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THE MONITOR

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Risk Factors for Stockholders in Cross-Border Mergers and Acquisitions

Over the past several years, numerous mergers and acquisitions have been called off due to regulatory issues stemming from purported national security concerns. Although such regulatory scrutiny might ultimately foster national security, deal limbo and deal cancellations have generally had a negative impact on stockholders of the target companies, whose fates can remain unresolved for many, many months.

During his 2016 campaign and since taking office, President Trump has positioned himself as a jobs-focused figure who emphasizes economic growth, a tough-on-China stance, and a strong approach to national security. In implementing his platform, the Committee on Foreign Investment in the United States (CFIUS) has assumed a major role in mergers and acquisitions involving cross-border companies.

CFIUS is an inter-agency committee of the U.S. government that was established in 1975 to review the national security implications of foreign investments in U.S. companies or operations. Under CFIUS guidelines, all companies proposing to be involved in an acquisition by a foreign firm are supposed to voluntarily notify CFIUS, but CFIUS can still review transactions that are not voluntarily submitted.

For most of its existence, CFIUS has had relatively limited influence on mergers and acquisitions, but its activity has recently surged, due to both President Trump's platform and the increase in acquisitions by Chinese firms. CFIUS review has had a significant impact on numerous proposed acquisitions, including, for example, the proposed acquistions of Lattice Semiconductor Corp. and Genworth Financial, Inc.

On November 8, 2016, on the eve of Election Day, Lattice announced that it would be acquired for $1.3 billion by Canyon Bridge Capital Partners LLP, a China-based private equity firm. The deal was priced at $8.30 per share, and Lattice's stock price sharply rose after the deal announcement, as commonly occurs. Moreover, there was a huge uptick in trading volume in

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the days and weeks following the deal announcement.

Almost immediately, however, U.S. legislators and regulators began to express concern over the impact of the deal on national security, focusing specifically on China's potential to acquire new technology that could be used for military or space exploration purposes. Congressional members from both political parties requested CFIUS to investigate and recommend blocking the merger. As concerns over deal certainty mounted, Lattice's stock price began a slow, steady decline.

On September 13, 2017, following a lengthy CFIUS review and negative recommendation, President Trump announced that the U.S. would block the Lattice deal due to national security concerns. In the weeks that followed, Lattice's stock continued to lose value and ultimately hit bottom on September 26, 2017, closing at $5.07 per share, roughly 60% of the original value of the deal value and less even than pre-deal trading levels. In retrospect, for long-term Lattice stockholders as well as for those who purchased their stock after the deal announcement, the CFIUS review derailed the deal and cost stockholders many millions of dollars.

The proposed acquisition of Genworth involved a different regulatory outcome but still had an adverse effect on stockholders.

Around the same time the Lattice deal was announced, Genworth, a Virginia-based insurance holding company, entered into a merger agreement with China Oceanwide Holdings Group Co., Ltd., a privately held, family owned international financial holding group based in Beijing. Like the Lattice deal, the Genworth takeover was conditioned on, among other things, regulatory (including CFIUS) approval. The deal was worth $2.7 billion in cash, or $5.43 per share.

When the deal was announced on October 23, 2016, Genworth and China Oceanwide said they expected to close the transaction by mid-2017. The merger agreement even expressly contemplated that the parties could terminate the deal if it hadn't closed by August 31, 2017, the so-called "end date." However, because of the unexpected and inordinate amount of time required to complete CFIUS review, the parties were forced to extend the end date numerous times to accommodate the regulatory process.

On June 8, 2018, Genworth issued a press release stating that CFIUS had completed its review and that there were no unresolved national security concerns. However, other regulatory issues remain under review, and the parties have not yet publicly stated when they expect the deal to close.

