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The Shifting Tides of Merger Litigation

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Abstract

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ESSAY

The Shifting Tides of Merger Litigation

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In 2015, Delaware made several important changes to its laws concerning merger litigation. These changes, which were made in response to a perception that levels of merger litigation were too high and that a substantial proportion of merger cases were not providing value, raised the bar, making it more difficult for plaintiffs to win a lawsuit challenging a merger and more difficult for plaintiffs' counsel to collect a fee award.

We study what has happened in the courts in response to these changes. We find that the initial effect of the changes has been to decrease the volume of merger litigation, to increase the number of cases that are dismissed, and to reduce the size of attorneys' fee awards. At the same time, we document an adaptive response by the plaintiffs' bar. Merger cases are being filed in other state courts or in federal court, presumably in an effort to escape the application of the new Delaware rules.

This responsive adaptation offers important lessons about the entrepreneurial nature of merger litigation and the limited ability of the

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courts to reduce the potential for litigation abuse. In particular, we find that plaintiffs' attorneys respond rationally to these changes by shifting their filing patterns, and that defendants respond in kind. We argue, however, that more expansive efforts to shut down merger litigation, such as through the use of fee-shifting bylaws, are premature and create too great a risk of foreclosing beneficial litigation. We also examine Delaware's dilemma in maintaining a balance between the rights of managers and shareholders in this area.

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INTRODUCTION

In recent years, over 96% of publicly announced mergers have attracted a shareholder lawsuit,[1] with many mergers attracting suits in multiple jurisdictions.[2] This extraordinarily high litigation rate has drawn criticism from those who claim that the bulk of merger litigation

1. Private litigation is the dominant mechanism for challenging the price, fairness, or disclosures in connection with a public company merger. SEC enforcement actions have typically been limited to particular transaction contexts such as reverse mergers and, even in such cases, are addressed exclusively to disclosure issues. *See, e.g.*, Paul Rodel, *A Look at Market Trends in Reverse Mergers*, LAW360 (Mar. 21, 2017, 2:05 PM), https://www.law360.com/articles/904096/a-look-at-market-trends-in-reverse-mergers [https://perma.cc/E7Y2-WHE5] (describing SEC enforcement actions in several reverse merger cases in 2011).

2. Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2014 (Feb. 20, 2015) (unpublished manuscript) (on file with authors), https://ssrn.com/abstract=2567902 [https://perma.cc/GP7L-Q53Y].

is frivolous.[3] Critics also observe that merger litigation is typically settled without material benefit to shareholders but with a significant fee paid to the lead plaintiffs' attorneys filing the case.[4]

In the summer and fall of 2015, the Delaware courts forcefully responded to this criticism. In several decisions, judges openly questioned the value of so-called disclosure-only merger litigation settlements in which the only relief provided to the plaintiff class was additional disclosure by the takeover parties.[5] In particular, the courts criticized the lack of materiality of the additional disclosures and the overly broad releases negotiated by the parties.[6] This judicial push back culminated in the January 2016 Delaware Chancery Court decision, *In re Trulia*, which held that the Delaware courts would no longer countenance merger litigation settlements that did not achieve meaningful benefits for shareholders.[7] The court specifically rejected the proposed disclosure-only settlement in that case which provided for additional nonmaterial disclosures, a broad release, and a fee award to plaintiffs' counsel.[8]

At the same time, the Delaware courts significantly restricted the substantive ability of plaintiffs to win takeover-related claims by

3. *See, e.g.*, Gregory A. Markel & Gillian G. Burns, *Assessing a Judicial Solution to Abusive Merger Litigation*, LAW360 (Nov. 19, 2015, 9:59 AM), https://www.law360.com/articles/728061/assessing-a-judicial-solution-to-abusive-merger-litigation [https://perma.cc/YG87-JB2A] (observing that "lawsuits are filed after virtually every public merger is announced, in many cases with little regard to the merits of the claim").

4. Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 559 (2015). *But see* Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements*, 15 U. PA. J. BUS. L. 669, 674 (2013) (defending the value of disclosure-only settlements in merger litigation).

5. *E.g.*, Transcript of Settlement Hearing and Rulings of the Court at 74–75, *In re* Aruba Networks Stockholder Litig., No. 10765-VCL (Del. Ch. Oct. 9, 2015); Transcript of Settlement and Hearings of the Court at 14, *In re* Riverbed Tech., Inc. Stockholders Litig., No. 10484-VCG (Del. Ch. Sept. 17, 2015); Settlement Hearing and Request for Attorneys' Fees and the Court's Rulings at 45–46, Acevedo v. Aeroflex Holding Corp., No. 9730-VCL (Del. Ch. July 8, 2015).

6. *See* Fisch et al., *supra* note 4, at 591–92 (describing growing judicial criticism of disclosure-only settlements).

7. *In re* Trulia, 129 A.3d 884, 899 (Del. Ch. 2016). The *Trulia* court found that, because the supplemental disclosures obtained by the plaintiffs in the settlement were not material, they "provided no meaningful benefit to stockholders." *Id.*; *see also* Transcript of Settlement Hearing and Rulings of the Court at 37, 40, Assad v. World Energy Sols., Inc., No. 10324-CB (Del. Ch. Aug. 20, 2015) (stating that "it should be pretty clear from some of the questions that I'm asking and some of the recent hearings . . . that there is a lot of concern in this court about nonmonetary settlements," and "there is going to be more scrutiny on some of the give and the get of these things").

8. *Trulia*, 129 A.3d at 907.

adopting more deferential standards of judicial review in these cases.[9] In *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court held that the business judgment rule is "the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders."[10] The Chancery Court extended *Corwin*'s holding in *Volcano* to cases involving a tender offer.[11] The net effect of these two cases was to limit substantially the availability of a post-closing suit for damages. Only if the target company failed to disclose the alleged improprieties prior to shareholder approval of the transaction would the court allow a claim to proceed.[12]

These decisions made the successful prosecution of merger litigation cases more difficult. They reduced the likelihood that a plaintiff could recover damages by challenging a merger involving a Delaware corporation. In addition, they reduced the likelihood that plaintiffs' counsel could receive a significant fee award by bringing litigation in the Delaware courts.

The Delaware legislature also responded to the increase in multijurisdictional litigation. In 2015, the legislature adopted amendments to the Delaware General Corporation Law explicitly authorizing issuers to adopt forum selection bylaws,[13] which would enable Delaware corporations to halt the filing of merger-related suits in multiple states.[14] Issuers' widespread adoption of these bylaws both before and after the legislative response provided some reason for Delaware courts to expect that any crack-down on merger litigation

9. Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES (Steven Davidoff Solomon & Randall S. Thomas eds., forthcoming 2018).

10. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305–06 (Del. 2015).

11. *In re* Volcano Corp. Stockholder Litig., 143 A.3d 727, 750 (Del. Ch. 2016).

12. The previous year, the Delaware Supreme Court for the first time applied the deferential business judgment standard of review in the context of a controlling shareholder merger, making shareholder litigation more difficult in that context. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014).

13. DEL. CODE. ANN. tit. 8, §§ 102(b)(4), 109(b) (West 2017). The legislation codified the Delaware Chancery Court's decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), upholding the validity of a board-adopted forum selection bylaw.

14. Prior to the legislation, corporations had experimented with the adoption of forum selection bylaws. Joseph Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 337 (2012). In *Boilermakers*, the Delaware Supreme Court upheld the facial validity of such bylaws, and this holding was ratified by the 2015 legislation. 73 A.3d at 934. Notably, however, the legislation prohibits Delaware corporations from excluding the Delaware courts as a permissible forum. *See* Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1640 (2016) (explaining and analyzing the scope of the Delaware legislation).

would not simply shift these cases out of Delaware. This then provided the foundation for *Trulia* and its progeny.[15]

In this Essay, we explore the effect of these developments on the shifting dynamics of merger litigation. We focus, in particular, on disclosure-only settlements and the related phenomenon of multijurisdictional litigation. We hypothesize that, as many commentators have long recognized, plaintiffs and their lawyers respond to litigation incentives. Specifically, we predict that the increased difficulty of bringing a successful claim for money damages and the reduced likelihood that plaintiffs' attorneys will receive a fee award in the absence of a recovery of money damages will push plaintiffs' attorneys to find ways to file and resolve merger litigation outside of Delaware despite the presence of forum selection clauses.[16] We also expect that plaintiffs' lawyers will find alternative ways to bring and prosecute merger-related suits in order to continue to collect attorneys' fees.

One such avenue is to file merger litigation in federal court. Forum selection bylaws prohibit merger litigation from being pursued in state courts outside of Delaware, but they do not prevent plaintiffs from bringing federal suits alleging disclosure violations under Rule 14a-9, the federal prohibition against proxy fraud.[17]

Another option is collusion between plaintiffs' counsel and the defendant corporation. Even in corporations that have adopted a forum selection bylaw, the board of directors may waive the application of that bylaw and allow the corporation to be sued in a non-Delaware forum. This enables the corporation to negotiate a settlement on terms that are now prohibited in Delaware by the *Trulia* decision. Along similar lines, in situations where the plaintiffs can credibly allege that the filing of their case led to increased disclosures by the defendants that mooted the litigation, the parties can settle disclosure-only cases on the grounds of "mootness." In such cases, defendants can voluntarily compensate plaintiffs' counsel through a "mootness fee."

We test the incidence of these responses in the first wave of merger cases following the *Trulia* decision. Our empirical analysis in this Essay examines a dataset of merger litigation for deals over $100

15. *See* Lawrence A. Hamermesh, *How Long Do We Have to Play the "Great Game?,"* 100 IOWA L. REV. BULLETIN 31, 37 (2015) (arguing that forum selection clauses are likely to substantially diminish multiforum merger litigation).

16. Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 165, 166 (2015).

17. 17 C.F.R. § 240.14a-9 (2017).

million completed from 2003 through October 2017.[18] We find that overall levels of merger litigation initially declined but have risen back as plaintiffs' attorneys have adapted to the new regime. In 2013, 96% of all completed deals were challenged in at least one lawsuit. That number declined to 73% in 2016 but rose to 85% in 2017.

On the other hand, as we predicted, plaintiffs appear, in the short term at least, to be trying to avoid the effects of the changes in Delaware law by filing their cases elsewhere. Litigation brought in the Delaware Chancery Court has declined substantially. Of the deals completed in 2016, only 34% were challenged in Delaware, while 61% were challenged in other states and 39% in federal court. During the first ten months of 2017 the trend accelerated, with only 9% in Delaware compared to 87% in federal court.[19] The latter number, which represents a significant increase in the percentage of cases filed in federal court, seems to be an attempt to avoid the impact of forum selection bylaws.

