MERGERS & ACQUISITIONS

Post-Closing Litigation Risk in Stockholder M&A Actions

Recent Delaware Chancery Court decisions denying preliminary injunctions suggest that post-closing litigation in merger and acquisition transactions is on the rise and likely to continue. Further, the damages exposure in such litigation can be staggering.

By Bradley R. Aronstam and S. Michael Sirkin

Stockholder lawsuits challenging mergers and acquisitions[1] are an unavoidable market reality for corporate practitioners and their clients.[2] Suits of this type typically seek injunctive relief and damages on behalf of a putative class of stockholders of the target company. The relative merits of these actions vary significantly; many are filed within hours of an announced transaction and advance shopworn allegations that the target's directors breached their fiduciary duties by agreeing to an "unfair" price following a "defective" sales process. As with civil litigation generally,[3] most stockholder lawsuits settle—and most that do settle quickly.[4] Often, defendants remove impediments to closing by agreeing to minimal changes to the governing merger agreement and/or disclosure document that do not affect the economics of the transaction.[5] Others settle pre-closing for consideration that includes monetary payments.[6] In contrast, cases that survive closing are far less common.

Yet, despite its rarity, post-closing deal litigation warrants attention for at least two reasons. *First*, post-closing deal litigation appears to be on the rise and the trend is likely to continue. As highlighted by three recent cases, the Delaware Court of Chancery has effectively encouraged post-closing deal litigation by denying preliminary injunction motions while simultaneously finding that plaintiffs demonstrated a probability of succeeding on the merits of their claims. *Second*, the damages exposure resulting from post-closing deal litigation can be staggering depending on the transaction at issue. And the cost of settlement can increase significantly when the Court endorses plaintiffs' claims, even on a preliminary basis and an incomplete record, when ruling on a preliminary injunction motion.

Del Monte, *El Paso*, and *Delphi*: Unique Facts, or a Paradigm Shift?

Preliminary injunction practice has long been a hallmark of Delaware corporate litigation. To obtain a preliminary injunction, stockholder plaintiffs bear the heavy burden of "demonstrat[ing] (i) a reasonable probability of success on the merits; (ii) that they will suffer irreparable injury if an injunction is not granted; and (iii) that the balance of the equities favors the issuance of an injunction."[7] The Court of Chancery has long been reluctant to issue an injunction that would jeopardize the opportunity for stockholders to decide for themselves whether to accept a premium deal: "when [the Court] is asked to enjoin a transaction and another higher-priced alternative is not immediately available, it has been appropriately modest about playing games with other people's money."[8]

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This sensitivity was evident in the Court of Chancery's widely discussed application of the "Unified Standard" to a two-step "*Siliconix*" squeeze-out transaction[9] in *In re CNX Gas Corporation Shareholders Litigation*.[10] In *CNX*, Vice Chancellor Laster held that the Unified Standard "simplifie[d] matters" at the preliminary injunction stage because money damages could be awarded if the defendants "fail to establish that the tender price [wa]s fair."[11] The Court thereafter conducted the well-established preliminary injunction analysis and concluded that the availability of post-trial monetary relief counseled against enjoining the all-cash premium transaction.[12]

CNX therefore marked a temporal shift, in the *Siliconix* controlling stockholder squeeze-out context, from a pre-closing litigation regime to one involving post-closing litigation.[13] As discussed below, the Court of Chancery's recent *Del Monte*, *El Paso*, and *Delphi* opinions underscore this construct in more conventional transactional contexts.

