

Two Courts Deny Class Action Plaintiffs' Attempt to Claim Attorneys' Fees for "Causing" Renegotiated Merger Terms

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Two recent rulings in New York and Delaware denying motions by plaintiffs in a shareholder class action for attorneys fees should provide acquirers with comfort that they can negotiate changes to transaction terms without fear that the renegotiation will necessarily render them liable for attorneys' fees. *In re Bear Stearns Litig.*, Index No. 600780/08 (N.Y. Sup. Ct. Dec. 28, 2009); *Alaska Electrical Pension Fund v. Brown*, C.A. No. 2015 (Del. Jan. 14, 2010).

In the *Bear Stearns* case, the plaintiffs filed suit challenging the terms of an acquisition the day after it was announced, claiming that the consideration was inadequate. When the parties to the merger subsequently renegotiated its terms to increase the consideration, the class action plaintiffs sought attorneys' fees, claiming that their litigation had caused the parties to renegotiate the economic terms of the deal. Similarly, in *Alaska Electrical Pension Fund*, while the defendant agreed that the settlement of Delaware litigation played a role in the decision to increase the deal price from \$93 to \$100 per share, the defendant contested the claim of non-settling plaintiffs that their separate litigation in California played a role in the subsequent decision to raise the deal price to \$109 per share.

In both cases, the courts undertook a detailed factual analysis of the negotiations that led to the price increases and concluded that the participants in the negotiations were not motivated by the pending shareholder litigation to increase the price.

Members of the plaintiffs bar have come to view their claim to an attorneys fee in cases where the deal has been renegotiated almost as an entitlement. But these decisions demonstrate that in contested cases, where there is no settlement, courts will examine very closely claims that the pursuit of shareholder litigation have conferred a "substantial benefit" on a class. And although at least in Delaware, plaintiffs generally are afforded the benefit of a presumption that their litigation caused a benefit to the class, as the *Alaska Electrical Pension Fund* case demonstrates, that presumption can be rebutted

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