How to Prepare for and Defend Against Shareholder Litigation Stemming From Mergers & Acquisitions

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I. CURRENT LANDSCAPE
## REVIEW OF LITIGATION

**M&A DEALS VALUED OVER $100 MILLION**

<table>
<thead>
<tr>
<th>ACQUISITION ANNOUNCEMENT YEAR</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of lawsuits filed</td>
<td>349</td>
<td>792</td>
<td>742</td>
<td>602</td>
</tr>
<tr>
<td>Percentage of deals litigated</td>
<td>86%</td>
<td>90%</td>
<td>93%</td>
<td>93%</td>
</tr>
<tr>
<td>Average number of lawsuits per deal</td>
<td>4.3</td>
<td>4.9</td>
<td>5.3</td>
<td>4.8</td>
</tr>
<tr>
<td>Average number of days between deal announcement and lawsuit filing</td>
<td>14</td>
<td>16</td>
<td>17</td>
<td>14</td>
</tr>
</tbody>
</table>

Source: Thomson Reuters’ SDC; SEC filings; docket

Note: The data include shareholder lawsuits related to acquisitions of U.S. public companies valued at or over $100 million.

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Figure 2

PERCENTAGE SUBJECT TO LITIGATION
M&A DEALS VALUED OVER $500 MILLION

Source: Thomson Reuters’ SDC; SEC filings; dockets
Note: The data include shareholder lawsuits related to acquisitions of U.S. public companies valued at or over $100 million.

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This is a significant change from 1999-2000 when 59% of merger related suits filed in the Delaware Court of Chancery were dismissed and only 28% settled.

Table from “Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions”, March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumrain
II. MERGER LITIGATION

CASE STUDY

Google acquisition of
Motorola Mobility for $12.5 Billion
A. Deal Announced

- On August 15, 2011 Google announces an all-cash deal to acquire Motorola Mobility for $12.5 billion, or $40 a share.
- Price represented a **63% premium** for Motorola Mobility’s Shareholders.
- Within hours plaintiffs’ securities firms issue press releases that they are investigating whether the Board breached its fiduciary duties to shareholders.
B. Litigation Announced

Motorola Mobility Faces Shareholder Lawsuit In $12.5 Billion Google Buyout

By Andrew R Hickey, CRN
August 18, 2011 10:02 AM ET

A Motorola (NYSE: MOT) Mobility shareholder has filed a lawsuit against the company and Google (NASDAQ: GOOG) claiming that Google’s $12.5 billion acquisition bid for Motorola Mobility was a low-ball offer and that Motorola Mobility was grossly undervalued in the deal.

C. The Litigation Multiplies in Number and Across Jurisdictions

- 16 shareholder class actions were filed related to the Google/Motorola Mobility deal.
  - 4 filed in Cook County, Ill., headquarters of MM’s former parent.
  - 8 filed in Lake County, Ill., where MM was based.
  - 3 filed in Delaware Chancery Court.
  - 1 filed in Illinois federal Court.

- In general
  - Lawsuits often filed before the preliminary proxy is filed.
  - Suits are filed in state court because primary relief sought is injunctive and they tend to move faster than federal courts.
  - Additional cases usually filed in location of the headquarters or incorporation, so plaintiffs can try to avoid consolidation.
  - Complaints often amended to include allegations based on disclosures in proxy statement.
C. The Litigation Multiplies in Number and Across Jurisdictions (con’t)

