Dealing with the Inevitable: Practical Considerations in Defending Merger Objection Lawsuits

October 29, 2013

Identifying, evaluating, and acting on potential merger & acquisition (M & A) deals is one of a director’s most challenging responsibilities. The process involves complex valuation and market analysis, high-stakes negotiations, input from independent legal and financial advisors, and ultimately, deciding whether a deal is in the shareholders’ best interests. Industry observers lament that after all of this work on behalf of their firms and shareholders, directors of target companies are “routinely rewarded for this huge commitment by being sued.” Dan A. Bailey, Director Liability Loss Prevention in Mergers and Acquisitions at 1 (Chubb 2012). This article explores the trend of these “merger objection lawsuits” and offers some basic practical considerations for transactional attorneys, litigators, and insurance representatives involved in deal litigation. The authors wish to make clear that while this article focuses on defending merger objection lawsuits of dubious merit, shareholders pursue many meritorious merger objection lawsuits. For example, a meritorious lawsuit might involve a deal that violates the corporate charter or have evidence of real self-dealing causing damage to the shareholders. Such cases would be an excellent subject for a different article.

The past decade has been marked by an explosion of shareholder class action lawsuits against boards of directors of target companies involved in M & A deals. Cornerstone Research found that from 2011–2012, “almost every acquisition of [public companies valued over $100 million] elicited multiple lawsuits, which were filed shortly after the deal’s announcement and often settled before the deal’s closing.” Robert M. Daines & Olga Koumrian, Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions, March 2012 Update at 1 (Cornerstone Research 2012). This trend has serious implications for directors and officers, corporate attorneys, litigation attorneys, and insurance companies and their representatives.

Overview

Merger objection lawsuits, while far from new, represent a growing category of corporate governance class actions. They differ from traditional securities class actions, which are brought by purchasers of securities based on alleged violations of securities laws. They also differ from derivative class actions, which are brought nominally by a company based on allegations of breaches of fiduciary duties by the company’s directors. In contrast, in a typical merger objection class action lawsuit, shareholders acting on their own behalf allege that a target company’s board plans to sell the company at terms unfavorable to the shareholders. While each transaction is unique, the lawsuits generally proceed in a similar fashion.

Public companies usually issue press releases giving advance notice of major M & A deals. Within hours, class action firms issue their own releases announcing that they are investigating a transaction. Although these releases purport to announce the investigation of various breaches of fiduciary duties, often the principal purpose is to serve as a vehicle for plaintiffs’ firms to attempt to find clients. The first complaint will usually be filed within a week or two—most likely in a state court to avoid the higher pleading standards under Twombly, Iqbal, and the Federal Rules of Civil Procedure. The complaint will name as defendants the target company, its board, and the acquiring company and often its board as well under an “aiding and abetting” theory. One or more additional complaints usually follow in the coming days, sometimes filed in different jurisdictions. These lawsuits often precede the preliminary proxy statement and are amended later to include allegations based on the proxy disclosures. The average transaction is subject to five lawsuits, but some deals attract 15 or more. About half of all deals will generate lawsuits in multiple jurisdictions.

Merger objection lawsuits allege violations of various fiduciary duties. For example, plaintiffs may allege that directors violated the duty of candor by misrepresenting or by omitting material information in proxy materials. Lawsuits often target the duty of care and duty of loyalty—the “Revlon duties”—by alleging that a board failed to appoint a special committee, to
conduct a robust pre- and post-signing market check, or to use a truly competitive auction, or the board agreed to unduly restrictive deal protection devices. Plaintiffs also commonly allege breaches of the duty of loyalty if they can colorably plead self-dealing—for example, when a director with a personal interest in the success of the deal leads the negotiation without adequate supervision from disinterested directors. Most complaints allege violations of more than one of these duties, and the factual variations are endless. These lawsuits may demand money damages, but more commonly they focus on seeking injunctive relief such as delaying a vote on a deal by a target company’s shareholders. The stated goal is to require certain actions to ensure that shareholders’ interests are protected, such as supplemental disclosures or changes to the terms of the merger agreement. It often appears, however, that the usual strategy in unmeritorious lawsuits is to leverage a settlement that includes substantial attorneys’ fees.