We also observe differences in case outcomes. In 2016, 43% of deal litigation settled compared to 63% in 2014. Within Delaware, only 6% of cases settled in 2016, the lowest rate over the past decade. We find no evidence to indicate that the quality of these settlements differs substantially from that in prior years. We also find a substantial increase in dismissals; in particular, the rate at which cases are dismissed spiked to 89% in 2017. Finally, we find a rising use of dismissal combined with the mootness fee. In 2016, 22% of cases were resolved in this manner, while so far in 2017 this rate has skyrocketed to 75%—an all-time high.[20] Plaintiffs' attorneys' fees have also declined. In 2014—the year before *Trulia*—the median attorneys' fee was $500,000. In 2017, it was $280,000.

We find little evidence of collusion. In no cases in our sample did defendants appear to ignore forum selection clauses in order to

18. We limit our analysis to larger transactions, as do many similar studies, because larger deals are more likely to attract interest from the plaintiffs' bar. *See, e.g.*, Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1823 n.87 (2004) (employing similar approach).

19. The percentages do not sum to 100% because of multiple cases in multiple forums.

20. In the past year, the Chancery Court has approved such fees, albeit at a reduced rate. *See In re* Xoom Corp. Stockholder Litig., No. 11263-VCG (Del. Ch. Aug. 4, 2016) (rejecting mootness fee request of $275,000 by allowing a smaller fee of $50,000); *In re* Receptos, Inc. Stockholder Litig., No. 11316-CB, slip op. at 76 (Del. Ch. July 21, 2016) (reducing mootness fee from $350,000 to $100,000, stating that:

> [A] lesson to take away from this [is that there] is no right to cover one's supposed time and expenses just because you sue on a deal, and plaintiffs should not expect to receive a fee in the neighborhood of $300,000 for supplemental disclosures in a post-*Trulia* world unless some of the supplemental information is material under the standards of Delaware law).

avoid the effect of *Trulia* by negotiating a settlement in another jurisdiction that included a release. In five cases, however, litigation was resolved in another state through dismissal and payment of a mootness fee to plaintiffs' counsel even though the issuer had a forum selection bylaw in place requiring that the litigation be pursued in Delaware.

Our sample represents the first wave of litigation response to the developments in merger law. As a result, our findings are necessarily preliminary. Nonetheless, our results document what commentators have often predicted: litigation practices respond to changes in the law and, in the short term, plaintiffs' lawyers will seek alternate forms of recourse if Delaware law becomes more restrictive.

Because of the time frame that we studied, we cannot evaluate the long-term consequences of the changes in Delaware law. Specifically, the extent to which the federal courts and other state courts will adhere to *Trulia* and the other components of Delaware merger law is unclear. We note that at least one federal court has explicitly followed *Trulia* and refused to validate a disclosure-only settlement.[21] In addition, as two of us have noted elsewhere, federal law contains a variety of safeguards against frivolous litigation that may frustrate attempts to use federal court litigation as a substitute.[22] As a result, it seems likely that the shift of deal cases into federal court will work itself out as federal courts address these cases.

More broadly, our results highlight the responsiveness of shareholder litigation to changes in the law and venue options. Plaintiffs' and defendants' attorneys will make moves and countermoves as they seek to shift venues and move to filing alternative forms of shareholder litigation. For example, barriers in Delaware to deal litigation appear to have led to an increase in the number of filings seeking relief under the Delaware appraisal statute.

We also examine claims that Delaware has not done enough to eradicate frivolous lawsuits using the prism of Type I error (false positives) and Type II error (false negatives). If Delaware makes its law less favorable for plaintiffs to reduce the risk of frivolous lawsuits (lowering Type I error), it risks increasing Type II error by blocking out valuable cases that address managerial misconduct. Extreme actions to cut down on strike suits, like fee-shifting bylaws, will inevitably trade off fewer frivolous cases for fewer good cases.[23]

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21. *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 725 (7th Cir. 2016).

22. Fisch et al., *supra* note 4, at 597–98.

23. *See, e.g.*, Albert H. Choi, *Fee-Shifting and Shareholder Litigation* (Va. Law & Econ., Research Paper No. 2016-15, 2017), https://ssrn.com/abstract=2840947 [https://perma.cc/Y8FX-NCEV] (modeling this trade-off).

Finally, we revisit the competition between Delaware and other states to analyze how the new, more restrictive rules will impact it. We find that other states may seek to attract litigation by offering a more attractive environment for plaintiffs' counsel. The greater risk for Delaware than losing its cases is losing incorporations as a consequence of its efforts to adopt litigation reforms.[24] We also argue that some Delaware corporate law stakeholders, especially Delaware lawyers, may push back against overly stringent standards for shareholder litigation. Adaptive responses to these regulatory changes push and pull at Delaware's equilibrium.

In the end, we counsel caution in responding to the fluid situation. The dynamic nature of the merger litigation game shows that the pattern is both adaptive and still a work in progress. The better choice appears to be to wait and ascertain the full effect of forum selection clauses and the federal court response to these issues.

In the remainder of the Essay, Part I discusses the problem of merger litigation and the recent developments, including the *Trulia* decision. Part II sets forth our empirical analysis. Part III considers the implications of our results. A brief conclusion follows.

I. RECENT DEVELOPMENTS IN MERGER LITIGATION

In recent years, many commentators have argued that merger litigation is fundamentally broken.[25] Virtually all deals are challenged through litigation—with the rate of such challenges in deals over $100 million hovering between 94% and 96%.[26] In addition, most large mergers are challenged in multiple lawsuits filed in different courts.[27] In 2013, the average number of such lawsuits was more than seven per merger.[28] Lawsuits are brought by a number of different plaintiffs'

24. Commentators have long expressed concern about the prospect that litigants might seek to avoid the impact of Delaware decisions by filing lawsuits in courts outside of Delaware. *See, e.g.*, John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 606 (2012).

25. *See, e.g.*, Marc Wolinsky & Ben Schireson, *Deal Litigation Run Amok: Diagnosis and Prescriptions*, 47 REV. SEC. & COMMODITIES REG. 1, 1 (2014) (arguing that "the system is broken, that shareholder suits are being filed regardless of the merits, and that shareholder plaintiffs are imposing a dead weight on society").

26. Fisch et al., *supra* note 4, at 558–59; *see also In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 907 (Del. Ch. 2016) (noting the high rate of merger litigations).

27. Fisch et al., *supra* note 4, at 604–05.

28. Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2013*, at 1–2 (Ohio State Pub. Law, Working Paper No. 236, 2014), https://ssrn.com/abstract=2377001 [https://perma.cc/MCJ3-C2AW].

firms that then compete with each other over control of the case and receipt of a fee award.[29]

There are several legal bases for challenging a merger.[30] Most merger lawsuits include claims for breach of fiduciary duty, including allegations that the board failed to adhere to its duty under *Revlon* to maximize shareholder value.[31] These claims are commonly linked with a claim that the merger documents failed to make adequate disclosure.[32] Plaintiffs may also challenge the disclosures made in a merger by filing a proxy fraud claim under section 14(a) of the Securities Exchange Act of 1934.[33] Finally, if the merger involves a controlling shareholder, a management buy-out, or other conflict of interest, the plaintiff may allege a violation of the duty of loyalty.[34]

Although mergers are subject to frequent challenges, the benefits from this litigation to the plaintiff class, in many cases, are limited. To be sure, some merger lawsuits identify serious misconduct and produce substantial monetary recoveries.[35] In addition, some lawsuits result in a change in the merger terms, such as a reduction in the amount of a break-up fee.[36] These decisions have an impact beyond a single case in that they announce standards of conduct that guide

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29. *See* Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 469 (explaining that counsel "regularly file identical claims in more than one forum and then compete with each other for position in settling with defendants"). The prospect that class counsel will engage in a reverse auction in which they agree to cheaply settle a case in order to receive a fee award has long been recognized as a risk in class action litigation that is not unique to merger cases. *See, e.g.*, Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 473 (2000) (describing the problem of a reverse auction).

30. Plaintiffs also have the right to dissent from the merger and seek a judicial determination of the fair value of their shares under the Delaware appraisal statute. DEL. CODE ANN. tit. 8, § 262 (West 2017).

31. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182–83 (Del. 1986).

32. Fisch et al., *supra* note 4, at 564.

33. 15 U.S.C. § 78n(a) (2012).

34. *See, e.g.*, Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644–45 (Del. 2014) (alleging violation of the duty of loyalty in the context of a controlling stockholder freeze-out merger).

35. *See, e.g.*, *In re* Dole Food Co. Stockholder Litig., No. 9079-VCL, 2015 Del. Ch. LEXIS 223, at *83 (Aug. 27, 2015) (imposing liability of $148 million for breaches of the duty of loyalty); *In re* Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1030 (Del. Ch. 2015) (approving $275 million settlement); *In re* Rural/Metro Corp. Stockholders Litig., 102 A.3d 205, 224 (Del. Ch. 2014) (entering judgment against financial advisor for $76 million); *see also* Joel Edan Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623, 626 (2017) (identifying data points of successful stockholder litigation and arguing that these data points should inform the discussion of stockholder litigation reform).

36. These are known as amendment settlements and are viewed as superior to disclosure-only settlements as they offer some substantive changes. *See* Fisch et al., *supra* note 4, at 576 ("[B]ecause amendments should improve the terms of the merger or the quality of the procedures used in reaching a final agreement, amendment settlements should increase shareholder voting in favor of the merger.").

participants in future transactions. They may also influence the terms on which challenges are settled in the absence of a reported judicial opinion.[37]

The vast majority of merger challenges, however, are resolved through a settlement in which the target company agrees to make additional disclosures in the proxy statement and not to oppose a request by plaintiffs' counsel for a fee award.[38] The settlement also includes a release of all possible merger-related claims, thereby insulating the merger from further attack. Although corrective disclosures can, in theory, provide value to the plaintiff class, they often do not.[39]

A related development is the increase in Delaware appraisal litigation.[40] Although class actions alleging a breach of fiduciary duty have traditionally been the dominant litigation strategy,[41] both the frequency and size of appraisal claims have grown dramatically in the last several years.[42] Commentators have argued that this trend was due, in part, to the fact that the appraisal statute mandated that courts award interest in appraisal cases at a statutory rate that, in recent years, has substantially exceeded the market rate.[43] The opportunity to collect the statutory interest rate at relatively low risk has led some to characterize appraisal litigation as "appraisal arbitrage" and to warn that the practice is having an adverse effect on merger activity.[44]

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37. *See* Friedlander, *supra* note 35, at 626 (describing opinion in J.L. Schiffman & Co., Inc. Profit Sharing Tr. v. Standard Indus., Inc., No. 11267, 1993 WL 271441 (Del. Ch. July 19, 1993), in which the court sought to memorialize the value to plaintiffs of the unopposed settlement of a shareholder suit).