As with the Lattice deal, Genworth's stock price jumped from pre-deal announcement trading levels to just below the $5.43 per share deal price. However, during the nearly 20 months that have passed since the deal was announced, Genworth's stock has traded at much lower levels due to concerns over whether the deal will ultimately fall apart because of potential national security concerns. Specifically, shortly after the merger announcement, Genworth's stock steadily declined past $5, $4, $3, and eventually to as low as $2.69 per share in the spring of 2018. When Genworth announced that it had received CFIUS approval on June 9, 2018, the company's stock increased sharply, trading between $4.35 and $4.70 per share.

Even with the recent uptick, however, Genworth's stock has underperformed compared to its peers and standard benchmarks. For example, while Genworth's stock has lost approximately 10% of its value since October 2016, the S&P 500 has increased by more than 30%. Thus, even if the merger ultimately goes through, investors would suffer because of the extraordinary amount of time it has taken for the deal to close.

The Lattice and Genworth deals are just two examples of many potential transactions that have been affected by CFIUS-related delay or cancellation. And from a financial perspective, the impact is clear—stockholders lose money when their investments are tied up. But from a legal perspective, things get murky.

Under state and federal law, directors and officers of companies are legally required to disclose material information and to act in accordance with their fiduciary duties. Certain state laws even provide that directors have a duty to "maximize stockholder value" and get the highest price whenever trying to sell a company. Yet to enforce these rights and seek monetary damages where directors and officers have breached their duties, stockholders typically have to retain their shares through the completion of any deal. This, unfortunately, forces individuals to choose between their financial interests versus their legal interests, which will depend upon the unique facts and circumstances of each case and of each individual.

Accordingly, although the need to ensure national security is unquestionably important, the impact that CFIUS and other regulatory review has on mergers can pose very complicated problems for stockholders of companies that are pursuing potential mergers.

Johnson Fistel, LLP regularly counsels and represents stockholders who own shares of companies that are engaged in mergers and acquisitions. For more information, please don't hesitate to contact W. Scott Holleman, a partner in the firm's New York office, at 212.802.1486.

AT&T – Time Warner: Will This Open the Merger Floodgates?

When AT&T bid on Time Warner for $85 billion in October 2016, the putative acquisition would have combined the juggernaut forces of two media heavyweights in an industry being rapidly transformed by new content and distribution drivers.

AT&T touted the merger as one that would create efficiencies and allow the company to reduce consumer prices. But the U.S. Justice Department, in a lawsuit to enjoin the merger initiated last November, argued that it would hurt American consumers by curtailing innovation and ultimately effecting higher monthly bills. In other words, the U.S. Justice Department argued that by reducing the competitive vigor of the market in which AT&T and Time Warner operate by allowing "[t]he merged firm [to] have the incentive and the ability to raise its rivals' costs and stifle growth of innovative next-generation entrants," the merger violated U.S. antitrust laws designed to protect consumers from predatory corporate acts designed to achieve monopolies.

But in a landmark ruling in June 2018, U.S. District Court Judge Richard Leon called certain of the government's arguments "poppycock" and issued an opinion that the deal could go through. In so reasoning, the Court opined that the two companies' competing visions "couldn't be more different" and wrote "that the Government has failed to meet its burden to establish that the proposed transaction is likely to lessen competition substantially."

The green-lighting inspired a flurry of analyst and legal commentary concerning whether judicial approval of the deal would incite an "urge to merge" among other large companies, including Disney—which bid $52 billion for most of 21st Century Fox's assets last December—and other target media commodities such as Lionsgate, MGM, and Sony Pictures Entertainment.

While the ruling may have signaled a clear path forward for such deals, the federal appeals court this month approved the government's request for an expedited schedule for an appeal, with briefing due by mid-October and oral arguments "as soon as practicable." Notwithstanding the accelerated litigation schedule, AT&T and Time Warner have already taken significant steps to integrate the two businesses and AT&T Chief Executive Randall Stephenson has publicly averred that "[T]he likelihood of this thing being reversed or overturned is really remote."

