

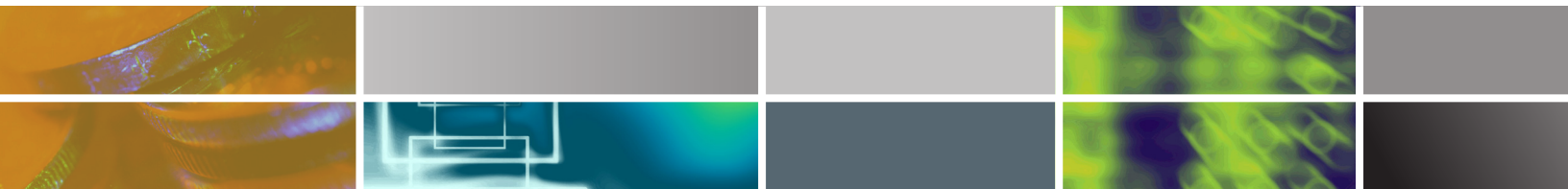
CORNERSTONE RESEARCH

Economic and Financial Consulting and Expert Testimony

Shareholder Litigation Involving Acquisitions of Public Companies

Review of 2014 M&A Litigation

Filings | Litigation Outcomes | Settlements



Background

This report looks at litigation challenging M&A deals valued over \$100 million announced from 2007 through 2014, filed by shareholders of public target companies.

These lawsuits usually take the form of a class action. Plaintiff attorneys typically allege that the target's board of directors violated its fiduciary duties by conducting a flawed sales process that failed to maximize shareholder value. Common allegations include the failure to conduct a sufficiently competitive sale, the existence of restrictive deal protections that discouraged additional bids, and conflicts of interest, such as executive retention post-merger or change-of-control payments to executives. Another typical allegation is that the target board failed to disclose enough information about the sale process and the financial advisor's valuation.

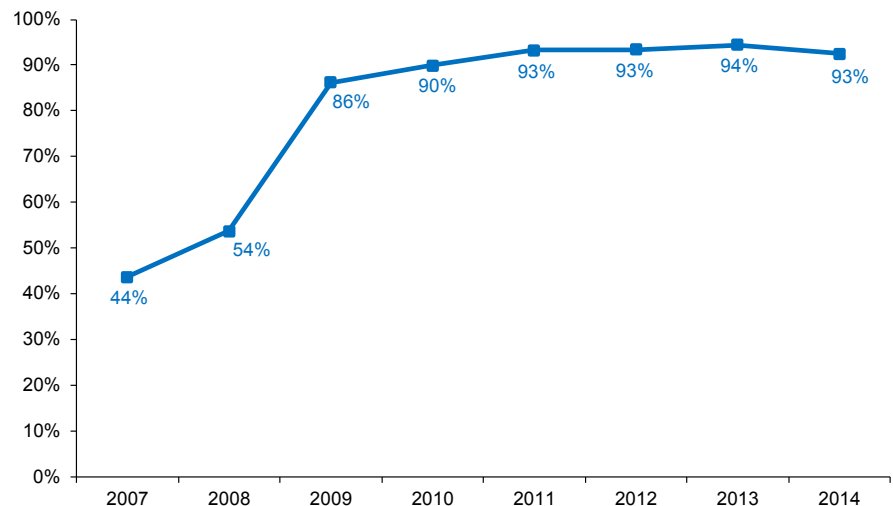
This report discusses lawsuit filings, outcomes, and settlement terms. A forthcoming report will discuss plaintiff attorney fees.

HIGHLIGHTS

There are signs that shareholder M&A litigation subsided slightly in 2014. Although 93 percent of M&A deals valued over \$100 million were litigated, plaintiffs brought a smaller number of competing lawsuits for the same deal and in fewer competing jurisdictions, challenged fewer deals valued below \$1 billion, and took slightly longer to file a lawsuit.

