



Recent Developments in M&A Litigation

2015 was a record-setting year in mergers and acquisitions (M&A). Globally, total M&A activity reached a volume of nearly \$5 trillion, beating the record of \$4.6 trillion set in 2007. Last year also saw courts in Delaware (where most corporations are incorporated) issue numerous decisions that implicated key aspects of the fiduciary duties that boards of directors owe shareholders when pursuing and agreeing to M&A transactions. A few key decisions are discussed below.

When considering potential M&A—whether in response to an unsolicited offer or because of an independent decision to explore strategic options—boards typically hire a financial advisor to oversee the process and to advise on the financial fairness of a given proposal. It's vital for the financial advisor to be free of any potential conflicts of interest.

In December, the Delaware Supreme Court upheld the trial court's decision in a case challenging the acquisition of

ambulance company Rural/Metro Corporation, finding that the company's financial advisor, RBC Capital Markets LLC, had to pay more than \$75 million for giving tainted merger advice.

RBC was hired by the Rural/Metro board to represent its interests in deal negotiations (and stood to earn a fee for that engagement), but the bank wanted more money and offered to provide buyer-side financing to the eventual buyer. Standing on both sides of the transaction, RBC gave the board misguided advice regarding the sales process and also performed flawed analyses regarding the deal price.

The Delaware Court of Chancery held RBC liable in connection with the board's decision to agree to an unfair deal. In affirming the trial court's decision, the Delaware Supreme Court explained that an advisor like RBC may be liable for "misleading the board or creating [an] informational vacuum."

The *Rural/Metro* decision rep-

(Continued on Page 2)

In This Issue

ATTORNEY INSIGHTS

Recent Developments in M&A Litigation 1

NEWS & EVENTS

Recent Noteworthy Decisions 2

Settlement in Medbox Receives Preliminary Court Approval 3

Upcoming Lead Plaintiff Deadlines 3

Recent Firm News and Accomplishments 4

PORTFOLIO MONITORING

The Firm's Portfolio Monitoring Program 5

FIRM INFORMATION

About the Firm 6

Contact Information 6

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(Continued from Page 1)

resents a major victory for shareholders, holding financial advisors responsible for misconduct and creating new avenues for recovery. The case also illustrates just how important it is for a board to act carefully in retaining and relying on a financial advisor and, similarly, how vital it is for the advisor to have no conflict of interest.

Another landmark case involved a takeover by a company's largest stockholder. A controlling stockholder is an individual or entity that owns or controls a substantial share of a company's stock and, through his stock ownership and intangible influence, has the ability to control that company's affairs. Because of a controlling stockholder's inherent power to exert improper influence over a company's affairs, there are special concerns in deals involving a controller.

In 2014, the Delaware Supreme Court announced in a case involving the management-led buyout of M&F Worldwide Corp. that a controlling stockholder could limit his potential for liability by requiring an independent "special committee" of the board to review a transaction and including a "majority of the minority" voting or tender condition.

In 2015, the Delaware Chancery Court issued a post-trial decision in the management-led buyout of Dole Food Company, Inc., holding that David M. Murdock, who held roughly 40% of Dole's stock, was liable to former stockholders for \$148 million even though the deal included the two measures endorsed in *M&F Worldwide*.

The court in *Dole* found that Mr. Murdock was "an old-school, my-way-or-the-highway controller, fixated on his authority and the power and privileges that went with it." The court further found that Mr. Murdock had used his control to mislead Dole's special board committee and its financial advisor in order to secure an unfair deal.

Thus, despite the transaction employing the two mechanisms that can help insulate controlling stockholders, the court applied the rigorous "entire fairness" standard of re-

view and held Mr. Murdock and one of his affiliates liable for breach of fiduciary duty to former Dole stockholders.

The *Dole* decision demonstrates the potential for fraud and overreaching in M&A involving a controlling stockholder transaction even in a transaction involving a special committee and a majority-of-the-minority condition.

Another key decision from 2015 involved stockholders' voting rights and the impact of a vote on the availability of recourse. Most mergers or acquisitions require stockholder approval. In deals requiring a stockholder vote, for example, stockholders are sent a proxy statement that discusses the deal and asks stockholders to vote "For" or "Against" the transaction.

Directors have a duty to disclose all material information in the proxy statement, which enables stockholders to make an informed decision how to vote on the merger. (This article does not address what is or isn't, material information.) As shown in 2015, how stockholders vote and whether the vote was informed has a huge impact on M&A litigation.

In 2014, following hedge fund KKR's acquisition of its publicly traded financing affiliate, a group of the target company's stockholders filed suit, alleging that the deal resulted from a conflicted process and involved an inadequate price. The Delaware Chancery Court dismissed those claims, however, holding that the board of directors is entitled to the deferential "business judgment" standard of review if a deal has been approved by a majority of disinterested stockholders via an informed vote.

