

Five Takeaways From Del. Courts' Recent M&A Rulings

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By Michael Greene

* Recent Delaware decisions make it easier to fend off merger-related lawsuits when deal is approved by shareholders

* Attorneys say rulings may heighten focus on deal disclosures and decrease claims brought in Delaware Sept. 9 (BNA) -- A series of Delaware rulings is making it easier for companies to shed certain merger and acquisition-related lawsuits brought by shareholders.

The Delaware Chancery Court recently applied *Corwin v. KKR Fin. Holdings LLC*, 2015 BL 323544 (41 CARE, 10/6/15), and *Singh v. Attenborough*, 2016 BL 145197 (89 CARE, 5/9/16), to dismiss several shareholder lawsuits challenging billion-dollar deals, including those involving Teva Pharmaceutical Industries Ltd.'s \$3.5 billion acquisition of Auspex Pharmaceuticals Inc. (167 CARE, 8/29/16) and C&J Energy Services Inc.'s \$2.86 billion merger with a unit of Nabors Industries Ltd. (166 CARE, 8/26/16).

The *Corwin* and *Singh* cases limit judicial review of transactions when they are approved by a fully informed, uncoerced stockholder vote. The cases apply under two conditions-that the deal doesn't involve a controlling shareholder, and the shareholder plaintiffs seek post-closing damages.

Attorneys told Bloomberg BNA that there are several takeaways from the court's recent use of the case law.

1. 'Cleansing Effect' of Shareholder Approval

The cases applying *Corwin* and *Singh* continue the trend of Delaware courts limiting challenges to transactions which are approved by a majority of disinterested stockholders, said Jessica Corley, an Atlanta-based Alston & Bird LLP partner who chairs her firm's securities litigation group.

Delaware Supreme Court rulings within the last three years, including the *Corwin* decision, "demonstrate that the Delaware courts seem to be getting out of the business of second-guessing the fully informed decisions of sophisticated investors with real skin in the game," she said.

2. Emphasis On Disclosures

Attorneys also suggested that the rulings may increase the focus on deal disclosures because the "cleansing effect" only applies when fully-informed stockholders approve the deal.

Accordingly, "it is all the more important to have complete and accurate material disclosures in your proxy," said Albert Manwaring IV, a Wilmington, Del.-based partner at Morris James LLP and a member of his firm's corporate and fiduciary litigation group.

Companies must ensure that board or financial adviser conflicts of interests, whether actual or potential, are explained in the proxy so that shareholders truly are making informed decisions when they approve the deal, Manwaring said.

Companies and their legal counsel also must make sure that shareholders are given all material information "reasonably available in connection with their vote on the merger," Joan MacLeod Heminway, a law professor at the University of Tennessee at Knoxville, told Bloomberg BNA.

3. More Merger-Related Claims Filed Elsewhere?

The rulings may also contribute to the flight of merger-related lawsuits from Delaware.

According to recent Cornerstone Research reports, merger-related claims may be moving from Delaware to the federal courts (150 CARE, 8/4/16). While many have attributed the trend to the chancery court's promise-articulated in *In re Trulia Inc. Stockholder Litig.* (16 CARE, 1/26/16)-to more closely scrutinize litigation involving disclosure-only settlements, others say the cases applying *Corwin* and *Singh* may be a contributing factor.

"It's a hand-in-hand effect," said Mark A. Morton, a Wilmington-based partner at Potter Anderson & Corroon LLP whose practice involves corporate counseling, governance and opinion work.

Plaintiffs usually bring claims challenging both the transaction process and disclosures, Morton said. "With the *Trulia* and *Corwin* decisions, now there is an incentive to file merger-related claims in jurisdictions that have not yet decided to follow these cases."

Corley, for her part, noted that this line of jurisprudence, taken together with the law developed by the Delaware courts in other decisions, "make it more difficult for plaintiffs to pursue breach of fiduciary duty claims in Delaware."

The plaintiffs' bar may try to get around the high hurdles for pursuing disclosure-only settlements resulting from the chancery court's *Trulia* decision by turning to the federal courts, Corley continued. However, "Judge Posner's decision in the *Walgreens* case adopting *Trulia*'s reasoning may curb that trend before it really gets started."

In *In re Walgreen Co. Stockholder Litig.*, the U.S. Court of Appeals for the Seventh Circuit Aug. 10 applied *Trulia* in rejecting the settlement of a shareholder class action challenging the deal that created *Walgreens Boots Alliance Inc.* (155 CARE, 8/11/16).

4. Rise in Appraisal Claims?

The attorneys also suggested that shareholder plaintiffs may turn to claims that aren't related to breaches of fiduciary duty.

Disgruntled shareholders may sue for waste, which will be tough to prove in these circumstances, or find another applicable claim based on facts related to the merger, such as a federal or state securities fraud claim, Heminway said. Shareholders who disagree with the deal value of a merger transaction before the voting takes place may follow applicable statutory procedures allowing them to dissent from the transaction and seek an appraisal of their shares, she said.

Corley agreed. "Given the resulting decline in disclosure and fiduciary duty litigation, we are likely to see more plaintiffs seek to pursue statutory appraisal claims," she said.

5. Buyers Now Have More Leverage?

Morton suggested that *Corwin* and its progeny may create challenges on the transactional side. The decisions give buyers leverage that they didn't have before, he said.

Buyers, knowing that a transaction with tighter deal protections are still likely to be sterilized by the approval of a majority of stockholders, can now push for higher termination fees and other restrictions that make it more difficult for higher bidders to emerge, Morton said. He predicted that over the next two to three years, it will be harder for targets to shop for higher offers and to get better deal prices.

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