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BUSINESS COURT INSIDER

Court Provides Additional Guidance on Mootness Fee Procedures

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In *Swomley v. Schlecht*, C.A. No. 9355-VCL (Del. Ch. March 12, 2015), the Delaware Court of Chancery recently issued a letter opinion detailing the obligations of parties in class or derivative litigation to provide notice where a mootness fee is paid, and provided further guidance regarding the procedures that must be observed in such a scenario.

Swomley involved a transaction where former minority stockholders were frozen out following a merger between the company and a newly formed entity created by management. Prior to the merger, the plaintiff minority stockholders filed a class action complaint and sought a temporary restraining order preventing the defendants from proceeding with a vote on the merger due to the defendants' alleged failure to disclose material facts. The defendants subsequently agreed to postpone the vote and ultimately issued supplemental disclosures.

Following the issuance of the supplemental disclosures, the parties, who now agreed that the disclosure claims were moot, submitted a stipulation and order approving a form of notice to the class and providing a hearing on the plaintiffs' motion for attorney fees and expenses, as well as a form of final order and judgment to be entered after the notice and hearing.

Denying the parties' request, the court, citing *In re Advanced Mammography Systems Shareholders Litigation,* 1996 Del. Ch. LEXIS 132 (Oct. 30, 1996), began by observing that notice to the class is required where: "(i) the defendants have taken action sufficient to render a class or derivative action moot and (ii) the defendants agree (or someone else agrees on their behalf) to pay a fee to plaintiffs' counsel in light of the benefits of the litigation conferred by contributing to the action taken by the defendants." The court explained that notice to the class is required in this scenario because of the possibility of "a surreptitious buyout," where the defendants have not actually mooted the claims, but the plaintiffs nevertheless agree to dismiss them for a fee. Additionally, even where the defendants' actions have, in fact, mooted the claims, notice to the class would still be useful as the defendants' actions in mooting them may themselves have been wrongful.

Although notice to the class is required by Delaware law, the court held that a hearing is not. This served as a departure from the procedure described in *Advanced Mammography*, which had required both notice to the class members and a hearing to afford them the opportunity to object. In so holding, the *Swomley* court reasoned that, unlike a court-approved fee award, the payment of a mootness fee is an "exercise of business judgment by the board." The court, therefore, was not making any determinations as to whether the claims were actually mooted or whether the mootness fee paid was reasonable or otherwise a valid exercise of board discretion. Relying, in part, on Chancellor Andre G. Bouchard's opinion in *In re Zalicus Stockholders Litigation*, 2015 Del. Ch. LEXIS 15 (Jan. 16, 2015), the court noted that these issues could be addressed by class members in subsequent litigation and, as a result, need not be raised in the action presently before the court.

The court ultimately instructed the parties to submit a revised form of stipulated order that: (1) removes all references to a hearing; (2) dismisses the disclosure claims with prejudice as to the named plaintiffs, but without prejudice as to other stockholders; (3) provides notice to the putative class; and (4) states that dismissal of the action will occur upon the filing of an affidavit stating that the notice was provided to the putative class.

As to the form of the notice, the court required that it clearly describe the nature of the claims pleaded and the actions taken by the defendants to render them moot, as well as set forth the amount of the fee paid and the specific identity of the persons or entities paying it. The parties were also required to include a provision advising shareholder class members that the court had not endorsed or otherwise made any determination as to the reasonableness of the fee paid.

Gary Lipkin *is a member of Eckert Seamans Cherin & Mellott's Delaware office. He focuses his practice in the area of corporate and commercial litigation, including the defense of stockholder class and derivative actions, large merger disputes, breaches of partnership and limited liability company operating agreements, commercial contract actions, trademark infringement, business torts, trust disputes and employment-related disputes, such as actions to enforce post-employment covenants and defending claims of discrimination.*
