federal level. Medicinal cannabis had been legal since 2001 and the bill to legalize recreational use had been introduced in April 2017, so Canadian producers have had more time (and regulatory and legal freedom) to grow than many of their American peers. Accordingly, much of the capital markets and M&A activity (including each of the deals referenced above) surrounding cannabis producers have occurred in Canada. Over 50 U.S.-based companies, including Acreage Holdings (which appointed former House Speaker John Boehner to its board of directors), Harvest Health and Recreation and MJardin Group completed listings on the Canadian Securities Exchange in 2018, each at a nine-figure valuation. As of December 2018, nine public companies in the cannabis sector had a market cap in excess of $1 billion—a number that, along with cannabis M&A, looks set to grow.

Mary Poppins Returns: More M&A to Come in 2019

Although the M&A markets were slower than anticipated in the final months of 2018, all the factors are in place for another strong year for deals in 2019. A strong if not particularly bubbly economy, coupled with strong cash balances and historically low interest rates, will lead boards and managements to seek growth through acquisition. In particular, Japanese outbound deals could be the driver of a stronger than expected cross-border M&A spending spree. While it is always difficult to predict the level of M&A activity beyond the next quarter, what we do know is that 2019 will be an active and interesting year for dealmakers everywhere.

DELAWARE LITIGATION DEVELOPMENTS IMPACTING FINANCIAL ADVISORS

By Edward B. Micheletti and Bonnie W. David

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Over the last few years, significant developments in Delaware law and practice have changed the traditional M&A litigation landscape. These developments resulted in a dramatic reduction in pre-closing applications for injunctions that dominated the M&A litigation practice in Delaware for decades and a marked decrease in M&A-related filings overall in the Delaware Court of Chancery.[1] Instead, stockholder plaintiffs have focused their efforts primarily on selected cases pursued post-closing as money damages actions or, in certain instances, statutory appraisal proceedings.

These changes—particularly the increased attention in the Court of Chancery on money damages as a remedy—have resulted in stockholder plaintiffs crafting new litigation tactics that focus on defendants they believe have "deep pockets," including financial advisors. As the court has explained, it is well-established under Delaware law that "because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts."[2] Plaintiffs have also looked to purported banker conflicts, particularly those that are undisclosed to the board or stockholders approving a transaction, as a basis to name a financial advisor as a defendant in deal litigation on an aiding-and-abetting theory.

Plaintiffs have maintained this focus on financial advisors, notwithstanding the Delaware Supreme Court's clarification in *RBC Capital Markets, LLC v. Jervis* that the high bar for pleading scienter "makes an aiding and abetting claim among the most difficult to prove." Financial institutions that are responding to subpoenas or are named as defendants in litigation challenging M&A transactions in which they acted as advisors should keep these plaintiff litigation strategies in mind and develop potential defenses accordingly.

Responding to a Subpoena

Traditionally, the financial advisor's role in M&A litigation was perceived as that of a nonparty, limited to responding to a subpoena. The role often entailed producing limited documents or offering a single banker witness to testify about narrow topics, such as the financial

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advisor's role in the deal process and valuations provided to the board. This perception has evolved along with the current M&A landscape.

For example, the Court of Chancery has recently remarked that financial advisors faced with a subpoena are considered more than just nonparties with little stake in the dispute. Specifically, in a recent transcript ruling, the Court of Chancery granted a motion to compel against a nonparty financial advisor faced with a subpoena and ordered it to produce documents consistent with the "ambitious schedule" to which the parties in the case had agreed.[3] In its decision, the court emphasized that "when investment bankers are involved in complex transactions, they take a very important role," and "the bankers are compensated well for the work that they have done," such that responding to a subpoena is simply a "cost of doing business." As a result, the court felt it was "not the case" that financial advisors should be considered "third part[ies] with marginal involvement in the dispute," justifying imposing a minimal burden. Thus, financial advisors responding to subpoenas should be cognizant that arguments about burden in responding to subpoenas may not have as much force as they have in the past.

Until the last several years, financial advisors rarely were named as defendants. However, in the current M&A litigation landscape, plaintiffs increasingly have targeted financial advisors. The plaintiffs' intentions, though, are not always transparent at the outset of litigation. Instead, plaintiffs' attorneys pursuing a post-closing breach of fiduciary duty action in a deal litigation against a board of directors attempt to lull financial advisors into a false sense of security by serving them with a subpoena, making them believe they are not a focus of the litigation, and coaxing them into providing extensive documents. Then, with just a few months left in the case schedule, sometimes near or after the close of discovery, the complaint will be amended to add the financial advisor as an additional defendant on an aiding and abetting theory.

