No. 8388-VCG (Del. Ch. Aug. 11, 2016) (“*ISN Software*”).

⁵ Figures referring to the post-2017 period include all rulings issued starting from January 1, 2017.

⁶ *Dell Inc. v. Magnetar Global Event Driven Master Fund Ltd. et al.*, Consolidated C.A. No. 9322-VCL (Del. Sup. Ct. Dec. 14, 2017), p. 65 (“Although widely considered the best tool for valuing companies when there is no credible market information and no market check, DCF valuations involve many inputs—all subject to disagreement by well-compensated and highly credentialed experts—and even slight differences in these inputs can produce large valuation gaps.”).

⁷ *Gearreald et al. v. Just Care Inc.*, C.A. No. 5233-VCP (Del. Ch. Apr. 30, 2012), p. 28 (“As for the company’s equity risk premium, the experts dispute whether a historical or supply side equity risk premium should apply. [One expert] supports the use of a supply side equity risk premium of 5.73%, whereas [the other expert] applied a historical risk premium of 6.47%.”).

⁸ *In Re Appraisal of Columbia Pipeline Group Inc.*, Consolidated C.A. No. 12736-VCL (Del. Ch. Aug. 12, 2019) (“*Columbia*”), pp. 49–50 (“When assessing whether a sale process results in fair value, it is critical to recall that ‘fair value is just that, “fair.”’ *DFC*, 172 A.3d at 370. ‘[T]he key inquiry is whether the dissenters got fair value and were not exploited.’ *Dell*, 177 A.3d at 33. ‘The issue in an appraisal is not whether a negotiator has extracted the highest possible bid.’ *Id.* Rather, ‘the purpose of an appraisal is . . . to make that [the petitioners] receive fair compensation for their shares in the sense that it reflects what they deserve to receive based on what would fairly be given to them in an arm’s-length transaction.’ *DFC*, 172 A.3d at 370–71. When applying this standard, the Delaware Supreme Court has cited ‘**objective indicia**’ that ‘suggest[] that the deal price was a fair price.’ *Dell*, 177 A.3d at 28; *accord DFC*, 172 A.3d at 376.”), **emphasis added**.

⁹ *In Re Appraisal of Stillwater Mining Company*, Consol. C.A. No. 2017-0385-JTL (Del. Ch. Aug. 21, 2019) (“*Stillwater*”), p. 2.

¹⁰ *Columbia*, p. 108.

¹¹ *In Re Appraisal of Panera Bread Company*, C.A. No. 2017-0593-MTZ (Del. Ch. Jan. 31, 2020) (“*Panera*”), p. 1.

¹² *In Re Appraisal of Regal Entertainment Group*, Consol. C.A. No. 2018-0266-JTL (Del. Ch. May 13, 2021) (“*Regal*”), pp. 1–2.

¹³ *BCIM Strategic Value Master Fund LP v. HFF Inc.*, C.A. No. 2019-0558-JTL (Del. Ch. Feb. 2, 2022) (“*HFF*”), p. 52.

¹⁴ *In Re: Appraisal of Jarden Corporation*, Consol. C.A. No. 12456-VCS (Del. Ch. Jul. 19, 2019) (“*Jarden*”), p. 67.

¹⁵ *Kruse et al. v. Synapse Wireless Inc.*, C.A. No. 12392-VCS (Del. Ch. Jul. 14, 2020) (“*Synapse*”), p. 27.

¹⁶ *Synapse*, p. 57 (“[The court was] satisfied that [Synapse’s expert] has offered the most reliable appraisal of Synapse’s fair value in one of his two DCF valuations. While not perfect, [Synapse’s expert’s] DCF valuation is far more credible than any of the valuations proffered by [Kruse’s Expert], and far superior to any valuation I might endeavor to undertake on my own.”).

¹⁷ *Verition Partners Master Fund Ltd. v. Aruba Networks Inc.*, C.A. No. 11448-VCL (Del. Ch. Feb. 15, 2018). (“*Aruba*”), p. 128 (“The best evidence of Aruba’s fair value as a going concern, exclusive of any value derived from the merger, is its thirty-day average unaffected market price of \$17.13 per share.”).

¹⁸ *Verition Partners Master Fund Ltd. et al. v. Aruba Networks Inc.*, No. 368, 2018 (Del. Sup. Ct. Apr. 16, 2019), p. 1 (“Because the Court of Chancery’s decision to use Aruba’s stock price instead of the deal price minus synergies was rooted in an erroneous factual finding that lacked record support, we answer that in the positive and reverse the Court of Chancery’s judgment. On remand, the Court of Chancery shall enter a final judgment for the petitioners awarding them \$19.10 per share, which reflects the deal price minus the portion of synergies left with the seller as estimated by the respondent in this case, Aruba.”).

¹⁹ *Jarden*, p. 9 (“After considering all relevant factors, I have appraised Jarden’s fair value as of the Merger at \$48.31 per share. This value, derived from the unaffected market price, is consistent with Jarden’s DCF value and the less reliable, but still relevant, deal price less synergies value.”).

²⁰ *Panera*, p. 111.

