



The ConEd Decision — One Year Later: Significant Implications for Public Company Mergers Appear Largely Ignored

By Kevin Miller

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It has been almost a year since the Second Circuit rendered its decision in *Consolidated Edison v. Northeast Utilities*¹ but the implications of that decision are still not being addressed by the vast majority of public company merger agreements. In *ConEd IV*, the Second Circuit effectively held that, under New York law, an acquiror could not be held liable for target shareholders' lost merger premium if the target shareholders were not intended third-party beneficiaries entitled to such relief.² The Second Circuit's opinion in *ConEd IV* also challenged, and potentially seriously undermined, the legal arguments used to justify granting a target's request for specific performance of a merger agreement—e.g., in cases like *In re: IBP*,³ the seminal 2001 decision in which the Delaware Chancery Court, applying New York law, granted IBP's request for specific performance of its merger agreement with Tyson.

As a consequence of *ConEd IV*, absent changes to the forms of merger agreement commonly used in acquisitions of public companies, such agreements may not contain adequate protections against an acquiror who wrongfully fails to consummate a merger. To address that gap, target companies should consider requesting the inclusion of provisions that:

- explicitly grant target shareholders third-party beneficiary rights enforceable solely by the target; and
- acknowledge the target's rights, on behalf of itself and its third-party beneficiary shareholders, to obtain specific performance of the merger agreement.

Background

The case arose out of the failed merger of Consolidated Edison and Northeast Utilities in 2001. Pursuant to the Amended and Restated Agreement and Plan of Merger among ConEd, NU and certain affiliated entities, NU was to merge with a subsidiary of ConEd, each outstanding share of NU common stock was to be converted into the right to receive

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cash or shares of ConEd common stock with an expected value of \$26.50 per share and NU was to become a wholly-owned subsidiary of ConEd.⁴ The aggregate consideration for NU's outstanding shares was to be approximately \$3.6 billion, reflecting a 40 percent premium, or an aggregate of approximately \$1.2 billion, over the value of NU's outstanding shares prior to the time that rumors of the transaction began circulating in the marketplace.⁵

On February 16, 2001, while the parties were still awaiting SEC approval of the merger pursuant to the Public Utility Holding Company Act of 1935, ConEd's Chairman and Chief Executive Officer advised NU's Chairman and Chief Executive Officer that ConEd would not proceed with the merger on the terms previously agreed and would only go forward with the merger at a substantially reduced price.⁶ Thereafter, NU sought assurances that ConEd would comply with its obligations under the merger agreement and consummate the merger. ConEd initially advised NU that it would comply with its obligations to consummate the merger if NU could satisfy all of the conditions precedent to closing. However, two and one-half weeks later, ConEd advised NU that it would not pay NU more than \$22.50 per share of NU common stock, contending that NU had suffered a material adverse change. NU rejected ConEd's attempt to renegotiate the merger agreement and said it would treat ConEd's actions as an anticipatory repudiation of the merger agreement and take appropriate action to recover the benefits of the merger for its shareholders. Shortly thereafter, ConEd filed a complaint in the United States District Court for the Southern District of New York seeking a declaratory judgment that NU had breached the merger agreement and, as a result, ConEd was excused from its obligation to close the merger.⁷ NU counterclaimed charging ConEd with wrongfully refusing to consummate the merger in breach of its obligations under the merger agreement and, among other things, seeking recovery of approximately \$27 million expended to obtain various regulatory permits and \$1.2 billion in damages for its shareholders' lost merger premium.⁸

ConEd I

ConEd moved for dismissal of NU's counterclaim arguing, among other things, that NU lacked standing to recover its shareholders' lost merger premium because NU's shareholders were not third-party beneficiaries of the merger agreement prior to the consummation of the merger. In pertinent part, the merger agreement provided that:

This Agreement ... (i) constitutes the entire agreement, and supersedes all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter of this Agreement... and (ii) except for the provisions of Article II [relating to the effect of the merger and the exchange of stock certificates after the effective time] and Section 5.08 [relating to director and officer indemnification, exculpation and insurance], [is] not intended to confer upon any person other than the parties any rights or remedies.⁹