Whether or not the deal withstands judicial scrutiny on appeal remains to be seen. Critically, if the AT&T-Time Warner deal ultimately bears the imprimatur of the court, it could very well precipitate a colossal spike in media mergers, acquisition activity, and consolidation.

Upcoming Lead Plaintiff Deadlines

Johnson Fistel 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
Glencore plc (OTC: GLNCY)	Sept. 7, 2018
Mercury Systems, Inc. (NASDAQ: MRCY)	Sept. 8, 2018
Farmland Partners Inc. (NYSE: FPI)	Sept. 9, 2018
Mednax, Inc. (NYSE: MD)	Sept 9, 2018
Prothena Corporation PLC (NASDAQ: PRTA)	Sept. 14, 2018
National Beverage Corp. (NASDAQ: FIZZ)	Sept. 15, 2018
Vuzix Corporation (NASDAQ: VUZI)	Sept. 22, 2018
Rockwell Medical, Inc. (NASDAQ: RMTI)	Sept. 25, 2018
Tetraphase Pharmaceuticals, Inc. (NASDAQ: GDS)	Sept. 25, 2018
GDS Holdings Limited (NYSE: ATEN)	Oct. 1, 2018
Helios and Matheson Analytics Inc.(NASDAQ: HMNY)	Oct. 1, 2018
Impinj, Inc. (NASDAQ: PI)	Oct. 7, 2018
Nielsen Holdings PLC (NYSE: NLSN)	Oct. 7, 2018
Sinclair Broadcast Group, Inc. (NASDAQ: SBGI)	Oct. 8, 2018
Zion Oil & Gas, Inc. (NASDAQ: ZN)	Oct. 8, 2018
Oracle Corporation (NYSE: ORCL)	Oct. 9, 2018
Tesla, Inc. (NASDAQ: TSLA)	Oct. 9, 2018
LogMeIn, Inc (NASDAQ: LOGM)	Oct. 19, 2018

China Agritech: Bring Claims Before the Clock Runs Out

A recent decision by the U.S. Supreme Court has created new urgency for those considering when and whether to bring claims for relief on behalf of themselves or others similarly situated. Over forty years ago, in the landmark *American Pipe* case, the Supreme Court held that the "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Am. Pipe & Constr. Co. v. Utah,* 414 U.S. 538 (1974). The Supreme Court of the United States recently clarified and updated this rule in *China Agritech, Inc. v. Resh,* 138 S. Ct. 1800 (2018).

In *China Agritech*, the Court unanimously held that the American Pipe rule only tolls a putative class member's individual claims and does not allow a putative class member to file a new class action after the statute of limitations has expired. *China Agritech,* 138 S. Ct. at 1808 ("Ordinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in pursuit of their claims," "A would-be class representative who commences suit after expiration of the limitation period, however, can hardly qualify as diligent in asserting claims and pursuing relief."). In other words, the Court held that *"American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action." *China Agritech,* 138 S. Ct. at 1806.

Moreover, when considered in conjunction with the Court's other recent decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.,* 137 S. Ct. 2042 (2017), which held that American Pipe class action tolling applies only to statutes of limitation and not statutes of repose, absent class members can no longer wait until a decision on class certification has been rendered to decide whether to opt out and pursue their claims individually because waiting for a decision on class certification risks running afoul of the applicable statute of repose, thus time-barring their claims. For example, Securities Act claims carry a two-year limitations period and a five-year repose period (*see* 15 U.S.C. § 77m), and any Section 10(b) securities fraud claims carry a two-year limitations period and a five-year repose period (*see* 28 U.S.C. § 1658(b)).

In light of these decisions, it is imperative that those seeking to bring securities or other claims consider whether to bring those claims before the clock runs out and the statute of limitation or statute of repose applicable to those claims bar those claims from being filed. Such would-be plaintiffs should not rely on the pendency of an already-filed class action to preserve their rights with respect to when to bring a case. Actions to consider include, but are not limited to, timely filing related claims or intervening in the pending class proceeding. Please feel free to contact our offices if you have any concerns regarding these issues.