In *RBC*—well known for affirming a more than $75 million damages award against the financial advisor—that is precisely the tactic the plaintiff employed. Doing so may have downplayed the risk the financial advisor believed it faced when responding to the subpoena and forced the financial advisor to quickly review and assess the discovery already taken in the case in order to develop a trial defense. One notable risk for a financial advisor is post-trial monetary liability for aiding and abetting breaches of fiduciary duty, even in a circumstance where monetary damages may not be available against directors because of a Section 102(b)(7) exculpatory provision barring damages for duty-of-care violations. Plaintiffs have continued to follow this blueprint in subsequent cases. Therefore, it is crucial that financial advisors identify this tactic early so that they have a greater opportunity to strategize and approach subpoena discovery with an eye toward the possibility of becoming a defendant.

Discovery in Appraisal Litigation

Plaintiffs' attorneys have even used appraisal litigation as an angle to ultimately reach financial advisors. In the current deal litigation landscape where pre-closing injunctions are rare, many plaintiffs' attorneys have complained that they no longer have access to the documents or deposition testimony they once received in expedited discovery as part of an injunction application. Stockholder plaintiffs therefore have gotten creative in their efforts to obtain discovery to challenge fiduciary conduct post-closing, including by seeking documents through appraisal proceedings.[4] By statute, parties to appraisal proceedings are limited and include stockholder petitioners and a respondent corporation. However, petitioners that seek appraisal typically obtain access to liberal discovery in preparation for the appraisal trial, which, in light of recent case law suggesting that deal price is often the best evidence of fair value,[5] usually includes discovery regarding the conduct of fiduciaries and financial advisors during the deal process. As Vice Chancellor J. Travis Laster explained recently in *In re Appraisal of Columbia Pipeline Group, Inc.*, where broad discovery about the merger process was sought, "[n]o one forced [respondent] to rely on the deal price as the principal evidence of fair value. Having chosen to advance that valuation argument, [respondent] opened the door to discovery into its sale process."

With this increased focus on deal process, it is perhaps

unsurprising that recent appraisal cases have also delved into perceived conflicts on the part of financial advisors. For example, in *In re Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, the Court of Chancery found that unaffected market price was the "most reliable" indication of fair value and also found what the court characterized as certain "defects" in the sales process, which included the seller's financial advisor seeking to "rehab" its strained relationship with the buyer instead of zealously advocating on its client's behalf. In *Blueblade Capital Opportunities LLC v. Norcraft Cos., Inc.*, the court declined to rely on the deal price as evidence of fair value, citing, among other things, its view that the sell-side advisor acted improperly by affirmatively dissuading potential buyers from coming forward to make a bid during a post-signing go-shop period.

Additionally, some petitioners will use the discovery obtained in an appraisal action to amend their pleading and add new claims on behalf of a stockholder class—for breach of fiduciary duty against the target board members, and aiding and abetting against the financial advisors or others. This creates the possibility that both the appraisal action and the classwide breach of fiduciary duty action may be tried simultaneously. Depending on when this happens, much like the approach stockholder plaintiffs are taking with subpoenas, stockholder plaintiffs can take steps in an appraisal action to leave a financial advisor rushing to catch up to develop a merits-based trial defense to an aiding-and-abetting claim for money damages.