While District Court Judge John G. Koeltl acknowledged that Article II of the merger agreement only described what would happen after the effective time of the merger, he refused to limit NU shareholders' third-party beneficiary rights to the period following consummation of the merger because there was no such express limitation in the agreement.¹⁰ Applying the so-called "prevention doctrine," the District Court further noted that "[w]here NU alleges that Con Edison unilaterally and unlawfully breached the Merger Agreement, Con Edison cannot avoid responsibilities that it may have to NU's shareholders relying on the argument that the Effective Time has not come to pass."¹¹ Accordingly, the District Court denied ConEd's motion for summary judgment on NU's counterclaim for its shareholders' lost merger premium.¹²

ConEd II

Matters grew more complicated when, on May 16, 2003, Robert Rimkoski, an NU shareholder that had owned shares of NU common stock as of March 5, 2001, but subsequently sold his shares, sued ConEd in New York State court. Rimkoski alleged that the appropriate third-party beneficiaries of the merger agreement were NU shareholders of record at the time of ConEd's alleged breach on March 5, 2001, even if they subsequently sold their shares (the March 5 Class), rather than the current shareholders of NU or the shareholders of record at the time that a judgment against ConEd is entered or collected (the Judgment Class). Apparently adopting Rimkoski's view, ConEd filed a new motion with the District Court in July 2003 requesting dismissal of NU's claim for its shareholders' lost merger premium on the grounds that NU's current shareholders were not the proper beneficiaries and that NU could not adequately represent or litigate the rights of its former shareholders or receive damages owed to them. With ConEd's support, Rimkoski moved to intervene in the federal court action promising to dismiss the case filed in the New York State courts if his motion was granted. The District Court granted the motion to intervene but denied ConEd's motion to dismiss NU's lost premium counterclaim without prejudice pending resolution of whether the March 5 Class, presumably represented by Rimkoski, or the Judgment Class, represented by NU, had the right to sue ConEd for the lost merger premium.¹³

ConEd III

Ultimately the District Court held that the right to pursue damages for lost merger premium belonged to Rimkoski and the proposed March 5 Class and not to NU on behalf of the Judgment Class. As a consequence, the District Court granted ConEd's motion for summary judgment on NU's counterclaim for its shareholders lost merger premium and denied NU's motion for summary judgment on Rimkoski's cross-claim against ConEd.¹⁴ However, recognizing that the motions had raised questions of New York state law that were issues of first impression with "little case law that is even closely analogous," the District Court certified the motions for interlocutory appeal before the Second Circuit.¹⁵

ConEd IV

On interlocutory appeal, the Second Circuit considered (i) whether NU shareholders were intended third-party beneficiaries of the merger agreement between ConEd and NU; and (ii) if so, whether the claims for damages for breach of contract belonged to the shareholders of NU on March 5, 2001, the date of ConEd's alleged breach, or were thereafter automatically transferred to subsequent purchasers of NU shares.¹⁶ Because the Second Circuit concluded that NU shareholders were not intended third-party beneficiaries of the merger agreement prior to the consummation of the merger, it never reached the second question. According to the Second Circuit:

the parties to the [merger agreement] clearly created a third-party right, but just as clearly they took pains to assure that the right was limited to a right to collect the shareholder premium if and when the merger happened, not a right to sue to compel completion of the merger or for damages resulting from a party's refusal to merge.¹⁷

With respect to the argument that ConEd could not avoid performance of a contractual duty by preventing the occurrence of a condition precedent, the Second Circuit held that the prevention doctrine exists to serve the intent of the parties and not create new rights. Consequently, it declined to apply the prevention doctrine in a way that would "transform a narrow right to secure payment if and when [the merger becomes effective] into a billion-dollar penalty for the failure to merge."¹⁸

Specific Performance

ConEd IV also challenged, and potentially seriously undermined, the legal arguments used to justify granting a target's request for specific performance of a merger agreement in cases like *IBP*. According to *IBP*:

[u]nder either New York or Delaware law, the plaintiff bears the burden of persuasion to justify its entitlement to specific performance. Under New York law, [the plaintiff] must show that: (1) the Merger Agreement is a valid contract between the parties; (2) [the plaintiff] has substantially performed under the contract and is willing and able to perform its remaining obligations; (3) [the defendant] is able to perform its obligations; and (4) *[the plaintiff] has no adequate remedy at law* (emphasis added).¹⁹

In *IBP* the Delaware Chancery Court, applying New York law, granted *IBP*'s request for specific performance of its merger agreement with Tyson because, in the court's view, specific performance was the preferable remedy for the injury suffered by *IBP*'s stockholders. In so doing, the Chancery Court noted that:

[i]n the more typical situation, an acquiror argues that it cannot be made whole unless it can specifically enforce the acquisition agreement, because the target company is unique and will yield value of an unquantifiable nature, once combined with the acquiring company. In this case, the sell-side of the transaction is able to make the same argument, because the Merger Agreement provides the

IBP stockholders with a choice of cash or Tyson stock, or a combination of both. Through this choice, the *IBP* stockholders were offered a chance to share in the upside of what was touted by Tyson as a unique, synergistic combination. This court has not found, and Tyson has not advanced, any compelling reason why sellers in mergers and acquisitions transactions should have less of a right to demand specific performance than buyers, and none has independently come to my mind.²⁰

As if in answer to the *IBP* decision, the Second Circuit provided—albeit in dicta—a potentially compelling reason why sellers in mergers and acquisitions transactions may have less of a right to demand specific performance. Even though ConEd and NU had agreed "that irreparable damage would occur and that *the parties* would not have any adequate remedy at law in the event that any of the provisions of [the ConEd/NU merger agreement] were not performed in accordance with their specific terms or were otherwise breached (emphasis added),"²¹ it appears the Second Circuit would not have been willing to grant specific performance to address irreparable harm to NU shareholders absent a showing that they were intended third party beneficiaries under the ConEd/NU merger agreement at the time of the breach.²² In contrast, even though *IBP*'s shareholders were not third-party beneficiaries under the *IBP*/Tyson merger agreement,²³ and thus arguably not entitled to relief, the irreparable harm relied upon by the Chancery Court to justify granting *IBP*'s request for specific performance was a harm that would have been suffered by *IBP*'s shareholders by virtue of their failure to receive merger consideration in the form of Tyson stock.²⁴ The Chancery Court did not rely upon a harm that would have been suffered by a party to the merger agreement entitled to relief such as *IBP*, which was to become a wholly-owned subsidiary of Tyson, subject to its full and complete control.²⁵

Discussion

The forms of merger agreements commonly used in connection with public company mergers typically contain a provision that explicitly disclaims the existence of third-party beneficiaries other than with respect to the provision of the merger agreement obligating the acquiror to indemnify and obtain D&O insurance for the benefit of the target company's directors and officers after the closing of the merger. Occasionally, the "no third-party beneficiaries" provision will also contain other limited exceptions, including an exception, as in the ConEd/NU merger agreement, giving target shareholders the right to enforce the obligations of the acquiror to pay the merger consideration upon consummation of the merger—when the target, as an independent entity, has ceased to exist and its shareholders are the only parties remaining with an interest in suing to obtain the merger consideration.²⁶ The foregoing limited exception is nevertheless proof of the general rule that both acquirors and targets abhor granting third-party beneficiary rights to target shareholders for fear that such rights would deprive the acquiror and the target of the ability to control the transaction prior to the effective time and, if necessary, renegotiate the terms of a still desirable transaction following a change in circumstance.²⁷ However, as a result of *ConEd IV*, unless target shareholders

are intended third party beneficiaries of the merger agreement prior to its consummation, target companies will generally not be able to obtain damages for their shareholders' lost merger premium shareholders and may not even be able to obtain specific performance. Targets may only be able to recover the target company's provable damages—an amount that may be insufficient to deter acquirors suffering buyer's remorse from refusing to consummate a merger.²⁸ On its face, this places a target in an untenable position—damned if they grant target shareholders pre-closing third-party beneficiary rights and damned if they don't.

