Examining Trulia's "Plainly Material" Standard for Disclosure-only Settlements and Practice Tips to Contour Settlements to Meet This New Standard in Delaware

Disclosure-only settlements in M&A deal litigation became an increasingly significant topic in corporate law during 2015. The Delaware Court of Chancery increasingly took a harder look at settlements stemming from M&A deals that involved broad releases of present and future claims in return for therapeutic benefits. The Delaware Court of Chancery's recent decision in *In re Trulia Inc. Stockholder Litig.*, C.A. No. 10020-CB, 2016 BL 17194 (Del. Ch. Jan. 22, 2016) sets forth a new "plainly material" standard for these once routine "deal tax" settlements.

This article will help counsel address this new standard by analyzing the Court of Chancery's recent rulings on disclosure-only settlements. It will then examine the Court of Chancery's "plainly material" standard for disclosure-only settlements as set out in *Trulia*. It concludes by suggesting solutions on how counsel can contour settlements to meet Delaware's "plainly material" standard or how counsel can litigate claims in other jurisdictions that may not follow Delaware's lead.

**Delaware's Hard Look at Disclosure-Only Settlements**

The discussion began in Acevedo, with the Court declining to approve a seemingly routine therapeutic settlement involving additional disclosures and two modifications to the merger agreement by reasoning the therapeutic benefits were insufficient consideration for the global release of present and future claims. Vice Chancellor Laster left counsel with three options: (1) dismiss the disclosure claims for mootness; (2) limit the proposed release to the Delaware fiduciary breach claims; or (3) move to dismiss the action.

The trend continued in Riverbed where the parties reached a compromise to settle all present and potential Federal and State claims in exchange for additional proxy statement disclosures concerning the sell-side's financial advisors previous relationship with the purchasers. Despite noting that 99.48% of the voting shares voted in favor of the merger without the additional disclosure, Vice Chancellor Glasscock approved the settlement because of counsel's reliance on the Court's practice of accepting therapeutic agreements. The Court was troubled with the agreements broad release which was based on limited discovery and stated that going forward these once routine settlements would not be approved merely because they had been so in the past.

Trulia Creates the "Plainly Material" Standard for Disclosure-Only Settlements

In 2014, Zillow, Inc. announced its acquisition of Trulia, Inc. in a stock-for-stock merger valued at $3.5 billion. Four plaintiffs filed class action complaints seeking to enjoin the merger alleging the Trulia board breached their fiduciary duties and that the corporations involved in the transaction aided and abetted those breaches. Before the end of the year the parties reached a compromise which included Trulia filing a Form 8-K with the SEC which contained additional disclosures about the deal. In July 2015, the parties executed an agreement stipulating to a broad release of claims, both known and unknown, "arising under federal, state, foreign, statutory, regulatory, common law or other law or rule."

The agreement was unremarkable because it followed the beaten path of familiar disclosure-only settlement cases. Chancellor Bouchard heard arguments on the fairness of the settlement and reserved decision until counsel provided briefing on two issues. First, the Court wanted to hear from counsel whether additional disclosures must meet the materiality standard in order to be considered an adequate benefit which supported a settlement. Second, the Court wanted justification for including "unknown claims" in the proposed release.

Chancellor Bouchard denied the settlement because it was "not fair or reasonable to Trulia's stockholders." The Court's opinion explicitly informs counsel that disclosure-only settlements will be met with disdain and establishes the "plainly material" standard for reviewing such agreements. Under the "plainly material"
standard counsel must meet two prerequisites.

First, the supplemental disclosure provided to shareholders must correct a material misrepresentation or omission. Delaware law follows the Supreme Court of the United States in defining materiality. See *Rosenblatt v. Getty Oil, Co.*, 493 A.2d 929 (Del. 1985). Information is considered material if there is "a substantial likelihood that [the disclosure] . . . altered the 'total mix' of information" available to a reasonable shareholder. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976). The misrepresented or omitted information does not have to be something that would make the shareholder change his vote, rather it is information that a reasonable shareholder would consider important when voting.

