PANORAMIC

M&A LITIGATION 2024

Contributing Editors

Matthew Solum and **Stefan Atkinson**

Kirkland & Ellis LLP

LEXOLOGY

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Panoramic guide (formerly Getting the Deal Through) containing side-by-side comparison of local insights into M&A litigation, including types of shareholder claim; class or collective actions; derivative litigation; interim relief and early dismissal; claims against third-party advisers or counterparties; limitations on claims; standards of liability; legal restrictions on indemnities; challenges to particular clauses or terms; pre-litigation tools and procedure; the role of directors' and officers' insurance; forum and discovery considerations; damages and settlements; directors' duties regarding unsolicited or unwanted M&A proposals; types of counterparty claim; and recent trends.

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Global Overview

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The 2024 update of this publication reinforces the enduring themes that characterise M&A litigation across jurisdictions. In previous editions, we have noted that M&A litigation implicates substantive and institutional considerations that offer helpful vectors for understanding the similarities and differences across jurisdictions. By substantive considerations, we refer mainly to the rights and duties of parties affected by the transaction, which may include the directors, officers, employees and shareholders of the constituent corporation. By contrast, institutional considerations concern the role of courts or other authorities in adjudicating or intervening in M&A transactions and the procedural steps by which that occurs.

We have noted that almost all jurisdictions share similar substantive characteristics, and that remains true. Whether common law or civil law, almost all jurisdictions impose duties upon directors and officers of the corporation to make decisions on an informed basis, free from conflict, and in the best interests of the corporation, broadly reflecting the duty of care and the duty of loyalty. Similarly, most jurisdictions place primacy on the shareholder franchise and typically will not interfere with an outcome that has been approved by a fully informed vote of the unaffiliated shareholders, as is frequently required before an M&A transaction can close.

Where jurisdictions tend to differ is with respect to institutional considerations. To be sure, there are similarities here as well – for example, jurisdictions are similar in terms of deference to decisions made by directors and officers. All jurisdictions are reluctant to second-guess decisions that have been made on an informed basis, free from conflict, and in the best interests of the corporation. Whether that deference is expressed explicitly as a default presumption in favour of the decision (such as the business judgment rule in the United States), or implicitly as a matter of practice, all jurisdictions exhibit deference in these circumstances. At the same time, all jurisdictions engage in closer scrutiny of decisions made by directors and officers with potential conflicts of interest, whether through a heightened standard of judicial review (such as the entire fairness standard in the United States), or by enforcing heightened statutory or regulatory requirements.

But there are significant institutional differences across jurisdictions too, particularly in the mechanisms for seeking intervention in M&A transactions. One way these differences present is in the conduct of litigation, where the United States is comparatively liberal compared to civil law systems. As we have highlighted before, the United States provides for comparatively permissive pre-trial discovery and motions practice, both of which are unavailable to the same degree (if at all) in civil law systems. Another difference is in the availability of collective litigation. The United States has a permissive policy toward class action litigation, allowing a representative shareholder to assert claims on behalf of other similarly situated shareholders so long as the representative and the claims meet certain requirements. In other jurisdictions, class actions may not be permitted for shareholder claims in the M&A context, or the class action mechanism may not be the preferred vehicle for such actions. One additional difference, which has become particularly relevant recently, is the mechanism for regulatory intervention. In the United States, government regulators seeking to enjoin a proposed M&A transaction based on antitrust concerns must litigate and prevail in court. In other jurisdictions, regulatory enforcement of antitrust laws in the context of a proposed M&A transaction occurs through specialised institutions, such as the European Commission. These differences, among others, demonstrate that jurisdictions have adopted different schemes for intervening in M&A transactions, even if the substantive standards governing M&A litigation may be similar.

The following chapters present more detail on the state of M&A litigation across jurisdictions. We trust that these chapters will serve as useful guidelines on the content and practice of M&A litigation around the world. We emphasise, however, that the following responses are provided as general guidance only, and should not be construed as opinions or views on any specific set of facts or transaction.

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

Identify the main claims shareholders in your jurisdiction may assert against corporations, officers and directors in connection with M&A transactions.

