

Professional Perspective

Trends in Private Company M&A Transactions: Waiver of Jury Trials (2021)

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Trends in Private Company M&A Transactions: Waiver of Jury Trials (2021)

Editor's Note: This article is part of an ongoing series analyzing the results of the American Bar Association's (ABA) Private Target M&A Deal Points Studies. For more articles in this series and studies from prior years, see Bloomberg Law's collection of [deal points Professional Perspectives](#) authored by experts from Goulston & Storrs.

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Market Trends: What You Need to Know

As reflected in the American Bar Association's Private Target Mergers and Acquisitions Deal Points Studies, over the past twelve or so years, inclusion of jury trial waivers in mergers and acquisitions (M&A) agreements has increased from 50% of reported transactions in the 2007 study to 93% in each of the 2019 and 2021 studies.

Introduction

By including a jury trial waiver in an M&A purchase agreement, the parties agree to waive their rights to a jury trial in any dispute under the M&A agreement. Jury trial waivers may also extend to disputes under all of the documents related to the M&A transaction (as opposed to the M&A agreement only) or to disputes with respect to the M&A transaction more generally.

Arguments for Including a Jury Trial Waiver Provision

In a negotiation, the arguments for requesting a jury trial waiver provision may include the following:

- Jury trials are more costly and time-consuming than bench trials. Procedural requirements like voir dire and the submission of jury instructions, which can take weeks of preparation, can be avoided with a waiver provision.
- Juries are perceived as more sympathetic to individuals or smaller “mom-and-pop” institutions litigating against larger institutions. Judges are perceived as better equipped at focusing on intricate legalities, leaving prejudices and biases out of the verdict.
- Jury trials are viewed as producing more reversible verdicts due to error than bench trials. This may be due to juries’ perceived propensity to award excessive damages, faults in voir dire or jury instructions, or breaches in the heightened evidentiary standards of a jury trial.

Arguments Against Including a Jury Trial Waiver Provision

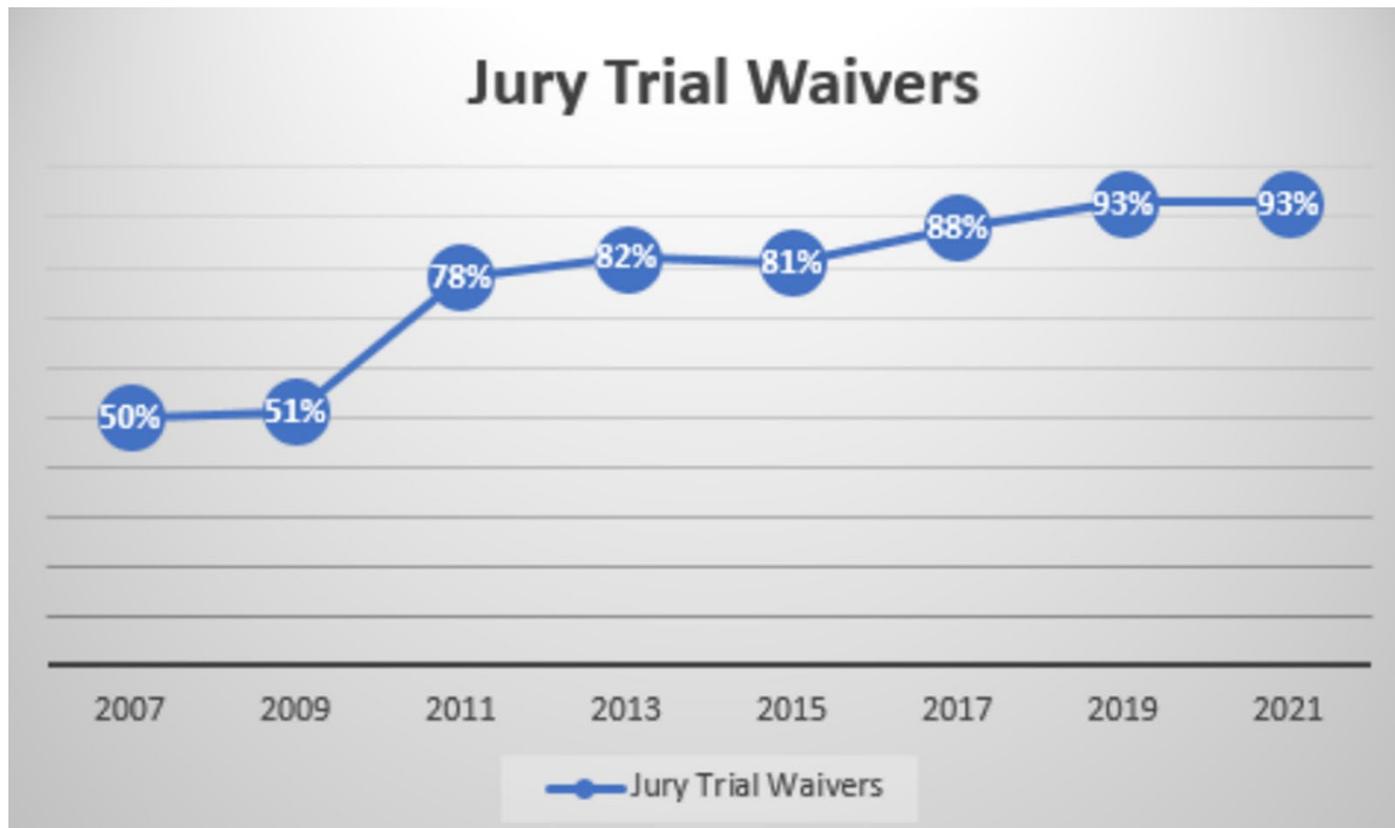
In a negotiation, the arguments for resisting a jury trial waiver provision may include:

- The right to a jury trial has been recognized for centuries as an important aspect of our judicial system. Why should any party be asked to waive such an important right?
- A jury trial waiver may be unenforceable. Although the choice-of-law clause in the M&A purchase agreement may select a jurisdiction that permits waiver, courts may invalidate the parties’ choice-of-law selection if neither the parties nor the transaction has a sufficient relationship with that state.

Trends in Usage of Jury Trial Waiver Provisions

Every other year since 2005 the ABA has released its Private Target Mergers and Acquisitions Deal Points Studies. The ABA studies examine purchase agreements of publicly available transactions involving private companies. These transactions range in size but are generally considered as within the “middle market” for M&A transactions; the transaction values of the 123 deals within the 2021 study ranged from \$30 to \$750 million.

The eight most recent (of nine total) ABA studies examined jury trial waiver provisions. These seven studies highlight a steady increase of jury trial waiver provisions, which as of the 2019 and 2021 studies, are included in over 90% of reported transactions. This is significant considering that in the 2007 study, jury trial waiver provisions appeared in only half of the reported transactions.



GRAPHIC—Source: ABA Private Target Mergers and Acquisitions Deal Points Studies

Conclusion

Today, jury trial waivers are very common in M&A purchase agreements. Determining whether to include a jury trial waiver is an important consideration in M&A negotiations; the choice may materially impact the outcome of post-closing claims between the parties. Counsel on both sides of an M&A transaction should consider these issues carefully when negotiating an M&A agreement.