38. *See* Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2015, at 5 (Jan. 14, 2016) (unpublished manuscript) (on file with the Berkeley Center for Law, Business and the Economy), http://ssrn.com/abstract=2715890 [https://perma.cc/C9N2-67MS] (documenting the limited number of cases that are resolved other than through a disclosure-only settlement).

39. *See, e.g.*, *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 724 (7th Cir. 2016) ("The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket.").

40. *See* Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1553 (2015) (describing a tenfold increase in appraisal litigation from 2004 to 2013).

41. *See* Craig Boyd, *Appraisal Arbitrage: Closing the Floodgates on Hedge Funds and Activist Shareholders*, 65 KAN. L. REV. 497, 502 (2016) ("Over the past decade, appraisal claims have had a limited presence in Delaware courts and have been insignificant in terms of Delaware legislative reform.").

42. Korsmo & Myers, *supra* note 40, at 1572–74.

43. *See* Wei Jiang, Tao Li, Danqing Mei & Randall Thomas, *Appraisal: Shareholder Remedy or Litigation Arbitrage?*, 59 J.L. & ECON. 697, 721 (2016) (finding evidence that the surge in appraisal rights is attributable in part to the high interest rate paid on claims).

44. Boyd, *supra* note 41, at 522. *But see* Jiang et al., *supra* note 43, at 698 (documenting growth in use of appraisal but defending its importance as a corporate governance remedy).

The rise in merger litigation led the Delaware legislature in 2016 to make two significant changes to the appraisal statute. First, the legislature restricted appraisal filings to cases involving a minimum collective stake of $1 million, or 1% of the outstanding stock of the company. Second, the statute permitted issuers to reduce their exposure to the statutory interest rate by tendering some or all of the merger consideration to plaintiffs before the resolution of the case.[45]

The appraisal amendments have been criticized, however, as insufficient.[46] Moreover, they appear to have done nothing to stop the flow of appraisal rights cases in Delaware.[47] In 2015, for instance, thirty-three deals were targeted with fifty-one appraisal petitions. By comparison, in 2016, forty-eight deals were challenged by seventy-seven appraisal petitions. Both 2015 and 2016 were record years with respect to both the number of deals challenged and number of petitions filed.

The Delaware courts recognized the problems with merger litigation and, in the past several years, they began to take steps both to reduce the substantive scope of director liability in merger litigation and the incentives to plaintiffs' counsel for bringing litigation challenges.[48] The most recent development with respect to the substantive scope of director liability was the Delaware Supreme Court's 2015 decision in *Corwin v. KKR*.[49] In *Corwin*, the court held that the business judgment rule is the proper standard of review in a post-closing action for damages when the transaction has been approved by a fully informed majority of disinterested shareholders. The court expressly noted that the heightened standards of review under cases

45. Boyd, *supra* note 41, at 508.

46. *See* Stanley Onyeador, Note, *The Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 70 VAND. L. REV. 339 (2017). *But see* Jiang et al., *supra* note 43, at 700 (arguing that statutory changes should mitigate appraisal litigation problems).

47. Michael Greene, *M&A Deal Price Challenges Spiking in Delaware*, BLOOMBERG: BNA (Jan. 13, 2017), https://www.bna.com/ma-deal-price-n73014449766/ [https://perma.cc/7PNQ-ZTPA].

48. The Delaware Supreme Court had previously held that the deferential business judgment rule rather than the more demanding entire fairness standard could be applied, in certain cases, to litigation challenges to freeze-out mergers (i.e., mergers where a controlling stockholder acquires the remaining minority interest). In *MFW*, the court held that the business judgment rule was the appropriate standard of review "where the merger is conditioned *ab initio* upon both the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders." Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014). The court also held in *Leal v. Meeks* (*In re Cornerstone Therapeutics, Inc.*), 115 A.3d 1173, 1180 (Del. 2015), that a plaintiff must plead nonexculpated claims against a defendant director to survive a motion to dismiss, regardless of the underlying standard of review, and that a board could satisfy its *Revlon* duties without conducting a market check in *C&J Energy Services v. City of Miami General Employees' & Sanitation Employees' Retirement Trust*, 107 A.3d 1049, 1071 (Del. 2014).

49. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305–06 (Del. 2015).

such as *Revlon* and *Unocal* were only appropriate in actions for injunctive relief and were "not tools designed with post-closing money damages claims in mind."[50] The effect of *Corwin* was to provide a streamlined basis for a court facing a claim for damages in a third-party merger to dismiss the case on the pleadings.[51]

At the same time, several decisions expressly questioned the practice of approving disclosure-only settlements of merger cases, noting the limited value provided by the corrective disclosures, the broad releases generated by the settlement, and the absence of an adversarial process by which to test the adequacy of the settlement terms.[52] These concerns culminated in Chancellor Bouchard's January 2016 decision *In re Trulia, Inc. Stockholder Litigation*.[53] *Trulia* focused specifically on the appropriate legal standard for judicial approval of a disclosure-only settlement of a lawsuit challenging a merger. Chancellor Bouchard observed that the courts' historic practice of approving disclosure-only settlements of "marginal value" and awarding plaintiffs' counsel an attorneys' fee in such cases was a component of the "dynamics that have fueled disclosure settlements of deal litigation."[54] Consequently, the court announced its intent to exercise greater vigilance in analyzing the reasonableness of a proposed disclosure-only settlement.[55] The court explained that

> practitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.[56]

In *Trulia*, Chancellor Bouchard recognized that plaintiffs could respond to these doctrinal developments in several ways. One option, if

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50. *Id.* at 312.

51. Subsequent decisions reaffirmed *Corwin* and applied it to mergers accomplished by means of a tender offer. *See* Singh v. Attenborough, 137 A.3d 151, 151–52 (Del. 2016) (explaining that "[w]hen the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result"); *In re* Volcano Corp. Stockholder Litig., 143 A.3d 727, 743 (Del. Ch. 2016) (explaining that "the policy considerations underlying the holding in *Corwin* do not provide any basis for distinguishing between a stockholder vote and a tender offer"); *In re* Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 Del. Ch. LEXIS 274, at *8 (Oct. 29, 2015) (holding that "after the merger has been approved by a majority of disinterested stockholders in a fully informed vote, the standard for finding a breach of the duty of care under BJR is gross negligence").

52. *See, e.g.*, *In re* Aruba Networks, Inc. Stockholder Litig., No. 10765-VCL (Del. Ch. Oct. 9, 2015); *In re* Riverbed Tech., Inc. Stockholders Litig., No. 10484-VCG, 2015 Del. Ch. LEXIS 241 (Sept. 17, 2015).

53. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884 (Del. Ch. 2016).

54. *Id.* at 891, 894.

55. *Id.* at 898.

56. *Id.*

the litigation involved plainly material disclosure deficiencies, was to seek injunctive relief prior to the closing of the merger.[57] Although the Delaware courts have been reluctant to provide injunctive relief that would interfere with the shareholders' ability to participate in an economically beneficial transaction,[58] an injunction that is limited to corrective disclosure does not present that concern.[59]

Another option is to dismiss the case on mootness grounds with the defendants voluntarily agreeing to pay counsel a mootness fee.[60] The extent to which mootness fees can be justified under a lesser standard than "plainly material" is unclear.[61] In a post-*Trulia* opinion, Vice Chancellor Glasscock struggled with this question and ultimately awarded plaintiffs' counsel a $50,000 mootness fee, reasoning that a fee could be justified even if the disclosures were merely "helpful" because the dismissal did not bind the stockholder class or result in a class-wide release.[62]

A third option, not discussed by the *Trulia* opinion, is for counsel to seek to avoid the application of the recent Delaware decisions by filing in another jurisdiction.[63] As discussed above, plaintiffs already frequently challenge mergers by filing suit in state courts outside of Delaware or in federal court.

The extent to which other courts will follow these Delaware cases is unclear. To the extent that plaintiffs bring fiduciary duty claims outside of Delaware against Delaware directors, Delaware substantive

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57. *Id.* at 896.

58. *See, e.g.*, *In re* Delphi Fin. Grp. S'holder Litig., No. 7144-VCG, 2012 Del. Ch. LEXIS 45, at *7, *66–73 (Mar. 6, 2012) (refusing to enjoin merger where plaintiffs had demonstrated a reasonable likelihood of success on the merits of some claims "because the deal represents a large premium over market price").

59. *See, e.g.*, *In re* Pure Res., Inc. S'holders Litig., 808 A.2d 421, 452–53 (Del. Ch. 2002) ("[A]lthough I recognize that this court rightly hesitates to deny stockholders an opportunity to accept a tender offer, I believe that the risks of an injunction are outweighed by the need for adequate disclosure . . . .").

60. *Trulia*, 129 A.3d at 897.

61. One report finds that "[p]laintiffs' lawyers who have sought mootness fees have faced mixed but mostly negative results." Keenan Lynch & Edward Micheletti, *Key Developments in Delaware Corporation Law in 2016*, JDSUPRA (Feb. 3, 2017), http://www.jdsupra.com/legalnews/key-developments-in-delaware-43114/ [https://perma.cc/VQX4-24WK] (reporting "the court only granted amounts of $50,000 and $100,000, if any at all").

62. *In re* Xoom Corp. Stockholder Litig., No. 11263-VCG, 2016 Del. Ch. LEXIS 117, at *10, *15 (Aug. 4, 2016).

