european corporate governance institute

ecgi

The Shifting Tides of Merger Litigation

Law Working Paper N° 375/2017
November 2017

Matthew D. Cain
U.S. Securities and Exchange Commission

Jill Fisch
University of Pennsylvania Law School and ECGI

Steven Davidoff Solomon
University of California, Berkeley and Berkley Center for Law, Business and the Economy

Randall S. Thomas
Venderbilt University and ECGI

© Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon and Randall S. Thomas 2017. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

This paper can be downloaded without charge from:
http://ssrn.com/abstract_id=2922121.

www.ecgi.org/wp

european corporate governance institute

ECGI Working Paper Series in Law

The Shifting Tides of Merger Litigation

Working Paper N° 375/2017
November 2017

Matthew D. Cain
Jill Fisch
Steven Davidoff Solomon
Randall S. Thomas

The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues on the staff of the Commission.
The authors wish to thank Samantha Vega for research assistance.

© Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon and Randall S. Thomas 2017. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

Abstract

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 in which cases are being filed in other state courts or in federal court in an effort to escape the application of the new rules.

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

Keywords: Mergers, acquisitions, M&A, corporations, corporate law, corporate governance, Delaware legislation, merger litigation, plaintiffs' lawyers, securities litigation, shareholder rights, management rights, empirical study

JEL Classifications: G34, K22, K41

Matthew D. Cain
Financial Economist
U.S. Securities and Exchange Commission, Division of Economic and Risk Analysis
450 Fifth Street, NW
Washington, DC 20549, United States
e-mail: mdcain@outlook.com

Jill Fisch*
Perry Golkin Professor of Law
University of Pennsylvania Law School
3501 Sansom Street
Philadelphia, PA 19104, United States
phone: +1 215 746 3454, fax: +1 215 573 2025
e-mail: jfisch@law.upenn.edu

Steven Davidoff Solomon
Professor of Law
University of California, Berkeley, School of Law
693 Simon Hall
Berkeley, CA 94720, United States
phone: +1 510 642 1769
e-mail: steven.solomon@law.berkeley.edu

Randall S. Thomas
John S. Beasley II Chair in Law and Business, Professor of Management
Venderbilt University, School of Law
131 21st Avenue South
Nashville, TN 37203, United States
phone: +1 615 343 3814, fax: +1 615 322 6631
e-mail: randall.thomas@law.vanderbilt.edu

*Corresponding Author

Vanderbilt University Law School

Legal Studies Research Paper Series

Working Paper Number 17 - 19

The Shifting Tides of Merger Litigation

Matthew D. Cain
U.S. Securities & Exchange Commission

Jill E. Fisch
University of Pennsylvania Law School

Steven Davidoff Solomon
University of California, Berkeley-School of Law

Randall S. Thomas
Vanderbilt Law School

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract_id=2922121

Electronic copy available at: https://ssrn.com/abstract=2922121

University of Pennsylvania Law School

ILE

INSTITUTE FOR LAW AND ECONOMICS

A Joint Research Center of the Law School, the Wharton School,
and the Department of Economics in the School of Arts and Sciences
at the University of Pennsylvania

RESEARCH PAPER NO. 17-6

The Shifting Tides of Merger Litigation

Matthew D. Cain
U.S. SECURITIES & EXCHANGE COMMISSION

Jill E. Fisch
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

Steven Davidoff Solomon
UNIVERSITY OF CALIFORNIA, BERKELEY - SCHOOL OF LAW

Randall S. Thomas
VANDERBILT UNIVERSITY - LAW SCHOOL

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:
http://ssrn.com/abstract=2922121

Electronic copy available at: https://ssrn.com/abstract=2922121

The Shifting Tides of Merger Litigation

Matthew D. Cain[*]
Jill Fisch[**]
Steven Davidoff Solomon[***]
Randall S. Thomas[****]

Abstract

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 in which cases are being filed in other state courts or in federal court in an effort to escape the application of the new rules.

This responsive adaptation offers important lessons about the entrepreneurial nature of merger litigation and the limited ability of the courts to reduce the potential for litigation abuse. In particular, we

---

[*] Financial Economist, U.S. Securities and Exchange Commission, Division of Economic and Risk Analysis. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues on the staff of the Commission. The authors wish to thank Samantha Vega for research assistance.

[**] Perry Golkin Professor of Law, University of Pennsylvania Law School, Visiting Professor, U.C. Berkeley School of Law

[***] Professor, University of California, Berkeley, School of Law

[****] Professor, John S. Beasley II Chair in Law and Business, Vanderbilt University School of Law

Electronic copy available at: https://ssrn.com/abstract=2922121

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.

