

7-1-2000

Mergers & Acquisitions: The Decade in Review

Joseph H. Flom

Follow this and additional works at: <http://repository.law.miami.edu/umlr>



Part of the [Corporation and Enterprise Law Commons](#)

Recommended Citation

Joseph H. Flom, *Mergers & Acquisitions: The Decade in Review*, 54 U. Miami L. Rev. 753 (2000)

Available at: <http://repository.law.miami.edu/umlr/vol54/iss4/4>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Mergers & Acquisitions: The Decade in Review

PRESENTED BY: JOSEPH H. FLOM, SENIOR PARTNER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

PRESENTED TO: FOURTH ANNUAL INSTITUTE ON
MERGERS & ACQUISITIONS

FEBRUARY 12, 2000

I. THE DECADE OF THE NINETIES

In my talk today I will briefly review merger activity during the previous decade (which reached a high point at the end of the Nineties), attempt to discuss what the current merger wave and other recent takeover developments augur and make some observations about the societal and economic impact of merger activity, including its impact on the legal profession. My observations reflect personal experience gained from having been active in the takeover arena for almost half a century.

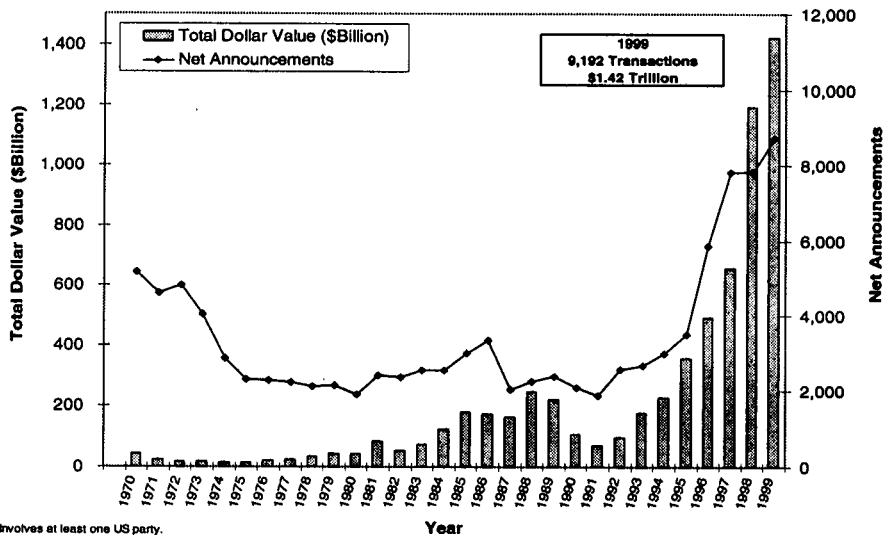
A note of caution about the data presented: to a large extent, it mixes all sorts of subsets. In some cases it includes acquisitions of substantial minority interests, spin-offs, hostile tender offers, cash offers and stock offers of public, as well as private, companies as mergers and acquisitions transactions; the statistics, however, unless otherwise indicated, reflect announced transactions and, accordingly, may reflect transactions that never came to fruition. To the extent possible, I will try to indicate when such distortions occur.

The Nineties:

During the decade, there were almost 46,000 announced transactions involving at least one U.S. party¹ with aggregate announced values totaling \$4.7 trillion. From a low point in 1991 (1,877 transactions, \$71.2 billion), the numbers steadily increased to 9,192 transactions valued at \$1.4 trillion in 1999.

1. Mergerstat defines an acquisition as a publicly-announced formal transfer of ownership of at least 10% of a company's equity, where the purchase price is at least \$1 million and at least one party is a U.S. entity. These transactions do not include repurchases, spin-offs or straight asset purchases. Thompson Financial Securities Data tallies all worldwide announced public and private transactions, excluding only split-offs.

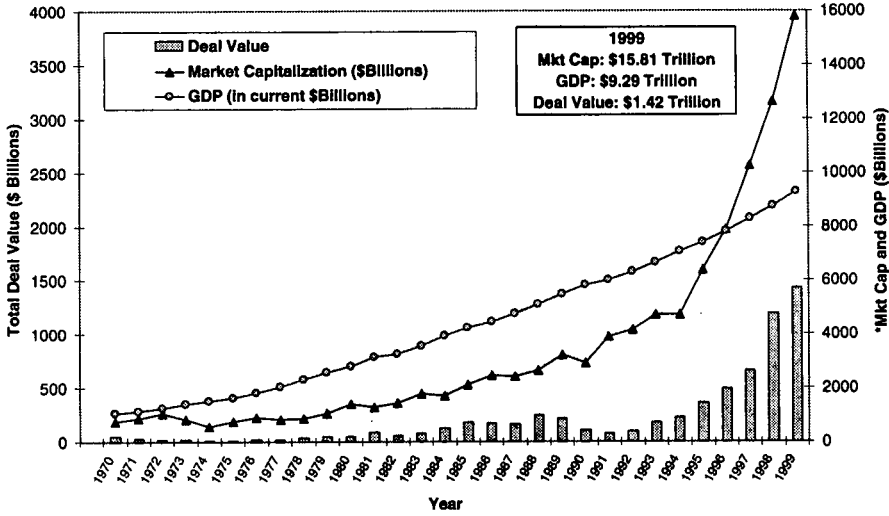
TRENDS IN MERGERS AND ACQUISITIONS 1970-1999*



* Involves at least one US party.
Source: Mergerstat

While the numbers reflecting the growth in total value of transactions are dramatic, they should be read in light of the fact that during this same period, the Wilshire 5000 Total Market Index grew from \$3.9 trillion to \$15.8 trillion and Gross Domestic Product grew from \$6.0 trillion in 1991 to \$9.3 trillion through the third quarter of 1999. Since 1995 (total transaction volume \$356 billion), the rate of growth in the Wilshire 5000 (\$6.4 trillion in 1995) steadily grew at a pace exceeding the rate of growth of mergers and acquisitions activity.

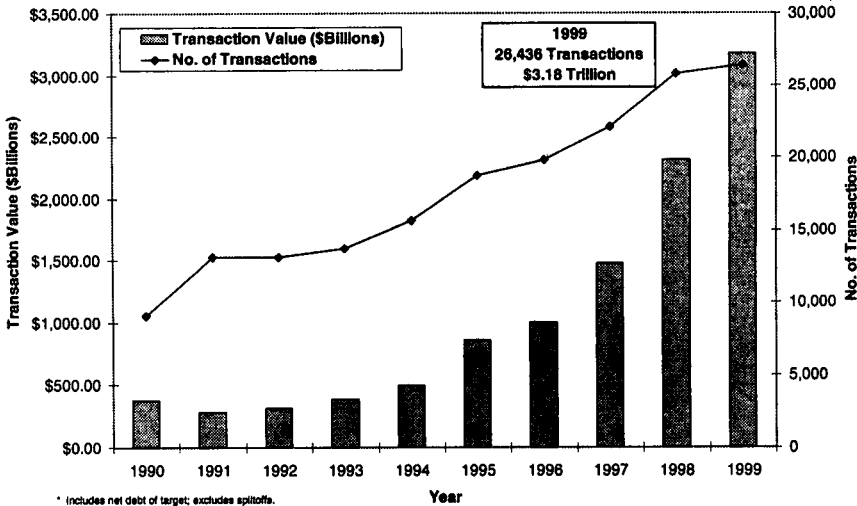
DEAL VALUE, MARKET CAPITALIZATION AND GDP
UNITED STATES, 1970-1999



*The Wilshire 5000 Total Market Index consists of over 7000 US headquartered equity securities individually weighted by market capitalization.
Source: Mergerstat, US Bureau of Economic Analysis and Wilshire Associates Incorporated

Total worldwide mergers and acquisitions grew from \$286.9 billion in 1991 to \$2.3 trillion in 1998 and \$3.2 trillion in 1999.

