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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

With Goldman, Bain Out, PE Players Pressured To Cut Deals

By **Kaitlyn Kiernan**

Law360, New York (June 13, 2014, 3:37 PM ET) -- Bain Capital Partners LLC and Goldman Sachs Group Inc.'s agreement to pay a combined $121 million to resolve claims they plotted to suppress prices in leveraged buyouts before the financial crisis might drive five other PE heavyweights also accused in the case to the bargaining table ahead of November's trial.

With fewer parties left liable, this week's settlement might pressure the other firms still named in the antitrust case — which include some of private equity's largest players — to seek a settlement to avoid being left holding the bag for an outsized portion of the damages a guilty verdict could carry at trial, experts say.

"The potential exposure for the remaining defendants might be bigger than before because of the way treble damages are calculated," said Thomas F. Bush, a partner inEdwards Wildman Palmer LLP's antitrust practice.

An old element of case law makes it standard to deduct partial settlement amounts only after calculating the enhanced damages, rather than before — resulting in a higher total divided among fewer parties.

After six years of litigation and a handful of dismissals, Blackstone Group LP, Carlyle Group LLC, KKR & Co. LP, Silver Lake Partners and TPG Capital LP are all that remain in the shareholder suit accusing them of holding back from competition in some of the pre-financial crisis era's largest club deals, including a $21 billion deal for hospital chainHCA Holdings Inc. and the $5.1 billion purchase of high-end retailer Neiman Marcus Group.

With the plaintiffs claiming damages that run into the billions, that would likely mean these initial settlements are just a drop in the bucket, some experts say.

"Those who tend to settle early and first tend to get the better deal," said Gregory Asciolla, co-chair of the antitrust and competition litigation practice at Labaton Sucharow LLP Asciolla.

To be sure, the parties might have secured a joint defense agreement provision early in the process to avoid the troubling trebling calculation, said Kent S. Bernard, an adjunct professor at Fordham University School of Law. "But if they didn't, everyone better try to settle tomorrow," he said.

Another motivation to settle is a desire to avoid the exposure of embarrassing or damaging evidence

that would come with a trial.

“What we learned during the financial crisis is that a lot of people who should know better are very indiscreet in their emails,” Bernard said.

Some emails already named in the suit appear very damaging to some of the remaining defendants, experts say. For instance, an excerpt of an email from Blackstone Chief Operating Officer Tony James to KKR co-founder George Roberts allegedly said, “Together we can be unstoppable, but in opposition we can cost each other a lot of money.”

And that’s where another aspect of the Bain Capital and Goldman Sach settlements could work against the other defendants. In addition to making big cash payouts, both parties agreed to cooperate in the authentication of documents for trial.

“Even the admissibility of evidence has become a contentious point where so much of the evidence relies on electronic exchanges,” said Labaton’s Asciolla.

Still, a lot is pegged on a pending motion for class certification. Until that motion is resolved, some say the plaintiffs won’t have much motivation to settle further.

“The momentum is now on the plaintiffs’ side,” said Asciolla. “What was before a united front is now fractured.”

The proposed class first filed a motion to certify in October, with the defendants filing a second reply last month. The proposed class includes shareholders in eight different companies taken private by the defendants, including TXU Corp. — target of the biggest leveraged buyout ever, which has since become one of the biggest bankruptcy cases ever.

The defendants argue the proposed class has little in common given that they were shareholders of vastly different companies from unrelated transactions that took place at different times over a five-year period.

Additional settlements might emerge depending on how the oral arguments around the motion for class certification shake out, experts agree.

Until then, the added cash if the settlements are approved could infuse additional vigor into their campaign against the remaining defendants by giving them the funds to do so, Bernard said.

Overall, “the settlements are very helpful to the plaintiffs’ case,” said Harry First, a professor and co-director of the competition law program at New York University School of Law. “It makes it harder for those who initially stayed out of settlement to continue to stay out.”

The plaintiffs are represented by Robbins Geller Rudman & Dowd LLP, Scott+Scott LLP and Robins Kaplan Miller & Ciresi LLP.

Bain Capital is represented by Jones Day and Kirkland & Ellis LLP.

Goldman Sachs is represented by Ropes & Gray LLP and Sullivan & Cromwell LLP.

The remaining defendants are represented by Simpson Thacher & Bartlett LLP, Mintz Levin Cohn Ferris Glovsky & Popeo PC, Willkie Farr & Gallagher LLP, Hunton & Williams LLP, Susman Godfrey LLP and Weil Gotshal & Manges LLP, among others.

The case is Kirk Dahl et al. v. Bain Capital Partners LLC et al., case number 1:07-cv-12388, in the United States District Court for the District of Massachusetts.

--Editing by Kat Laskowski and Philip Shea.