Shareholders typically assert three types of claims in connection with M&A transactions. First, shareholders may assert claims under US securities law. Section 14 of the Securities Exchange Act of 1934 prohibits materially false or misleading representations in connection with a proxy solicitation. After the parties announce their agreement to combine and begin making proxy filings with the Securities and Exchange Commission, shareholders often bring section 14 claims alleging that the company's proxy disclosures are false or misleading.

Second, shareholders may assert breach of fiduciary duty claims. Directors and officers owe several fiduciary duties to shareholders, including the duty of care and the duty of loyalty. Claims based on the board's fiduciary duties are governed by state law – typically common law.

Third, shareholders may assert claims under state statutes, including requests for appraisal and books and records demands. Appraisal rights allow shareholders to request a judicial valuation of their shares and seek a judicial determination of the 'fair value' of their shares. Books and records demands allow shareholders to review the company's books and records (typically board materials and perhaps other company records) further to a proper purpose. If the company does not make its books and records available, shareholders may ask the court to compel production.

This chapter discusses the most common US legal concepts in the context of M&A litigation, using Delaware law as the standard for state law issues unless otherwise specified. In the United States, most public companies are incorporated in Delaware, and Delaware M&A law is well-developed and highly regarded by other states, many of which have adopted broadly similar fiduciary duty standards and statutory rights.

The following responses are provided as general guidance only, and should not be construed as opinions or views on any specific set of facts or transactions.

Law stated - 6 March 2024

Requirements for successful claims

For each of the most common claims, what must shareholders in your jurisdiction show to bring a successful suit?

To succeed on a claim under section 14 of the 1934 Act, shareholders must prove that the proxy statement contained a material misrepresentation or omission that induced shareholders to authorise the transaction (or to forgo redemption rights, or both) and caused injury to shareholders. In some circumstances, shareholders also need to show that the misrepresentation or omission was intentional.

To prevail on a breach of fiduciary duty claim, the shareholder must prove the existence of a fiduciary duty and a breach of that duty. For a breach of the duty of care, shareholders must show that the defendants acted with gross negligence, which means 'conduct that constitutes reckless indifference or actions that are without the bounds of reason' (*Zucker v Hassell*, 2016 WL 7011351, at *7 (30 November 2016). For a breach of the duty of loyalty, shareholders must show that the board failed to act in the best interests of the company and its shareholders.

To invoke statutory appraisal rights, shareholders must generally perfect those rights by making the requisite demands for appraisal to the company, and the shareholder may not vote in favour of the transaction. The court then determines the 'fair value' of the shares, which is the 'value to a stockholder of the firm as a going concern' (*Golden Telecom, Inc v Global GT LP*, 11 A.3d 214, 217 (Del. 2010)). To make a books and records demand, the shareholder must generally specify a proper purpose for the inspection that is 'reasonably related to [the] person's interest as a stockholder', and the stockholder is entitled to only those books and records 'necessary and essential to accomplish the stated, proper purpose' (*AmerisourceBergen Corp v Lebanon Cty Emps' Retirement Fund*, 243 A.3d 417, 425–27 (Del. 2020)).

Law stated - 6 March 2024

Publicly traded or privately held corporations

Do the types of claims that shareholders can bring differ depending on whether the corporations involved in the M&A transaction are publicly traded or privately held?

Shareholder plaintiffs are generally more active in M&A transactions involving publicly traded companies, and frequently assert claims under US securities law and for breaches of fiduciary duties. In some situations, appraisal rights are not available for public transactions. In transactions involving privately held companies, claims are typically brought by the buyers or sellers and generally arise out of the contract.

Law stated - 6 March 2024

Form of transaction

Do the types of claims that shareholders can bring differ depending on the form of the transaction?

In some cases, yes. Claims alleging breaches of fiduciary duty typically do not differ depending on how the transaction is structured. However, in a sale that involves a 'change of control' where *Revlon* duties would ordinarily attach to the board's decision, a merger structured as a tender offer followed by a back-end merger may be reviewed under the business judgment rule.

Claims under section 14 of federal securities law may differ depending on whether the transaction is structured as a merger, in which case intent to deceive investors is not necessarily an element, or structured as a tender offer, in which case intent is an element.

Law stated - 6 March 2024

Negotiated or hostile transaction
Do the types of claims differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer?

