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Civil War on the Plaintiffs Side as Robbins Geller Attacks Firms Seeking Dubious Fees

By Jenna Greene
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Lawyers from plaintiffs powerhouse Robbins Geller Rudman & Dowd in court papers on Friday called out "a cadre of firms responsible for a dramatic explosion of federal deal litigation," and urged a federal judge in San Francisco to reject a fee request by fellow plaintiffs' counsel.

It's a remarkable motion, laying bare tension on the plaintiffs' side as merger objection filings—many of dubious merit—have skyrocketed in the past two years in federal courts after Delaware Chancery Court judges quit rubber-stamping the settlements.

Robbins Geller "has no dog in this fight," wrote partner David Wissbroecker. Nonetheless, he sided with defense counsel from Latham & Watkins and Wilson Sonsini Goodrich & Rosati, urging U.S. District Judge Edward Chen of the Northern District of California to reject a $350,000 fee request by Weisslaw LLP; Levi & Korsinsky; and Monteverde & Associates.

Wissbroecker derided their fee request as a "bold attempt to be paid a mootness fee for essentially filing an initial complaint in a case that no longer exists, and for which they were not appointed to lead."

He then spent nearly five pages listing examples of merger cases in 2017 alone where the firms stipulated to dismissal or voluntarily dismissed, "often asking federal courts to retain jurisdiction to award mootness fees as part of the very same pattern of conduct condemned in *Trulia* and *Walgreen*."

Whoa. That's harsh. And kind of awesome.

A little context:

In recent years, virtually every merger involving a publicly traded company has been hit with suits by

shareholders claiming that company directors breached their fiduciary duty by agreeing to sell the business at an unfair price.

There would often be a hastily written complaint, a few case management conferences and a quickie settlement where stockholders got some supplemental proxy materials. The only money to change hands went to the plaintiffs lawyers, who'd get a nice, six-figure fee awarded by the court.

But the companies didn't necessarily mind. The settlements amounted to deal insurance, providing a broad release from future merger-related claims, plus a green light to close without worrying about getting hit with an injunction.

Indeed, in the motion on Friday, Wissbroecker noted that "certain defense counsel" (though not in this case) "have been complicit in encouraging (or at least not deterring) the tidal wave of federal M&A litigation that harkens back" to before the passage of the Private Securities Litigation Reform Act of 1995.

The thing is, the cases are sometimes garbage—one study showed that additional proxy materials have no impact at all on voting behavior.

Delaware used to be the forum of choice until judges there put the kibosh on the suits. "Such litigation serves no useful purpose for stockholders. Instead, it serves only to generate fees for certain lawyers," wrote Chancellor Andre Bouchard in early 2016, rejecting a disclosure-only settlement stemming from real estate website Zillow Inc.'s acquisition of Trulia Inc.

Which brings us to the current suit in San Francisco.

It stems from Broadcom's $5.5 billion purchase of network gear maker Brocade Communications Systems, Inc.

Six putative class actions were filed by Brocade shareholders, who said the proxy statements about the deal were incomplete and misleading, and that the acquisition undervalued Brocade.

In April 2017, Chen granted Robbins Geller's (unopposed) motion to be appointed lead counsel. And why not? The firm pioneered such M&A suits, recovering more than $1 billion over the years for shareholders.

But not all cases are created equal.

On December 29, 2017, Robbins Geller moved to voluntarily dismiss the Brocade complaint—a decision that Wissbroecker in court papers said came after "lead plaintiff and lead counsel thoroughly investigated the claims and facts and determined it was prudent, for several reasons" to do so.

(Er, possibly because the deal included hundreds of pages of proxy statements, provided a nearly 50 percent premium to Brocade stockholders, and was approved by 99.24 percent of the votes cast at the Brocade stockholder meeting.)

Robbins Geller made no request for fees. "Lead counsel stated during the January 18, 2018 case management conference that he 'would never even dream of trying to seek attorneys' fees,'" wrote Latham's Matthew Rawlinson and Wilson Sonsini's Boris Feldman in court papers.

Hallelujah. You win some, you lose some, right?

But lo and behold, the trio of non-lead firms (referred to as the GCK group, after the plaintiffs they represent) filed a motion on Feb. 16 arguing they should get paid $350,000 because they "conferred a substantial benefit upon all Brocade stockholders."

As a result of their efforts, they said, the defendants "disseminated certain material information regarding the proposed merger … The Supplemental Disclosures enabled Brocade stockholders to properly assess the financial fairness of the merger and the valuation analyses performed by Brocade's financial advisor, Evercore Group."

Their fee request has some major procedural problems, since they weren't lead counsel. But defense counsel from Latham and Wilson Sonsini also argued the GSK group "has not conferred any benefit on Brocade's stockholders."

True, the merging companies filed additional disclosures, but defense lawyers said the new information was immaterial and that they only released it "because plaintiffs waited for three weeks after the Definitive Proxy was filed and a mere 11 business days before the stockholder vote to file their motion for preliminary injunction—forcing defendants' hands so as not to jeopardize the transaction."

Robbins Geller said it "does not concur with defendants that certain additional disclosures were immaterial." But Wissbroecker wrote that "the link to these disclosures and the GCK Group's pleadings are vague and tangential at best."

He added, "Lead plaintiff wholeheartedly agrees with defendants' conclusion that the GCK Group is not entitled to attorneys' fees."

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