<table>
<thead>
<tr>
<th>Target</th>
<th>Acquirer</th>
<th>Year</th>
<th>Deal Value (Millions)</th>
<th>Number of Lawsuits Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Genentech</td>
<td>Roche Holding</td>
<td>2008</td>
<td>$46,700</td>
<td>over 30</td>
</tr>
<tr>
<td>Dynegy</td>
<td>Blackstone</td>
<td>2010</td>
<td>$600</td>
<td>29</td>
</tr>
<tr>
<td>Medco Health Solutions</td>
<td>Express Scripts</td>
<td>2011</td>
<td>$29,370</td>
<td>22</td>
</tr>
<tr>
<td>El Paso Corp.</td>
<td>Kinder Morgan</td>
<td>2011</td>
<td>$24,000</td>
<td>22</td>
</tr>
<tr>
<td>Novell</td>
<td>Attachmate</td>
<td>2010</td>
<td>$2,200</td>
<td>19</td>
</tr>
<tr>
<td>Conexant Systems</td>
<td>Standard Microsystems</td>
<td>2011</td>
<td>$280</td>
<td>18</td>
</tr>
<tr>
<td>Qwest Communications</td>
<td>CenturyLink</td>
<td>2010</td>
<td>$22,400</td>
<td>17</td>
</tr>
<tr>
<td>Force Protection</td>
<td>General Dynamics</td>
<td>2011</td>
<td>$390</td>
<td>17</td>
</tr>
<tr>
<td>Schering-Plough</td>
<td>Merck</td>
<td>2009</td>
<td>$38,400</td>
<td>17</td>
</tr>
<tr>
<td>Motorola Mobility Holdings</td>
<td>Google</td>
<td>2010</td>
<td>$12,450</td>
<td>16</td>
</tr>
<tr>
<td>American Oil &amp; Gas</td>
<td>Hess</td>
<td>2011</td>
<td>$440</td>
<td>16</td>
</tr>
<tr>
<td>J. Crew Group</td>
<td>Leonard Green and TRG</td>
<td>2010</td>
<td>$3,000</td>
<td>16</td>
</tr>
<tr>
<td>Alltel</td>
<td>TPG, GS Capital Partners</td>
<td>2007</td>
<td>$27,500</td>
<td>16</td>
</tr>
<tr>
<td>Anheuser-Busch</td>
<td>InBev</td>
<td>2008</td>
<td>$52,200</td>
<td>16</td>
</tr>
<tr>
<td>Del Monte Foods</td>
<td>KKR, Vestar, Centerview</td>
<td>2010</td>
<td>$4,000</td>
<td>15</td>
</tr>
<tr>
<td>Brigham Exploration</td>
<td>Statoil</td>
<td>2011</td>
<td>$4,407</td>
<td>15</td>
</tr>
</tbody>
</table>

Table 3
D. Litigation Allegations

- All actions had same theory that MM, its Board and Google had breached (or aided and abetted a breach) their duty to shareholders. Suits sought to enjoin the transaction.

- Targets Generally
  - The target company
  - Directors and certain officers of the target
  - The Buyer
  - Advisors (maybe)
D. Litigation Allegations (con’t)

- Claims generally against: (1) target defendants for breaches of fiduciary duties; and (2) buyers and advisors (sometimes) for aiding and abetting.

- Common allegations:
  - Conflicts of interest.
    - Affiliates or large shareholder involvement
    - Board acceleration of stock appreciation rights.
    - Management negotiation of employment and compensation
    - Advisors dealing on both sides of transaction.
  - Transaction was rushed, ill-considered
  - Agreement inhibits higher offers with preclusive deal terms.
  - Company is being sold for too little in light of recent financial results.
  - Inadequate/misleading disclosures to shareholders
  - Deal is coercive to shareholders
  - Transaction should be enjoined.
E. Procedural fights and Discovery

- Fights to consolidate and stay matters in all but one jurisdiction.
- Injunction
- Expedited Discovery
  - Expedited Production of Documents
    - Board minutes and presentations
    - Email
    - Third party discovery from advisors/outsiders
  - Expedited Depositions
  - Experts
- All of this often overlaps with presenting the deal to shareholders
F. Motions to Dismiss and Dispositive Challenges

- Failure to state a claim.
- Business judgment rule.
- No demand futility.
- Formation of special litigation committees.
G. Settlement

- Google/MM settlement was largely for modified disclosures.
- 8-K disclosed changes to proxy statement including:
  - A paragraph explaining that MM shareholder Carl Icahn tried to negotiate for a portion of the reverse-breakup fee the company would receive if the deal did not go through, but the board turned him down, saying it was not willing to treat Icahn differently than other shareholders.
  - Details back and forth between MM’s lawyers and Google’s counsel over the termination and reverse-termination fees and equity grants to Motorola execs.
  - Disclosure of the $21 million in fees MM and its former parent have paid its financial adviser, Centerview, in the last two years.
G. Settlement (con’t)

Evolution of Settlements in Merger Litigation

• 1999 and 2000
  • 52% of settlements included payments to shareholders.
  • Only 10% involved additional disclosures only.

