

How to Prepare for and Defend Against Securities Litigation Stemming From Mergers, Acquisitions and Going Private Transactions

Jeffery A. Dailey
Partner
Akin Gump
Philadelphia

Kathryn M. Pytlewski
VP – Senior Counsel
Dollar Financial Group, Inc.
Berwyn

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Akin Gump
Strauss Hauer & Feld LLP

I. Current Landscape

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

Table from "Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions", March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumraïn

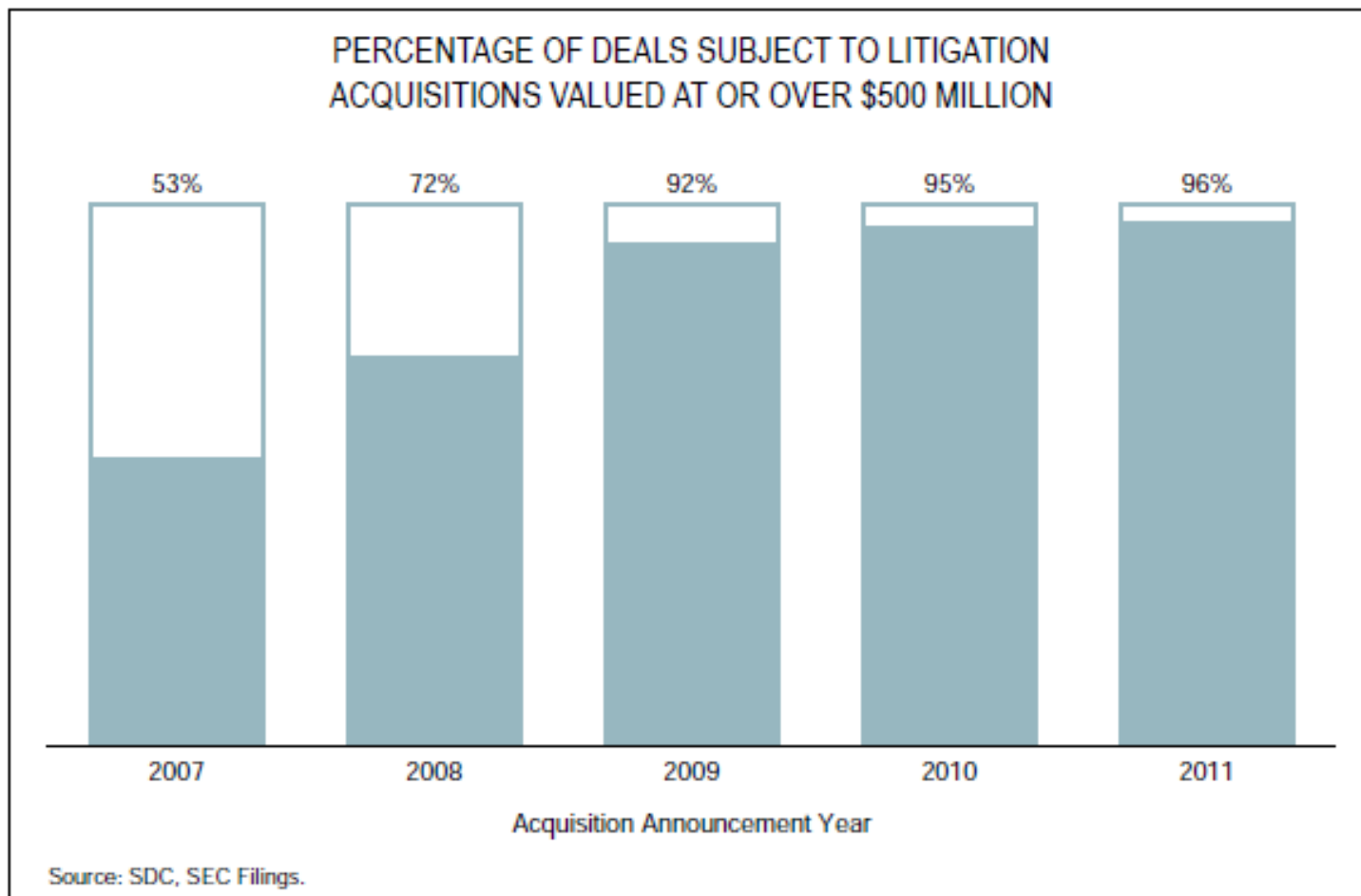


Figure 1

Table from "Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions", March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumraï

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 from "Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions", March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumrain

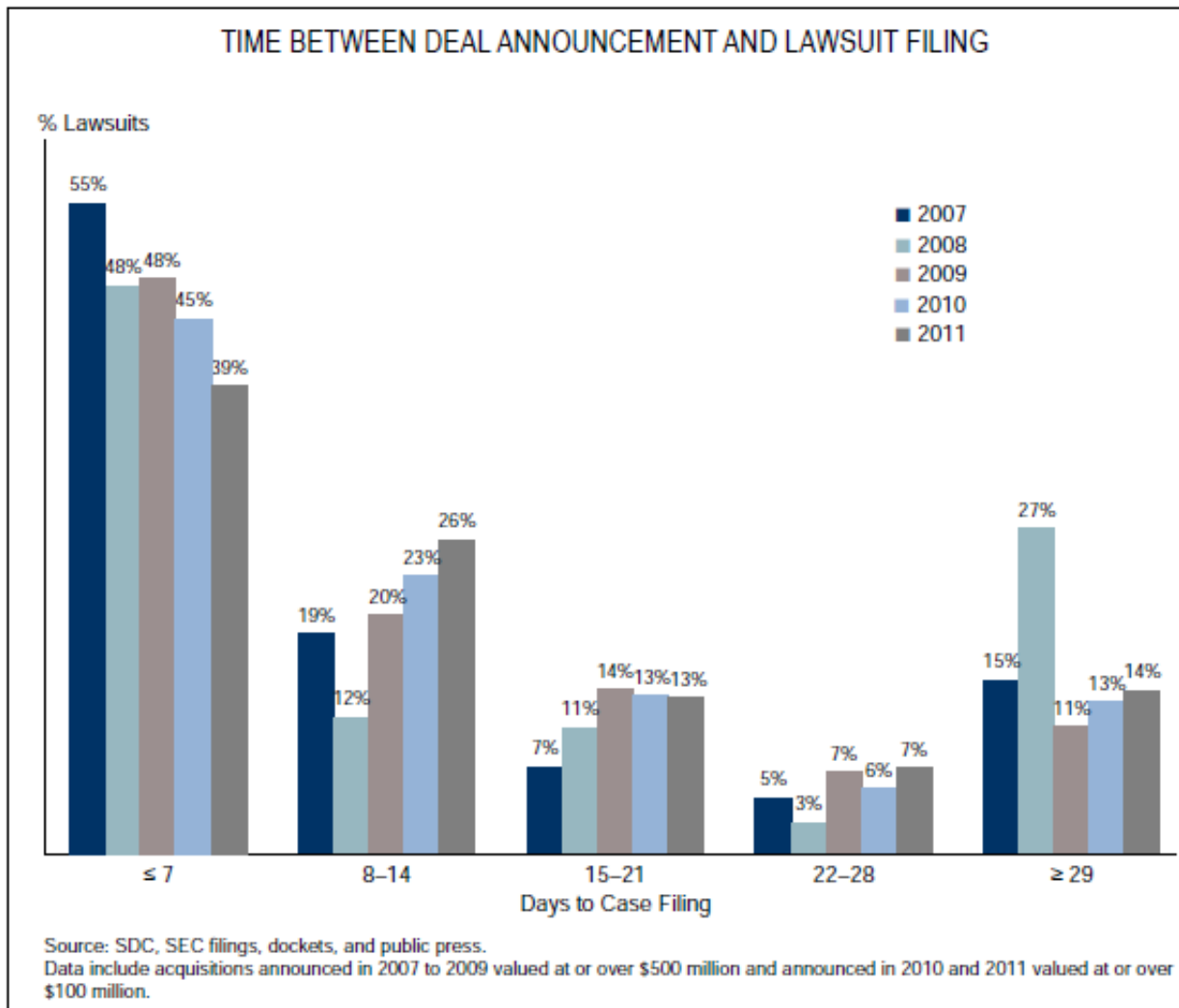


Figure 2

Table from "Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions", March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumraï

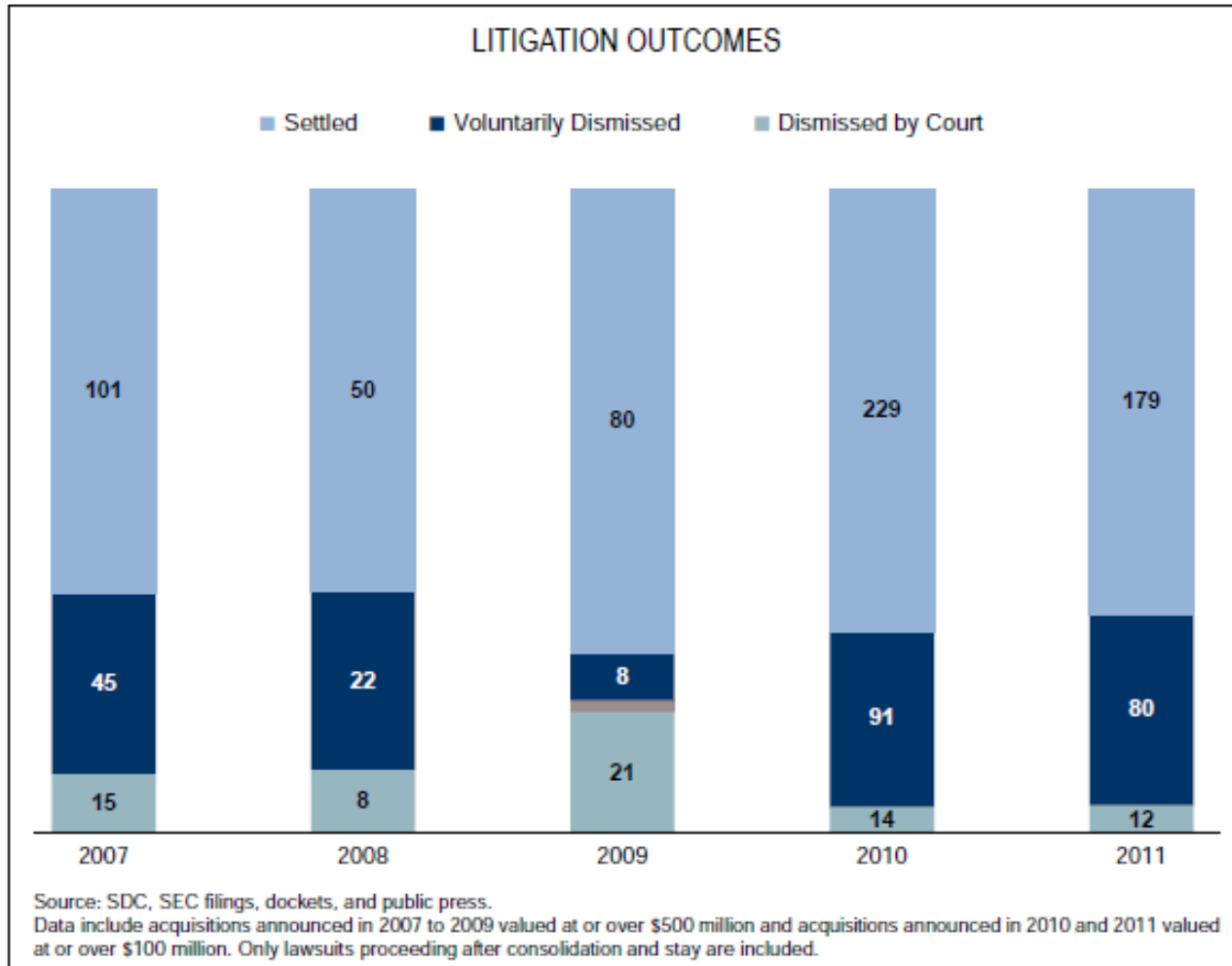


Figure 4

This is a significant change from 1999-2000 when 59% of merger related suits filed in the Delaware Court of Chancery were dismissed and only 28% settled.

