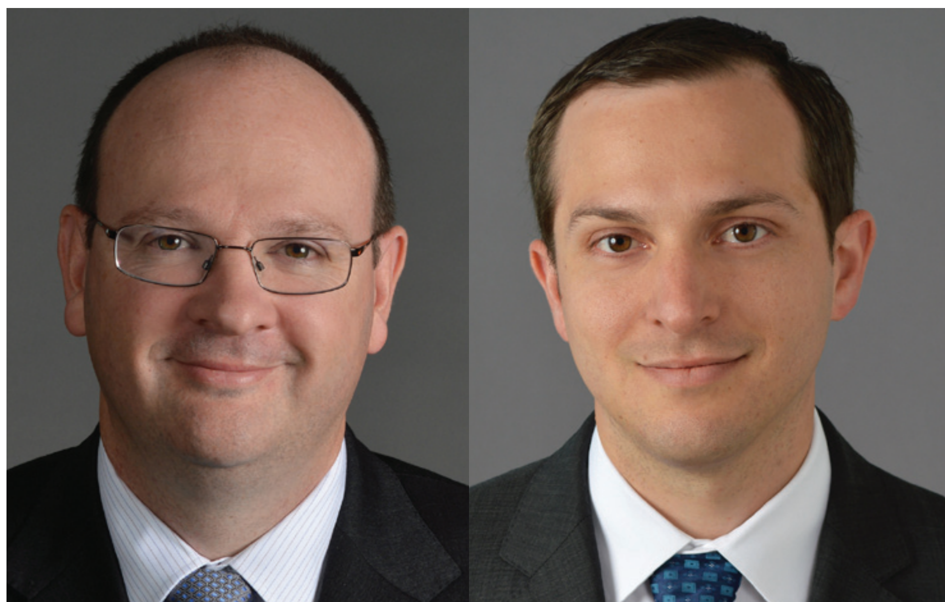
DELAWARE BUSINESS COURT INSIDER

April 27, 2016 An ALM Website

Deal Litigation After 'Trulia'

By Paul J. Collins and Michael J. Kahn

By now, virtually every lawyer who litigates merger cases knows that the "disclosure-only settlement" is either dead or at least on life support in Delaware following several recent decisions rejecting such settlements, including *In re Trulia Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016), *In re Aruba Networks Stockholder Litigation*, C.A. No. 10765-VCL, transcript op. (Del. Ch. Oct. 9, 2015), and *Acevedo v. Aeroflex Holding*, C.A. No. 9730-VCL, slip. op. (Del. Ch. July 8, 2015). And few would say, given the ubiquity with which merger cases have been pursued in recent years, that the "deal tax" that most such settlements represented will be missed. There are, however, likely to be several consequences, both intended and otherwise, that leave the typical defendants in merger litigation subject to the same "perverse incentives" that the Delaware Court of Chancery is attempting to eradicate.



Paul J. Collins and Michael J. Kahn

In *Trulia*, Chancellor Andre G. Bouchard declined to approve a disclosure-only settlement of litigation challenging Zillow Inc.'s 2015 stock-for-stock acquisition of Trulia Inc., finding based on the limited record that the defendants' "give" in the form of supplemental disclosures to the parties' joint proxy statement was inadequate to support the "get" of broad releases from the proposed settlement class of "'any claims arising under federal, state, statutory, regulatory, common law, or other law or rule' held by any member of the proposed class relating in any conceivable way to the transaction."

Following a lengthy discussion of the parties' incentives in settling merger cases on a disclosure-only basis, and the courts' frequently limited ability to review the fairness of the terms of such settlements to absent class members, Bouchard noted that, absent a settlement, there are two options to resolve disclosure claims: litigating a motion for preliminary injunctive relief and supplementing disclosures voluntarily followed by a potential mootness fee application by plaintiffs' lawyers. In either case, defendants would not obtain a release and "to the extent fiduciary duty claims challenging the sales process remain in the case, they may be amenable to dismissal" on a Rule 12 motion. Although the court did not rule out the viability of disclosure-only settlements given an appropriate record—and the court approved such a settlement in *In re BTU International*, C.A. No. 10310-CB, transcript op. (Del. Ch. Feb. 18, 2016), just weeks after *Trulia*—Bouchard warned that "practitioners should expect that

disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process."