63. *See, e.g.*, Armour et al., *supra* note 24, at 607 (presenting statistics showing that an increasing percentage of cases involving Delaware corporations are being litigated outside of Delaware); Ted Mirvis, *Anywhere but Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, M&A J., May 2007, at 17, 17 (reporting statistics indicating that it had become "twice as likely as it was previous that the litigation will be brought and litigated outside of Delaware").

law, such as *Corwin*, should govern those claims.[64] On the other hand, the nonadversarial context of a proposed settlement and request for attorneys' fees may dissuade a non-Delaware court from rejecting the proposed settlement on the grounds that the case might have been dismissed pursuant to *Corwin*. Similarly, courts in other states may not be willing to follow *Trulia* in evaluating the reasonableness of the settlement terms.[65]

Indeed, a New York court recently refused to apply *Trulia* to a Delaware corporation, instead imposing an easier to meet standard for approval of disclosure-only settlements.[66] In *Gordon v. Verizon Communications, Inc.*,[67] the New York appellate court rejected the *Trulia* test and instead applied its own standard to approve a proposed settlement of litigation challenging the 2013 acquisition by Verizon for $130 billion of a 45% stake in Verizon Wireless held by Vodafone. The settlement required additional disclosure and allowed for the payment of an attorneys' fee of $2 million. Although the lower court concluded that the additional disclosure was "unnecessary surplusage" and refused to award the requested fee, the appellate court reversed.[68] Applying its own test instead of *Trulia*, even though Verizon Wireless was a Delaware company, the court examined whether the proposed settlement was in the best interest of "shareholders" and the class as well as the "corporation."[69] The court found that although the disclosure provided "some . . . albeit minimal" benefit to the company, a settlement avoided "having to incur the additional legal fees and expenses of a

64. *See, e.g.*, *In re* Crown Castle Int'l Corp., 247 S.W.3d 349, 352–53 (Tex. App. 2008) (holding that Delaware substantive corporate law, including pleading requirements that Delaware courts had characterized as substantive, applied to corporations incorporated in Delaware); *see also* Quinn v. Knight, No. 3:16-cv-610, 2016 U.S. Dist. LEXIS 151346, at *10 (E.D. Va. Nov. 1, 2016) (citing to Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015), in the context of a Virginia corporation).

65. *See* Myers, *supra* note 29, at 471 (explaining that other state courts may "compete to offer the most shareholder-friendly interpretations of Delaware law or the most attractive procedures for pressing claims").

66. Gordon v. Verizon Commc'ns, Inc., 148 A.D.3d 146, 161–62, 164 (N.Y. App. Div. 2017) (approving a $2 million disclosure settlement and promulgating a multifactor test for consideration of such settlements). Prior to the *Gordon* decision, several New York trial courts had refused to approve disclosure-only settlements. *See, e.g.*, *In re* Allied Healthcare S'holder Litig., No. 652188/2011, 2015 WL 6499467, at *3 (N.Y. Sup. Ct. Oct. 23, 2015); City Trading Fund v. Nye, No. 651668/2014, 2015 WL 93894, at *19 (N.Y. Sup. Ct. Jan. 7, 2015).

67. 148 A.D.3d at 149, 161–62.

68. Gordon v. Verizon Commc'ns, Inc., No. 653084/13, 2014 WL 7250212, at *7 (N.Y. Sup. Ct. Dec. 19, 2014), *rev'd*, 148 A.D.3d 146 (N.Y. App. Div. 2017).

69. *Gordon*, 148 A.D.3d at 159.

trial."[70] The court also considered the time and labor involved in the action and awarded the full $2 million fee to the attorneys.[71]

Similarly, a Nevada attorney has written that Nevada offers issuers the opportunity to resolve strike suits "efficiently and effectively" by permitting these cases to be resolved through the traditional disclosure-only settlement coupled with a release and fee award, citing a number of decisions approving such settlements and, in at least one case, the award of a substantial attorneys' fee.[72] Whether other courts will follow these decisions is unclear. Indeed, even prior to *Trulia*, Texas had adopted another method of discouraging disclosure-only settlements.[73]

In federal court, Judge Posner explicitly endorsed the *Trulia* standard for the Seventh Circuit Court of Appeals in *In re Walgreen Co. Stockholder Litigation*.[74] Although Delaware law does not govern the substance of federal proxy fraud claims, the scope of such claims is focused on disclosure rather than substantive fairness and is therefore more limited than traditional merger litigation.[75] In addition, the federal securities laws contain a number of safeguards to permit early dismissal of nonmeritorious claims.[76]

Plaintiffs' ability to avoid the impact of the Delaware decisions by filing in courts outside of Delaware will depend on another complication—the increasing adoption of forum selection provisions.[77] Forum selection provisions enable a corporation to designate the

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70. *Id.* at 159–61.

71. It is unclear how broadly the holding of *Gordon* will be applied. In a recent New York case, *City Trading Fund v. Nye*, No. 651668/2014, 2018 WL 792283 (N.Y. Sup. Ct. Feb. 8, 2018), a New York lower court interpreted *Gordon*'s "some benefit" standard to be equivalent to the standard for a mootness fee in Delaware and refused to approve a settlement that included "the payment of counsel fees in exchange for worthless supplemental disclosures." *Id.* at *19.

72. Jeffrey S. Rugg, *Strike Suit Certainty Remains the Status Quo in Nevada*, LAW360 (Aug. 11, 2015), http://www.law360.com/articles/689917/strike-suit-certainty-remains-the-status-quo-in-nevada [https://perma.cc/VA3Q-3MAV].

73. Texas law prohibits courts from awarding attorneys' fees in a case in which there is no monetary recovery for the plaintiff class. Fisch et al., *supra* note 4, at 613. Although the provision was adopted to address coupon settlements in consumer class actions, a Texas appellate court applied it to merger litigation. Kazman v. Frontier Oil Corp., 398 S.W.3d 377, 387 (Tex. App. 2013).

74. 832 F.3d 718, 725 (7th Cir. 2016).

75. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477–78 (1977) (holding that "the fairness of the terms of the transaction is at most a tangential concern of the [federal] statute").

76. *See* Fisch et al., *supra* note 4, at 613 (describing procedural safeguards including heightened pleading standard and discovery stay).

77. Some issuers also responded to the concerns about excessive litigation by adopting fee-shifting bylaws, which impose liability for the corporation's attorneys' fees on unsuccessful plaintiffs. Although the Delaware Supreme Court upheld the validity of fee-shifting bylaws in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557 (Del. 2014), the Delaware legislature subsequently amended the statute to prohibit both fee-shifting bylaws and charter provisions. *See* DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (West 2017).

jurisdiction in which shareholder suits must be filed; for Delaware corporations, that jurisdiction is typically Delaware.[78] Vice Chancellor Laster first suggested approval of forum selection charter provisions in 2010.[79] For some years, the validity of such provisions was questionable.[80] In 2013, however, then-Chancellor Strine upheld their validity in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*[81] The Delaware legislature subsequently ratified his decision and explicitly authorized Delaware corporations to adopt both forum selection charter and bylaw provisions.[82]

As of August 2014, 746 U.S. public companies had adopted forum selection provisions.[83] In theory, such provisions should prevent plaintiffs from evading the impact of the recent Delaware merger cases by filing in another jurisdiction. The typical forum selection provision, however, is not mandatory—the board has the authority to waive its application.[84] As a result, it is possible even for issuers with a forum selection provision to be sued and settle litigation outside of Delaware if the board agrees to that action.

What has been the initial impact of these developments on Delaware merger litigation? The situation is clearly still a work in progress, as judges and litigants work through the implications of the new legal climate. As one commentator noted: "It remains to be seen whether stockholder plaintiffs will experiment with new strategies and recalibrate, or if the trends of 2016 will lead to permanent changes in deal litigation practice."[85] Although it is too early to evaluate the long-term effects, we present in the next Part some preliminary statistics.

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78. The 2015 legislation requires that forum selection provisions for Delaware corporations designate a Delaware forum, but that designation need not be exclusive. §§ 102(f), 109(b).

79. *See In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 (Del. Ch. 2010) ("[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.").

80. Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation* 10 (Eur. Corp. Governance Inst., Law Working Paper No. 295/2015, 2015), http://ssrn.com/abstract=2624951 [https://perma.cc/MVD3-9489].

81. 73 A.3d 934 (Del. Ch. 2013).

82. §§ 102(f), 109(b).

83. Romano & Sanga, *supra* note 80, at 2.

84. *See* Paul J. Collins & Michael J. Kahn, *Deal Litigation After "*Trulia,*"* DEL. BUS. CT. INSIDER (Apr. 27, 2016), http://www.gibsondunn.com/publications/Documents/Collins-Kahn-Deal-Litigation-After-Trulia-DBCI-4-27-16.pdf [https://perma.cc/V55Z-ZY9U] (observing that "at least some companies [are waiving the application of a forum selection bylaw] to obtain the certainty associated with settlement").

85. Lynch & Micheletti, *supra* note 61.

II. DATA AND EMPIRICAL ANALYSIS

A. Data Set

Our sample contains all the transactions listed in the FactSet MergerMetrics[86] database and announced from 2003 through 2017 that meet the following criteria: (1) the target is a U.S. firm publicly traded on the New York Stock Exchange, American Stock Exchange, or NASDAQ; (2) the transaction size is at least $100 million; (3) the offer price is at least five dollars per share; (4) a merger agreement is signed and publicly disclosed through a filing with the Securities and Exchange Commission ("SEC"); and (5) the transaction has been completed as of October 20, 2017. This constitutes 2,101 unique deals.

We then review by hand merger proxy statements and tender offer documents filed with the SEC to determine if litigation is brought with respect to the transaction. We document all class action litigation brought in connection with a merger, finding that litigation is brought in 1,355 transactions, or 64% of our sample. For litigation outcomes, attorneys' fees, and settlement terms, we review public filings and obtain actual court filings. Court filings are obtained directly from the court, from public filings on the LexisNexis File and Serve Database, or Bloomberg Law and are also reviewed by hand.[87]

B. Empirical Analysis

We begin by setting forth in Chart 1 the total number of deals and associated litigation completed in each year over our sample period from 2003 to 2017.[88] The sample includes all mergers with an aggregate value exceeding $100 million wherever the target corporation is incorporated.

86. More information about the database can be found at *Bifurcated Termination Fees and Common Termination Events*, FACTSET MERGERS (Sept. 3, 2014), https://www.mergermetrics.com [http://perma.cc/7U34-82CR].

87. The data collection here is taken in part from a database compiled for a prior study by two of the coauthors. *See* Cain & Davidoff Solomon, *supra* note 16, at 487 (stating that the court filings are obtained directly from the court and from public filings on the LexisNexis File and Serve Database or on Bloomberg Law and are also reviewed by hand).

88. This chart records deals by date of completion. A transaction announced in 2014 and completed in 2015 would be marked in this chart as a 2015 transaction; the remaining tables follow the same convention. The numbers for 2017 are annualized figures.

