

CORNERSTONE RESEARCH

Recent Developments in
Shareholder Litigation Involving
Mergers and Acquisitions

March 2012 Update

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RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION
INVOLVING MERGERS AND ACQUISITIONS

MARCH 2012 UPDATE

Shareholder litigation challenging merger and acquisition (M&A) deals has increased substantially in recent years. To study this increase and characterize the recent litigation, Cornerstone Research and Professor Robert Daines of the Stanford Law School reviewed reports of M&A shareholder litigation in Securities and Exchange Commission (SEC) filings related to acquisitions of U.S. public companies valued over \$100 million and announced in 2010 or 2011.¹ We found that almost every acquisition of that size elicited multiple lawsuits, which were filed shortly after the deal's announcement and often settled before the deal's closing. Only a small fraction of these lawsuits resulted in payments to shareholders; the majority settled for additional disclosures or, less frequently, changes in merger terms, such as deal protection provisions.

In this updated report, we provide statistics on recent M&A shareholder lawsuits, describing their prevalence, filing timelines, venue choices, outcomes, and settlement terms. We have added 2008 and 2009 data to the historical trends as well as an analysis of litigation by industry and plaintiff attorney fees over time. We have also updated the analyses with data available as of March 2012.

TYPICAL ALLEGATIONS

Shareholder lawsuits objecting to an M&A transaction usually are filed as class actions or derivative suits. Shareholders 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 deal terms not resulting from a sufficiently competitive auction, the existence of restrictive deal protections² that discouraged additional bids, or the impact of various conflicts of interests, such as executive retention or change-of-control payments to executives. Complaints also typically allege that a target's board failed to disclose sufficient information to shareholders to enable their informed vote. Insufficient disclosure allegations have focused on information related to the sale process, the reasons for the board's actions, financial projections, and the financial advisors' fairness opinions.

PREVALENCE

We identified 789 lawsuits filed for acquisitions of U.S. public companies valued at or over \$100 million announced in 2010, and 740 lawsuits filed for such deals announced in 2011. As of late March 2012, sixty-seven lawsuits have already been reported for thirteen out of seventeen deals announced during January and February 2012.

To examine a historical trend, we compared the number of M&A shareholder lawsuits valued at or over \$500 million for deals announced in 2007 to 2009 with those announced in 2010 and 2011 and found that the number of lawsuits increased almost twofold (Table 1).

Because M&A activity declined in 2010 and 2011 compared with 2007,³ the increase in the number of lawsuits translates into a much higher incidence of lawsuits for 2010 and 2011 deals. Whereas only about half of the acquisitions announced in 2007 and valued at or over \$500 million were challenged, almost every such acquisition in 2010 and 2011 was the target of litigation, and each challenged deal attracted many more lawsuits (Figure 1 and Table 1). As deal activity slowed dramatically during the recession, the percentage of litigated deals grew in 2008 and almost reached the current level in 2009. With deal activity increasing in 2010 and 2011 compared with 2008 and 2009, the majority of deals still attracted lawsuits, leading to an upsurge in the number of filed cases.

GROWTH IN M&A SHAREHOLDER CHALLENGES, 2007–2011
ACQUISITIONS VALUED AT OR OVER \$500 MILLION

	2007	2008	2009	2010	2011
Number of lawsuits filed	289	201	250	557	502
Number of deals litigated	103	48	48	103	81
Number of lawsuits per deal	2.8	4.2	5.2	5.4	6.2