Second, the settlement's proposed release must be targeted to nothing more than the shareholders disclosure claims and any fiduciary duty claims resulting from the proposed merger or acquisition. The likely result is that "intergalactic releases" providing corporations with a release of unknown claims, covering both federal securities law and antitrust claims, will not be approved any longer.

Solution: Contouring Settlement Agreements to Meet the "Plainly Material" Standard

Many practitioners view *Trulia* as the definitive end to the Court of Chancery approving what were once routine disclosure-only settlements. The Court will no longer rubber stamp settlement agreements but counsel still has the ability to contour their agreements to meet the stringent "plainly material" standard and pass the Court's give-and-get analysis.

The materiality requirement of additional disclosures should entice counsel to litigate meritorious claims as opposed to routine "deal tax" litigation. One complaint from the Court was that settlement agreements were often reached before discovery had progressed to a point where sufficient information could be presented to the Court evidencing the shareholders "get" of the agreement. To counteract this, counsel should engage in meaningful discovery in an effort to prove to the Court how additional disclosures would be viewed as altering the total mix of information available to shareholders. Besides moving for expedited proceedings to gain additional discovery, counsel may seek an appraisal or DGCL Section 220 inspection of books and records if they have faith in the strength of their claims. See Order Denying Expedited Proceedings, *Johnson v. Driscoll*, C.A. No. 11721-VCN (Del. Ch. Feb. 3, 2016).

The second requirement of the "plainly material" standard puts counsel on notice that disclosure-only settlements, if accepted by the Court, will potentially be limited only to Delaware disclosure and fiduciary duty claims. Counsel should present the Court with limited releases that encompass only these claims if they wish for their settlement to be approved. Counsel should draft narrowly tailored releases that carve out any release of "unknown claims," forward looking claims, and any federal securities claims. See Letter from Counsel Producing Revised Order, *In re BTU Int'l Inc. Stockholders Litig.*, C.A. No. 10364-CB (Del. Ch. Jan. 28, 2016).

As stated earlier, more meaningful discovery must be conducted. The Court wants to
see that the Delaware claims have been "investigated sufficiently" before they are released. Counsel should take more fact witness depositions and request appropriate documents to show the Court that claims have been analyzed. This additional discovery should provide the parties with the requisite information necessary to make a showing to the Court that claims merit approval of a release.

**Other Options: Taking Disclosure-Only Settlements to Other Venues**

Absent some forum selection bylaw, a class of plaintiffs can continue bringing actions in other state venues. Chancellor Bouchard identifies this possibility in *Trulia* and hopes "that our sister courts will reach the same conclusion if confronted with the issue."

A class of shareholder plaintiffs in Maryland is awaiting court approval for an agreement recently reached which resulted in the defendant corporation filing a Form 8-K disclosing additional details about the corporation's fairness opinion analysis. See Complaint, *Silverwood v. Campus Crest*, Case No. 24-C-15-005414 (Md.Cir.Ct. Oct. 27, 2015); Campus Crest Cmty., Inc., Current Report (Form 8-K) (Jan. 19, 2016). Similarly, a class in Wisconsin is awaiting court approval of an agreement reached in which the defendant corporation disclosed additional valuation methods used by their financial advisor. See Stipulation Before Trial, *In re Wausau Paper Corp. S'holders Litig.*, Case No. 15-CV-009090 (Wis.Cir.Ct. Jan. 11, 2016); Wausau Paper Corp., Current Report (Form 8-K) (Jan. 12, 2016). Both settlements call for an "intergalactic release" of present and future claims, both known and unknown, which may be raised in any jurisdiction.

The above settlements were presented a matter of days before the Court of Chancery's opinion in *Trulia*. If the court in each matter approves the party's settlements then future litigants will continue to have venues available for routine, disclosure-only settlements.

**Conclusion**

The *Trulia* decision likely is not the death knell for disclosure-only settlements in Delaware provided the proposed settlements offer a material disclosure to shareholders and the release of claims is narrowly tailored to the present proceedings. Counsel that wish to get additional disclosures in exchange for broad releases would be wise to follow upcoming rulings from other states.

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