- Unlike recent years, the majority of litigation for 2014 deals was filed in only one jurisdiction (60 percent). This is likely a result of widespread adoption of forum selection clauses in corporate bylaws. Just 4 percent of the deals were challenged in more than two courts, the lowest number since 2007. (page 3)
- The average number of lawsuits per deal declined, from 5.2 in 2013 to 4.5 in 2014. (page 2)
- In 2014, 59 percent of lawsuits were resolved before deals closed, compared with 74 percent in 2013. The 2014 percentage was the lowest since 2008. (page 4)
- Only one M&A case in the data went to trial in 2014; it resulted in a \$76 million damages award. (page 4)
- Similar to prior years, almost 80 percent of settlements reached in 2014 provided only additional disclosures. Just six settlements involved payments to shareholders. (page 5)

Figure 1: Percentage of M&A Deals Challenged by Shareholders (by deal year)



Source: Thomson Reuters SDC; SEC Filings

Note: Percentages have been rounded to the nearest whole number.

FILINGS

Most litigated deals of 2014 (by number of lawsuits)

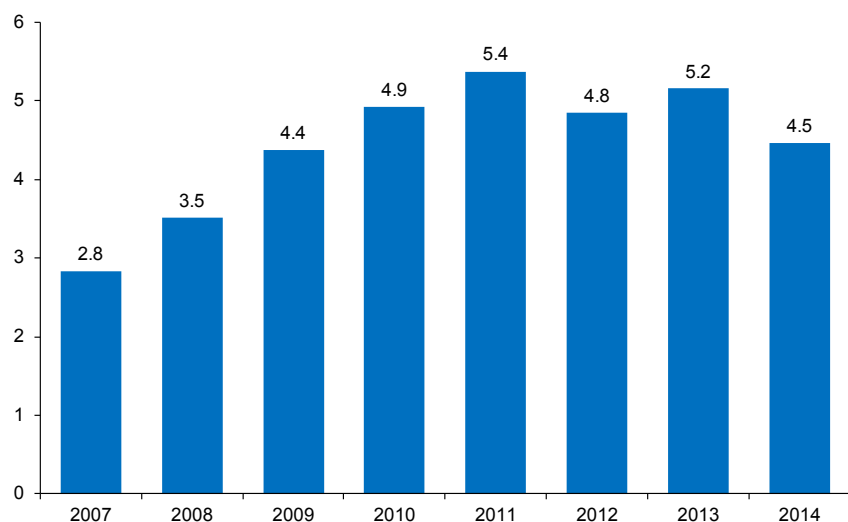
Fusion-io Inc./SanDisk Corp.	22
International Game Technology/GTECH S.p.A.	21
Safeway Inc. Buyout	14
American Realty Capital Healthcare Trust Inc./Ventas Inc.	13
Pepco Holdings Inc./Exelon Corp.	13
Lorillard Inc./Reynolds American Inc.	12
Avanir Pharmaceuticals Inc./Otsuka Pharmaceutical Co. Ltd.	12
Questcor Pharmaceuticals Inc./Mallinckrodt PLC	11
TIBCO Software Inc. Buyout	11

Top three in 2007–2014

Genentech Inc. (2008)	30+
Dynegy Inc. (2010)	29
Dell Inc. (2013)	26

- Plaintiff attorneys filed lawsuits in 93 percent of all M&A deals announced in 2014 and valued over \$100 million, a total of 608 lawsuits.
- The percentage of deals challenged in litigation remained high at 96 percent for deals valued over \$1 billion, but declined for deals valued under \$1 billion, from 94 percent in 2013 to 89 percent in 2014.
- For all deals, the average number of lawsuits per deal declined to 4.5, the lowest level since 2009 (Figure 2).
- The average number of lawsuits per deal declined for both larger (valued over \$1 billion) and smaller (valued under \$1 billion) deals—5.7 for larger deals (compared with 6.2 in 2013) and 3.2 for smaller deals (compared with 4.4 in 2013).
- The number of deals with more than 10 filings decreased, from 14 in 2013 to nine in 2014.
- Lawsuits were filed more slowly in 2014. The first lawsuit was filed an average of 14 days after the deal announcement, compared with 11 days in both 2012 and 2013.

