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Client Alert

Shareholder and Securities Litigation Practice Group

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Disclosure-Only Settlements Face Continued Scrutiny In Delaware

On Thursday, September 17, 2015,[1] in *In re Riverbed Technology, Inc. Stockholders Litigation*, the Delaware Chancery approved a disclosure-only settlement related to the go-private deal for Riverbed Technology, Inc. Although the court approved the settlement, it expressed serious reservations about the broad releases provided to Riverbed's directors in exchange for enhanced disclosures that provided little value for shareholders. *In re Riverbed* is yet another in a line of Delaware cases that have expressed dissatisfaction with the current trend of merger litigation resulting in disclosure-only settlements.[2]

The Concerns Presented By Litigation Without Adversaries

In *In re Riverbed*, Vice Chancellor Glasscock outlined the general agency issues that are presented by class litigation opposing mergers. First, a plaintiff's attorney has incentive to reach settlement quickly to avoid the additional effort to develop valuable claims that may not generate an additional fee.[3] Second, the defendants have incentive to consummate the merger and terminate threats of future litigation.[4] "In combination, the incentives of the litigants may be inimical to the class: the individual plaintiff may have little actual stake in the outcome, her counsel may rationally believe a quick settlement and modest fees is in his best financial interest, and the defendants may be happy to 'purchase,' at the bargain price of disclosures of marginal benefit to the class and payment of the plaintiffs' attorney fees, a broad release from liability."[5] This leaves courts to determine the value of the claims that are released in comparison to the value of the settlement, which requires a balancing of "the policy preference for settlement against the need to insure that the interests of the class have been fairly represented."[6]

Under the facts of *In re Riverbed*, the court reasoned that the settlement was appropriate because (1) the supplemental disclosures made regarding Goldman Sachs' involvement provided *some* value to investors, (2) 99.48% of shareholders voted in favor of the merger despite the disclosures, (3) no expert could opine that the amount paid to the shareholders was unfair, and (4) plaintiffs' counsel testified that he thoroughly examined the record to search for viable Federal securities claims and found none. Further, while the parties disputed the breadth of the release in the settlement agreement, the court found it to be a "very broad, but hardly unprecedented, release" of

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"existing claims arising from the merger, known and unknown."[7] In consideration of the specific facts of this case, Vice Chancellor Glasscock acknowledged that while the value the shareholders received from the supplemental disclosures may have only been a mere "peppercorn," the value of what was released amounted to only a "mustard seed" – as such, the settlement was confirmed.[8]

The Shifting Tide Of Disclosure-Only Settlement Approval

While the Chancery Court's ruling approved the settlement based on the specific facts of this case, it found the "breadth of the release . . . troubling."[9] The court reasoned that if 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."[10] Corporations contemplating mergers should make note of the court's hesitation in approving this settlement and warning about the future of such settlements. The court's opinion in *In re Riverbed* indicates that broadly-worded releases in settlement agreements in exchange for disclosures that provide little value to shareholders will be more closely scrutinized in the future and may not be approved. Given the "near-ubiquity of litigation in connection with public company mergers," merging corporations should expect suits challenging the merger and have a strategy for disclosure and settlement.[11] Further, disclosure-only settlements have become the industry norm, with "almost 80 percent of settlements reached in 2014 provid[ing] only additional disclosures."[12] Indeed, in 2014 only six litigations regarding mergers ended in settlement payments to shareholders.[13]

The Chancery Court's seeming distain for disclosure-only settlements is by no means new.[14] In *Acevedo v. Aeroflex Holding Corp.*, Vice Chancellor J. Travis Laster rejected a settlement that would resolve a lawsuit challenging the acquisition of Aeroflex Holding Corp. Vice Chancellor Laster concluded that the settlement consideration of additional disclosures, a 40 percent reduction in the breakup fee, and a reduced matching period brought no value to the shareholder class and, consequently, the releases that were exchanged were too broad. The *In re Riverbed* opinion, in conjunction with the *Aeroflex* opinion and other recent opinions, highlight the Chancery Court's efforts to ensure that meritorious merger challenges are litigated and there is disincentive to bring suit where there has been no breach of fiduciary duty and the value provided to shareholders was fair.[15]

