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Alison Frankel's On The Case

January 19, 2016

It's official: Analysis finds 'sharp and significant' decline in Delaware M&A filings

(Reuters) - It has been less than six months since the judges of Delaware Chancery Court began what has revealed itself to be a concerted campaign against so-called disclosure-only settlements of shareholder class actions challenging M&A transactions. In a series of momentous decisions beginning in July, each of the Chancery judges advised plaintiffs' and defense lawyers that the rules had changed: Defendants would not be able to obtain broad releases from shareholder claims in exchange for trivial disclosures and a few hundred thousand bucks in fees for plaintiffs' lawyers. By last November, when the Chancery Daily analyzed new filings in every month of 2015, it was clear plaintiffs' lawyers were heeding Chancery Court's warning.

Now the disruptive impact of those mid-summer opinions is clearer than ever. Matthew Cain of the Securities and Exchange Commission and Steven **Davidoff** Solomon of Berkeley Law (aka the Deal Professor at the New York Times) have been compiling data on M&A shareholder litigation since 2005. Their seminal 2015 paper, "A Great Game," provided hard data chronicling the waxing and waning of multiforum M&A shareholder suits and the near ubiquity in recent years of suits challenging transactions of $100 million or more. Cain and **Davidoff** Solomon are the first and last word on the state of play for M&A shareholder suits.

Their just-out preliminary analysis of 2015 cases found a precipitous decline in filings after Chancery Court's change of heart on disclosure-only settlements. In the last quarter of the year, the paper said, the rate of challenges fell from a high of nearly 95 percent of all transactions to 21 percent. "While litigation still may be brought with respect to # uncompleted transactions, there is no doubt the decline is sharp and significant," they wrote.

And plaintiffs' lawyers aren't just diverting their attention away from new Delaware M&A suits in the wake of the Chancery crackdown, according to the paper. Already-filed suits are taking longer to settle - presumably because the shareholder bar knows Chancery Court won't award fees for disclosure-only outcomes - and are being dismissed. The dismissal rate, including cases voluntarily dismissed and tossed by judges, was 32 percent in 2014 and 46 percent last year, according to Cain and **Davidoff** Solomon.

Thanks in part to corporate forum selection clauses, only 23.4 percent of big announced deals were challenged in more than one state in 2015, down from a high of 53.6 percent in 2012, the paper said. It remains to be seen whether Chancery's discouragement of reflexive "deal tax" suits will prompt plaintiffs to resume filing suits outside of Delaware or lead defendants to selectively enforce forum selection clauses so they can reach disclosure-only settlements outside of the state.

Last year's results also show, however, that class action lawyers who find and vigorously litigate strong challenges to conflicted sales will be well rewarded for their efforts, according to Cain and **Davidoff** Solomon, who cite big judgments and awards in the Dole, Rural/Metro and Freeport McMoRan cases. Thanks to the Rural/Metro case, which targeted the company's financial adviser, investment banks are plaintiffs' lawyers' favorite defendants.

The paper calls the takeover litigation market "substantially disrupted," an apt description based on the data. Back in July, I asked whether same-day rulings by two Delaware judges who refused to approve disclosure-only settlements marked the beginning of the end of the deal-tax litigation boom. The new paper by Cain and **Davidoff** Solomon suggests that the middle of the end has already come and gone.

(Reporting by Alison Frankel)

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Word Count: 605

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