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Is New York Now a More Favorable Disclosure-Only Settlement Jurisdiction? Time Will Tell

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In *Gordon v. Verizon Communications, Inc.*,[1] New York's Appellate Division, First Department approved a non-monetary settlement to a putative shareholders' class action lawsuit challenging a corporate acquisition. The decision is notable because Delaware courts have recently issued a number of opinions rejecting "disclosure only" settlements as immaterial to shareholders, leading to speculation as to whether courts in other jurisdictions would follow suit. While the full impact of *Gordon* remains to be seen, the decision confirms that, at least in New York, "the extinction of 'disclosure-only' settlements … may be premature."[2]

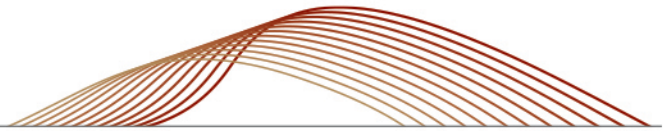
Background

In *Gordon*, parties to a shareholder class action, which challenged the purchase by defendant of an entity owned by its joint venture partner, reached a settlement in principle that required defendants to make certain supplemental disclosures related to valuation and financial advisor analysis. The non-monetary consideration was not limited to disclosures, as the parties also agreed that, for a period of three years, the defendant would obtain a fairness opinion from an independent financial advisor if there were a disposition of greater than five percent of the defendant's assets.

The trial court, after hearing from two objectors, rejected the settlement, concluding that the supplemental disclosures "individually and collectively fail[ed] to materially enhance the shareholders' knowledge about the merger" and that "[t]hey provide[d] no legally cognizable benefit to the shareholder class, and cannot support a determination that the Settlement is fair, adequate, reasonable and in the best interests of the class members." The trial court also "found that the corporate governance aspect of the terms of the proposed settlement could curtail [the defendant's] directors' flexibility in managing minimal asset dispositions."[3]

The Appellate Decision

The Appellate Division reversed. Citing the Delaware Court of Chancery decision in *In re Trulia, Inc. Stockholder Litig.*,[4] and other cases, the Appellate Division acknowledged the "increasingly negative view of 'disclosure-only' or other forms of nonmonetary settlements … reflected in decisions of courts in both Delaware and New York."[5] However, the Appellate Division rejected as premature the admonition that such settlements are extinct, citing among other precedents a recent Appellate Division case finding that additional disclosures to be made as part of a proposed settlement were "arguably beneficial" to shareholders, and reversing a determination that a proposed disclosure-only settlement should not be approved.[6]

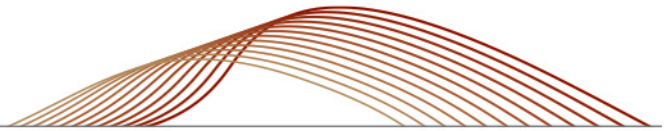


After determining New York law would govern the analysis even though the acquiring defendant was a Delaware corporation, the Appellate Division applied New York's five-factor class action settlement fairness test articulated in *Matter of Colt Indus. Shareholders Litig.*: the likelihood of success on the merits, the extent of support from the parties for the proposed settlement, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact.[7] The Appellate Division found all of these factors weighed in favor of the proposed settlement. The Appellate Division then went on to apply two additional factors to the *Colt* test to create an "enhanced standard" so as "to effect an appropriately balanced approach to judicial review of proposed nonmonetary class action settlements and provide further guidance to courts reviewing such proposed settlements in the future."[8] These sixth and seventh factors, respectively, were (1) whether the proposed settlement was in the best interests of all members of the putative class; and (2) whether the settlement was in the best interest of the corporation. The Appellate Division observed that the enhanced *Colt* factors were comparable to those applied by its Delaware counterparts, including "the reasonableness of the 'give' and the 'get' or what class members receive in exchange for ending the litigation" as recently articulated in *Trulia*.

Regarding the sixth factor, the Appellate Division went through each of the supplemental disclosures and determined that they provided "some benefit" to the shareholders, although the fourth disclosure the Appellate Division characterized as "minimal in nature." Separately, however, the Appellate Division characterized the fairness opinion requirement as "the *most* beneficial aspect" because it "safeguard[ed] the valuation of corporate assets" and therefore was a "sufficient benefit to the putative class of shareholders as a whole to warrant approval of the proposed settlement in this case."[9] As to the seventh factor, the Appellate Division determined it was in the best interest of the corporation because it would reflect the defendant's direct input and allow it to avoid additional legal fees and expenses. Finally, the Appellate Division concluded that an award of attorneys' fees was warranted, and remanded the case to the trial court for a determination of an appropriate fee award.[10]

Takeaways

It remains too early to discern the full impact the *Gordon* decision may have on future M&A shareholder class action settlements that lack a monetary consideration component, but there are some preliminary takeaways. *First*, differences in language aside, the Appellate Division characterized the *Colt* enhanced factors as "comparable" to Delaware law for determining whether a class action settlement merits approval. Although not binding, New York courts may potentially continue to look to Delaware holdings in this area for guidance, which could influence *Gordon*'s reach. Of particular interest will be how other New York courts address settlement releases, an issue that was a focal point of the *Trulia* decision in Delaware but not discussed extensively in *Gordon*. *Second*, the "most beneficial" aspect of the settlement from the Appellate Division's perspective was *not* the supplemental disclosures, but rather the fairness opinion requirement. Indeed, the decision suggests that this corporate governance reform was a "sufficient benefit" in and of itself to warrant settlement approval. As such, it is not clear that absent the fairness opinion requirement the Appellate Division would have approved the settlement. *Finally*, it is important to note that on appeal neither of the two objectors opposed the settlement, but only the fee award, a point the Appellate Division noted several times in its opinion, leaving open the question of whether the outcome would have been different had the objectors continued to challenge the substance of the settlement on appeal. Still, the decision is an important reminder that class action settlements lacking monetary consideration may still pass muster in New York.



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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] 2017 WL 442871 (Feb. 2, 2017).

[2] *Id.* at *5.

[3] *Id.* at *3.

[4] 129 A.3d 884 (Del. Ch. 2016).

[5] 2017 WL 442871, at *4.

[6] *Id.* at *5.

[7] 155 A.D.2d 154 (1st Dep't 1990).

[8] 2017 WL 442871, at *6.

[9] *Id.* at *8 (italics added).

[10] *Id.* at *9, *11-12.