In re Del Monte Foods Company, Inc. Shareholder Litigation

Del Monte Foods Company agreed to be taken private by a consortium of private equity firms for $5.3 billion in November 2010.[14] This was a third-party deal in which the company shopped itself, and the merger agreement contained market deal-protection terms.[15] Nevertheless, stockholders filed seven competing class actions that the Court eventually consolidated.[16]

"[D]iscovery disturbed the patina of normalcy surrounding the transaction."[17] Late in the sale process, the Del Monte board allowed its financial advisor, Barclays Capital, to participate in the buy-side financing syndicate.[18] Unbeknownst to the board, however, Barclays apparently had been exploring this option from the start of the process, and had been working with both sides to close a deal.[19] Likewise, when two competing bidders surfaced a belated request to submit a joint bid, the board permitted the teaming of competing bidders without bargaining for anything in return.[20] Again unbeknownst to the board, the "competing" bidders already had been discussing teaming up, and Barclays had evidently been aware of this all along.[21]

From the Court's perspective, these undisclosed conflicts infected all of the advice and information channeled to Del Monte through Barclays and, consequently, tainted the pre-signing sale process and negotiations.[22] The Court issued a preliminary injunction,[23] effective for 20 days, against the closing of the transaction and enforcement of deal protections, thereby empowering the board to engage an unconflicted advisor to re-shop the company. While this post-injunction shopping period came and went and the deal closed without any topping bid,[24] the Court's injunction opinion explicitly left the door open for a post-closing damages action against the buying consortium and Barclays.[25] Specifically, the Court warned that although "the plaintiffs face[d] a long and steep uphill climb before they could recover money damages from the independent, outside directors on the board," "other prospects for recovery [*i.e.*, Barclays and the acquiring group] [we]re not so remote" and "disgorgement of transaction related profits may be available as an alternative remedy."[26] The plaintiffs pressed on, and post-closing litigation continued until early October 2011, when the parties agreed to settle the case for $89.4 million.[27]

In re El Paso Corporation Shareholder Litigation

On October 16, 2011, Kinder Morgan, Inc. announced that it had agreed to acquire the El Paso Corporation in a transaction valued at more than $35 billion. Within days over a dozen stockholder plaintiffs filed suit challenging the deal.[28] El Paso's long-time financial advisor, Goldman Sachs, owned an approximately 20 percent equity interest in Kinder Morgan.[29] During the negotiations, the two Goldman Sachs directors on Kinder Morgan's board were screened from all discussions concerning the proposed transaction, and the El Paso board took several steps to protect the integrity of the developing sale process, including retaining a second financial advisor, Morgan Stanley.[30]

The Chancellor, however, expressed dissatisfaction with Goldman Sachs's involvement in the sale process, including its claim for a transaction fee, as well as a fee structure for Morgan Stanley that might have disincentivized it from exploring alternatives.[31] The Court also expressed concern that El Paso's CEO might have been conflicted by an alleged interest in a future management buyout of a portion of El Paso's business.[32] Although the Court found a likelihood of success on the merits of the plaintiffs' claims, it nonetheless ruled that the "balance of harms counsel[ed] against a preliminary injunction" because there was "no other bid on the table and the stockholders of El Paso, as the seller, ha[d] a choice whether to turn down the Merger themselves."[33] The Court expressly contemplated "an after-the-fact monetary damages claim against the defendants," including Goldman, but also recognized some of the challenges to pursuing damages claims.[34]

In re Delphi Financial Group Shareholder Litigation

In *In re Delphi Financial Group, Inc. Shareholder Litigation*,[35] Delphi Financial Group agreed to sell itself to a third party, a subsidiary of Tokio Marine Holdings, for $2.7 billion in a deal announced in December 2011.[36] While aggregate deal consideration was negotiated with Tokio Marine, Delphi's founder and controlling stockholder sought to receive a per-share premium for his super-voting stock despite a provision in Delphi's certificate of incorporation that prohibited the payment of differential consideration in a merger.[37] Negotiations between the controlling stockholder and an independent committee of the Delphi board eventually led to an allocation agreement, together with a proposed charter amendment that would permit the agreed-upon transaction structure.[38]