Merger objection lawsuits usually generate a flurry of procedural motions, many of which are never decided. For example, defendants may move to stay or to consolidate later-filed cases and to dismiss each lawsuit. Plaintiffs usually seek expedited discovery and move, or threaten to move, to enjoin a shareholder vote on the transaction. These expedited motions to enjoin the transactions are expensive for target companies and challenging for defense attorneys. The condensed schedule is akin to a mini-trial based on substantial discovery, all packed into a few weeks. More often than not, litigation activity ceases before the deal occurs as the result of a negotiated settlement. In the typical settlement, a target company agrees to a series of nonmonetary remedies, which, depending on one’s perspective, often seem immaterial, and which may include amending proxy materials to provide additional disclosures, extending the period to solicit additional bids, reducing the termination fee, extending the appraisal rights period, or other so-called “corporate therapeutics.”

Rarely do settlements of unmeritorious lawsuits result in significant financial benefits to the shareholders. For example, a recent study cited by the U.S. Chamber of Commerce Institute for Legal Reform found that of settlements in 2011

- 84 percent were “disclosure only” changes to merger documents, with no monetary award to shareholders;
- 11 percent involved changes to the deal terms other than monetary awards; and
- Only 5 percent benefited class members by awarding monetary consideration, such as a change to the share price.

Settlements typically occur before a deal closes, with the average time between filing the lawsuit and approval of the settlement being 42 days. Robert M. Daines & Olga Koumrian, Shareholder Litigation Involving Mergers and Acquisitions, February 2013 Update at 5 (Cornerstone Research 2013).

### Statistics and Trends

The number of merger objection lawsuits grew from 27 in 2002 to a peak of nearly 400 in 2011. Advisen Insurance Intelligence, Securities Suits Remain Off Recent Highs: An Advisen Quarterly Report—Q2 2012 at 6 (2012). The past two years have seen fewer lawsuit filings, representing a return to 2009 levels. Id. Interestingly, the growth of merger objection lawsuits was most pronounced during the Great Recession, a time when the volume of M & A deals dropped substantially from pre-recession levels. Another notable trend is the decrease in the average size of companies involved in merger objection suits. In 2006, the median market cap of a target company involved in a lawsuit was $1.1 billion; by 2009 the median had fallen to $509 million. D. Bradford, Merger Objection Lawsuits: A Threat to Primary D&O Insurers? (Advisen 2011). While it appears that no deal of sufficient size is immune to merger objection lawsuits, Cornerstone found that the information technology, energy, health-care, and financial industries attracted the most lawsuits.

Because Delaware is the most popular state of incorporation, its Chancery Court historically has been the forum of choice for merger objection lawsuits. Starting in the early 2000s more lawsuits were filed in other states, especially California, Texas, and New York. Additionally, Illinois and Maryland saw some of the highest lawsuits per deal despite the relatively low number of deals in those states. Scholars coined this phenomenon a “flight from Delaware” and offered multiple theories for the increased geographical diversity. See, e.g., Chefins, Armour, & Black, Delaware Corporate Litigation and the Fragmentation of the Plaintiff’s Bar, 2012 Colum. Bus. L. Rev. 427 (2012). More recent data suggests, however, that this represented a temporary trend as “the proportion of all [merger objection] lawsuits filed in the Delaware Court of Chancery grew in 2011 and 2012, drawing filings away from both federal and other state courts.” Daines & Koumrian, February 2013 Update, supra, at 2.

