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M&A Litigation in Delaware After 'Trulia'

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By now, virtually every Delaware practitioner, adviser to companies incorporated in Delaware, and observer of Delaware law and practice is aware of the recent Delaware Court of Chancery decisions criticizing and arguably doing away with the once standard practice of settling lawsuits challenging mergers and acquisitions (M&A) transactions through "disclosure-only" settlements. This article addresses what we can anticipate in Delaware practice following these important decisions.

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Long accepted in Delaware (and in courts throughout the country), "disclosure-only" settlements were common in lawsuits brought by stockholders of a corporation sold in an M&A transaction. These lawsuits alleged that directors of the seller breached their fiduciary duties in connection with the sale price and process and through allegedly deficient proxy materials provided to stockholders in connection with their vote on the deal. In disclosure-only settlements, the seller would agree to provide additional disclosures in advance of the stockholder vote on the transaction. As part of these settlements, all defendants typically would obtain the benefit of a broad release of liability of all claims and potential claims (not limited to disclosure claims), and the plaintiff lawyers would typically obtain a fee for obtaining a benefit for the putative class of stockholders in the form of the additional disclosures (whether helpful to stockholders or not). Many M&A participants came to view these fees as a customary "deal tax" required to be paid by the buyer as part of the transaction price.

Criticism of disclosure-only settlements from the Chancery Court has been building for years, beginning perhaps with then-Chancellor Leo E. Strine Jr.'s rejection of a proposed disclosure-only settlement in the *In re Transatlantic Holdings Shareholders Litigation*, C.A. 6574-CS (Feb. 28, 2013),case in 2013. More recently, decisions in *Acevedo v. Aeroflex Holding*, C.A. No. 9730-VCL, *In re Riverbed Technology Stockholders Litigation*, C.A. No. 10484-VCG (Del. Ch. Sept. 17, 2015), *In re Susser Holdings Shareholder Litigation*, C.A. No. 9613-VCG (Del. Ch. Sept. 15, 2015), *In re Aruba Networks Stockholder Litigation*, C.A. No. 10765-VCL (Transcript Ruling, Oct. 9, 2015), and *In re Silicon Image Stockholders Litigation*, C.A. No. 10601-VCG, reflected the Chancery Court's deep skepticism of disclosure-only settlements. While acknowledging that Delaware law

had for years permitted this very practice, these decisions questioned the propriety of allowing counsel for a single stockholder or group of stockholder plaintiffs—who, with the promise of a significant fee award, are incentivized to reach a prompt settlement with minimal litigation expense—to bargain away the right of absent class members to bring any claim relating to the deal. These decisions also questioned the benefit to the putative class, who typically received only minimal additional disclosures that in some cases were of questionable materiality. Chancellor Andre G. Bouchard's recent *In re Trulia Shareholder Litigation*, C.A. No. 10020-CB,decision is the latest, and most definitive, pronouncement that disclosure-only settlements with broad releases are unlikely to be approved in Delaware. After *Trulia*, settlements reached on the basis of additional disclosures will only be approved if the disclosures "address a plainly material misrepresentation or omission," and the releases granted in connection with the settlement are limited to disclosure claims and other breach of fiduciary duty claims concerning the sale process that have been investigated sufficiently.

So what's next? First, we may see a drop in Delaware of the kind of reflexive M&A challenges filed in the immediate wake of an announced deal that had until recently been common in the state. For years, more than 90 percent of significant M&A transactions were challenged in litigation, most of which was filed in Delaware. Without the prospect of a relatively quick disclosure-only settlement and the plaintiff attorney fee award, we already appear to have seen a stark decrease in the number of these lawsuits filed in Delaware. For example, one study recently found that, in the last quarter of 2015, only 21 percent of deals resulted in stockholder litigation. It remains to be seen whether this sharp decline will stabilize—indeed, as discussed below, there is sound reason to believe M&A litigation filings will continue apace in Delaware—but it appears at least some plaintiffs lawyers have not been filing the kind of lawsuits that were commonplace just last year.

Second, while the overall number of M&A cases may drop, we may see an increased shift in this kind of litigation to jurisdictions outside Delaware, where courts may be more willing to approve disclosure-only settlements. The same study backs up this trend, finding a 10 percent drop between 2014 and 2015 in the percentage of cases with a Delaware connection that resulted in lawsuits filed in Delaware. Another factor that may impact this trend is whether Delaware companies will continue to adopt (or revoke) forum selection clauses that push M&A litigation to Delaware. Given that companies and their directors can no longer rely on a speedy resolution of fiduciary duty litigation arising out of mergers in Delaware, directors of Delaware corporations will likely give careful thought to the utility of these forum selection bylaws.

Third, M&A litigation certainly is not going away, despite these decisions. But what may change is the manner in which these cases are litigated. For example, we may see a spike in cases in which companies proactively make additional disclosures in response to alleged proxy deficiencies, with stockholder plaintiffs then dismissing their lawsuits and their lawyers seeking a mootness fee. Bouchard anticipated this development in *Trulia*, noting that one benefit of this approach is that "defendants are incentivized to oppose fee requests they view as excessive," creating an adversarial process that facilitates the court's evaluation of the materiality of the supplemental disclosures. Moreover, we may see an increase in litigation that proceeds after the closing of the transaction—which would likely mean suits that are more heavily litigated and expensive than the typical litigation resolved through a disclosure-only settlement. Vice Chancellor John Noble's recent post-closing decision in *Doppelt v. Windstream*, C.A. No. 10629-VCN (Del. Ch. Feb. 5, 2016), in which he denied the defendants' motion to dismiss disclosure claims relating to a spin-off transaction, is one example of the type of litigation that may increase.

Whatever the result of these recent decisions, they demonstrate once again that the Delaware Court of Chancery remains at the forefront of corporate law and M&A litigation.

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