The Delaware Supreme Court upheld the trial court's decision, and trial courts have subsequently applied this principle to dismiss a number of cases.

There is considerable room for debate over whether this outcome is fair and whether it should remain good law. Still, this decision underscores two essential points: it is vital for proxy materials to disclose all information, and stockholders must exercise their right to vote on corporate transactions in order to safeguard their interests.

Recent Noteworthy Decisions

- ***In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016):** Chancellor Andre G. Bouchard recently held that, in disclosure-based settlements of merger litigation, the release language must be narrowly tailored to the claims asserted and that the disclosures must be "plainly material" to support a settlement.
- ***Amalgamated Bank v. Yahoo! Inc.*, C.A. No. 10774-VCL (Del. Ch. Feb. 19, 2016):** In a "books and records action" where the plaintiff sought documents to investigate wrongdoing, the court ruled for the plaintiff but held that any documents would be incorporated by reference into any eventual complaint.
- ***Calesa Associates, L.P. v. American Capital, Ltd.*, C.A. No. 10557-VCG (Del. Ch. Feb. 29, 2016):** In a case involving the acquisition of Halt Medical, Inc., Vice Chancellor Glasscock held that a stockholder owning just 26% of the company's stock could be a "controlling stockholder" if it exerted sufficient control over the company's affairs.
- ***Hazout v. Tsang*, No. 353, 2015 (Del. Feb. 26, 2016):** The Delaware Supreme Court recently expanded Delaware's extraterritorial jurisdiction over non-resident officers of Delaware corporations who are being sued not in their capacity as such, but, rather solely because they are deemed a "necessary or proper party."



Settlement in Medbox, Inc. Securities Class Action Receives Preliminary Court Approval

On February 3, 2016, California federal court judge Beverly R. O’Connell preliminarily approved a settlement in *Crystal v. Medbox, Inc.*, No. 2:15-CV-00426-BRO (JEMx) (C.D. Cal.), a class action alleging securities fraud against Medbox, Inc. and certain of its executives. Johnson & Weaver represents lead plaintiffs and serves as sole lead counsel in the action. Attorneys Frank J. Johnson, Michael I. Fistel, Jr., and Shawn E. Fields are leading the case for the plaintiffs.

The plaintiffs claim that, during the class period—April 2, 2013 through December 29, 2014—the defendants issued materially false and misleading statements regarding Medbox’s financial results. Specifically, the plaintiffs allege that the defendants overstated Medbox’s revenues by recognizing revenue on customer contracts before it had been earned.

As a result of these allegedly false statements, as well as other misrepresentations and omissions, Medbox’s stock traded at artificially inflated prices during the class period, reaching an intraday high of \$93.50 per share on January 8, 2014 and continuing to trade at inflated levels throughout the class period.



Through several partial disclosures, the truth about Medbox’s revenues began to emerge. As a result, Medbox had to restate 11 consecutive quarters of accounting statements. When these revelations surfaced, Medbox’s stock price plummeted, dropping more than 95% off its previous high to trade as low as \$4.50 per share on December 30, 2014.

Following extensive, hard-fought litigation, the parties reached a proposed settlement, which provides for the payment of \$1,850,000 in cash and 2,300,000 shares of Medbox stock into a common fund for the class.

Pursuant to the court’s preliminary approval, the plaintiffs’ claims administrator is in the process of sending notices and claim forms to potential class members. The notice includes an overview of the settlement as well as additional details regarding Medbox shareholders’ rights in the settlement and relevant dates and deadlines.

A fairness hearing, where the court will consider whether to finally approve the settlement, is scheduled for May 16, 2016 at 1:30 p.m.

Upcoming Lead Plaintiff Deadlines

Johnson & Weaver is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a “lead plaintiff” under the Private Securities Litigation Reform Act of 1995.

COMPANY	DEADLINE
Match Group, Inc. (NASDAQ: MTCH)	April 26, 2016
G-Willi Food International Ltd. (NASDAQ: WILC)	April 29, 2016
Hortonworks, Inc. (NASDAQ: HDP)	April 29, 2016
Sempra Energy (NYSE: SRE)	May 2, 2016
Teekay Corporation (NYSE: TK)	May 2, 2016
PTC Therapeutics, Inc. (NASDAQ: PTCT)	May 2, 2016
Rockwell Medical, Inc. (NASDAQ: RMTI)	May 2, 2016
William Partners L.P. (NYSE: WPZ)	May 6, 2016
PTC, Inc. (NASDAQ: PTC)	May 6, 2016
Horizon Pharma, Inc. (NASDAQ: HZNP)	May 9, 2016
Apollo Education Group, Inc. (NASDAQ: APOL)	May 13, 2016
Mentor Graphics Corp. (NASDAQ: MENT)	May 17, 2016
Performance Sports Group Ltd. (NYSE: PSG)	May 17, 2016
LPL Financial Holdings, Inc. (NASDAQ: LPLA)	May 23, 2016
Amaya, Inc. (NASDAQ: AYA)	May 24, 2016
Fly Leasing Ltd. (NYSE: FLY)	May 24, 2016
Precision Castparts Corp. (NYSE: PCP)	May 27, 2016
DS Healthcare Group, Inc. (NASDAQ: DSKX)	May 31, 2016
Platform Specialty Products Corp. (NYSE: PAH)	May 31, 2016
Tailored Brands, Inc. (NYSE: TLRD)	May 31, 2016
Brixmor Property Group, Inc. (NYSE: BRX)	May 31, 2016

