

Delaware Chancery Court dismisses disclosure claims relating to AOL's acquisition of Millennial Media

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On September 28 2016, in an action challenging the disclosures issued by Millennial Media in connection with its 2015 acquisition by AOL, Vice Chancellor Glasscock of the Delaware Court of Chancery granted a motion to dismiss in favour of the directors of Millennial Media, finding that:

- a claim alleging insufficiency of disclosures and whether they are misleading or incomplete in a way that is material to the stockholders should be pursued pre-closing (and not post-closing); and
- there is a higher burden on the plaintiff to sustain a post-closing disclosure claim for damages against directors than there is to sustain a pre-closing disclosure claim heard in a pre-closing injunction proceeding.

In *Nguyen v Barrett*, following the denial of preliminary injunctive relief based on disclosure claims, the Millennial-AOL transaction closed. Following the closing, the plaintiff amended his complaint, seeking damages for two alleged disclosure violations that included a claim that the court had previously rejected and another that the plaintiff had not previously asserted. In rejecting these claims, the vice chancellor highlighted the contrast between disclosure claims heard on a motion for preliminary injunctive relief brought before closing and claims for damages against directors brought post-closing. The court noted that a pre-closing claim concerns a stockholder's right to a fully informed vote and the plaintiff must demonstrate "a reasonable likelihood of proving that the alleged omission or misrepresentation is material". However, with respect to a disclosure claim for damages pursued against directors post-closing, a "plaintiff must allege facts making it reasonably conceivable that there has been a non-exculpated breach of fiduciary duty by the board in failing to make a material disclosure". Thus, the standard for sustaining a disclosure claim in a post-closing damages action is that it is reasonably conceivable both that the alleged non-disclosure was material and that it constituted a breach of the duty of loyalty. The vice chancellor granted the defendant's motion to dismiss on the grounds that the plaintiff had not satisfied the higher burden with respect to the alleged disclosures.

The decision thus reaffirms the position regarding disclosure claims and the timing of when those claims should be sought and the differing standards that apply based on the stage at which such claims are brought.

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Endnotes

(1) *Nguyen v Barrett*, CA 11511-VCG (Del Ch, Sept 28 2016).

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