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## The Shift in M&A Litigation From Delaware to Federal Court: Has the Song Remained the Same?

Federal securities class action filings continued their record pace during the first half of 2018,<sup>1</sup> bolstered by the recent uptick in M&A-related filings, which comprised 50% of the overall cases.<sup>2</sup> In these M&A cases, a plaintiff typically challenges, on behalf of a proposed class of shareholders, certain disclosure documents seeking shareholder approval of the proposed transaction (usually a proxy statement). A recent study revealed that 73% of public company M&A deals valued over \$100 million drew litigation in 2017.<sup>3</sup> Because such litigation poses a risk that the transaction may be delayed, companies facing these lawsuits often make the pragmatic decision to issue supplemental disclosures and pay attorneys' fees to plaintiffs' counsel in order to eliminate the timing risk the litigation poses.<sup>4</sup> A recent case involving Triangle Capital Corporation demonstrates that settlement may not be the only path for companies wishing to keep their transactions on schedule, and that litigating these nuisance claims remains a viable option.

### BACKGROUND AND RECENT SHIFT IN LIKELY VENUE FOR M&A LITIGATION

Until fairly recently, the most likely venue for these cases was the Delaware Court of Chancery, given most U.S. public companies are incorporated in Delaware. However, in a series of decisions culminating in *In re Trulia, Inc. Stockholder Litigation* in January 2016, the Delaware Court of Chancery announced it had reached its breaking point with the "flurry of class actions" following "the public announcement of virtually every transaction involving the acquisition of a public corporation," which litigation it found "far too often ... serves no useful purpose for stockholders" and instead "serves only to generate [attorney's] fees."<sup>5</sup> Criticizing plaintiffs' counsel for flooding the court's docket with fee-driven lawsuits, defense counsel for robbing the court of its key "gating mechanism" against frivolous cases by often pragmatically "self-expedit[ing] the litigation," and itself for enabling the bloom of meritless deal suits, the Chancery Court announced that it would no longer



rubberstamp disclosure-only settlements in an effort to curb this type of litigation.<sup>6</sup>

After Delaware's shot across the bow in *Trulia*, M&A litigation, particularly suits focused on allegedly inadequate disclosure, shifted to federal courts. As Cornerstone Research reported, "[t]he number of deals litigated in Delaware declined . . . from 2016 to 2017" and "the number of M&A deals litigated in federal court increased."<sup>7</sup> Although a few federal courts have since viewed disclosure-only settlements with Delaware-like hostility,<sup>8</sup> the construct of the disclosure-only settlement, for the most part, seems to remain alive and well in federal courts.<sup>9</sup> So, notwithstanding the criticisms from Delaware (and other) jurists, public companies involved in M&A deals are still likely to face shareholder litigation and the related decision of whether to fight or to settle. A recent case example shows that a company can fight rather than settle, and still close the transaction on schedule.

### TRIANGLE CAPITAL CORPORATION M&A LITIGATION

Triangle Capital Corporation ("Triangle"), a Raleigh-based Business Development Company, announced on April 4, 2018 that it had entered into transaction agreements with Benefit Street Partners L.L.C. ("BSP") and Barings LLC.<sup>10</sup> Triangle would sell its December 31, 2017 investment portfolio to BSP for \$981.2 million in cash, and simultaneously enter into a stock purchase agreement with Barings, pursuant to which Barings would become Triangle's investment advisor in exchange for a one-time payment to Triangle shareholders of \$85 million (\$1.78 per share).<sup>11</sup> The transaction represented a substantial premium for Triangle and its shareholders.<sup>12</sup> On June 1, 2018, Triangle filed its more than 500-page Proxy Statement with the United States Securities and Exchange Commission, and invited shareholders to attend a special meeting on July 24, 2018, where shareholders would be asked to approve the proposed transaction.<sup>13</sup>

Three days after Triangle filed its Proxy Statement, a law firm issued a press release announcing it was "investigating" Triangle in connection with the transaction.<sup>14</sup> The press release, effectively an advertisement to solicit potential clients in order to challenge the transaction, claimed that the law firm was focusing on whether Triangle disclosed all material financial information in connection with the upcoming shareholder vote.<sup>15</sup>

On July 6, 2018—just 18 days before the upcoming July 24 shareholder vote—Plaintiff Dan Carlson filed a Complaint against Triangle and its Board of Directors alleging various deficiencies in Triangle's Proxy Statement.<sup>16</sup> Specifically, Plaintiff alleged that Defendants violated Sections 14(a) and 20(a) of the Securities Exchange Act of 1934<sup>17</sup> because Triangle's Proxy Statement contained materially incomplete and misleading information concerning: (1) the Company's financial projections; (2) the valuation analyses conducted by the Company's financial advisor; and (3) the background process leading up to the announcement of the transaction.<sup>18</sup> On July 11, 2018, only 13 days before the scheduled July 24 vote, Plaintiff filed an expedited Motion for Preliminary Injunction seeking to enjoin the vote until shareholders could allegedly be "fully informed."<sup>19</sup> Although companies often choose to resolve such suits by issuing supplemental disclosures and paying plaintiff's attorneys' fees, Triangle decided instead to defend its Proxy Statement in court, and instructed its counsel at King & Spalding LLP to defend the action vigorously.

