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Oracle Ruling Underscores Trend of Mootness Fee Denials

WRITTEN BY

Jay A. Dubow | Mary Weeks | Hannah Baskind | Milica Krnjaja

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Consistent with recent trends, the Delaware Chancery Court in February denied a $5 million attorney fees request, commonly known as a "mootness fee," requested by Oracle Corp.'s shareholders' attorneys following their unsuccessful challenge to Oracle's acquisition of NetSuite Inc.

Although the shareholders lost the derivative suit in August 2022 after a 10-day trial, they moved for attorney fees, arguing that the litigation worked as a corporate benefit because Oracle appointed two new independent board directors after the litigation commenced.

The Chancery Court disagreed and denied the fee request, finding that the appointment of new directors was "merely a collateral effect of this litigation."

Mootness fee requests arise after a stockholder claims that a company's disclosures or other decisions were inadequate or improper, and after the company issues a supplemental disclosure or performs another action to moot the stockholder's claim.

Under the American rule, litigants pay for their own attorney fees. However, an exception to that rule is the so-called corporate benefit doctrine, which allows plaintiffs to be awarded attorney fees when their claims have been mooted if:

- The suit was meritorious when filed;
- The defendant took an action that produced a corporate benefit before the plaintiffs obtained a judicial resolution; and
- The suit and the corporate benefit were causally related.

Such fees were once ubiquitous in mergers and acquisitions transactions. Companies would announce a transaction, and after the proxy statement or similar document was made public, stockholder attorneys would claim that the price was too low, the process was unfair, and the disclosures were false and misleading.

Often, following some supplemental disclosures, the stockholder attorneys would negotiate a fee for the benefit

they obtained for the stockholders. Such payments were deemed a “deal tax.”

However, courts now impose higher standards on these fee requests and often reduce or reject the fees.

Oracle Derivative Litigation

In re: Oracle Corp. Derivative Litigation is the most recent case in the saga of courts denying mootness fee requests.[1]

This derivative suit against Oracle resulted from Oracle’s $9.3 billion acquisition of NetSuite in 2016. Shareholders filed the initial suit in 2017, alleging that Larry Ellison, the founder and a majority shareholder of both Oracle and NetSuite, intentionally overpaid for NetSuite and that a special committee that vetted the deal was too beholden to Ellison to make fair decisions.

After the shareholders’ suit survived Oracle’s motion to dismiss, Oracle appointed two new independent directors. They were then named to a special litigation committee that reviewed the situation and found that it was in the company’s interest for the claims to be resolved through litigation.

The matter was tried, and the Delaware Chancery found that no liability attached because Ellison had insulated himself from the transaction.

Despite the loss, shareholder attorneys moved for mootness fees, arguing that Oracle’s appointment of two new independent directors constituted a corporate benefit that they had caused. They claimed that the post-trial defeat was irrelevant because the benefit was complete when the two new directors were appointed.

The Chancery Court first noted that although both parties referred to the request as a request for “mootness fees,” the appointment of the new directors did not render any claims moot.

Accordingly, the dispute centered around two elements of the corporate benefit doctrine: whether the appointment of the directors constituted a corporate benefit and whether the litigation prompted Oracle to appoint the new directors.

The court found that “the relationship between the suit and benefit is attenuated at best” as the plaintiffs did not seek the appointment of independent directors at any time during the litigation. The court reasoned that to prove a connection, the benefit must be similar to the relief sought. That is, the “claimed benefit must have some relationship to the grievance which led to the filing of the complaint.”

Because the appointment of the new Oracle directors was a collateral effect of the litigation, the court rejected the attorneys’ request for fees.

Prior Decisions on Mootness Fees

The Chancery Court order in the Oracle Corp. litigation follows a trend of Delaware courts reducing or rejecting mootness fees.

In July 2023, the Delaware Chancery Court declined to grant an “eye-popping” $1.1 million mootness fee request in *Anderson v. Magellan Health Inc.*[2] This case arose out of a stockholder’s claim that the company’s disclosures were materially deficient because the company failed to disclose the “don’t ask, don’t waive” provisions it entered into with prospective bidders in acquisition negotiations.