Generally, no – except, of course, that the hostile bidder (a shareholder) may well sue the company and its board on claims related to the hostile bid. Boards are permitted to adopt certain defensive measures in response to a hostile offer, which courts will uphold if the board had 'reasonable grounds for identifying a threat to the corporate enterprise' and 'the response was reasonable in relation to the threat posed' (*Williams Companies Stockholder Litig*, 2021 WL 754593, at *2 (Del. Ch. 2021)).

Law stated - 6 March 2024

Party suffering loss
Do the types of claims differ depending on whether the loss is suffered by the corporation or by the shareholder?

Yes. Claims for losses suffered by the corporation belong to the corporation, so shareholders asserting such claims do so in a derivative capacity. Derivative claims must satisfy certain procedural requirements, and any recovery flows to the company. Derivative claims may be extinguished if the corporation that owns the claim no longer exists as a result of the transaction.

Claims for losses suffered by the shareholder belong to the shareholder, and may be asserted directly (either as an individual action or as a class action) against the alleged wrongdoer. Any recovery from a direct suit flows to the shareholders, rather than the company.

Claims under US securities law and state statutes, such as appraisal rights and books and records demands, are generally direct claims, although there are some derivative federal securities claims. Claims for breach of fiduciary can be either direct or derivative, depending on whether the claimed harm was suffered by the shareholders or the company.

Law stated - 6 March 2024

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions
Where a loss is suffered directly by individual shareholders in connection with M&A transactions, may they pursue claims on behalf of other similarly situated shareholders?

Yes. To maintain a class action, the representative shareholder or group of shareholders must show that:

- the class is so numerous that joining all members of the class in a single case would be impracticable;
- there are questions of law or fact commonly applicable to all class members;

- the claims of the class representative are typical of the claims of other class members; and
- the representative will adequately protect the interests of other class members.

In addition, the class representative must show that either common questions of law or fact predominate over individualised issues, there is a risk of inconsistent adjudications if the claims were brought individually, or the action seeks appropriate class-wide injunctive relief.

Law stated - 6 March 2024

Derivative litigation

Where a loss is suffered by the corporation in connection with an M&A transaction, can shareholders bring derivative litigation on behalf or in the name of the corporation?

Yes. Shareholders may bring a derivative lawsuit on behalf of the corporation, but must typically satisfy several procedural requirements. The shareholder must either make a pre-suit demand on the board asking the corporation to pursue its claim, which the corporation must wrongfully refuse, or show that the demand would have been futile because the board was incapable of impartially evaluating the demand. The plaintiff must also remain a shareholder from the time of the alleged misconduct through the conclusion of the litigation. Further, any settlement must be approved by the court.

Law stated - 6 March 2024

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

What are the bases for a court to award injunctive or other interim relief to prevent the closing of an M&A transaction? May courts in your jurisdiction enjoin M&A transactions or modify deal terms?

Yes. US courts may issue injunctive relief to enjoin the closing of an M&A transaction in certain situations. To determine whether injunctive relief is appropriate, courts generally consider whether the moving party has a reasonable probability of success on the merits, whether the moving party will suffer immediate and irreparable harm absent the requested injunctive relief, and whether the balance of the equities favours injunctive relief. Courts may also modify or strike specific deal terms. As a general matter, damages are more likely to be awarded by US courts than injunctive relief.

Law stated - 6 March 2024

Early dismissal of shareholder complaint

May defendants seek early dismissal of a shareholder complaint prior to disclosure or discovery?

Yes. Defendants may seek early dismissal by filing a motion to dismiss. Motions to dismiss may be premised on procedural grounds or substantive grounds, such as a shareholder's failure to plead an actionable claim. For a claim under federal securities law, the filing of a motion to dismiss will typically trigger an automatic stay of discovery through the resolution of such motion. For other shareholder claims, courts have discretion to stay discovery while a motion to dismiss is pending.

Law stated - 6 March 2024

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers
Can shareholders bring claims against third-party advisers that assist in M&A transactions?

