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Maryland Trial Court Refuses to Award Plaintiffs' Attorneys' Fees in Post-Merger Litigation

In an important ruling affecting the typical post-announcement merger litigation, Judge Crystal D. Mittelstaedt of the Circuit Court for Prince George's County, Maryland, recently rejected a request for plaintiff's attorneys' fees in connection with settlement of a purported class action suit against WSB Holdings, Inc., a Delaware corporation ("WSB Holdings"), its directors and Old Line Bancshares, Inc., a Maryland corporation ("Old Line"), that was filed shortly after Old Line announced its acquisition of WSB Holdings, the parent company of Washington Savings Bank.

The acquisition was announced on September 10, 2012, and the plaintiff's law firm issued the now routine press release the next day announcing an "investigation" into the approval of the acquisition by the Board of Directors of WSB Holdings. Suit was filed on September 27, 2012 (with the usual inadequate-price/unfair-process claims), the acquisition closed in May, 2013 and the litigation was settled in June, 2013, with no additional consideration for the stockholders of WSB Holdings and only minor revisions to the proxy materials.

On September 6, 2013, the plaintiff filed a motion for final approval of the class action settlement and an application for attorneys' fees and reimbursement of expenses amounting to $400,000. Old Line challenged the application for attorneys' fees and reimbursement of expenses, arguing that: "This lawsuit has, from the outset, been nothing but a baseless strike suit seeking to disrupt a bank merger under the guise of a class action and to pad the pockets of Plaintiff's counsel – without providing any value to the actual Plaintiffs."

Ruling from the bench, Judge Mittelstaedt, applying Maryland law, denied the request for attorneys' fees. Her Order Approving Class Action Settlement stated: "The Court finds that Class Counsel . . . is not . . . entitled to an award of attorneys' fees and costs. The amount awarded is $0.00." The Court declared that "one of the things that [was] really concerning for me, that made a big difference in terms of how I'm going to decide this case is the issue of whether this was a meritorious lawsuit filed." She noted that the initial complaint was filed "before there was any real reason for such filing" and that the amended complaint was filed only "after some initial disclosures." The plaintiffs' premature initial complaint alleged, among other things, that the Board of Directors of WSB Holdings "breached their fiduciary duties by agreeing to the Proposed Transaction for inadequate consideration." Accordingly, in her bench ruling, Judge Mittelstaedt "determine[d] that the lawsuit was not meritorious based on the timing of the filing and the lack of factual basis for it." She concluded that: "There was no benefit conferred . . . on the shareholders, based on this lawsuit."

It is well known that suits similar to the one filed against WSB Holdings and its directors have become common among plaintiffs' law firms. According to a report in February by Cornerstone Research (the "Cornerstone Report"), in 2012 shareholders nationwide "challenged 93 percent of merger and acquisition (M&A) deals valued over $100 million and 96 percent of transactions valued over $500 million." The Cornerstone Report also states that these types of lawsuits "were filed an average of 14 days after the merger announcement, with plaintiff firms sometimes announcing investigations within hours of the merger announcement."

The Daily Record, the business and legal newspaper in Maryland, recently quoted Olga Koumrian, a principal of Cornerstone and a co-author of the Cornerstone Report, as saying that the plaintiffs' lawyers recovered attorneys' fees in 90 percent of these types of shareholder lawsuits filed in 2012. According to the Cornerstone Report, the average agreed upon plaintiffs' attorneys' fees in the settlements related to 2012 transactions was $725,000. The attorneys' fees related to these suits have been described by one commentator as a "litigation tax." The leading treatise on Maryland corporation law notes that: "Settlements [of these types of suits] are often agreed to for no additional money for the stockholders but with just enough adjustments to the other terms or to the disclosure to justify a fee for the plaintiffs' lawyers, which must be approved by the court."

We are glad to see that courts in Maryland are recognizing this problem and are willing to rule against plaintiffs' lawyers who recruit plaintiffs based upon so-called "investigations" of major corporate transactions and challenge the terms and process in almost every significant M&A transaction with the hope of pressuring the parties to pay the plaintiffs' lawyers significant fees, without any additional consideration for the stockholders, not because the litigation has any merit but solely in order to end it so that the parties may consummate the transaction and allow their stockholders to receive the benefits.

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As always, we and our colleagues are available at any time to discuss these or other matters of Maryland law.

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