Delaware Courts Question Long-Standing Practice of Approving Disclosure-Based Deal Litigation Settlements

Skadden

10/22/15

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In a series of rulings issued over the last few months, the Delaware Court of Chancery has shaken up decades of well-settled authority in the area of deal litigation settlements. The Court of Chancery historically has approved broad releases in deal litigation settlements which cover not only fiduciary duty claims but all claims, known and unknown, based on the same factual predicate. Defendants have taken comfort in the fact that approval of a settlement involving such a release provides certainty and finality. However, with these recent rulings, the court has begun to question whether settlements involving therapeutic benefits (such as supplemental disclosures or deal protection changes) should support broad releases for defendants. The increased scrutiny in this area has resulted in varying decisions by the members of the court.

Vice Chancellor Laster Sparks the Debate

On July 8, 2015, Vice Chancellor J. Travis Laster declined to approve a therapeutic settlement whereby the defendants agreed to the following: a $14 million reduction in the termination fee; reduction in the matching rights period from four days to three days; and supplemental disclosures. *Acevedo v. Aeroflex Holding Corp.*, C.A. No. 9730-VCL (Del. Ch. July 8, 2015) (TRANSCRIPT). Despite "acknowledging … that this is the type of settlement which courts have long approved on a relatively routine basis," the court refused to approve the settlement for a novel reason — namely, that the therapeutic consideration was insufficient to support a broad release.

Instead, the court offered three options for alternative resolution of the action, and indicated that the plaintiffs' counsel would be entitled to a modest mootness fee. The three options were: (i) the plaintiffs could reframe the issues as a dismissal of disclosure claims on mootness grounds, (ii) the parties could renegotiate the scope of the release in the settlement to encompass solely Delaware fiduciary duty claims, or (iii) the defendants could move to dismiss the action. The defendants ultimately moved to dismiss the action, which Vice Chancellor Laster granted without argument.

Vice Chancellor Noble Joins the Discussion

The same day the *Aeroflex* decision was rendered, Vice Chancellor John W. Noble expressed reservations about the scope of a broad release in a therapeutic settlement. *See In re Intermune Inc. Stockholders Litig.*, Consol. C.A. No. 10086-VCN (Del. Ch. July 8, 2015) (TRANSCRIPT). Specifically, he questioned why the scope of the release in the settlement should extend to "process" claims (when such claims appeared to be weak from the outset) and the action was "destined to be" a "disclosure case." Vice Chancellor Noble expressed concerns that permitting the parties to settle process claims with supplemental disclosures is a form of "deal insurance" the court arguably should not be sanctioning. He offered the parties an opportunity to submit additional briefing before he ruled on the merits of the settlement, but all of the parties declined. He then reserved decision on approval of the settlement, which he has not yet issued.

Chancellor Bouchard Voices His Concerns

Before, during and after *Acevedo* and *Intermune*, Chancellor Andre G. Bouchard continued to approve disclosure-based settlements with broad releases, noting a number of times that a broad release may be appropriate so long as the disclosures obtained in the settlement correspond to similarly "weak" price and process claims. *See, e.g.*, *In re Protective Life Corp. S'holders Litig.*, Consol. C.A. No. 9794-CB (Del. Ch. June 16, 2015) (TRANSCRIPT); *In re OpenTable, Inc. S'holders Litig.*, Consol. C.A. No. 9776-CB (Del. Ch. May 27, 2015) (TRANSCRIPT); *In re Peregrine Semiconductor Corp. S'holder Litig.*, C.A. No. 10119-CB (Apr. 13, 2015) (TRANSCRIPT); *Assad v. World*

Delaware Courts Question Long-Standing Practice of Approving Disclosure-Based Deal Litigation Settlements

Energy Solutions, Inc., C.A. No. 10324-CB (Del. Ch. Aug. 20, 2015) (TRANSCRIPT); *In re TW Telecom, Inc. S'holder Litig.*, C.A. No. 9845-CB (Del. Ch. Aug. 20, 2015) (TRANSCRIPT).

