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Takeover Litigation in 2013

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Takeover Litigation in 2013

(Preliminary Figures)

** Takeover Litigation Continues at an Extraordinarily High Rate

** Lawsuits Brought in 97.5% of Takeovers versus 39% in 2005

** Average Takeover Receives Seven Suits in 2013

** Median Attorneys' Fee Awards Drop to \$485 thousand per case

** Delaware Loses Slight Edge in Attracting Litigation

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Introduction

Takeover litigation continues to be a much discussed issue in Delaware and among the corporate bar. Our academic study "[*A Great Game: The Dynamics of State Competition and Litigation*](#)" looks at takeover litigation during the period 2005-2011. Continuing this research project, we are releasing preliminary statistics for takeover litigation in 2013.¹

Our Sample

We use the same sample criteria as in our *Great Game* study. This sample contains all completed transactions listed in the FactSet MergerMetrics database and announced from 2005- 2013 that meet the following criteria: 1) the target is a U.S. firm publicly traded on the NYSE, AMEX, or NASDAQ stock exchanges, 2) the transaction size is at least \$100 million, 4) the offer price is at least \$5 per share, 5) a merger agreement is signed and publicly disclosed through an SEC filing, and 6) completed by January 6, 2013.

¹ This report also updates the preliminary statistics for litigation in 2012 that we released in last year's report [*Takeover Litigation in 2012*](#).

This gives us a sample size of 80 transactions for 2013. We intend to update our statistics and this report during the summer of 2013 to include any further transactions from 2013 completed over the next six months.

Litigation Rates

In Table A we set forth litigation rates from 2005-2013 as well as the mean number of lawsuits brought and percent which are subject to multi-jurisdictional (multi-state) litigation. The statistics for before 2012 are based on data from our *Great Game* paper.

Table A: Litigation rates over time

	<u>Deals</u>	<u>Litigation</u>	<u>% with litigation</u>
2005	183	72	39.3%
2006	232	99	42.7%
2007	249	97	39.0%
2008	104	50	48.1%
2009	73	62	84.9%
2010	150	131	87.3%
2011	128	117	91.4%
2012	121	111	91.7%
2013	<u>80</u>	<u>78</u>	<u>97.5%</u>
Total	1,320	816	61.8%

	<u>Mean # suits per case</u>	<u>% Multi- state claims</u>
2005	2.2	8.3%
2006	2.6	26.3%
2007	3.1	21.9%
2008	2.8	30.0%
2009	4.6	41.9%
2010	4.7	46.6%
2011	5.0	53.0%
2012	5.2	51.8%
2013	6.9	41.6%

The figures show that takeover litigation as a percentage of deals has continued to increase over the past four years. 84.9 percent of transactions in 2009 experienced litigation, a figure which rose to 91.7 percent of transactions in 2012 and spiked up to almost 98% of deals in 2013. The higher figure continues the increasing trend of takeover litigation which is now brought at a rate almost 2.5 times that of 2005. While these figures do not include pending transactions for 2013, anecdotally we expect that the ultimate 2013 litigation rate will match the current rate. If this occurs, the fraction of transactions that experience a lawsuit in

2013 is likely to continue the high rate of litigation from prior years. In plain English, if a target announces a takeover it should assume that it and its directors will be sued.

The number of complaints brought per transaction increased in 2013 to an average of 6.9 lawsuits per transaction – an all-time high. Each complaint typically represents a different plaintiffs’ law firm. While the number of lawsuits (and rough approximation of law firms) remained steady from 2012 to 2013, this still represents a more than tripling from the mean number in 2005 of 2.2 lawsuits.

Multi-jurisdictional litigation dropped slightly in 2013 with 41.6% of transactions with litigation experiencing litigation in multiple states. This compares to 51.8% of transactions with multi-state litigation in 2012. Multi-state litigation rates have now been sliding for the past two years, which may provide some correction to the sharp increase from 8.3% in 2005 to over half of all transactions in 2011. We will continue to monitor what has been described as the biggest phenomena in takeover litigation.²

Settlements

Table B sets forth the litigation fees and settlements from 2005-2013. Again, the statistics before 2012 are based on data from our *Great Game* paper.

