



Int'l Brotherhood—Reduction of Merger Litigation Risk by Massachusetts Supreme Court

Posted by David J. Berger, Wilson Sonsini Goodrich & Rosati, on Thursday, March 30, 2017

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The recent decision by the Massachusetts Supreme Judicial Court in *Int'l Brotherhood of Electrical Workers Loc. No. 129 Benefit Fund v. Tucci* has the potential to significantly reduce merger litigation for publicly traded companies incorporated in Massachusetts. The decision, arising out of the Dell/EMC transaction, held that because directors of a Massachusetts company generally owe fiduciary duties only to the corporation and not directly to shareholders, a claim that the price paid in a merger is too low may only be brought as a derivative claim, not as a direct claim.

As part of its ruling, the court specifically rejected the plaintiffs' argument that "shareholders claiming the loss of their stock at an unfair price on account of allegedly improper actions by the board of directors is a direct rather than a derivative claim."¹ The court's holding means that Massachusetts law differs fundamentally from Delaware law on the scope of a director's fiduciary duties (and corresponding risk of liability), especially in the merger context. As a result of this decision, a shareholder of a Massachusetts corporation generally does not have a direct claim that the price paid in a merger is too low, or that the process employed by the board—even if unfair—causes direct injury to the shareholder.

The factual context of the litigation will seem very familiar to those who follow M&A litigation. On October 12, 2015, EMC announced that it had entered into an agreement to be acquired by Dell for \$24.05 per share in cash and a fractional share of a new "tracking stock" to be issued by Dell, for a total deal value of approximately \$67 billion. Within days of the deal's announcement, nine lawsuits were filed in Massachusetts state court challenging the decision by the EMC board to approve the merger.² Shortly thereafter, the cases were consolidated, and EMC moved to dismiss.

The lower court granted EMC's motion, holding that the board owed no fiduciary duty directly to the stockholders and that the action was necessarily derivative because the harm alleged was merely harm to the corporation. In particular, the court found that because there was no allegation that any EMC shareholder would receive any more per share than any other shareholder, nor were there any allegations that a shareholder (or group of shareholders) controlled the

¹ *Int'l Brotherhood of Electrical Workers Loc. No. 129 Benefit Fund v. Tucci*, SJC-12137 (Mass. Mar. 6, 2017), slip. op. at 18

² *Id.*, slip. op. at 4-6. EMC was a Massachusetts corporation. *Id.*

corporation or the vote, the claim that the price paid for the corporation's assets was too low was derivative.³ Accordingly, the lower court dismissed the complaint.

On appeal, the Massachusetts Supreme Judicial Court described the legal issue as whether “shareholders who challenge the fairness or validity of a proposed merger on the ground that it will effectively result in the sale of...their stock holdings for an inadequate price must bring their claim against the directors as a derivative action on behalf of the corporation or may bring it directly on their own behalf.”⁴ In concluding that the claim was derivative, the court held that “the general rule of Massachusetts corporate law is that a director of a Massachusetts corporation owes a fiduciary duty to the corporation itself, and not to its shareholders.”⁵ The court ruled that the alleged harm—that the corporation was being sold for less than it was worth—was an injury to the corporation and would impact each shareholder proportionally depending upon the number of shares owned. As such, the case was clearly derivative, not direct.

The court specifically rejected the plaintiffs' argument that Massachusetts should follow Delaware law on this issue. In rejecting that argument, the court noted that Massachusetts' corporate code differed from Delaware's General Corporation Law, and that Delaware “has a history of asserting that directors stand in a fiduciary relation to stockholders of the company, in contrast to [Massachusetts] precedent.”⁶ The court also rejected the plaintiffs' arguments, based in equity, that the ruling would impede stockholders' ability to challenge merger-related breaches because stockholders lose standing to pursue derivative claims after closing. The court noted that stockholders would be required to follow the statutory procedures governing derivative claims, including the requirement that the stockholder first allow the corporation the opportunity to determine whether pursuit of claims is in the best interests of the corporation, and that any pursuit of claims would have to be done within this framework—which will likely limit a stockholder's ability to challenge merger-related conduct in the future.

The potential impact of this decision could be very significant. At present, Delaware is the dominant domicile for most companies in the country, especially public companies. At the same time, in recent years, many companies have begun to consider alternative forums and jurisdictions, while numerous states, including (among others) Massachusetts, North Carolina, New Jersey, and Nevada have attempted to establish new business courts as part of an effort to challenge Delaware's dominance and attract companies to incorporate in their states.

While Delaware's courts have taken a number of actions to decrease the prevalence of nuisance lawsuits challenging mergers of Delaware corporations, which has led to a decrease in the number of merger related lawsuits filed in Delaware, the decision by the Massachusetts Supreme Judicial Court in *Tucci* goes a step further by largely eliminating the ability of shareholders to file direct claims challenging either the price or process in a public company merger, assuming that the target company is not a controlled company. As such, the decision has the potential to more dramatically reduce the prevalence of merger related litigation in Massachusetts.

³ *Id.* at 7

⁴ *Id.* at 8

⁵ *Id.* at 15-16. The court noted that there are few exceptions to this general rule, including the controlling shareholder situation mentioned above as well as situations involving a closed corporation.

⁶ *Id.* at 18-19.