

## Insights

# WHAT'S BEHIND THE RISE IN UK M&A LITIGATION?

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Litigation following mergers and acquisitions has always been a source of important judicial decisions on critical legal issues. However, can it tell us more about the state of the deal market and where future disputes may be heading?

Data from [Solomonic](#) shows that there has been a 200% increase in High Court claims issued from 2019 to 2021 that are litigation related to M&A. This trend is sector agnostic, with M&A claims in all sectors increasing over the period.

	2019	2020	2021 (YTD)	Total
<b>Total M&amp;A claims</b>	16	43	48	107
<b>Financial services - including Insurance</b>	1 (6.25%)	12 (27.9%)	12 (25%)	25 (23.36%)
<b>Financial services</b>	1 (6.25%)	10 (23.25%)	10 (20.83%)	21 (19.63%)
<b>Insurance</b>	0	2 (4.65%)	2 (4.16%)	4 (3.74%)
<b>Retail</b>	1 (6.25%)	4 (9.30%)	1 (2.08%)	6 (5.61%)
<b>Energy</b>	1 (6.25%)	5 (11.63%)	2 (4.17%)	8 (7.48%)
<b>Healthcare</b>	1 (6.25%)	0	3 (6.25%)	4 (3.74%)
<b>TMT</b>	3 (18.75%)	6 (13.95%)	7 (14.58%)	16 (14.95%)
<b>Real Estate (including construction)</b>	2 (12.5%)	5 (11.63%)	5 (10.42%)	12 (11.21%)

We think there are a number of possibilities why M&A litigation has grown significantly during this period, and given the deal market over the last few years has been buoyant, this suggests to us that

this trend will continue. Those possibilities include:

1. Wider and more mature adoption of warranty and indemnity insurance policies:

- We think that increased adoption of W&I insurance is making claimants more confident to pursue claims when enforcement considerations (which would otherwise be a primary concern) have been effectively de-risked. There is no point pursuing your sellers for damages if they are not ultimately good for it and W&I insurance removes this risk.
- There is a lot of price competition in the W&I market, so insurers are now writing broader warranty coverage, which increases the scope of coverage for buyers when considering claims.
- The existence of a W&I insurance policy can remove some of the emotions and reputational concerns that may otherwise factor into considerations for a buyer looking to sue a seller.

2. A rising trend in claims focused on often overlooked boilerplate provisions. While gateway issues such as whether notices have been served correctly have always been ripe for litigation, we have noticed an increasing trend for litigants to raise issues with other boilerplate provisions like variation, no waiver and assignment clauses.

3. Litigation being used to try and re-price deals. Whilst deals often include agreed price adjustment mechanisms, litigation is another route that parties can use to try to correct pricing that, with hindsight, appears to have over or under valued the asset.

4. Attempts to remedy deficient due diligence. The booming deal market of the last few years has inevitably meant that some deals will have been completed with limited or rushed due diligence. Concerns about incomplete disclosure during the diligence period can often result in litigation.

There is also the possibility that the [Solomonic](#) data does not actually reflect an increase in M&A litigation, but instead proportionately reflects the growth of the deal market. We should get more insight into this as the cases arising from the pandemic start to come through the courts. Between Q1 – Q2 2020, a number of M&A deals collapsed due to the pandemic and existing deals may have found themselves in the period between exchange and completion, where parties may have looked to exit the deal prior to completion. While a number of claims have been started, we anticipate more will follow and will show whether litigants do now have greater appetite to litigate following M&A.

Conversely, there also seems to be a noticeable reduction in M&A disputes citing fraud or negligent misrepresentation comparing 2021 to 2020.

	Total M&A claims	M&A claims citing Fraud OR negligent misrepresentation	Percentage of overall M&A claims citing Fraud OR negligent misrepresentation

<b>2019</b>	16	5	31.25%
<b>2020</b>	43	9	20.93%
<b>2021 (YTD)</b>	48	3	6.25%

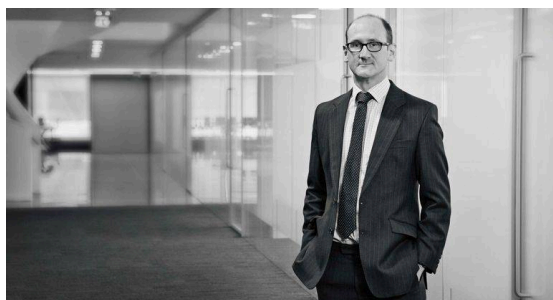
That is not unsurprising given the difficulties in successfully bringing these claims, which are complex to plead and prove. This difficulty is borne out by the Solomonic data. The data shows that for cases citing fraud or negligent misstatement 52.8% failed in 2019, 58.1% failed in 2020 and 43.3% have failed so far this year.

This suggests to us as M&A litigation grows, the claims will be focused on more straightforward causes of action such as a breach of contract.

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## MEET THE TEAM



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