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THE CHANGING TIDE OF DELAWARE DEAL LITIGATION

Following the Trulia *case, disclosure-related deal litigation has notably declined in Delaware and has shifted to some extent to other jurisdictions. There has been a significant increase in appraisal actions and the emergence of aiding and abetting claims against financial advisors. The author traces these developments.*

By Paula Anderson *

In the 15 years prior to 2016, there had been a steady increase in Delaware stockholder litigation challenging proposed M&A transactions. Almost immediately following the announcement of virtually any M&A deal of significant value, the typical playbook scenario would unfold as follows: a named plaintiff-stockholder of the target company would file a lawsuit on behalf of a putative stockholder class challenging the proposed transaction and alleging breaches of fiduciary duties by the director defendants in connection with the proposed sale, including inadequate and/or false and misleading disclosures in the proxy statement. Following some limited discovery (typically board minutes discussing the transaction and board presentations by the target's financial advisor, along with the occasional deposition of a company director and/or the company's financial advisor), the plaintiffs and defendants would then enter into what has become known as a "disclosure-only settlement." Pursuant to such settlement, defendants would agree to issue supplemental disclosures in the proxy prior to the stockholder vote on the proposed transaction. In exchange, plaintiffs would agree to dismiss the claims, not seek to enjoin the transaction, and grant broad releases shielding the defendants from any claims, known or unknown, relating in any way to the deal. Defendants would get deal certainty and immunity from liability, while plaintiffs' counsel would walk away with a substantial award of attorneys' fees. There would be no economic benefit conferred upon the purportedly aggrieved stockholder class. Such disclosure settlements had been routinely approved by Delaware courts — although increasingly begrudgingly because of the lack of any tangible benefit to stockholders.

Then, in January 2016, the tide of Delaware deal litigation changed course abruptly. Chancellor Bouchard rejected a disclosure-only settlement that had been presented to the court for approval in *In re Trulia, Inc.*[1] Subsequent Delaware Chancery Court rulings echoed *Trulia*'s criticism of such settlements. The result has been that since the issuance of the *Trulia* opinion, there has been a notable decline in disclosure-related deal litigation and a shift in the jurisdictions in which those suits are filed. This article will discuss how *Trulia* and similar decisions have stalled the use of disclosure-only settlements and, consequently, changed the course of Delaware deal litigation.

[1] *In re Trulia Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. Jan. 22, 2016).

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