Changes in common settlement terms are one of the starkest developments in M & A litigation. In 1999 and 2000, 52 percent of settlements included cash awards, versus just 10 percent that involved disclosures only. Daines & Koumrian, March 2012 Update, supra, at 11. As discussed, that trend has reversed. Now monetary consideration is a part of only 5 percent of all settlements. Even in nonmonetary settlements, defendants have to pay the plaintiffs’ attorneys’ fees, which can reach into the millions of dollars. Commonly viewed as a “deal tax,” these settlements create a ripple effect of
secondary penalties such as increased directors and officers (D & O) insurance premiums and negative incentives that might discourage potential directors from serving on boards.

Although rare, settlements that involve monetary consideration remain an important risk in M & A litigation. Notable monetary awards to shareholders in recent years include $89 million in the Del Monte Foods buyout of KKR, $110 million in the El Paso Corp. and Kinder Morgan deal, and $49 million in the Delphi Financial and Tokio Marine Holdings deal. Daines & Koumrian, February 2013 Update, supra, at 6. In part due to large settlements such as these, the average settlement fund has increased from $36 million in 2003 through 2009, to $78 million between 2010 and 2012. Id. Notably, each of these lawsuits alleged breaches of the duty of loyalty based on perceived self-dealing by directors of the companies. These deals signal that although the frequency of monetary consideration as part of a merger objection settlement has decreased, the amounts of the monetary settlements continue to rise. Thus it is critical that defendants and their attorneys know of this risk and not assume that the deal litigation is simply a nuisance.

The explanations for these trends, as well as the reactions to them, range from indifferent to cynical to the legal equivalent of geopolitics. Recognizing the relatively small value of most settlement payments when compared to the size of the transactions, some view the settlements as “rounding errors” and “deal taxes” that encourage the wave of filings to continue. Others point to “entrepreneurial plaintiffs’ firms,” characterizing them as “frequent fliers” motivated by a quick payday. See In re Revlon S’holders Lit., 990 A.2d 940, 958 (Del. Ch. 2010). One practitioner attributes the pattern in part to the breakup of the dominant plaintiff’s securities law firm, Milberg Weiss. Boris Feldman, Shareholder Litigation After the Fall of an Iron Curtain, 45 Rev. Sec. & Comm. Reg. 1 (Jan. 11, 2012). Whatever the causes, merger objection lawsuits present unique challenges for companies and their attorneys.

In re Transatlantic Holdings—A Harbinger of Change?

Does a February, 2013 ruling from the Delaware Court of Chancery signal the beginning of a judicial “clamp-down” on unmeritorious merger objection suits? Commentators have called Chancellor Strine’s recent bench ruling in In re Transatlantic Holdings Inc. Shareholders Litigation, Case No. 6574-CS, “an unmistakable warning to plaintiffs firms that they cannot continue to count on paydays through the settlement of meritless lawsuits filed in the wake of announced deals.” Gibson Dunn, Delaware Court of Chancery Rejects Settlement of M & A Litigation Based on Immateriality of Additional Disclosures and Inadequacy of Named Plaintiffs (Mar. 18, 2013).

In Transatlantic Holdings, shareholders of the reinsurance organization Transatlantic Holdings, Inc., filed a class action against Transatlantic, members of the Transatlantic board, Alleghany Corporation (the acquiring company), and Allied World, a would-be acquiring company under a terminated merger agreement. The shareholders alleged that the board breached its fiduciary duties, and the other defendants aided in those breaches by abandoning the merger with Allied World, paying the termination fee, and accepting Alleghany’s proposal. The shareholders alleged further that the proxy statement omitted information necessary to allow the shareholders to make an informed decision in voting on the merger. The complaint sought to enjoin a vote by the Transatlantic shareholders based on these alleged breaches of fiduciary duties and deficiencies in the proxy statement.

The parties reached a preliminary agreement to settle the litigation that involved the usual sort of supplemental disclosures and no change to the share price. After Transatlantic made supplemental disclosures in a U.S. Securities and Exchange Commission (SEC) filing, its shareholders voted overwhelmingly to approve the merger. All that remained was for the court to grant the plaintiffs’ counsel’s requests to certify the class and to approve the proposed settlement, including substantial attorneys’ fees awards.