Despite the foregoing, a survey of over 45 merger agreements relating to proposed mergers announced between November 1, 2005 and August 31, 2006 with a value in excess of \$1 billion identified only four transactions in which the merger agreement contained a provision addressing the issue identified by *ConEd IV*:

- Berkshire Hathaway's proposed acquisition of Russell Corp.:

Section 7.6 Entire Agreement; Third Party Beneficiaries. This Agreement and the Confidentiality Agreement (including the documents and the instruments referred to herein and therein) (a) constitute the entire agreement, and supersede all other prior agreements and understandings, both written and oral, between the parties, or any of them, with respect to the subject matter hereof and thereof and (b) *except for* (i) the rights of the Company's stockholders to receive the Merger Consideration at the Effective Time in accordance with Section 1.7, (ii) *the right of the Company, on behalf of its stockholders, to pursue damages in the event of Parent's or Merger Sub's intentional breach of this Agreement or fraud, which right is hereby acknowledged and agreed by Parent and Merger Sub*, and (iii) as provided in Section 4.6 (which is intended for the benefit of the Company's former and current officers, directors, employees and other indemnitees, all of whom shall be third-party beneficiaries of this provision), are not intended to confer upon any person other than the parties hereto any rights or remedies hereunder (emphasis added);²⁹

- Brookfield Properties' proposed acquisition of Trizec Properties:

Section 11.09. Parties in Interest. This Agreement shall be binding upon and inure solely to the benefit of each party hereto, and *nothing in this Agreement, express or implied, is intended to or shall confer upon any other person any right, benefit or remedy of any nature whatsoever under or by reason of this Agreement, other than* (a) the provisions of Article III and Sections 8.06 and 8.07 (which are intended to be for the benefit of the persons covered thereby or the persons entitled to payment thereunder and may be enforced by such persons); and (b) *the right of Trizec and/or TZ Canada, on behalf of their respective stockholders, to pursue damages in the event of Parent's, MergerCo's or AcquisitionCo's intentional breach of this Agreement or fraud, which right is hereby acknowledged*

and agreed by Parent, MergerCo, AcquisitionCo and the Guarantor (emphasis added);³⁰

- Phelps Dodge's proposed acquisition of Inco:

Section 10.4. Entire Agreement; Third Party Beneficiaries. *This Agreement and the documents and instruments and other agreements among the parties hereto . . . are not intended to confer upon any other person any rights or remedies hereunder, except* (i) as specifically provided in Section 7.6 and (ii) *the right of Italy's shareholders to receive Portugal Common Shares and cash at the Effective Time and to recover, solely through an action brought by Italy, damages from Portugal in the event of a wrongful termination of this Agreement by Portugal* (emphasis added);³¹ and

- Aviva's proposed acquisition of AmerUs:

8.5. Entire Agreement; No Third Party Beneficiaries. This Agreement, including the AmerUs Disclosure Letter, Exhibit A and the Confidentiality Agreement (a) constitute the entire agreement and supersede all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof and (b) except for the provisions of Section 5.6 (which shall be for the benefit of the Indemnified Parties), is not intended to confer upon any person other than the parties hereto any rights or remedies hereunder; *provided that AmerUs shall be entitled to pursue damages on behalf of its shareholders in the event of Aviva's or Merger Sub's intentional breach of this Agreement or fraud, which right is hereby acknowledged and agreed by Aviva and Merger Sub* (emphasis added).³²

Proposed Solution

In order to address the significant gap in target and target shareholder protections identified by *ConEd IV*, target companies should consider requesting the inclusion of provisions in their merger agreements to the effect that:

