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SHOULD BANKS SETTLE WHEN THEY ARE HIT WITH AN M&A LAWSUIT?

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In virtually every transaction involving a publicly traded entity these days, a purported shareholder class action challenging the fairness of the merger has become almost inevitable. While these actions ostensibly seek monetary relief, such as an increase in the merger consideration, most of them ultimately settle on terms that call for some additional disclosures to the shareholders in advance of the vote on the transaction, and, of course, an attorneys fee award for the plaintiffs' lawyers. There are two primary reasons for these settlements. First, the risk, however small, of having a large transaction enjoined or otherwise disrupted is often seen as outweighing the relatively minimal nature of the settlement relief. Second, a settlement is not without its benefits, as, once approved by the Court, the settling defendants can obtain a full and complete release of any claims that were or could have been brought by the shareholders in connection with the merger transaction. So long as these two dynamics remain in place, the settlement of the majority of these merger and acquisition cases will continue to be the norm. The Courts, however, particularly in Delaware, have begun to show a healthy skepticism about the plaintiffs lawyers' application for fees in these cases. Ultimately, it will be the plaintiffs lawyers' ability to obtain a profitable fee award that will determine the extent to which these cases remain so prevalent.

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