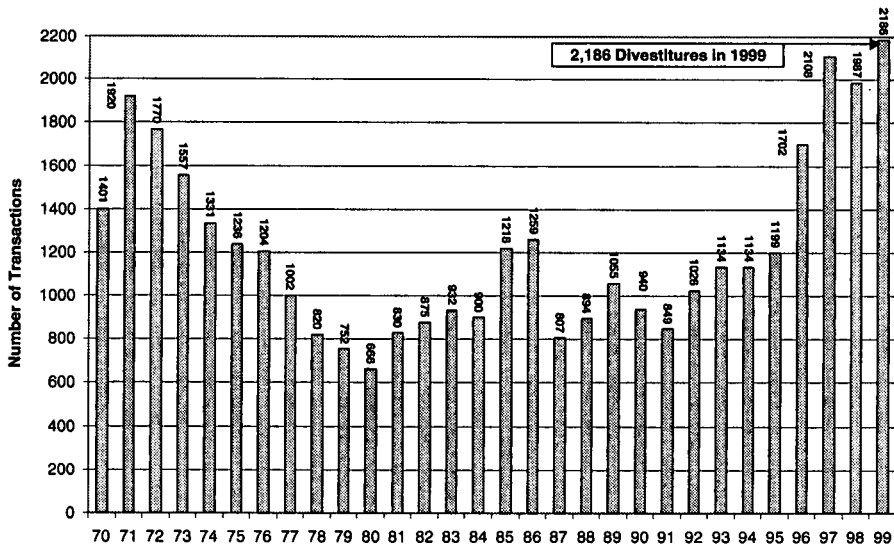
WORLDWIDE MERGERS AND ACQUISITIONS ACTIVITY
1990-1999



* Includes net debt of target; excludes spinoffs.
Source: Thomson Financial Securities Data

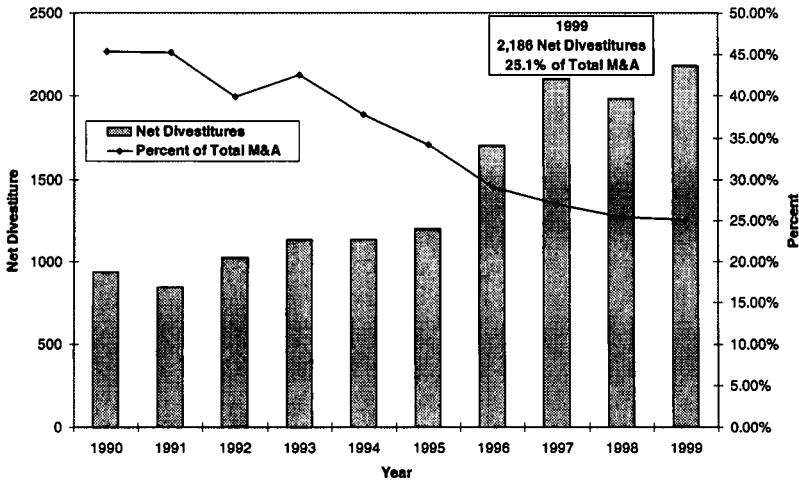
Strategic refocusing of companies continued throughout the decade. Publicly announced divestitures (excluding spin-offs) rose from 849 in 1991 to 2,186 in 1999. Spin-offs accounted for a substantial additional number of divestitures. Since many companies announcing divestitures did not supply information about the value of the divestiture, the total dollar value of such transactions is not recorded. Announced divestitures accounted for about 25% of the total number of announced transactions in 1999.

NET DIVESTITURE ANNOUNCEMENTS 1970-1999



* Mergerstat defines divestitures as the sale of subsidiaries, minority interest or divisions.
Source: Mergerstat

NET DIVESTITURE* AND PERCENT OF TOTAL MERGERS AND ACQUISITIONS TRANSACTIONS, 1990-1999

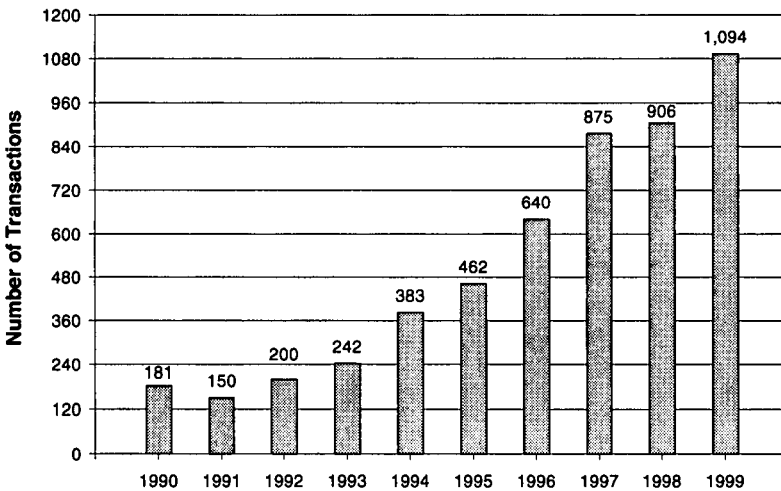


* Mergerstat defines divestitures as the sale of subsidiaries, minority interests or divisions.
Source: Mergerstat

Size of Transactions

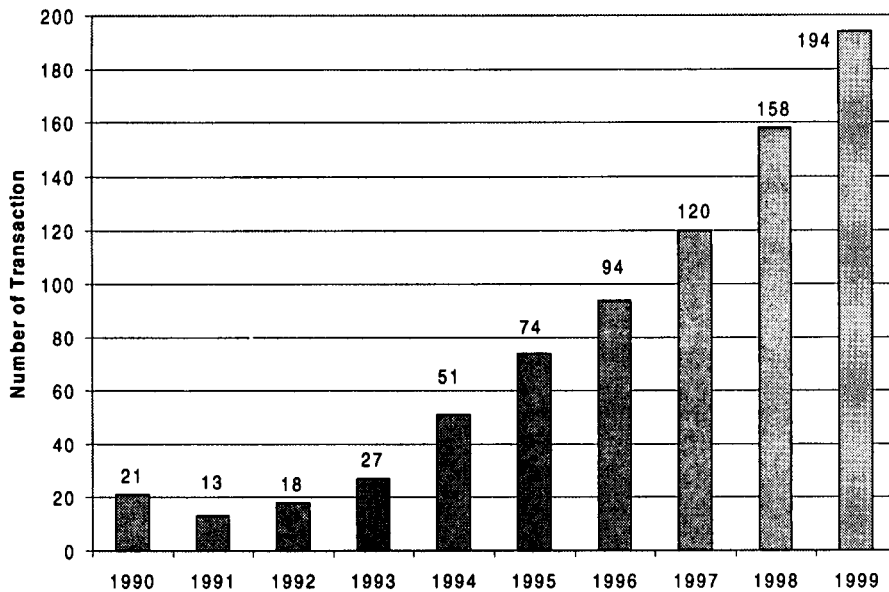
As a result of the growth in megadeals, the average transaction size rose from \$98.6 million in 1991 to \$421 million in 1999. Deals valued at over a billion dollars (the standard for megadeals at the beginning of the current wave) increased from thirteen in 1991, to 194 in 1999.

PURCHASE PRICE DISTRIBUTION
ONE HUNDRED MILLION DOLLAR TRANSACTIONS* 1990-1999



* Includes all transactions over one hundred million dollars.
Source: Mergerstat

**PURCHASE PRICE DISTRIBUTION
ONE BILLION DOLLAR TRANSACTIONS 1990-1999**



* Includes all transactions over one hundred million dollars.

Source: Megerstat

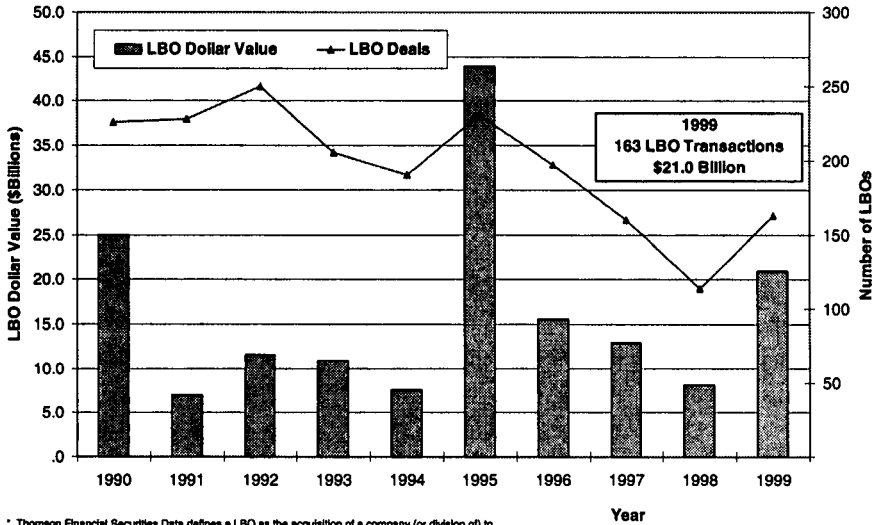
There were forty-seven announced transactions worldwide in 1999 valued over \$10 billion. In 1991, there were only three completed deals valued over \$5 billion and none valued over . \$10 billion.²

Leveraged Buyouts

Despite the growth in divestitures and mergers and acquisitions activity, there was a general decline in the number of leveraged buyout transactions from 228 (\$7.0 billion) in 1991, to 114 (\$8.1 billion) in 1998 and 163 (\$21 billion) in 1999.