Figure 2: **Average Number of Lawsuits per M&A Deal
(by deal year)**



JURISDICTIONS

Most active state courts 2014 (by number of deals litigated)

Delaware	74
California	22
New York	10
Maryland	10
Michigan	6

- In 2014, 60 percent of M&A litigation was filed in only one jurisdiction. This is a reversal from the 2009 to 2013 period, when multi-jurisdictional litigation prevailed (Figure 3). This is likely a result of widespread adoption of forum provisions in corporate bylaws, which specify exclusive jurisdiction for lawsuits alleging breach of fiduciary duties. More than 300 companies adopted such provisions in 2013 and 2014.
- Only 4 percent of 2014 deals were challenged in three or more jurisdictions, down from a peak of 20 percent in 2011.
- For acquisitions of Delaware-incorporated companies, the Delaware Court of Chancery gained ground as a filing destination, likely reflecting the choice of this court as the exclusive litigation forum. Plaintiffs filed in Delaware for 88 percent of the deals, close to 82 percent at its peak two years ago (Figure 4).

Figure 3: **Number of Jurisdictions per M&A Deal (by deal year)**

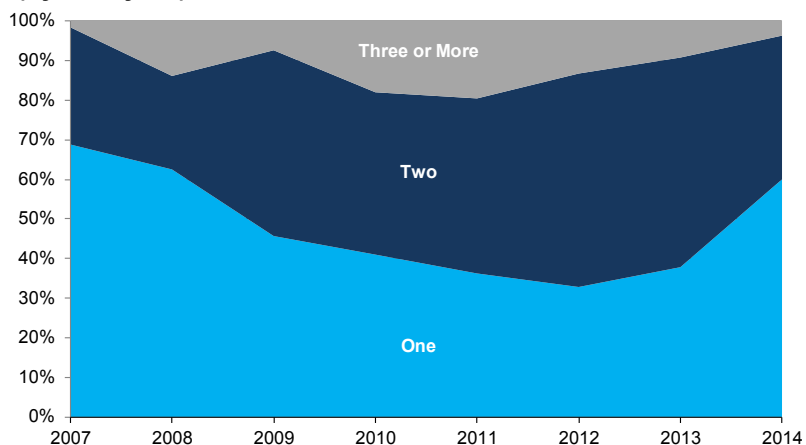
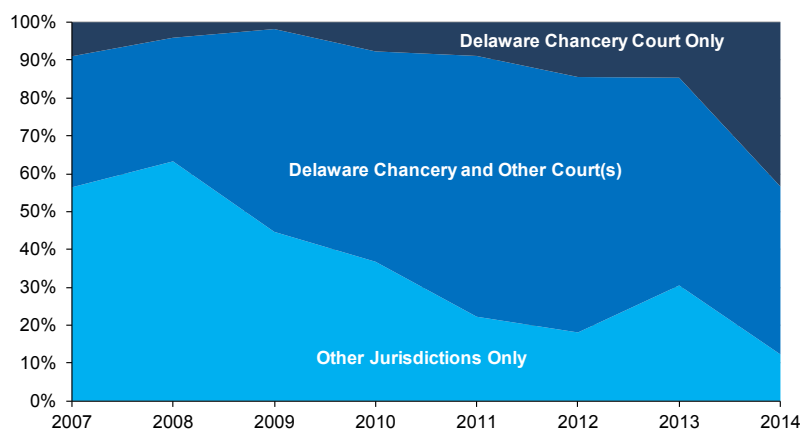


Figure 4: **Jurisdiction for Acquisitions of Companies Incorporated in Delaware (by deal year)**