Yes. Shareholders may assert claims against third-party advisors for aiding and abetting an alleged breach of fiduciary duties. In addition to showing that a fiduciary duty existed and the board breached the duty, a shareholder bringing an aiding and abetting claim must show that the third-party advisor 'knowingly participated in a breach' and that the 'damages to the plaintiff resulted from the concerted actions of the fiduciary and the non-fiduciary' (*Gotham Partners LP v Hallwood Realty Partners LP*, 817 A.2d 160, 172 (Del. 2002)).

Law stated - 6 March 2024

Claims against counterparties
Can shareholders in one of the parties bring claims against the counterparties to M&A transactions?

Yes. Shareholders may likewise assert claims against the counterparty in a transaction for aiding and abetting an alleged breach of fiduciary duties. These claims typically involve allegations that the bidder created or exploited conflicts of interest in the target company's board, or conspired with the board to cause a fiduciary breach. However, attempts to obtain better value through arm's-length negotiation do not alone give rise to aiding and abetting liability. Shareholders of target companies may also assert claims under federal securities law against bidders that make allegedly false or misleading representations in joint proxy statements or in connection with a tender offer.

Law stated - 6 March 2024

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents
What impact do the corporation's constituting documents have on the extent board members or executives can be held liable in connection with M&A transactions?

Many states allow corporations to include in their certificates of incorporation a provision, which can be referred to as an exculpatory provision, eliminating the personal liability of directors for monetary damages arising out of breaches of the duty of care. Some states also allow corporations to extend these exculpatory provisions to certain officers of the corporation against direct claims. However, these provisions do not eliminate liability for directors or officers found to have breached their duty of loyalty or acted in bad faith. These exculpatory provisions do not preclude shareholders from seeking non-monetary relief such as injunctive relief.

Law stated - 6 March 2024

Statutory or regulatory limitations on claims

Are there any statutory or regulatory provisions in your jurisdiction that limit shareholders' ability to bring claims against directors and officers in connection with M&A transactions?

Yes. The statute of limitations determines how long shareholders have to bring claims in connection with an M&A transaction. For federal section 14 claims, shareholders must generally bring suit within three years of the date of the allegedly false or misleading disclosure. For claims based in state law, the statute of limitations varies across states. In Delaware, for example, the statute of limitations for claims asserting a breach of fiduciary duty is three years from the date the claim accrues. In certain situations, courts may exercise their equitable powers to disregard or toll the statute of limitations in a particular case.

Law stated - 6 March 2024

Common law limitations on claims

Are there common law rules that impair shareholders' ability to bring claims against board members or executives in connection with M&A transactions?

Yes. The business judgment rule is a common law presumption that the board made the business decision 'on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company' (***McMullin v Beran***, 765 A.2d 910, 916 (Del. 2000)). The shareholder plaintiff bears the burden of rebutting the business judgment rule by providing evidence that the board breached its fiduciary duties.

Law stated - 6 March 2024

STANDARD OF LIABILITY

General standard

What is the standard for determining whether a board member or executive may be held liable to shareholders in connection with an M&A transaction?

There are three general standards: business judgment rule, enhanced scrutiny, and entire fairness.

Business judgment rule

The default standard of review is the business judgment rule, under which the court will presume the defendants acted in accordance with their fiduciary duties. As long as the defendants can proffer a rational business justification for their decision, the court will not second-guess their decision.

Enhanced scrutiny

Enhanced scrutiny is the intermediate standard of review. Forms of enhanced scrutiny apply to certain transactions involving a sale or break-up of the company and to defensive actions taken by boards in response to takeover proposals. To satisfy enhanced scrutiny, defendants must generally show that 'their motivations were proper and not selfish' and that 'their actions were reasonable in relation to their legitimate objective'(***Firefighters' Pension Sys v Presidio, Inc***, 251 A.3d 212, 249 (Del. Ch. 2021)).

Entire fairness

The most onerous standard is entire fairness review. Once entire fairness review applies, the board must prove to the court that 'the transaction was the product of both fair dealing and fair price' (***Id***).

The standard of review is frequently dispositive of the outcome in M&A litigation. If the business judgment rule applies, the board's decision will generally be upheld. On the other hand, entire fairness review favours plaintiff shareholders, because it places the burden on the board to prove that all aspects of its decision were objectively fair. Entire fairness review is also fact-intensive, and usually resolved at trial rather than by pre-trial motions.

