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N.Y. judge rejects 'worthless' disclosure-only deal in M&A class action

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(Reuters) - If you thought the New York state appeals court assured the future of the M&A plaintiffs' bar last year when it bucked Delaware precedent and said shareholder lawyers deserve to be awarded fees for forcing defendants to cough up minimally useful new disclosures, you'd better read a new opinion by New York State Supreme Court Justice **Shirley Kornreich**, who rejected a disclosure-only settlement that included a $500,000 fee for plaintiffs' lawyers.

Justice Kornreich, ruling in a challenge to Martin Marietta's 2014 acquisition of Texas Industries, did acknowledge the New York Appellate Division, First Department's precedent, if somewhat reluctantly. In Gordon v. Verizon, the New York appeals court set a lower standard than Delaware's Chancery Court for attorneys' fees in settlements that deliver no cash but only additional deal disclosures to shareholders. As you probably recall, Delaware judges clamped down on these so-called disclosure-only settlements in late 2015 and early 2016, effectively shutting down the cottage industry of M&A challenges in Chancery Court. After the Delaware crackdown, both the 5th and 7th U.S. Circuit Courts of Appeals also issued rulings criticizing disclosure-only settlements, the 7th in 2016's In re Walgreen; the 5th in 2017's Farber v. Crestwood Midstream Partners.

The New York state appellate court, however, refused in the Gordon opinion to adopt Delaware's policy that additional proxy disclosures must be "plainly material" to shareholders to merit fees for the lawyers who secured them. Instead, the state appeals court held plaintiffs' lawyers are entitled to fees when they force defendants to issue supplemental disclosures of "some benefit" to shareholders.

The appeals court provided a seven-factor test for New York judges to apply in deciding whether disclosures provide any benefit to shareholders: the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, the nature of the issues of law and fact, the best interests of the putative settlement class as a whole and the best interest of the corporation.

As Justice Kornreich pointedly noted in Thursday's decision, the appellate division's Gordon ruling provoked some tart commentary about whether New York was trying to attract nuisance-value M&A shareholder filings by plaintiffs' lawyers shut out of Delaware and other, more discerning courts. It's not much of stretch to guess that Kornreich would have liked her appellate overseers to have adopted Delaware's tough test: In 2015, before the appellate division's Gordon ruling, she refused to approve a previous iteration of the Martin Marietta settlement.

The proposed settlement came back to Kornreich after the Appellate Division, First Department, vacated her rejection of the deal and ordered her to reconsider the settlement in light of the Gordon test.

The **Brualdi Law Firm** and **Mintz & Gold**, which represent the former Texas Industries shareholder City Trading Fund, once again asked Justice Kornreich to approve a $500,000 fee request, arguing that additional deal disclosures, including financial projections, benefited shareholders. Interestingly, Judge Kornreich reported, two other shareholders – with far bigger stakes than City Trading's 10 shares – submitted vehement statements to the contrary. Gardner Russo & Gardner, a longtime shareholder whose investment was worth as much as $415,000, objected to the settlement because it "did not believe that the additional disclosures ... were necessary nor would they have been helpful to our shareholders." The CEO of another shareholder, Chapter IV LLC, said he found the disclosures obtained in the litigation "to be completely unnecessary and not helpful to me as a shareholder."

Justice Kornreich dutifully conducted the seven-factor analysis the appeals court laid out in Gordon. It led her straight back to her previous assessment of the proposed settlement: "The disclosures here are worthless," she wrote. "Are the company and its shareholders better off if the court permits plaintiffs' disclosure claims to be settled in consideration for the supplemental disclosures and a substantial attorneys' fees award? The answer is no."

In the big picture, the judge wrote, shareholders are the real victims of "worthless disclosure-only settlements of strike suits that seek to enjoin mergers of publicly traded

corporations," she said. Shareholders ultimately bear the cost of payments to plaintiffs' lawyers, as well as the cost of the company's counsel. And in a classwide settlement like the proposed Texas Industries deal, which requires the release of all shareholders' potential disclosure claims, investors lose the right to go after the company for any real violations that could turn up.

"The only winners are the lawyers," Justice Kornreich wrote. "This is not a controversial view. It is the view of the Delaware Court of Chancery, two Federal Circuit Courts of Appeal, and respected legal academics."

U.S-China trade talks wrap up in Beijing

And also, it now seems clear, of one very emphatic New York State Supreme Court justice.

I left a phone message for plaintiffs' lawyer Richard Brualdi but didn't hear back.

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