



# SIDLEY

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■ **TALKINGPOINT** February 2022

## Trends in hostile M&A

FW discusses trends in hostile M&A with Kai Liekefett, Derek Zaba, Paul Choi, Beth Berg and Jessica Wood at Sidley Austin LLP. ■



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Kai Liekefett is a partner in New York and co-chairs Sidley's shareholder activism and corporate defence practice. He spends 100 percent of his time on activism campaigns, proxy fights and hostile takeovers. In the last five years, he has been involved in over 80 proxy contests, more than any other defence attorney in the world, and 25 percent of all US proxy fights that went all the way to a vote.



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Derek Zaba is a partner in the Palo Alto and New York offices and co-chairs Sidley's shareholder activism and corporate defence practice. He counsels companies on a variety of matters, including activism defence and proxy contests, activism preparedness, takeover defences, shareholder engagement and corporate governance. Over the past two decades, he has been involved in dozens of activist campaigns and proxy contests in various advisory and principal capacities.



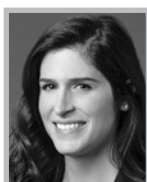
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Paul Choi is the global co-leader of the firm's mergers and acquisitions practice and a member of the firm's executive committee. In the mergers and acquisitions area, he focuses on public and private mergers, acquisitions, dispositions, spin offs and joint ventures. He also advises clients on corporate finance transactions and securities and corporate governance matters. His practice also includes counselling clients on takeover defence and proxy contests.



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Beth Berg is a partner in Sidley's Chicago office and has nearly 20 years of experience advising public and privately held companies and boards of directors with respect to public and private mergers and acquisitions, spin offs, corporate governance and SEC disclosure matters. In addition, she has an active practice advising companies in connection with shareholder activism, proxy contests and unsolicited tender offers and takeover defence.



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Jessica Wood is a partner in Sidley's New York office, where she focuses her practice on corporate and securities matters, including shareholder activism, public and private mergers and acquisitions, and corporate governance. She is a leading member of Sidley's shareholder activism defence practice, advising public companies on shareholder activism campaigns, hostile takeovers and other unsolicited bids, and strategic investor relations.

**FW: Reflecting on the last 12-18 months, how would you describe hostile M&A activity and prevailing trends in this space?**

**Liekefett:** We have seen hostile takeovers make a real comeback, piggybacking on the market upheaval from the coronavirus (COVID-19) pandemic. But the modern hostile takeover is more of a tactic to force a target into a negotiated sale. Given the sophisticated takeover defences companies have developed over the past few decades, hostile takeovers are still incredibly challenging to complete. However, a hostile approach is effective in creating a sense of urgency with the target board and, if made publicly, in churning the target's

shareholder base resulting in more investors who are open to a deal. With the ongoing uncertainty from the pandemic, boards are sometimes hesitant to make a major decision like selling the company. Bidders are using hostile tactics to turn up the heat and push through a sale while share prices are still depressed. We have also seen activist investors eager to jump on the hostile takeover bandwagon. Activists are agitating – both publicly and privately – at targets to support hostile takeover bids and increase pressure on the board. They are also increasingly launching takeover attempts themselves, both alone and jointly with others, mostly with private equity (PE) funds.

**“TO EFFECTIVELY DEFEND AGAINST A HOSTILE TAKEOVER AT AN ATTRACTIVE PRICE, THE BOARD NEEDS TO CONVINCE INVESTORS THAT ITS LONG-TERM VISION FOR THE COMPANY IS MORE VALUABLE THAN A SHORT-TERM PAYOUT.”**

JESSICA WOOD  
Sidley Austin LLP

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BETH BERG  
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**FW: With unsolicited takeover activity typically increasing following market downturns, to what extent has the COVID-19 pandemic triggered an uptick?**

**Zaba:** Markets have generally recovered from the initial drops in early 2020, but not all industries and companies have recovered equally. Some are still trading well below their pre-pandemic levels. We are seeing huge deal premiums, in a few cases exceeding 100 percent, that still do not touch where the stock was trading two years ago. This is a great deal for buyers and for shareholders who are happy to recoup their losses. The uncertainty of the pandemic also makes standalone plans harder to develop and rely on, making short-term value more attractive to boards and shareholders. Buyers are eager to capitalise on the current environment to get a bargain, and the hostile approach exerts maximum pressure on the board to sell quickly.