In denying both requests, Chancellor Strine noted that 99.85 percent of Transatlantic shareholders who voted did so in favor of the transaction. He questioned whether the additional disclosures “would have been meaningful, would have been interesting, in any real way to someone voting on this transaction[,]” He declined to certify the class, noting that one representative plaintiff held only two shares and that the other could not even remember if he voted on the transaction. To deny class certification mandated denying the proposed settlement, including the requested attorneys’ fees. Chancellor Strine concluded:

[[If these plaintiffs here would reflect maturely on the record, I think they would recognize that they’ve achieved nothing substantial for the class that could justify the release; that the actual named plaintiffs that they represent have taken no personal interest in the litigation, have participated in no meaningful way in making sure that the class got something meaningful; and they can dismiss with prejudice as to themselves; and the defendants can deal with others or just move on with the risk.]]
Although this bench ruling was not reported, practitioners on both sides of merger objection lawsuits have taken notice. It is reasonable to anticipate that this ruling from "the most powerful voice in deal litigation" may embolden judges in Delaware and other states to look more closely at the issues of certification and materiality of the relief requested. In response, plaintiffs’ attorneys may tweak their “playbooks” to press for increases to share prices, even nominal ones, in an effort to counter the notion that they value a quick payday over improving outcomes for shareholders.

**Practice Points for a Defense Team**

Merger objection lawsuits can affect companies across a variety of industries and market caps. Company deal attorneys, in-house counsel, and outside litigation counsel all have important roles to play to minimize the potential effect of these lawsuits on their publicly traded clients.

**Deal Counsel and In-House Counsel: Recommending Best Practices for a Target Company’s Board**

Transactional attorneys and in-house counsel must appreciate the near certainty of litigation arising from M & A deals valued at $100 million or more. These attorneys are best positioned to advocate for certain best practices that can defeat some of the more commonly alleged claims of fiduciary duty violations. They should advise boards on how to perform their fiduciary duties and document such performance to avoid needlessly creating ammunition for plaintiffs’ class action counsel. Additionally, they must advise target and acquiring companies of the nature of merger objection lawsuits and build appropriate costs into the deals. These costs include time and money to make agreed-upon additional disclosures or nonmaterial changes to a merger agreement, legal fees for defending a lawsuit, and the plaintiffs’ attorneys’ fees and expenses.

The circumstances of each deal will present unique issues of timing, financing, market strategy, and other considerations that make it impossible to prescribe a one-size-fits-all “checklist” of best practices. Still, certain allegations appear so often in the lawsuits that they warrant consideration in almost every deal.

- With an eye toward Revlon duties, a board should seek the highest value for the shareholders through an unrestrained bidding process and document the process. This process may include a pure auction or a market check performed by independent financial advisors.
- To avoid alleged breaches of the duty of loyalty and the attendant risk of losing the protections of the business judgment rule, attorneys should verify that no one among the directors or officers involved in a transaction has interests that do not align with the shareholders’ interests. If conflicts exist, interested directors or officers normally should recuse themselves from discussing and voting on the transaction.
- Alleged breaches of the duty of candor are often resolved by supplemental disclosures. The initial disclosures can preempt some of these allegations by including current and material financial projections that were reviewed by the financial advisors, as well as other information that would be material to the shareholders.
- Directors should also weigh carefully the use and the size of deal protection devices such as break-up fees. While these fees are standard and have been approved when equaling as much as 4 percent of the deal value, as in In re 3Conn S’holder’s Litig., C.A. No. 5067-CC (Del. Ch. Dec. 18, 2009), they are a common target in merger objection lawsuits.
- If a board elects to create a special committee, the committee should have its own separate financial and legal advisers. See, e.g., Gesoff v. IIC Indus. Inc., 902 A.2d 1130 (Del. Ch. 2006).

By anticipating and eliminating some of the most common challenges to a board’s exercise of fiduciary duties—and by documenting the board members’ efforts to do so—a company and the directors can reduce their exposure.

