

consideration, 2006 cases for inclusion in our 2006 annual survey. We are asking all members of the Committee to send to us significant judicial decisions for possible inclusion in the survey. Submissions can be sent by email either to Scott Whittaker at [swhittaker@stonepigman.com](mailto:swhittaker@stonepigman.com) or to Jon Hirschhoff at [jhirschhoff@fdh.com](mailto:jhirschhoff@fdh.com). You may fax cases to Scott at (504) 596-0836 or to Jon at (203) 325-5001. Please state in your email or on the fax cover sheet why you believe the case merits inclusion in the survey.

The first criterion for inclusion is that the decision must involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control. The second criterion is that the decision must (i) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement or standstill agreement), (ii) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (iii) pertain to a successor liability issue, or (iv) decide a breach of fiduciary duty claim. We are currently excluding cases dealing with federal law, securities law, tax law, and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant please send it, even if it does not meet the foregoing criteria.

### **Decision to be Discussed at the Dallas Committee Meeting**

***Halliburton Company Benefits Committee v. Graves*, 2006 WL 2499142 (5<sup>th</sup> Cir. August 30, 2006).**

In the Summer 2005 issue of *Deal Points*, we reported on the District Court opinion in *Halliburton Company Benefits Committee v. Graves*, 2004 WL 2938645 (S.D. Tex. Dec. 20, 2004). See also *Annual Survey of Judicial Developments Pertaining to Mergers and*

*Acquisitions*, 61 BUS. LAW. 987, 988 (2006). That opinion, in which the United States District Court for the Southern District of Texas enforced a provision of a merger agreement that obliged the buyer to continue the acquired company's benefit programs for its retirees, was recently affirmed by the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit opinion has such important implications for M&A practice that it merits discussion at the Committee meeting in Dallas.

Halliburton Company agreed, in a 1998 merger agreement governing the merger of Dresser Industries, Inc. into a wholly owned subsidiary of Halliburton, to maintain the Dresser *retiree* medical plan except to the extent modifications were consistent with changes in medical plans provided by Halliburton and its subsidiaries to *active* employees.

Five years after the merger, Halliburton, acting through its plan administrator, amended three subplans of the Dresser retiree medical program, with the goal of achieving parity for all Halliburton and Dresser retirees. The amendments were not consistent with changes in plans for active employees, as contemplated by the merger agreement. The Halliburton Benefits Committee then initiated a declaratory judgment action seeking declarations that the amendments were permissible and did not violate the merger agreement or the Halliburton welfare benefits plan or ERISA, and that the merger agreement did not limit Halliburton's right to amend or terminate the Dresser retiree medical program. Dresser retirees filed counterclaims and third party claims.

An issue central to both the district court and the Fifth Circuit opinions was whether the merger agreement could operate as an amendment of the Dresser plan. The Fifth Circuit held that under ERISA, an amendment to an ERISA plan need not be labeled as such, and that any act directed to a provision of an ERISA plan may be deemed to constitute a plan amendment. Thus the merger agreement could amend the Dresser plan, as

long as it complied with any procedures for amendment specified in the Dresser plan.

As to conformance with specified procedures for amendment, Halliburton argued that the plan provided that it could be amended by “written instrument signed by the Vice President, Human Resources,” and that since the merger agreement was not signed by that officer, it did not comply with the plan’s specified procedures for amendment. The Fifth Circuit gave that argument short shrift, pointing out that the merger agreement was signed by Dresser’s Chief Executive Officer and Chairman, and approved by the Dresser Board of Directors. The fact that authority to amend had been delegated to the Vice President, Human Resources, did not mean that the company, acting through a more senior officer and the directors, could not amend the plan without the signature of that officer.

Halliburton also argued that the Dresser retirees could not enforce, as third party beneficiaries, the provision of the merger agreement that amended the Dresser plan, due to a provision in the merger agreement that Halliburton contended prohibited third party beneficiary enforcement. The court of appeals stated that this position “wrongfully equates a plan participant’s enforcement of a plan right under ERISA with a third party’s enforcement of a provision in a contract.” 29 U.S.C. sec. 1132(a)(1)(B) specifically permits a participant or beneficiary under ERISA to bring a civil action to enforce his rights under the plan or to clarify his rights to future benefits under the terms of the plan. Such enforcement, the court held, “falls exclusively in ERISA’s remedial scheme.”

Like *Prouty v. Gores Technology Group*, 18 Cal. Rptr. 3d 178 (Cal. Ct. App. 2004), discussed in our 2004 survey, *see* 60 BUS. LAW. 843, 847-49 (2005), *Halliburton* raises the question whether employees (in *Halliburton*, retired employees) of the target company can claim benefits under an acquisition agreement. But unlike *Prouty* (which held that certain target company employees could

enforce the acquisition agreement as third party beneficiaries), the *Halliburton* decisions suggest that to the extent employees are enforcing rights under ERISA, the ERISA remedial scheme is exclusive, so that the question whether the employees have third party beneficiary rights under the acquisition agreement becomes irrelevant. Thus, if an acquisition agreement can be read to create obligations of the buyer with respect to an ERISA plan of the target company, it will be difficult, and perhaps impossible, to avoid the possibility that employees of the target company can enforce the buyer’s obligations – not through third party enforcement of the acquisition agreement, but through the remedial scheme of ERISA. In light of *Halliburton*, M&A practitioners who are involved in drafting acquisition agreement provisions pertaining to the buyer’s post-closing handling of an ERISA plan of the target company might want to consider language to the effect that those provisions are not intended by the parties to constitute a plan amendment or to create any obligations of the buyer with respect to the target company ERISA plan.

### **Judicial Interpretations Working Group**

The Judicial Interpretations Working Group met during the Committee’s August 2006 meeting in Honolulu, Hawaii. Attendees at that meeting discussed the status of the work of the teams that have been formed to research and prepare memoranda pertaining to the jurisprudence interpreting more than 20 different provisions of M&A agreements and ancillary documents. We discussed at length the memorandum prepared by Arman Kuyumjian and John Cermak on the potential liability of a third party bidder for tortious interference with acquisition agreements, exclusivity agreements and letters of intent. A report on that memorandum was presented by Arman and John at the Committee meeting in Honolulu. We also discussed potential new projects, including an initiative to create an area on the Committee website, where the memoranda created by members of the Judicial Interpretations