Table B: Fees and settlements over time

	Attorneys’ fees, if positive (<i>\$s in thousands</i>)			Non-Disclosure Settlements
	N	Mean	Median	%
2005	34	\$1,766	\$450	36.1%
2006	64	\$1,835	\$528	42.2%
2007	53	\$994	\$550	18.3%
2008	33	\$865	\$588	17.6%
2009	44	\$1,704	\$638	14.3%
2010	82	\$1,263	\$583	21.1%
2011	55	\$1,430	\$580	20.5%
2012	57	\$600	\$500	14.3%
2013	11	\$694	\$485	15.2%

² See, e.g., David Marcus, Delaware’s Chancery grapples with multijurisdictional litigation, *The Deal, Pipeline*, Dec. 9, 2011; Peter B. Ladig, *Multi-Jurisdictional Litigation a Rich Vein of Issues for Chancery Court*, *Delaware Business Court Insider*, Ap. 20, 2011.

Table B, continued: Attorneys' fees over time by settlement type¹

	<u>Disclosure-Only</u>		<u>Non-Disclosure</u>	
	<u>Mean</u>	<u>Median</u>	<u>Mean</u>	<u>Median</u>
2005	\$422	\$400	\$3,938	\$985
2006	\$755	\$402	\$3,431	\$1,300
2007	\$767	\$500	\$2,010	\$700
2008	\$854	\$488	\$885	\$937
2009	\$1,152	\$575	\$5,137	\$2,988
2010	\$697	\$525	\$3,305	\$1,800
2011	\$517	\$470	\$4,397	\$1,350
2012	\$495	\$475	\$1,201	\$1,000
2013	\$511	\$485	\$2,700	\$2,700

¹ \$s in thousands; includes fee awards of \$0.

In 2013 “disclosure only” settlements remained at levels similar to 2012. 84.8 percent of settlements were “disclosure only” in 2013 compared to approximately 85.7 percent in 2012. Other types of settlements such as increases in consideration paid in the takeover or an amendment to the merger agreement to reduce the termination fee remained constant in 2013 at roughly 85 percent of settlements. This figure is down from 20.5 percent of settlements in 2011.

So far for 2013 average attorneys’ fee awards continue a downward slide. The average attorneys’ fee award in 2013 was \$694 thousand versus \$1.43 million in 2011. Fees in 2012-2013 are at the lowest average levels since we began tracking the data in 2005. However, the averages are driven by a few significant settlements and the median fees are more similar, at \$485 thousand in 2013 versus \$500 thousand in 2012. Similarly, for “disclosure only” settlements the average attorneys’ fee award in 2013 was \$511 thousand compared to \$495 thousand in 2012. Other types of settlements such as an increase in consideration and amendments to the merger agreement to reduce the termination fee had higher attorneys’ fee awards in 2013 and averaged \$2.7 million, rebounding up from \$1.2 million in 2012.

These preliminary statistics should be read with caution. Attorneys’ fee awards typically lag settlements by about four to eight months since they must be considered and awarded by the courts. Consequently, we only have attorneys’ fee awards for 11 transactions so far in 2013. In addition, cases may vary in quality from year to year and the increased average non-disclosure fee awards may reflect a higher quality of cases for litigation in 2013. We expect to provide updated numbers in the summer of 2013 that will have more comprehensive data on the average attorneys’ fee awards as well as types of settlements.

Delaware's Standing

In Table C we put forth statistics assessing litigation brought in Delaware. Statistics from 2005-2011 are based on data from our *Great Game* paper.