Corporate attorneys should of course, think about more than a particular deal, advising their client boards on creating and documenting long-term business strategies. These plans can help directors in evaluating M & A proposals and serve as valuable defenses to merger objection lawsuits. Bailey, supra, at 5.

**Litigators to the Rescue**

No matter how carefully companies have shopped and crafted the merger agreements, deals will likely still face lawsuits. Litigation attorneys must prepare for the plaintiffs’ attorneys’ “playbooks.” This means expecting an attorney to file a lawsuit within days of a deal’s announcement or filing of the proxy statement, planning for requests for expedited discovery and motions for preliminary injunctions, and addressing settlement proposals that will include substantial attorneys’ fees.

In the typical merger objection lawsuit the primary fight is not over certification, which can surprise attorneys accustomed
to defending other types of class actions. Rather, when they decide to fight, defendants usually focus on dismissing a lawsuit or on defeating the preliminary injunction motion. However, Chancellor Strine’s Transatlantic ruling may cause defendants to challenge particularly unsuited class representatives in Delaware and beyond.

Important considerations include dealing with multiple lawsuits across different jurisdictions, preparing for the fast-paced nature of the litigation—including responding to expedited discovery requests—and negotiating plaintiffs’ attorneys’ fees as part of a settlement agreement. While each case requires a tailored approach, knowing about plaintiffs’ attorneys’ usual tactics will enable defense attorneys to minimize the disruption to a target company and the acquiring company.

Winning the Preliminary Injunction Battle

Good M & A defense litigators know when and how to fight a motion for a preliminary injunction. Doing so successfully may deprive the plaintiffs of most if not all of their leverage, especially if their counsel does not wish to pursue damages claims up to and through trial. The most commonly invoked justification for a preliminary injunction is that shareholders lack material information without which they cannot vote intelligently on the deal. Once a merger occurs it cannot normally be unwound, and so, plaintiffs’ attorneys argue, allowing a vote to occur will result in irreparable harm. As many courts have noted, it can be impossible after a deal closes to “unscramble the egg.” In principle the argument seems sound, but a court must first be convinced that material information has been withheld from shareholders. What should a company do when the information alleged to have been withheld is facially immaterial? In certain cases, it is worth the additional expense and risk to fight a preliminary injunction.

While each lawsuit is different, certain factors reappear in the case law. For example, in In re Plains Exploration & Prod. Co. S’holder Litig., No. 8090-VCN (Del. Ch. May 9. 2013), the court declined to enjoin the proposed merger. The plaintiffs argued that the company’s board breached fiduciary duties by failing to obtain the best possible sale price and by making inadequate disclosures in the proxy statement. The court ruled that the plaintiffs did not have a reasonable likelihood of proving a breach of Revlon duties or that the board issued a misleading proxy statement. The court emphasized that all but one director was disinterested and that the board “relied upon sophisticated legal and financial advisors to guide them in the sales process.” The court noted further that while the plaintiffs “highlight[ed] various ways in which the Board might have obtained a higher price,” those suggestions did not establish that the board’s decision-making process was inadequate. These factors are common in cases, both in Delaware and in other state courts, when plaintiffs cannot establish the requisite likelihood of success on the merits to justify a court granting a preliminary injunction. When applicable, the argument that damages can provide an adequate remedy may also convince a court to deny an injunction on the basis that irreparable harm will not result. See, e.g., Gradient OC Master, Ltd. V. NBC Universal, Inc., 930 A.2d 104, 131, 133-34 (Del. Ch. 2007) (denying a preliminary injunction when money damages were adequate to compensate plaintiffs).

Defeating a preliminary injunction can be a significant victory for a target company, and one that deprives plaintiffs of leverage in negotiating a settlement. When a target company’s board is demonstrably independent, relied on sound analysis from investment bankers, acted reasonably to maximize shareholder value, and ensured that no material information was omitted from the proxy statement, the best defense strategy may be to win the preliminary injunction battle. Needless to say, it pays to “know your judge” before choosing this strategy.

