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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3 Ways To Help Chancery M&A Suits Survive Trulia

By **Matt Chiappardi**

Law360, Wilmington (July 29, 2016, 1:48 PM ET) -- Delaware Chancellor Andre G. Bouchard's landmark ruling this year in the Trulia Inc. merger case didn't just put the clamp on disclosures-only settlements in merger and acquisition lawsuits; it established a new paradigm for what kinds of challenges to deals will pass muster in the state.

The Trulia decision dealt with a disclosures-only settlement in the case challenging the $2.5 billion merger of Trulia Inc. and Zillow Inc., and said that the Chancery Court "must evolve" away from its predisposition for deals that end investor suits with sometimes minor disclosures, attorneys' fees, and sweeping, unrelated releases from future claims, and such deals must include a tangible benefit to shareholders to pass muster. While the ruling spoke directly to settlements, it also informed counsel on what types of claims and deal challenge cases would have currency with the bench.

In the post-Trulia world, focusing on targeted and discrete claims and taking an aggressive litigation stance will help give M&A suits a fighting chance of not being dead on arrival, according to attorneys who practice in that court. Here are three ways to make sure your deal challenge case isn't torpedoed right out of the starting gate.

Target Meaningful Disclosure Flaws

The Trulia decision dealt with cases that are settled only for additional disclosures to stockholders in proxy materials as consideration, but that doesn't mean the information or lack thereof that merger parties are revealing to investors is off limits.

Although a plaintiff can no longer simply allege the disclosures are wanting and hope to gain ground in court, Chancellor Bouchard still left the door open to challenges calling the disclosures incomplete. But plaintiffs had better make sure the information supposedly being left out is "plainly material," as the chancellor wrote in the Trulia opinion, if their complaint is going to have legs.

"The court stated essentially that it should not be a close call whether or not the supplemental information is material," said Peter N. Flocos, a partner at K&L Gates LLP. "Plaintiffs are going to have to significantly elevate their game. What the court in Trulia signals is that to be in the ballpark for a significant fee award, at a minimum, the plaintiff must obtain plainly material disclosures or other items that substantially benefit shareholders."

That means the myriad complaints that were gaining traction before Trulia with less-than-specific

allegations challenging a deal are no longer likely to fly, which is probably the result Chancellor Bouchard was aiming for.

“The autogenerated complaint that simply alleges an unfair price is not likely to bear fruit anymore, “ said R. Christian Walker of Sutherland Asbill & Brennan LLP. “It’s a transition from a focus on quantity to quality.”

Examples of “plainly material” disclosure deficiencies can range from unrevealed conflicts among the players involved to something that might have made the process go less smoothly than it could have.

“Anything suggesting management got a sweetheart deal,” said William M. Regan, a partner at Hogan Lovells. “Anything involving the financial advisers’ relationship with buyer.”

Jason M. Halper, co-chair of Orrick Herrington & Sutcliffe LLP’s financial services litigation practice, added that other vulnerable disclosure deficiencies can also include things that may have been ignored in the merger that can come back to bite shareholders.

“Situations of a real concern are an acquirer not taking into account litigation exposure to a product or accounting irregularities,” Halper said.

Zoom In on Conflicts

A crucial way to inject high octane into a deal challenge is to focus on whether any director, officer or adviser had some kind of conflict that severely tainted a board’s consideration of a transaction. That nexus of potentially conflicting relationships is likely to get a Chancery judge’s attention.

“They would be most suspect of a case in which the board appears to have in some way acted disloyally,” said Peter Adams, a partner at Cooley LLP. “Were the directors or their advisers somehow affiliated with the buyer and, as a result, did that undermine the process? Those types of undisclosed conflicting arrangements would give the Chancery Court the most pause.”

Adams adds that a key marker of a potentially conflicted transaction is for company leadership to be offered employment with the acquiring company after the merger, which is likely to prompt the Chancery Court to put a deal under the microscope.

“It really boils down to the quantum of facts plaintiffs put in their complaints,” he said. “If, for example, there are facts alleged suggesting that some directors negotiated post-close employment and that information wasn’t fully shared with the rest of the board and shareholders, from a defense perspective, those are more challenging cases.”

Moreover, the universe of players whose conflicts can give a merger challenge suit traction is expanding.

A recent challenge to ExamWorks Group Inc.’s $2 billion take-private deal also focused on management’s law firm Paul Hastings LLP for possible conflicts, a notion both the company and firm have denied.

“The conflicts discussion has gone beyond just advisers, board members and management,” said Matthew Solum, a partner at Kirkland & Ellis LLP. “Plaintiffs are focusing on counsel now as well.”

Yosef J. Riemer, a partner with Kirkland & Ellis, adds that plaintiffs are wise to include as many detailed facts as possible challenging a director's independence and to clearly measure them against the governing legal standards.

"The more you allege, the more you can appeal to a judge's human side, as opposed to a desire just to allow the litigation to proceed," Riemer said.

Aim for the Fast Track

Perhaps the most important way to get the Chancery Court to take a close look at a complaint post-Trulia is to push hard for expedited treatment, so the bench has a chance to actually weigh in on the claims.

One of the takeaways from Chancellor Bouchard's opinion was to encourage vigorous litigation of claims before they should be considered for settlement, and a fast track toward something like a preliminary deal injunction hearing is an ideal setting.

If the court favors the plaintiffs on the speed of the case, it likely has found something worth litigating, said Stuart M. Glass, a partner at Choate Hall & Stewart LLP.

Getting speedy treatment for a case also allows plaintiffs to get their hands on coveted discovery early on.

"Plaintiffs' attorneys are creative, and they will be able to cobble something together to give more substance to their cases than quoting 10-Qs and 8-Ks," Glass said.

But the court will not countenance plaintiffs' attorneys going through the motions to get discovery for its own sake.

"Trulia indicates that there needs to be genuine discovery by the plaintiff, not simply a small number of depositions or of documents reviewed," Flocos said. "What had been happening traditionally was that plaintiffs were going through a charade in terms of discovery. They would pretend to do expedited discovery, but it would be a couple of softball depositions, if that. That's not vigorous litigation, according to the Trulia court."

Flocos said that Chancery judges are going to be on the lookout for a more probing sort of investigation and will likely be much more interested in battle-tested claims.

"Under Trulia, there needs to be genuine litigation by the plaintiffs," Flocos said. "Have plaintiffs really investigated the claims? That is what the court is looking for before being in a position to consider a significant fee award."

--Editing by Brian Baresch and Kelly Duncan.
