Deal Focus

Mergers & Acquisitions: Massachusetts Courts Reject Injunction Attempts

By James Carroll and Margaret Brown

It's becoming a common phenomenon: two public companies announce an acquisition on terms thought to benefit all interested parties and within days they face shareholder lawsuits that seek to enjoin the announced deal. While these suits typically include allegations of breached fiduciary duties or non-disclosures, the plaintiffs often go a step further, petitioning courts for "emergency" injunctions to stop the dissemination of information to shareholders, halt tender offers, and postpone or even cancel the shareholder votes required by law for most public-company merger transactions. As deal activity increases with a broader economic recovery, we are likely to see more of these sorts of cases: in recent years, virtually every public company merger or acquisition has faced this kind of litigation.

As recent case law demonstrates, Massachusetts courts are not receptive to injunctive efforts to block corporate transactions or interfere with shareholder voting in the public company context. Illustrative of the current view of Massachusetts courts is the case of Elliot v. Millipore, in which Judge Neel of the Business Litigation Session of the Suffolk County Superior Court rejected an attempt to stop the shareholder vote on Merck KGaA's $7.2 billion acquisition of Millipore Corp. Given the predicted consolidation in the pharma and high-tech industries, Elliot may prove to be a particularly important case for both transactional lawyers and litigators.

The background to Elliot was unremarkable. In early January 2010, the board of Billerica-based Millipore received an unsolicited offer to buy the company. Millipore's board decided to test the waters for other suitors and quickly

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identified a set of potential merger partners, including Merck. During a month-long process, the board received offers from the initial bidder and Merck; and when the initial bidder refused to match Merck's final offer of $107 per share — which represented a fifty percent premium over the Millipore's stock price prior to the unsolicited offer — Millipore's board approved the acquisition by Merck and on February 28, publicly announced execution of the agreement.

On March 2 — just two days later — a single shareholder filed a purported class action against Millipore, its directors, and Merck. The initial complaint alleged that the Millipore directors breached their duty to secure the best purchase price for shareholders, and that Merck had somehow "aided and abetted" those breaches. Once Millipore filed its initial proxy materials describing the transaction, the plaintiff amended his complaint to allege further breaches of the duty of candor, which were grounded in the alleged inadequacy of the proxy disclosures. The complaint sought to prevent consummation of the merger pending a showing that the board had secured the best deal for shareholders.

On May 14, two weeks after the filing on April 30 of Millipore's definitive proxy statement, the plaintiff filed an emergency motion for a preliminary injunction to block the shareholder vote that was scheduled for early June. The plaintiff alleged that Millipore's 125-page proxy lacked material information necessary for shareholders to cast an informed vote, such as details of the board's internal discussions about the negotiations with prospective acquirers and specific calculations that Millipore's financial advisor had used to assess the proposed deal.

In response, defendants argued that the plaintiff had not satisfied Massachusetts's three-prong test to justify the extraordinary remedy of enjoining a vote. First, the defendants argued the plaintiff had shown no likelihood of winning on the merits of his underlying claims because the extensive proxy materials thoroughly documented all material information. Second, the defendants maintained that the plaintiff's claim of irreparable harm was undercut by the length of time he waited (more than two months after the deal announcement, and two weeks after the definitive proxy filing) to seek an injunction. Third, the defendants argued that the severe harm that an injunction would do to the bulk of shareholders — namely, losing their right to cast a yes-or-no vote on a deal that offered a substantial premium to Millipore's prior trading value — substantially outweighed the plaintiff's speculation that there existed, somewhere, a better deal.

On June 3, the day of the scheduled shareholder vote, the court denied the injunction motion. Citing the definitive proxy's "considerable detail" regarding the board's decision-making process, the fact that the $107-per-share offer price marked a significant premium over Millipore's prior-year trading average, and the fact that early-voting stockholders overwhelmingly supported the transaction the court concluded that the remaining shareholders would be "prejudiced, not advantaged" by delaying the vote. The transaction was overwhelmingly approved by shareholders.

The outcome in *Elliot* exemplifies Massachusetts courts' skepticism of injunctive attempts in the context of sophisticated corporate transactions, and it is fully in line with other similar and very recent cases in Massachusetts. In May 2010, for example, the Suffolk County Superior Court's Business Litigation Session declined to enjoin Hospira, Inc.'s tender offer for shares of Javelin Pharmaceutical Inc.; and again in late June, the Middlesex County Superior Court

refused to enjoin the shareholder vote on Oracle Corporation's acquisition of Phase Forward Corp., and dismissed the underlying complaint in its entirety.

The lesson of *Elliot* and its brethren is clear. Massachusetts law is increasingly unreceptive to injunction motions seeking to interfere with sophisticated corporate transactions, particularly where such motions would seek to interfere with shareholder votes. While such cases may occasionally find litigation "traction" elsewhere — indeed, there are Delaware cases granting injunctions in some circumstances, including injunctions delaying shareholder votes — our judges have been skeptical. This skepticism, and the important predictability that results, makes Massachusetts an attractive venue for matters involving sophisticated corporate transactions. ■