Johnson & Weaver, LLP's Recent Accomplishments

Many of the firm's attorneys have received acclaim for their expertise and high ethical standards, and the firm has also recently secured major victories in pending litigation and been involved in numerous cases that have yielded substantial settlements. The following is a sample of Johnson & Weaver's recent accolades and achievements.

- **Johnson & Weaver Attorneys Named SuperLawyers:** Partners Frank J. Johnson and Brett M. Weaver were recognized by their peers as among the best lawyers in the legal community. Specifically, Martindale-Hubbell, a well-recognized and independent organization, awarded Mr. Johnson an AV rating—the highest possible rating—in both legal ability and ethical standards based upon a strenuous peer review rating process. In addition, *SuperLawyers*, rating service of outstanding lawyers from more than 70 practice areas, awarded Mr. Weaver recognition as a Super Lawyer after attaining a high-degree of peer recognition and professional achievement. Michael I. Fistel, an attorney in the firm's Atlanta area office, was also named a 2016 Georgia Super Lawyer – Rising Star.
- **Settlement Approved in *In re BTU International, Inc. Stockholders Litigation*, C.A. No. 10310-CB (Del. Ch.):** In a case arising out of the acquisition of solar industry participant BTU International, Inc., Johnson & Weaver helped to secure significant relief through a settlement. The settlement addressed the claim that BTU's proxy materials were materially inadequate and misleading by providing for numerous additional disclosures, including multiple sets of financial projections that were previously omitted. The settlement also lifted restrictions on potential buyers so that they could bid on BTU if they wanted to offer more than the existing buyer. The court recently approved the settlement, holding that it conferred a substantial benefit to BTU's former stockholders.
- **Johnson & Weaver Appointed Class Counsel in *Englehart v. Brown*, No. 13-2-33726-6 KNT (Wash. Super. Ct.):** The firm was named class counsel in a case challenging the 2014 acquisition of Flow International Corp. by hedge fund American Industrial Partners. The class action complaint alleges that the former members of Flow's board of directors, as well as Flow's former chief financial officer, breached their fiduciary duties and seeks unspecified monetary damages. The firm's client was appointed class representative, and Johnson & Weaver was appointed as co-counsel for the class of former Flow stockholders.
- **Class Certified in *Desrocher v. Covisint Corp.*, No. 14-cv-03878-AKH (S.D.N.Y):** In a decision issued on February 22, 2016, Judge Hellerstein of the U.S. District Court for the Southern District of New York certified a class of investors who purchased Covisint Corporation stock in or traceable to the company's initial public offering. Johnson & Weaver is serving as co-lead counsel for plaintiffs and the class in this case.
- **Settlement Achieved in *Liebsohn v. Augme Technologies, Inc.*, No. 13-2-40007-3 SEA (Wash. Super. Ct.):** Johnson & Weaver represented a group of 47 high net worth investors who were defrauded into trading their stock in a privately-held company for stock in a publically-traded company. After defeating several motions to dismiss and a petition for discretionary review by the Washington Court of Appeals, Johnson & Weaver obtained a favorable confidential settlement from the defendants' insurance carrier.
- **Settlement Reached in *In re LHC Group, Inc. Derivative Litigation*, No. 6:13-CV-02899-JTT-CBW (W.D. La.):** Johnson & Weaver, as co-lead counsel in this shareholder derivative action, was able to resolve the case for substantial reforms to LHC Group, Inc.'s corporate governance including, among other things, amendments to the company's compliance policies to address the allegations concerning its Medicare home health care program and to the Audit Committee Charter to provide for greater oversight over the company's compliance-related activities, Medicare and Medicaid reimbursement policies, compliance audits, the handling of anonymous complaints, and the effectiveness of LHC's Code of Conduct. The settlement also caused changes to be made to the company's insider trading and pre-clearance policies to provide more clarity and transparency and additional restrictions on insiders' sales of LHC stock, and caused the Board to establish lead independent director guidelines to address plaintiffs' allegations that LHC's directors and officers breached their fiduciary duty of loyalty.
- **Settlement Approved in *Singh v. Hsu*, No. 1-13-CV-243247 (Cal. Super. Ct.):** In a shareholder derivative action on behalf of Impax Laboratories, Inc., Johnson & Weaver obtained numerous corporate governance reforms, including (i) board-level reforms, (ii) officer-level reforms, and (iii) employee-level reforms. The retired federal judge that helped mediate the settlement explained that the outcome represented "an outstanding recovery that will benefit Impax and its shareholders for years to come." The company's general counsel also commented on the benefits provided by the settlement. After a hearing, the court fully approved the settlement.