Several stockholder plaintiffs filed suit and moved to preliminarily enjoin the stockholder votes on the merger and proposed charter amendment.[39] In a decision issued only a week after the *El Paso* ruling, Vice Chancellor Glasscock denied the *Delphi* plaintiffs' preliminary injunction motion, citing the absence of a competing bid.[40] The Court in *Delphi* also expressed in its preliminary injunction decision that the plaintiffs "demonstrated a likelihood of success on the merits," at least as to the claims against the controlling stockholder, and discussed the availability of "readily ascertainable damages" post-closing.[41] After the stockholders voted to approve the transaction, the plaintiffs and defendants agreed in principle to a $49 million settlement.[42]

Together, *Del Monte*, *El Paso*, and *Delphi* highlight that—in certain cases—the Court of Chancery will not only permit, but will encourage, post-closing deal litigation. Although each of these cases contained unusual case-specific allegations, the trend is likely to continue. From the Court's perspective, shifting deal litigation from pre-closing to post-closing helps address the agency costs attributable to pre-closing disclosure or deal protection-based settlements.[43] Post-closing, there are no merger agreements or disclosure documents to tweak that will justify a fee award to class counsel and a transactional release for defendants. Post-closing, plaintiffs' lawyers either get additional consideration on behalf of the class and get paid a portion of the recovery, or they get nothing at all—*i.e.*, they are forced to bear meaningful contingency risk. Moreover, post-closing litigation permits more fulsome discovery and briefing, more opportunity for motion practice, and ultimately allows the Court to evaluate live witness testimony instead of a paper record. Thus, the apparent trend towards post-closing deal litigation seems unlikely to wane, making early consideration and evaluation of post-closing deal litigation risk increasingly important.

The *Southern Peru* Cautionary Tale

Incredibly, the *Del Monte* and *Delphi* settlements combined would only comprise slightly more than 10 percent of the post-trial judgment entered by Chancellor Strine in *In re Southern Peru Copper Corp. Shareholder Derivative Litigation*.[44] The Court in *Southern Peru* held that Southern Peru Copper overpaid its controlling stockholder, Grupo Mexico, by $1.347 billion in the purchase of another Grupo Mexico subsidiary, and entered judgment for that amount.[45] From the defense perspective, this reflects a worst-case-scenario underscoring the magnitude of risk and inherent uncertainty when post-closing deal litigation lingers. Unlike the cases discussed above, *Southern Peru* did not involve pre-closing litigation, presumably because the claims were derivative and pursued on behalf of Southern Peru, who was the buyer in the challenged transaction, as opposed to being direct claims brought on behalf of a putative class of target stockholders.

Grupo Mexico owned approximately 99 percent of Minera and approximately 54 percent of Southern Peru. Grupo Mexico proposed selling Minera to Southern Peru for approximately $3.1 billion. Because Grupo Mexico was Southern Peru's controlling stockholder, Southern Peru formed a special committee to consider and negotiate the proposed transaction.[46]

The consolidated derivative suit challenging the merger was first filed in late 2004 and "moved too slowly."[47] After trial, the Court found fault with the committee process, holding that the special committee was "trapped in the controlled mind-set," and that its "focus was on finding a way to get the terms . . . proposed by Grupo Mexico to make sense, rather than aggressively testing the assumption that the merger was a good idea in the first place."[48] The Court rejected the financial analysis done by Goldman Sachs, upon which the special committee relied, and criticized the absence of an updated fairness opinion after relative movements in the stock prices made the deal materially more expensive than originally proposed by the controlling stockholder.[49] Grupo Mexico was required to pay damages, but permitted to satisfy the judgment by returning a portion of its shares rather than paying out cash.[50] And, because this was a derivative recovery on behalf of a company controlled by Grupo Mexico, the majority of the judgment will be a bookkeeping exercise within the Grupo Mexico corporate family. This case nevertheless epitomizes the substantial risk and uncertainty inherent in allowing deal cases to proceed towards trial.

The Early Post-Closing Settlement Strategy

Unlike *Southern Peru*, the lion's share of post-closing deal cases, including the *Delphi* and *Del Monte* actions discussed above, result in settlements that involve cash payments to a class. The *J. Crew* and *Student Loan* litigations addressed below provide two more examples of noteworthy cases that survived the preliminary injunction phase but were quickly settled by the parties soon after closing.

