

Client Alert

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The Recent Decline in M&A Litigation

Cornerstone Research recently announced its study showing that the number of public company M&A transactions subject to stockholder litigation in 2015 and the first half of 2016 was 84% and 64%, respectively. This is a marked drop from prior years, where over 90% of M&A transactions were challenged by stockholders.

Other noteworthy observations from [Cornerstone Research](#) include:

- The average number of lawsuits filed against each transaction fell from 4.6 in 2014 to 2.9 in the first half of 2016;
- 57% of the litigation was limited to a single jurisdiction instead of multiple jurisdictions; and
- Only 56% of litigation in the first half of 2016 was resolved before the transaction closed, compared to 75% in 2014.

The decline is directly attributable to several recent legal developments in Delaware that:

- enforced exclusive forum bylaws, thus limiting the ability of plaintiffs' lawyers to forum shop¹;
- refused to approve disclosure-only settlements of claims with questionable merit²;
- gave greater protection to outside directors even when the transaction involves an interested party³; and
- gave greater deference to an informed stockholder vote that approves the transaction.⁴

The study also reveals that litigation outside of Delaware involving Delaware corporations is increasing.⁵ Specifically, only 36% of lawsuits involving a Delaware target corporation were litigated in Delaware during the first half of 2016, compared with 74% in 2015. In addition, another recent study by Cornerstone Research indicates that the number of federal securities class actions involving mergers and acquisitions has more than doubled in the first half of 2016. Although exclusive forum bylaws can be adopted to reduce forum-shopping and multi-forum litigation, the continuation of this trend will depend on the willingness of other state courts to adopt at least some of the recent legal developments in Delaware.

¹ See 8 DEL. C. § 115 (authorizing exclusive forum bylaws); *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013). Several courts outside of Delaware have also upheld exclusive forum bylaws. See *Roberts v. Triquint Semiconductor, Inc.*, CC 1402-02441, 1403-02757; SC S062642 (Or. Sup. Ct. Dec. 10, 2015); *Daugherty v. Ahn*, Cause No. CC-11-06211 (Cnty. Ct. No. 3, Dallas Cnty. Tex., Feb. 15, 2013); *HEMG Inc. v. Aspen Univ.*, No. 650457/13 (N.Y. Sup. Ct. Nov. 4, 2013); *Miller v. Beam*, No. 2014 CH 00932 (Ill. Cook Cnty. Mar. 5, 2014); *Groen v. Safeway Inc.*, No. RG14716641 (Cal. Sup. Ct. Order May 14, 2014).

² See, e.g., *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016); *In re Aruba Networks, Inc. S'holder Litig.*, C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015) (TRANSCRIPT).

³ See *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173 (Del. 2015).

⁴ See *Corwin v. KKR Financial Holdings*, 125 A.3d 304 (Del. 2015); *Singh v. Attenborough*, 137 A.3d 151 (Del. 2016).

⁵ Similar observations were made by Professor Stephen Bainbridge. See *Is Trulia Really Working?*, at <http://www.professorbainbridge.com/professorbainbridge.com/2016/08/is-trulia-really-working.html> (Aug. 3, 2016).

M&A litigation remains in flux as plaintiffs' lawyers assess these developments. In January, we offered several observations for the [shifting landscape in M&A litigation](#), many of which have already proven true, including:

- Plaintiffs' counsel will become more selective in bringing lawsuits. Mergers involving conflicts of interest (e.g., management-led buyouts and controlling stockholder freeze-outs) will be much more likely to be targeted than third-party transactions.
- Plaintiffs may find that litigating outside of Delaware is more appealing. Delaware companies can try to safeguard against this threat by adopting exclusive forum bylaws.
- Disclosure-only settlements will face significant scrutiny in Delaware going forward. Mundane supplemental disclosures will be unlikely to justify a broad release of claims covering the process in which the merger was approved.
- Releases will be more narrowly tailored to the allegations, the actual work done by the plaintiffs' counsel, and the benefits provided by the settlement.

It remains too early to conclude that the recent decline in M&A litigation reflects the new normal, but certainly the ubiquitous "deal tax" imposed in the past five years has fallen considerably.

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