CHART 1: LITIGATION RATES BY DEAL COMPLETION YEAR

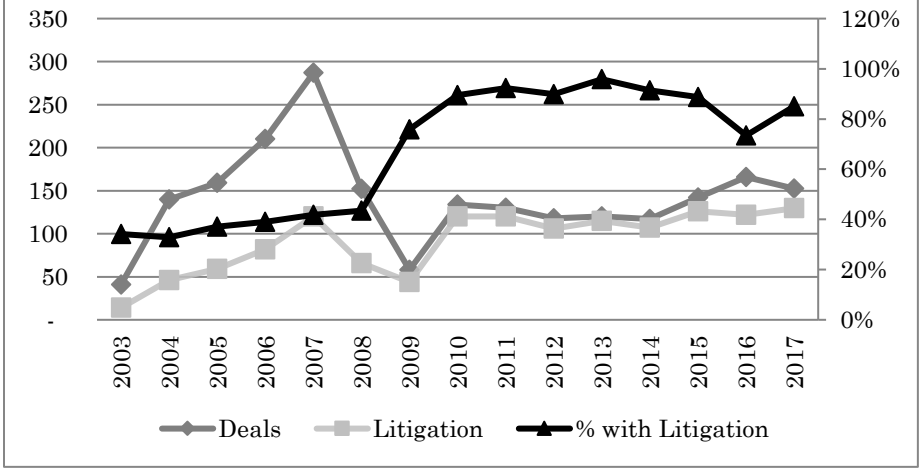


Chart 1 also sets forth the percentage of completed deals attracting litigation for each year. The number of completed deals in our sample reached a high point of 287 in 2007, falling to 58 in 2009. In 2015 and 2016, the number of completed deals was 142 and 166, respectively, a slight rise from 2010 to 2014, during which time the number of completed deals ranged from 117 to 134 deals. Litigation rates have fluctuated substantially over our sample period. From 2003 to 2008, litigation challenges ranged from 33% of completed deals (2004) to 43% of completed deals (2008). There was a sharp rise in the litigation rate in 2009 to 76% of completed deals. This rise continued in 2010 when 90% of completed deals attracted litigation.

Litigation then peaked in 2013 at an astounding rate of 96% of all completed deals. In 2015, the litigation rate was 89%, but the rate was 92% for deals announced in the first half of 2015 and 85% in the second half of 2015 as the Delaware courts began to crack down on disclosure-only settlements. In 2016, the litigation rate fell to 73% of all completed deals, below the 2009 rate, and rose slightly to 85% during the first ten months of 2017.

The rise in overall litigation rates was accompanied by a sharp rise in multijurisdictional litigation. Table 1 sets forth the percentage of cases filed in Delaware, other states, and the federal courts during our sample period. The final column reports the percentage of cases filed in more than one jurisdiction.

TABLE 1: FILINGS BY DEAL COMPLETION YEAR

	Deals	% with Litigation	% Delaware*	% Other States*	% Federal*	% Filed in Multiple Jurisdictions
2003	41	34%	7%	100%	7%	7%
2004	140	33%	43%	78%	0%	33%
2005	159	37%	39%	66%	7%	14%
2006	210	39%	21%	82%	12%	17%
2007	287	42%	28%	86%	13%	35%
2008	152	43%	23%	92%	21%	31%
2009	58	76%	34%	98%	20%	50%
2010	134	90%	49%	88%	26%	53%
2011	130	92%	51%	88%	39%	63%
2012	118	90%	56%	88%	34%	69%
2013	120	96%	52%	83%	32%	61%
2014	117	91%	55%	73%	15%	41%
2015	142	89%	60%	51%	20%	31%
2016	166	73%	34%	61%	39%	33%
2017	127	85%	9%	18%	87%	22%
Total	2,101	64%	41%	74%	28%	42%

* Note: Percentages sum to > 100% each year due to multijurisdictional filings.

The percentages of filings in Delaware, other states, and the federal courts do not sum to 100% because of the fact that a single deal can be challenged by a lawsuit in Delaware, a lawsuit in another state, and a lawsuit in federal court. However, these numbers show that the number of filings in Delaware has fluctuated substantially. Most notably, filings in Delaware fell by almost 50% in 2016 and are down below 10% during the first ten months of 2017. In 2006, 21% of completed deals with litigation had a suit brought in Delaware, while 82% of such deals had filings in other states and 12% had a federal complaint brought. The fall in Delaware filings from 2006 through 2008 led to some assertions that plaintiffs' lawyers were filing suit out of Delaware in order to seek better outcomes and that Delaware was "losing its cases."[89] As litigation rates increased starting in 2009, cases migrated back to Delaware, however. Delaware filings peaked in 2015,

89. *See* Armour et al., *supra* note 24 (finding that in a period from 1994 to 2010, Delaware courts were losing market share in lawsuits).

when 60% of completed deals had a Delaware filing, compared with a rate of other state filings of 51%.[90]

The 2016–2017 filing numbers show the immediate impact of *Trulia* and its cohort. In addition to the fact that 2016 filings in Delaware are half the 2015 number, other state filings have increased from 51% to 61%. The most significant shift in filings is in federal court, which increased from 20% of filings in 2015 to 87% of filings in 2017—by far the highest percentage rate for federal filings in our sample period. If this trend continues, merger litigation seems likely to become a matter largely for the federal courts.

In Table 2 we further explore the effects of the *Trulia* decision and its cohort by examining litigation settlements over our sample period. The first column represents the total number of deals with litigation for which we located data on the case outcome (settled or dismissed).

90. Not all firms in our sample are Delaware incorporated or headquartered, and so the number of Delaware filings can never reach 100%. Instead, the number of Delaware-incorporated or Delaware-headquartered targets is 65% of the sample, and so the 2015 rate is near the maximum litigation rate for Delaware.

TABLE 2: LITIGATION OUTCOMES BY DEAL COMPLETION YEAR

	Deals with Litigation*	Settled	Dismissed	Settlement Rejected**	Mootness Fees***	% of Settlements that are Disclosure-Only
2003	11	55%	45%	0	0%	83%
2004	44	66%	34%	0	0%	41%
2005	56	54%	46%	1	0%	63%
2006	78	71%	29%	0	0%	58%
2007	109	68%	32%	0	0%	68%
2008	65	69%	31%	0	0%	82%
2009	41	73%	27%	0	0%	90%
2010	111	82%	18%	0	0%	78%
2011	110	80%	20%	0	0%	69%
2012	100	78%	22%	1	1%	85%
2013	109	77%	23%	1	0%	76%
2014	104	63%	38%	2	3%	74%
2015	117	45%	55%	2	14%	85%
2016	97	43%	57%	1	22%	98%
2017	91	11%	89%	0	75%	90%

* Total number of deals with litigation for which data on the case outcome (settled or dismissed) is available.

** Subset of dismissals. Includes effective rejections due to out-of-court mootness fee settlements.

*** Percentage of all cases. Subset of dismissals.

Settlement numbers lag filings since litigation can be time consuming and span years before a settlement or disposition occurs. In particular, trials or settlements providing money damages often occur several years after the initial filing. As a result, these outcomes may be underrepresented in our outcomes for recent deals. Nonetheless, the effects of *Trulia* and other decisions that have affected the ability to settle cases for a disclosure-only outcome are clear. The rate of dismissals has already risen sharply in 2017 to an astounding 89% of all cases.

The rise of the mootness fee is also documented in Table 2. Litigation outcomes resulting in the payment of a mootness fee are near 0% of cases prior to 2014, but in the wake of *Trulia* these cases became more significant. They comprised 14% of cases in 2015 and rose to 75% of cases by 2017. The payment of mootness fees for cases from 2015 and 2016 can be largely explained as payment made to plaintiffs' lawyers

abandoning already existing settlements that were negotiated prior to *Trulia*. However, in late 2016 and 2017 there were very significant numbers of mootness fee payments and accompanying case dismissals. Accordingly this appears to be an adaptive litigation strategy of plaintiffs.[91]

A final development related to Table 2 is the decline of the amendment settlement, a settlement that changes the terms of the agreement.[92] In 2016 there were only 2% of amendment settlements compared to 24% of settlements for deals completed in 2013. It may be the case that, like monetary settlements, settlements that involve an amendment to the merger terms are lagged and will not show up for transactions completed in 2015–2017 until future years, although this seems unlikely as the deals at issue have already been completed (and many cases have been dismissed). We asked a number of prominent M&A lawyers about the reasons for this development. They uniformly attributed the decrease to better drafting by transaction lawyers and the lack of extreme terms existent in prior years which justified such a settlement, an explanation that we have no way to test with our current data. Notably, however, the parties do not appear to be seeking to evade the effect of *Trulia* by shifting from disclosure-only settlements to amendment settlements, a trend that some had predicted would occur if Delaware courts limited their willingness to approve disclosure-only settlements.[93]

In Table 3 we examine the effect of *Trulia* on attorneys' fees in merger litigation.

91. *See also* Richard L. Renck, *Court of Chancery Critically Reviewing "Mootness" Fee Applications*, LEXOLOGY (Aug. 10, 2016), https://www.lexology.com/library/detail.aspx?g=29b6aab8-a7ab-498f-9eb7-22e5f2f2a162 [https://perma.cc/U46V-Z4V9] (describing recent decisions evaluating mootness fee applications).

92. *See* Fisch et al., *supra* note 4, at 576 (describing amendment settlements).

93. *See id.* at 610 (discussing this possibility).

TABLE 3: MEDIAN ATTORNEYS' FEES BY DEAL COMPLETION YEAR AND LITIGATION OUTCOME (IN THOUSANDS)

	# of Non-Zero Fees	All Non-Zero Fees	Nondisclosure Settlement	Disclosure-Only Settlement	Mootness Fee
2003	4	$425	$450	$499**	N/A
2004	25	$785	$1,050	$350	N/A
2005	30	$400	$588	$395	N/A
2006	52	$505	$1,118	$435	N/A
2007	68	$643	$2,925	$525	N/A
2008	41	$500	$893	$485	N/A
2009	29	$575	$3,050	$575	N/A
2010	89	$600	$1,375	$531	N/A
2011	78	$600	$1,750	$500	N/A
2012	73	$500	$1,940	$450	$4,000*
2013	57	$490	$2,400	$450	N/A
2014	49	$500	$900	$435	$450
2015	54	$373	$825	$400	$200
2016	20	$263	N/A	$320	$238
2017	11	$280	N/A	$300	$265

* Note: $4 million mootness fee in 2012 for *Ancestry.com*.
** Note: Disclosure-only fees in 2003 are higher than nondisclosure settlement fees.

The first two columns of Table 3 report median attorneys' fees for all settlements by year of deal completion. Again, because of a lag in consideration settlements, figures are lower for immediate years. However, median attorneys' fees in disclosure-only settlements decline from a high of $575,000 in 2009, to $300,000 in 2017. The drop may be attributable to judges viewing disclosure-only settlements as providing lower value to the shareholders in the wake of *Trulia* and its progeny.