Table 1

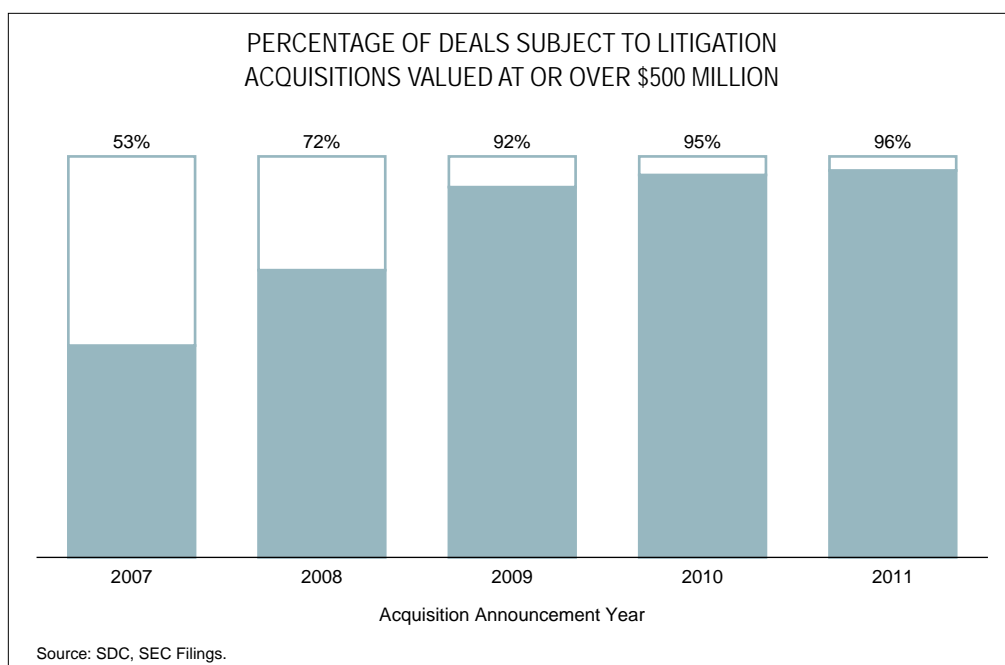


Figure 1



The high incidence of shareholder litigation is not limited to the largest deals. As shown in Table 2, the vast majority of deals announced in 2010 and 2011 and valued between \$100 million and \$500 million were also challenged with multiple lawsuits per deal.

INCIDENCE OF LITIGATION BY DEAL VALUE
ACQUISITIONS VALUED AT OR OVER \$100 MILLION ANNOUNCED IN 2010–2011

	Over \$1 Billion	\$500 Million to \$1 Billion	\$100 Million to \$500 Million	All Over \$100 Million
Percentage of deals litigated	96%	95%	85%	91%
Number of lawsuits per deal	6.1	4.7	4.1	5.1

Table 2

Table 3 shows the most litigated deals of 2007 to 2011—those that attracted fifteen or more lawsuits. Only four deals announced in 2007 to 2009 made the list, all of which were more than \$27 billion in value. In contrast, the list includes twelve deals announced in 2010 and 2011, which ranged in value from \$280 million to \$29 billion. While the value of a deal may contribute to the likelihood of M&A litigation, these data show that deal size is not the only determinant of the recent litigation activity. The Blackstone acquisition of Dynege, for example, attracted the most lawsuits among 2010 and 2011 deals but was valued at less than \$1 billion. Relatively small acquisitions of Conexant Systems, Force Protection, and American Oil & Gas also attracted more than fifteen lawsuits.

DEALS WITH FIFTEEN OR MORE LAWSUITS FILED
ACQUISITIONS VALUED AT OR OVER \$100 MILLION ANNOUNCED IN 2007–2011

Target	Acquirer	Year	Deal Value (Millions)	Number of Lawsuits Filed
Genentech	Roche Holding	2008	\$46,700	over 30
Dynege	Blackstone	2010	\$600	29
Medco Health Solutions	Express Scripts	2011	\$29,370	22
El Paso Corp.	Kinder Morgan	2011	\$24,000	22
Novell	Attachmate	2010	\$2,200	19
Conexant Systems	Standard Microsystems	2011	\$280	18
Qwest Communications	CenturyLink	2010	\$22,400	17
Force Protection	General Dynamics	2011	\$390	17
Schering-Plough	Merck	2009	\$38,400	17
Motorola Mobility Holdings	Google	2010	\$12,450	16
American Oil & Gas	Hess	2011	\$440	16
J. Crew Group	Leonard Green and TRG	2010	\$3,000	16
Alltel	TPG, GS Capital Partners	2007	\$27,500	16
Anheuser-Busch	InBev	2008	\$52,200	16
Del Monte Foods	KKR, Vestar, Centerview	2010	\$4,000	15
Brigham Exploration	Statoil	2011	\$4,407	15

Table 3

Table 4 shows litigation activity by industry. The energy industry attracted the most lawsuits per deal, with Dynegy being the most litigated recent deal, and El Paso, American Oil & Gas, and Brigham Exploration also making the list. The financial and other services industries attracted the least lawsuits per deal.

INCIDENCE OF LITIGATION BY INDUSTRY
ACQUISITIONS VALUED AT OR OVER \$100 MILLION ANNOUNCED IN 2010–2011

Industry	Deals	Average Deal Value (Millions)	Lawsuits	Average Number of Lawsuits per Deal
Energy	30	\$4,602	259	8.6
Consumer Goods	29	\$1,823	174	6.0
Industrial	20	\$2,751	101	5.1
Transport, Travel and Utilities	13	\$1,334	65	5.0
High Technology	83	\$1,489	403	4.9
Telecommunications	8	\$4,038	38	4.8
Healthcare	50	\$2,858	230	4.6
Materials	12	\$3,644	54	4.5
Financial	34	\$1,720	140	4.1
Other Services	19	\$818	65	3.4

