

Informed Investing in Appraisal Rights

[Example of easily exploited confusion](#) [Icahn speculation and simple arithmetic](#)

Investing in appraisal rights, like any other investing, is competitive. You don't have to be the smartest investor on Wall Street to win, but you do have to be smarter than the average.

And being smarter means being better informed.

Example of easily exploited confusion

Observing what has been reported about supposed expert views of appraisal rights during the past few weeks, being better informed than average should be easy.

An important example is the confused application of court opinions in breach of duty litigation to theories of how judges will determine value in appraisal cases. While some elements of valuation are obviously relevant to both, the standards are essentially different. First, valuation becomes relevant in a breach of duty case only if a plaintiff establishes that a board has failed to perform its duties, justifying court intervention to determine what would have been a fair price. The kind of pricing that is relevant in those circumstances is typically current market bidding. For appraisal cases, it does not matter whether the board has done a good or bad job, since the appraisal remedy is intended for the very different purpose of protecting the rights of a stockholder to realize the long term value of a business when a majority of other shareholders want to sell. Delaware law provides for a judge to make a completely independent appraisal of the "fair value" of the standalone "going concern," without regard to market bidding. This distinction between auction price and fair value was explicitly established in a 2010 decision of the Delaware Supreme Court that has been referenced repeatedly in Forum reports.¹

This should help you understand why there have been no cases in the past twenty years in which the Delaware Chancery court has appraised value below a buyout price other than in purchases by third parties and in buyouts of dissident managers.² That does not mean the next court decision will follow the pattern, but you can assume that it would be difficult for management insiders backed by professional equity investors to convince a judge that they knowingly offered to pay more than the standalone value of a going concern.³

¹ For examples of past Forum references to [Golden Telecom, Inc. v. Global GT LP and Global GT LTD, 11 A.3d 214 \(Delaware Supreme Court, December 29, 2010\)](#), see the [May 23, 2013 Forum Report: Analysis of "Appraisal Rights" in a Dell Buyout](#) and the [July 8, 2013 Forum Report: Supporting Practical Choices for Dell, and for Shareholders](#).

² Research is available upon request.

³ See [July 15, 2013 Wall Street Journal: "Private-Equity Buyouts Shortchange Shareholders | Dell Deal an Example of the Upper Hand Held by Smart Financiers and Knowledgeable Insiders."](#)

Obviously, from all the media and analyst reports of expected court views of Dell's auction process, most people do not know the rules for value determination in appraisal cases. If you know them, it will give you a legitimate and well deserved information advantage.

These and other elements of appraisal rights, both Dell-specific and general, will be addressed by members of the "Review Panel" being organized as part of the Dell Valuation Trust to support your information requirements.⁴

Icahn speculation and simple arithmetic

Responding to reports that Icahn representatives have said we are talking, I cannot disclose any information about private communications in the absence of specific permission. I can, however, suggest consideration of the following assumptions based on logic and arithmetic:

1. Icahn, like any other investor, should make more money, more predictably, from appraisal rights than from winning a series of two proxy fights to reorganize Dell.
2. Icahn's investment style, including stated negotiating objectives, would benefit more than most from establishing effective marketability of interests in appraisal rights.
3. Icahn should also benefit along with other owners of Dell appraisal rights from the effective management and consistent definition of these rights, providing essential support for informed decision-making and eliminating the confusion that results from variations in ownership and decision-making rights, differences in cost and benefit allocations, and discriminatory information access.
4. Since Icahn has reported perfecting appraisal rights for over 150 million Dell shares, more than all the other announced dissenters combined, everyone should encourage their leadership support of this shared opportunity to realize the fair value of Dell.

I will of course let you know if there are any further developments before Mr. Icahn presents his views at the conclusion of tomorrow's [CNBC "Delivering Alpha" conference](#), and before Dell votes are counted the following morning.

GL – July 16, 2013

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⁴ See the section "[Provisions for "Review Panel" support of participating investors](#)" in a July 5, 2013 Forum Report, and evolving plans in the [July 12, 2013 Forum Report: Plan for Support of Dell Appraisal Rights](#).