The final column of Table 3 reports mootness fees. The $4 million fee for a deal completed in 2012 is an outlier, reflecting a large settlement in the *Ancestry.com* case.[94] But for 2016 and 2017, median

94. *In re* Ancestry.com S'holder Litig., No. 7988-CS, 2012 Del. Ch. LEXIS 294 (Nov. 27, 2012). *Ancestry.com* was not a typical litigation case; it involved a don't ask/don't waive standstill and was one of the first decisions to challenge this type of arrangement. Accordingly, the fee was proportionately higher and an outlier. *See* Brian M. Lutz & Jefferson E. Bell, *Chancery Court Provides Guidance on 'Don't Ask, Don't Waive' Standstill Provisions*, DEL. BUS. CT. INSIDER (Jan. 16, 2013), http://www.gibsondunn.com/publications/Documents/LutzBell-ChanceryCourtProvidesGuidance.pdf [https://perma.cc/R8W3-54VB] (describing early cases evaluating the propriety of don't ask/don't waive provisions).

mootness fees were $238,000 and $265,000, respectively. These numbers are below the medians for disclosure-only settlements and it is questionable whether they are sufficient to sustain a litigation practice in this area.

Table 4 further analyzes how the *Trulia* change has affected Delaware litigation.

TABLE 4: DELAWARE CASES AND ATTORNEYS' FEES BY DEAL COMPLETION YEAR

		Attorneys' Fees ($k)		
	% Cases Going to DE	**Mean**	**Median**	**Median Attorneys' Fees ($k) for Disclosure-Only**
2003	0%	N/A	N/A	N/A
2004	44%	$1,724	$725	$331
2005	52%	$602	$400	$353
2006	16%	$410	$330	$328
2007	43%	$2,698	$530	$415
2008	28%	$1,040	$850	$750
2009	48%	$1,627	$550	$500
2010	49%	$1,739	$710	$525
2011	58%	$3,098	$600	$400
2012	41%	$1,797	$475	$440
2013	46%	$3,165	$450	$414
2014	55%	$749	$473	$330
2015	41%	$1,337	$350	$315
2016	10%	N/A	N/A	N/A
2017	N/A	N/A	N/A	N/A

Trulia's consequences are reflected in the first column, which records those cases that are settled in Delaware as a percentage of deals involving Delaware-incorporated target corporations for which litigation is brought and can potentially be brought in Delaware. This drops to 10% in 2016 from 55% in 2014 and 41% in 2015. This drop documents that plaintiffs' attorneys are avoiding Delaware for their settlements and dispositive litigation.

In Table 4, we also denote changes in aggregate attorneys' fees over the years. The findings in Table 4 are consistent with a prior paper by Cain and Davidoff which finds that overall, Delaware awards higher

attorneys' fees and dismisses more cases than other states, perhaps to compensate for this dismissal rate.[95] This is reflected in Table 4, as median fees for disclosure-only cases declined from $440,000 to $315,000 between 2012 and 2015. Figures for 2016 and 2017 are incomplete due to the lack of observations in which attorneys' fees have been awarded because of the lag in time between such settlements and fee awards.

Table 5 examines in more detail the use of federal courts as an alternative forum to Delaware.

TABLE 5: PERCENTAGE OF CASES GOING TO FEDERAL COURTS BY DEAL COMPLETION YEAR

	# of Federal Settlements	% of All Settled Cases in Federal Courts	% of Mootness Fees Paid in Federal Courts	Nondisclosure Settlements
2003	0	0%	N/A	N/A
2004	0	0%	N/A	N/A
2005	2	6%	N/A	50%
2006	3	6%	N/A	0%
2007	0	0%	N/A	N/A
2008	0	0%	N/A	N/A
2009	0	0%	N/A	N/A
2010	3	3%	N/A	33%
2011	1	1%	N/A	100%
2012	6	8%	N/A	33%
2013	6	8%	N/A	17%
2014	5	8%	0%	20%
2015	10	18%	0%	0%
2016	14	32%	71%	0%
2017	4	44%	100%	0%
Total	54	7%	90%	13%

Table 5 shows a substantial uptick in cases settled in federal courts. In unreported figures we also note that 2015 saw 25 federal lawsuits, 2016 saw 47, and 2017 is on track to see 113 federal lawsuits if the trend during the first ten months continues throughout the year. Accompanying that trend, Table 5 shows significant increases in the percentages of all settled cases that are in federal court. Cases settled

95. Cain & Davidoff Solomon, *supra* note 16, at 469.

in federal court represented 0% of cases resolved in 2009. In contrast, in 2017, 44% of all settlements were in federal court.

Table 5 also documents that the primary driver of the federal court shift is a rise in mootness fee payments. In 2017, all mootness fee payments were in federal court cases. None of the federal court cases settled in 2015 through 2017 were nondisclosure settlements, meaning that all of these additional federal settlements were disclosure ones. These statistics are not surprising; filings in federal court must generally allege a disclosure violation as a basis for jurisdiction, and a federal court that rejects a disclosure claim need not exercise supplemental jurisdiction over any state law fiduciary duty claims. Therefore, we would expect to see federal court litigation focus primarily on disclosure issues. Two of us argued in another article that this focus is appropriate because federal law has developed a specialized jurisprudence for addressing disclosure claims.[96] The federal courts' expertise in this area suggests that they will be able to work through these cases proficiently.

The question is whether federal courts will be more receptive to disclosure claims, disclosure-only settlements, and mootness fee payments than the Delaware state courts. At least two federal courts have adopted the reasoning of the *Trulia* decision.[97] If other federal courts follow these decisions, we would expect to see the rate of federal court filings decline in the future.[98]

Table 5 also allows us to explore, in a preliminary fashion, the possibility that plaintiffs' lawyers and defendants are deliberately colluding to settle suits outside of Delaware. By collusion, we mean cases in which an issuer with a Delaware forum selection provision is sued in another state court and the board waives or otherwise fails to invoke the forum selection provision and instead settles the case. To explore this possibility, we examine 2016 announced deals with litigation completed by February 2017. The issuers in 59.32% of these cases (n=35) have forum selection clauses that select Delaware as the exclusive forum for state litigation. The issuers in 11.9% of these cases (n=7) have forum selection clauses that name a jurisdiction other than

96. Fisch et al., *supra* note 4, at 596–98.

97. *See In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 725 (7th Cir. 2016); Bushansky v. Remy Int'l, Inc., 262 F. Supp. 3d 742, 752–53 (S.D. Ind. 2017) (denying request for over $400,000 in attorneys' fees and applying the *Trulia* standard); *see also supra* note 73 and accompanying text.

98. As this Essay goes to press, we are collecting data on additional federal court filings and resolutions. Our early results suggest a substantial increase in the number of cases that are dismissed as moot and that result in the payment of a mootness fee to plaintiffs' counsel. We intend to document this result and discuss its implications in a subsequent article.

Delaware. Of these cases, four were settled in a forum not specified by the forum selection clause, but all four cases involved federal court litigation which is permitted by all forum selection clauses. Notably, in no case was a Delaware forum selection clause ignored to reach a state court settlement.

We note, however, that in five cases from this time period in 2016 involving litigation filed outside of Delaware against an issuer that had a Delaware forum selection clause, a mootness fee was paid to plaintiffs' counsel. The payment of a mootness fee does not directly evade *Trulia*; indeed, Delaware judges have approved the payment of mootness fees in post-*Trulia* cases. Moreover, five cases are not a trend, but Table 5 also reveals that in 2016 71% of all mootness fees involved cases litigated in federal courts. This number rose to 100% in 2017. These cases thus suggest that continued scrutiny of litigation outside Delaware is required to determine the extent to which this practice provides a viable way for plaintiffs' counsel to collect fees in weak merger cases.

In Table 6, we look at the number of suits filed in 2015, 2016, and 2017 for firms that are either headquartered or incorporated in Delaware.

TABLE 6: MEAN NUMBER OF SUITS FILED (2015–2017)

Mean # Suits, for Filings in:	**DE Only**	**DE+ Fed**	**DE+Fed +Other State**	**DE+ Other State**	**Fed**	**Other State**	**Overall**
2015	3.7	4.5	9.8	4.9	3.0	3.0	4.3
[N]	*47*	*6*	*4*	*16*	*1*	*7*	*83*
2016	2.4	5.0	6.0	3.9	2.3	2.3	2.7
[N]	*25*	*5*	*2*	*9*	*13*	*18*	*82*
2017	2.7	3.3	7.0	N/A	2.5	1.3	2.7
[N]	*3*	*6*	*1*	*0*	*55*	*3*	*71*

Average number of suits filed, by venue and deal completion year.
Sample includes only Delaware-incorporated (or headquartered, but not both) firms.

The number of suits filed is a good measure of plaintiffs' attorneys' belief in their ability to bring cases that are sufficiently successful to warrant a reasonable fee award, either on the merits or through a settlement. Historically, the number of suits filed is also a good measure of law firm interest in merger litigation. The number of

lawsuits peaked in 2011 with a mean of 5.8 suits filed per case involving a Delaware firm. Table 6 shows a shift in plaintiffs' lawyers' suit rate and likely their belief in the prospects for a successful merger litigation suit. The overall average number of suits per transaction with litigation for all jurisdictions dropped from 4.3 in 2015 to 2.7 in 2017. Delaware-only suits dropped from an average of 3.7 suits to 2.7 suits per completed deal. Meanwhile, in multijurisdictional litigation involving Delaware and federal court, the number rose from 4.5 to 5.0 suits in 2016. This rise further reflects the shift to federal court evidenced in other tables and is likely attributable to plaintiffs' lawyers' belief that they are more likely to get a disclosure-only settlement approved in these jurisdictions. It appears also that forum selection clauses are limiting litigation.

Ultimately, our findings reveal a significant shift in merger litigation practice post-*Trulia*. There are fewer suits brought, particularly in Delaware. There is an outflow of filings from Delaware towards federal court to avoid forum selection clauses and *Trulia*. There is a substantial rise in the percentage of cases with mootness fee awards, but an overall reduction in the size of attorneys' fee awards. There also appear to be higher dismissal rates for cases generally. In summary, *Trulia* and other recent changes in Delaware law have brought a tidal wave of change to the merger litigation industry.

III. IMPLICATIONS OF OUR FINDINGS

A. Litigation Practices Are Responsive to Changes in the Law

Representative shareholder litigation is shaped by two important characteristics: (1) shareholders' power to sue is based on multiple sources of substantive legal rules; and (2) representative litigation inevitably involves self-appointed agents acting for the investor group.[99] One result of these forces' interaction is that the importance of different venues for bringing these cases changes over time, and the relative strength of different forms of shareholder litigation is dynamic as well.[100] If one avenue for vindicating investor rights shuts down, entrepreneurial agents in the plaintiffs' bar will seek

99. Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1755 (2012).

