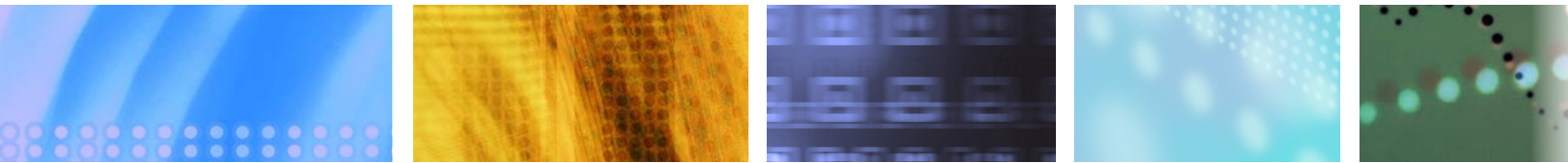


Settlements of Shareholder Litigation Involving Mergers and Acquisitions

Review of 2013 M&A Litigation



Background

The lawsuits discussed in these reports usually take the form of class actions. 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 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.

INTRODUCTION

This report is the second in a two-part series that looks at litigation challenging M&A transactions valued over \$100 million. These studies spotlight trends involving lawsuits filed by shareholders of public target companies from 2007 through 2013

The first [report](#), on filings and litigation outcomes, found that for the fourth consecutive year, shareholders filed suit in more than 90 percent of deals. The findings in this report focus on 85 cases identified as reaching a settlement in 2013 and include a statistical analysis of plaintiff attorney fees. Highlights from the current report are below.

HIGHLIGHTS

- Monetary settlements related to M&A deal litigation were rarer in 2013 than in prior years.
- Supplemental disclosures remained the only shareholder consideration in the majority of 2013 settlements.
- Over 90 percent of the known 2013 settlements were reached before the merger was closed.
- Average fees requested by plaintiff attorneys in 2013 declined to \$1.1 million from \$1.4 million in 2011 and 2012.
- Average plaintiff attorney fees requested in disclosure-only settlements were \$500,000 in 2013 compared with over \$700,000 in 2009.
- In 2013, the Delaware Court of Chancery reduced the requested fees by an average of 20 percent, compared with 10 percent in other courts.
- Statistical analysis of M&A deals between 2007 and 2013 shows that plaintiff attorney fee awards were higher in settlements with monetary consideration, and with reduced termination fees. Fee awards also were higher in settlements with a larger-than-average number of lawsuits, and in cases where settlements took longer than average to reach.

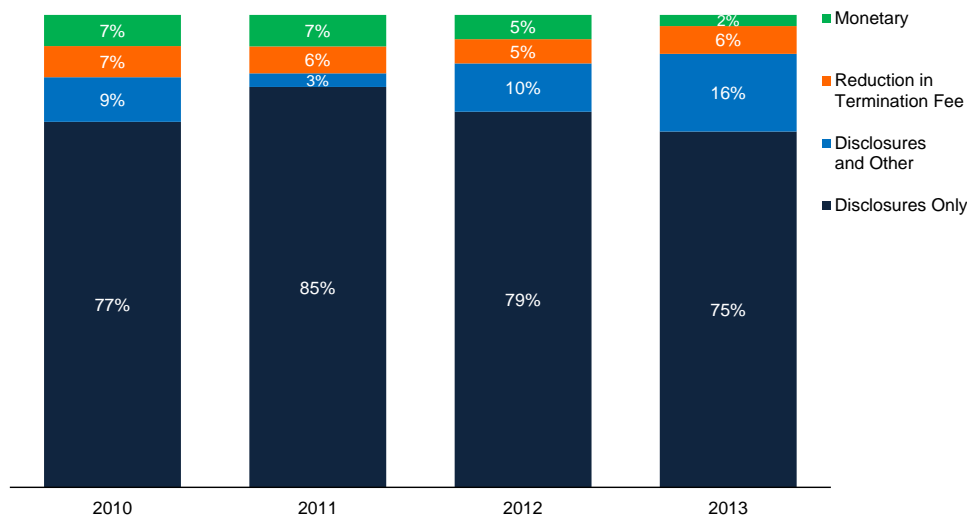
SETTLEMENT TERMS AND CHARACTERISTICS

Table 1
**Largest settlement funds
 (deal year)**

2013 Settlements	\$ millions
CNX Gas (2010)	\$42.7
BMC Software (2013)	\$12.4
2012 Settlements	
El Paso Corp. (2011)	\$110.0
Delphi Financial (2011)	\$49.0
Playboy Enterprises (2010)	\$5.3
2011 Settlements	
Del Monte Foods (2010)	\$89.4
Laureate Education (2007)	\$35.0
GSI Commerce (2011)	\$23.7
Atlas Energy Resources (2009)	\$20.0
J.Crew Group (2010)	\$16.0
Mediacom Comm. (2010)	\$10.3
2010 Settlements	
Kinder Morgan (2006)	\$200.0
Intermix Media (2005)	\$45.0
Landry's Restaurants (2009)	\$14.5
Student Loan Corp. (2010)	\$10.0
Talecris Biotherapeutics (2010)	\$8.1

- In 2013, shareholder plaintiffs achieved only two large monetary settlements (defined as more than \$5 million). This represents just 2 percent of all settlements reached in 2013, compared with over 5 percent in prior years.
- Settlements for additional disclosures, or additional disclosures plus other terms, remained prevalent. Nearly 92 percent of settlements reached in 2013 included such deal terms.
- A larger share of nonmonetary settlements included other terms along with supplemental disclosures in 2013 compared with prior years. These included removal of “don’t ask, don’t waive” provisions, a frequent litigation complaint in 2012; changes to deal protections other than termination fees; and changes to appraisal/dissenter rights.
- As in prior years, over 90 percent of the known 2013 settlements were reached before deal closing.
- The percentage of Delaware-incorporated target companies that settled in the Delaware Court of Chancery decreased in 2013. Delaware Chancery was the approving court in 41 percent of such settlements, compared with more than 50 percent in the prior two years.