Johnson & Weaver, LLP Launches StockMonitor™ Portfolio Monitoring Program to Assist Investors in Detecting and Prosecuting Fraud

Johnson & Weaver is pleased to announce that it has launched StockMonitor™, the firm's complimentary and proprietary portfolio monitoring program for both institutional and individual investors.

StockMonitor™ will provide alerts to qualified investors whenever one of their investments may be impacted by misconduct, such as when there has been suspected securities fraud, an unfair merger or acquisition, or other corporate malfeasance. The program is available to both U.S. and foreign investors, and there are no minimum portfolio requirements to participate.

"StockMonitor™ represents a major step forward in our efforts to detect and eradicate corporate misconduct," explained Frank J. Johnson, one of the firm's founding partners. He added, "We are excited about this program and look forward to providing investors with the protection they deserve."

Unlike some law firms, Johnson & Weaver's StockMonitor™ program is not outsourced to a third-party. All investment portfolios submitted to Johnson & Weaver and tracked by StockMonitor™ are monitored 100% in-house by an experienced team of professionals, including lawyers and securities analysts with significant experience identifying and prosecuting corporate misconduct.

Through StockMonitor™, the firm will keep investors' data strictly confidential. Security and confidentiality of all information submitted via StockMonitor™ is of paramount importance to the firm. Investors' data will be securely stored, and the firm will not disclose any information except as expressly authorized by the client and as required to pursue legal remedies.

Investors may wish to pursue legal action in response to alerts, and Johnson & Weaver is also highly qualified to serve as legal counsel in such matters.

Johnson & Weaver's StockMonitor™



offers many different services to program participants. The specific features available through StockMonitor™ may vary depending upon different investors' specific needs and circumstances. Potential services include:

The Monitor: All StockMonitor™ participants will receive Johnson & Weaver's quarterly newsletter, which highlights recent legal developments, the firm's recent accomplishments and accolades, upcoming lead plaintiff deadlines, and other information.

Ongoing Fraud Monitoring: If potential corporate misconduct or fraud is detected with respect to a particular investment, the firm will notify qualified participants about their legal rights and remedies as an investor.

New Case Filing Updates: The firm may provide updates to participants regarding new shareholder cases filed in the U.S. identified as relevant to the participant's portfolio.

Investigation Updates: Johnson & Weaver may contact participants to alert them of current instances of potential wrongdoing the firm is investigating.

Notice of Settlements: Participants can receive notifications concerning

settlements in class actions, derivative actions, or other cases relevant to the their respective stock holdings.

Customized Alerts: Participants can customize what types of alerts they want to receive (e.g., new cases, investigations, settlements).

Action Items: With respect to new cases, the alert will provide the nature of the claims asserted, the court where the case is pending, the upcoming deadline for lead plaintiff submissions, and Johnson & Weaver's recommended course of action. Action plans are customized to the participating institution's holdings.

Claims Filing: If requested, Johnson & Weaver can assist with the filing of any necessary paperwork to be submitted in connection with a settlement involving the participant's portfolio.

To get started, please contact us at monitor@johnsonandweaver.com, and we will contact you promptly.

DISCLAIMERS: The foregoing description of services provided is provided for information purposes only. Not all services are available to all StockMonitor™ participants. Submitting an inquiry regarding StockMonitor™ shall not create an attorney-client relationship.



ABOUT THE FIRM

Johnson & Weaver is a firm built on foundational principles of trust, hard work, determination, and integrity. We embrace and embody those ideals in everything we do. Whether we're pursuing damages against a billion-dollar corporation or we're challenging a small transaction, Johnson & Weaver devotes every resource necessary to secure the best result possible. As a result, we have developed the reputation of delivering big-firm results with the personal touch that only a small firm can offer.

Johnson & Weaver's practice areas include securities class actions, shareholder derivative litigation, mergers & acquisitions litigation, labor & employment litigation, and consumer class actions. These cases are handled on a contingency fee basis. Johnson & Weaver also handles complex business and commercial matters on an hourly fee basis.

We believe we are only as good as our people, and Johnson & Weaver is determined to recruit only the best and brightest and most determined candidates possible. Our team includes:

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Frank J. Johnson
Brett M. Weaver

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James Baker
Emily Bigelow
Mason Hattam
Anna Lizano

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