Due to the increased scrutiny and rejections of disclosure-only settlements, the plaintiffs' bar may react to the *In re Riverbed* opinion by filing suits challenging mergers involving Delaware companies in jurisdictions outside of Delaware to avoid the general disapproval of broad releases in disclosure-only settlements that the Chancery Court has expressed. Delaware companies should carefully consider whether to adopt a forum selection bylaw to eliminate such forum shopping. Also, *In re Riverbed* could reduce the number of suits challenging mergers by raising doubt as to whether plaintiffs can obtain quick and easy disclosure-only settlements. Generally, these possible outcomes are positive for corporations considering mergers, but the potential lack of a relatively cheap and quick settlement alternative could result in more protracted merger litigation for some companies. Public corporations considering mergers should continue to consider litigation risks and possible settlement strategy early in the merger process.

[1] *In re Riverbed Technology, Inc. Stockholders Litigation*, C.A. No. 10484-VCG (consol.) (Del. Ch. Sept. 17, 2015).

[2] *See, e.g., In re Medicis Pharma. Corp. S'holders Litig.*, C.A. No. 7857-CS, at 24 (Del. Ch. Feb. 26, 2014) (Transcript) ("I don't think [this disclosure-only settlement is] enough to justify a release . . . giving out releases lightly, I think, is something we've got to be careful about."); *Acevedo v. Aeroflex Holding Corp.*, C.A. No. 7930-VCL, at 73 (Del. Ch. Jul. 8, 2015) (Transcript) *available at* http://blogs.reuters.com/alison-frankel/files/2015/07/acevedovaeroflex-settlementhearingtranscript.pdf ("I don't think this relief [deal term changes and supplemental disclosures] is sufficient to support an intergalactic release.") .
[3] *In re Riverbed* at 7.
[4] *Id.* at 8.
[5] *Id.* at 9.
[6] *Id.* at 6 (citing *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1283 (Del. 1989)). *See also In re Countrywide Corp. Shareholders Litig.*, 2009 WL 2595739, at *3 (Del. Ch. Aug. 24, 2009) ("In assessing the fairness of the Proposed Settlement in relation to the release of such claims the Court focuses its evaluation primarily on the probable validity of the claims, and the apparent difficulty of enforcing them.").
[7] *Id.* at 14, n. 20. The definition of "Released Claims" in the settlement agreement in issue encompassed "(i) the allegations contained in the Action, (ii) the Merger, (iii) the Company's Preliminary Proxy, filed on January 7, 2015, the Company's Definitive Proxy, filed on January 20, 2015, or any other disclosures relating to the Merger, or alleged failure to disclose, with or without scienter, material facts to stockholders in connection with the Merger, (iv) the events leading to the Merger, (v) the negotiations in connection with the Merger, (vi) any agreements relating to the Merger, and any compensation or other payments made to any of the Defendants in connection with the Merger, (vii) the Merger Consideration, (viii) any alleged aiding and abetting of any of the foregoing, and (ix) any and all conduct by any of the defendants or any of the other Released Parties arising out of or relating in any way to the negotiation or execution of the MOU and [the] Stipulation[.]" *In re Riverbed Technology, Inc. Stockholders Litigation*, Opposition to Motion to Compel the Deposition of Objector Sean J. Griffith, 2015 WL 4507587 at n. 18 (Del. Ch. July 14, 2015).
[8] *Id.* at 15.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 19, n. 29. *See also* Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation, Cornerstone Research, at 2, *available at* https://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf (finding that in 2014 over 93% of M&A deals valued at over $100 million were litigated).
[12] Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation, Cornerstone Research, at 2.
[13] *Id.*
[14] *See, e.g.*, Frankel, Alison, Reuters, "The beginning of the end of 'deal tax' litigation boom," *available at* http://blogs.reuters.com/alison-frankel/2015/07/10/the-beginning-of-the-end-of-deal-tax-litigation-boom/ (discussing decisions similar to *In re Riverbed* and declaring that "[s]omething is afoot in Delaware Chancery Court.:").
[15] Indeed, in the hearing regarding approval of the Aeroflex settlement, Vice Chancellor Laster stated that "[w]e want to be in the business of seeing good cases litigated, and we don't want people to file junky cases." Vice Chancellor Laster added that "[w]hat we've learned is that routine approval of these [disclosure-only] settlements carries real consequences, all of them bad." *Acevedo*, C.A. No. 7930-VCL, at 59, 67 (Transcript).