- Nothing in this agreement, express or implied, is intended to or shall confer upon any other person any right, benefit or remedy of any nature whatsoever under or by reason of this agreement other than (a) as specifically provided in [section of merger agreement relating to director and officer indemnification and insurance]; (b) the rights of holders of shares of target common stock to pursue claims for damages and other relief, including equitable relief, for the acquiror's or merger sub's [intentional] breach; [wrongful repudiation or termination of this agreement;] [wrongful failure to consummate the merger;] [or fraud;] and (c) after the effective time of the merger, the rights of holders of shares of target common stock to receive the merger consideration specified in [section of the merger agreement relating to the effect of the merger on the target's capital stock]; *provided, however*, that the rights granted pursuant to clause (b) shall only be enforceable on behalf of such shareholders by the target in its sole and absolute discretion[, it being understood and agreed that any and all interests in such claims shall attach to such

shares of target common stock and subsequently trade and transfer therewith and, consequently, any damages, settlements or other amounts recovered or received by the target with respect to such claims (net of expenses incurred by the target in connection therewith) may, in the target's sole and absolute discretion, be (x) distributed, in whole or in part, by the target to the holders of shares of target common stock of record as of any date determined by the target or (y) retained by the target for the use and benefit of the target on behalf of its shareholders in any manner the target deems fit];

- The parties to the merger agreement acknowledge and agree that in the event that any of the provisions of the merger agreement are breached or are not performed in accordance with their terms, irreparable damage may occur; that the parties to the merger agreement and the third-party beneficiaries of the merger agreement may not have an adequate remedy at law; that the parties to the merger agreement (on behalf of themselves and the third-party beneficiaries of the merger agreement) shall be entitled to injunctive or other equitable relief to prevent breaches of the merger agreement and to enforce the terms of the merger agreement; and that the parties to the merger agreement shall not object to the granting of injunctive or other equitable relief on the basis that there exists an adequate remedy at law; and
- If any provision or provisions of this agreement shall be held to be invalid, illegal, or unenforceable for any reason (a) the validity, legality and enforceability of the remaining provisions of this agreement shall not be affected or impaired thereby; (b) such provision or provisions shall be deemed reformed to the extent necessary to conform to applicable law and to give the maximum effect to the intent of the parties hereto; and (c) to the fullest extent possible, the provisions of this agreement shall be construed to give the maximum effect to the intent of the parties hereto; *provided, however*, that under no circumstances shall the rights of holders of shares of target common stock as third-party beneficiaries pursuant to [clause granting target shareholders pre-closing third-party beneficiary rights] be enforceable by such shareholders or any other person acting for or on their behalf other than the target and its successors in interest.

While such provisions have not been tested in the courts, they may provide the best means of ensuring that targets and target company shareholders will receive the benefit of their bargains through the award of monetary damages for lost merger premium or by obtaining specific performance of the merger agreement.

Notes

1. *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005) (*ConEd IV*).
2. Technically, the decision reversed District Court rulings denying motions for summary judgment by parties opposing claims on behalf of NU's shareholders for their lost merger premium. *Id.* at 531. The Delaware Supreme Court has reached a similar conclusion in analogous circumstances. See *Tooley v.*

Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004) (“[Minority stockholders] rights have not yet ripened. The contractual claim is nonexistent until it is ripe, and that claim will not be ripe until the terms of the merger are fulfilled...”)