On July 12, 2018, the Court held a telephonic hearing on Plaintiff's request to expedite the proceedings. In light of the short time remaining before the scheduled shareholder vote, the Court denied Plaintiff's request for a hearing on his Motion for Preliminary Injunction, but ruled that Defendants must file their response to the motion within 24 hours, and that all briefing must be complete within 48 hours.<sup>20</sup>

On the morning of Monday July 16, 2018, the Court issued an order denying Plaintiff's Motion for Preliminary Injunction in full.<sup>21</sup> In a memorandum opinion that followed, the Court held that Plaintiff had not established any of the four requirements for obtaining the requested injunctive relief.<sup>22</sup> Specifically, the Court determined that Plaintiff failed to establish (1) likelihood of success on the merits; (2) likelihood of irreparable harm; (3) that the balance of equities tipped in his favor; or (4) that issuance of the preliminary injunction would be in the public interest.<sup>23</sup> As a result of the Court's



ruling, the shareholder vote proceeded as planned on July 24, and the recommended transactions closed shortly thereafter.

### CONCLUSION AND LESSONS LEARNED

Triangle’s prompt litigation success demonstrates that public companies faced with such disclosure suits do not have to immediately issue supplemental disclosures in order to preserve the transaction schedule. Where plaintiffs’ claims obviously lack merit, and the court seems willing to issue a prompt ruling that allows for the transaction to remain on schedule, public companies should consider whether the more prudent approach is to defend its disclosures, as opposed to issuing supplemental ones and merely perpetuating in federal court the disclosure-only settlement practice first criticized in Delaware. Moreover, others recent developments in Delaware jurisprudence, namely *Corwin v. KKR Financial Holdings LLC* and its progeny, which make it harder for plaintiffs to obtain damages on a post-closing basis, provide even more incentive for public companies to decline to enter into disclosure-only settlements on a pre-closing basis.<sup>24</sup>

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### ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,000 lawyers in 20 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

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<sup>1</sup> Cornerstone Research, *Securities Class Action Filings 2018 Midyear Assessment*, <https://www.cornerstone.com/Publications/Reports/Securities-Securities-Class-Action-Filings%E2%80%94Midyear-Assessment>, at 1.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation*, <https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2017-M-and-A-Litigation>, at 1.

<sup>4</sup> See Browning Jeffries, *The Plaintiff's Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55, 58-59 (2014).

<sup>5</sup> 129 A.3d 884, 891-92 (Del. Ch. 2016).

<sup>6</sup> See *id.* at 891-99 & n.35.

<sup>7</sup> See Cornerstone Research, *Securities Class Action Filings: 2016 Midyear Assessment*, <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-Midyear-Assessment>, at 10 (reflecting that “[i]n the first half of 2016, federal M&A filings increased by 167 percent from the second half of 2015”); see also Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation*, <https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2017-M-and-A-Litigation>, at 1, 4 (reflecting that “[i]n 2017, the number of M&A deals litigated in federal court increase 20 percent, while state court filings declined”).

<sup>8</sup> See, e.g., *In re Walgreen Co. S'holder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016).

<sup>9</sup> In addition to keeping the transaction on schedule, the principal benefit to defendants in settling M&A litigation is the ability to obtain a class-wide release for all claims relating to the transaction. See Jeffries, *supra*, at 82. As judicial hostility towards disclosure-only settlements increases, defendants choosing to settle face a risk that the court will not approve the settlement, thereby depriving the defendants of the benefits of a class-wide release.

<sup>10</sup> See Apr. 4, 2018 Triangle Capital Corp. Form 8-K.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See June 1, 2018 Triangle Capital Corp. Schedule 14A.

<sup>14</sup> See <https://www.prnewswire.com/news-releases/shareholder-alert-monteverde--associates-pc-announces-an-investigation-of-triangle-capital-corporation---tcap-300659903.html>.

<sup>15</sup> *Id.*

<sup>16</sup> See *Carlson v. Triangle Capital Corp.*, Case 5:18-cv-00332-FL (E.D.N.C.), Dkt. No. 1.

<sup>17</sup> 15 U.S.C. §§ 78n(a), 78t(a).

<sup>18</sup> See generally *Carlson v. Triangle Capital Corp.*, Case 5:18-cv-00332-FL (E.D.N.C.), Dkt. No. 1.

<sup>19</sup> See *id.*, Dkt. Nos. 6-7.

<sup>20</sup> See *id.*, Dkt. No. 39.

<sup>21</sup> See *id.*, Dkt. No. 43.

<sup>22</sup> *Carlson v. Triangle Capital Corp.*, No. 5:18-cv-00332-FL, 2018 WL 3546232 (E.D.N.C. July 23, 2018).

<sup>23</sup> See *id.* at \*\*4-9.

<sup>24</sup> Recent Delaware jurisprudence reflects a more defendant-friendly approach in actions seeking post-closing damages for alleged breaches of fiduciary duty, applying the business judgment rule in “post-closing damages action[s] when a merger that is not subject to entire fairness ... has been approved by a fully informed, uncoerced majority of the disinterested stockholders.” See, e.g., *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 305 (Del. 2015). Delaware courts applying *Corwin* have noted that “[w]hen the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result.” *Singh v. Attenborough*, 137 A.3d 151, 151-52 (Mem.) (Del. 2016).