Table 4

FILING TIMELINE

Some reports suggest that the increase in the number of lawsuits challenging the same deal has led to a “race to file” lawsuits after a deal is announced.⁴ Our analysis confirms that filings have quickly followed deal announcements but does not show that a “race to file” has reduced the time to file in recent years as compared with 2007. We find that about two-thirds of the lawsuits we identified were filed within two weeks after a deal’s announcement. Filing speed, however, has not increased for deals between 2007 and 2010–2011. On the contrary, as shown in Figure 2, the proportion of lawsuits filed in the first week after a deal’s announcement declined from 55 percent in 2007 to 45 percent in 2010 and to 39 percent in 2011. In all years, a significant percent of lawsuits were filed more than four weeks after a deal’s announcement.



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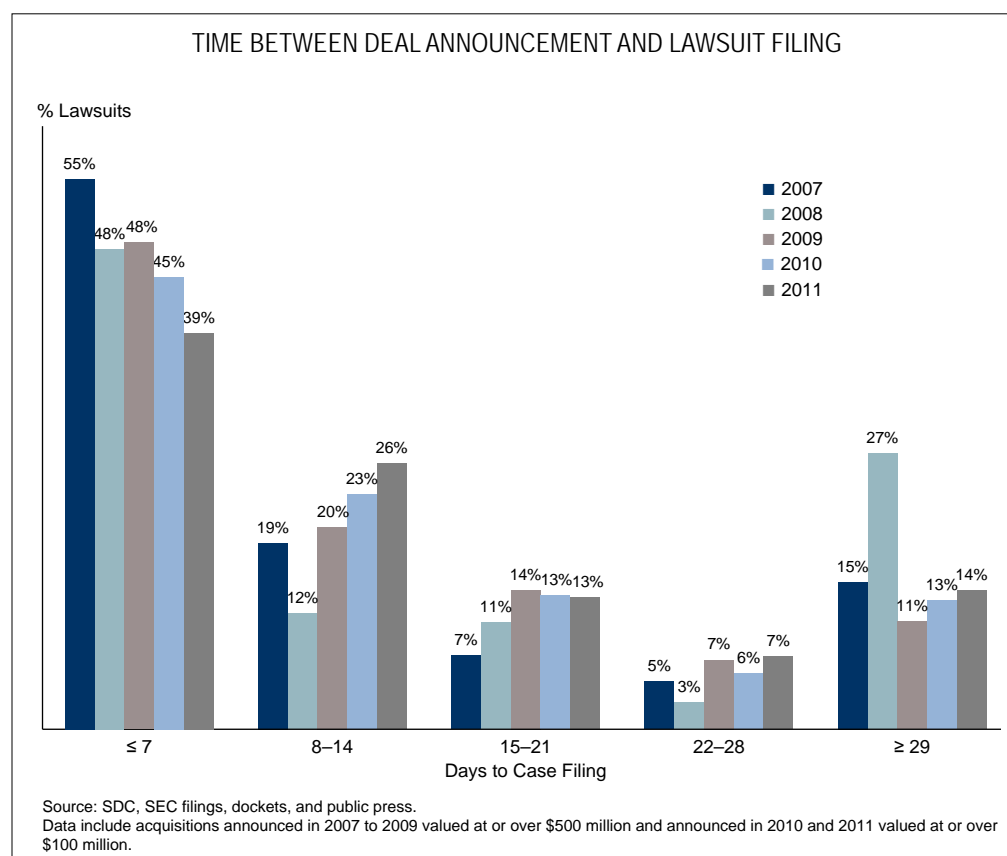


Figure 2



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CHOICE OF VENUE

Traditionally, the Delaware Court of Chancery has been the venue of choice for litigation involving M&A targets incorporated in Delaware.⁵ Beginning in the early 2000s, however, much of this litigation moved to other state courts, a trend that has attracted the attention of academic researchers and industry observers and prompted the term “flight from Delaware.”⁶

Our analysis shows that while a minority of M&A lawsuits involving targets incorporated in Delaware were filed in the Delaware Court of Chancery, the share of M&A lawsuits filed in Delaware was higher in 2011 and has increased steadily since 2008 (see Table 5).

COURT OF FILING FOR LAWSUITS INVOLVING TARGETS INCORPORATED IN DELAWARE
PERCENTAGE OF ALL LAWSUITS FILED
ACQUISITIONS VALUED AT OR OVER \$500 MILLION

Deals Announced	Delaware Court of Chancery	Other State Courts	Federal Court
2007	34%	64%	2%
2008	38%	51%	11%
2009	36%	58%	6%
2010	37%	52%	11%
2011	45%	43%	11%
January–February 2012	45%	53%	2%

Table 5

The most striking trend in venue choice for M&A litigation is not a flight from or return to Delaware, but that challenges to the same deal in both Delaware and some other venue are now more common (see Figure 3⁷).