3. *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14 (Del. Chanc. 2001).
4. See Amended and Restated Agreement and Plan of Merger dated as of October 13, 1999, as amended and restated as of January 11, 2000 (the “ConEd/NU merger agreement”), among Consolidated Edison, Inc. (“Old ConEd”), Northeast Utilities, Consolidated Edison, Inc. (“New ConEd”), originally incorporated as CWB Holdings, Inc. and a wholly owned subsidiary of Old ConEd, and N Acquisition LLC, 99% of which is owned by the Old ConEd and 1% of which is owned by X Holding LLC, 99% of which is owned by the Old ConEd and 1% of which is owned by N Acquisition LLC, attached as Annex A to the Registration Statement on Form S-4 filed by Consolidated Edison with the SEC on March 1, 2000, File No.: 333-31390, available at: <http://www.sec.gov/Archives/edgar/data/1103782/0000912057-00-009178.txt> (the “ConEd Registration Statement”) and the Joint Proxy Statement/Prospectus included in the ConEd Registration Statement.
5. See *Consolidated Edison v. Northeast Utilities*, 249 F.Supp.2d 387, 395 (S.D.N.Y. 2003) (*ConEd I*), reversed in part, *ConEd IV*, 426 F.3d 524 (2d Cir. 2005). (“The merger price comprised three parts: 1) a \$25 base price; 2) an additional \$1 to be paid if, as expected (and as actually occurred), NU entered into a binding agreement to sell its Millstone nuclear power station to an unaffiliated third-party; and 3) an ‘adjustment’ payment of \$0.0034 per day (or about \$.10 per month) for each day from August 5, 2000 until the merger closed....The premium constituted more than \$1 billion of the total \$3.6 billion that Con Edison expected to pay for NU’s 137 million then outstanding shares.”).
6. *Id.* at 397.
7. *Id.* at 399. The complaint was subsequently amended to include seven claims for relief based upon, among other things, NU’s alleged breaches of covenants and representations and warranties, failures of conditions precedent to ConEd’s obligations to consummate the merger, fraudulent inducement and negligent misrepresentation.
8. *Consolidated Edison, Inc. v. Northeast Utilities*, 318, F. Supp. 2d 181,184-185 (S.D.N.Y. 2004) (*ConEd III*), reversed in part, *ConEd IV*, 426 F.3d 524 (2d Cir. 2005).
9. See Section 8.06 of the ConEd/NU merger agreement attached as Annex A to the ConEd Registration Statement.
10. “There is no question under the Merger Agreement that the NU shareholders were third party beneficiaries and there is no basis in the Merger Agreement to limit their third party beneficiary status solely to the time after the merger had been completed.” *ConEd I* at 417. See also, *In Re: Enron Corp 292 B.R. 507* (S.D.N.Y. 2002).
11. *Id.* at 417, note 11.
12. *Id.* at 416 and 417.
13. *Consolidated Edison, Inc. v. Northeast Utilities*, No. 01 Civ. 1893(JGK), 2004 WL 35455, (S.D.N.Y. Jan. 7, 2004) (*ConEd II*).
14. *ConEd III* at 195.
15. *Id.* at 195-196.
16. *Id.* at 197.
17. *ConEd IV* at 528.
18. *Id.* at 529.
19. *In re IBP* at 52.
20. *Id.* at 83.