Law stated - 6 March 2024

Type of transaction
Does the standard vary depending on the type of transaction at issue?

Yes, in certain cases. When a corporation initiates an auction to sell or break up the company for cash, or abandons a long-term strategy in response to a bidder's offer and seeks alternative cash transactions to break up the company, or the M&A transaction involves a 'change of control', ***Revlon*** duties may attach to the board's decision. When ***Revlon*** duties apply, the board's goal is to get the best price for the shareholders from the sale of the company. Courts will review the board's decision under a form of enhanced scrutiny, where the board bears the burden of proving that it acted reasonably to maximise shareholder value. Interested transactions, such as going private transactions involving a controlling shareholder, are reviewed under the entire fairness standard in certain circumstances.

M&A transactions that do not involve a potentially interested party, such as a merger between corporations without a controlling shareholder or a sale to an unaffiliated financial sponsor, are generally reviewed under the business judgment rule.

Law stated - 6 March 2024

Type of consideration
Does the standard vary depending on the type of consideration being paid to the seller's shareholders?

Yes, in certain cases. The type of consideration may determine whether ***Revlon*** duties attach to a board's decision to approve an M&A transaction. In a sale of a company for cash, where the shareholders' interest in the company would be terminated by the transaction, ***Revlon*** duties generally apply and boards must maximise the present value for the shareholders. In a sale for stock that does not involve a change of control, such as when control of the merged entity remains in a large and fluid market, ***Revlon*** duties do not apply to the board's decision. M&A transactions that offer a mix of cash and stock as consideration are evaluated case by case, but US courts tend to find that ***Revlon*** duties apply where 50 per cent or more of the consideration is in cash.

Law stated - 6 March 2024

Potential conflicts of interest
Does the standard vary if one or more directors or officers have potential conflicts of interest in connection with an M&A transaction?

Yes, in certain cases. If a majority of the directors on the board have a material conflict of interest with respect to the M&A transaction, the board's decision is usually reviewed under the entire fairness standard. In some circumstances, if an interested director was able to control or dominate the board as a whole, the court may also apply entire fairness review to the board's decision. Under entire fairness review, the board must show that the transaction was the product of both fair dealing and fair price.

Law stated - 6 March 2024

Controlling shareholders
Does the standard vary if a controlling shareholder is a party to the transaction or is receiving consideration in connection with the transaction that is not shared rateably with all shareholders?

Yes, in certain cases. Courts typically review M&A transactions that involve a controlling shareholder who 'competes with other stockholders for consideration or otherwise receives a non-ratable benefit at the expense of minority shareholders' under the entire fairness standard (*In re Viacom Inc Stockholders Litig*, 2020 WL 7711128, at *16 (Del Ch 2020)). But if the transaction replicates an arm's-length transaction by, at the outset, conditioning the transaction upon the 'approval of an independent, adequately-empowered Special

Committee that fulfils its duty of care' and the 'uncoerced, informed vote of a majority of the minority stockholders', then the business judgment rule applies and the court will not second-guess the transaction (*Flood v Synutra Int'l, Inc*, 195 A.3d 754, 755–56 (Del. 2018)). If only one of those two procedural safeguards exists, courts will review the transaction under the entire fairness standard but shift the burden of proving unfairness onto the plaintiff.

Law stated - 6 March 2024

INDEMNITIES

Legal restrictions on indemnities
Does your jurisdiction impose legal restrictions on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants?

Yes. Companies are generally permitted to indemnify directors and officers unless a court determines that the director or officer failed to act in good faith or in a manner they believed was in the best interests of the company, or, in the case of a criminal proceeding, the director or officer had reasonable cause to believe their conduct was unlawful. For lawsuits brought by the company, including derivative lawsuits, indemnification for liability is only permitted if the court determines that indemnification is fair and reasonable. If a director or officer is successful in defending against shareholder litigation, companies are typically required to indemnify the director or officer for expenses and fees incurred in the litigation.

Companies are generally permitted to advance expenses and attorneys' fees to directors or officers defending against litigation, so long as the director or officer undertakes to repay the advanced fees if the director or officer is ultimately found ineligible for indemnification.

