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The resurgence of Delaware appraisal litigation

Delaware was historically the nation's epicenter of shareholder appraisal litigation, in which dissenting shareholders in a merger ask the court to determine the company's "fair value" and require the buyer to pay the difference between that amount and the deal price. However, case volume declined precipitously from its peak of 76 cases filed in 2016 to only 26 in 2018. Practitioners attribute this decline to two Delaware Supreme Court decisions from that time, *Dell* and *DFC Global*, that emphasized that greater weight should be given to the deal price in appraisal actions, as well as a contemporaneous statutory amendment that then allowed companies to pre-pay anticipated amounts due to prevent the accrual of pre-judgment interest. These changes made Delaware appraisal litigation a less attractive investment for hedge funds and other dissenting shareholders, and appraisal activity accordingly slowed in the following years.

While today's environment is far more disciplined than the pre-2017 arbitrage boom, the trend line is clear that Delaware appraisal litigation is regaining strategic relevance in 2025. In just the first six months of the year, the Delaware Court of Chancery saw as many appraisal actions as had been filed in the past three years combined.

The Endeavor Group take-private transaction has been the most prominent among the new wave of challenged transactions. Endeavor, a conglomerate of primarily sports, betting, and media entities, including WWE and UFC, was taken private by Silver Lake Management, its private equity sponsor and controlling shareholder, for USD 27.50 per share. The dissenting shareholders allege that the stock price of TKO Holdings, an entity in which Endeavor owns a 51% equity stake, implies a valuation for just the TKO equity stake substantially greater than what Silver Lake is paying for all of Endeavor. The transaction is also alleged to have featured other red flags that attract appraisal attention, including that:

- it was a single-buyer process without a market check;
- it was controlled by a majority shareholder;
- it did not include protections for minority shareholders; and
- it was dislocated from public trading prices.

In addition, Silver Lake has declined to put forward pre-payment money that would forestall the accrual of pre-judgment interest at nearly 10% per annum. Not surprisingly, over two dozen appraisal actions have been filed in connection with Endeavor alone.

While Endeavor has been the splashiest appraisal of 2025, it is not the only driver of Delaware's resurgence. Appraisal cases have been filed against software and tech companies, including in connection with the USD 16.8 billion squeeze-out transaction of Aspen Technologies, and in the consumer-retail sector against the Skechers shoe company. Other large, sponsor-led take-privates, including the USD 55 billion take-private of the video game company Electronic Arts by the Saudi Public Investment Fund, are likely to draw further appraisal attention into 2026.

Liability management exercises

A liability management exercise (LME) is a transaction in which a borrower restructures its existing debt outside of formal bankruptcy by modifying terms,

exchanging instruments, or altering creditor priorities to improve liquidity, extend maturities, or obtain new financing, and in doing so frequently pits lenders against one another. LMEs can take many forms, including uptier exchanges that give participating lenders a priming position and drop-down transactions that move assets into unrestricted subsidiaries to support new secured debt.

On New Year's Eve 2024, United States courts published two significant LME decisions. In *Serta*, the Fifth Circuit Court of Appeals invalidated an uptier transaction, which had elevated participating lenders' claims over others purportedly using an exception under the credit agreement permitting the company to repurchase its debt on the "open market." The court held that a privately negotiated transaction with only select lenders was not an "open market" purchase, which it held would need to occur on a truly open secondary market. *Mitel* concerned a similarly structured uptier transaction, but the credit agreement at issue did not have the same "open market" qualifier. New York's First Department Appellate Division court thus upheld the *Mitel* transaction, and in the process reinforced that the enforceability of LMEs will largely turn on the specific language of the credit agreement at issue.

In 2025, debtors and participating lenders have continued to conduct LMEs while attempting to stay within the bounds of *Serta*, *Mitel*, and previous LME precedents. One new innovation following these decisions has been the "Extend-and-Exchange" structure seen in Better Health and Oregon Tool, which allows participating lenders to exchange existing notes for notes with better economic terms and a longer maturity date, effectively creating a new senior debt class without needing to rely on an "open market purchase" exception as was implicated in *Serta* and *Mitel*.

Lender groups have adapted to the threat of LMEs by executing cooperation agreements amongst themselves. These co-op agreements give the group's members strength in numbers, allowing them to either block the borrower from executing an LME, or at least allow the co-op group members to benefit from any LME that does occur. But these co-op agreements have recently been challenged in court in *Selecta* and *Optimum Communications (f.k.a. Altice USA)* as illegal coordination under antitrust law. The co-op agreement in *Selecta* was challenged by a group of excluded minority lenders, whereas the *Optimum* co-op agreement has been challenged by the borrower alleging that the co-op group shut it out of the credit market. Both cases are still in early stages, but will have significant implications for the balance of power in restructuring negotiations between borrowers and lenders.

Looking ahead — disputes in the private credit market

The rapid expansion of the private credit market, now estimated by the Alternative Credit Council to exceed USD 3 trillion, has prompted increasing attention to its legal and regulatory implications. Demand remains strong, and new capital providers continue to enter the market, suggesting that growth will persist into 2026.

Structural illiquidity, limited transparency, and the proliferation of increasingly intricate financing arrangements in private credit may create legal uncertainty leading to disputes. Emerging areas of potential dispute include:

- the methodology and governance of portfolio valuation;
- the identification of the constituencies to whom valuation obligations are owed;
- the allocation of responsibility among different tiers of the capital structure;
- the adequacy of disclosures and risk warnings; and
- the robustness of internal credit-assessment frameworks.

Questions may also arise regarding the sufficiency of risk oversight by managers and, in some jurisdictions, the appropriateness of offering private credit products to retail investors.

For now, these are primarily storm clouds on the horizon rather than active disputes, but recent events indicate to some observers that these risks may be more than theoretical. Among the early warning signs was the execution of the private credit world's first LME-style transaction by Pluralsight and its private equity sponsor, Vista Equity Partners. In this transaction, Pluralsight in coordination with Vista transferred IP assets to a newly formed non-guarantor restricted subsidiary. While tame by LME standards and reportedly non-adversarial, the Pluralsight transaction set off alarm bells in the industry that parties may be willing to import more aggressive "creditor-on-creditor violence" techniques seen in the broadly syndicated loan market in the event liquidity pressures intensify or commercial relationships begin to deteriorate.

Elsewhere, early signs of distress in certain private credit pools, in combination with the subjective and at times disputed valuations of private credit loans, have also raised questions as to the ramifications in the event private credit pools begin to fail. The risks of cascading effects in the event of failure are difficult to assess from the outside given private credit's opaque nature, but cannot be ruled out at this time. Litigators and advisers may therefore benefit from developing a more granular understanding of private credit instruments and preparing for increased early-stage and pre-litigation engagement before these and other disputes materialize.

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