**FW: In what ways are rising shareholder activism, the proliferation of special purpose acquisition companies (SPACs) and the intervention of private equity impacting hostile dealmaking?**

**Choi:** Competition for targets has become fierce. Years of active deal markets and consolidation have reduced the number of public companies, and the previous 11-year bull market has made many of them too expensive to acquire. The deal market is also crowded, particularly with the number of SPACs that were formed in 2020 and early 2021. This means that buyers, both friendly and hostile, and activists are often going after the same companies, and they have the same goal – sell the company. It is no surprise that many hostile buyers and activists have embraced each other to work toward their shared objectives. Beyond overt coordination, which remains the exception, activist investors have helped flesh out the hostile takeover playbook through a decade of proxy contests, litigation and PR campaigns. But the proliferation of dealmaking in recent years also cuts the other way. There is more regulatory scrutiny of major transactions

than ever under both antitrust laws and the growing regime of foreign investment screening laws. Buyers have become wary of pursuing deals with significant regulatory risk, particularly in cross-border transactions that might be subject to layers of regulatory review.

**FW: Have any recent, high profile hostile takeovers caught your attention? What made these takeovers notable in terms of the strategies deployed and the eventual outcome?**

**Berg:** Corelogic was a great example of two funds, one being a sometimes activist, teaming up to mount a hostile takeover bid. Cannae and Senator were able to accumulate almost 15 percent before surprising Corelogic with a joint bid. Corelogic adopted a poison pill and increased its stock buyback programme after the public approach, but at this point it was too late. Cannae and Senator had a large enough stake to call a special meeting under Corelogic's bylaws. Cannae, Senator and Corelogic remained deadlocked through the special meeting, where Cannae and Senator successfully elected three of their director candidates to the Corelogic board. But despite this victory and the prolonged takeover campaign, Cannae and Senator ultimately withdrew their bid when Corelogic agreed to a deal with Stone Point at a significantly higher price. This was still a win for Cannae and Senator as major shareholders, but it showed that in this competitive environment a hostile approach can effectively pressure the board into a deal, but it might be a deal with someone else.

**FW: How important is it for companies to evaluate their vulnerability to a hostile approach? What characteristics do they need to assess in this regard?**

**Wood:** It is crucial for companies to assess their vulnerabilities and to be prepared for a hostile approach. Boards should view the company through the eyes of a potential buyer and take a critical perspective with respect to the company's performance, long-term strategy and market position

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PAUL CHOI  
Sidley Austin LLP

relative to its peers. Companies should also evaluate their corporate governance practices and shareholder engagements. To effectively defend against a hostile takeover at an attractive price, the board needs to convince investors that its long-term vision for the company is more valuable than a short-term payout. A history of poor governance and lacklustre shareholder engagement could make this an uphill battle for the board.

**FW: What steps can potential target companies take to prepare for and defend against a hostile takeover bid?**

**Liekefett:** The most valuable resource for a board that is defending against a hostile takeover attempt is time. There are a few key steps companies can take before a hostile approach to make sure they are not caught flat footed. It is important for companies to assemble their response team and get a 'break the glass' plan in place before the hostile approach. In depth stock monitoring is a great tool to help catch early signs of accumulation. Every public company board should have a poison pill on the shelf that is ready to be deployed overnight if necessary. Companies should also evaluate and update their bylaws regularly to make sure they have best-in-class legal defences and strong corporate governance. Once a hostile approach has been made, boards should resist the urge to stonewall indefinitely with the hope that the hostile bidder will tire and move on. Considering other credible alternatives to the company's standalone plan, which might be an investment from a friendly shareholder or even initiating a broader auction process, can help the board take back control of the situation.

**FW: In what ways have defensive tactics evolved over the years? Have any significant legal and regulatory changes affected the available options?**

**Zaba:** Thanks to the proliferation of activism and unsolicited M&A, defensive tactics have become very effective and widely accepted. The strongest defence is certainly the poison pill, but companies

should be careful to adopt one only when necessary and with reasonable terms. The *Williams* decision in 2021 demonstrated that unduly restrictive terms will not be tolerated by Delaware courts. Hostile bidders must also work around laws designed to protect corporate targets from a hostile approach, like France's 2014 Florange Act which provides that a French company's long-term shareholders are granted double voting rights unless companies opt out, or the Dutch *stichting*, which allows a target to issue voting shares to an independent foundation that has a defensive mandate. The latter was used effectively by Mylan in its takeover defence against Teva in 2015.

**FW: What are your predictions for hostile takeovers in the months and years ahead, particularly for companies that continue to experience market dislocation and depressed share prices?**

**Choi:** We expect the combination of activism and hostile M&A to continue throughout 2022, with more activists becoming bidders themselves, whether alone or by teaming up with private equity funds. At the same time, companies are getting smarter about these risks, better prepared and more willing to take strong defensive measures. This could lead to an increase in protracted hostile takeover campaigns like the Corelogic situation. Competition for targets is also likely to focus buyers on vulnerable markets and industries, as responses to the pandemic continue to vary. We are also likely to see a continued trend toward activist challenges to signed deals that they view as underpriced and a continued trend toward topping bids and deal jumps for companies that have been forced into a transaction with an aggressive bidder without having the opportunity to fully shop the company.

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