Table from "Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions", March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumraïn

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

Table from "Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions", March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumrain

II. Merger Litigation Case Study

Google acquisition of
Motorola Mobility for \$12.5 Billion

A. Deal Announced

- On August 15, 2011 Google announces an all-cash deal to acquire Motorola Mobility for \$12.5 billion, or \$40 a share.
- Price represented a **63% premium** for Motorola Mobility's Shareholders.
- Within hours plaintiffs' securities firms issue press releases that they are investigating whether the Board breached its fiduciary duties to shareholders.

B. Litigation Announced

Motorola Mobility Faces Shareholder Lawsuit In \$12.5 Billion Google Buyout

By [Andrew R Hickey](#), CRN

August 18, 2011 10:02 AM ET

A Motorola (NYSE:[MOT](#)) Mobility shareholder has filed a lawsuit against the company and Google (NSDQ:[GOOG](#)) claiming that [Google's \\$12.5 billion acquisition bid for Motorola Mobility](#) was a low-ball offer and that Motorola Mobility was grossly undervalued in the deal.

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C. The Litigation Multiplies in Number and Across Jurisdictions

- 16 shareholder class actions were filed related to the Google/Motorola Mobility deal.
 - 4 filed in Cook County, Ill., headquarters of MM's former parent.
 - 8 filed in Lake County, Ill., where MM was based.
 - 3 filed in Delaware Chancery Court.
 - 1 filed in Illinois federal Court.
- In general
 - Lawsuits often filed before the preliminary proxy is filed.
 - Suits are filed in state court because primary relief sought is injunctive and they tend to move faster than federal courts.
 - Additional cases usually filed in location of the headquarters or incorporation, so plaintiffs can try to avoid consolidation.
 - Complaints often amended to include allegations based on disclosures in proxy statement.

C. The Litigation Multiplies in Number and Across Jurisdictions(con't)

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
Dynegy	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

C. The Litigation Multiplies in Number and Across Jurisdictions(con't)

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

D. Litigation Allegations

- All actions had same theory that MM, its Board and Google had breached (or aided and abetted a breach) their duty to shareholders. Suits sought to enjoin the transaction.
- Targets Generally
 - The target company
 - Directors and certain officers of the target
 - The Buyer
 - Advisors (maybe)

D. Litigation Allegations (con't)

- Claims generally against: (1) target defendants for breaches of fiduciary duties; and (2) buyers and advisors (sometimes) for aiding and abetting.
- Common allegations:
 - Conflicts of interest.
 - Affiliates or large shareholder involvement
 - Board acceleration of stock appreciation rights.
 - Management negotiation of employment and compensation
 - Advisors dealing on both sides of transaction.
 - Transaction was rushed, ill-considered
 - Agreement inhibits higher offers with preclusive deal terms.
 - Company is being sold for too little in light of recent financial results.
 - Inadequate/misleading disclosures to shareholders
 - Deal is coercive to shareholders
 - Transaction should be enjoined.

E. Procedural fights and Discovery

- Fights to consolidate and stay matters in all but one jurisdiction.
- Injunction
- Expedited Discovery
 - Expedited Production of Documents
 - Board minutes and presentations
 - Email
 - Third party discovery from advisors/outside
 - Expedited Depositions
 - Experts
- All of this often overlaps with presenting the deal to shareholders

F. Motions to Dismiss and Dispositive Challenges

- Failure to state a claim.
- Business judgment rule.
- No demand futility.
- Formation of special litigation committees.

G. Settlement

- Google/MM settlement was largely for modified disclosures.
- 8-K disclosed changes to proxy statement including:
 - A paragraph explaining that MM shareholder Carl Icahn tried to negotiate for a portion of the reverse-breakup fee the company would receive if the deal did not go through, but the board turned him down, saying it was not willing to treat Icahn differently than other shareholders.
 - Details back and forth between MM's lawyers and Google's counsel over the termination and reverse-termination fees and equity grants to Motorola execs.
 - Disclosure of the \$21 million in fees MM and its former parent have paid its financial adviser, Centerview, in the last two years.

