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SPECIAL BULLETIN

Florida Adopts the *In re Trulia* Standard for Disclosure-Based M&A Transaction Settlements

July 18, 2018

Florida's Second District Court of Appeal announced on July 13, 2018 the adoption of the review standard formulated in the Delaware Chancery Court opinion in *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016) for class action disclosures-only settlements arising out of M&A transactions. This ruling is binding on Florida trial courts in all circuits. The Second District's decision included the adoption of the clarifications of the *In re Trulia* standard provided by the U.S Seventh Circuit Court of Appeals in *Hays v. Walgreen Co.*, 832 F.3d 718 (7th Cir. 2016).

The Second District ruled that:

> [W]hen a Florida trial court is asked to approve a disclosure settlement in a class action merger lawsuit, in order for a disclosure settlement to pass muster, the supplemental disclosures must address and correct a plainly material misrepresentation or omission and the subject matter of the proposed release must be narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.

Griffith v. Quality Distribution, Inc. et al., 2018 WL 3403537 at *6, _____ So. 3d____ (Fla. 2DCA July 13, 2018). This heightened standard for review of such settlements is predicated on the academic and Delaware Chancery Court concerns raised about the potential abuses of "strike suits" and "deal litigations" which had exploded in Delaware and throughout the United States and amounted to little more than a "transaction tax" on corporate merger deals.

In recent years, it became routine for a boilerplate shareholder class action to be filed challenging any corporate M&A transaction upon announcement. Most litigation was filed in a rush in Delaware Chancery Court, seeking injunctive relief blocking the deal based on alleged inadequate disclosure about the deal and breach of fiduciary duties by the board in approving the transaction. These cases then generally followed a well-worn script.

Due to the time pressures for seeking shareholder approval and consummating the M&A transaction, the parties typically agreed to expedited limited discovery followed by mediation and settlement

based on corrective or supplemental disclosure. In many of these cases, the agreed corrective or supplemental disclosures were of dubious value to shareholders considering whether to approve the M&A transaction. The settlement agreement also typically included an agreement to jointly seek approval of a settlement class consisting of all shareholders, a broad class-wide release of defendants without any economic benefits coming to the class and an agreement by the defendants to take no position on plaintiff's application for her attorney fees to be paid by defendants. At that point, plaintiff would agree not to go forward with her motion for a preliminary injunction, the corrective or supplemental disclosures would be made and the M&A transaction would close.

Thereafter, notice of the settlement would be given to the class, objectors (if any) would appear and a final fairness hearing conducted seeking approval of the settlement, which would make the release effective and create *res judicata* protection for defendants. At this point, the process would no longer be adversarial. Finally, plaintiff's request for an award of attorney's fee based on time and rates, or an agreed set amount of attorney's fees, would be submitted for approval. As described in *Trulia*, this routine course of proceedings was not conducive to the court's ability to determine whether the shareholders had derived any benefit from the settlement, much less a benefit sufficient to justify judicial approval.

The *Griffith* decision will require litigants in Florida to make a record and to tailor any deal to constructive disclosures, if no monetary amounts are sought, with narrow releases tied to better, more precisely articulated claims. The costs of litigation are likely to increase as the parties search for ways to reach a resolution that will pass Court scrutiny within the time constraints of M&A transactions. Recently reported statistics have indicated that *Trulia* was a watershed decision that was followed by a sharp decrease in disclosure-based claims and settlements. However, the trend has been for an increase in "mootness fee" applications and claims seeking appraisal rights or "post-closing" damages.

The reaction to *Trulia* outside of Delaware has been mixed but largely supportive. Federal decisions disapproving disclosure-based settlements have cited *Trulia* in support. *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718 (7th Cir. 2016); *Bushansky v. Remy Int'l*, 2017 WL 3530108 (S.D. Ind. Aug 16, 2017). Many states accord great deference to Delaware decisions in the context of corporate litigation.

However, although the concerns raised in *Trulia*, and adopted and applied by *Griffith* in Florida, do resonate in other jurisdictions, there are also strong judicial policies in certain states that apply their own enhanced standards of scrutiny or strongly support resolution through settlements. *Gordon v. Verizon Communications, Inc.*, 148 A.D. 3d 146 (N Y App. 2017); *In Re Compuware Corp Shareholder Litigation*, No 14-011437-CB (Mich. Way. Cty, March 24, 2016); *In re Journal Media Group Inc. Shareholder Litigation*, Case No. 15-CV-9686 (Wis. Cir. Ct. July 24, 2017); *Verigrev v. Aguero*, No UNN-L-2276-15-TTW (N.J. Super. Ct. Law Div. June 6, 2016). This remains a developing area of the law.

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