Partial Settlements Excluding Financial Advisor Defendants

Stockholder plaintiffs have also used strategies to place financial advisor defendants at a disadvantage when negotiating a settlement. One such strategy involves the stockholder plaintiffs pressing for a partial settlement with the fiduciaries named in the lawsuit while excluding the financial advisor. The timing of such a partial settlement can create complications. For example, in *RBC*, the plaintiffs entered into a partial settlement with the fiduciary defendants mere days before trial. This significantly increased the financial advisor's burden at trial not only to defend itself against aiding-and-abetting claims but also to assume the mantle of arguing that no predicate breach of fiduciary duty had occurred. The Court of Chancery in *RBC* denied the financial advisor's motion to continue the trial. The plaintiffs in the *Good Technology* litigation also tried this tactic, but in that case the financial advisor reached a settlement on the eve of trial that was fully funded by the acquirer. The relevant terms of a financial advisor's engagement letter may have bearing on this type of partial settlement tactic. Even when the financial advisor is part of a pre-trial partial settlement, the court may still make post-trial findings about its perceived conflicts that have bearing on process-related issues, resulting in unwanted publicity. For example, in *In re PLX Technology Inc. Stockholders Litigation*, in addition to addressing the facts and claims against the remaining trial defendant, the court noted, regarding its views about the process, that the financial advisor's motivations appeared to have "influenced the [target company's] boardroom dynamic and therefore deserve mention." In particular, the court looked to the financial advisor's "contingent fee arrangement" and "longstanding and thick relationship" with the buyer as reasons why the financial advisor had "significant reasons to favor a near-term sale" to the buyer.

Takeaways

In light of the current deal litigation landscape, financial advisors should be prepared to respond and adapt to new stockholder plaintiff tactics in order to protect their interests.

- Plaintiffs' attorneys pursuing deal litigation are hyper-focused on financial advisor "conflicts," both in terms of disclosure claims and as the basis for claims of aiding and abetting and breach of fiduciary duty. Building a record of disclosing any potential conflicts to the board and client company in the transaction process and, where applicable, to stockholders voting to approve a transaction is one method for mitigating against such claims.

- Disclosures to stockholders in the deal litigation context are particularly important in light of the Delaware Supreme Court's decision in *Corwin v.*

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KKR Financial Holdings LLC, which requires a fully informed vote of disinterested, uncoerced stockholders before an irrebuttable business judgment presumption may apply. In *Singh v. Attenborough*, the Delaware Supreme Court affirmed the dismissal of an aiding-and-abetting claim against a financial advisor, holding that because "the stockholder vote was fully informed and voluntary, the Court of Chancery properly dismissed the plaintiffs' claims against all parties."

- When responding to a subpoena, financial advisors should keep in mind that the court may be less receptive to arguments about undue burden, in part because the court does not credit financial advisors as mere nonparties with marginal involvement in the dispute.
- Financial advisors also should be aware that even if they are not named as defendants at the outset of litigation, they could be named later on in the case. Accordingly, financial advisors should consider developing litigation strategies with their counsel early, before they are named as defendants, and approach subpoenas or other nonparty discovery (including potential objections as to privilege, relevance and scope) with that strategy in mind. Financial advisors should take these precautions not only in traditional deal cases alleging breaches of fiduciary duty but also in appraisal litigation.
- In addition to litigation strategy, financial advisors that are named as defendants also need to understand their indemnification and settlement rights and consider strategy around those rights as early as possible once litigation is filed.

ENDNOTES:

[1]"M&A Litigation Developments: Where Do We Go From Here?" Insights: The Delaware Edition (May 29, 2018); *see also* "Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation," Cornerstone Research (July 18, 2018) (reporting that "[t]he number of deals litigated in Delaware declined 81 percent from 2016 to 2017").

[2]*See, e.g., Vento v. Curry*, 2017 WL 1076725 (Del. Ch. Mar. 22, 2017) (requiring disclosure regarding the amount of financing-related fees the financial advisor for the acquiror stood to receive in connection with stock-for-stock merger).

[3]*Cumming v. Edens*, C.A. No. 13007-VCS (Del. Ch. July 12, 2018) (Transcript).

[4]Stockholder plaintiffs also have increasingly turned to Section 220 books-and-records requests for documents they can use to bolster post-closing breach of fiduciary claims for money damages relating to a merger or other transaction on behalf of a stockholder class. *See, e.g., Lavin v. West Corporation*, 2017 WL 6728702 (Del. Ch. Oct. 9, 2017).

[5]*See, e.g., Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1 (Del. 2017).

U.S. ANTITRUST AGENCIES INTRODUCE REFORMS TO SPEED UP MERGER REVIEWS

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The Trump Administration leadership at the U.S. Department of Justice and Federal Trade Commission have announced reforms regarding merger reviews. This article reviews these reforms and their strategic implications for merging parties. As described more fully below, there is good, bad, and unknown. The agencies' reforms will improve some merger reviews by reducing document and data requests and providing at least a soft commitment to published timeframes. The reforms may actually add burden in some circumstances, and they may have little impact for mergers with complex or significant competitive implications.