A Farewell to Alms? Peppercorn Settlements of M&A Litigation

posted on: Monday, September 21, 2015

An apparently frustrated Delaware Vice Chancellor recently approved yet another disclosure-only settlement of yet another challenge to a merger, but seemed intent on signaling that such proposed class-action settlements might not fare so well in the future. Vice Chancellor Glasscock’s September 17, 2015 decision in *In re Riverbed Technology, Inc. Stockholders Litigation* (Del. Ch. Ct.) repeatedly stressed that, while certain factors mildly favored approval of the proposed settlement, the weight of those factors would “be diminished or eliminated going forward in light of this Memorandum Opinion and other decisions of this Court.”

The facts of the case conformed to the familiar template: a transaction was announced for the purchase of the target’s shares; lawsuits were filed challenging the purchase price, the sale process, and the disclosures in the preliminary proxy statement; the subsequently issued definitive proxy statement mooted some of the disclosure claims; the court granted limited expedited discovery on certain issues (here, the financial advisor’s alleged conflicts of interest); the parties soon agreed to settle the case for supplemental disclosures and a broad release (the court briefly pondered whether the release was “indeed inter-galactic, or only, say, solar-systemic, Jovian, or just global”), and they later negotiated a proposed fee for plaintiffs’ counsel.

Vice Chancellor Glasscock began his opinion by bemoaning the “agency problems” that exist in class-action settlements of this type, where “[a] plaintiff’s attorney may favor a quick settlement where the additional effort required to fully develop valuable claims on behalf of the class may not generate an additional fee as lucrative to the plaintiff’s attorney as accepting a quick and moderate fee, then pursuing other interests” – and where “the defendants’ interest is largely subsumed within that of the successor entities’ interest, which is commonly in the consummation of the deal and the termination of any further litigation threat.” The court observed that “[t]his agency problem is, in part, ameliorated – but not entirely eliminated – by requiring counsel for both sides to refrain from negotiating fees until a settlement of the underlying matter is reached.” But the problem nevertheless “remains, as both sides are necessarily aware that the common benefit doctrine will permit the plaintiffs to seek an award of fees.”

Turning to the facts presented, the court concluded that the supplemental disclosures (primarily concerning the target’s financial advisor’s relationships with the purchasers) had some, but not much, importance. The consideration that the class received was thus “a peppercorn, a positive result of small therapeutic value to the Class which can support, in my view, a settlement, but only where what is given up [i.e., the released claims] is of minimal value.” The released claims here apparently had only minimal value, because (i) plaintiffs’ expert could not opine that the merger price was unfair, and (ii) plaintiffs’ counsel testified that the disclosure claims did not appear viable under the federal securities laws.

But the court’s decision to approve the settlement also turned on the recognition that, “given the past practice of this Court in examining settlements of this type, the parties in good faith
negotiated a remedy – additional disclosures – that has been consummated, with the reasonable expectation that the very broad, but hardly unprecedented, release negotiated in return would be approved by this Court.” The court cautioned that “this factor, while it bears some equitable weight here, will be diminished or eliminated going forward in light of this Memorandum and other decisions of this Court.” The court also observed that, “[i]f it were not for the reasonable reliance of the parties on formerly settled practice in this Court, . . . the interests of the Class might merit rejection of a settlement encompassing a release that goes far beyond the claims asserted and the results achieved.” Because those results were relatively limited, the court reduced plaintiffs’ counsel’s fee request from $500,000 to $329,881.61 (including expenses).

The Riverbed Technology decision is the latest example of Delaware courts’ dissatisfaction with the merger-challenge industry, which generates lawsuits against virtually every merger or acquisition upon announcement. Whether the recent spate of decisions will dampen enthusiasm for those types of cases remains to be seen. Those decisions might encourage corporations to adopt Delaware-forum provisions in their charters or bylaws – as Delaware law allows – because Delaware judges appear to be in the vanguard of voicing concern about merger challenges and disclosure-only settlements (although some New York courts have also done so).

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