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Latest Suit Over $13B TransCanada Sale Is Tossed

By **Jeff Montgomery**

Law360 (September 27, 2019, 9:28 PM EDT) -- Describing the litigation as "the class's fourth bite at the apple," a New York federal judge has dismissed one case in a string of suits that challenged Columbia Pipeline Group's $13 billion merger with TransCanada in March 2016.

The ruling Thursday by U.S. District Court Judge George B. Daniels rejected claims that Columbia's directors and officers violated two sections of the Exchange Act of 1934 and breached their fiduciary duty to investors as a result of allegedly false or misleading proxy materials and disclosures in the months leading up to the deal

Part of Judge Daniels' decision referred to observations in a recent Delaware Chancery Court decision in an appraisal lawsuit over the same merger that upheld the $25.50 per share deal price as fair value, rejecting stockholders' arguments that they should have received $32.47 per share, or over 27% more than the final price.

The ruling in the Southern District of New York broadly rejected claims that Columbia's directors were aware of or knowingly enabled alleged actions by company executive officers that provided them with undisclosed financial benefits or tilted the deal in TransCanada's favor.

"Instead of pleading with specificity any conduct by the board that may establish their desire to endorse the executive officer defendants' conduct — or to feed their own agenda, lead plaintiff pleads facts that do not themselves lead one to believe that the director defendants acted wrongfully," the judge wrote.

In addition to the appraisal case and the now-dismissed New York case, stockholders had attempted to sue in Texas and launched a breach of fiduciary suit in Delaware's Chancery Court that was dismissed and then followed by a second Chancery Court complaint. That last one was dubbed "plaintiff's fifth bite" by Judge Daniels.

In a memorandum of law opposing dismissal filed earlier this year in the New York case, the class, led by The Arbitrage Fund, argued that "material misstatements and omissions misrepresented the fairness and adequacy of the merger and falsely presented TransCanada as the only viable bidder when, in fact, defendants had foreclosed any other company from merger negotiations."

But the Securities Act claims against the directors, Judge Daniels, attempted to tell two stories: "One in which all defendants acted unlawfully in furnishing a false and misleading proxy statement, and another

in which the executive officer defendants unlawfully withheld information from the director defendants."

According to the complaint, the directors were aware of executive officer misconduct in steering through the merger, including top officer preference for TransCanada and intent to retire immediately afterward under terms that benefited from the deal. But the complaint was said to have failed to show that directors "played a pivotal role in the events leading to the furnishing of the alleged false and misleading statement."

Columbia executives named in the suit were accused of producing a proxy that failed to disclose no-further-bidding "standstill" agreements that hampered TransCanada competition and failed to report that TransCanada received due diligence materials without board approval. They also were accused of misrepresenting other bidder prospects and omitting details about the officers' role in planning the spinoff, which granted change-in-control benefits ahead of their retirement.

"The operative complaint in this case fails to allege any conflicts," Judge Daniels wrote, at times drawing on Chancery Court Vice Chancellor J. Travis Laster's 112-page ruling in the Delaware stockholder appraisal case. "In alleging that the executive officer defendants went to great lengths to afford TransCanada preferential treatment, lead plaintiff fails to explain why."

After rejecting the New York allegations, Judge Daniels noted that Vice Chancellor Laster separately concluded after "much fact-finding at trial that the executive officer defendants did not rush to a sale to quickly retire and recoup their change-in-control benefits as lead plaintiff suggests."

The appraisal action also concluded that the "sale process in this case was sufficiently reliable to make the deal price a persuasive indicator of fair value," Judge Daniels added. In addition, he agreed with Columbia's arguments that the company's forum selection clause required the fiduciary duty claims to be addressed in Chancery Court.

The class is represented by Andrew J. Entwistle, Vincent R. Cappucci and Jonathan H. Beemer of Entwistle & Cappucci LLP and David R. Scott and William C. Fredericks of Scott & Scott Attorneys at Law LLP.

Columbia Pipeline Group is represented by Brian J. Massengill and Matthew Sostrin of Mayer Brown LLP.

The case is In Re Columbia Pipeline Inc., case number 1:18-cv-03670, in the U.S. District Court for the Southern District of New York.

--Editing by Jill Coffey.