However, on September 16, 2015, Chancellor Bouchard reserved decision on approval of a disclosure-based settlement that he described as the "underbelly of settlements." He requested supplemental briefing on two issues: whether disclosures must be material to support a settlement, and why the scope of the release should include unknown claims. *In re Trulia, Inc. S'holder Litig.*, C.A. No. 10020-CB (Del. Ch. Sept. 16, 2015) (TRANSCRIPT).

Vice Chancellor Glasscock Warns That Broad Releases May No Longer Be Available in Disclosure-Based Settlements

In April 2015, Vice Chancellor Sam Glasscock III approved a therapeutic settlement based on consideration similar to that in the *Aeroflex* settlement, which, as discussed above, Vice Chancellor Laster rejected. Vice Chancellor Glasscock awarded the plaintiffs' counsel $2.1 million in fees and did not express concern about the scope of the release in this settlement. *In re Athlon Energy, Inc. S'holder Litig.*, Consol. C.A. No. 10250-VCG (Del. Ch. Apr. 14, 2015) (TRANSCRIPT).

Months later, on September 15, 2015, Vice Chancellor Glasscock approved a disclosure-based settlement in which he found, after receiving assurance from counsel that the release would not extend to certain federal claims, that the scope of the release was "limited to … the fiduciary duty claims that arose out of the transaction." *In re Susser Holdings Corp. Stockholder Litig.*, C.A. No. 9613-VCG (Del. Ch. Sept. 15, 2015) (TRANSCRIPT). In approving the settlement, Vice Chancellor Glasscock emphasized that the release "was negotiated in good faith under the understanding that typically broad releases have been accepted by the Court."

Two days later, on September 17, 2015, Vice Chancellor Glasscock approved a settlement with even stronger language concerning the ongoing viability of broad releases in connection with disclosure-based settlements. *In re Riverbed Technology, Inc.*, C.A. No. 10484-VCG (Del. Ch. Sept. 17, 2015). Over multiple objections, Vice Chancellor Glasscock found that the supplemental disclosures obtained in the settlement represented "a positive result of small therapeutic value to the Class which can support, in my view, a settlement, but only where what is given up is of minimal value." In addition, Vice Chancellor Glasscock declined to reject the settlement based on the scope of the broad release but noted that the scope of the release was "troubling," explaining:

> [G]iven the past practice of this Court in examining settlements of this type, the parties in good faith negotiated a remedy — additional disclosures — that has been consummated, with the reasonable expectation that the very broad, but hardly unprecedented, release negotiated in return would be approved by this Court. *I note that this factor, while it bears some equitable weight here, will be diminished or eliminated going forward in light of this Memorandum Opinion and other decisions of this Court*.

In re Riverbed Technology, Inc., C.A. No. 10484-VCG, slip. op. at *14 (*emphasis added*).

Vice Chancellor Noble Approves Disclosure-Based Settlement Using a Balanced Approach

Although he has not yet issued a decision in *Intermune*, on September 17, 2015, only hours after the *Riverbed* decision was issued, Vice Chancellor Noble, ruling from the bench, approved a disclosure-based settlement with broad releases. *In re CareFusion Corp. Stockholders Litig.*, C.A. No. 10214-VCN (Del. Ch. Sept. 17, 2015) (TRANSCRIPT). In approving the settlement, Vice Chancellor Noble acknowledged that no one had appeared to object to the settlement, which offered "a modicum of confidence that nothing else worth pursuing is out there." He found further that "plaintiffs' counsel offered a reasoned analysis as to why … other Delaware or federal claims offered nothing for the class" and indicated that the court could not independently discern any other viable claims either.

Vice Chancellor Noble also mused that "there may be something out there for worry" about a broad release but "[t]hat kind of ever-present speculation does not call for rejecting or limiting the settlement to which the parties have agreed. It is a reason though for caution and care." He acknowledged that "[a]bsolute certainty simply is not a realistic goal," and further explained:

> The shareholder class, and, indeed, the Court, are dependent upon counsel for the class. But, the settle quickly and cheaply to collect a fee [approach] is, I guess, something that we always have to be concerned about. But on the other hand, that may simply be somewhat too cynical. When plaintiffs' counsel represent that they have seriously looked at other possible claims and can explain why they chose not to pursue them because of the merits and not because of sloth or short-term greed, approval of a global release may make much more sense.

