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Delaware Court of Chancery Clarifies Heightened Standard for Recovery of Attorneys' Fees in Disclosure-Based Deal Litigation

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In Anderson v. Magellan Health, Inc., No. 2021-0202, — A.3d —-, 2023 WL 4364524 (Del. Ch. July 6, 2023) (McCormick, C.), the Delaware Court of Chancery addressed the circumstances under which the Court will award a shareholder plaintiff attorneys' fees in disclosure-based deal litigation. In particular, Anderson analyzed the history of disclosure-based deal litigation in Delaware and the Court's evolving standard for awarding fees where shareholder action has caused a company to issue additional pre-merger disclosures "mooting" pending deal litigation. Prior to the decision in Anderson, the state of the law was unsettled. The first line of cases would award fees as long as the shareholder plaintiff secured additional disclosures that were "helpful" such that they provided "some benefit" to shareholders. The second line of cases, however, adopted a stricter standard requiring that the supplemental disclosures be "plainly material." In an effort to combat the so-called "deal tax" associated with disclosure-based merger litigation, Anderson comes out in favor of the stricter standard. Going forward, the Court will only award disclosure-based mootness fees when the complaining shareholder obtains additional disclosures that are "plainly material" to the shareholders. Companies, boards and advisors engaging in M&A transactions should pay attention to this decision as it will weigh on the proper strategy for approaching a shareholder challenge to an M&A transaction.

In Anderson, a shareholder plaintiff filed suit in the Delaware Court of Chancery to enjoin Magellan Health, Inc. (the "Company") from merging with Centene Corporation (the "Acquirer"). The plaintiff alleged that confidentiality agreements from a prior deal process contained "don't ask don't waive" standstill provisions, which tainted the negotiation and approval process of the merger with the Acquirer. Ten days later and before any discovery, the Company agreed to waive some of the offending provisions and issued supplemental disclosures. The plaintiff, in turn, dismissed its lawsuit as moot and sought $1.1 million in alleged fees and costs for procuring the disclosures and waivers of the confidentiality provisions. The Company opposed the plaintiff's request for fees arguing that plaintiff was entitled to no more than $75,000 to $125,000 because the disclosures were not material. The Court sided with the Company and awarded fees of $75,000.

The Anderson decision provides an overview of the evolution of Delaware's jurisprudence with respect to fee requests in deal litigation. Prior to the doctrinal shift of Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014) ("MFW"); Corwin v. KKR Financial Holdings. LLC, 125 A.3d 304 (Del. 2015); C&J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust, 107 A.3d 1049 (Del. 2014), and In re Trulia, Inc. Shareholder Litigation, 129 A.3d 884 (Del. Ch. 2016), the merger litigation playbook was: In M&A deal would get announced and a proxy statement soliciting stockholder approval would be issued, stockholder plaintiffs sued for breach of fiduciary duty and sought injunctive relief to stop the deal, and the defendants quickly settled the action in exchange for providing supplemental stockholder disclosures and paying the shareholder plaintiffs' attorneys' fees and costs.

Under the prior regime, defendants were incentivized to settle because the decision to approve the merger was subject to an entire fairness or enhanced scrutiny standard of review, which necessarily required a careful (and costly) analysis of the merits of the shareholder plaintiffs' claims. The heightened standard of review served as a powerful weapon for plaintiffs to potentially delay a merger. Plaintiff strike suits proliferated.

The Delaware courts observed that a large portion of deal-related lawsuits provided no real corporate benefit. Hence, the Delaware Supreme Court's decisions in MFW and Corwin, which gave transactional advisors a playbook to get to business judgment deference in connection with a decision to approve a merger. C&J Energy, in turn, discouraged the use of preliminary injunctions to hold up merger transactions and instead encouraged plaintiffs to seek post-deal monetary damages. Finally, Trulia established that disclosure-only settlements would be approved only when they involved the disclosure of valuable information that was "plainly material" to shareholders. This doctrinal shift led to a dramatic decline in such disclosure suits in Delaware. But, it had the unintended effect of moving disclosure suits to federal court where they were recast as securities laws claims.

The Court of Chancery's decision in In re Xoom Corporation Shareholder Litigation, 2016 WL 4146425 (Del. Ch. Aug. 4, 2016), revived the fortunes of the plaintiff's bar in Delaware. Xoom modified Trulia's "plainly material" standard to allow disclosure-based settlements where the supplemental disclosures were merely "helpful" to shareholders. The Court in Xoom arrived at this result for policy reason: the lesser standard would allow the Court to avoid the assessment of the viability of the disclosure challenges each time a mootness fee is disputed, thus promoting judicial economy. The tradeoff, however, was that plaintiffs could continue to pursue weak disclosure claims expecting defendants to settle and pay a modest mootness fee.

While the Court in Anderson analyzed the corporate benefit of the supplemental disclosures under the Xoom standard, the Court indicated that clarity was needed and disavowed Xoom's allowance of mootness fees where supplemental disclosures were merely "helpful." Going forward, Delaware courts will approve mootness fees only where the supplemental disclosures are "plainly material."

Anderson should inform deal advisors going forward. Plaintiff's counsel must show real, "material" disclosure issues, and likely disclosures that were required by law or that lead to a measurable expectation of increased consideration to get its cut of the "merger tax." Anderson should also help defense counsel in litigation proceeding outside of Delaware as the decision was clearly written with an eye towards educating non-Delaware courts on the evolution of Delaware jurisprudence concerning deal litigation and plaintiff's counsel's entitlement to attorneys' fees.

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