Source: Thomson Reuters SDC; SEC Filings

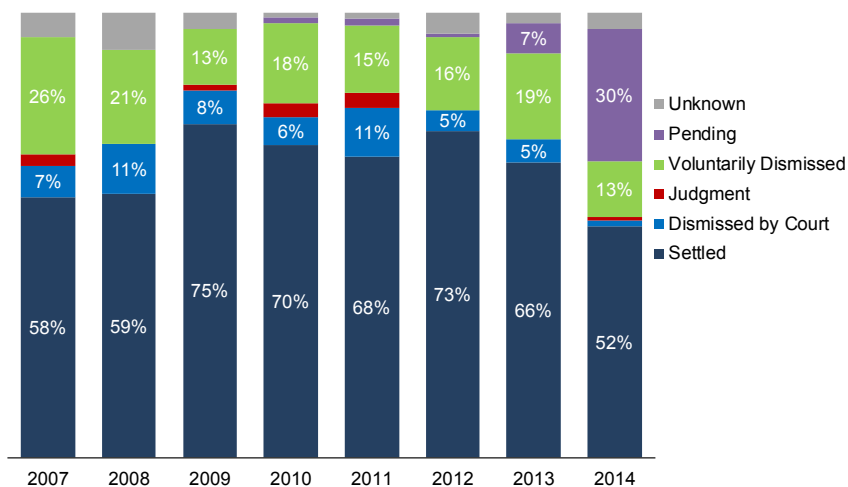
LITIGATION OUTCOMES

Percentage of M&A deals for which litigation was resolved before closing (by deal year)

2007	66%
2008	54%
2009	78%
2010	74%
2011	73%
2012	78%
2013	74%
2014	59%

- In each of the previous five years, over 70 percent of litigation was resolved before deal closing. In 2014, however, only 59 percent of such deals reached a litigation outcome. It remains to be seen whether plaintiffs are successful in post-closing M&A litigation.
- Overall, the majority of the resolved 2014 M&A litigation settled, consistent with prior years (Figure 5).
- Historically, of litigation that was resolved before deal closing, close to 90 percent settled, and the remainder was either withdrawn by plaintiffs or dismissed by courts. In cases for which litigation was resolved after a merger closing, only 15 to 20 percent reached a settlement; the majority was either dropped by plaintiffs or dismissed by the courts.
- Only one lawsuit proceeded to trial in 2014. This case was related to the 2011 buyout of Rural/Metro Corp. by Warburg Pincus LLC. While Rural/Metro’s directors and one of its advisors settled for \$11.6 million, another advisor, RBC Capital Markets LLC, decided to litigate. In March 2014, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery ruled that RBC was liable because it planned to provide financing to the acquirer, without telling the Rural/Metro directors, and in October awarded damages of \$75.8 million.

Figure 5: Litigation Outcomes for All M&A Deals (by deal year)



Source: Thomson Reuters SDC; SEC Filings; Dockets

SETTLEMENTS

Monetary settlements (by deal year)

2014 Settlements	\$ millions
Plains Exploration & Production Co. (2012)	\$137.5
Jefferies Group LLC (2012)	\$70.0
Gardner Denver Inc. (2013)	\$29.0
Epicor Software Corp. (2011)	\$18.0
Cole Real Estate Inc. (2013)	\$14.0
ArthroCare Corp. (2014)	\$12.0

2013 Settlements

CNX Gas (2010)	\$42.7
BMC Software Inc. (2013)	\$12.4
Infogroup (2010)	\$13.0
Rural/Metro Corp. (2011)	\$11.6

2010–2012 Settlements over \$20 million

El Paso Corp. (2011)	\$110.0
Delphi Financial Group Inc. (2011)	\$49.0
Del Monte Food Inc. (2010)	\$89.4
Laureate Education Inc. (2007)	\$35.0
GSI Commerce Inc. (2011)	\$23.7
Kinder Morgan (2006)	\$200.0
Intermix Media Inc. (2005)	\$45.0

- Of the 78 settlements reached in 2014 for which data are available, only six (8 percent) provided monetary consideration to shareholders, consistent with historical numbers (Figure 6).
- Settlements for additional disclosures remained prevalent. Nearly 80 percent of settlements reached in 2014 provided only disclosure.
- Seven of the 2014 settlements (9 percent) included changes to deal protection provisions in the merger agreements.
- Parallel to the increasing share of M&A filings in the Delaware Court of Chancery, the percentage of Delaware-incorporated target companies that settled in that jurisdiction increased to 56 percent in 2014 (Figure 7).