In re J. Crew Group Shareholder Litigation

In re J. Crew Group Shareholder Litigation[51] involved a transaction in which J. Crew's Chief Executive Officer, Millard Drexler, together with private equity sponsors TPG Capital and Leonard Green & Partners, negotiated a $3 billion management buy-out in late-2010.[52] The buyout group coalesced and began discussions of a potential take-private transaction in August 2010.[53] The company brought in Goldman Sachs to advise and inform management in its review of strategic alternatives on September 13, and Goldman prepared an analysis 10 days later.[54] But, by October 15, Goldman was advising the buyout group.[55] Importantly, the J. Crew board was not involved in or informed of discussions about the potential buyout until between October 7 and 11,[56] giving the buyout group and management a seven-week head start out in front of the board. The board immediately recognized Drexler's conflict of interest and formed a special committee.[57] The special committee negotiated the buyout group up from an initial $41 proposal to $43.50 per share, and secured a lengthy go-shop period.[58]

Stockholder plaintiffs filed suit and moved to enjoin the merger. The case settled shortly before the scheduled preliminary injunction hearing in exchange for a 31-day extension of the go-shop period, a reduction in the termination fee, the removal of certain information rights, and $10 million in additional consideration.[59] But the settlement eventually broke down, the deal closed, and litigation resumed. In September 2011, the parties agreed once again to settle the remaining claims, this time for $16 million.[60]

In re The Student Loan Corporation Litigation

Student Loan took a more conventional litigation path, settling shortly after the preliminary injunction hearing.[61] On September 17, 2010, Citigroup announced its plans to sell its 80 percent-owned Student Loan Corporation in two parts to Discover Financial Services and Sallie Mae.[62] In the multi-faceted transaction,[63] Student Loan employed a special committee to negotiate on its behalf, and the agreed-upon $30 per share price represented an approximately 42 percent premium.[64]

Stockholders sued, alleging that the deal was the product of a controlling stockholder's inequitable efforts to sell the company on terms that benefitted the controller to the detriment of the minority.[65] The Court of Chancery denied the plaintiffs' motion for preliminary injunction, and the case was set to proceed towards a post-closing damages trial.[66] But the parties agreed to settle the remaining claims for $2.50 per share, or approximately $10 million for the class, less than four weeks after the preliminary injunction hearing.[67]

Conclusion

The extent to which *Del Monte*, *El Paso*, and *Delphi* portend an increasingly prominent role for post-closing deal litigation generally remains to be seen. But it is clear, however, that focusing on the possibility of post-closing litigation is essential to accurately assessing litigation risk, preparing a comprehensive litigation strategy, and evaluating settlement opportunities. This is not to say, of course, that stockholder plaintiffs are guaranteed a damages award following trial as the litigation risk exists for all parties involved.[68] But the possibility of post-closing deal litigation cannot safely be ignored, and transacting parties should be so advised from the outset.

Notes

1. This article focuses exclusively on Delaware corporate law and practice in the Delaware Court of Chancery.
2. Indeed, a staggering 96 percent of publically announced business combination transactions valued at or over $500 million resulted in stockholder challenge. *See* Cornerstone Research*, Recent Developments In Shareholder Litigation Involving Mergers and Acquisitions—March 2012 Update*, at 2, available at *http://www.cornerstone.com/corporate_transactions/* (hereinafter, "Cornerstone Report"). On average, five separate complaints are filed for each announced transaction. The first two plaintiffs file on average within a week of the deal's announcement. Two more file in the next two weeks, and one files three or four weeks after the deal is announced. *See id*. at 5.
3. For a thorough empirical analysis of the timing and mechanics of settlement in civil litigation, *see* Christina L. Boyd & David A. Hoffman, *Litigating Toward Settlement* (October 11, 2010), available at *http://ssrn.com/abstract=1649643.*
4. *See* Cornerstone Report, at 9-10 (two-thirds of stockholder cases end in settlement, and the majority of settled cases are resolved within 60 days of filing).
5. A cottage industry of stockholder strike suits aimed at quick "disclosure only" therapeutic settlements has become the unfortunate norm. *See* Cornerstone Report, at 11 (more than 80 percent of settlements are for disclosures only). *In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210 (Del. Ch. May 3, 2011), provides an illustrative guide as to the range of attorneys' fees awarded for these settlements.
6. *See, e.g.*, *In re Talecris Biotherapeutics Holdings S'holder Litig.*, C.A. No. 5614-VCL (Del. Ch. Oct. 17, 2011) (TRANSCRIPT) (settlement

