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Disclosure Only Settlements – the Effect of Choice of Law

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The Delaware Courts took a significant step in 2016 to reduce the filing in Delaware of lawsuits aimed at procuring disclosure only settlements (meaning settlements that involve only the provision of additional information surrounding a proposed sale or acquisition of a company and not involving any financial payments other than attorneys' fees). *In re Trulia, Inc. Stockholder Litigation (Del. Ch. 2016)* set new conditions to gain court approval of a disclosure only settlement. For public companies, this development offers relief from the frequency of shareholder suits, particularly in the mergers and acquisitions context. This adds to the list of reasons why so many companies, both public and private, choose to incorporate in Delaware, and makes it a preferred choice for governing law and venue in agreements. With the competition among states for corporate tax dollars, it was surprising, therefore, that the New York Appellate Division failed to follow suit in *Gordon v. Verizon Communications, Inc. (Feb. 2, 2017)*.

In 2016, the Delaware Court of Chancery took a firm stand against "disclosure only" settlements with the opinion issued in *In re Trulia, Inc. Stockholder Litigation*. Until that decision, stockholder litigation had become, for all practical purposes, an almost routine and anticipated step in selling a company. For plaintiffs' counsel, disclosure only settlements presented the opportunity to earn a significant fee. For defendants, a disclosure only settlement, which included paying plaintiffs' counsel's fees, became a routine part of doing business, insurance almost, against problems that are more serious. Delaware courts, however, frustrated with the proliferation of such cases and believing the costs of such suit did little to protect stockholder value, took a firm stand in 2016 to discourage the bringing of such suits. The court stated that disclosure settlements would continue to be met with disfavor "unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sales process, if the record shows that such claims have been investigated sufficiently."

The Appellate Division of the Supreme Court of the State of New York took a different approach in resolving a disclosure only settlement in *Gordon v. Verizon Communications, Inc.* In that case, the appellate court reversed an order denying plaintiffs' motion for final approval of a disclosure only settlement in a shareholder class action litigation related to Verizon Communication, Inc.'s acquisition of Vodafone Group PLC's stake in Verizon Wireless. The corporation promised to obtain fairness opinions in connection with future transactions to determine the overall fairness of any agreement regarding such future transaction. The appellate court's decision indicated that the promise to obtain a fairness opinion constituted a benefit sufficient to warrant approval of the settlement agreement, despite expert testimony that fairness opinions can be routine and do not provide real benefit to shareholders.

For companies that anticipate a future that may include mergers and acquisitions, careful attention should be given to state of incorporation and choice of law in all documents. Roetzel attorneys can assist you in reviewing relevant documents and making choices to ensure an optimal outcome for your company. If you have questions about this topic, please contact one of the listed Roetzel attorneys.

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