After the company issued supplemental disclosures in response to the suit, shareholders stipulated to dismissal and moved for attorney fees. The Chancery Court awarded a fee, but only for $75,000 and, notably, overturned prior Delaware precedent and raised the bar for mootness fee awards.

Under the standard the Chancery Court established in 2016 in In re: Xoom Corp . Stockholder Litigation, a mootness fee could be “awarded if the disclosure provide[d] some benefit to stockholders, whether or not material to the vote” — or in other words, if the disclosures were helpful. The Anderson court overturned the “helpful” standard by holding that mootness fees can be awarded only when the information is material.

Following the recent trend, federal courts in the Ninth Circuit, Third Circuit and Second Circuit also have rejected several mootness fee requests.

For instance, the U.S. District Court for the Central District of California in 2020 rejected a mootness fee request in *Anschutz v. Pacific Premier Bancorp Inc*.[3] where a company amended its Form S-4 after shareholders brought a suit alleging misrepresentations and omissions in the company’s Form S-4 disclosures, finding that the information was immaterial.

Similarly, the U.S. District Court for the District of New Jersey in 2021 rejected a claim for fees in *Visser v. Vitamin Shoppe Inc.*[4] arising out of a merger between Vitamin Shoppe and Franchise Group Inc.

In the merger, Vitamin Shoppe issued supplemental disclosures after shareholders brought a suit alleging Vitamin Shoppe’s preliminary proxy statement disclosing the terms of the merger omitted material information. The court rejected the plaintiff’s request for $125,000, finding that the plaintiff “failed to carry his burden of establishing that he provided a substantial benefit to … shareholders.”

Finally, the U.S. District Court for the Southern District of New York in 2022 in *Serion v. Nuance Communications Inc.*[5] and in February 2024 in *Belcher v. Volta Inc.*[6] followed the trend and denied mootness fee requests where the remedial disclosures did not provide a substantial benefit to the companies’ shareholders.

Takeaway

In disputes over mootness fees, courts are expressing skepticism about awarding such.

First, Delaware and federal courts are not awarding mootness fees for supplemental disclosures that moot claims unless such disclosures contain material information, as opposed to information that is helpful.

Second, as illustrated by the Oracle litigation, some courts require any action taken by the corporation to be more than “merely a collateral effect of this litigation” and the benefit to be similar to the relief sought.

By raising the bar for mootness fee requests, courts are making it more difficult for plaintiffs attorneys to seek high awards in derivative suits. As a result, companies may be able to introduce remedial actions to benefit their stockholders with less concern of being ordered to pay a large mootness fee in return.

Although courts are pushing to disincentivize mootness fee requests, investors — and their attorneys — are not likely to ever cease filing such lawsuits. Since February, individual investors have brought more than a dozen merger suits requesting a mootness fee across New York's Southern District, the U.S. District Court for the District of Delaware, California district courts and Colorado district courts, among others.

These suits have targeted a variety of companies in many industries. Nevertheless, these recent cases portray a continued and significant decline in granting such attorney fees.

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[1] *In re: Oracle Corporation Derivative Litigation* , C.A. No. 2017-0337-SG (Del. Ch. Feb. 7, 2024).

[2] *Anderson v. Magellan Health Inc.* , 298 A.3d 734 (Del. Ch. 2023).

[3] *Anschutz v. Pac. Premier Bancorp Inc.* , No. SACV2000650JVSADSX, 2020 WL 7049543, at *1 (C.D. Cal. Oct. 21, 2020).

[4] *Visser v. Vitamin Shoppe Inc.* , No. 19CV20545WJMLDW, 2021 WL 6010349, at *1 (D.N.J. Dec. 17, 2021).

[5] *Serion v. Nuance Commc'ns Inc.* , No. 21-CV-4701 (JPO), 2022 WL 1166017, at *1 (S.D.N.Y. Apr. 20, 2022).

[6] *Belcher v. Volta Inc.* , No. 23-CV-1406 (JSR), 2024 WL 390865 (S.D.N.Y. Feb. 2, 2024).

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