

Client Alert

September 2019

State of M&A Litigation

Cornerstone Research recently published its annual review of public company M&A litigation for 2018. The report indicates that M&A litigation remains prevalent and that the trend towards filing lawsuits in federal court continues.

Here are the key takeaways from Cornerstone Research's [report](#), which examines litigation challenging public company mergers with a value above \$100 million:

- **The number of lawsuits filed has stabilized, but remains high.** Last year, 82% of public company M&A transactions were subject to litigation, the same percentage as in 2017. Although this is a decline from the average of 90% between 2009 and 2015, it indicates that the overwhelming majority of transactions are still challenged.
- **Multiple plaintiffs continue to file lawsuits.** Transactions continue to see multiple lawsuits, with an average of 3.1 complaints filed in 2018. This was consistent with an average of 2.9 complaints filed in 2016 and 2017 and a decline from 5.3 complaints in 2011, the high-water mark from 2009 to 2018. The highest number of complaints filed last year was nine, which occurred in two transactions.
- **The trend towards litigating in federal court continues.** The plaintiffs' bar continues its shift from litigating M&A transactions in state court to federal court. In 2018, 91% of transactions subject to litigation were litigated in federal court. Only 13 of the 142 transactions in the dataset were litigated in the Delaware Court of Chancery. The shift suggests that the plaintiffs' bar is seeking to avoid the scrutiny that Delaware judges have brought to bear on many litigation tactics and questionable settlements.¹ Indeed, the plaintiffs' bar has also avoided the Seventh Circuit, which has adopted the same sort of scrutiny as the Delaware courts.²
- **Multi-forum litigation continues.** Last year, only 45% of transactions were challenged in a single jurisdiction. 43% of transactions were challenged in two jurisdictions, and 12% were challenged in three or more jurisdictions (representing a significant increase from the 4% in 2017).
- **Most M&A lawsuits continue to be voluntarily dismissed, but a significant driver may be mootness fees.** Last year, plaintiffs voluntarily dismissed 70% of the lawsuits. This is a significant shift in practice, as 81% of lawsuits were settled in 2009. Plaintiffs may be dismissing some of these actions because they have determined that they are not worth pursuing, particularly after stockholders have approved the merger and given rise to a ratification defense.³ Many other lawsuits, however, may be giving rise to mootness fees in which the companies provide supplemental disclosure and pay a mootness fee to the plaintiffs' lawyers.⁴

¹ See *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

² See *In re Walgreen Co. S'holder Litig.*, 832 F.3d 718 (7th Cir. 2016).

³ See *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015).

⁴ See generally Matthew D. Cain et al., *Mootness Fees*, VAND. L. REV. (forthcoming 2019).

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