• 2010 and 2011
  • Only 5% resulted in payments to shareholders.
  • 83% settled for additional disclosures only.
  • 13% included merger agreement changes other than payments to shareholders.
    • 7% resulted in modified deal protection provisions (such as termination fees, no-solicitation, and matching rights) or inclusion of top-up option and appraisal rights.
    • 6% involved other terms, most often a delay of the shareholder vote.
G. Settlement (con’t)

Settlement Strategies

• Standard Terms of Settlement
  • Deal modifications
  • Enhanced disclosures
    • Additional disclosures concerning the “Selected Company Analysis” and “Selected Transaction Analysis” in the summary of the fairness opinion
    • Additional disclosure relating to the discounted cash flow analysis
  • Cash payments?
  • Reduced target company termination fee
  • Dismissal of the pending litigations
  • An agreement that plaintiffs’ counsel can seek fees up to a certain amount subject to court approval

• Get carrier consent
• Expect plaintiffs’ fees to be an issue with carrier
<table>
<thead>
<tr>
<th>Deal</th>
<th>Settlement Payment to Shareholders (Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Del Monte Foods/KKR</td>
<td>$89.4</td>
</tr>
<tr>
<td>Delphi Financial/Tokio Marine</td>
<td>$49.0(^15)</td>
</tr>
<tr>
<td>GSI Commerce/eBay</td>
<td>$24.0</td>
</tr>
<tr>
<td>J. Crew Group/Leonard Green</td>
<td>$16.0</td>
</tr>
<tr>
<td>Mediacom Communications MBO</td>
<td>$10.3</td>
</tr>
<tr>
<td>Student Loan Corp./Discover</td>
<td>$10.0</td>
</tr>
<tr>
<td>Talecris Biotherapeutics/Grifols</td>
<td>$8.1</td>
</tr>
<tr>
<td>Atlas Energy/Chevron</td>
<td>$5.0</td>
</tr>
<tr>
<td>Protection One/GTCR</td>
<td>$3.2</td>
</tr>
<tr>
<td>NYSE Euronext/Deutsche Börse</td>
<td>Postmerger dividend to all shareholders of the merged entity</td>
</tr>
</tbody>
</table>

Table 8

Table from “Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions”, March 2012 Update, Cornerstone Research, Robert M. Daines and Olga Koumrain
Why Do Some Settlements Result in Money Payments?

- Negotiations by management for benefits not given to others
  - Prior to settlement of litigation relating to Delphi Financial Group sale to Tokio Marine Holdings, the Court found plaintiffs showed a likelihood of success because of the “troubling” actions of Delphi’s founder and CEO, who negotiated a premium price for his Class B stock compared to the price of the publicly owned stock.

- Failure to identify and/or disclose advisor conflicts
  - $89 million Del Monte Foods settlement in October of 2011.
  - In February 2011, the Delaware Court of Chancery awarded a preliminary injunction of the shareholder vote.
  - The court focused on allegation that advisor Barclays helped with the buy-side financing and failed to disclose its relationship to the target.
  - Court found that Del Monte’s board “fail[ed] to provide the serious oversight that would have checked Barclay’s misconduct.”
  - Barclays paid $23.7 million of the $89.4 million settlement.
G. Settlement (con’t)

Who Gets Paid When Cases Settle?

- 87% of cases: No one
- 9% of cases: Class Members and Plaintiffs' Attorneys
- 4% of cases: Plaintiffs' Attorneys Only

Table modified from “Anatomy of a Merger Litigation”, April 4, 2012, NERA Economic Consulting, Douglas J. Clark and Dr. Marcia Kramer Mayer
New Lawsuits Challenging Annual Proxies

Table from "Shareholder Litigation Involving Mergers and Acquisitions", February 2013 Update, Cornerstone Research, Robert M. Daines and Olga Koumrain
III. STEPS YOU CAN TAKE NOW TO MINIMIZE RISKS AND COSTS LATER
1. Intra-Corporate Forum Selection Clauses

- Most merger agreements have forum selection provisions in the event there is a dispute between the parties to the merger agreement.
- However, only a small percentage of companies are estimated to have intra-corporate forum selection clauses in charters or bylaws.
- Clause will limit venues and number of filings when derivative actions brought.
1. Intra-Corporate Forum Selection Clauses (con’t)

- In re Revlon, Inc. Shareholders Litig., 990 A. 2d 940, 960 (Del. Ch. March 16, 2010) stated: “[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.”