Expedited Discovery—Prepare for the Fire Drill

Plaintiff shareholders have the burden of demonstrating that good cause exists to “justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding.” Ehlen v. Conceptus, Inc., C.A. No. 8560-VCG (Del. Ch. May 24, 2013). They try to meet this burden by demonstrating “a sufficient possibility of threatened irreparable injury” and a “colorable claim.” Id. Judges may interpret any delay in seeking expedited discovery as a signal that the claim of irreparable harm will not result. See, e.g., Gradient OC Master, Ltd. V. NBC Universal, Inc., 930 A.2d 104, 131, 133-34 (Del. Ch. 2007) (denying a preliminary injunction when money damages were adequate to compensate plaintiffs).

The Delaware Court of Chancery has encountered expedited discovery requests so often that it has issued “Guidelines for Expedited Discovery in Advance of a Preliminary Injunction Hearing,” available at http://courts.state.de.us/chancery/docs/PIDiscoveryGuidelines.pdf. The guidelines require parties to limit the written discovery sought to document requests and “narrowly-tailored [sic] interrogatories intended primarily to identify persons with relevant knowledge.” As to document requests, certain “core documents” are likely to be relevant in most merger
objections:

- The minutes of the relevant meetings of a board of directors and any board committees;
- The materials provided to the directors related to a transaction;
- The working group lists associated with a transaction; and,
- The engagement agreements and fee arrangements with investment advisors.

Parties should usually agree to produce these significant documents as soon as possible, and to supplement this initial production on a “rolling basis.”

While the timing and schedule of expedited discovery will vary by court, the Delaware Court of Chancery suggests that plaintiffs file initial discovery requests with a complaint or a motion to expedite. This recommendation is consistent with the notion that a failure to request expedited discovery immediately cuts against a claim of irreparable harm.

Defense attorneys must know about confidential or proprietary information in these documents and seek and secure a confidentiality order or agreement when appropriate. Other considerations include whether to limit the scope, or defer altogether, privilege and redaction logs. One common alternative to the traditional document-by-document review is using a “quick peek” agreement. In quick peek agreements the producing party permits a review of its documents without waiving any privileges. Regardless of the specific discovery devices that are used, litigators should identify potential discoverable information as early as possible and work with their clients to preserve and produce that information in a fashion that minimizes disruption and allows a deal to close as scheduled.

When the decision is made to settle, counsel in a merger objection lawsuit may rely on “confirmatory discovery,” which usually occurs after the parties sign a Memorandum of Understanding (MOU) containing the essential deal points of the proposed settlement. Some MOUs condition a settlement on consenting to have the plaintiffs’ counsel to conduct confirmatory discovery and on permitting the plaintiffs to rescind the MOU and continue to litigate if newly discovered information materially affects the strength of the claims or the fairness of the settlement’s terms. These conditions rarely occur, however, and the main goal of confirmatory discovery is to allow both sides to be able to assure a reviewing court that the proposed settlement is fair and reasonable.

**Strike While the Iron Is Still Hot: Negotiating the Settlement, Including Attorneys’ Fees**

Failing to reach a settlement before a deal closes can result in postmerger litigation, which can be difficult to resolve. One reason for this difficulty is that most settlements that happen after a deal closes result in an increase in the price paid by the acquiring company. Problems arise, however, because an acquired company’s D & O policy will not insure this increased deal consideration even if the policy covers attorneys’ fees related to deal litigation. An acquiring company that increases consideration after closing an acquisition does so at its own cost. Yet failing to reach a settlement exposes directors of the acquired company to a potential liability determination in a trial, possibly without the protections of insurance or indemnification. Both the pre-deal urgency and the post-deal uncertainty dictate that a prompt settlement is often in the best interests of both target and acquiring companies.

Fortunately for defendants that wish to reach an early settlement, the plaintiffs’ bar agrees! Parties can often meet this goal by entering into an MOU that outlines fair, reasonable, and adequate supplemental disclosures in exchange for a sufficiently broad release of liability for defendants.