2. Search of Thompson Financial Securities Data (Jan. 2000).

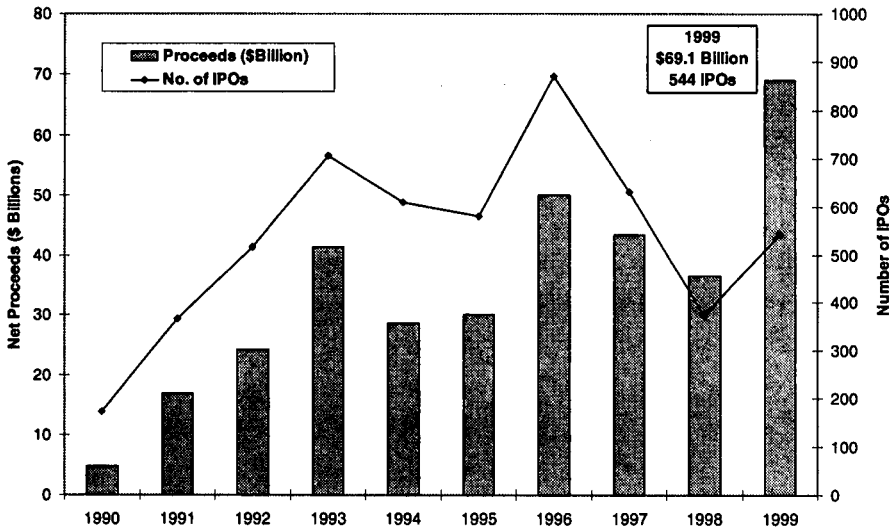
LEVERAGED BUYOUT ACTIVITY
1990-1999



* Thomson Financial Securities Data defines a LBO as the acquisition of a company (or division of) to a private investment group, individual or management, financed heavily by borrowing against the assets that will be acquired, and with financing that is repaid with anticipated cash flow generated from the acquired assets or the sale of the acquired assets.
Source: Thomson Financial Securities Data

The relative decline in leveraged buyout activity reflects value competition created by strategic buyers and the Initial Public Offering (“IPO”) market. (The U.S. IPO market reached \$70 billion in 1999.)

IPO PROCEEDS AND NUMBERS
UNITED STATES, 1990-1999



Source: Thomson Financial Securities Data

Substantial availability of buyout equity remained despite this

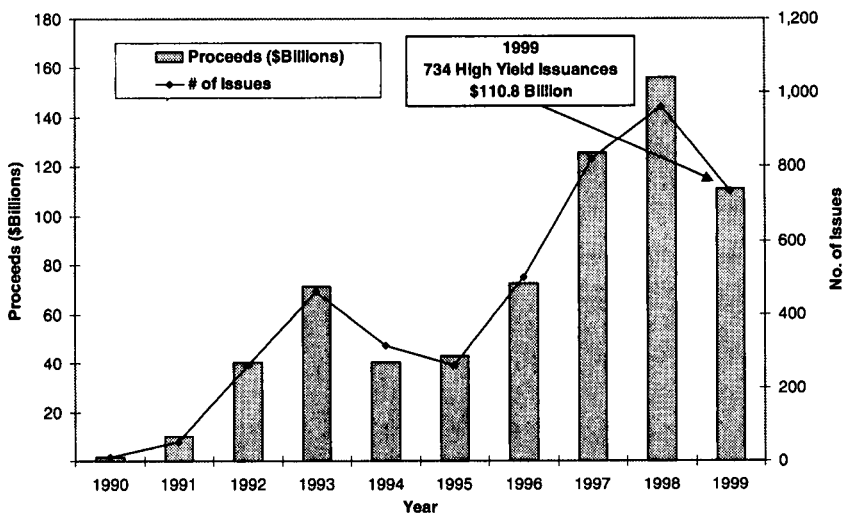
decline, the higher costs for raising debt for leveraged buyouts, greater percentages of equity utilized in transactions (causing reduced returns in potential LBO transactions) and increased competition for the investment dollar from other investment vehicles (including Internet and tech-related funds). Also, private-equity firms are turning to alternative forms of investing, reflecting the limited ability to make traditional investments.

Roughly \$85 billion of new equity capital was raised by investment funds from mid-1996 to mid-1999, with less than \$10 billion of it invested as of March 1999.³ These funds, with the leverage they can command, represent huge availability of funds for leveraged buyout activity.

High Yield Debt

High yield debt, scarce at the beginning of the wave in 1991 (\$10.3 billion), did rebound, yet currently faces tough sledding. High yield issuances, which reached \$155.9 billion in 1998, declined to \$110.8 billion in 1999. The decline in 1999 reflects, in part, rising interest rates and rising high yield default rates.

HIGH YIELD VOLUME TOTAL
UNITED STATES, 1990-1999



Source: Thomson Financial Securities Data

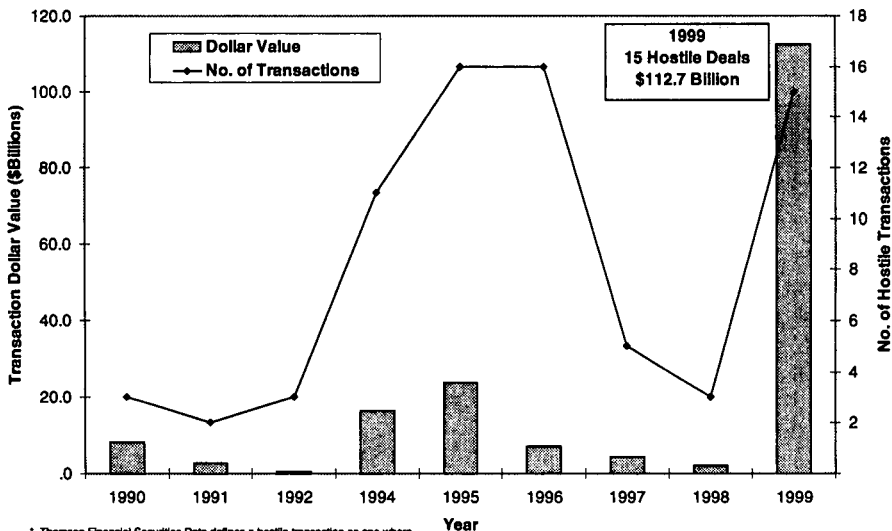
3. See Erica Copulsky, *Novel Solutions: Cash-rich LBO Firms Are Being Forced to Go Outside the Box to Find New Ways to Put All That Money to Use*, INVESTMENT DEALERS' DIG., Mar. 22, 1999 (citing Morgan Stanley Dean Witter).

The 1999 average domestic speculative-grade default rate was 5.63% — above 1998's average of 3.99%, well above 1996's default rate of under 1.94% but still well below the 1991 default rate of over 10.56%.⁴ Y2K fears and competition provided by other high yield investment vehicles have been detrimental to the high yield market. The end of that decline is not yet in sight.⁵

Hostile Takeovers

Domestic hostile takeovers fluctuated wildly both in number and size throughout this period. In 1991, there were only two domestic hostile deals announced, with an aggregate value of \$2.8 billion. In 1998 there were three announced hostile deals accounting for \$2.1 billion. Such transactions substantially increased in number (fifteen transactions) and dollar volume (\$112.7 billion) in 1999.

HOSTILE TRANSACTIONS*
UNITED STATES, 1990–1999



* Thomson Financial Securities Data defines a hostile transaction as one where the target board of directors rejects an initial bid from a potential acquirer and also rejects an additional bid from the same bidder.

† All 54 hostile transactions in 1993 were withdrawn.

Source: Thomson Financial Securities Data

Unlike the situation in the Eighties, financial players represented a relatively small percentage of hostile transactions.

In 1999, announced hostile deals worldwide reached over \$473 billion in dollar volume representing over 14% of all announced worldwide

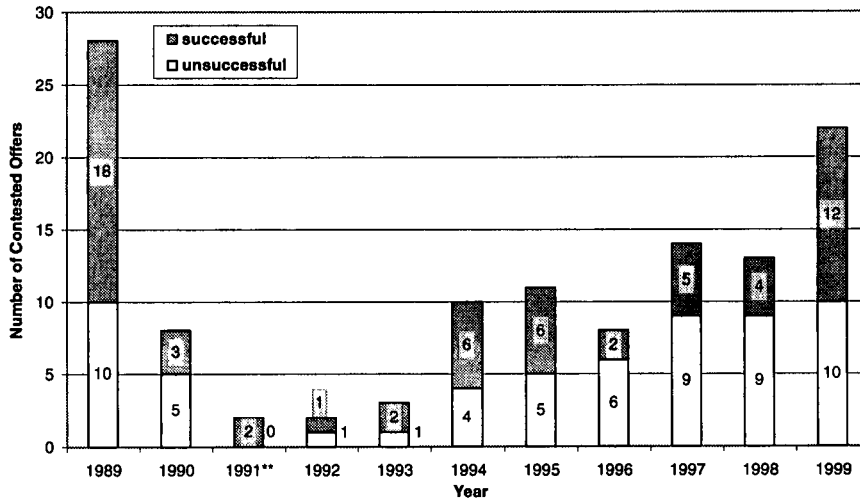
4. See GLOBAL CREDIT RESEARCH (Moody's Investors Service, New York, N.Y.), Jan. 2000.