100. *See* Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 WASH. U. L. REV. 487 (2015) (discussing the evolution of securities fraud litigation to enforce state law fiduciary principles).

others, while defendants' attorneys will in turn react to those changes in their own way.[101]

1. Deal Litigation Moves to Other Jurisdictions

Our results demonstrate that, as expected, plaintiffs' attorneys respond to litigation incentives that affect deal litigation. When Delaware law changed to reduce the likelihood of success in M&A cases, plaintiffs' counsel reacted by filing fewer deal cases in Delaware. When Delaware law reduced the size of the expected attorneys' fee awards in these cases, plaintiffs' counsel again responded by filing fewer deal cases in Delaware. At least in the short run, the efforts by Delaware courts to reduce the volume of litigation have been successful—these trends are particularly apparent in Delaware, with both filing rates and settlement rates dropping in 2016 and 2017.

The changes in Delaware have had some spillover effects as well. One practical response to multiforum litigation is for a Delaware company to adopt a forum selection bylaw choosing Delaware as the appropriate forum. Companies are incentivized to make this choice in order to limit litigation and appear to be doing so at significant rates. Forum selection bylaws have funneled litigation that might otherwise have been filed elsewhere into the Delaware courts. They have also discouraged plaintiffs' counsel from bringing cases outside Delaware, since plaintiffs' lawyers do not want to engage in costly and generally fruitless litigation over the validity of forum selection bylaws.

The ability of plaintiffs to avoid *Trulia* may be limited still more by the continued adoption and use of these forum selection provisions. When *Trulia* is combined with the widespread adoption of forum selection clauses, it is likely to leave the merger litigation venue choice as between Delaware and federal court.

The substantive impact of *Trulia* has not been confined to Delaware either. Some courts outside of Delaware are looking more closely at disclosure-only settlements and dismissing more of them.[102] Thus, overall merger litigation levels are down, and plaintiffs' success rates in these cases seem to be declining.

Plaintiffs' law firms are adjusting to this new reality. A significant number of merger lawsuits that these firms might once have filed as deal litigation in Delaware have instead been initiated in federal court or to a lesser extent in other states' courts. In federal

101. *See* Cain & Davidoff Solomon, *supra* note 16, at 487–96 (empirically documenting the actions and reactions of plaintiffs' attorneys to shifting legal standards).

102. *See supra* notes 66–73, 76 and accompanying text.

courts, these cases are brought as Rule 14a-9 disclosure cases. For corporations without forum selection bylaws, plaintiffs can file deal litigation in the state court of the state where the target corporation is headquartered.

As plaintiffs have adjusted their tactics, so have defendants. It has become common for defendants' counsel to seek to dismiss deal litigation, and the number of dismissed cases has risen sharply. The most worrisome development to date is the sharp increase in federal court cases that are being litigated as mootness cases.[103] Although these cases are being dismissed without a release, reflecting the likelihood that they are largely nuisance suits, they appear to be generating the payment of mootness settlement fees, creating an incentive for plaintiffs' lawyers to continue to file them. These cases appear to indicate that plaintiffs' counsel may be extracting rents by seeking low cost payments to "go away." Mootness fee payments thus likely warrant a more thoughtful response by the federal courts.[104]

If Delaware is trying to reduce the amount of deal litigation, these adjustments by the lawyers involved in them may make Delaware's task more difficult. For example, if non-Delaware courts prove, in the long run, to be more receptive forums, either because they do not follow Delaware's restrictions on the scope of merger duties or because they approve settlements and fee awards more liberally, then Delaware's ability to curtail the amount of merger litigation will be limited.

The full effect of forum selection provisions remains unclear, however. Although the number of issuers adopting forum selection clauses is growing, to date, many companies have not adopted them. In addition, even those issuers that adopt a forum selection provision may waive its application in order to enter into a settlement on terms that would not have been permitted by a Delaware court. We find no evidence of this behavior in our sample. Indeed, there are a number of specific instances where companies have successfully brought motions to dismiss litigation based on these clauses.[105] Nonetheless, it is far too soon to reject this possibility.

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103. *See supra* note 97 and accompanying text.

104. We plan to provide details on the increase in mootness settlements and outline a potential federal court response in a subsequent article.

105. *See, e.g.*, Petit-Frere v. Office Depot, Inc., No. 502015, 2015 WL 10521805 (Fla. Cir. Ct. May 15, 2015) (upholding forum selection bylaw of a Delaware corporation).

2. Plaintiffs Shift Resources into Other Forms of Litigation

If the barriers to deal litigation grow, we would expect to see the plaintiffs' bar shift more resources into other forms of shareholder litigation.[106] Many of the same plaintiffs' law firms that file deal litigation also are major players in bringing derivative lawsuits and federal securities class actions. From the plaintiffs' perspective, there is little reason to think that corporate misconduct is going to disappear, so investors will continue to seek legal avenues to redress it. If deal litigation is no longer a viable way to address wrongdoing, these firms will find alternative forms of shareholder litigation.

The desire of shareholders and their lawyers to seek viable legal alternatives to traditional merger litigation is a plausible explanation for the significant increase in appraisal filings in Delaware in 2016. This increase occurred against the backdrop of the recent legislative changes to the appraisal statute that defendants' law firms pushed for aggressively.[107] These reforms eliminated cases where the claims made totaled less than $1 million and also gave defendants the option of distributing the merger consideration to claimants as a method of cutting off prejudgment interest accruals. In both instances, the winning argument for reforms was to cut back on strike suits using the appraisal statute.[108]

While these reforms addressed some of the underlying motives for the earlier upsurge in appraisal cases, the most recent filing statistics suggest that the new popularity of appraisal litigation is being driven by other factors. The most likely explanation is that cases that in earlier years would have been filed as deal challenges are no longer viable after *Corwin*, *Volcano*, and *Trulia*, so plaintiffs' attorneys are choosing to file them as appraisal actions today.

New developments in Delaware, however, could bring an abrupt halt to this shift in filing patterns. In several recent cases, Delaware courts determined that the merger price is fair value for purposes of the

106. *See* Thomas & Thompson, *supra* note 99, at 1756.

107. This earlier round of reform measures is another example of the way that law firms adjust to new litigation patterns. Jiang et al., *supra* note 43, at 698. In the mid-2000s, a small group of hedge funds began to take advantage of the Delaware appraisal statute by filing a rapidly increasing number of actions seeking damages. As the numbers climbed, signs emerged that some of these actions, particularly smaller ones, appeared to be strike suits. *Id.* Seven Wall Street law firms then petitioned the Delaware legislature to amend the appraisal statute to eliminate smaller cases and to reduce the prejudgment interest rate awarded, among other things. Ultimately, the Delaware legislature did make some, but not all, of the changes requested. *Id.*

108. *Section 262 Appraisal Amendments*, LOWENSTEIN SANDLER (Mar. 6, 2015), https://www.lowenstein.com/files/upload/DGCL%20262%20Proposal%203-6-15%20Explanatory%20Paper.pdf [https://perma.cc/RYE6-2PGQ].

appraisal proceeding.[109] This approach was recently considered by the Delaware Supreme Court in *DFC Global Corp. v. Muirfield Value Partners, LP*.[110] The *DFC Global* court declined to adopt a presumption that, in cases involving a robust market check and a fair sales process, the deal price is the best evidence of fair value, concluding that the adoption of such a presumption should be a legislative decision.[111] Nonetheless, the court emphasized the importance that deal price should play in a court's fair value determination.[112] The *DFC Global* decision, coupled with a recent decision appraising a company's stock at a value that was less than half of the deal price,[113] may signal a conservative trend by the Delaware courts that reduces the attractiveness of appraisal litigation to plaintiffs and their counsel and that reduces the volume of future appraisal cases as an alternative to litigating process issues in a traditional fiduciary duty claim.

Our analysis suggests that, rather than adopting a broad presumption either in favor or against deal price in appraisal litigation, the Delaware Supreme Court should be cautious. Unless and until the scope of traditional merger litigation has had the opportunity to respond to *Trulia*, *Corwin*, and the adoption of forum selection bylaws and reach a new equilibrium, we cannot be sure how these changes in the law will affect litigation practices. Equally importantly, cutting too big a swath out of shareholders' potential remedies for corporate malfeasance opens up the possibility that managerial wrongdoing will go undetected. In other words, a broad appraisal remedy may be a necessary additional safeguard to protect shareholder interests. We develop this argument more fully in the next Section.

B. Type I Versus Type II Error

The Delaware courts and legislature have been engaged in an aggressive campaign to stamp out frivolous shareholder litigation—this was undoubtedly the driving force behind forum selection bylaws

109. *See, e.g.*, Merion Capital L.P. v. Lender Processing Servs., No. 9320-VCL, 2016 Del. Ch. LEXIS 189, at *89 (Dec. 16, 2016) (giving "100% weight to the transaction price" where "[t]he Company ran a sale process that generated reliable evidence of fair value"); Huff Fund Inv. P'ship v. CKx, INC., No. 6844-VCG, 2013 Del. Ch. LEXIS 262, at *49 (Oct. 31, 2013), *aff'd*, 2015 Del. LEXIS 77 (Feb. 12, 2015) (finding "the sales price to be the most relevant exemplar of valuation available").

110. DFC Glob. Corp. v. Muirfield Value Partners, L.P., No. 518, 2016, 2017 Del. LEXIS 324, at *43–44 (Aug. 1, 2017).

111. *Id.*

112. *Id.* at *48 ("[T]he basic economic concept of fair market value remains central to our statutory concept of fair value.").

113. ACP Master, Ltd. v. Sprint Corp., Nos. 8508-VCL, 9042-VCL, 2017 Del. Ch. LEXIS 125, at *2–3 (July 21, 2017).

(targeting multijurisdictional deal litigation), *Trulia* (attacking disclosure-only settlements), and the 2016 legislative amendments to the Delaware appraisal statute (eliminating small shareholder appraisal suits). While few, if any, commentators defend strike suits as valuable, the danger of closing all the courthouse doors is that injustices go undetected and unpunished. In other words, the price of getting rid of bad cases by cutting back on the scope of the law is often simultaneously getting rid of good cases that might have been brought under the old rules.[114]

Corporate law commentators have referred to this as the trade-off between Type I error (false positives) and Type II error (false negatives).[115] In the context of securities fraud class action litigation, this hypothesis has been applied to the passage of the Private Securities Litigation Reform Act ("PSLRA"), a statute that was implemented to address perceived strike suits.[116] In this context, the PSLRA is claimed to have had two effects: it lowered Type I error by reducing the incidence of frivolous litigation, but in doing so it increased Type II error by blocking non-nuisance suits.[117] One empirical study has confirmed that this trade-off occurred after the implementation of the PSLRA.[118]

These trade-offs will also occur as Delaware cuts back on deal litigation through legislative and judicial interventions designed to eliminate strike suits. Certainly fewer bad suits will be brought (Type I error will decrease)—that is apparent from the data that we presented earlier in this paper. What will go undetected, but nevertheless be equally certain to occur, is that Type II error will also increase. In other words, fewer good cases that would result in substantial judgments against corporate wrongdoers will be filed and successfully prosecuted.

