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### Del. Court Applies Heightened Review In Rejecting Proposed Trulia Settlement

In rejecting a proposed settlement arising out of a stockholder class action challenging Zillow Inc.'s acquisition of Trulia Inc., the Delaware Chancery Court Jan. 22 said it will be "increasingly vigilant" in scrutinizing disclosure-only settlements (*In re Trulia Inc. Stockholder Litig.*, Del. Ch., No. 10020-CB, 1/22/16).

"[T]he Court's historical predisposition toward approving disclosure settlements needs to be reexamined," Chancellor Andre G. Bouchard wrote.

He added 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."

#### 'Mounting Evidence'

Bouchard cited a variety of factors for concluding that disclosure claims shouldn't be resolved in a settlement, including "mounting evidence" that supplemental disclosures rarely benefit shareholders and the challenges the court faces in assessing disclosure claims in non-adversarial settlements.

The investors' lawsuit alleged that Trulia directors breached their fiduciary duties in approving the stock-for-stock merger. In determining that the proposed settlement wasn't fair or reasonable, Bouchard reasoned that none of the supplemental disclosures received in exchange for the release of claims

"were material or even helpful to Trulia stockholders."

The high number of investor lawsuits challenging merger and acquisition deals has sparked debate over what is sometimes referred to as the "deal tax" problem, in which there is a broad release of the claims in exchange for supplemental disclosures. While the shareholders don't receive any money in the settlement, their lawyers are paid attorneys' fees by the defendants.

The chancery court recently issued several transcript rulings expressing reservations about approving such pacts.

Additionally, Vice Chancellor Sam Glasscock III issued a Sept. 17 opinion—*In re Riverbed Technology Inc. Stockholders Litig.*—suggesting that the court will be ramping up its review of disclosure-only accords (30 CCW 289, 9/30/15).

#### Significant Ruling

Fordham law school professor Sean Griffith, who filed amicus briefs objecting to the settlements in *Riverbed* and *Trulia* (30 CCW 289, 9/30/15), told Bloomberg BNA in a Jan. 25 e-mail that the court's Jan. 22 ruling is significant.

Bouchard is saying, on the record in a full-length opinion, that disclosure-only settlements are disfavored, Griffith observed. He added that the court's discussion of the merits of disclosure settlements is "the holding of the opinion, not just dicta."

Francis G.X. Pileggi, a managing member of Eckert Seamans Cherin & Mellott LLC's Wilmington, Del., office and publisher of the "Delaware Corporate & Commercial Litigation Blog," also told Bloomberg BNA that the decision provides "clearer guidance" to attorneys on how the Delaware Chancery Court will handle disclosure-only cases going forward.

In a Jan. 25 e-mail, Pileggi said the court's reluctance to approve such settlements is the right approach, "to the extent that some 'correction' was needed in the large number of suits being filed in deals over \$100 million."

#### Decreasing Numbers

Between 2011 and 2014, shareholders challenged over 90 percent of merger and acquisition deals valued over \$100 million, according to Cornerstone Research. In 2015, however, the number of such lawsuits decreased in response to the Delaware courts' increasing skepticism of disclosure-only settlements. A recent study, "Takeover Litigation in 2015," by the Securities and Exchange Commission's Matthew Cain and University of California, Berkeley law professor Steven Davidoff Solomon, provided preliminary statistics suggesting that shareholder lawsuits were brought only in 87.7 percent of completed takeovers in 2015.

The chancery court's *Trulia* ruling will lead to a further fall in the number of merger objection lawsuits, predicted Lawrence Hamermesh, a professor from Widener University Delaware Law School.

Bouchard's articulation of the standard for evaluating disclosure-only settlements is significant in its "clarity and stringency," Hamermesh said in a Jan. 25 e-mail. "I believe that this standard will (and was intended to) make it significantly harder to rely on supplemental disclosures as a basis for a settlement of deal litigation."

"The positive side of this development is that plaintiffs' counsel will have less incentive to bring such litigation where it lacks genuine merit," Hamermesh continued. "The negative side is that it will make it more difficult to settle cases where the merits of the disclosure

claims are nuanced and legitimately contestable.”

### **Taking Claims Elsewhere**

In his opinion, Bouchard addressed concerns that litigants may take their settlements to another jurisdiction in response to the court’s enhanced scrutiny of disclosure pacts.

“We hope and trust that our sister courts will reach the same conclusion if confronted with the issue,” Bouchard said.

Hamermesh observed that corporate boards have the ability—such as adopting forum selection bylaws—to

ensure that litigation stays in Delaware. Boards that are “unwilling to use that power will have to suffer the costs generated by multi-forum litigation in which the participants play off one proceeding against another, to the ultimate detriment of stockholders,” he said.

Griffith suggested that the court ruling may alleviate some concerns that lawsuits will be taken elsewhere. “The opinion itself is a clear roadmap for out-of-state judges on how to apply Delaware law on these points,” he said. “And it is extremely clear in its reasoning.”

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*The opinion is available at [http://www.bloomberglaw.com/public/document/In\\_re\\_Trulia\\_Inc\\_Stockholder\\_Litig\\_No\\_10020CB\\_2016\\_BL\\_17194\\_Del\\_C](http://www.bloomberglaw.com/public/document/In_re_Trulia_Inc_Stockholder_Litig_No_10020CB_2016_BL_17194_Del_C).*

*The study, “Takeover Litigation in 2015,” is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2715890](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715890).*