Law stated - 6 March 2024

M&A CLAUSES AND TERMS

Challenges to particular terms
Can shareholders challenge particular clauses or terms in M&A transaction documents?

Yes. Shareholders often challenge deal protection devices in an M&A agreement that may deter other bidders, such as terminations fees, standstills and 'no shop' or 'no talk' clauses. Courts generally review these deal protection devices under enhanced scrutiny review. So long as the deal protection devices in an M&A agreement 'are not draconian (preclusive or coercive) and are within a "range of reasonableness"', courts will generally enforce the deal protection provisions (*Omnicare, Inc v NCS Healthcare, Inc*, 818 A.2d 914, 932 (Del. 2003)).

Law stated - 6 March 2024

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

What impact does a shareholder vote have on M&A litigation in your jurisdiction?

In an M&A transaction without a controlling shareholder, a fully informed and uncoerced shareholder vote that ratifies the decision of the board will result in an application of the business judgment rule that is irrebuttable by the plaintiff. The shareholder vote 'cleanses' any potential breach of fiduciary duty by the board, and thus the business judgment presumption applies even if the board's decision standing alone would have been reviewed under a different standard. The plaintiff may, however, challenge the adequacy of the board's disclosure of information to shareholders, in which case the board bears the burden of showing that the shareholder vote was fully informed.

In addition, if a shareholder votes in favour of an M&A transaction, the shareholder may not later invoke its appraisal rights.

Law stated - 6 March 2024

Insurance

What role does directors' and officers' insurance play in shareholder litigation arising from M&A transactions?

Directors' and officers' insurance mitigates the risk that officers or directors will be personally liable as a result of shareholder litigation. For that reason, companies generally purchase directors' and officers' insurance to cover the types of shareholders' claims that may arise out of an M&A transaction. The details of the insurance policy, such as the deductible and the coverage amount, may influence the parties' willingness or ability to settle shareholder litigation. Over the past few years, directors' and officers' insurance has increased in cost, resulting in one or more of higher premiums, higher deductibles and lower coverage limits.

Law stated - 6 March 2024

Burden of proof

Who has the burden of proof in an M&A litigation – the shareholders or the board members and officers? Does the burden ever shift?

Plaintiffs bear the burden of proof under the default standard of review in M&A litigation, which is the business judgment rule. The business judgment rule presumes that the board acted in accordance with its fiduciary duties, and the plaintiff shareholder bears the burden of rebutting that presumption by providing evidence that the board breached one of its fiduciary duties. If the plaintiff successfully rebuts the presumption, then the burden shifts to the board to prove the M&A transaction meets the entire fairness standard.

Similarly, in other situations where the entire fairness standard of review applies, such as a transaction involving a controlling shareholder, the board usually bears the burden of proving the transaction was fair. However, if certain procedural safeguards are present, the burden may shift to the plaintiff to prove the transaction was unfair.

Law stated - 6 March 2024

Pre-litigation tools

Are there pre-litigation tools that enable shareholders to investigate potential claims against board members or executives?

Yes. Many states provide shareholders a qualified right to inspect the company's books and records. To make a book and records demand, the shareholder must generally make the request under oath and in writing, and specify a proper purpose of the inspection. A proper purpose is commonly to investigate suspected wrongdoing, such as potential breaches of fiduciary duties by the board, but the shareholder must have a credible basis for the suspected wrongdoing. If a shareholder makes a proper demand, the shareholder is entitled to the books and records that are necessary and essential to the purpose of the demand. The types of documents available to the shareholder may extend in some circumstances to informal records such as electronic documents and communications. However, the scope of documents available through a books and records demand is narrower than is obtainable through ordinary discovery during litigation.

Companies may resist a books and records demand on the ground that the shareholder failed to state a proper purpose or because the scope of the demand is too broad. Companies may also impose reasonable conditions on the production of books and records to protect their legitimate interests (such as confidentiality restrictions).

Shareholders have increasingly turned to books and records demands to seek documents in connection with M&A transactions as a result of courts' 'encouragement of stockholders, who can show a proper purpose, to use the "tools at hand" to obtain the necessary information before filing a derivative action' (***Seinfeld v Verizon Communications, Inc***, 909 A.2d 117, 120 (Del. 2006)).

