

July 12, 2023

Delaware Court of Chancery Raises Standard for Mootness Fee Awards in M&A Transactions

On July 6, 2023, Chancellor McCormick in *Anderson v. Magellan Health, Inc.* took another step towards curbing fees for plaintiffs' lawyers when corporations issue supplemental disclosures in response to litigation challenging the disclosures for M&A transactions. Because these types of litigation constitute a "merger tax" that "continues to plague Delaware corporations" without bringing demonstrable benefit to shareholders, Chancellor McCormick announced that going forward, the Court of Chancery should grant fees to plaintiffs' lawyers only where supplemental disclosures are "material" to stockholders.¹ This new standard replaces the lower "some benefit" or "helpful" standard the Court of Chancery has generally used since the 2016 *Trulia* decision.²

This latest decision stems from Centene Corporation's 2021 acquisition of Magellan Health. After the merger was announced, a Magellan stockholder sued in the Court of Chancery seeking to enjoin the stockholder vote and merger.³ Ten days after filing suit—and without prosecuting or briefing his motion for a preliminary injunction—the stockholder agreed to dismiss his lawsuit in exchange for Magellan waiving certain of the "don't-ask-don't-waive" standstill provisions in confidentiality agreements with unsuccessful bidders and issuing supplemental disclosures.⁴ After the merger closed, the stockholder's counsel moved for an award of \$1.1 million in fees and expenses, claiming that the waivers and disclosures produced a corporate benefit to Magellan.⁵

In awarding a "modest fee" of \$75,000 under the previous "helpful" standard, the court found that the waiver of the don't-ask-don't-waive provisions "had little-to-no value" and that the supplemental disclosure was only "marginally helpful."⁶ The court stated that had the supplemental disclosure been subject to the new "materiality" standard announced in its decision, "it seems unlikely that there would have been any award at all."⁷ Chancellor McCormick emphasized that the \$75,000 award—which was the lowest amount in the

range Magellan presented to the court—was less than the stockholder’s counsel’s lodestar and “should send a signal that these sorts of cases are not worth the attorneys’ time.”⁸

IMPLICATIONS

Chancellor McCormick’s decision takes direct aim at the high volume of merger litigation that offers no benefit for corporations or their stockholders. Despite *Trulia*’s attempt to limit the value of such suits, the court in *Magellan* noted that the merger tax has “spread mainly to federal courts” and “is still a problem” for Delaware corporations.⁹ In an effort to address the spread of this litigation to other jurisdictions, the court issued a “warning” to other courts that “[o]ften, pre-*Trulia* precedent pricing corporate benefits reflect inflated valuations and warrant careful review.”¹⁰ The decision may serve as a guide to other jurisdictions tasked with valuing mootness fee petitions for supplemental disclosure-only settlements, and may provide grounds to resist similar fee requests in federal courts, which often have looked to Delaware precedent for guidance.

The decisions also addressed certain policy reforms advanced by two law professors in an *amicus* brief. Though the court declined to endorse these reforms, it did state in a footnote that Delaware corporations may “have the power to include a provision in their certificates of incorporation, but not in their bylaws, that would require a minimum holding threshold for filing a breach of fiduciary duty claim.”¹¹ Such a power may reduce the frequency of merger tax suits, which are frequently filed by plaintiffs holding a *de minimis* number of shares in the corporation.

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ENDNOTES

- 1 *Anderson v. Magellan Health, Inc.*, 2023 WL 4364524, at *10-*11 (Del. Ch. July 6, 2023).
- 2 *Id.* at *9 (quoting *In re Xoom Corp. S’holder Litig.*, 2016 WL 4146425, at *3 (Del. Ch. Aug. 4, 2016)).
- 3 *Id.* at *2.
- 4 *Id.*
- 5 *Id.* at *2-*3.
- 6 *Id.* at *7, *11.
- 7 *Id.* at *16.
- 8 *Id.*
- 9 *Id.* at *10.
- 10 *Id.* at *7.
- 11 *Id.* at *15 n.103 (citing *New Enter. Assocs. 14, L.P. v. Rich*, 2023 WL 3195927, at *29 (Del. Ch. May 2, 2023)).

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