Figure 1: **Percentage of Settlement Deal Terms
 (by settlement year)**



Source: Thomson Reuters SDC; Dockets

Note: Percentages may not add to 100 due to rounding.

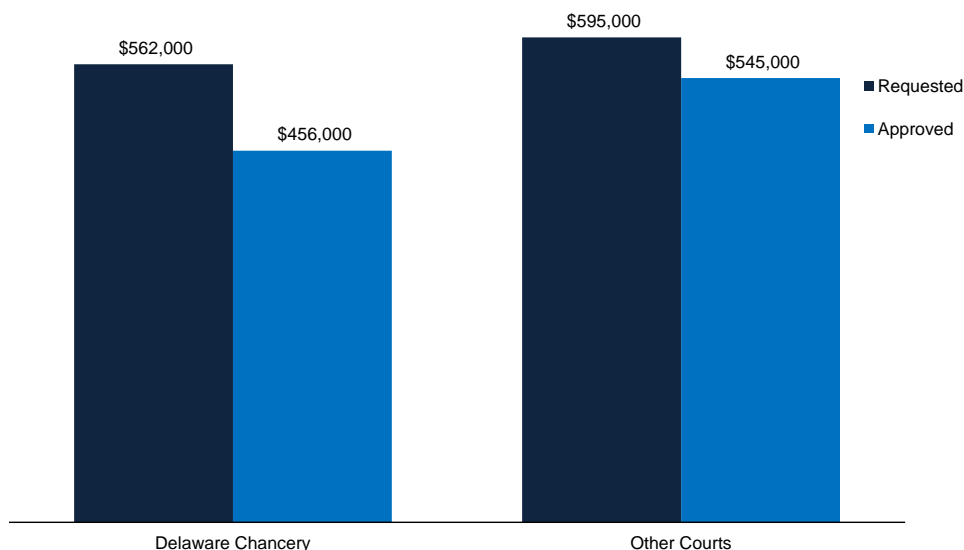
PLAINTIFF ATTORNEY FEES

Table 2
Average fees requested by plaintiff attorneys in disclosure-only settlements (by settlement year)

2013	\$500,000
2012	\$513,000
2011	\$560,000
2010	\$676,000
2009	\$715,000
2008	\$953,000

- Plaintiff attorneys requested an average of \$1.1 million in fees for 2013 settlements, compared with approximately \$1.4 million in 2011 and 2012. This decline likely relates to the lack of large monetary settlements, which are accompanied by larger fees.
- Fees requested by plaintiff attorneys in disclosure-only settlements continued to decline.
- Over the last four years (2010–2013), fees requested and approved in disclosure-only settlements were, on average, slightly lower in the Delaware Court of Chancery compared with other courts.
- Over the same period, Delaware Chancery approved, on average, 80 percent of the fee amounts requested by plaintiff attorneys in disclosure-only settlements, compared with 90 percent in other courts.
- Delaware Chancery granted less than the requested fees in 35 percent of settlements, compared with only 19 percent for other courts. On the other hand, other courts denied all fees completely in 5 percent of settlements compared with only 1 percent for Delaware Chancery.

Figure 2: Fee Approval in Delaware and Other Courts (disclosure-only settlements reached 2010–2013)



Source: Thomson Reuters SDC; Dockets

DETERMINANTS OF PLAINTIFF ATTORNEY FEES

Table 3
Statistical analysis of fees
(2007–2013)

	Coefficient
Settlement fund	22%**
Indirect monetary benefit	0.5%**
Termination fee reduction by 10%	\$260,000**
Other settlement condition except supplemental disclosures	\$1,500,000**
Deal value (per \$1 million)	\$42**
Number of lawsuits	\$147,000**
Deal year	(\$174)**
Days from filing to settlement	\$1,100*

** Indicates statistical significance at 5 percent level.

* Indicates statistical significance at 10 percent level.

- Statistical analysis of factors influencing fee awards in settlements between 2007 and 2013 shows that plaintiff attorney fees increased, on average, by approximately:
 - 22 percent of the monetary settlement fund
 - 0.5 percent of the increase in merger consideration or special shareholder dividend attributed to litigation (indirect monetary benefit)
 - \$260,000 for a 10 percent reduction in termination fee
 - \$42 per additional \$1 million in deal value (above the average deal value of \$4 billion)
 - \$147,000 for each additional lawsuit filed (above the average of five lawsuits per deal)
 - \$1,100 per additional day between lawsuit filing and settlement (above the average of 113 days)

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. She has experience across a range of industries, including high technology and real estate, and she has developed particular expertise in financial institutions, including banking and insurance, venture capital and private equity, mortgage financing, asset-backed securities, and issues related to the credit crisis. Ms. Koumrian has managed a variety of cases involving corporate transactions, corporate governance, valuation, breach of contract, auditor liability, and intellectual property. 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.

ABOUT CORNERSTONE RESEARCH

For more than twenty-five years, Cornerstone Research staff have provided economic and financial analysis of complex issues arising in commercial litigation and regulatory proceedings. The firm has four hundred fifty staff who work with a broad network of testifying experts to bring specialized knowledge and experience to each assignment.

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