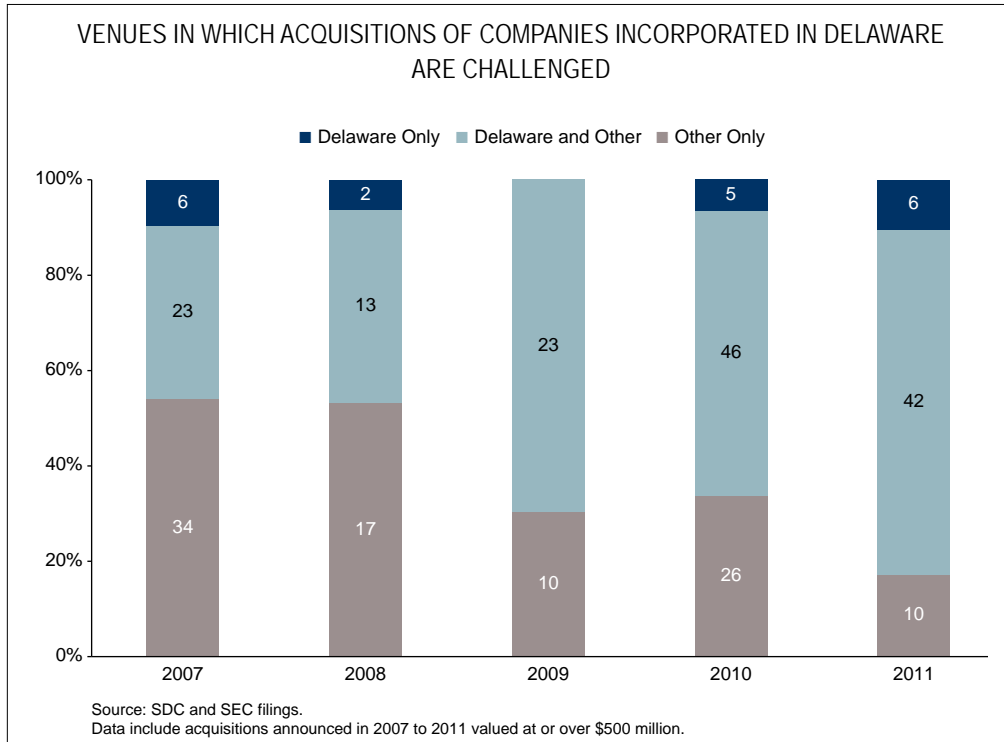


Figure 3



We also examined which state courts (other than the Delaware Court of Chancery) were most active in M&A shareholder litigation involving all targets. Most lawsuits brought in non-Delaware state courts were in California, Texas, and New York, likely reflecting where many deal targets are headquartered. To compare litigation activity across states, in Table 6, we report the average number of lawsuits filed per deal in each state and the average time between the deal announcement and the lawsuit filings. Texas and Illinois had the largest number of competing lawsuits (on average, more than four per deal), and Illinois, Florida, and Washington had the fastest filers (on average, the time to file was less than ten days). The bottom panel of the table shows that, on average, it took much longer to file in federal courts than in state courts.

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STATES (OTHER THAN DELAWARE) IN WHICH SEVEN OR MORE DEALS WERE LITIGATED
ACQUISITIONS VALUED AT OR OVER \$100 MILLION ANNOUNCED IN 2010–2011

	Average Number of Lawsuits per Deal	Average Time to File (Days)	Number of Deals
Texas	4.4	12.4	29
Illinois	4.1	3.8	14
Maryland	3.7	14.0	11
Minnesota	3.6	10.5	11
California	3.4	12.0	60
Florida	3.3	9.5	9
North Carolina	3.1	14.2	7
Washington	3.1	9.2	7
New Jersey	3.0	20.6	8
New York	3.0	12.9	23
Georgia	2.9	10.3	10
Massachusetts	2.3	16.4	15
Pennsylvania	2.1	26.9	19
Delaware Court of Chancery	2.9	14.7	149
Federal	1.7	36.6	98

Table 6

OUTCOMES

The data confirm that M&A shareholder lawsuits typically settle and often settle quickly. We were able to track to resolution 605 challenges of 2010 and 2011 M&A deals (82 percent of all proceeding lawsuits in our sample).⁸ Of these lawsuits, 171 (28 percent) were voluntarily dismissed by the plaintiffs, twenty-six (4 percent) were dismissed by the court with prejudice, and 408 (67 percent) settled (see Figure 4).