²¹ *Regal*, p. 2.

²² *HFF*, p. 83.

²³ *Columbia*, p. 95.

²⁴ *Stillwater*, p. 110. *See also Stillwater*, p. 115 (“As this discussion shows, whether to adjust the deal price for an increase in value between signing and closing presents numerous difficult questions. In this case, the petitioners did not argue for an adjustment to the deal price, and so the parties did not have the opportunity to address these interesting issues. The court will not take them up at this late stage in the proceeding. The petitioners accordingly failed to prove that the deal price should be adjusted upward to reflect a change in value between signing and closing.”).

²⁵ *Regal*, p. 2 (“The resulting value of \$19.23 per share reflects the fair value of Regal when the Merger Agreement was signed. The appraisal statute obligates the court to determine the fair value of Regal when the Merger closed. The parties agreed that some adjustment was necessary because after signing but before closing, Regal’s value increased when the Tax Cuts and Jobs Act (the ‘Tax Act’) reduced the corporate tax rate from 35% to 21%. To reflect that valuation increase, this decision adds \$4.37 per share to the value of the deal price minus synergies. Consequently, based on the evidence presented at trial, the fair value of the Company’s common stock at the effective time of the Merger was \$23.60 per share.”).

²⁶ *HFF*, p. 66.

²⁷ *HFF*, p. 70 (“An appraisal case involves fact-finding, and the record in one case may support a price adjustment when the record in another may not. Here, the Company’s outperformance was both more significant and durable.”).

²⁸ *See, e.g.*, Farallon Capital Management LLC, which lists “Merger Arbitrage” as one of its six core investment strategies (“Our Approach,” Farallon Capital, <http://www.faralloncapital.com/core-strategies/>); Water Island Capital, which lists “Merger Arbitrage” as one of its four investment strategies (“Our Strategies,” Water Island Capital, <http://waterislandcapital.com/strategies/>).

²⁹ The Chancery Court at the time acknowledged this possibility and stated: “Respondents raise one policy concern that deserves mentioning. They argue that this decision will ‘pervert the goals of the appraisal statute by allowing it to be used as an investment tool for arbitrageurs as opposed to a statutory safety net for objecting stockholders.’ That is, the result I reach here may, argue respondents, encourage appraisal litigation initiated by arbitrageurs who buy into appraisal suits by free-riding on [the petitioner’s] votes on behalf of other beneficial holders—a disfavored outcome. To the extent that this concern has validity, relief more properly lies with the Legislature. Section 262, as currently drafted, dictates the conclusion reached here. Only the record holder possesses and may perfect appraisal rights. The statute simply does not allow consideration of the beneficial owner in this context. The Legislature, not this Court, possesses the power to modify § 262 to avoid the evil, if it is an evil, that purportedly concerns respondents.” *See In re: Appraisal of Transkaryotic Therapies Inc.*, C.A. No. 1554-CC (Del. Ch. May 2, 2007), pp. 7–8.

³⁰ Delaware Code Title 8, Chapter 1. General Corporations Law, Subchapter IX. Merger, Consolidation or Conversion, § 262.

³¹ *Tri-Continental Corp. v. Battye et al.*, 74 A.2d 71 (Del. Sup. Ct. June 8, 1950).

³² Delaware Code Title 8, Chapter 1. General Corporations Law, Subchapter IX. Merger, Consolidation or Conversion, § 262.

³³ *In Re Appraisal of DFC Global Corp.*, Consol. C.A. No. 10107-CB (Del. Ch. July 8, 2016) (“*DFC Global*”), p. 14.

³⁴ *Brigade Leveraged Capital Structures Fund Ltd. et al. v. Stillwater Mining Company*, No. 427, 2019 (Del. Sup. Ct. Oct. 12, 2020), p. 29.

³⁵ *In Re Appraisal of AOL Inc.*, C.A. No. 11204-VCG (Del. Ch. Feb. 23, 2018), pp. 1–2.

³⁶ *Columbia*, pp. 49–50 (“When assessing whether a sale process results in fair value, it is critical to recall that ‘fair value is just that, “fair.”’ *DFC*, 172 A.3d at 370. ‘[T]he key inquiry is whether the dissenters got fair value and were not exploited.’ *Dell*, 177 A.3d at 33. ‘The issue in an appraisal is not whether a negotiator has extracted the highest possible bid.’ *Id.* Rather, ‘the purpose of an appraisal is . . . to make that [the petitioners] receive fair compensation for their shares in the sense that it reflects what they deserve to receive based on what would fairly be given to them in an arm’s-length transaction.’ *DFC*, 172 A.3d at 370–71. When applying this standard, the Delaware Supreme Court has cited ‘**objective indicia**’ that ‘suggest[] that the deal price was a fair price.’ *Dell*, 177 A.3d at 28; *accord DFC*, 172 A.3d at 376.”), **emphasis added**.

³⁷ *Stillwater*, p. 100.

³⁸ *Stillwater*, pp. 67–68.

³⁹ *Stillwater*, p. 70.

⁴⁰ “About Us,” *Courthouse News Service*, <https://www.courthousenews.com/about-us/>.

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