Sample Mandatory and Elective Forum Provisions

- Both examples below are variants of the Netsuite provision.

Sample Elective Forum Selection Provision (actual Netsuite provision)
- Unless the corporation consents in writing to the selection of an alternative forum, The Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCSL, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this Article VII, Paragraph D.

Sample Mandatory Forum Selection Provision (the Netsuite provision excluding the introductory provision)
- The Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCSL, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this Article VII, Paragraph D.
### Implications of Forum Selection Clauses

<table>
<thead>
<tr>
<th>Litigation Pattern</th>
<th>Current Regime</th>
<th>Type of Forum Selection</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Mandatory</td>
</tr>
<tr>
<td>Plaintiffs sue only in charting state.</td>
<td>Litigation proceeds in charting state.</td>
<td>Litigation proceeds in charting state.</td>
</tr>
<tr>
<td>Plaintiffs sue only in headquarters state.</td>
<td>Litigation proceeds in headquarters state.</td>
<td>Litigation proceeds in charting state.</td>
</tr>
<tr>
<td>Plaintiff sue in headquarters and charting state.</td>
<td>Litigation over the venue in which litigation proceeds.</td>
<td>Litigation proceeds in charting state.</td>
</tr>
</tbody>
</table>

- If the elective provision is effective, it generates greater benefits for the corporation than the mandatory provision (as determined by the board) whenever a plaintiff sues outside the charting state. (But see slide 17 for a discussion of the ambiguous social welfare consequences.)
2. Scrutinize Disinterested Directors and Structure of Deal

• Utilize disinterested directors to evaluate

• Where possible prohibit negotiation of future employment by management until deal done. If part of deal, limit role of interested parties in evaluation process.

• Use special litigation committees
  • After an objective and thorough investigation of the merits of a corporate claim by an independent committee to whom complete authority to act has been delegated, the committee may move on the name of the corporation to dismiss the suit on the ground that the committee has concluded, in a written report making specific findings, that dismissal is in the best interest of the corporation. See Zapata v. Maldonado, 430 A.2d 779 (Del. 1981).
  • Corporation has burden to show independence, good faith and reasonableness of investigation.
  • Carefully select special committee members and document inquiry into independence, including exploring financial and personal relationships. Make sure committee has latitude, money and advisors
3. Carefully Evaluate Types of Disclosures Previously Subjected to Litigation

• Locate previously challenged disclosures and the enhanced disclosures through settlement and compare to your planned disclosures.

• Modeling your company disclosures after disclosures that were part of prior Court approved settlements may make it harder for plaintiffs to successfully challenge the adequacy.

• Court approval of disclosure only settlements is different than monetary settlements. In theory, court is not approving disclosures that remain deficient.
4. Vet and Supervise the Advisors

- Del Monte Food case and undisclosed investment banker conflicts resulted in $89 million payment
- Avoid actions that could cause loss of business judgment rule (abdication of decision making to advisors or failure to supervise advisors)
5. Segregate and Gather Documents During Deal Phase

- Assume all actions and communications will be scrutinized
- When litigation hits, it is likely that deal will still be in process of being presented to shareholders. You will be busy enough with deal. By planning ahead, you can minimize disruption that expedited discovery will have.
- Definite categories of documents that will be requested include:
  - Board minutes and presentations
  - Email
  - Third party discovery from advisors/outsiders
Jeffery A. Dailey

Mr. Dailey is a partner in the Philadelphia office of Akin Gump Strauss Hauer & Feld LLP and a member of the firm’s Securities Enforcement and Litigation Practice Group.

His recent shareholder litigation matters include defending companies, officers, directors, accountants and other third parties against a variety of securities related claims.

- Mr. Dailey has been published by Accounting Today, The Practical Litigator and Securities Law360 and has presented on numerous occasions to in-house counsel groups about defense strategies and new developments in shareholder litigation. In addition, he was recently served as a member of the Editorial Advisory Board of Securities Law360.
- Mr. Dailey can be reached at jdailey@akingump.com or (215) 965-1325.
Secondary Sources Consulted And Borrowed From


