Securities Regulation Daily Wrap Up, MERGERS AND ACQUISITIONS—N.D. Ill.: Shareholder falters in mootness fee challenge, but court remains 'concerned', (Nov. 27, 2017)

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By Anne Sherry, J.D.

An Akorn shareholder lost his bid to intervene in a disclosure settlement in order to object to a $322,500 mootness fee. The Northern District of Illinois, bound by the Seventh Circuit's *Walgreen* decision (which in turn took influence from Delaware's *Trulia* case), concluded that there was no procedural avenue by which it could approve or reject the settlement. However, the court granted leave to refile as it is "concerned with [plaintiff's] apparent success in evading the requirements of Rule 23" and the contention that the case only injures shareholders' interests (*Berg v. Akorn, Inc.*, November 21, 2017, Durkin, T.).

The plaintiff sued to force Akorn to make revisions to the proxy it filed in connection with a potential acquisition by Frensenius Kabi AG. Akorn made the changes, mooting the lawsuit, and the parties stipulated to dismissal without prejudice. Notably, the motion for dismissal provided that the court would retain jurisdiction to adjudicate the plaintiff's attorney fee claim. The court granted the motion to dismiss, but did not enter the stipulation and proposed order. The parties later filed another stipulation and proposed order, providing that they stipulated to a mootness fee of $322,500.

The Akorn shareholder then moved to intervene for purposes of objecting to the fee settlement. But the parties' briefs focused on the court's subject matter jurisdiction, and the court could not discern a process by which it could approve or reject the settlement akin to Federal Rule of Civil Procedure 23 (class actions) or 23.1 (derivative suits). To the extent the would-be intervenor has an interest in "curtailing the scourge of merger strike suits," his injury could only be derivative of Akorn's, but he did not follow the procedures for derivative relief (and such a claim would be barred by the business judgment rule in any event). To the extent his interest in the case derives from his status as a class member, he cannot intervene because the class claims were dismissed without prejudice.

Indeed, the Delaware chancery court's *Trulia* decision, while excoriating disclosure-only settlements, specifically contemplated post-dismissal attorney fee claims as a better alternative. If parties stipulate to dismissal and then litigate the attorney fee issue, the court reasoned, the defendant corporation will retain its incentive to challenge an unreasonable fee claim. This adversarial process would assist the court in evaluating the reasonableness of the fee. The chancery court wrote that "this arrangement provides a logical and sensible framework for concluding the litigation."

Nevertheless, the court recognized that its decision to retain jurisdiction in the case may have facilitated counsel's ability to extract a higher fee, and to that extent, the court "is sympathetic to [the would-be intervenor's] frustration with Plaintiffs' engineering of a device to evade review under Rule 23 and the spirit of *Walgreen.*" The court also took seriously the contention that the case actually serves to injure the interests of Akorn's shareholders, albeit derivatively. So the court granted leave to refile the motion to intervene, directing the would-be intervenor to focus on his interest in the case generally.

The case is No. 17-cv-05016.

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Companies: Akorn, Inc.

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