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# **LITIGATION TRENDS IN MERGERS AND ACQUISITION TRANSACTIONS**

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## **TABLE OF CONTENTS**

I.	The Backdrop	3
II.	New Case Law On Claims Frequently Brought By Plaintiff Shareholders In M&A Litigation	4
A.	Paying the Piper: Challenges To Executive Compensation	5
B.	“But We Elected Him”: Litigation Involving Dissident Directors	8
C.	There’s A New Sheriff In Town: Ramifications To Change Of Control	9
D.	How Bad Is Bad? Bad Faith Claims And Defenses	10
E.	Storm Clouds Ahead For M&A Plaintiff’s Counsel -- “Like, Beyond Ivory Soap”	12
F.	Questions Arise Concerning “Don’t Ask, Don’t Tell” Provisions In Standstill Agreements	14
G.	The Push/Pull: Plaintiff Shareholders Want More Information And Directors Want To Give Less	16
III.	Cleaning Up The Mess: What Happens When, After The Transaction Closes, Litigation Is Unresolved?	17
IV.	An Incomplete List Of How To Protect Directors From The Inevitable Litigation That Follows Announced Disclosures	18
V.	“The Times They Are A Changin’”: Proposed Changes To Rules Of Civil Procedure	23
A.	A Summary Of Proposed Changes To The Federal Discovery Rules	23
B.	How Will Changes To Discovery Rules Affect M&A Litigation Practice?	25
	Biography	27

## **I. THE BACKDROP**

Virtually every merger and acquisition (“M&A”) transaction will result in litigation, often class action lawsuits.<sup>1</sup> Shareholders of public companies with capitalizations greater than \$100 million challenged 93% of all M&A transactions in 2012.<sup>2</sup> That statistic grows to 96% for public company targets valued at greater than \$500 million.<sup>3</sup> Following a merger or going private announcement, approximately five lawsuits will be filed, often in more than one jurisdiction.<sup>4</sup> The recent Dell announcement stated that its founder, Michael Dell, and Silver Lake, a private equity firm, intended to take Dell private. This notice resulted in the filing of 21 lawsuits in Delaware Chancery Court and 3 in Texas State Court.<sup>5</sup>

In fact, statistics reveal that the number of M&A cases filed in Delaware Chancery Court is on the rise. In 2012, 39 percent of the cases involving M&A transactions were filed in Delaware, as opposed to 32 percent in 2011 and 25 percent in 2010.<sup>6</sup> In fact, a significant number of suits go to Delaware Chancery Court for approval when litigation is filed in Delaware Chancery Court, as well as in other jurisdictions.

As one would imagine, the claims that plaintiff shareholders make are rather similar. This paper will explore the various claims and expose trends in litigation brought by shareholder plaintiffs and discuss recent cases that have addressed them. In addition, this paper will report

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<sup>1</sup> Robert Daines and Olga Koumrian of Cornerstone Research update shareholder litigation involving M&A statistics yearly and these statistics are as of March 2013. (“Cornerstone Research”).

<sup>2</sup> *See id* at 1.

<sup>3</sup> *See id* at 1.

<sup>4</sup> *See id* at 2.

<sup>5</sup> *See* Steven M. Davidoff, “Debating the Merits of the Boom in Merger Lawsuits,” *Deal Book* (March 8, 2013).

<sup>6</sup> Cornerstone Research at 2.

several suggested changes to the Federal Rules of Civil Procedure that have recently been published and include some comment and advice on how those suggested changes will affect practitioners who labor in the M&A vineyard.

## **II. NEW CASE LAW ON CLAIMS FREQUENTLY BROUGHT BY PLAINTIFF SHAREHOLDERS IN M&A LITIGATION**<sup>7</sup>

When commenting on current trends in M&A litigation, Doug Raymond, a well-regarded expert in M&A transactions, offers a hypothetical which I will shape with the reader and expand on it. The transaction receives Board approval; the fairness opinion is in; the transaction is signed and sealed; and the booze starts to flow.<sup>8</sup> What now, Mr. Director? May I extend the hypothetical to add a quote from the mythical deal lawyer: “Well, let me introduce my senior litigation partner because complaints are being filed in venues throughout the country. The cases involve significant sums of money, are complex, and you had better lawyer-up for the occasion, as in your \$1000/hour type, and his merry band of partners and associates.” Welcome to the reality.

In contrast to years past, today significantly more litigation alleges inadequate disclosure failures and often the case is filed after the transaction has closed. It is a cold world out there for board members. As a result, they must employ prophylactic measures as soon as it becomes clear that a transaction is in the planning stages. The author will address what measures directors

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<sup>7</sup> The author recognizes and acknowledges and wishes to give credit to the excellent scholarship and research of a number of lawyers from Arnold & Porter LLP who authored a firm advisory dated May 2013 (“A&P Advisory”), which may be obtained from the firm’s website. In this paper I have liberally used their work as a framework for this section of the paper, categorization of claims frequently brought by plaintiff shareholders in M&A litigation and cases supporting some.

<sup>8</sup> Raymond, “Protecting Directors from the New Trends in M&A Litigation,” found at Willamette.com, Summer 2013 (“Raymond”).