Attorneys’ fees represent a significant component of nearly all settlements, and they are normally unopposed as part of a settlement agreement. While plaintiffs argue that judicial review of these “agreed-to” fees should be limited to “ferreting out collusion,” judges have started to scrutinize them nonetheless. In re PAETEC Holding Corp. S’holders Litig., C.A. No. 6761-VGC (Del. Ch. Mar. 19, 2013), the court explained that such scrutiny is appropriate “in the context of merger litigation that produces disclosure-only settlement” to determine whether “plaintiff’s efforts have conferred a benefit on the class.” The PAETEC court ultimately approved the requested attorneys’ fees of $500,000 after finding that additional disclosures of potential conflicts of interest did confer such a benefit.

Plaintiffs’ attorneys in Texas, however, will not be as fortunate. In disclosure-only settlements the Texas Rules of Civil Procedure require awarding attorneys’ fees “in cash and non-cash amounts in the same proportion as the recovery for the class.” Tex. Civ. Prac. & Rem. Code § 26.001(a). An intermediate appellate court has applied this “coupon rule” to reject awarding the proposed $600,000 in attorneys’ fees in a disclosure-only merger objection settlement. In re Katzman v. Frontier Oil Corp., 2013 WL 1244376 (Tex. Ct. App. Mar. 28, 2013). If the decision stands, it may act as the “death knell” for merger objection lawsuits in Texas state court.
Litigators must find a way to negotiate settlement terms that minimize disruption to the underlying transaction without conceding excessively onerous additional disclosures or outrageous attorneys’ fees. Then, using information gleaned from merits discovery or confirmatory discovery, counsel for a target company should assist the plaintiffs in assuring a court that the proposed settlement is fair and reasonable. In rare cases, when plaintiffs’ counsel insist on exorbitant fees, it can make sense to litigate the fee issue.

**Last but Not Least, Don’t Neglect the Insurance**

Insurance representatives must evaluate requests for the defense and settlement of individual lawsuits as well as the long-term effect that these lawsuits will have on their offerings for primary and first excess D & O liability coverage. While individual lawsuits are likely to settle for relatively small amounts, even after accounting for attorneys’ fees, the cumulative effect of these settlements may be more substantial. One possible result is that “higher frequency and lower severity claims [could produce] heightened loss for the primary and first level excess carriers, and perhaps lower severity experience for the high attaching excess carriers.” Bradford, supra, at 4. Other commentators opine that “the new M&A litigation model represents both a high frequency and a high severity risk.” Kevin M. LaCroix, Why M & A Related Litigation is a Serious Problem, D&O Diary (Nov. 28, 2011). Taken together, defense expenses, plaintiffs’ attorneys’ fees, and merger and acquisition-related indemnity exposure “increasingly represent[] a risk for all of the carriers in companies’ D&O insurance programs.” Id. In addition to these pressures, more insurance carriers now offer D & O insurance to fewer public companies. This increased competition has resulted in declining premiums, even in the face of increased exposure.

Directors and officers insurers and their representatives must continue to monitor these trends and to evaluate their offerings accordingly. For defense counsel, the main concern is usually to work with the insurance representatives to ensure that the insurers pay the fees and costs incurred in the defense of the litigation, as well as the fees and costs awarded to plaintiffs’ counsel.

**Conclusion**

Merger and acquisition transactions raise complex strategic, financial, and legal issues. To allow target and acquiring companies to focus on a deal, transactional and litigation attorneys must steer their clients through the near-certain merger objection class action lawsuits, which requires preparation. Some deals justify a zealous defense against unmeritorious lawsuits, while in other cases it is wise to negotiate an acceptable settlement as quickly as possible to reduce interference with the deal. Defense counsel must keep abreast of the evolving litigation trends and case law and the latest tactics from plaintiffs’ counsel to avoid messy outcomes and to help their corporate clients achieve the strategic objectives of their transactions.