The court's new rubric has several practical implications, not all of which may have been anticipated. First, by requiring only "plainly material" supplemental disclosures as a price for obtaining a release, plaintiffs may pass on some marginal cases—but they might also bring more cases (and certainly the marginal ones) in jurisdictions where the settlement standard is lower and the hurdle to dismissal on a pleading motion is higher. Indeed, although the number of merger cases filed in Delaware is down since the court began applying greater scrutiny to disclosure settlements, there is evidence that at least some of those cases are being brought elsewhere.

Anticipating this, Bouchard, in *Trulia*, noted that Delaware companies have the option to adopt bylaws requiring such suits to be filed in Delaware. That option may not always be attractive, however, given that ISS or other proxy advisory firms are not entirely on board with exclusive forum bylaws and ISS, in particular, has stated that it will evaluate such bylaws—and the boards that adopt them—on a case-by-case basis. Moreover, it is not clear that a target's board will view litigation in Delaware as an attractive option given the hostility to disclosure settlements; for some target companies and their boards, the prospect of being sued outside Delaware may be a feature rather than a bug. Likewise, it is not yet clear that companies that adopt exclusive forum bylaws will choose to enforce them if, in the context of a merger transaction, a disclosure-only settlement remains an option outside Delaware. Chief Justice Leo E. Strine Jr. of the Delaware Supreme Court recently noted that Delaware judges are likely to "take a dim view" of companies that choose to waive their rights in this circumstance, but at least some companies are doing precisely that to obtain the certainty associated with settlement.

Second, Bouchard, in *Trulia*, noted that the court may apply greater scrutiny to disclosure claims when plaintiffs seek expedited discovery in advance of a stockholder vote and "screen out frivolous cases." If the court denies expedited discovery based on the perceived merits of the plaintiffs' claims, the plaintiffs may attempt to obtain the same information through a Section 220 inspection demand. Indeed, in the context of derivative suits, the Court of Chancery has strongly encouraged, if not required, stockholders to pursue their inspection rights prior to filing a complaint.

Finally, the court's views on disclosure settlements may result in more, not less, merger litigation at least in some types of cases. To the extent that disclosure claims remain untested until after a transaction closes, plaintiffs still may assert disclosure claims post-closing that might easily have been resolved earlier, in "quasi-appraisal" actions—that is, in class actions in which plaintiffs allege they were denied an effective appraisal remedy because they did not have information sufficient to make an informed appraisal decision. As a result, litigants may pursue disclosure settlements in which releases are narrowed to prevent further disclosure-related claims, including quasi-appraisal claims, while preserving unexculpated fiduciary breach and aiding and abetting claims, such as those at issue in *In re Rural/Metro Stockholders Litigation*, 102 A.3d 205 (Del. Ch. 2014), *RBC Capital Markets v. Jervis*, 129 A.3d 816 (Del. 2015), and *In re Jefferies Group Stockholders Litigation*, C.A. No. 8015-CB, order (Del. Ch. Mar. 26, 2015), and other recent cases.

Paul J. Collins (pcollins@gibsondunn.com) *is a securities litigation partner in the Palo Alto, California, office of Gibson, Dunn & Crutcher, focusing on securities, fiduciary duty, and corporate control litigation.*

Michael J. Kahn *(mjkahn@gibsondunn.com) is a litigation associate in the firm's Palo Alto office.*

Reprinted with permission from the April 27, 2016 edition of DELAWARE BUSINESS COURT INSIDER © 2016 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 203-04-16-01