G. Settlement (con't)

Evolution of Settlements in Merger Litigation

- 1999 and 2000
 - 52% of settlements included payments to shareholders.
 - Only 10% involved additional disclosures only.

- 2010 and 2011
 - Only 5% resulted in payments to shareholders.
 - 83% settled for additional disclosures only.
 - 13% included merger agreement changes other than payments to shareholders.
 - 7% resulted in modified deal protection provisions (such as termination fees, no-solicitation, and matching rights) or inclusion of top-up option and appraisal rights.
 - 6% involved other terms, most often a delay of the shareholder vote.

G. Settlement (con't)

Settlement Strategies

- Standard Terms of Settlement
 - Deal modifications
 - Enhanced disclosures
 - Additional disclosures concerning the “Selected Company Analysis” and “Selected Transaction Analysis” in the summary of the fairness opinion
 - Additional disclosure relating to the discounted cash flow analysis
 - Cash payments?
 - Reduced target company termination fee
 - Dismissal of the pending litigations
 - An agreement that plaintiffs’ counsel can seek fees up to a certain amount subject to court approval
- Get carrier consent
- Expect plaintiffs’ fees to be an issue with carrier

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

Table from "Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions", March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumraïn

G. Settlement (con't)

Why Do Some Settlements Result in Money Payments?

- Negotiations by management for benefits not given to others
 - Prior to settlement of litigation relating to Delphi Financial Group sale to Tokio Marine Holdings, the Court found plaintiffs showed a likelihood of success because of the “troubling” actions of Delphi’s founder and CEO, who negotiated a premium price for his Class B stock compared to the price of the publicly owned stock.

- Failure to identify and/or disclose advisor conflicts
 - \$89 million Del Monte Foods settlement in October of 2011.
 - In February 2011, the Delaware Court of Chancery awarded a preliminary injunction of the shareholder vote.
 - The court focused on allegation that advisor Barclays helped with the buy-side financing and failed to disclose its relationship to the target.
 - Court found that Del Monte’s board “fail[ed] to provide the serious oversight that would have checked Barclay’s misconduct.”
 - Barclays paid \$23.7 million of the \$89.4 million settlement.