21. See Section 8.09 of the ConEd/NU merger agreement attached as Annex A to the ConEd Registration Statement.
22. *ConEd IV* at 528. (“the parties to the [merger agreement] clearly created a third-party right, but ... not a right to sue to compel completion of the merger...”). In *IBP*, the Chancery Court never discussed, and did not appear to consider, whether IBP’s shareholders were intended third party beneficiaries of the merger agreement between IBP and Tyson and thus entitled to the remedy granted. *But see C&S/Sovran Corporation v. First Federal Savings of Brunswick*, 463 S.E.2d 892, 895 (Ga. 1995) (“C&S/Sovran also urges that First Federal lacks standing to recover specific performance because such relief would benefit shareholders rather than the corporate entity. However, in the Agreement the parties acknowledge the difficulty of determining damages and contemplate that the Agreement be specifically enforced. As a party to both the Agreement and the action, First Federal has standing to seek the relief contemplated in the Agreement.”). Although specific performance is available to address irreparable harms to the target itself, such harms are inherently more difficult to prove and, if proffered, could be used by the acquiror to establish the existence of a “Material Adverse Change” excusing the acquiror’s obligation to close unless such harms (e.g., the loss of key customers or employees following the announcement of the transaction) have been excluded from the definition of a MAC. Presumably, because the only alleged injury to NU, itself, was the \$27 million it expended in connection with the proposed merger, NU had not demonstrated an irreparable harm to itself for which there was not an adequate remedy at law.
23. See Section 12.05 of the Agreement and Plan of Merger dated as of January 1, 2001 (the “IBP/Tyson merger agreement”) among IBP, Tyson and a wholly-owned subsidiary of Tyson attached as Exhibit 99.(E).(3) to Amendment No. 1 to the Solicitation/Recommendation Statement on Schedule 14D-9 filed by IBP with the SEC on January 2, 2002, File No.: 005-06183, available at: <http://www.sec.gov/Archives/edgar/data/52477/000089882201000003/0000898822-01-000003-0003.txt>. (“Nothing in this Agreement, expressed or implied, shall confer on any Person other than the parties hereto, and their respective successors and assigns, any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except that the present and former officers and directors of [IBP] shall have the rights set forth in SECTION 8.04 hereof.”)
24. *Id.* at 84 (“[Specific performance] is decisively preferable to a vague and imprecise damages remedy that cannot adequately remedy the *injury to IBP’s stockholders*” (emphasis added)).
25. *Id.* at 83-84 (“Tyson will have the power to decide all the key management questions itself. It can therefore hand-pick its own management team. While this may be unpleasant for the top level IBP managers who might be replaced, it was a possible risk of the Merger from the get-go and a reality of today’s M&A market.”).
26. Such an exception is not generally deemed essential as target shareholders may be able to compel payment through other means including claims of conversion, quasi-contract, implied contract or accounting *ConEd IV* at 529. Target shareholders can point to the certificate of merger filed with the secretary of state which sets forth the terms of the merger, including the merger consideration.
27. Consider the confusion that would exist if any target shareholder could make claims to enforce the terms of the merger agreement prior to its consummation – potentially alleging numerous and various breaches of representations and warranties or covenants by the acquiror in any jurisdiction and court they deemed appropriate. In addition if the District Court had been correct and Rimkoski and the March 5 Class were intended third party beneficiaries of the ConEd/NU merger agreement, with potentially valid claims against ConEd, it would have been virtually impossible to get Rimkoski and the March 5 Class to release their claims and effectively consent to the terms of a renegotiated merger without a separate, potentially substantial, payment because the members of the March 5 Class who were no longer NU shareholders would not otherwise benefit from the renegotiated merger.
28. In the proposed ConEd/NU merger, the lost merger premium was \$1.2 billion as compared to recoverable expenses of approximately \$27 million.
29. See Agreement and Plan of Merger, dated as of April 17, 2006, by and among Berkshire Hathaway Inc. (“Parent”), F Subsidiary, Inc., an indirect wholly-owned subsidiary of Parent (the “Merger Sub”), and Russell Corporation (the “Company”) available at: <http://www.sec.gov/Archives/edgar/data/85812/000119312506081999/dex21.htm>.
30. See Agreement and Plan of Merger and Arrangement Agreement, dated as of June 5, 2006, as amended, by and among Trizec Properties, Inc., Trizec Holdings Operating LLC, Trizec Canada Inc., Grace Holdings LLC, Grace Acquisition Corporation, Grace OP LLC and 4162862 Canada Limited, pursuant to which Grace Acquisition Corporation would merge with and into Trizec Properties, Inc., a copy of which is attached as Annex A to the Proxy Statement filed on Schedule 14A by Trizec Properties Inc. with the Securities and Exchange Commission on August 8, 2006, available at: <http://www.sec.gov/Archives/edgar/data/1161935/000095013306003622/w06263dfdefm14a.htm>.
31. See Combination Agreement, made and entered into as of June 25, 2006, between Phelps Dodge Corporation (“Portugal”) and Inco Limited (“Italy”) available at: <http://www.sec.gov/Archives/edgar/data/49996/000090956706001146/o32125exv2w1.htm>. Of the four transactions identified, the Phelps Dodge/Inco transaction was the only one in which the target was not a U.S. company. Nevertheless, the agreement was principally governed by New York law.
32. See Agreement and Plan of Merger dated as of July 12, 2006 by and among Aviva PLC, Libra Acquisition Corporation, a wholly owned subsidiary of Aviva PLC, and AmerUs Group Co. available at: <http://www.sec.gov/Archives/edgar/data/1051717/000095013706007761/c06698exv2w1.htm>.