consideration included more than $7 million and appraisal rights, plus disclosures); *In re RehabCare Group, Inc. S'holders Litig.*, C.A. No. 6197-VCL (Del. Ch. Sept. 28, 2011) (TRANSCRIPT) (settlement consideration included $2.5 million plus disclosures); *In re Atlas Energy, Inc. S'holders Litig.*, C.A. No. 5990-VCL (Del. Ch. Sept. 19, 2011) (TRANSCRIPT) (settlement consideration included $7.45 million plus disclosures); *In re Mosaic Co. S'holder Litig.*, C.A. No. 6228-VCL (Del. Ch. Sept. 15, 2011) (TRANSCRIPT) (settlement consideration included $3.5 million and significant limitations on high-vote stock, plus disclosures); *In re Allion Healthcare, Inc. S'holder Litig.*, C.A. No. 5022-CC (Del. Ch. Mar. 29, 2011) (TRANSCRIPT) (settlement consideration included $4 million plus disclosures).

7. *In re Del Monte Foods Co. S'holders Litig.,* 25 A.3d 813, 829-30 (Del. Ch. 2011) (citing *Revlon, Inc. v. MacAndrews & Forbes Hldgs.,* Inc., 506 A.2d 173, 179 (Del. 1986)).

8. *In re Netsmart Techs. S'holders Litig.*, 924 A.2d 171, 208 (Del. Ch. 2007); *see also, e.g.*, *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 618 (Del. Ch. 2010) (balance of harms tilted against injunction because stockholders could decide for themselves to vote deal down and take the chance of receiving an actionable higher bid); *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 516 (Del. Ch. 2010) ("At the other end of the spectrum, where a selling Board's alleged *Revlon* violations occur in the absence of another viable bid, this Court often finds injunctive relief to be inappropriate because it would be imprudent to terminate the only deal available, when the stockholders can make that decision for themselves."); *Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS, at 24-25 (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) ("[T]he number of times that this Court has ever enjoined stockholders from considering a premium-generating transaction in the absence of fear of a disclosure violation or coercion and the absence of a higher competing offer that it's impeding, it's just—it's basically a null set."); *In re Pennaco Energy, Inc. S'holders Litig*., 787 A.2d 691, 715 (Del. Ch. 2001) ("After all, even when a sufficient merits showing is made by a plaintiff, this court is justifiably reluctant to enjoin a premium-generating transaction when no other option is available, except insofar as is necessary for the disclosure of additional information to permit stockholders to make an informed decision whether to tender.").

9. A "*Siliconix*" transaction is a type of going-private transaction in which a controlling stockholder seeks to acquire the outstanding shares of its subsidiary via a first-step tender offer to be followed by a short-form merger of the balance of the non-tendered shares. *See In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787 (Del. Ch. June 19, 2001); *see also Glassman v. Unocal Exploration Corp.*, 777 A.2d 242 (Del. 2001).

10. 4 A.3d 397 (Del. Ch. 2010). In denying plaintiffs' preliminarily injunction motion in *CNX*, the Court applied the "Unified Standard" advocated in *In re Cox Communications, Inc. Shareholders Litigation*, 879 A.2d 604 (Del. Ch. 2005), in holding that business judgment review should only apply to *Siliconix* transactions if the first-step tender offer was "both (i) negotiated and recommended by a special committee of independent directors and (ii) conditioned on the affirmative tender of a majority of the minority shares." *CNX Gas*, 4 A.3d at 412.

