



Delaware Court of Chancery: Merger Disclosure Claims Must Be Brought Pre-Closing

Posted by William Savitt, Wachtell Lipton Rosen & Katz, on Saturday, October 1, 2016

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The Delaware Court of Chancery yesterday held that claims challenging the sufficiency of merger disclosures should be pursued before the merger closes if they are to be pursued at all. [An Nguyen v. Michael G. Barrett, et al., C.A. No. 11511-VCG \(Del. Ch. Sept. 28, 2016\)](#).

The lawsuit challenged the disclosures issued by Millennial Media in connection with its 2015 acquisition by AOL. Before Millennial's stockholders approved the merger, the plaintiff raised some thirty alleged disclosure violations, but sought pre-closing injunctive relief for just one. The court denied the injunction application and the transaction closed with the support of the overwhelming majority of Millennial's stockholders.

The plaintiff then amended his complaint to seek damages for two alleged disclosure violations—the claim that the court had previously rejected and a second claim that the plaintiff had not earlier pressed. Dismissing the amended complaint, the court emphasized the contrast between a “pre-close disclosure claim, heard on a motion for preliminary injunctive relief,” and a “disclosure claim for damages against directors *post-close*.” A pre-close claim, the court explained, requires a plaintiff to show only “a reasonable likelihood . . . that the alleged omission or misrepresentation is material,” while a post-close damages claim carries substantial additional burdens, including the obligation to plead that the directors violated their disclosure duties “consciously,” “intentionally,” or in “bad faith.” Finding no allegations that demonstrated this “extreme set of facts,” the court ruled that the damages claims could not stand.

The court rejected the plaintiff's suggestion that “Delaware has recently established a new regime,” under which a plaintiff can elect to bring disclosure claims before or after the stockholder vote: “To be clear, where a plaintiff has a claim, pre-close, that a disclosure is either misleading or incomplete in a way that is material to stockholders, that claim should be brought pre-close, not post-close.” Only that rule, the court

explained, encourages litigants to seek a remedy for disclosure problems “pre-close, at a time when the Court can insure an informed vote.”

The decision makes clear that plaintiffs may not seek tactical gain by deferring merger disclosure claims until after stockholders tender or vote and the disclosures can no longer be supplemented. *Nguyen* thus complements recent case law establishing the increasing importance of informed stockholder approval in reducing merger litigation risk.