How many good cases will we lose, and what will the impact of their disappearance be? In 2015 alone, one commentator identified six major settlements in breach of fiduciary duty litigation in the range of $70 to $275 million in the Delaware Chancery Court.[119] Collectively, these cases resulted in one year of over $900 million in recoveries for

114. *See, e.g.*, Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598 (2007) (finding evidence that meritorious suits that might have previously been filed were deterred by the litigation barriers enacted through the Private Securities Litigation Reform Act).

115. Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711, 711 (1996).

116. *Id.*; Choi, *supra* note 114, at 603.

117. Choi, *supra* note 114, at 603.

118. *Id.* at 622–23.

119. *See* Friedlander, *supra* note 35, at 624–25.

the shareholders in these companies.[120] There are other benefits to be gained from judicial sanctions against corporate misconduct as well. For instance, they provide courts with the opportunity to lay out the rules of the road for deals[121] and give judges a pulpit from which they preach to corporate directors about the perils of wrongdoing.[122] More generally, because transactions are negotiated in the shadow of potential litigation, the availability of a litigation remedy is likely to affect both the price and procedures of future mergers.[123]

These trade-offs highlight the need to assess the costs and benefits of the litigation reform efforts in Delaware carefully before embarking on further cutbacks to shareholders' ability to challenge corporate directors' actions in mergers and acquisitions for fear we will inadvertently cut off valuable shareholder monitoring efforts. Litigation patterns will shift, and it will take time before their effects on corporate behavior become apparent. The dramatic shifts that our data show will stabilize in due course, and at that point it will become apparent if more (or less) needs to be done.

For example, some commentators have recently called for the immediate institution of a "loser pays" system in shareholder litigation, arguing that deal litigation patterns are evolving too slowly and that more needs to be done to stop frivolous litigation.[124] They claim that deal litigation continues to be a significant problem for companies engaged in corporate transactions because forum selection bylaws and *Trulia* have only had a limited impact. They determine that "if *Trulia* fails to eradicate the problem of socially detrimental litigation, Delaware should reconsider its prohibition on fee-shifting bylaws."[125]

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120. Similar settlements have occurred in other years as well. For example, in 2012, the Delaware Supreme Court affirmed a $1.263 billion judgment in a derivative lawsuit challenging Southern Peru Copper Corporation's acquisition of an affiliate. *See* Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1218–19 (Del. 2012).

121. *See* Davidoff Solomon & Thomas, *supra* note 9, at 10.

122. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997).

123. *See, e.g.*, Albert H. Choi & Eric L. Talley, *Appraising the "Merger Price" Appraisal Rule* (Va. Law & Econ., Research Paper No. 2017-01, 2017), https://ssrn.com/abstract=2888420 [https://perma.cc/WM4B-MWXS] (arguing that the scope of the appraisal remedy affects the negotiated deal price in mergers).

124. William B. Chandler III & Anthony A. Rickey, The Trouble with *Trulia*: Re-evaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims 1–2 (Apr. 4, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946477 [https://perma.cc/X2NE-JMHW].

125. *Id.*; *see also* Sean J. Griffith, *Private Ordering Post*-Trulia*: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES (Steven Davidoff Solomon & Randall S. Thomas eds., forthcoming 2018), https://ssrn.com/abstract=2855950 [https://perma.cc/5TF6-FPST] (proposing a charter or bylaw term prohibiting "corporations from paying attorneys' fees for specified litigation outcomes").

In essence, what these commentators are calling for is an extreme trade-off between Type I and Type II error. Even if *Trulia* was 100% effective in stopping disclosure-only settlements, it would not eliminate Type I error since there could still be frivolous cases where the settlement included other elements besides disclosure changes. "Eradicating" Type I error is only possible by eliminating all forms of representative shareholder litigation, which may well be the effect of permitting fee-shifting bylaws. However, as we just discussed, eliminating all forms of representative litigation would also eliminate valuable cases that generate compensation to injured shareholders and deter future managerial wrongdoing.[126]

C. Delaware's (Re-)Balancing Act

These changes in deal litigation, and more broadly in shareholders' ability to sue to enforce their rights, have further implications in the age-old debate about Delaware's competition with other states both for corporate litigation and more broadly for corporate charters. The debate between Cary and Winter over whether Delaware law is leading a race to the bottom or a race to the top centers on whether corporate codes benefit shareholders.[127] Many corporate law academics have contributed to this debate, and while there are many disagreements among these commentators about different aspects of the competition, there seems to be nearly universal agreement that Delaware has emerged victorious thus far in that competition.[128]

The shifting tides of merger litigation may be stirring up the waters of this competition again. The explosion in multijurisdictional deal litigation was one of the forces that stimulated the Delaware legislature to take action to validate forum selection bylaws. These bylaws were intended to funnel cases out of other states' courts into the Delaware Chancery Court. However, as the legal rules in Delaware got tougher on deal cases, the consequence was that plaintiffs looked to

126. Similarly, if the Delaware courts shut down appraisal litigation completely, it will result in fewer good cases being filed under the statute—that is, greater Type II error. In the appraisal area, there is a second negative effect on deterring misconduct as the discovery in these cases can uncover fraud and breaches of fiduciary duties as well. The Delaware courts have permitted the plaintiffs in these circumstances to pursue both actions. Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1184–85 (Del. 1988).

127. *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064–65 (2000) (summarizing the Cary-Winter debate).

128. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

other jurisdictions as safer havens. States that had lost out to Delaware in earlier times now may become preferred venues for shareholders.[129]

The large number of plaintiffs' law firms and availability of alternative forums mean that litigation may migrate and that Delaware rules may not have foreclosing or *in toto* effects.[130] In particular, Delaware's rules may not be adopted or may be circumvented in other jurisdictions, particularly to the extent they are viewed as procedural in nature. One court in New York, for example, went so far as to develop an alternative legal doctrine for assessing settlements in disclosure-only litigation.[131]

Other stakeholders in the corporate law competition have much to gain or lose from these shifts. The Delaware bar, whose role as a key player in this competition was first explained by Professors Macey and Miller,[132] might well be worried about Delaware law shifting too far towards the defense side viewpoint on shareholder litigation and the resulting demise, or outmigration, of corporate litigation. While many Delaware attorneys, even on the plaintiffs' side, supported cutting back on frivolous litigation outside of Delaware (and therefore supported forum selection bylaws), they were much less willing to back fee-shifting bylaws when those came before the Delaware legislature.

The responsiveness of litigation trends to the foregoing legal developments highlights the delicate tightrope that Delaware walks in balancing the interests of shareholders in minimizing corporate wrongdoing against the interests of corporate management in avoiding strike suit deal litigation as well as any conflicts with interests of other stakeholders in the Delaware corporate law enterprise. If Delaware law in this area becomes too favorable to any set of these players, then it will get push back from the opposing set of actors. In setting up its corporate law rules and enforcement, Delaware must take all those

129. A number of papers predicted, as a matter of theory, that this would happen. *See, e.g.*, Armour et al., *supra* note 24, at 640 ("[B]oth for large M&A and LBO transactions, Delaware is increasingly being bypassed as a litigation venue."); Cain & Davidoff Solomon, *supra* note 16, at 499–500 ("[C]ertain states with an interest in attracting business litigation respond to this jurisdictional forum shopping by rewarding higher attorneys' fees and more favorable outcomes when these states have seen cases migrating towards other jurisdictions.").

130. *See* C.N.V. Krishnan, Steven Davidoff Solomon & Randall S. Thomas, *Who Are the Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, 18 AM. L. & ECON. REV. 122, 143 (2016) (concluding that top plaintiffs' firms "are significantly and positively associated with a higher probability of lawsuit success for plaintiffs").

131. *See* Gordon v. Verizon Commc'ns, Inc., 148 A.D.3d 146, 156–64(N.Y. App. Div. 2017) (setting forth an enhanced seven-part test to consider whether a proposed settlement merits approval).

132. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest Group Theory of Corporate Law*, 65 TEX. L. REV. 469, 522–23 (1987).

interests into account or risk losing its dominant position in attracting corporate charters.

We do not suggest in this Essay that Delaware law has become too restrictive—indeed, the statistics on merger litigation suggest that the recent changes are quite modest and that the volume of litigation, at least to date, remains sufficient to discipline the merger process. The analysis is useful, however, in reinforcing the fact that the ultimate check on changes in Delaware corporate law is the desirability of Delaware as a state of incorporation.

CONCLUSION

We examine the shifts in merger litigation following substantial developments in Delaware law regarding merger litigation, including the *Trulia* decision. We find that *Trulia* and its progeny have substantially disrupted merger litigation. Short-term effects include an increase in federal filings, a reduction in Delaware filings and settlements, and a rise in mootness fee payments. Moreover, while the overall volume of merger litigation has declined, it is still very high.

One reason for the continued high rate of litigation, at least in the short term, is that plaintiffs' lawyers are attempting to evade the restrictions of Delaware law by bringing claims elsewhere. Our empirical results demonstrate a high degree of responsiveness by plaintiffs' counsel in terms of venue shifts as well as shifts in the types of claims brought. We also see rapidly shifting tactics being employed by defense side firms. The responsiveness of the lawyers involved suggests that Delaware does not have complete freedom to adjust the merger litigation ecosystem. The Delaware courts and legislature must take this responsiveness into account.

Whether, however, these market-based responses will enable counsel to evade the effect of Delaware law remains unclear. Forum selection clauses may prove effective in limiting the ability of opportunistic plaintiffs to bring cases in other state courts. Federal courts may treat disclosure claims and settlements with similar skepticism to that shown by the *Trulia* decision. And mootness fees may not provide an adequate financial payoff to warrant the filing of low-value cases in the long term, despite the current sharp uptick of cases. Furthermore, shutting down all avenues for shareholders to stop managerial misconduct raises a strong likelihood of also cutting out valid cases that would expose unwanted behavior.

As a result, we argue that the Delaware courts and legislature should hold off on further litigation reforms. Instead, caution is warranted until the full impact of the recent changes has been

incorporated into the merger ecosystem and the federal courts can address the rise in mootness fees. At that time, Delaware can determine whether its litigation system provides an appropriate balance between protecting shareholder value and limiting litigation abuse.

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