G. Settlement (con't) Who Gets Paid When Cases Settle?

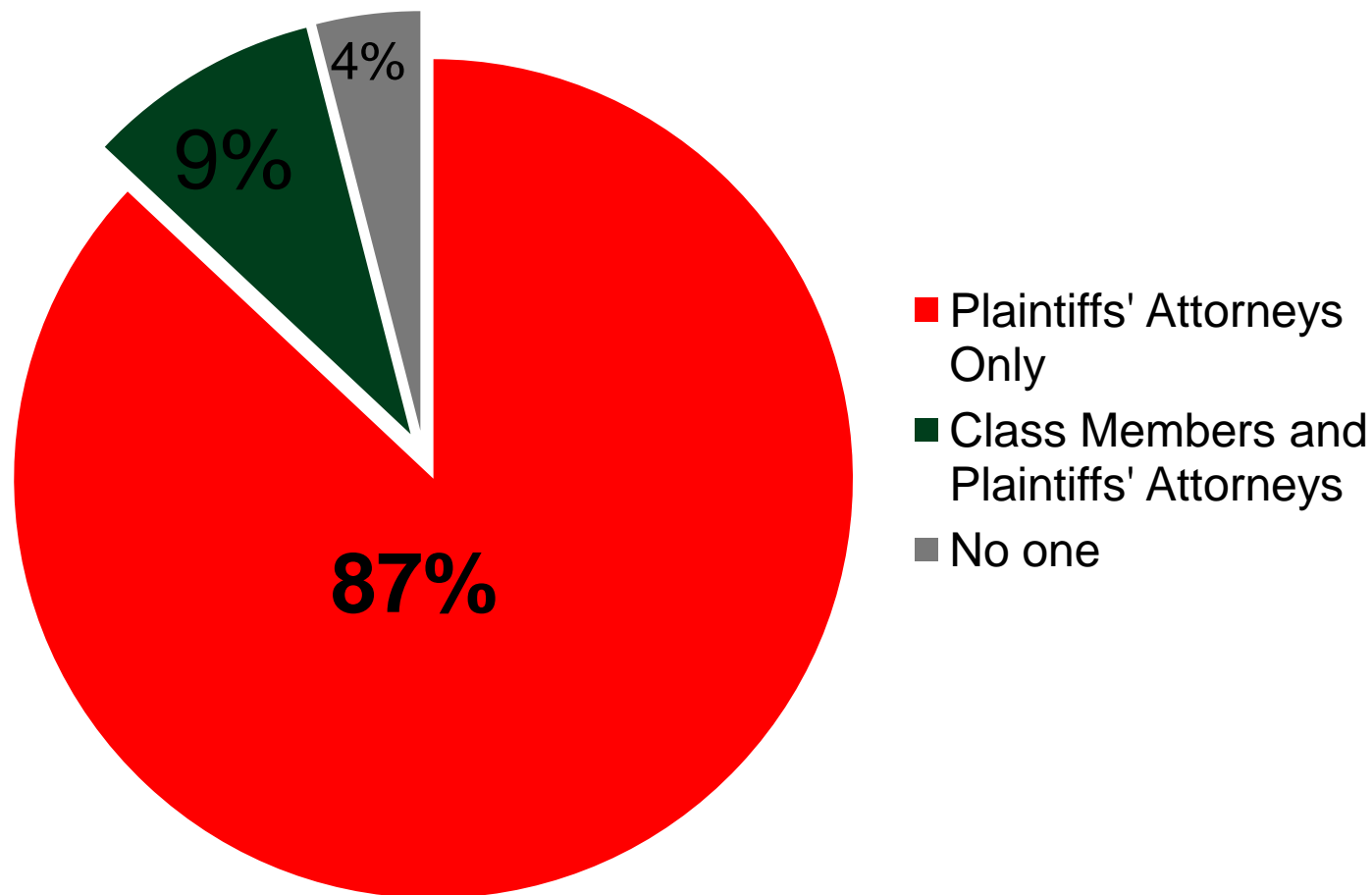


Table modified from "Anatomy of a Merger Litigation", April 4, 2012, NERA Economic Consulting, Douglas J. Clark and Dr. Marcia Kramer Mayer

III. Going Private Litigation

- Similar claims and discovery issues.
- Different standards of review and considerations
- Inherent conflict of interest with controlling shareholder potentially on both sides of the transaction.
- Whether structured as one step merger or tender offer transaction can impact legal standard applied.

- One Step Merger Reviewed Under Entire Fairness Standard.
 - Fair dealing.
 - When the transaction was timed.
 - How it was initiated, structured, negotiated and disclosed to directors.
 - How the approvals of the director's and stockholders were obtained.
 - Fair price.
 - Anything affecting intrinsic or inherent value of a company's stock (assets, market value, earnings, future prospects).
- Tender Offer Viewed Under Business Judgment Rule.
 - The business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the Courts. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

IV. Steps You Can Take Now To Minimize Risks and Costs Later

1. Intra-Corporate Forum Selection Clauses

- Most merger agreements have forum selection provisions in the event there is a dispute between the parties to the merger agreement.
- However, only a small percentage of companies are estimated to have intra-corporate forum selection clauses in charters or bylaws.
- Clause will limit venues and number of filings when derivative actions brought.
- In re Revlon, Inc. Shareholders Litig., 990 A. 2d 940, 960 (Del. Ch. March 16, 2010) stated: “[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”

Sample Mandatory and Elective Forum Provisions

- Both examples below are variants of the Netsuite provision.

Sample Elective Forum Selection Provision (actual Netsuite provision)

- Unless the corporation consents in writing to the selection of an alternative forum, The Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCSL, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this Article VII, Paragraph D.