Vice Chancellor Noble concluded by finding he was "satisfied the settlement is fair, reasonable, and adequate."

Delaware Courts Question Long-Standing Practice of Approving Disclosure-Based Deal Litigation Settlements

Vice Chancellor Parsons Weighs In

On September 29, 2015, Vice Chancellor Donald F. Parsons, Jr. approved a disclosure-based settlement in *In re Vitesse Semiconductor Corp. Stockholders Litig.*, C.A. No. 10828-VCP (Del. Ch. Sept. 29, 2015). He observed that "[i]n light of this Court's recent decisions — and this would be going back to July, and there have been several of them — involving so-called disclosure-only settlements, including *In re Riverbed Technology Inc. Stockholder Litig.*, it's clear that this Court is paying careful attention to such settlements, and I consider both plaintiff's underlying claims and the scope of the release being granted by the plaintiffs in assessing the give side of the evaluation I have to do here." Vice Chancellor Parsons found the consideration sufficient and added that the scope of the release was broad but "[b]ased on the fairly weak nature of the claims under Delaware law … I will approve the release in its current form."

Vice Chancellor Laster Confirms His Earlier Views Expressed in *Aeroflex*

Nine days after issuing his ruling in *Aeroflex*, in a letter addressing the settlement of another action, Vice Chancellor Laster instructed the plaintiffs' counsel to "address in their brief and be prepared to explain at oral argument why this matter should not be approached in the same manner as the *Aeroflex* case." *In re Aruba Networks, Inc. S'holder Litig.*, Consol. C.A. No. 10765-VCL (Del. Ch. July 17, 2015) (ORDER). On October 9, 2015, Vice Chancellor Laster refused to approve the settlement, finding that the case was not meritorious when filed and that he was unimpressed by the discovery record. Addressing the scope of the release, Vice Chancellor Laster also noted that "we have reached a point where we have to acknowledge that settling for disclosure only and giving the type of expansive release that has been given has created a real systemic problem." Moreover, Vice Chancellor Laster addressed "the idea of expectations and whether there's a reliance interest in the past practice of granting these types of releases," explaining that "[f]or better or for worse, I don't think you had that reliance interest from me." Ultimately, the court determined that it would not certify the class, declined to approve the settlement on "inadequate representation" grounds and went a step further to dismiss on similar grounds the cases filed by the named plaintiffs involved in the litigation.

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One thing is clear — disclosure-based deal litigation settlements involving a broad release of claims are no longer routinely being approved by the Court of Chancery. The court is openly revisiting and questioning what has been long-settled practice. At present, it does not appear that the members of the court have landed on a uniform view on how to approach the issue going forward.

The court's rulings have left many practitioners asking: What should a company do when presented with an opportunity to settle a deal litigation for therapeutic consideration, such as supplemental disclosures, especially when facing multiforum litigation? Whether to settle or litigate may depend on a number of factors, including:

- whether litigation has been filed in Delaware, or in some other forum or multiple forums;
  - in some respects, this may depend on whether the selling company has adopted a forum selection charter provision or bylaw selecting Delaware as the exclusive forum;
- the judge assigned to the case;
- the strength of the claims asserted, and what standard of judicial review will be used by the court to review the claims; and
- the individual facts and circumstances of each transaction, including, for example, any alleged board conflicts or challenges to independence, or whether a case involves a controlling stockholder or management take-private transaction.

This type of consideration likely will be present in every deal litigation for the foreseeable future, at least until the Court of Chancery lands on a uniform view. In certain circumstances, it may be that litigation, including dispositive motion practice, is a better approach than settlement. In other situations, mooting disclosure claims or agreeing to a more narrow form of release may be warranted.

Until the Court of Chancery issues more concise guidelines, or the Delaware Supreme Court weighs in on the issue, this will be an area for careful attention and discussion between litigants and their counsel. In addition, these recent developments possibly could result in plaintiffs filing (and settling) deal litigation cases in other states, and it is not clear what effect the Court of Chancery's re-examination of settlement practice might have in other forums.