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Delaware Court of Chancery Will Require Supplemental Disclosures to Be "Plainly Material" to Justify Mootness Fee Awards Going Forward

In *Anderson* v. *Magellan Health, Inc.*, the Delaware Court of Chancery drastically reduced a plaintiff's mootness fee request and held, in an opinion by Chancellor McCormick, that, moving forward, plaintiffs can justify a mootness fee only if they obtain supplemental disclosures that are "plainly material." In so holding, the court split with prior Court of Chancery precedent requiring that such disclosures be merely "helpful" to support a mootness fee. The result is that the standard required for supplemental disclosures in the context of a mootness fee award is now higher and in line with the "plainly material" standard established for disclosure-only settlements in *In re Trulia, Inc. Stockholders Litigation* (discussed here). *Magellan* also provides helpful guidance around the dollar value of mootness fee awards based on supplemental disclosures, as well as the standards required for a mootness fee award based on the loosening of deal protections, including the waiver of "don't-ask-don't-waive" standstill provisions.

Background

In January 2021, Magellan entered into a merger agreement with Centene Corporation. At that time, five standstill agreements containing "don't-ask-don't-waive" provisions remained in effect with prospective bidders from an earlier 2019 sale process. Customary standstill provisions for a sale process prohibit the bidder from making unsolicited offers. A don't-ask-don't-waive provision further prohibits the bidder from requesting (publicly or privately) a waiver of the standstill to be able to make a bid. The court observed that while such provisions have value-maximizing uses in an active auction, they also can cause a target board to be uninformed that a party is interested in making a topping bid. In this case, however, one of the standstills was scheduled to expire before the Magellan stockholder vote on the proposed Centene transaction, and the others were with parties that were not serious bidders during the earlier 2019 process.

A Magellan stockholder sued, alleging among other things that the five remaining don't-ask-don't-waive standstills tainted the sale process by prohibiting those potential acquirers from coming forward. The plaintiff also moved to enjoin the transaction but, 10 days later and without any discovery, agreed to dismiss the lawsuit as moot after Magellan (i) waived three of the don't-ask-don't-waive provisions (a fourth had already expired, and the board determined the fifth to be in the company's best interest to keep in place) and (ii) issued supplemental disclosures about the provisions. Plaintiff's counsel then sought a mootness fee award of $1.1 million, which amount the company contested, arguing for a fee in the range of $75,000-$125,000. The court awarded a fee of $75,000, finding that the supplemental disclosures were only "marginally helpful" by providing "a more easy-to-read summary" of the don't-ask-don't-waive standstill terms and their effects on the sale process.

Court's Reasoning

Under the corporate benefit doctrine, plaintiffs' attorneys can be reimbursed for fees and expenses when a suit, meritorious when filed, is causally related to a benefit produced by the defendants' action before plaintiffs obtained judicial resolution. The court must make a determination of reasonableness as to the amount of the requested mootness fee based on seven factors articulated in *Sugarland Industries, Inc.* v. *Thomas,* the most important of which is the value of the benefit achieved. Here, plaintiff's counsel sought fees for two corporate benefits, the waivers of the don't-ask-don't-waive provisions and the supplemental disclosures.

- *Waivers*. The court found that the waivers achieved "little-to-no value" in this case, given that one of the standstills by its terms expired two days after the suit was filed and none of the parties bound by the standstills was likely to have been interested in acquiring Magellan or topping Centene's price in early 2021. Thus, while acknowledging that waivers of don't-ask-don't-waive provisions could result in a compensable corporate benefit by increasing the likelihood of a topping bid, the court determined that the waivers did not justify a fee award because they had not achieved such a benefit in this case.

- *Supplemental Disclosures*. The court next discussed the appropriate standard to apply to contested mootness fee requests based on supplemental disclosures. Under the Court of Chancery's 2016 decision in *Trulia*, approval of a "disclosure-only settlement," in which defendants receive a release in exchange for supplemental disclosures to stockholders but no monetary settlement, requires that the supplemental information be "plainly material." Mootness proceedings, by comparison, involve the voluntary dismissal of a case after supplemental disclosures are made but without a release of the defendants or prejudice to other stockholders' ability to pursue the same claims. Such dismissals do not require court approval, but still entitle the plaintiff's attorneys to a fee for obtaining the benefit of the supplemental disclosures, and if the parties cannot agree on the fee amount, then the plaintiff can bring that dispute to a court. Shortly after *Trulia*, in *In re Xoom Corp. Stockholder Litigation*, the court addressed the standard applicable to such mootness fee requests, ruling that supplemental disclosures can merit a mootness fee if they were "helpful" or provide "some benefit to stockholders, whether or not material to the vote." However, in *Magellan*, the court observed that it had not had many opportunities to clarify Delaware policy on mootness fees in the years since *Xoom*, since plaintiffs started filing routine M&A objection suits in federal court. The court further observed that *Xoom* "could be construed as encouraging plaintiffs' counsel to pursue meritless [disclosure] claims" with the expectation of modest mootness fees. This was contrary to the policy objective of *Trulia* to reduce incentives for excessive M&A litigation. Thus, the court ruled that it would no longer follow *Xoom* and, going forward, it would instead require a showing that the supplemental disclosures were "material," in the sense that "the additional information was legally required," as a condition to granting an award of a mootness fee.[1]

Key Takeaways

- *The decision is a clear indication of Delaware's goal of discouraging excessive M&A litigation where stockholders receive no or marginal benefits.* While the court acknowledged that Delaware itself has seen a steep decline in stockholder strike suits in favor of filings in federal court post-*Trulia*, plaintiffs' counsel that continue to bring such suits in Delaware must now demonstrate that the supplemental disclosures obtained are "material" to justify the "merger tax" resulting from award of mootness fees.

- *The decision gives a clear indication to non-Delaware courts that this new policy and standard should be followed in cases involving Delaware corporations, which may effectively lower the dollar value of mootness fee awards in other jurisdictions*. Indeed, at several places in the opinion, the court explicitly assumed the holding would be a persuasive authority to other courts. For example, the court observed that, although the merger tax "is not presently a problem in Delaware courts, it continues to plague Delaware corporations," stated that it determined to reduce the requested fee award in part to avoid

[1] The court declined to apply the higher materiality standard in *Magellan* because no Delaware court had done so in a mootness fee context since *Xoom* and the parties had not briefed whether the standard should be changed.

inadvertently "signal[ing] to other jurisdictions that [its post-*Trulia*] concern over merger litigation has dissipated," and gave a specific warning to other courts "for their sake" to be cautious when citing pre-*Trulia* precedent fee awards.

- *The decision also provides defense counsel a significant precedent to use when negotiating a mootness fee payment with plaintiff's counsel to resolve a mooted case without court approval*.

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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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