Figure 6: Settlement Terms
(by settlement year)

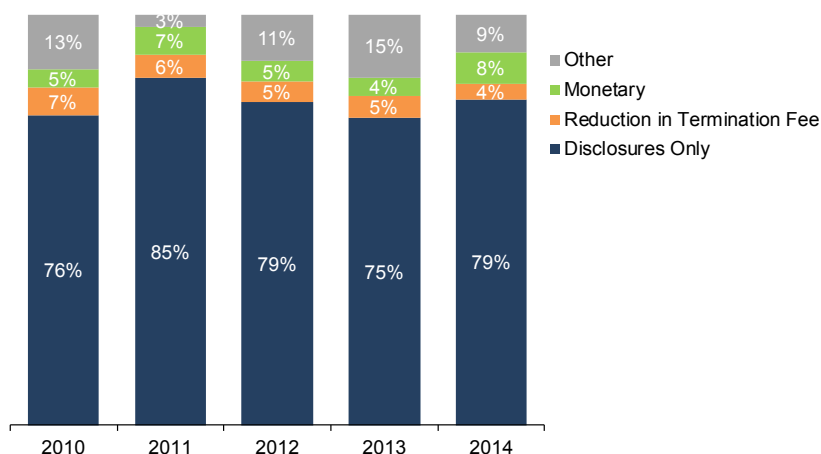
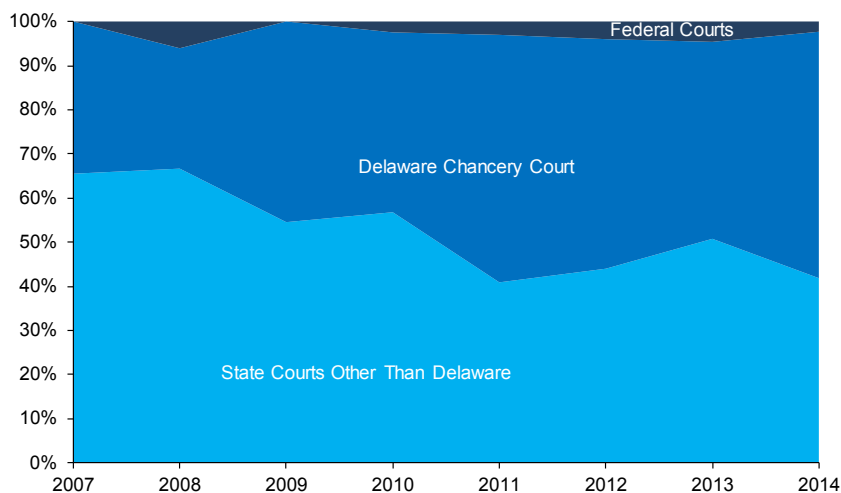


Figure 7: Settlement Court
(by settlement year)



The views expressed in this report are solely those of the author, who is responsible for the content, and do not necessarily represent the views of Cornerstone Research.

Please direct any questions, comments, or requests for information to Olga Koumrian. The author requests that you reference Cornerstone Research in any reprint of the tables or figures included in this study.

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Olga Koumrian, a principal of Cornerstone Research, has more than ten years of experience providing economic analysis in commercial litigation matters. Ms. Koumrian has managed a variety of cases involving corporate transactions, corporate governance, valuation, and damages. She has worked on corporate transaction cases involving mergers, acquisitions, leveraged buyouts, venture capital investments, assets sales, spin-offs, and dividend payments. Ms. Koumrian has analyzed merger agreements and valuations as well as acquisition-related disclosures and board and management conduct in the sales process.

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