Independent Contractors or Employees: Is the "Gig" Up in California?

In what many are calling a landmark decision, the California Supreme Court recently adopted a new legal standard that will make it much more difficult for businesses to classify workers as independent contractors in California. The decision could have wide-ranging ramifications for all businesses that use independent contractors, especially those like Uber, Lyft, Amazon, Instacart, and other companies buoyed by the sweat of the emerging "gig economy." The case is *Dynamex Operations West, Inc. v. Superior Court.*

Under the new, much simplified "ABC" test, a worker is determined to be an employee under California's Wage Orders *unless the business can establish each of three ABC factors:*

(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*

(C) that the worker is customarily engaged in an independently established trade, occupation, or business.

The test starts with the presumption that all workers are employees, and utilizes three factors, all of which must be satisfied for an independent contractor classification to pass muster. The first factor—whether the worker is "free from the control and direction" of the company—essentially reflects the current legal standard and is not controversial. The other two factors, however, threaten to upend the business model used by many companies that rely heavily on independent contractors. The first of these elements, referred to above, requires that the worker perform services "outside of the usual course of the hiring entity's business." A strict interpretation of this standard would limit independent contractors to workers who perform services totally unrelated to the company's core function. The Court offered examples of a retail store that "hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line," as utilizing legitimate independent contractors. Any worker who participated in any part of the store's actual business, however, would be considered an employee.

The third part of the ABC test requires that the worker be "engaged in an independently established trade, occupation, or business." The Court explained that this element is designed to identify individuals

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who have "made the decision to go into business for himself or herself," and to prevent companies from "unilaterally determin[ing] a worker's status by assigning the worker the label 'independent contractor' or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker as an independent contractor."

Signs that an individual has established an "independently established" business would include "incorporation, licensure, advertisements, routine offerings to provide the services of the independent contractor to the public or to a number of potential customers, and the like."

The decision not only expands the definition of "employee" under California's Wage Orders, it also imposes an affirmative burden on businesses to defend their classification of workers as independent contractors and prove that such classification is proper.

Misclassifying workers can have a huge impact on businesses, because if a worker should be classified as an employee, the business bears responsibility for paying federal social security and payroll taxes, unemployment insurance taxes, and state employment taxes, as well as providing workers' compensation insurance. Employees, unlike independent contractors, are protected by an extensive body of laws regulating the work place, including wage and hour laws like minimum wage and overtime, and discrimination laws, among many, and significant penalties are imposed for misclassifying workers, including the potential for costly tax audits by the Employment Development Department (EDD).

As a result of the *Dynamex* decision,

it would appear that workers, particularly those working in the gig economy, should generally be treated as employees, not independent contractors, of the company that facilitates their work. As such, all California workers that are utilized as independent contractors should re-evaluate whether they are properly classified under the ABC test – on both an individual and class basis.

For more information or questions about your employment classification, please contact the Johnson Fistel, LLP team.

Firm News

Johnson Fistel Welcomes New Attorney Tiffany Johnson

Tiffany is a terrific addition to our team. She brings nearly two decades of government trial experience to help our firm meet the needs of our clients," said Frank J. Johnson, Johnson Fistel's managing partner. Mrs. Johnson focuses her practice on complex business litigation and civil rights matters. She also has experience representing clients in family law matters.

Prior to joining Johnson Fistel, Mrs. Johnson was a Deputy Attorney General for the State of California for over twelve years where she primarily litigated civil rights cases through trial.

Read Tiffany Johnson's full bio here.

Johnson Fistel – Top Fundraising Team for Feeding San Diego

We are proud to announce that Feeding San Diego awarded Johnson Fistel recognition as the Top Fundraising Team among all participating law firms in San Diego with 30 or less employees for raising money to help combat hunger in San Diego. "I'm pleased to be part of an important and meaningful effort to help others.

