

3 Things M&A Attys Need To Know About Delaware Law In 2018, *Law360*, ft. Patrick Kennell

Patrick M. Kennell, partner in Kaufman Dolowich & Voluck's New York City office, was quoted in a *Law360* article written by Benjamin Horney.

Law360, New York (January 4, 2018, 3:52 PM EST) — Decisions in the Delaware Chancery and Supreme Courts last year on appraisal actions and fiduciary duty lawsuits could leave lawyers feeling a bit confused after judges' opinions differed on a case-by-case basis, but they still provide lessons attorneys can learn from in 2018 as they continue face similar issues for their corporate clients.

Here, *Law360* looks at three things M&A attorneys need to know about Delaware corporate law in 2018.

There's No 'One Size Fits All' When It Comes to Appraisal

Attorneys have been seeking clear guidance for years from the courts on when and why appraisal claims — which typically involve entrepreneurial shareholders buying into a target company after a deal announcement and then asking a judge to increase the price tag based on an independent valuation — will succeed or fail.

At first glance, 2017 appeared to be a year in which they might finally get their wish; there were rulings in multiple appraisal suits last year, including high-profile matters like the Dell and DFC Global cases.

In the Dell and DFC Global cases, it was determined that the transaction price was fine and that there were no problems with the deal process.

Other suits, however, such as the so-called Clearwire case, did not wind up relying on the merger price. In that suit, the appraisal of Sprint Nextel Corp.'s \$3.6 billion buyout of Clearwire Corp. resulted in Vice Chancellor J. Travis Laster ruling in July that the fair value of the deal was 60 percent below the actual deal price.

The main takeaway from the numerous appraisal decisions seems to be that there is still no definitive guide to knowing exactly how the Delaware courts will determine fair value for a given deal, as it all depends on the specific circumstances. Sometimes a judge will take it as gospel that the deal price is generally fair, while other times they seem to begin with the assumption that the deal price might not be fair, instead using their own discounted cash flow analysis or other methods to determine fair value.

"The difference between one appraisal decision and another has to do solely with the judge calling balls and strikes on each of the components of the experts' inevitably competing views of what is the fair value," said Patrick Kennell, a partner with Kaufman Dolowich & Voluck LLP.