11. *Id.* at 420.

12. *See id.*

13. *In re CNX Gas Corp. S'holders Litig.*, C.A. No. 5377-VCL, at 17-18 (Del. Ch. May 26, 2010) (TRANSCRIPT).

14. *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 817 (Del. Ch. Feb. 14, 2011).

15. *Id.* at 840.

16. *See generally In re Del Monte Foods Co. S'holders Litig.,* 2010 WL 5550677 (Del. Ch. Dec. 31, 2010).

17. *Del Monte*, 25 A.3d at 817.

18. *Id.* at 818.

19. *Id.* at 817-18.

20. *Id.* at 823.

21. *Id.*

22. *Del Monte*, 25 A.3d at 836 ("Here, the taint of self-interest came from a conflicted financial advisor. . . . [T]he Del Monte Board was deceived. At a minimum, Barclays withheld information about its buy-side intentions, its involvement with KKR, and its pairing of [competing bidders].").

23. *Del Monte* marked a departure from the Court's traditional reluctance to enjoin a stockholder vote on a premium transaction in the absence of a competing bid. *See supra* note 9. In this respect, the case can largely be limited to its extraordinary facts. First, the board structured and defended the transaction on the assumption that the deal had been fully shopped, but the Court's stated concerns about Barclays infecting the shopping process undermined this assumption. Moreover, the Court found that the evidence supported a reasonable likelihood of success on the merits of an aiding and abetting claim against the buying group, thereby undermining the legitimacy of its bargained-for contract rights. The Court mitigated the risk of the stockholders losing the deal by analyzing the merger agreement and concluding, on a preliminary basis, that the buyers would remain bound through the 20-day injunction period. *Del Monte*, 25 A.3d at 840-43. In contrast, the Court of Chancery in the later *El Paso* case discussed below found no evidence of aiding and abetting against the buyer. *See In re El Paso Corp. S'holder Litig.*, 2012 WL 1232608, at *11 (Del. Ch. Feb. 29, 2012) ("Nor do I find any basis to conclude that Kinder Morgan is likely to be found culpable as an aider and abettor. It bargained hard, as it was entitled to do.").

24. *See* Jason Kelly, *Del Monte Shareholders Approve Takeover by KKR-Led Buyout Group*, BUSINESSWEEK, March 7, 2011, available at *http://www.businessweek.com/news/2011-03-07/del-monte-shareholders-approve-takeover-by-kkr-led-buyout-group.html.*

25. *Del Monte*, 25 A.3d at 818 ("Unless further discovery reveals different facts, the one-two punch of exculpation under Section 102(b)(7) and full protection under Section 141(e) makes the chances of a judgment for money damages vanishingly small. The same cannot be said for the self-interested aiders and abettors.").

26. *Id.* at 838.

27. Steven M. Davidoff, *Del Monte Settlement Highlights Risk in M.&A. Advice*, The New York Times DealBook, October 7, 2011, available at *http://dealbook.nytimes.com/2011/10/07/del-monte-settlement-highlights-risk-in-m-a-advice.*The majority of the settlement reportedly will be funded by Barclays. *See id.* (noting that Del Monte is withholding unpaid fees owed to the conflicted advisor and that in total, Barclays will likely forfeit its $45 million fees for the deal entirely).

28. *See, e.g.*, *Kahn v. Foshee*, C.A. 6949-CS (Del. Ch. Oct. 31, 2011) (TRANSCRIPT).

29. *In re El Paso Corp. S'holder Litig.*, 2012 WL 1232608, at *5 (Del. Ch. Feb. 29, 2012).

30. *Id.*

31. *Id.* at *6-7.

32. *Id.*

33. *Id.* at *2.