When I heard that 1 in 6 children in San Diego doesn't know where his or her next meal is coming from, I encouraged my team to participate and reached out to my friends and family to also help," said Frank J. Johnson, one of the firm's founding partners.

Help make a difference, please visit https://feedingsandiego.org/.

Johnson Fistel Welcomes New Associate Mary Ellen Conner

"We are excited to add Mary Ellen to our already talented and diverse team here in Georgia," said Michael I. Fistel, Jr., a partner in Johnson Fistel's Georgia office. "Mary Ellen's past experience representing Fortune 500 companies in complex commercial and securities litigation, as well as her time spent in academia will serve the firm and its clients well."

At Johnson Fistel, Ms. Conner will concentrate her practice on securities litigation and complex commercial disputes, representing businesses and individuals who have been wronged by corporate fraud in shareholder litigation, including direct and derivative actions.

Read Mary Ellen Conner's full bio here.

Recent Accomplishments

***Morrison v. Berry,* No. 445, 2017 (Del. July 27, 2018):** In an appeal arising out of the management-led buyout of upscale grocer The Fresh Market, the Delaware Supreme Court reversed a decision of the Delaware Court of Chancery dismissing the case. In 2016, the plaintiff, represented by Johnson Fistel, obtained books and records regarding the buyout and subsequent filed a case alleging breach of fiduciary. Among other things, the plaintiff claimed that two Fresh Market insiders orchestrated the deal for their own benefit and chose the private equity firm as buyer who would give them the best incentives. The lower court dismissed the case on the grounds that shareholders made a fully-informed decision to approve the deal. However, the Supreme Court reversed, holding that the two conflicted insiders might have misled Fresh Market's board of directors, thus irreparably tainting the resulting sales process. The case, having been reinstated, is pending in the Delaware Court of Chancery.

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About the Firm

Johnson Fistel was founded on the following five core values: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients — their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.

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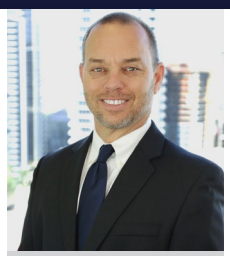
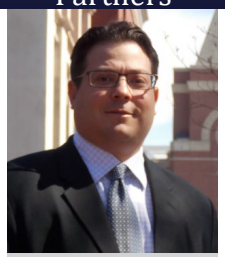

Frank J. Johnson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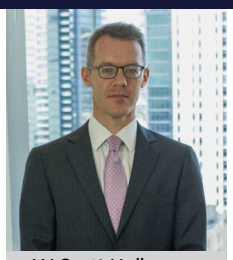
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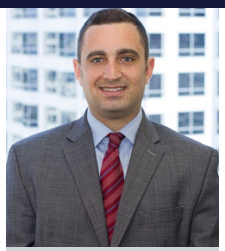
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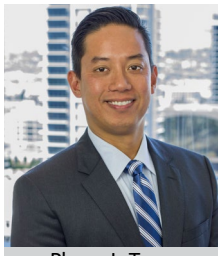
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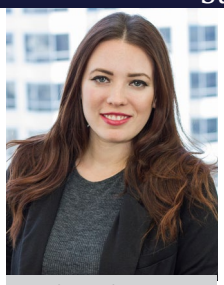
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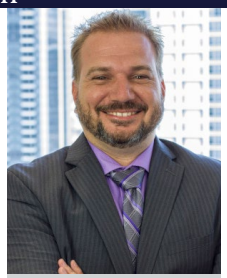
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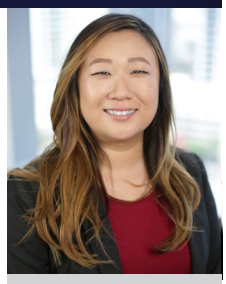
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