5. See Josh Kosman, *White Cap Financing Points to Still Troubled Junk Market*, DAILY DEAL, Jan. 26, 2000, at 1.

deal value. This was due, in no small measure, to a precipitous increase in European hostile deals. European hostile announced bids accounted for \$355 billion, a record dollar volume for the region.⁶

At the end of the Eighties, the level of hostile activity was high but then fell dramatically, reflecting a confluence of the stock market crash, the demise of Drexel Burnham, the drop in the high yield market, the general contraction of credit for takeover loans, as well as changes in public policy. As a result, there were so few contested bids recorded in the early part of this decade that comparisons become relatively meaningless. In 1994, the first year since 1990 where there were more than three contested offers, the success rate of bidders in contested offers was 60%; in 1998, it was 31% and, in 1999, 54%.

CONTESTED* OFFERS
SUCCESSFUL VS. UNSUCCESSFUL 1989-1999



*Contested offers include a) two companies bidding for one target and b) offers rejected by target.

** No unsuccessful contested offers in 1991

Source: Margerstat

In the Eighties, hostile takeovers were met at almost every turn by increased activism on the part of corporations and other affected constituencies. The Nineties, by contrast, have seen almost total acceptance of hostile takeover activity, with domestic hostile bids being made by major establishment firms such as GE, AT&T, IBM, Pfizer, and Allied Signal.

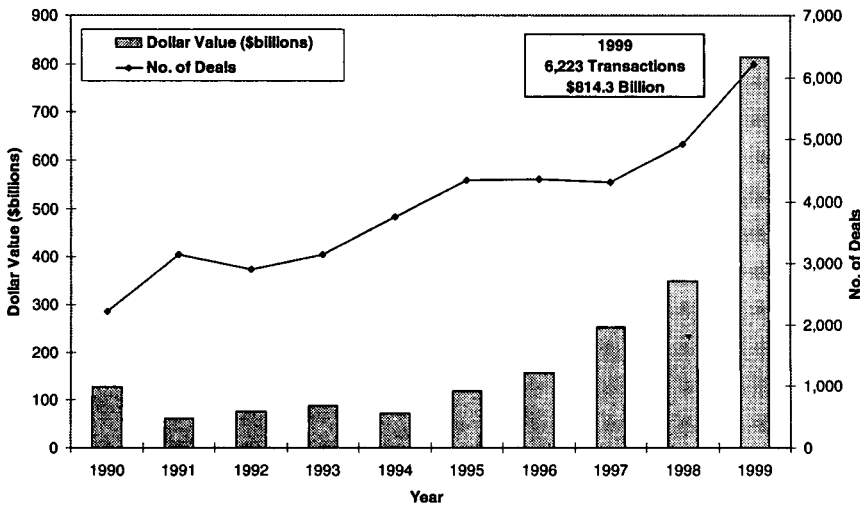
While the number of hostile transactions was small in comparison to the total number of transactions, management's fear of takeovers had a significant impact on merger activity.

6. Search of Thompson Financial Securities Data (Jan. 2000).

Cross-Border Activity

This period saw continued liberalization of government restrictions, easing of cross-border cash flows and advances in technology, which facilitated the ability to effect major international and domestic combinations. This led to the substantial growth in international cross-border transactions, which grew from 3,152 deals (\$61.1 billion) in 1991, to 4,923 deals (\$349.6 billion) in 1998 and 6,223 deals (\$814.3 billion) in 1999.

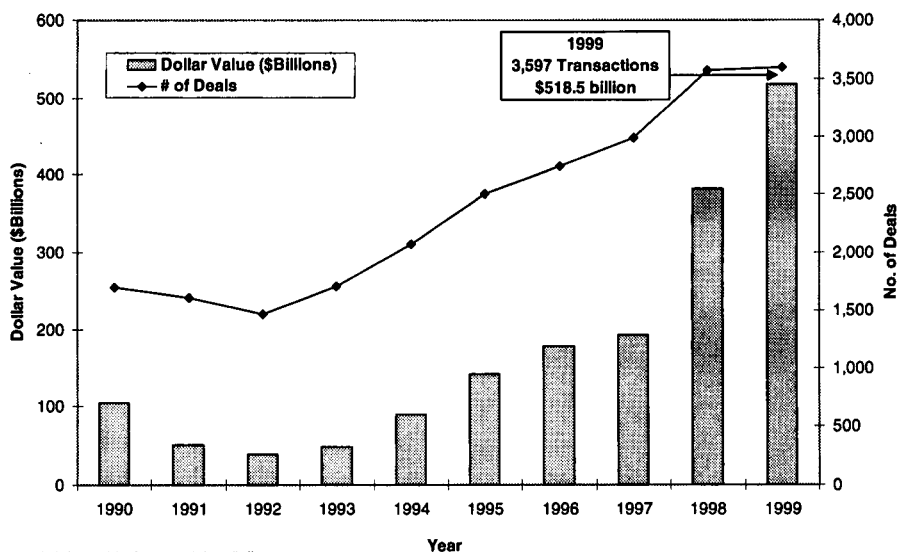
INTERNATIONAL CROSS BORDER TRANSACTIONS
1990-1999



* Includes net debt of target; excludes spinoffs.
Source: Thomson Financial Securities Data

Cross-border transactions involving one U.S. party reached \$518.5 billion (3,597 deals) in 1999 and \$382.1 billion (3,568 deals) in 1998, compared to \$39.5 billion (1,467 deals) in 1992.

CROSS BORDER TRANSACTIONS 1990–1999
ONE U.S. PARTY INVOLVED

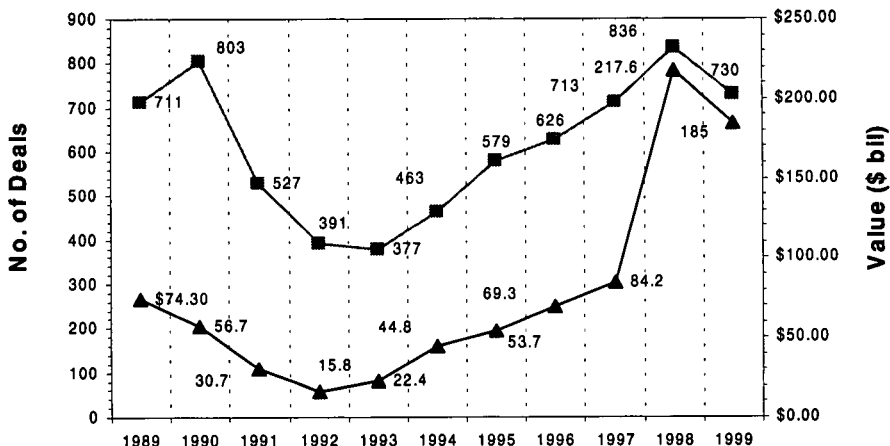


Worldwide mergers and acquisitions growth reflects the substantial increase in European mergers and acquisitions activity (\$1.2 trillion in 1999 and \$591.7 billion in 1998,⁷ representing 37% of total transaction volume in 1999 and 25.7% in 1998. The advent of the Euro, widespread privatization of government-controlled entities and developments tearing down cross-border restrictions in the common market all contributed to this activity, as did other strategic forces mentioned elsewhere in this paper (e.g., globalization, spreading costs, technology and communications). European mergers and acquisitions growth, even taking into account the recent steep rise in the region's activity, appears to be in the early stages of the mergers and acquisitions cycle.

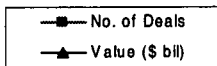
Foreign acquisitions in the United States grew from 391 deals (\$15.8 billion) in 1992, to 836 deals (\$217.6 billion) in 1998 and 730 deals (\$185 billion) through the third quarter of 1999. During the same period, U.S. acquisitions overseas grew steadily from 540 deals (\$14.1 billion) in 1992, to 1,387 deals (\$115.4 billion) in 1998, to 1,087 deals (\$120.3 billion) through the third quarter of 1999.