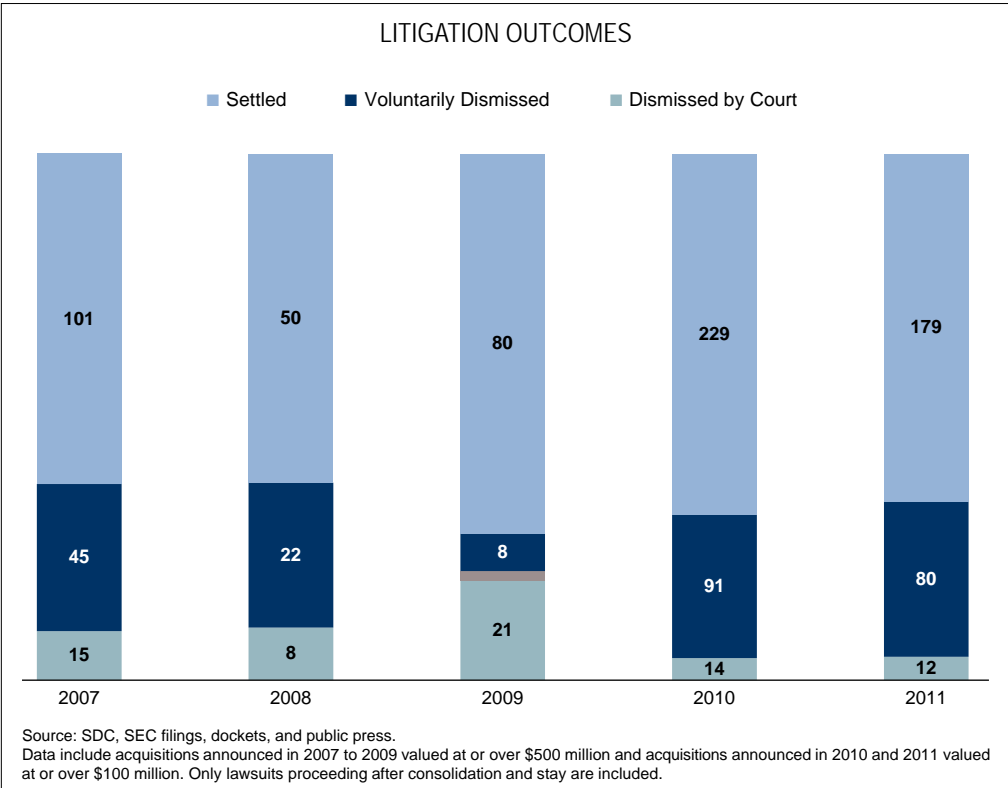


Figure 4

These findings show a significant change from the outcomes observed a decade ago. Thompson and Thomas (2004) examined M&A lawsuits filed in the Delaware Court of Chancery in 1999 and 2000 and found that 59 percent of these were dismissed and only 28 percent settled.⁹

Of the 202 unique settlements¹⁰ we identified, 194 were reached before the merger closed.¹¹ Most of these were reached shortly before a hearing on the plaintiffs' motion for preliminary injunction (restraining order) or shortly before the shareholder vote. The median time between lawsuit filing and settlement in this sample was forty-four days. Table 7 shows the distribution of the settlement time.

TIME BETWEEN LAWSUIT FILING AND SETTLEMENT
ACQUISITIONS VALUED AT OR OVER \$100 MILLION ANNOUNCED IN 2010–2011
UNIQUE SETTLEMENTS

Days between Lawsuit Filing and Settlement	Number of Lawsuits	Percent of All Lawsuits
20 or less	23	13%
21 to 40	42	24%
41 to 60	38	21%
61 to 80	30	17%
81 to 100	18	10%
More than 100	26	15%
Total¹²	177	

Table 7



SETTLEMENT TERMS

Settlement terms have changed over the last decade. Thompson and Thomas (2004) found that for lawsuits filed in Delaware in 1999 and 2000, the majority (52 percent) of settlements included cash awards, and only a fraction (10 percent) involved additional disclosures only.¹³ This distribution has reversed in recent years. Of the 202 unique reported settlements related to 2010 and 2011 M&A deals, only ten (5 percent) resulted in payments to shareholders (Table 8),¹⁴ and a large majority of settlements (166 or 83 percent of the sample) settled for additional disclosures only. Twenty-six settlements (13 percent) included merger agreement changes other than payments to shareholders. Fifteen of these (7 percent of the unique settlements) resulted in modified deal protection provisions (such as termination fee, no-solicitation, and matching rights). Other merger agreement changes included the terms of top-up option and appraisal rights. Eleven settlements (5 percent) involved other terms, most often a delay of the shareholder vote.