In limited circumstances, parties engaged in litigation in foreign jurisdictions may seek discovery in US court from US companies or individuals under the federal statute, 28 U.S.C. §1782. The discovery must be for use in a foreign or international proceeding and the request must be made by an interested party to that proceeding. Courts have discretion to grant or deny the requested discovery and will consider several factors, including whether the discovery request is an attempt to circumvent foreign laws. Courts may also modify or impose conditions on the discovery.

Law stated - 6 March 2024

Forum

Are there jurisdictional or other rules limiting where shareholders can bring M&A litigation?

Yes. A shareholder may only bring litigation in a court that has both jurisdiction over the subject matter and personal jurisdiction over the defendant. Subject matter jurisdiction concerns the court's authority to decide the specific claims. A federal court generally has subject matter jurisdiction to hear claims based on federal law, non-federal claims that arise out of the same facts as a federal claim in the same litigation, and non-federal claims between parties from different states or between a foreign party and a US party. State courts generally have broader and more general subject matter jurisdiction, but typically do not have jurisdiction over M&A litigation arising out of US securities law.

Personal jurisdiction concerns the court's authority over the defendant, and can be general or specific to the claim being litigated. General personal jurisdiction exists in the state where the defendant is domiciled, which for corporations is the state of incorporation and the principal place of business. General personal jurisdiction also exists if the corporation is otherwise 'at home' in the state, although this basis for personal jurisdiction is exceptionally limited. Specific personal jurisdiction depends on whether the defendant has sufficient minimum contacts with the forum state for the exercise of jurisdiction to be fair.

Corporations may adopt forum selection provisions in their charter or bylaws requiring certain shareholder claims to be brought in specific courts, so long as these provisions do not violate state law or public policy. Provisions regulating the forum for 'internal affairs' litigation, such as breach of fiduciary duty claims, are clearly enforceable, and provisions requiring claims under US securities law to be brought in federal court may also be enforceable (*Salzberg v Sciabacucchi*, 227 A.3d 102, 131 (Del. 2020)).

Law stated - 6 March 2024

Expedited proceedings and discovery
Does your jurisdiction permit expedited proceedings and discovery in M&A litigation? What are the most common discovery issues that arise?

Yes. Expedited proceedings are generally available in M&A litigation seeking injunctive relief. The plaintiff must articulate a sufficiently colourable claim and show a sufficient possibility of irreparable harm. The court has discretion to expedite proceedings. If the court allows expedited proceedings, the result is usually an expedited discovery schedule and hearing date.

The most common discovery issues involve the responsiveness of documents and attorney-client privilege. In some jurisdictions, the fiduciary exception to the attorney-client privilege may apply in shareholders derivative suits and related books and records demands in certain situations. The plaintiff must show good cause to overcome the privilege, and the exception is intended to be very difficult to satisfy. In addition, discovery of documents located internationally may be subject to foreign restrictions on disclosure, such as the EU General Data Protection Regulation.

Law stated - 6 March 2024

DAMAGES AND SETTLEMENTS

Damages
How are damages calculated in M&A litigation in your jurisdiction?

Shareholders typically seek either rescissory or compensatory damages. Rescissory damages are the monetary equivalent of rescission, and attempt to restore the shareholders to their position before the alleged wrongdoing. Compensatory damages seek to make shareholders whole by awarding damages that make up the difference between the value they received and the value they would have received absent the alleged wrongdoing. Plaintiffs and defendants usually retain economic experts to contest the amount of damages. Experts should generally use accepted valuation methodologies, and parties may ask the court to exclude the testimony of experts who fail to do so.

Law stated - 6 March 2024

Settlements
What are the special issues in your jurisdiction with respect to settling shareholder M&A litigation?

Settlements of derivative suits and class actions require approval by a court. As part of the approval process, the representative shareholders must generally provide notice of the settlement to other shareholders and allow them an opportunity to object to the settlement. At the settlement hearing, the court decides whether the settlement is adequate by considering factors such as the validity of the claim and the cost of litigation. The court also determines the reasonableness of attorneys' fees negotiated by the representative shareholders.