7. *Id.*

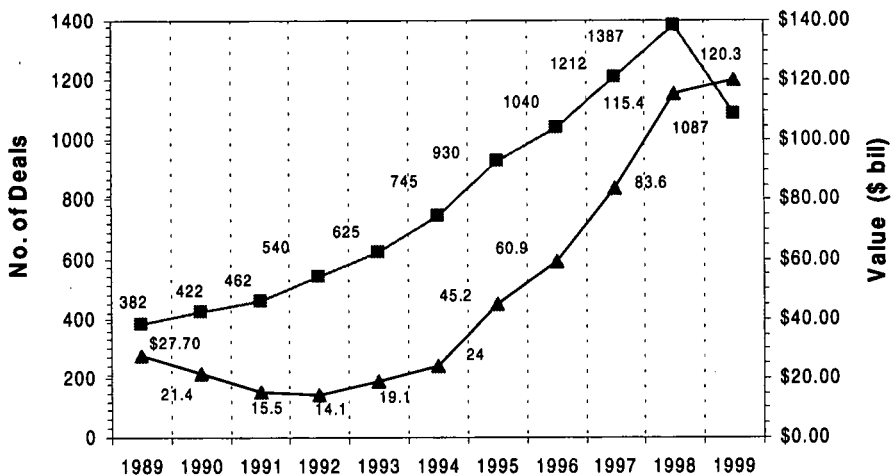
FOREIGN ACQUISITIONS OF U.S. COMPANIES
1989-1999*



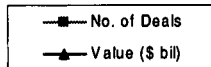
* Includes LBOs and divestitures.
 ** FI uses for 1999 are as of third quarter.
 Source: Mergers & Acquisitions Magazine, Philadelphia, and Securities Data
 Mergers & Corporate Transactions Database, Thomson Financial Securities
 Data Company



U.S. ACQUISITIONS OVERSEAS
1989-1999



* Includes LBOs and divestitures.
 ** Figures for 1999 are as of third quarter.
 Source: Mergers & Acquisitions Magazine, Philadelphia, and Securities Data
 Mergers & Corporate Transactions Database, Thomson Financial Securities
 Data Company

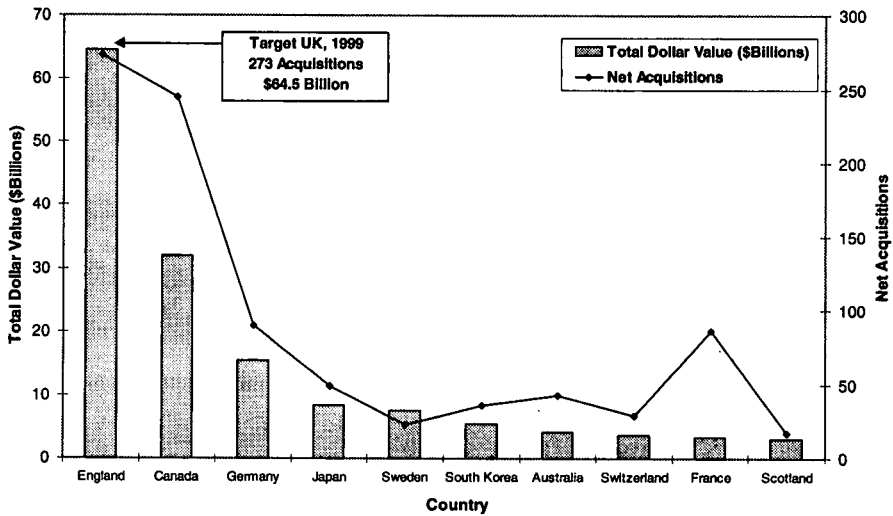


For U.S. acquirers in 1999, six of the top ten targets were European.

European firms constituted five of the top seven acquirers of U.S.

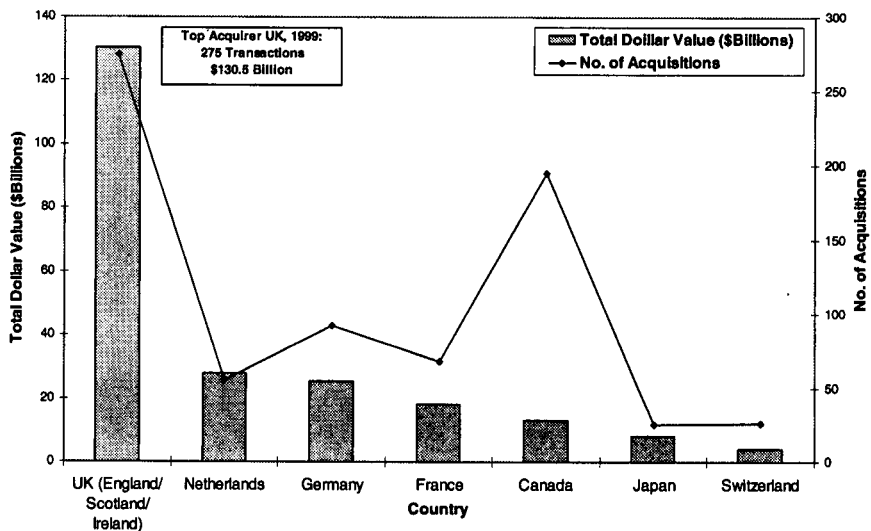
companies in 1999, with firms from the United Kingdom leading with 275 transactions worth \$130.5 billion.

1999 TOP TEN FOREIGN TARGETS OF U.S. COMPANIES



Source: Mergerstat

TOP FOREIGN ACQUIRERS OF U.S. COMPANIES IN 1999



Source: Mergerstat

In 1998, the Asian economic crisis caused a significant slowdown

in Asian merges and acquisitions. It rebounded to over \$238 billion⁸ in 1999, reflecting the region's rapid recovery from the financial crisis and the region's growing recognition that elimination of restrictions on foreign investment was necessary to provide needed capital for its economies.

Latin American mergers and acquisitions activity fell to \$66.5 billion in 1999, from \$86 billion in 1998⁹, reflecting the region's slow economic recovery and its halting willingness to encourage foreign acquisitions.

Liquidity

Stock and equity-based instruments have become the principal acquisition currency and were used in more than 70% of all deals in the first half of 1999. The use of equity-based instruments continues to provide great liquidity. Equity-based instruments include contingent value rights, targeted stock and special kinds of preferred shares. Liquidity was also provided by the availability of funds from off-balance sheet financial structures. Lending for takeovers has been available, although there is some tightness in the junk bond and mezzanine funding markets. Direct issuance of public debt in transactions is quite low.

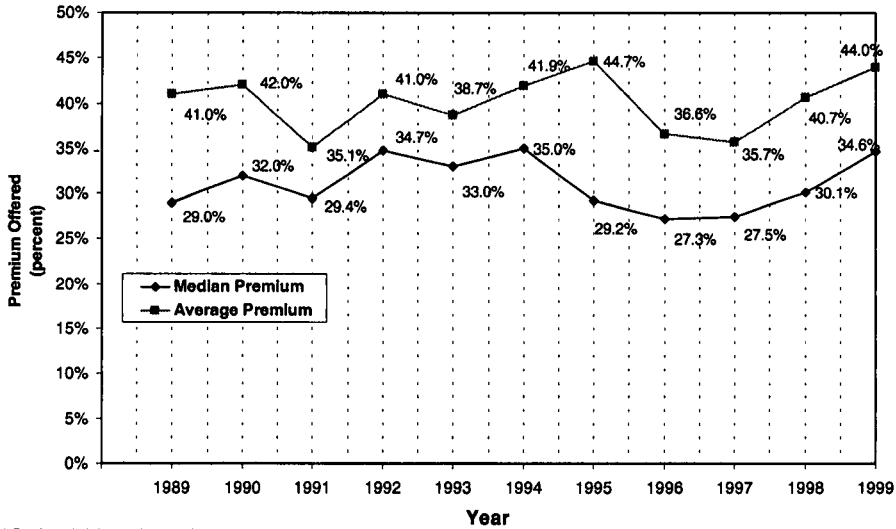
Acquisition Premiums and Price Earnings Ratios

Average acquisition premiums offered in the Nineties, based on the seller's closing price five business days before the initial announcement, varied between a low of 36% in 1997, to a high of 45% in 1995 and 44% in 1999.

8. *Id.*

9. *Id.*

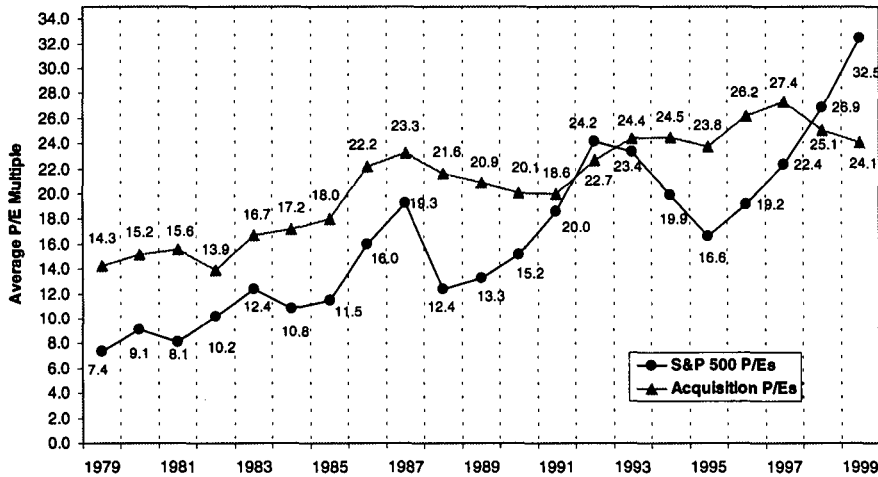
**PERCENT PREMIUM OFFERED
1989-1999**



* Premium calculations are based on the seller's closing market price five business days before the initial announcement. These calculations exclude negative premiums.
Source: Mergerstat

The S&P 500 price earnings ratio rose rapidly and steadily in the most recent five-year period going from 16.6 in 1995 to 32.5 in 1999. This rise reflects the heavy weighting of Internet and technology issues. The average acquisition price earnings ratios did not increase at the same rate and fell below the S&P 500 in 1998. This trend has continued. In 1999, the average acquisition price earnings ratio was 24.1.

