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DAILY REPORT

PRESENTS

Litigation Department OF THE Year 2014

AN ALM SIGNATURE AWARD SERIES



JOHN DISNEY/DAILY REPORT

From left, back row: Brandon Williams, John Latham, Todd David and Robert Long, and seated, John Jordak, Jessica Corley, Mary Gill and Tod Sawicki.

SECURITIES LITIGATION: ALSTON & BIRD

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SECURITIES LITIGATION: **ALSTON & BIRD****MARY WELCH** | Special to the Daily Report

FOR THE FOURTH consecutive year, shareholders in American companies filed suits in more than 90 percent of merger and acquisition deals valued at more than \$100 million, and 94 percent of all M&A deals were challenged by shareholders, according to the most recent annual study by Cornerstone Research.

In about 75 percent of those cases, the litigation was resolved before the deals closed. Of those lawsuits, roughly 88 percent were settled; 9 percent were withdrawn by plaintiffs, and 3 percent were dismissed by the courts.

"You can hardly do a public transaction today without being sued," says Todd R. David, co-chairman of Alston & Bird's litigation practice. He is based in Atlanta and New York.

A large percentage of the class action shareholders suits "may not have legs," says partner John Latham. "We have had a lot of success in getting them knocked down, knowing the difference and getting them dismissed and paring back the others."

The Atlanta office of Alston & Bird has 167 attorneys in its litigation practice, more than half of the firm's 298 overall litigators. The securities litigation group has 19 lawyers based in Atlanta (of 24 firmwide), all expert at securities litigation, whether it is M&A, class action suits, derivative actions, SEC investigations or banking litigation. The team was responsible for the biggest leveraged buyout since 2007.

The key to being a successful securities attorney is to "get in the weeds of your client's business," says Jessica P. Corley, chairwoman of the securities litigation group, who grew up watching trials in a Louisville courtroom where her mother was a judge's secretary. "You have to learn the business as well as the client does and that is how you can properly defend the claim. From day one, we prepare the case as if it's going to end up going to trial."

"In a merger case context, we have gone all the way through to hearings where the plaintiffs were trying to get an injunction to keep the deal from closing. That distinguishes us from others. We have never had a deal stopped, and that's the whole enchilada," says David. "We statistically have a higher than average dismissal rate."

"We're ready, willing and able to take those merger cases to court. And in those securities class actions, everyone is reluctant to try them because the dollars are so big. We've gotten a very high percentage compared to other firms of getting them knocked out at motions practice."

Securities litigation partner Lisa Bugni says the team litigates "with a key sense of each client's objective. It's a discussion you have to have with your client if you ultimately want to win. The first thing we do, as a strategy in a security case, is to file a very strong motion to dismiss and hope that the case gets dismissed."

Adds David, "The key to our success is that we have a philosophy of telling the whole story for the client when we go to court. We just don't say the client is not guilty, we explain why the client is actually innocent. We say what the business objectives are and how they are trying to achieve them; we don't limit ourselves to mere technical arguments."

Another trend in securities litigation is to file multiple lawsuits, with an average of five lawsuits for deals valued at more than \$100 million and 6.2 lawsuits for those valued at more than \$1 billion, according to Cornerstone. The deal that ignited the greatest number in 2013 was Alston & Bird client Dell Inc. Its buyout spanned 26 lawsuits, including one by billionaire investor Carl Icahn.

CEO Michael Dell, with partner Silver Lake Management, fought a seven-month battle to take the company private in a \$24.9 billion deal. The negotiations resulted in two increases in the takeover price. The deal was the biggest since 2007, when Blackstone Group took Hilton Worldwide private.

Alston & Bird was responsible for coordinating all litigation strategy for Dell and served as the litigation counsel in the actions.

"We had a plaintiff's lawsuit filed two weeks before Michael Dell announced his proposal to take the company private, based on rumors," says Latham. "If 94 or so percent of M&A cases face litigation, then it's only higher for going-private transactions, virtually 100 percent."

Part of the challenge in these cases is that, while progressing through the process of going private, another entity could offer a higher price.

The firm's strategy was to deal with the litigation in the multiple forums and take on the early suits filed in Travis County, Texas, where Dell is based. "We got those shut down," Latham says.

