CORPORATE FINANCE/M&A - USA

Demise of disclosure-only settlements? Delaware court outlines new regime

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In a recent opinion(1) Chancellor Bouchard of the Delaware Court of Chancery reiterated the court's belief that settlements of M&A litigation where the target agrees to issue supplemental public disclosures in exchange for a global release of all claims relating to the transaction "rarely yield genuine benefits for stockholders and threaten the loss of potentially valuable claims that have not been investigated with rigor" and that, going forward, the court will be "vigilant in scrutinizing the 'give' and the 'get' of such settlements to ensure they are genuinely fair and reasonable".

It is well recognised that for many years nearly all public company M&A transactions precipitated litigation. Many of those actions were settled when the target agreed to supplement its public disclosures concerning the transaction to add technical information that could potentially be helpful to stockholders in determining how to vote on the transaction. In exchange for issuing the supplemental disclosures, the stockholder plaintiffs would grant the defendants broad releases of all claims that were or could have been filed in connection with the transaction – including claims unrelated to the adequacy of the disclosures at issue in the case. The plaintiffs' counsel would then seek a fee for having conferred a benefit to the company's stockholders. Academics, practitioners and even certain courts denounced these 'merger tax' suits.

However, in recent decisions, the Delaware Court of Chancery has expressed reluctance to approve disclosure settlements in transactional litigation. In the case at hand Bouchard went further and rejected a proposed disclosure-only settlement of stockholder litigation challenging the acquisition of Trulia, Inc by Zillow, Inc. In so doing Bouchard held that the proposed settlement terms, which involved immaterial supplemental disclosures concerning the work performed by Trulia's financial adviser, did not provide Trulia's stockholders with adequate consideration for the released claims. Bouchard also held that, going forward, disclosure claims should be raised either in a preliminary injunction motion or through a mootness application for attorney fees if a company voluntarily moots a stockholder plaintiff's disclosure claim by disclosing the relevant information. Each procedural vehicle would result in the parties to litigation advocating in an adversarial context the true value of the supplemental disclosures.

This opinion, particularly following the court's prior rulings concerning disclosure settlements, likely signals the end of 'disclosure-only' settlements, which may have a material impact on the number of stockholder suits filed in connection with normal course M&A transactions. Indeed, it has been publicly reported that in the fourth quarter of 2015 after the Delaware Court of Chancery has become increasingly hostile to unremarkable disclosure-only settlements, stockholder suits were filed in connection with only 21.4% of public company transactions – far lower than the 90% and more that had become the norm.

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Endnotes

(1) *In re Trulia, Inc Stockholder Litigation*, CA No 10020-CB (Del Ch January 22 2016).