ACQUISITION P/Es vs. S&P 500 P/Es 1979-1999



* Based upon an average of weekly prices and quarterly earnings.
 ** Excludes negative P/E multiples and P/E multiples larger than 100.
 Source: Mergerstat

Pooling vs. Purchase Accounting

There has been an erosion in the importance of historical earnings per share as a method of determining the value of public companies; this reflects an increasing willingness by the investment community to use other analytical valuation methods.

Pooling accounting, used to improve historical reported earnings per share, has become somewhat less significant. There were major transactions (e.g., DEC-Compaq, AOL-Time Warner) in which purchase accounting was deliberately chosen and at least one major hostile transaction (Wells Fargo-First Interstate Bancorp) in which purchase accounting defeated a proposed pooling transaction.

New accounting rules, which will effectively eliminate pooling transactions at the end of 2000, have recently been adopted, but are not expected to have a significant impact on mergers and acquisitions transactions. However, these rules may cause a rush to announce transactions prior to the effective date.

A study by PricewaterhouseCoopers compared the market value of pooling and purchase transactions against industry standards at the time the deals were announced and one year later and found that, although the difference was not statistically significant on a directional basis, pooling deals under-performed purchase accounting deals at the time of announcement. This suggests that, at best, there is no performance dif-

ference between the two and, at worst, the decision to pool may actually dampen the market's expectations.¹⁰

A recent Goldman Sachs study predicts that this accounting change should not have a material adverse effect on future business consolidations as wider acceptance of a cash earnings valuation approach and a more intensified focus on alternative valuation metrics, such as return on invested capital, economic valuation metrics, such as return on invested capital, value added (EVA) and productivity will gain more prominence. Corporate consolidation decisions will be influenced primarily by the strength of the economic fundamentals underlying the transaction and strategic factors such as like synergies, improved competitiveness and market share gains.¹¹

The story may not be over yet – the high-tech industry has voiced vociferous criticism about the Financial Accounting Standards Board's plan to end pooling and has threatened to take its case to Congress.¹² The industry has successfully approached Congress in the past.

Antitrust

Antitrust regulation, eased in the Eighties, remains benign. The technology and information revolution forced redefinition of old guidelines. New rules for weighing cost savings and other efficiencies in evaluating the antitrust implications of mergers have been developed. While there is some current talk about tightening antitrust enforcement, it is unlikely that any contemplated change will radically impact Mergers and Acquisitions activity.

Of the 4,000 planned mergers in 1998, the Federal Trade Commission and Department of Justice conducted detailed investigations in approximately 150, intervened in only about sixty of those proposed transactions, and filed court action in only about fourteen. However, there are indications that vigilance in this area may increase.

Corporate Governance

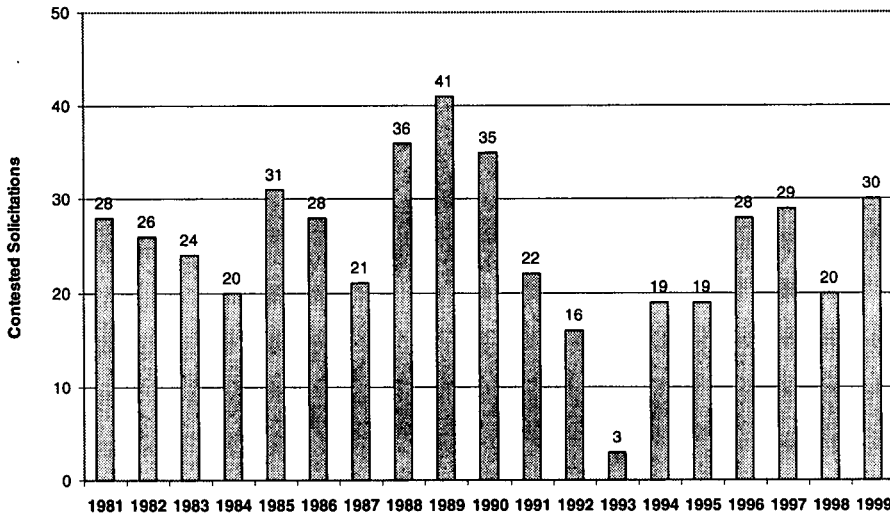
Substantial activity related to corporate governance in the form of proxy solicitations continued.

10. See Ray Beier & Richard Stewart, *How Pooling of Interests Accounting Affects Value: Findings from a PricewaterhouseCoopers Research Study* (visited June 1, 2000) <<http://www.pwcglobal.com>>. See also Ray Beier & Richard Stewart, *Who Needs Pooling?* DAILY DEAL, Nov. 30, 1999, at 14.

11. See Abby Joseph Cohen & Gabrielle Napolitano, *Purchase Versus Pooling: The Debate on Business Combinations*, Accounting/Portfolio Strategy (Goldman Sachs Investment Research, New York, N.Y.), May 28, 1999.

12. See Charles Sisk, *FASB Taken to Task at Hearing*, DAILY DEAL, Feb. 4, 1999, at 2.

PROXY CONTEST TRENDS*
1981-1999

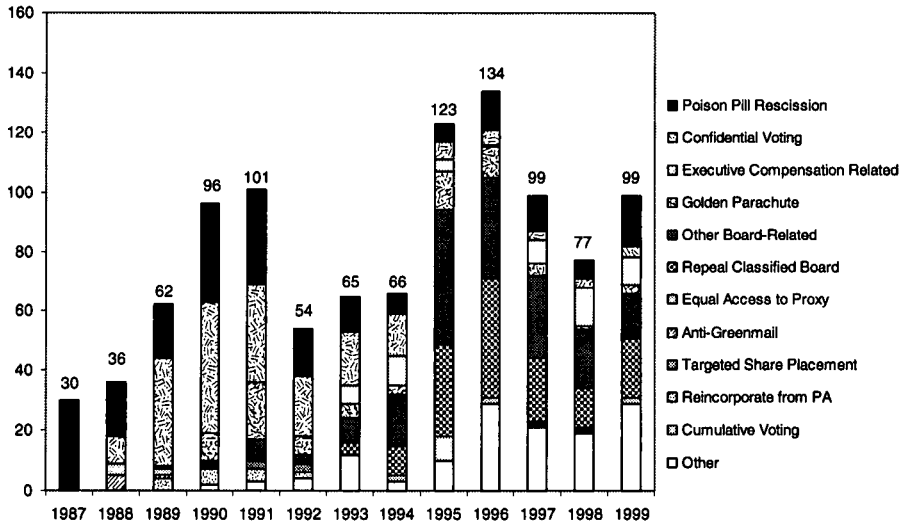


*Georgeson independently surveyed companies with annual meetings during the first six months of 1999; figures are based on situations where dissident party submitted actual proxy materials. Source: Georgeson Shareholder Communications Inc.

The principal change in the nature of proposals represented efforts to repeal classified boards. During the prior decade, on the other hand, proposals attacking classified boards were rare.

In 1999, there were twenty proposals to repeal classified boards. The second largest block of proposals was poison pill rescission, which accounted for seventeen proposals. The repeal of classified boards makes it easier to threaten a proxy fight in the event an acquisition proposal is not accepted or a board does not act appropriately with respect to a poison pill.

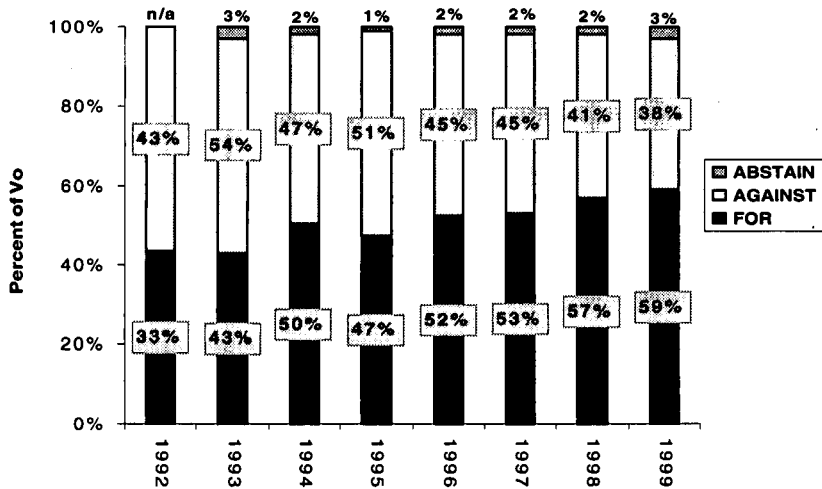
CORPORATE GOVERNANCE PROPOSALS 1987-1999



* Georeson independently surveyed companies with annual meetings during the first six months of 1999. Georeson monitored only proposals sponsored by institutions and shareholder groups, such as labor unions, and limited our analysis to corporate governance proposals. Source: Georeson Shareholder Communications Inc.

