Client Alert.

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Delaware Supreme Court Weighs In On Methodology for Attorneys' Fees Award in Shareholder Derivative Litigation

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On Monday, the Delaware Supreme Court affirmed a $2 billion judgment by Delaware Chancellor Strine in the Grupo Mexico/Southern Peru shareholder derivative litigation. The Supreme Court also affirmed Chancellor Strine's attorneys' fees award of more than $300 million. This ruling has implications for future attorneys' fee awards in Delaware derivative actions.

The litigation arose from Southern Copper's 2005 acquisition of Minera Mexico. The plaintiff alleged that the acquirer's controlling shareholder, Grupo Mexico, and directors of the acquirer breached their fiduciary duty of loyalty by causing the company to purchase Minera (which also was controlled by Grupo Mexico) for more than it was worth.

One of the issues raised on appeal was the propriety of the award of attorneys' fees, which gave the plantiffs' counsel more than $35,000 per hour worked and 66 times the value of their time and expenses. (The plaintiffs had sought 22.5% of the $2 billion judgment, and Chancellor Strine awarded them 15%.)

The Court discussed two methods of calculating fee awards in so-called "common fund" cases (*i.e.*, where a fund is created for the common benefit of those other than just the litigant): (1) the percentage of the fund method and (2) the lodestar method. Under the percentage of the fund method, courts determine fees based on a "reasonable percentage of the common fund." The lodestar method multiplies "reasonable" hours spent against a "reasonable" hourly rate to calculate a "lodestar," which is adjusted through a "multiplier" to account for "factors such as the contingent nature of the case and the quality of an attorney's work."

The Court reviewed the history of the two approaches and noted that "the vast majority of courts of appeals now permit or direct courts to use the percentage method in common-fund cases." The Court then affirmed its thirty-year-old decision in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980), explicitly disapproving of the Third Circuit's lodestar method. The Court reaffirmed that Delaware courts should consider and weigh five factors in awarding attorneys' fees: (1) the results achieved; (2) the time and effort of counsel; (3) the relative complexities of the litigation; (4) any contingency factor; and (5) the standing and ability of counsel involved.

The Court rejected the defendants' argument that Chancellor Strine was required to cross-check the fee award against the implied hourly rate. Instead, the Court found that Chancellor Strine properly applied the *Sugarland* factors. The Court identified an award of 33% of the common fund as "the very top of the range of percentages," but noted that in the settlement context, Delaware courts tended to award 10-15% when cases settle at early stages and 15-25% when cases settle after "meaningful litigation efforts." The Court observed that the average amount of fees awarded when derivative and class actions settle for monetary and corporate governance changes was 23-25% and that "higher percentages are warranted when cases progress to a post-trial adjudication." Taking these points into consideration, the Court found that

Chancellor Strine's percentage award—15% of the amount recovered or $304 million—was a reasonable exercise of discretion.

The Court's endorsement of the percentage of the fund method could affect the dynamics of how those cases are litigated, as well as plaintiffs' posture toward settlement. Plaintiffs—and plaintiffs' lawyers—may seek monetary recovery through common funds (instead of seeking changes relating to corporate governance). The ruling also may further incentivize plaintiffs to challenge, and to litigate, more "meaningful" high-dollar deal cases.

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