PAYMENTS TO SHAREHOLDERS AS PART OF A SHAREHOLDER LITIGATION SETTLEMENT
ACQUISITIONS VALUED AT OR OVER \$100 MILLION ANNOUNCED IN 2010–2011

Deal	Settlement Payment to Shareholders (Millions)
Del Monte Foods/KKR	\$89.4
Delphi Financial/Tokio Marine	\$49.0 ¹⁵
GSI Commerce/eBay	\$24.0
J. Crew Group/Leonard Green	\$16.0
Mediacom Communications MBO	\$10.3
Student Loan Corp./Discover	\$10.0
Talecris Biotherapeutics/Grifols	\$8.1
Atlas Energy/Chevron	\$5.0
Protection One/GTCR	\$3.2
NYSE Euronext/Deutsche Börse	Postmerger dividend to all shareholders of the merged entity

Table 8

The largest of the recent settlements—an \$89 million settlement in October 2011 in the Del Monte Foods buyout—attracted much attention in M&A circles. The case first made headlines in February 2011 when the Delaware Court of Chancery awarded a preliminary injunction of the shareholder vote.¹⁶ The court focused on the allegation that Del Monte’s financial advisor, Barclays Capital, also helped with the buy-side financing of the deal and failed to disclose to the target its relationship with the buyer. Vice-Chancellor Laster opined that Del Monte’s board “fail[ed] to provide the serious oversight that would have checked Barclays’ misconduct.” The final \$89.4 million settlement included a \$23.7 million payment by Barclays.¹⁷

On April 9, 2012, a large settlement was announced for litigation pending in the Delaware Court of Chancery related to Delphi Financial Group’s sale to Tokio Marine Holdings. In a March ruling, Vice-Chancellor Glasscock declined to enjoin the merger but found that plaintiffs showed a likelihood of success in the litigation because of the “troubling” actions of Delphi’s founder and CEO, who negotiated a premium price for the Class B stock he owned compared with the price of the publicly owned Class A stock.¹⁸

PLAINTIFF ATTORNEY FEES

The amount of plaintiff attorney fees was reported for eighty-eight of the 202 settlements.¹⁸ More than half of the settlement reports did not disclose the amount of fees, and there is no information that allows us to determine whether the amounts reported for the eighty-eight settlements are representative of the amounts for the settlements with no fee reports. The average fee reported was \$1.2 million, but the average is heavily influenced by a few large fee awards as shown in Figure 5. Only twenty (23 percent) of the reported attorney fees were \$1 million or higher. On the other hand, 44 percent of the reported attorney fees were at or under \$500,000.



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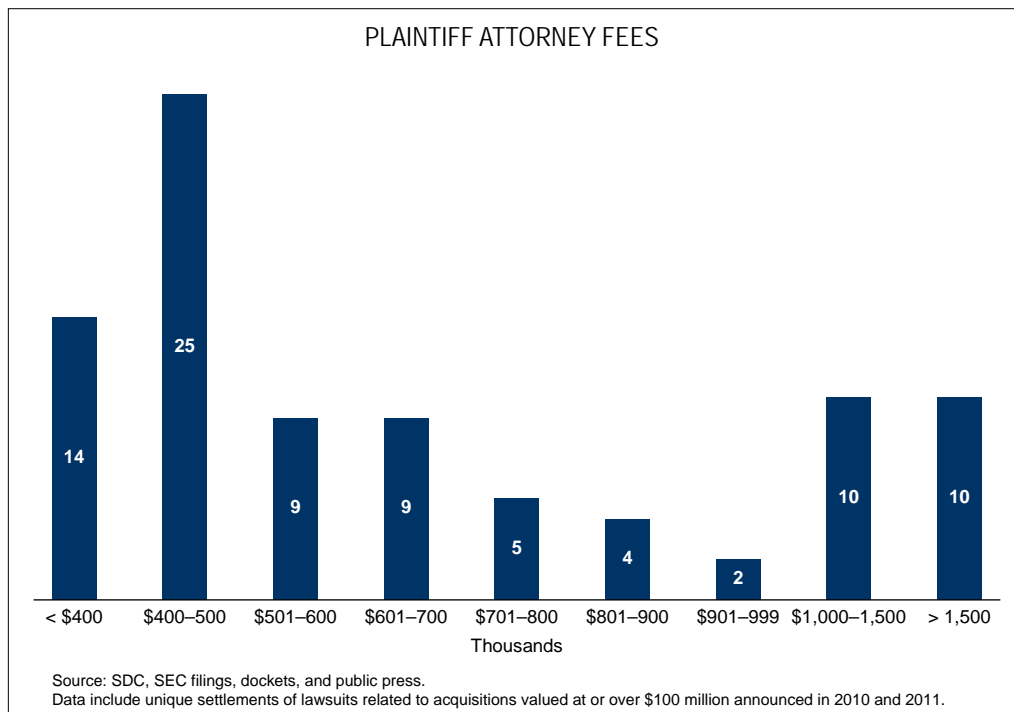


