

Client Alert

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M&A Stockholder Litigation Trends in 2017

Cornerstone Research recently published its review of 2017 stockholder litigation challenging public company mergers with a value over \$100 million. The research indicates that stockholder litigation has declined from its peak years of 2011–2014, but with 73% of deals being challenged last year, it has not gone away. In addition, the research indicates an increasing number of cases being voluntarily dismissed by plaintiffs and a continuing shift of stockholder litigation from state to federal courts.

Key Takeaways from Cornerstone Research's Report:

- *Although M&A litigation has declined from prior years, nearly three-quarters of public company mergers were challenged last year.*
 - In 2017, 73% of public company mergers resulted in stockholder litigation.
 - This was down from approximately 93% during 2011–2014 (the “golden years” for the plaintiffs’ bar), but up slightly from 71% in 2016.
- *Fewer plaintiffs are filing lawsuits, and they are not rushing to the courthouse with the rapidity of prior years.*
 - On average, 2.8 complaints were filed per M&A deal last year. This compares to an average of 4.2 complaints during 2013–2016.
 - There also continues to be a significant drop in M&A litigation filed in multiple jurisdictions: a majority of M&A litigation in 2017 and 2016 was filed in a single jurisdiction.
 - In 2017, the first lawsuit was filed, on average, 48 days after the deal’s announcement, which is 27 days more than the average filing date in 2015.
- *Delaware’s market share for M&A litigation has dropped dramatically.*
 - The number of lawsuits brought in Delaware state courts last year saw a significant decline of 81% from 2016. Only 6% of litigated M&A deals in 2017 were filed in Delaware state court.
 - There was a similar drop in lawsuits filed in California state courts, which could be caused by a variety of factors such as the presence of exclusive forum bylaws requiring state court litigation to be brought in Delaware and/or fewer California companies entering into mergers last year.
 - On the one hand, the decline in Delaware state court filings is somewhat surprising in light of the increasing number of exclusive forum bylaws adopted by public companies, which typically require stockholders asserting state (but not federal) law claims to file in Delaware. On the other hand, the decline in Delaware state court filings is likely attributable to numerous developments in Delaware perceived by the plaintiffs’ bar to have made it a much less hospitable forum for M&A litigation and, consequently, driven litigation to federal courts. Those developments include the following cases:

- *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016): *Trulia* significantly raised the level of judicial scrutiny that will be applied to non-monetary (e.g., disclosure-only) settlements of stockholder class actions. It effectively ended a widespread practice of quickly entering into non-monetary settlements providing for attorneys' fees to plaintiffs' counsel, a practice that had driven the proliferation of M&A lawsuits several years ago.
 - *C&J Energy Services, Inc. v. City of Miami Gen. Employees' & Sanitation Employees' Retirement Trust*, 107 A.3d 1049 (Del. 2014): In *C&J Energy*, the Delaware Supreme Court reversed the Court of Chancery's injunction against a stockholder vote where the plaintiff failed to plead that a majority of the directors had a conflict of interest or that stockholders were not fully informed. The decision has made it even more difficult to obtain an injunction against a merger in the absence of a disclosure violation or active topping bid.
 - *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015): In *Corwin*, the Delaware Supreme Court held that a fully informed and uncoerced vote of a majority of disinterested stockholders to approve a third-party merger will invoke the protections of the business judgment rule. As such, *Corwin* has made it easier for defendants to obtain a dismissal of litigation at the pleading stage and, in turn, made it more difficult for plaintiffs to pursue monetary damages after closing.
- *There is a notable migration of stockholder litigation from state courts to federal courts.*
 - In 2017, federal filings challenging mergers increased by 20% over 2016. As noted above, this is likely being driven by a desire by plaintiffs' lawyers to avoid filing in Delaware state court. The Third Circuit (which includes Delaware) was the most active federal circuit last year.
- *Two of the most significant trends are the growing number of cases that are withdrawn by plaintiffs after filing and fewer lawsuits are being settled.*
 - There has been a rapid increase in the number of lawsuits being voluntarily dismissed by plaintiffs. In 2017, 52% of M&A lawsuits were voluntarily dismissed, compared to 17%, 18%, and 19% in 2012, 2013, and 2014, respectively. Readers should be careful not to infer too much from this statistic, however. Many of the federal cases have been withdrawn after the target companies supplemented their disclosures to "moot" the plaintiff's claims. It is possible that the plaintiffs still seek attorneys' fees for the "benefit" purportedly conferred by the litigation.
 - Similarly, fewer lawsuits are being settled. In 2017 and 2016, 20% and 30% of cases were settled (although 24% of 2017 cases remained pending when Cornerstone Research's report was published). In contrast, 74%, 70%, and 65% of M&A lawsuits were settled in 2012, 2013, and 2014, respectively. A key reason for this trend is the difficulty in seeking court approval and an award of attorneys' fees for non-monetary settlements following *Trulia*, discussed above.
- *Appraisal petitions remained active in 2017.*
 - With 62 appraisal petitions filed in Delaware courts, 2017 saw the second-highest number of appraisal actions within the 12-year period covered by Cornerstone Research, although it was notably lower than the 85 petitions filed in 2016. This data, however, does not reflect appraisal demands that were settled or withdrawn prior to a petition's filing in court.
 - Recent Delaware cases, including *Dell, AOL Inc., Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, and *Merlin Partners, LP v. SWS Group, Inc.*, have provided significant guidance on appraisal valuation, making it less likely that plaintiffs can

establish a “fair value” in excess of a merger price produced by arms-length bargaining—and in some cases, appraisal petitioners have been awarded a “fair value” below the deal price. Thus, the drop in appraisal petitions from 2016 to 2017 is likely to continue. It is unclear, however, whether they will reach the number of petitions filed in 2010–2012 (~22).

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