I. Introduction

In recent years, over 95% of publicly-announced mergers have attracted a lawsuit, with many mergers attracting suits in multiple jurisdictions.[1] This extraordinarily high litigation rate has drawn criticism from those who claim that the bulk of merger litigation is frivolous.[2] 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.[3]

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

---

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

[2] *See, e.g*., Gregory A. Markel & Gillian G. Burns, *Assessing A Judicial Solution To Abusive Merger Litigation*, Law360 (Nov. 19, 2015), https://www.law360.com/articles/728061/assessing-a-judicial-solution-to-abusive-merger-litigation (observing that "lawsuits are filed after virtually every public merger is announced, in many cases with little regard to the merits of the claim").

[3] Jill Fisch, Sean Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV.557 (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 (2013) (defending the value of disclosure-only settlements in merger litigation).

additional disclosure by the takeover parties.[4] In particular, the courts criticized the lack of materiality of the additional disclosures and the overly broad releases negotiated by the parties.[5] This judicial pushback 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 substantial benefits for shareholders.[6] The court specifically rejected the proposed disclosure-only settlement in that case which provided for additional non-material disclosures, a broad release and a fee award to plaintiffs' counsel.[7]

At the same time, the Delaware courts significantly restricted the substantive ability of plaintiffs to win takeover-related claims by adopting more deferential standards of judicial review in these cases.[8] In *Corwin v. KKR Fin. 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."[9] The Chancery Court extended *Corwin's* holding in *Volcano* to cases

[4] *See e.g.,* Transcript of Settlement Hearing and Rulings of the Court at 74-75, *In re* Aruba Networks Stockholder Litig., C.A. 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., C.A. 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.,, C.A. No. 9730-VCL, (Del. Ch. July 8, 2015).

[5] *See* Fisch, et al., *supra* note 3, at 591-92 (detailing courts' growing criticism of disclosure-only settlements).

[6] 129 A.3d 884 (Del. Ch. 2016). *See also* Transcript of Settlement Hearing and Rulings of the Court at 38, 40, Assad v. World Energy Sols., Inc., No. 10324-CB, (Del. Ch. Aug. 20, 2015) (Bouchard, C.) ("[I]t 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. . . .").

[7] *Trulia,* 129 A.3d at 907.

[8] *See* Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards*, in STEVEN DAVIDOFF SOLOMON AND RANDALL S. THOMAS, EDS., THE CORPORATE CONTRACT IN CHANGING TIMES (forthcoming 2017), https://ssrn.com/abstract=2830257.).

[9] Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305-6 (Del. 2015).

involving a tender offer.[10] The net effect of these two cases was to limit substantially the availability of a post-closing suit for damages. Only if the target failed to disclose the alleged improprieties prior to shareholder approval of the transaction would the court allow a claim to proceed.[11]

The effect of these decisions was to make the successful prosecution of merger litigation cases more difficult. The decisions 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 multi-jurisdictional litigation. In 2015, the legislature adopted amendments to the Delaware General Corporation Law explicitly authorizing issuers to adopt forum-selection bylaws,[12] which would enable Delaware corporations to halt the filing of merger-related suits in multiple states.[13] Issuers' widespread adoption of these by-laws both before and after the legislative response provided some reason for Delaware courts to expect that any crack-down on merger litigation would not simply shift these

[10] *In re* Volcano Corp. Stockholder Litig., 143 A.3d 727 (Del. Ch. 2016).

[11] 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. *See* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014).

[12] Del. CODE. ANN. tit. 8, §§ 102(b) (4), 109(b) (West 2015). 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.

[13] Prior to the legislation, corporations had experimented with the adoption of forum-selection bylaws. *See* Joseph Grundfest, *The History and Evolution of Intra-Corporate Forum-selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. LAW (2012). In *Boilermakers*, the Delaware Supreme Court upheld the facial validity of such bylaws, and this holding was ratified by the 2015 legislation. Boilermakers, 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 BROOKLYN L. REV. 1237 (2016) (explaining and analyzing the scope of the Delaware legislation).

cases out of Delaware. This then provided the foundation for *Trulia* and its progeny.[14]

In this article, 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 multi-jurisdictional 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.[15] 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.[16]

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 to compensate plaintiffs' counsel through a "mootness fee."

---

[14] *See* Larry Hamermesh, *How Long Do We Have to Play the 'Great Game'?*, 100 IOWA L. REV. 31 (2015) (arguing that forum-selection clauses are likely to substantially diminish multi-forum merger litigation).
[15] Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 165 (2015).
[16] 17 C.F.R. § 240.14a-9 (2014).

