

D&O INSURANCE: LIMITING ATTORNEYS' FEE AWARDS IN DERIVATIVE SUITS

Angelo G. Savino • 212.908.1248 • asavino@cozen.com
Richard J. Bortnick • 610.832.8357 • rbortnick@cozen.com
Stephanie P. Gantman • 215.665.2116 • sgantman@cozen.com

On May 6, 2010, the Delaware Court of Chancery approved the settlement of a derivative action captioned *In re Cox Radio, Inc. Shareholders Litigation*, No. Civ. A. 4461-VCP, and ruled on plaintiffs' attorneys' application for a fee award. The court's decision on the fee award may have a material impact on directors and officers ("D&O") insurers' coverage analysis with respect to such awards.

Cox was a derivative class action brought by plaintiff shareholders alleging breaches of fiduciary duties in connection with a tender offer by the controlling shareholder of defendant Cox Radio, Inc. Plaintiffs alleged that defendants breached their fiduciary duties by offering inadequate consideration and making misleading disclosures. Such cases are frequently referred to as "bump up" cases because they seek additional consideration for, or a "bump up" in, the price of the stock. Approximately one month after the suit commenced, the case settled for over \$16 million in additional merger consideration. Defendants also agreed to provide significant additional disclosures about the transaction at issue. The court attributed the "bump up" to: (i) market forces, (ii) the efforts of a special committee that negotiated with the buyer, and (iii) the litigation. In light of the additional consideration provided, plaintiffs sought an award of attorneys' fees and costs amounting to \$3.6 million (21 percent of the "bump up"). In turn, defendants contended that the fees and expenses should be capped at \$490,000.

Faced with this dispute, plaintiffs filed a motion seeking: (i) class certification, (ii) approval of the settlement, and (iii) an award of attorneys' fees and costs in the amount of \$3.6 million. Defendants responded that they did not oppose class certification and agreed that the settlement should be

approved by the court because it met the entire fairness standard. Defendants also acknowledged that plaintiffs were entitled to attorneys' fees and costs, but objected to the amount of the fee award as an unreasonable request and argued that it should be limited to \$423,598, plus expenses.

In ruling on plaintiffs' motion, the court agreed that the class should be certified and that the settlement award was reasonable and fair to class members. As such, it approved those portions of plaintiffs' motion.

On the other hand, the court denied plaintiffs' fee award request, finding that it was unreasonable relative to the size of the modest benefit conferred on the class and the amount of time spent on the case given the early settlement. Significantly, the court appeared to recognize that attorneys' fees represent a portion of the additional merger consideration, noting that "fee awards in cases involving a bump in the consideration paid to shareholders are based on a percentage of the increased consideration." In addition, the court observed that defendants' contention that the fee award should be no greater than 2.52 percent of the "bump up" amount had merit. In this regard, the court stated that defendants' formulation was based on an analysis of each and every "bump up" case over the last decade pursuant to which defendants paid increased consideration of between \$10 million and \$40 million as part of a settlement. In nine of those cases, the fee award ranged from 1.3 percent to 4.97 percent. While plaintiffs' counsel countered that all but two of these cases were decided more than six years ago, the court noted that two more recent cases involved awards of 2.41 percent and 3.96 percent – far less than the 21 percent sought by plaintiffs' counsel. The court found defendants' statistical analysis persuasive and awarded

plaintiffs \$1,010,450 in attorneys' fees, or approximately 6 percent of the consideration "bump up," plus expenses in the amount of \$66,588.

Defendants' analysis of other comparable cases and the court's conclusion concerning the amount of the fee award provide D&O insurers with tools to evaluate the reasonableness of fee awards for which insureds seek coverage or consent. Additionally, because many D&O policies do not include increased consideration for the price of stock as insurable "loss" or, alternatively, contain specific exclusions that bar coverage for such amounts, the court's statements may provide

support for an argument that the attorneys' fee award, like the settlement amount, is not covered by a D&O policy. As such, insurers should be mindful of the *Cox* decision when faced with "bump up" or similar claims.

Cozen O'Connor is a global leader in representing the insurance industry in all coverage areas. For further analysis of coverage issues involving this case or D&O coverage issues, please contact Richard Bortnick, in our West Conshohocken office, (rbortnick@cozen.com, 610.832.8357), Angelo Savino, in our New York office (asavino@cozen.com, 212.908.1248), or Stephanie Gantman, in our Philadelphia office (sgantman@cozen.com, 215.665.2116).