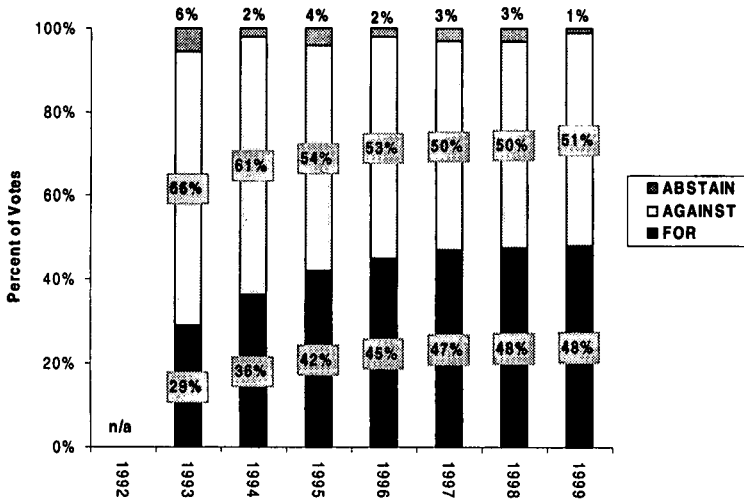
The threat of soliciting proxies has caused many other proposals to be adopted without a contested solicitation of proxies.

SAMPLE SUMMARY OF AVERAGE VOTING RESULTS
POISON PILL RESCISSION 1992-1999



Source: Georeson Shareholder Communications Inc.

**SAMPLE SUMMARY OF AVERAGE VOTING RESULTS
REPEAL CLASSIFIED BOARD, 1992-1999**



Source: Geogeson Shareholder Communications Inc.

There has been an improvement in the success rate of such solicitations. During this same period, communication among shareholders has been facilitated by the SEC's liberalization of proxy rules relating to shareholder communication.

The Technology and Communications Revolution

The technology and communications revolution continues to have the most profound effect. It has improved capabilities in modeling companies' cash flows and structuring transaction scenarios, thereby enhancing the ability to manage large multinational and domestic enterprises and to realize relatively short-term cost savings. It has fostered globalization of markets and of other business entities by enhancing the ability to communicate and effect transactions across borders. It has also resulted in a proliferation of new businesses and the remodeling of established businesses, all of which have led to increased mergers and acquisitions activity.

U.S. Mergers and Acquisitions Specialists

This period also saw growth worldwide for U.S. mergers and acquisitions specialists. It is now much more common to have two U.S. financial and legal firms as advisors to non-U.S. companies in a transaction where no U.S. party is involved. The globalization of markets has led to major expansion of U.S. banking houses and law firms. U.S. investment banks have also greatly expanded worldwide both through

generating and executing mergers and acquisitions transactions for clients, as well as through being directly involved as acquirers or acquirees themselves. This period also saw the expansion of their merchant banking business.

The central role played by investment banks in mergers and acquisitions transactions is not new:

During 1928 and 1929 some investment houses employed men who did nothing but search out mergers. One businessman told me he regarded it as a loss of standing if he were not approached at least once a week. A group of businessmen and financiers in discussing this matter in the summer of 1929 agreed that nine out of ten mergers had an investment banker at the core.¹³

II. CURRENT OUTLOOK

In 1992, mergers and acquisitions activity had fallen precipitously from the prior decade. At that time, I presented a paper reviewing the previous ten years and concluded that there were a number of factors in place which presaged a major upturn in mergers and acquisitions activity. The factors which led me to that conclusion then are today even more firmly in place and presage, in my view, even stronger growth in mergers and acquisitions activity:

- There has been substantial growth in capital availability, and there are ample sources of funds for acquisition lending despite some recent shrinkage in the availability of high yield debt.
- Trade barriers continue to fall.
- Communication abilities are advancing domestically and internationally.
- Revolution in technology, communications and the Internet is in its early stages.
- There is significant under-investment by large LBO funds.
- The European market, with increased consolidation and the advent of the Euro, continues to expand.
- The Asian market, which recently suffered a major downturn, is rebounding. Unlike 1992, however, the major thrust seems to be foreign investment into the Asian markets rather than the reverse.
- There is greater acceptance of innovative instruments such as targeted stock, contingent value rights, joint ventures and other methods of effecting a transaction.
- Strategic imperatives driving merger and acquisition activity,

13. William L. Thorp, *The Persistence of the Merger Movements*, *American Economic Review*, Papers and Proceedings 21, March 1931.

such as competition, rationalization of business, globalization and the effects of the information and technology revolution, give every sign of continuing to propel mergers and acquisitions activity.

- Rationalization of enterprises is moving forward at an accelerating pace.
- Hostile transactions have become thoroughly accepted as a corporate tool and will continue to act as a prod.
- Hostile transactions in Europe are likely to grow. Hostile transactions have been effected where comparatively small acquirers have acquired larger targets, reminiscent of earlier U.S. merger waves (e.g., Olivetti-Telecom Italia).
- Overall hostile transactions are also increasingly being used to interfere with apparently consensual transactions.
- Regulatory restrictions which limited the participation of many industries (e.g., banks, insurance, utilities) in the last great merger wave have been, and continue to be, eased. Activity in these areas has picked up substantially. This trend appears to be continuing.
- There is a strong, high-multiple market in technology, Internet and communications company stock. This currency is being used to acquire other companies, including established companies, (e.g., bricks & mortar/Internet combinations).
- The privatization market remains at a record level worldwide and is expected to continue growing. U.S. privatization, however, lags. The telecommunications industry has led privatization outside the United States.
- De-mutualization of insurance companies in the United States is moving forward at a fast pace.
- The high level of announcements of unused commitments for buy backs by corporations should further force liquidity in the markets.
- Antitrust enforcement remains relatively benign.
- There is a greater willingness in executive suites and boardrooms to consider mergers and acquisitions activity.
- Legislation such as the Telecommunications Act of 1996 and the repeal of the Glass-Steagall Act and Bank Holding Company Act of 1956 are likely to continue to cause mergers and acquisitions activity in the respective industries.

III. SOME COMMENTS ON THE SOCIETAL AND ECONOMIC IMPACT OF MERGERS

There were four other great merger waves in the United States in this century: the turn of the century, the years between the end of World War I and the stock market crash in 1929, the period following World War II until the early 1970's and the 1980's.

Although by strategic imperatives particular to the time influenced each merger wave, a common element of each wave was that it waxed during periods of high liquidity and waned with a fall-off in the stock market and illiquidity in the financing market.

The Four Previous Waves

First Wave (1893–1904):

- peaked during 1898–1902
- produced monopolies (e.g., U.S. Steel, Bethlehem Steel)
- saw the rise of JP Morgan and Carnegie
- large steel and railroad mergers
- ended with a major decrease in the twelve stocks of the Dow (the “Rich Man’s Panic”) in 1904, bank failures and tight money

Second Wave (1919–1930):

- more than 8,000 businesses in mining and manufacturing disappeared through combination or acquisition
- oligopolies created — by the end of this period an estimated 200 corporations owned nearly half the nation’s corporate wealth, and twenty of the hundred largest corporations were purely holding companies. There was a buoyant stock market and financing was readily available
- The Dow hit 300 in 1928 (a five-fold rise in three years)
- ended with the October 1929 crash and large bank failures, tight money

Third Wave (mid-1950s–1970):

- rode the heels of World War II
- increased multi-nationalization (tax incentives, decreasing trade barriers and falling transportation costs made investment abroad attractive)
- “conglomeration” became a catchword
- pooling of interest accounting was freely allowed and encouraged takeovers merely for balance sheet effect
- large scale auto production, retail mergers
- “Chinese money” available

- 1970 U.S. GNP hits \$1 trillion
- ended in 1970 when the Dow falls 36% to 631 (many market leaders at the time fell even more than that — leading conglomerates fell 86%, computer issues 80%, technology stocks 77%), with tight money (credit rationing for takeovers, dollar devaluation)

Fourth Wave (early 1980s–1989):

- average deal values increased
- proliferation of hostile takeovers and increased but reluctant acceptance as a normal tool
- strategic “megamergers,” though smaller than the current megamergers
- introduction of the junk bond market, providing quick but highly leveraged capital
- prominence of LBOs as a new takeover strategy in increasingly larger deals (RJR Nabisco)
- influence of foreign investment and competition
- ended in 1989 with a major decline in the market and liquidity

The availability of cash and the acceptability of equity-based securities to sellers seem to be the critical fuel spurring takeover activity. In each of the previous waves, “super high octane fuel” ultimately became available (e.g., “Chinese money” in the Seventies, junk bonds and highly confident letters in the Eighties) which lead to excesses and, ultimately, to collapse. Danger signals of such excesses are, at present, not apparent, unless one is especially concerned with stock market valuations, interest rates, the threat of inflation or a major systemic economic shock.