Sample Mandatory Forum Selection Provision (the Netsuite provision excluding the introductory provision)

- The Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCSL, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this Article VII, Paragraph D.

8 - Version 9.30

Joseph Grundfest, Oct. 6, 2010 Presentation to The Rock Center For Corporate Governance Standard, entitled "Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches.

Implications of Forum Selection Clauses

Litigation Pattern	Current Regime	Type of Forum Selection	
		Mandatory	Elective
Plaintiffs sue only in chartering state.	Litigation proceeds in chartering state.	Litigation proceeds in chartering state.	Litigation proceeds in chartering state.
Plaintiffs sue only in headquarters state.	Litigation proceeds in headquarters state.	Litigation proceeds in chartering state.	Corporation elects whether to proceed in HQ state or in chartering state.
Plaintiff sue in headquarters and chartering state.	Litigation over the venue in which litigation proceeds.	Litigation proceeds in chartering state.	Corporation elects whether to proceed in HQ state or in chartering state.

- If the elective provision is effective, it generates greater benefits for the corporation than the mandatory provision (as determined by the board) whenever a plaintiff sues outside the chartering state. (But see slide 17 for a discussion of the ambiguous social welfare consequences.)

14 - Version 9.30

Joseph Grundfest, Oct. 6, 2010 Presentation to The Rock Center For Corporate Governance Standard, entitled "Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches."

2. Scrutinize Disinterested Directors and Structure of Deal

- Utilize disinterested directors to evaluate
- Where possible prohibit negotiation of future employment by management until deal done. If part of deal, limit role of interested parties in evaluation process.
- Use special litigation committees
 - After an objective and thorough investigation of the merits of a corporate claim by an independent committee to whom complete authority to act has been delegated, the committee may move on the name of the corporation to dismiss the suit on the ground that the committee has concluded, in a written report making specific findings, that dismissal is in the best interest of the corporation. See Zapata v. Maldonado, 430 A.2d 779 (Del. 1981).
 - Corporation has burden to show independence, good faith and reasonableness of investigation.
 - Carefully select special committee members and document inquiry into independence, including exploring financial and personal relationships. Make sure committee has latitude, money and advisors
- Going private deal – One-step merger vs. tender offer?

3. Carefully Evaluate Types of Disclosures Previously Subjected to Litigation

- Locate previously challenged disclosures and the enhanced disclosures through settlement and compare to your planned disclosures.
- Modeling your company disclosures after disclosures that were part of prior Court approved settlements may make it harder for plaintiffs to successfully challenge the adequacy.
- Court approval of disclosure only settlements is different than monetary settlements. In theory, court is not approving disclosures that remain deficient.

4. Vet and Supervise the Advisors

- Del Monte Food case and undisclosed investment banker conflicts resulted in \$89 million payment
- Avoid actions that could cause loss of business judgment rule (abdication of decision making to advisors or failure to supervise advisors)

5. Segregate and Gather Documents During Deal Phase

- Assume all actions and communications will be scrutinized
- When litigation hits, it is likely that deal will still be in process of being presented to shareholders. You will be busy enough with deal. By planning ahead, you can minimize disruption that expedited discovery will have.
- Definite categories of documents that will be requested include:
 - Board minutes and presentations
 - Email
 - Third party discovery from advisors/outside

Jeffery A. Dailey



- Mr. Dailey is a partner in the Philadelphia office of Akin Gump Strauss Hauer & Feld LLP and a member of the firm's Securities Enforcement and Litigation Practice Group.
- His recent securities litigation matters include defending companies, officers, directors, accountants and a rating agency against a variety of claims.
- Many of these representations have resulted in dismissals of claims at the motion to dismiss stage, no money settlements, or settlements below the national average for cases of comparable size.
- Mr. Dailey has been published by *Accounting Today*, *The Practical Litigator* and *Securities Law360* and has presented on numerous occasions to in-house counsel groups about defense strategies and new developments in securities litigation. In addition, he was recently appointed a member of the Editorial Advisory Board of *Securities Law360*.
- Mr. Dailey can be reached at jdailey@akingump.com or (215) 965-1325.

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