GIBSON DUNN

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GIBSON DUNN M&A REPORT: THE END OF M&A "DISCLOSURE-ONLY" SETTLEMENTS WITH BROAD RELEASES IN DELAWARE

To Our Clients and Friends:

On January 22, 2016, Chancellor Andre Bouchard of the Delaware Court of Chancery issued an important decision in *In re Trulia, Inc. Stockholder Litigation*—likely hammering the final nail in the coffin of "disclosure-only" settlements with broad releases of liability in M&A stockholder lawsuits in the Court of Chancery. There could, however, be an increase in "mootness fee" applications resulting from stockholder lawsuits that are voluntarily dismissed following any supplemental disclosures defendants may voluntarily provide. Stockholder plaintiffs (and their lawyers) may use this vehicle to continue filing lawsuits challenging M&A transactions, albeit not in the same volume that has been the norm over the past several years.

The *Trulia* litigation arose from Zillow, Inc.'s acquisition of Trulia, Inc. in a stock-for-stock merger valued at approximately $2.5 billion. The stockholder litigation followed a familiar course: (1) several "essentially identical" complaints were filed by stockholders challenging the transaction, alleging that the members of Trulia's board had breached their fiduciary duties in connection with the transaction; (2) after minimal discovery, the parties reached a settlement in which Trulia agreed to supplement its proxy statement and defendants obtained a broad release of liability from all known and unknown claims that could be brought by any member of the putative class; and (3) defendants later agreed to pay plaintiffs' counsel $325,000 in attorney fees.

Following other recent decisions by the Court of Chancery rejecting or casting doubt on similar settlements, Chancellor Bouchard rejected the proposed settlement, stating that "the optimal means by which disclosure claims in deal litigation should be adjudicated is outside the context of a proposed settlement so that the Court's consideration of the merits of the disclosure claims can occur in an adversarial process where the defendants' desire to obtain a release does not hang in the balance." Chancellor Bouchard further cautioned that "practitioners should expect that the Court will continue to be increasingly vigilant in applying its independent judgment to its case-by-case assessment of the reasonableness of the 'give' and 'get'" of disclosure-only settlements. Litigants can expect that the Court of Chancery only will approve future disclosure-only settlements if the disclosures "address a plainly material misrepresentation or omission," and the releases granted in connection with the settlement are limited to disclosure claims. Chancellor Bouchard emphasized that the "plainly material" standard is a high bar, and if the disclosures do not meet that threshold, the Court might appoint an *amicus curiae* to assist in evaluating the benefit of the disclosures—a cost that would be borne by the parties.

The *Trulia* opinion has a number of significant implications for deal litigation in the Delaware Court of Chancery. First, the era of multiple stockholder lawsuits, inevitably filed immediately after almost any transaction is announced, likely has come to an end, as plaintiffs (and their lawyers) no longer can count on court approval of quick settlements with minimal litigation. Indeed, after reaching a high-water mark in 2014 of 94.9% of all transactions over $100 million resulting in litigation, one preliminary study found that the rate declined to just 21.4% of all deals in the fourth quarter of 2015. *See* Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015* 1, 3 (Jan. 16, 2016).

Second, defendants (including board members of the seller) can no longer count on quick, pre-closing settlements with broad releases in exchange for payment of nominal attorneys' fees. Rather, deal litigation in Delaware is likely to involve more dispositive motion practice (which may proceed after the closing of the transaction) to adjudicate disclosure and other claims asserted by stockholders.

Third, the decision may lead plaintiffs (and their lawyers) to dismiss their lawsuits and seek a "mootness fee" in cases where defendants make supplemental disclosures that moot some or all of the plaintiffs' claims. As Chancellor Bouchard noted, when plaintiffs seek mootness fees, "defendants are incentivized to oppose fee requests they view as excessive," creating an adversarial process that facilitates the court's evaluation of the supplemental disclosures.

Fourth, practitioners should expect an increase in deal litigation filings in jurisdictions outside of Delaware, as plaintiffs' counsel search for venues that may take a different approach to evaluating proposed settlements. Chancellor Bouchard anticipated as much, observing that "the historical predisposition towards approving disclosure only settlements must evolve," and that the Court of Chancery "hope[s] and trust[s] that [its] sister courts will reach the same conclusion if confronted with the issue."

The following Gibson Dunn lawyers assisted in preparing this client update: Brian Lutz, Meryl Young, Adam Offenhartz, Eduardo Gallardo and Colin Davis.

Gibson, Dunn & Crutcher's lawyers are available to assist with any questions you may have regarding these issues. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or any of the following leaders and members of the firm's Mergers and Acquisitions practice group:

Mergers and Acquisitions Group / Corporate Transactions:
Barbara L. Becker - Co-Chair, New York (212-351-4062, bbecker@gibsondunn.com)
Jeffrey A. Chapman - Co-Chair, Dallas (214-698-3120, jchapman@gibsondunn.com)
Stephen I. Glover - Co-Chair, Washington, D.C. (202-955-8593, siglover@gibsondunn.com)
Dennis J. Friedman - New York (212-351-3900, dfriedman@gibsondunn.com)
Jonathan K. Layne - Los Angeles (310-552-8641, jlayne@gibsondunn.com)
Eduardo Gallardo - New York (212-351-3847, egallardo@gibsondunn.com)

Mergers and Acquisitions Group / Litigation:
Meryl L. Young - Orange County (949-451-4229, myoung@gibsondunn.com)
Brian M. Lutz - San Francisco/New York (415-393-8379, blutz@gibsondunn.com)
Aric H. Wu - New York (212-351-3820, awu@gibsondunn.com)
Paul J. Collins - Palo Alto (650-849-5309, pcollins@gibsondunn.com)
Michael M. Farhang - Los Angeles (213-229-7005, mfarhang@gibsondunn.com)
Adam H. Offenhartz - New York (212-351-3808, aoffenhartz@gibsondunn.com)
Jonathan D. Fortney - New York (212-351-2386, jfortney@gibsondunn.com)
Colin B. Davis - Orange County (949-451-3993, cdavis@gibsondunn.com)