Table C: Delaware: Cases, settlements, and attorneys' fees over time

	% Cases Going to DE ¹	% DE Cases Settled ²	Attorneys' Fees (\$k)		Non-Disclosure Settlements
			Mean	Median	
2005	50.0%	48.7%	\$1,641	\$450	54.6%
2006	35.1%	70.3%	\$2,787	\$530	50.0%
2007	34.4%	59.5%	\$1,213	\$450	27.3%
2008	26.9%	61.5%	\$1,103	\$950	33.3%
2009	58.1%	59.1%	\$2,587	\$700	35.3%
2010	46.8%	75.0%	\$1,986	\$710	42.4%
2011	52.8%	82.6%	\$2,205	\$600	35.7%
2012	46.3%	72.7%	\$650	\$500	16.7%
2013	45.2%	72.7%	\$450	\$450	21.4%

¹ Includes only those cases in which the target's headquarters or incorporation (but not both) are in Delaware, i.e. cases for which Delaware may compete against other states.

² Includes only cases filed only in Delaware as the sole jurisdiction.

Delaware drew a more muted share of litigation in 2013. The state attracted 45.2% of all litigation which could conceivably go to Delaware. These are cases in which the target is incorporated or headquartered in Delaware. The rate of litigation in 2013 is a slight decrease from 2012 when 46.3 percent of cases in play went to Delaware.

Based on these preliminary figures Delaware also appears to be dismissing fewer cases, thus allowing more cases to be settled. 72.7 percent of Delaware cases settled in 2012 and 2013. This compares to a settlement rate of 61.5 percent in 2008 – the weakest year of our data for Delaware in attracting litigation. This trend is in accord with the findings in our *Great Game* paper. When Delaware loses cases to other jurisdictions it historically has dismissed fewer cases and allowed more to settle, consistent with conduct designed to reattract litigation.

Following the general decline in average attorneys' fees across states after 2011, Delaware also awarded lower average attorneys' fees of \$450 million in 2013 compared to \$650 million in 2012. This average also falls below the general sample average of \$694 for all states. It thus remains to be seen whether attorneys continue their out-of-Delaware flight going forward. As with the attorneys' fee numbers for other states, these numbers are preliminary and will be updated in summer 2013.

In contrast to the constant rate in other states, “disclosure only” settlements in Delaware decreased from 83.3 percent of settlements in 2012 to 78.6 percent of settlements in 2013.

With the recent changes in Delaware law to allow immediate squeeze-out of a minority stub after completion of a tender offer there is some expectation among practitioners that the number of tender offers will increase.³ This may change the dynamics of merger litigation by forcing more hurried settlements and litigation of these matters. Table D sets forth the number of tender offers from 2005 through 2013 and the percent of total transactions in our sample which are tender offers.

	<u>Tender Offers</u>	<u>% of Total</u>
2005	17	9.3%
2006	18	7.8%
2007	45	18.1%
2008	36	34.6%
2009	22	30.1%
2010	45	30.0%
2011	35	27.3%
2012	33	27.3%
2013	<u>21</u>	<u>26.3%</u>
Total	272	20.6%

The percentage of tender offers in 2013 was fairly steady at 26.3% of transactions versus 27.3% in 2012. Since the revision to the all/holders best price rule by the SEC in 2006 which made tender offers more acceptable, the rate of tender offers has remained fairly constant between 26.3% and 34.6% of all transactions. We will continue to monitor transactions in order to more fully document any change in merger litigation practices as a result of structural changes in the way takeovers are implemented.

Conclusion

We expect to update the information on takeover litigation in 2013 during the summer 2014. However, based on our preliminary figures, the upward trend in

³ See Skadden, Arps, Slate, Meagher & Flom LLP, *Amendments to Delaware General Corporation Law to Facilitate Short-Form Mergers in Two-Step Transactions*, Jul. 26, 2013, <http://www.skadden.com/insights/amendments-delaware-general-corporation-law-facilitate-short-form-mergers-two-step-transact>

takeover litigation continues unabated and is now a permanent feature of takeovers.

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