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KIRKLAND **M&A UPDATE**

August 15, 2016

Whack-a-Mole: The Evolving Landscape in M&A Litigation Following *Trulia*

While the Trulia decision on disclosure settlements has not ended M&A litigation, it has changed the risk profile of deal litigation and highlighted new ways to manage that risk.

The landmark January 2016 Delaware Chancery Court decision in *Trulia* has led to dramatic changes in the M&A litigation landscape. On a surface level, the results are straightforward — a sharp reduction in the use of pre-closing "disclosure-only settlements" to dispose of mostly nuisance suits filed indiscriminately on virtually every deal whereby a target's shareholders would receive supplemental pre-vote or pre-tender disclosures (sometimes of questionable value) in exchange for broad liability releases. While some of these settlements involved meaningful disclosure after plaintiffs engaged in appropriate discovery, the monetary benefits of these settlements flowed only to the plaintiffs' attorneys who received a fee award, usually six figures, for obtaining these disclosures on behalf of the target's shareholders. In *Trulia*, the Chancery Court's growing disfavor of this outcome culminated in the outright rejection of a proposed disclosure settlement and a clear warning that "practitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed."

While the impact of *Trulia* has been significant with the demise of the fast-track disclosure settlement route in Delaware, it has not spelled the end of deal litigation. Instead, it has set in motion a cascading set of developments that change (but do not eliminate) the risk profile of M&A litigation and create new pathways for the management of that risk.

Below we highlight a handful of these noteworthy post-*Trulia* trends:

Significant reduction in overall deal litigation. Given the large number of public companies incorporated in Delaware and the influence of Delaware courts nationwide, the economic incentive for plaintiffs' attorneys to reflexively file claims and seek a disclosure settlement has been reduced. According to Cornerstone Research, from 2010 to 2014, more than 90% of deals valued at over $100 million were the subject of at least one lawsuit (and usually multiple filings), with only a handful ever going to full trial and well over 50% being the subject of disclosure-only settlements. By contrast, in the post-*Trulia* first half of 2016, only 64% of such deals drew a legal challenge.

Many plaintiffs are seeking a "friendlier" forum. As a result of the *Trulia* decision in Delaware and the corresponding pressure on attorney fee awards in cases where the only remedy is additional disclosure, plaintiffs are now looking to file M&A cases in non-Delaware jurisdictions where they may find a more sympathetic audience for the continued pursuit of disclosure settlements. Many states have not yet adopted the *Trulia* approach to these settlements, and courts in those states may still be willing to approve disclosure settlements and make robust plaintiff attorneys' fee awards. This trend is reflected in data from Cornerstone Research. While plaintiffs filed in Delaware in over 60% of M&A lawsuits in prior periods, in the most recent nine months Delaware was the chosen forum in only 26% of litigated deals. The adoption by a target company of a forum-selection by-law mandating that breach of fiduciary duty suits must be filed in Delaware can help mitigate the effect of this forum shopping by plaintiffs.

Increase in federal claims. To evade the Delaware trends as well as the protective benefits of a forum-selection by-law, which only applies to state law claims, plaintiffs have also sought to recast their deal-related claims as disclosure claims brought in federal court under the proxy or tender offer rules. According to Cornerstone

Research, the first half of 2016 showed an increase of 167% in the number of federal M&A suits compared to the preceding six months. While disclosure settlements resulting from this uptick in federal claims are now working their way through the federal courts, it is worth noting that just last week an appellate panel in the Seventh Circuit (*Walgreens*) overturned a district judge's approval of a disclosure settlement. Adopting *Trulia*-like reasoning, the Seventh Circuit panel described the settlement as a "racket" where the "only concrete interest suggested by this litigation is an interest in attorneys' fees, which of course accrue solely to class counsel and not to any class members."

Renewed focus on appraisal claims. Plaintiffs are also focusing more on appraisal claims as an alternative avenue to challenge deals. These claims have not been impacted by *Trulia* and do not necessarily require proof that the board breached its fiduciary duties. After a string of cases where Chancery judges determined that the deal price was the best indicator of fair value (i.e., that appraisal claims would *not* lead to a higher value award than the deal price where there was good sale process), in the recent *Dell* and *DFC Global* appraisal cases, the Delaware Chancery Court awarded the claimant shareholders a "fair price" per share that was above the deal price by 28% and 7%, respectively, even while acknowledging that the sale processes in those cases were fairly robust.

Focus on getting disclosure right. At the same time as the *Trulia* developments, the Delaware courts also moved to articulate clearly a general principle regarding the "cleansing" effect of a fully informed shareholder approval of the deal on potential target board liability. In particular, the Delaware Supreme Court held in *Corwin v. KKR* that a board's decisions will have the benefit of being reviewed under the more deferential "business judgment" standard, as opposed to being subject to enhanced scrutiny under stricter standards, if a transaction is "approved by a *fully informed*, uncoerced majority of disinterested stockholders." This articulation of the benefit of accurate and complete disclosure coincided with *Trulia*, which resulted in less litigation about, and therefore less scrutiny of and possible improvements to, the pre-vote or tender disclosures issued to target shareholders. As a result, perceived disclosure shortcomings are more often being litigated post-closing, where the impact of any disclosure deficiencies is magnified by the potential loss of the "cleansing" effect imbedded in the *KKR* doctrine. Therefore, parties should place increased emphasis on preparing appropriate disclosure in the first instance, as there will likely not be either pre-closing litigation claims to improve the disclosure or the prospects of a general release of liability received in a pre-closing disclosure settlement.

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While the impact of *Trulia* is profound, rumors that it represented the demise of M&A litigation were greatly exaggerated. As described above, deal litigation continues, albeit in different forums, with different claims, and subject to different risk mitigation tactics.

If you have any questions about the matters addressed in this *M&A Update*, please contact the following Kirkland authors or your regular Kirkland contact.

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