Figure 5

Table 9 shows all identified instances of plaintiff attorney fees in excess of \$2 million in 2010 and 2011.²⁰ By far, the highest fee was in the Del Monte Foods settlement, which also included a large payment to Del Monte's shareholders. However, other large plaintiff attorney fees shown in the table were not necessarily associated with large shareholder payments, and several were not associated with any shareholder payments. The amount of attorney fees relative to the settlement payment also varied greatly—from 7 percent in the case of Student Loan Corporation to 71 percent for Protection One, Inc.

PLAINTIFF ATTORNEY FEES IN EXCESS OF \$2 MILLION IN LITIGATION SETTLEMENTS
ACQUISITIONS VALUED AT OR OVER \$100 MILLION ANNOUNCED IN 2010–2011

Deal	Fees (Millions)	Settlement Payment (Millions)	Other Settlement Terms
Del Monte Foods/KKR	\$25.25	\$89.40	
Coca-Cola Enterprises/Coca-Cola	\$7.5		Reduced termination fee and additional disclosures.
Alberto-Culver/ Unilever	\$6.5		Reduced termination fee and additional disclosures.
Terremark Worldwide/Verizon	\$4.1		Extended tender period by 11 days, eliminated force-the-vote, reduced termination fee, and additional disclosures.
Mediacom Communications MBO	\$3.5	\$10.3	Additional disclosures.
Student Loan Corp./Discover	\$3.5	\$10.0	Additional disclosures.
Arena Resources/SandRidge Energy	\$2.5		Modified no-shop provision and matching rights and additional disclosures.
Protection One/GTCR	\$2.3	\$3.3	Extended appraisal rights, modified the top-up option, and additional disclosures.
Beckman Coulter/Danaher	\$2.3	\$3.3	Extended appraisal rights, modified the top-up option, and additional disclosures.

Table 9

Table 10 shows the average reported plaintiff attorney fees by year of the deal announcement. Average fees as a percentage of deal value in 2010 and 2011 remained higher than in 2007, but slightly declined compared with 2009.

PLAINTIFF ATTORNEY FEES
UNIQUE SETTLEMENTS FOR ACQUISITIONS VALUED AT OR OVER \$500 MILLION

	2007	2008	2009	2010	2011
Number of settlements	29	6	13	43	9
Average fee (millions)	\$1.0	\$5.1	\$2.5	\$1.7	\$1.2
Average deal value (millions)	\$4,047	\$18,756	\$5,756	\$2,293	\$4,969
Average fee as % of deal value	0.05%	0.03%	0.09%	0.08%	0.07%

