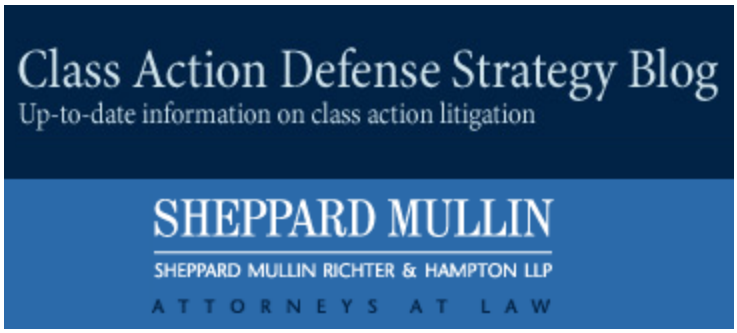

Class Action Defense Strategy Blog

Posted at 4:38 AM on April 21, 2010 by Sheppard Mullin

Delaware Chancery Court Dismisses Plaintiffs' Counsel In Merger Class Action, Challenging Credibility Of All Counsel In Connection With Proposed Settlement

By John Stigi and Jonathan Moss

In *In re Revlon, Inc. Stockholder Litigation*, Consol. C.A. No. 4578-VCL, 2010 WL 985732 (Del. Ch. Mar. 16, 2010), the Delaware Chancery Court dismissed a group of law firms that had been appointed to act as co-lead and liaison plaintiffs' counsel for a putative class of stockholders in an action challenging a corporate merger, and appointed new co-lead counsel with instructions to investigate the conduct of former counsel and the fairness of a proposed settlement negotiated by former counsel. This scathing decision from Vice Chancellor Laster highlights the critical importance for all attorneys of maintaining credibility and "reputational capital" with the Court when, among other things, seeking approval of a settlement of a class or derivative action.

In April 2009, Revlon, Inc.'s controlling shareholder, MacAndrews & Forbes Holdings Inc. ("M&F"), proposed a merger in which M&F would acquire 100% of Revlon's publicly traded Class A stock. Litigation ensured shortly thereafter. Four law firms that frequently represent stockholders immediately filed representative actions alleging impropriety by Revlon and M&F. The Court candidly referred to these firms as "Pilgrims," a nickname popularized by the local defense bar, for their reputation as early filers and early settlers of securities lawsuits. The Court consolidated the four cases and agreed to the representation structure proposed by plaintiffs' counsel.

Following the filing of the lawsuit, Revlon formed a Special Committee to evaluate the merger. However, the financial advisor hired to evaluate the deal, Barclays, would not render a fairness opinion. Thus, the Special Committee did not recommend the merger. To preserve the acquisition, the deal was repurposed as an exchange offer as opposed to a merger. Plaintiffs' counsel was brought in to "bless" the transaction — which they did — after making a few minor changes to the conditions of the transaction. Thereafter, the parties submitted a memorandum of

understanding ("MOU") to the Chancery Court which purported to document "vigorous" negotiations by plaintiffs' counsel and agreed to settle the suit based upon the supposed fairness of the exchange offer. On December 21, 2009, three new law firms filed representative actions challenging the exchange offer. The new plaintiffs moved to consolidate the cases and to replace the "Old Counsel" (a term used by the Court) who filed the original four lawsuits with "New Counsel."

The Court dismissed the original law firms as co-lead counsel. It criticized Old Counsel for failing to take legitimate discovery. The Court found that they fit the mold of entrepreneurial plaintiffs' counsel that spent little time on the case and settled early to maximize the firms' profits and avoid case investment. It also took issue with counsel's representations that they "vigorously" negotiated a resolution of the matter, finding instead that Revlon and M&F actually abandoned the merger because Barclay's would not offer a fairness opinion and that plaintiffs' counsel "literally did nothing." This excerpt from the Court's opinion speaks volumes:

> Having reviewed the record in the case to date, I conclude that the original plaintiffs' counsel failed to litigate the case adequately. Indeed, their advocacy has been non-existent. The memorandum of understanding to which they agreed raises serious questions about whether they focused foremost on the interests of the class, or instead settled on terms that would be easy gives for defendants while still arguably sufficient to support a release and a fee. Factual representations in the [MOU] appear inaccurate. When the defendants later wanted to amend a non-waivable majority-of-the-minority condition to effect a *de facto* waiver, original plaintiffs' counsel readily signed off. Then, when forced to defend their conduct and leadership role, original plaintiffs' counsel approached the concept of candor to the tribunal as if attempting to sell me a used car. Taken as a whole, their actions have undermined my confidence in their ability to provide adequate representation going forward. I am therefore replacing them with new lead counsel.

The Court instructed New Counsel to conduct confirmatory discovery into the fairness of the proposed settlement. It required the new firms to conduct discovery into the degree of negotiation performed by Old Counsel and the accuracy of the factual recitations in the MOU. The Court also expressed some consternation over the conduct of defense counsel, insofar as defense counsel was willing to tolerate sham representations in the MOU and in declarations submitted by Old Counsel.

The Court clearly was concerned about the specter of collusive, lawyer-driven settlements in representative stockholder litigation, and was offended by the lack of candor by counsel in this case. Because of this decision, defendants and their counsel can expect plaintiffs' counsel to act more vigorously in prosecuting claims and to take more aggressive positions in settlement negotiations. The decision also reminds all counsel to ensure that representations contained in settlement agreements are accurate.