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Delaware Court of Chancery Continues to Review Disclosure-Only Settlements with Increased Scrutiny

After issuing several decisions in which it indicated it would review disclosure-only settlements with increased scrutiny, in *In re Trulia, Inc. Stockholders Litigation*, the Delaware Court of Chancery again rejected a settlement in the M&A context that released a broad range of claims in exchange only for supplemental disclosure in the proxy. The Court explained that, in the future, practitioners should expect approval of such settlements only if the plaintiff obtains supplemental disclosures that are “plainly material” (*i.e.*, not a “close call” with respect to materiality) and the release is narrowly tailored. For more, click [here](#).

Delaware Court of Chancery Defers Decision on Disclosure Claims until After Merger Closes

In two recent transcript rulings, Vice Chancellor Laster ruled that allegedly colorable disclosure claims brought by plaintiffs challenging mergers did not warrant expedited injunction proceedings and deferred consideration of the disclosure claims until after the mergers had closed.

In *Johnson v. Driscoll*, the Court of Chancery ruled that the parties’ dispute over whether certain omissions were material was purely legal and did not necessitate expedited discovery. Vice Chancellor Laster then stated his view that the Court should decide disclosure claims on a post-closing motion to dismiss where the Court can give an actual ruling on materiality rather than on a pre-closing motion for expedited proceedings or injunctive relief where the Court can only give a probabilistic determination of materiality. He further explained that deferring a decision until a post-closing motion to dismiss, which would require plaintiffs to plead that there was a non-exculpated disclosure violation *and* that the transaction was underpriced such that the plaintiffs suffered monetary harm, would provide the benefit of a “gut check” for plaintiffs who would have to determine whether they believe a deal is underpriced and that the stockholders have suffered actual harm, “not just an amorphous informational deficit.” For the transcript ruling, click [here](#).

Subsequently, in *Chester County Retirement System v. Collins*, Vice Chancellor Laster again held that a plaintiff’s claim that the directors of a corporation omitted material information from a proxy presented an issue of law that did not necessitate expedited discovery and should be addressed on a post-closing motion to dismiss. For the transcript ruling, click [here](#).

Both rulings reflect the Court of Chancery's recent scrutiny of disclosure claims and settlements. They also depart from prior precedent in which the Court had traditionally held that colorable disclosure claims present a threat of irreparable harm justifying pre-closing expedited injunction proceedings, and had expressed a "certain solicitude" towards plaintiffs by erring on the side of expediting proceedings.

Delaware Court of Chancery Holds that a Buyer's Fraud Claim Based on Extra-Contractual Representations Will Not Be Barred Unless the Buyer Affirmatively Disclaims Reliance on Such Representations

In *FdG Logistics LLC v. A&R Logistics Holding, Inc.*, the Delaware Court of Chancery held that a seller's disclaimer in a merger agreement of extra-contractual representations and warranties was insufficient to bar a buyer's claim for fraud, which was based on extra-contractual representations allegedly made by the seller during merger negotiations, because the buyer *itself* did not make an affirmative statement in the merger agreement disclaiming reliance on such extra-contractual representations. For more, click [here](#).

In reaching its conclusion, the Court distinguished the disclaimer and integration clauses of the merger agreement from the anti-reliance and integration clauses in *Prairie Capital III v. Double E Holding Corp.* where the Court found that those provisions "reflected an affirmative expression by the aggrieved *buyer* that it had relied only on the representations and warranties in a stock purchase agreement." For more, click [here](#).

Delaware Court of Chancery Holds that a Minority Stockholder may be a Controlling Stockholder Where it has Control and Influence over a Board at the Time of a Transaction

In *Calesa Associates, L.P. v. American Capital, Ltd.*, the Delaware Court of Chancery denied a motion to dismiss breach of fiduciary duty claims against a 26% stockholder and members of a company's board of directors, holding that the plaintiffs raised reasonable inferences that a majority of the board was under the influence of, or shared a special interest with, the stockholder, such that it was a controlling stockholder. For more, click [here](#).

Delaware Court of Chancery Applies Entire Fairness Standard to Consulting Contract between Corporation and Affiliates of Controlling Stockholder

In *In re EZCorp Inc. Consulting Agreement Derivative Litigation*, the Delaware Court of Chancery denied a motion to dismiss derivative claims challenging consulting payments between a corporation and affiliates of its controlling stockholder despite the fact that the payments were approved by a purportedly independent committee of the corporation's board. In doing so, the Court distinguished prior opinions, which suggested that the Court should apply the business judgment rule to such a transaction where it had been approved by a board or a duly empowered committee with an independent majority of outside directors, and clarified that the entire fairness standard applied at the pleadings stage, with the possibility of the defendants shifting the burden of persuasion to the plaintiff later in the case by demonstrating that the payments were approved by a well-functioning independent committee. Such a transaction can be subject to dismissal at the pleading stage under the business judgment rule only where it is conditioned at the outset on approval by both an independent committee of the board and a majority of the minority stockholders. For the decision, click [here](#).

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M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

- [January 2016](#)
- [February 2016](#)
- [March 2016](#)

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:



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