A fiduciary suit, filed in Delaware, was dismissed last month. Still in Delaware are suits by shareholders seeking a fair value appraisal of their shares, which is the largest known appraisal action brought in Delaware. Also, in the U.S. Southern District Court of Texas in Houston, a shareholder suit for alleged proxy violations and breach of fiduciary duty was tossed out after investors withdrew their complaint. Dell had filed a motion to dismiss and early this month the plaintiffs—a shareholder and a pension fund—filed a voluntary motion for dismissal. The judge dismissed the case without prejudice.

"Dell was really one of the handful of biggest profile merger cases in the past 10 years and John and our team were leading the charge for Dell," says David. "It was a huge deal with a lot of issues in a lot of forums."

There were many people "working on this and it was a collective effort," says Latham.

"John saying that is like when LeBron [James] congratulates the bench players," adds David.

Another case involved the \$612 million acquisition of Hughes Telematics by Verizon Communications, which resulted in some of Hughes' shareholders filing a puta-

SECURITIES LITIGATION: **ALSTON & BIRD**

tive class action suit alleging that Hughes breached its fiduciary duties in approving the transaction and that Verizon aided and abetted those allegations.

Melding the strategy to the client's business objectives, Bugni said the goal was to "make sure the deal goes through." The plaintiffs filed at "the very last minute in order to have the most leverage. We actually thought it was going to be one of those deals where no one is going to sue, but it wasn't." The suit was before DeKalb County Superior Court Judge Clarence F. Seeliger.

"Consistent with the client's objectives to make sure the deal went through, we were able to negotiate a quick and favorable settlement that prevented the cases going forward with an injunction hearing," Bugni says.

The settlement moved very quickly—about a month—and settled for attorneys fees, she says.

Latham and Bugni worked together representing PSS World Medical and the members of its board of directors in litigation that arose concerning the announced merger of PSS and McKesson Corp. PSS shareholders filed a putative class action suit alleging that the PSS board breached its fiduciary duties in approving the transaction with McKesson. In addition, the suit alleged that McKesson and Goldman Sachs aided the alleged breaches.

"It was a big deal," says Bugni. "It was a \$2.1 billion transaction and our firm did the negotiations of the underlying deal and all the paperwork as well. The plaintiffs focused on the use of Goldman Sachs as an adviser."

The concern was that Goldman and McKesson had an existing agreement that allegedly created a conflict. "The existing relationship was basically an inverse relationship where the higher the deal price, the less Goldman would earn. The argument was that Goldman wasn't incented to get the highest price," says Latham. The PSS board hired an independent adviser besides Goldman Sachs to weigh in on

the fairness of the transaction. "In that case it was important to learn the objectives from the outset and develop a strategy so the deal will close," Latham says.

In February 2013, the Fourth Judicial Circuit in Duval County, Fla., entered an order of final approval of the settlement. All of the pending claims ultimately were settled on terms favorable to the defendants and the deal closed as scheduled.

Another noteworthy case was when Apple bought Alston & Bird client AuthenTec, a Melbourne, Fla.-based company that developed fingerprint sensory technology, in a deal worth about \$356 million. The deal was of special interest because it was one of the few times that Apple has acquired a public company.

Quickly following the announcement of the merger, 13 putative class action lawsuits were filed in Brevard County, Fla., the Delaware Court of Chancery and the Fifth District Court of Appeals, and employing 11 law firms.

"There was an awful lot on the line," says Bugni, who worked on the case with David and Alston & Bird senior associate Cara Peterman. "We had an injunction hearing and won."

The trial court denied the plaintiffs' motion for a preliminary injunction, which

was affirmed by the Fifth District Court of Appeals in March 2013. Recently the plaintiffs filed a second amended complaint, which Alston & Bird has moved to dismiss.

Alston & Bird's securities litigators understand that when a deal goes down, lawsuits will pop up. The trick is to not only help the client define the bottom-line goals, but also to actually achieve them.

"It goes back to knowing what your client wants to do," David says. "For some clients on a merger case the deal is so important that they can't wait to settle. Others get offended about the notion of being sued when they've done their very best to deliver value to the shareholders. They view it as reprehensible. Organized blackmail. Those clients want to fight."

In other cases the litigation team may offer the plaintiff's lawyers a change in the disclosure, or even change the deal a bit. "Sometimes you can do that, and in others the client won't agree as a matter of principle. Others can't change the deal to accommodate the plaintiffs lawyers," he says.

"And then there are those [deals] that tend to go the whole nine yards," he adds. "And we're perfectly willing to do that as well, if that's what the client wants." 