While each of the previous merger waves resulted in restrictive legislation or judicially-sanctioned impediments to mergers and acquisitions activity (judicial acceptance of poison pills, state statutes adversely affecting hostile takeover activity, tax penalties with respect to golden parachutes, the Exxon-Florio Act, the Public Utility Holding Company Act, the Glass-Steagall Act, the Bank Holding Company Act of 1956, and various insurance holding company statutes, to name a few), each successive wave proceeded apace with the restrictive legislation relatively intact.

The current wave appears unique in that there has been a dismantling of some major impediments to mergers and acquisitions activity (e.g., the Telecommunications Act of 1996, the partial repeal of the Glass-Steagall Act and the Bank Holding Company Act of 1956, legislatures’ increasingly permitting de-mutualization of insurance companies), and a subtle but uneven trend toward facilitating or allowing such trans-

actions by the courts,¹⁴ regulatory authorities and state¹⁵ and federal legislatures.

Despite the huge increase in mergers and acquisitions activity, the negative noise level accompanying both hostile and consensual transactions is muted compared to the noise levels toward the end of each previous merger wave.¹⁶ (Expressed concerns over megamergers, particularly as they affect the media, and their societal impact, however, have recently escalated.) This reflects the fact that for many of the following reasons, the reaction to the growth in mergers and acquisitions activity has actually grown more positive:

- There has been widespread acceptance of economists' views that mergers and acquisitions activity helps the economy by causing assets to be moved to their maximum and best use and that hostile takeover activity is an important tool in accomplishing this.¹⁷
- It has been more widely recognized that during takeover booms, markets tend to be buoyant and tend to fall with a decline in mergers and acquisitions activity. The symbiotic relationship between mergers and acquisitions activity and stock market values is highlighted in the Brady Report¹⁸ dealing with the major crash in the market in the late Eighties.

14. See *Quickturn Design Sys. v. Shapiro*, 721 A.2d 1281 (Del. 1998); *Ace Limited v. Capital Re Corp.*, 747 A.2d 95 (Del. Ch. 1999); *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998); *International Bhd. of Teamsters v. Fleming Cos.*, 975 P.2d 907 (Okla. 1999). *But see* *Invacare Corp. v. Healthdyne Technologies, Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997); *Brazen v. Bell Atlantic Corp.*, 695 A.2d 43 (Del. 1997); *In re IXC Communications, Inc. v. Cincinnati Bell, Inc.*, No. C.A. 17324, 1999 WL 1009174 (Del. Ch. Oct. 27, 1999).

15. In March 1998, Connecticut state legislators overwhelmingly defeated a controversial anti-takeover bill designed to protect Echlin Inc., a Connecticut auto-parts company, from an unfriendly \$3 billion takeover bid by SPX Corporation, a Michigan-based auto-parts manufacturer.

16. John R. Beckett, president (and now chairman) of a leading corporate acquirer, Trnasamerica Corp., said in 1967: "There's a great danger of people . . . trying to do what we're doing, and getting themselves completely overextended. They're using too much of debt securities . . . paying too high a price to acquire something and pyramiding. They could eventually get into very serious difficulties." John Brooks, *Sixty Years of American Business: The Pursuit of Happiness Through the Pursuit of Profit*, FORBES, Sept. 15, 1977, at 69.

17. *But see* Michael C. Jensen, *A Helping Hand For Entrenched Managers*, WALL ST. J., Nov. 4, 1987. "The Restructuring of Corporate America (including divestitures, spin-offs and 'going private' transactions) that is being brought by the takeover market is streamlining many of the largest and most complex corporations that are simply too large, too complicated and too unfocused to be efficient." *Id.*

18. See generally THE PRESIDENTIAL TASK FORCE ON MARKET MECHANICS, REPORT OF THE PRESIDENTIAL TASK FORCE ON MARKET MECHANISMS (submitted to the President of the United States, the Secretary of the Treasury, and the Chairman of the Federal Reserve Board) (Jan. 1988) reprinted in 1267 Fed. Sec. L. Rep. (CCH) (Jan. 12, 1998); Roberta Romano, *Triggering the 1987 Stock Market Crash: Anti-takeover Provisions in the Proposed House Ways and Means Bill?* 9 YALE J. ON REG. 119 (1992).

- After unprecedented consolidation over the last two decades, our economy is so strong that it is the envy of the world. The unemployment level continues to be low, having reached a generational low of 4%. This provides alternate opportunities for persons displaced in any particular transaction.

The technology and information revolution has forced recognition that corporate consolidations are more “do-able” and that increased mergers and acquisitions activity is necessary to achieve economies of scale, geographical diversification and other competitive imperatives:

- There is a greater willingness by target management to consider takeover transactions. This reflects the effect of golden parachutes, which aligned, to a greater extent, management’s personal interests with those of shareholders and the greater insecurity of executives in the corporate suite. (This period has seen unprecedented, abnormal changes in corporate leadership in major corporations, including IBM, GM and American Express.) This reduced the drumbeat against takeovers which was sounded by corporate management in prior periods.
- Institutional investors,¹⁹ recognizing that the nature and size of their holdings limit their ability to exit investments, have been active in seeking to keep the buyout exit open. As a result, there is a vocal and activist constituency which favors mergers and acquisitions activity. Its activism is being exercised more frequently in the proxy area, primarily in connection with eliminating or ameliorating poison pills and staggered boards.

The growth of international transactions has created a greater need for harmonization in the regulatory and accounting areas where there has been some movement. How fuller harmonization can be accomplished while reconciling local interests will be the subject of much debate.

The ability of law firms to compete and to service ever larger clients will require special expertise and infrastructure. As a result, law firms have grown in size and have become increasingly internationalized. The large-scale growth of law firms generally is presenting the legal profession with a number of major challenges, including greater conflict-of-interest concerns and the need to reconcile what is the practice of law (by jurisdiction and nature of service).

The legal profession is developing its own “urge to merge.” Also,

19. They hold about 50% of all listed corporate stock in the United States and about 60% of the hundred largest corporations.

the legal profession will have to come to grips with the new high turnover rate of lawyers and the challenges it presents.

The growth in the size and nature of companies will continue to fuel debate on the nature and the role of megamergers (and invariably smaller ones) in society in general and in various localities in particular. For example, there is concern that mergers and acquisitions activity may be contributing to a significant fall in the rate of corporate charitable giving. In the 1960's, companies gave up to 5% of their pre-tax income to charity; this fell to 2.5% in the 1980's and is presently about 1%.²⁰

We are in the early stages of a communications and technology revolution which will continue to propel mergers and acquisitions activity and market values.

There is, in my view, no adequate methodology for evaluating whether mergers and acquisitions activity enhances shareholder wealth nor is there any meaningful consensus on which effects should be evaluated, how such effects should be weighed or which type of transactions should be aggregated. Even when attempts to isolate and evaluate specific elements are made, there remains a multiplicity of factors raising questions as to how meaningful the conclusions are.

Take stockholder wealth. Which stockholder? Is this selling stockholder the long-term stockholder who will see a substantial portion of his profits eroded by taxes? The short-term stockholder? The arbitrageur? The tax-exempt holder? How do we assume the proceeds are invested — same industry, S&P or fixed income securities?

Which stockholder does one consider in evaluating the acquirer's actions? The short-term holder who may be hurt by the arbitrage in connection with the acquisition, or the long-term holder? In considering the impact on the long-term holder, when does one take a fix on the results? One year out? Two years out? Or longer? How does one evaluate whether inherent weaknesses in the acquirer have impacted the price rather than assume it as the result of the acquisition?

The results would also vary substantially if one were to take the results of an acquisition made early in a merger cycle rather than at the end of the cycle, when the excesses may have caused excessive pricing to be tolerated.

How are the effects on constituencies (e.g., local communities, bondholders, employees, suppliers), on job loss, or the impact on research and development, relative constituencies, and society and the economy as a whole to be evaluated absolutely and relatively?

20. See Linda Keslar, *Mergers Blamed for Decline in Gifts*, DAILY DEAL, (Feb. 1, 2000) <<http://www.thedailydeal.com/features/inthenews/A14840-2000Feb1.html>>.

IV. CONCLUSION

There is an old Chinese wish: "May you live in interesting times." It may be a curse or a blessing. For those practicing in this arena, I feel it is safe to say it undoubtedly will be both; — either way, will certainly be interesting.