Table 10



ENDNOTES

- 1 For historical comparison, we also collected information on M&A shareholder litigation of deals valued over \$500 million and announced in 2007 to 2009.
- 2 Typical deal protection provisions of merger agreements include termination (break-up) fees that the target has to pay to the acquirer if the target terminates the deal under certain circumstances, no-solicitation (no-shop) provisions that prevent the target from negotiating with additional bidders unless presented with a potentially superior bid, and matching rights that allow the acquirer to match a superior offer.
- 3 The Thompson Reuters SDC Platinum database reported that 195 deals valued over \$500 million were announced in 2007, and only 108 and 85 such deals were announced in 2010 and 2011, respectively. This count excludes the following acquisitions reported by the SDC:
 - (1) unsolicited bids rejected by the targets;
 - (2) share repurchases, block purchases, and convertible notes tender offers mistakenly reported as acquisitions;
 - (3) foreign targets mistakenly reported as U.S. companies;
 - (4) targets that do not file with the SEC;
 - (5) asset sales from bankruptcy; and
 - (6) second bids for the same target (litigation is often filed for the first bid, and then allegations are modified to address the second bid).
- 4 Mark Lebovitch, "Improving Multi-Jurisdictional, Merger-Related Litigation," Harvard Law School Forum on Corporate Governance and Financial Regulation, May 19, 2011, <http://blogs.law.harvard.edu/corpgov/2011/05/19/improving-multi-jurisdictional-merger-related-litigation/>.
- 5 Of the targets in our sample, two-thirds were incorporated in Delaware.
- 6 Cain, Matthew D., and Steven M. Davidoff, "Delaware's Competitive Reach," *Journal of Empirical Legal Studies* 9 (2012): 92–128. See also John Armour, Bernard Black, and Brian Cheffins, "Delaware's Balancing Act," *Indiana Law Journal* 87 (forthcoming 2012).
- 7 Figure 3 shows the courts of filing on the deal level as opposed to the level of lawsuit shown in Table 5.
- 8 Proceeding lawsuits exclude consolidated and stayed cases.
- 9 Thompson, Robert B. and Randall S. Thomas, "The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions," 57 *Vanderbilt Law Review*, 133 (2004).
- 10 Several lawsuits often settle together. In these cases, all lawsuits are included in the number of settled lawsuits (408), but the settlement is counted only once in the number of unique settlements (201).
- 11 Most target companies stop filing with the SEC after the merger closes, and therefore, data on post-merger settlements are not available in SEC filings.
- 12 The total number of lawsuits where both the filing date and the settlement date were available. In most cases, the settlement date is the date on which the parties signed a memorandum of understanding that first defines the preliminary settlement terms.
- 13 Thompson, Robert B. and Randall S. Thomas, "The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions," 57 *Vanderbilt Law Review*, 133 (2004).
- 14 A tenth company, Buckeye GP Holdings, reported that it agreed to pay \$900,000 "in settlement of the plaintiffs' claims (including any claim against the defendants by the plaintiffs' counsel for attorneys' fees or expenses related to the litigation)." Buckeye GP Holdings Form 10-Q filed on November 8, 2010. It is not clear whether any of this amount was paid to shareholders.
- 15 Plaintiff attorney fees and expenses will be deducted from this amount but have not yet been determined. Press Release, Delphi Financial Group, April 9, 2012.
- 16 *In re Del Monte Foods Company Shareholders Litigation*, C.A. No. 6027-VCL, 2011 WL 532014 (Del. Ch. February 14, 2011), Opinion by Vice-Chancellor Laster.
- 17 *In re Del Monte Foods Company Shareholders Litigation*, "Stipulation and Agreement of Compromise and Settlement," filed with the Delaware Court of Chancery on October 6, 2011.
- 18 *In re Delphi Financial Group Shareholder Litigation*, Memorandum Opinion, Delaware Court of Chancery, March 6, 2012.
- 19 Most of the fee amounts are not the fees eventually approved by courts but the maximum fees agreed upon by the parties, subject to court approval, as described in settlement summaries contained in SEC filings.
- 20 Table 9 does not include plaintiff attorney fees in the recent \$49 million settlement of *In re Delphi Financial Group Shareholder Litigation*. The amount of fees was not determined as of the settlement announcement, although one plaintiff attorney estimated them at 10 percent of the settlement (or \$4.9 million). See "Quartet of Plaintiffs Firm Reach Rare \$49 Million Cash Settlement in Delphi M&A Lawsuit," *The AmLaw Litigation Daily*, April 9, 2012.

ABOUT THE AUTHORS

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An internationally recognized corporate law scholar, Robert Daines is known for his rigorous statistical analysis of empirical data on the relationship between economic theory and corporate practice. He teaches courses on corporations, mergers and acquisitions, and corporate governance. Professor Daines's recent research focuses on merger litigation, corporate governance rankings, and shareholder voting. He is a director of the Rock Center for Corporate Governance at Stanford University and a former member of the NASDAQ Stock Market Review Council. Professor Daines's work has appeared in such top publications as the *Journal of Financial Economics*, the *Journal of Law, Economics and Organization*, and the *Yale Law Journal*. Before moving to Stanford, he taught at New York University School of Law and Yale Law School, and worked as an investment banker in leveraged finance at Goldman Sachs.

Olga Koumrian

Principal, Cornerstone Research

Olga Koumrian has worked across a range of industries and has developed particular expertise in banking and insurance. She has managed a variety of cases involving valuation; financial institutions; mergers, acquisitions, and other corporate transactions; securities; corporate governance; auditor liability; and intellectual property. She has addressed valuation issues involving stocks, bonds, and spectrum rights. Ms. Koumrian has also worked on cases involving mortgage finance, auditor liability, breach of contract in the subprime credit card sector, fraud by an asset-backed securities issuer, trust management fees, and auction rate securities. In the area of corporate transactions, Ms. Koumrian has analyzed merger agreements and acquisition-related disclosures as well as board conduct in the sales process, merger valuations, and board responsibilities related to spin-offs and dividend payments.

Ms. Koumrian has addressed class certification, liability, and damages issues, and has supported experts in all phases of litigation, including expert reports, depositions, district court trials, and international arbitrations.

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