34. Id. at *13.

35. 2012 WL 729232 (Del. Ch. Mar. 6, 2012).

36. *See* Mark Scott, *Tokio Marine to Buy Delphi Financial For $2.7 Billion*, The New York Times Dealbook (Dec. 21, 2011), available at *http://dealbook.nytimes.com/2011/12/21/tokio-marine-to-buy-delphi-financial-for-2-7-billion/.*

37. *In re Delphi Financial Group, Inc.,* 2012 WL 729232, at *1.

38. *Id.*

39. *Id.* at *2.

40. *Id.*

41. *Id.* at *19.

42. *See* News Release, Delphi Financial Announces Settlement With Class Action Plaintiffs Regarding Acquisition By Tokio Marine (Apr. 9, 2012), available at *http://www.delphifin.com/news/DFG_Announces_Settlement_with_Class_Action_Plaintiffs.pdf.* Although the merger awaits final regulatory approvals and thus has not yet closed, *id.*, the parties agreed to settle after the preliminary injunction opinion, and *Delphi* thus fits into the "post-closing" rubric described in this article.

43. *See generally* Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role In Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991).

44. 2011 WL 6440761 (Del. Ch. Dec. 20, 2011).

45 *Id.* at *43. As discussed below, Grupo Mexico may satisfy the judgment by returning the corresponding number of Southern Peru shares, and as the controlling stockholder, Grupo Mexico effectively pays itself the bulk of the judgment. This case is currently on appeal, with argument scheduled for June 7, 2012.

46. *Id.* at *1.

47. Id. at *19.

48. *Id.* at *29.

49. *Id.* at *17-18.

50. *Id*. at *43.

51. C.A. No. 6043-CS (Del. Ch. Dec. 14, 2011) (TRANSCRIPT).

52. *See* Miles Weiss, *J. Crew Board Ties To TPG, Drexler May Pose Buyout Conflicts*, Bloomberg, Jan. 13, 2011, available at *http://www.bloomberg.com/news/2011-01-13/j-crew-board-ties-to-tpg-ceo-drexler-may-pose-conflicts-in-second-buyout.html.*

53. *See* Anupreeta Das and Gina Chon, *J. Crew Board Didn't Have Many Details Ahead Of Bid*, The Wall Street Journal, December 7, 2010, available at *http://online.wsj.com/article/SB10001424052748703471904576003911260873464.html?mod=ITP_moneyandinvesting_0.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See* Steven M. Davidoff, *Behind the Collapse of the J. Crew Settlement*, The New York Times Dealbook (Feb. 2, 2011), available at *http://dealbook.nytimes.com/2011/12/21/tokio-marine-to-buy-delphi-financial-for-2-7-billion/.*

60. *In re J. Crew Group, Inc. S'holders Litig.*, C.A. No. 6043-CS (Del. Ch. Dec. 14, 2011) (TRANSCRIPT).

61. *In re The Student Loan Corp. Litig.*, C.A. No. 5832-VCL (Del. Ch. Oct. 27, 2011) (TRANSCRIPT).

62. *Id.* at 4-5.

63. Sallie Mae agreed to purchase $28 billion of federal student loan assets from Student Loan, with Discover taking the remaining $4 billion private student loan business from Student Loan via a merger. Citi agreed to buy back approximately $8.7 billion in federal and private student loan assets from Student Loan, while the U.S. Department of Education agreed to purchase $4.7 billion in federal student loan assets.

64. *Id.* at 14.

65. *Id.* at 4.

66. *Id.* at 6.

67. *Id.* at 17.

68. Indeed, plaintiffs recently have pursued cases all the way through trial and come up empty. *See, e.g.*, *S. Muoio & Co. LLC v. Hallmark, Entertainment Investments Co.*, 2011 WL 863007 (Del. Ch. Mar. 9, 2011), *aff'd*, 35 A.3d 419 (Del. 2011) (TABLE); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634 (Del. Ch. Jan. 14, 2011).