Most M&A transactions are subject to litigation related to the seller's disclosures, which frequently result in an expedited settlement with a broad release of liability from the plaintiff class and a significant fee for plaintiffs' counsel. Alternatively, parties may reach an agreement that the claim is mooted by a supplemental disclosure, which results in a narrower release of liability without prejudice to other putative class members.

Law stated - 6 March 2024

THIRD PARTIES

Third parties preventing transactions
Can third parties bring litigation to break up or stop agreed M&A transactions prior to closing?

Yes. Financial and strategic bidders interested in making a topping bid may challenge deal protection devices in an M&A transaction, such as a standstill provision, and seek an injunction preventing the transaction from closing. Private parties and government agencies may also seek to enjoin the M&A transaction under state and federal antitrust laws.

Law stated - 6 March 2024

Third parties supporting transactions
Can third parties in your jurisdiction use litigation to force or pressure corporations to enter into M&A transactions?

A bidder may challenge the board's decision to adopt defensive measures in response to a takeover proposal, although the bidder must generally hold some shares. Financial buyers may also initiate a proxy contest for control of the board and make a related books and records demand to pressure the company into a transaction. However, the demand must state a proper purpose and any production may be limited to documents necessary and essential to the proxy fight.

Law stated - 6 March 2024

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

What are the duties and responsibilities of directors in your jurisdiction when the corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction?

The board's fiduciary duties of care, loyalty and good faith apply when it receives an unsolicited or unwanted proposal. The board can satisfy those duties by, for example, evaluating the proposal in an informed and diligent way. The board may also adopt defensive measures, such as shareholder rights plans (sometimes called poison pills). Courts typically uphold these defensive measures if the board had 'reasonable grounds for identifying a threat to the corporate enterprise' and 'the response was reasonable in relation to the threat posed' (*Williams Companies Stockholder Litig*, 2021 WL 754593, at *2 (Del. Ch. 2021)). If a board seeks out alternative transactions or initiates an active bidding process for the sale or breakup of the company for cash, the board's duty is to maximise the value of the transaction for shareholders.

Law stated - 6 March 2024

COUNTERPARTIES' CLAIMS

Common types of claim

Shareholders aside, what are the most common types of claims asserted by and against counterparties to an M&A transaction?

In private transactions, the most common claims are breach of contract claims based on the M&A agreement, such as breaches of the representations and warranties or provisions for purchase price adjustments and earn-outs. Buyers typically shift the risk of a breach of the representations and warranties onto the seller through an indemnification provision backed by an escrow account or purchase representation and warranties insurance. Buyers may also assert fraud claims, such as fraudulent inducement.

Law stated - 6 March 2024

Differences from litigation brought by shareholders

How does litigation between the parties to an M&A transaction differ from litigation brought by shareholders?

Shareholder litigation is usually brought in a representative capacity on behalf of other shareholders or on behalf of the company and is generally premised on the board's fiduciary duties and disclosure obligations. Litigation between the parties in a transaction is typically brought as a direct claim based on a contract negotiated at arm's length, so neither party owes the other any fiduciary duties and the claims depend on the terms of the contract.

Law stated - 6 March 2024

UPDATES AND TRENDS

Recent developments

What are the most current trends and developments in M&A litigation in your jurisdiction?

In recent years, government agencies have become more active in applying federal and state antitrust laws in the M&A context and have intervened in a number of transactions. In 2023, the federal government reinforced that approach and issued new merger guidelines reflecting its aggressive enforcement policies. Among other things, the new guidelines lowered the threshold metrics used by agencies to evaluate whether a merger is presumptively anticompetitive and cover novel or less established legal theories of anticompetitive conduct (for example, an 'anticompetitive pattern or strategy' of multiple small acquisitions). These guidelines serve as a framework for government agencies to assess a proposed M&A transaction, but neither the guidelines nor the agency's assessment has the force of law. Government agencies must still litigate in court to enjoin a transaction, and courts have largely declined to endorse the new theories proposed by the guidelines. Nonetheless, the possibility of antitrust litigation creates additional risk and the increased regulatory scrutiny may delay a proposed transaction or cause the parties to walk away from a transaction, which may trigger certain protections in a merger agreement.

Law stated - 6 March 2024