We test the incidence of these responses in the first wave of merger cases following the *Trulia* decision. Our empirical analysis in this Article examines a dataset of merger litigation for deals over $100 million completed from 2003 through November, 2016. We find that overall levels of merger litigation have declined in the past year, suggesting that Delaware's effort to reduce frivolous litigation has been at least partially successful. In 2014, 91% of all completed deals were challenged in at least one lawsuit. That number declined to 89% in 2015 and 73% in 2016.

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 32% were challenged in Delaware, while 65% were challenged in other states and 37% in federal court.[17] The latter number, which represents a significant increase in federal court filings, seems to be an attempt to avoid the impact of forum-selection bylaws.

We also observe differences in case outcomes. In 2016 47% of deal litigation settled compared to 63% in 2014. Within Delaware, only 11% of cases settled in 2015, 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 and settlement rejections; in particular, the rate at which settlements are rejected goes from near zero to above 20%. Finally, we find a rising use of dismissal combined with the mootness fee. In 2016, 18% of cases were resolved in this manner – an all-time high. We note, however that the bulk of these fee payments relate to suits brought pre-*Trulia* and may therefore represent a temporary phenomenon.[18]

[17] The percentages do not sum to 100% because of multiple cases in multiple forums.

[18] In the past year, the Chancery Court has approved such fees albeit at a reduced rate. *See In re* Xoom Corporation Stockholder Litig.,, C.A. 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 (Del. Ch. Jul. 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

Plaintiffs' attorneys' fees have also declined. In 2014 – the year before *Trulia* – the median attorneys' fee was $500,000. In 2016, it was $275,000.

We find little evidence of collusion. In no cases in our sample did defendants appear to ignore forum-selection clauses in order 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. Relatedly, figures for appraisal rights proceedings in Delaware – an alternative mechanism for challenging a merger -- show that dollar value claims reached an all-time high, perhaps reflecting the difficulty of bringing merger litigation.

Because of the time frame that we study, 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.[19] 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.[20]

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

---

world unless some of the supplemental information is material under the standards of Delaware law.")

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

[20] *See* Fisch, et al., *supra* note 3.

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 (false positives) and Type II error (false negatives). If Delaware makes its law more unfavorable 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.[21]

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.[22] We also argue that some Delaware corporate law stakeholders, especially Delaware lawyers, may push back against too 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 dealings with these issues.

In the remainder of the article, Part II discusses the problem of merger litigation and the recent developments, including the *Trulia* decision. Part III sets forth our empirical analysis. Part IV considers the implications of our results. Part V concludes.

---

[21] *See, e.g.*, Albert Choi, *Optimal Fee-Shifting Bylaws* (Virginia Law Sch. Law and Econ. Research Paper Working Paper Grp., Working Paper No. 2016-15, 2017), https://ssrn.com/abstract=2840947 (modelling this trade-off).)

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

II. Recent Developments in Merger Litigation

In recent years, many commentators have argued that merger litigation is fundamentally broken.[23] Virtually all deals are challenged through litigation – with the rate of such challenges in deals over $100 million hovering between 94% and 96%.[24] In addition, most large mergers are challenged in multiple lawsuits filed in different courts.[25] In 2013, the average number of such lawsuits was more than seven per merger.[26] Plaintiffs' lawyers frequently file in multiple jurisdictions and then compete with each other over control of the case and receipt of a fee award.[27]

There are several legal bases for challenging a merger.[28] 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.[29] These claims are commonly linked with a claim that the merger documents failed to make adequate disclosure.[30] 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

---

[23] *See, e.g.*, Marc Wolinsky & Ben Schireson, *Deal Litigation Run Amok: Diagnosis and Prescriptions*, REV. SEC. & COMM. REG., Jan. 8, 2014, at 1 (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").

[24] Fisch, et al., *supra* note 3, at 558-59. *See also Trulia,* 129 A.3d at 907.

[25] *Id*. at 605.3.

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

[27] *See* Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. ONLINE 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 settle a case cheaply in order to receive a few 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 (2000).

[28] 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. *See DEL.* CODE ANN. tit. 8, § 262 (2011).

[29] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[30] *See* Fisch, et al., supra note 3, at 564.

of 1934.[31] 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.[32]

Although mergers are subject to frequent challenge, the benefits from this litigation to the plaintiff class are unclear. In a small number of cases, the litigation produces a substantial monetary recovery.[33] Occasionally the litigation results in a change in the merger terms, such as a reduction in the amount of a break-up fee.[34] 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.[35] 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.[36]

The Delaware courts recognized the problems with merger litigation and, in the past several years, they began to take steps to reduce the incentives to plaintiffs' counsel for bringing litigation challenges. In 2015, several decisions expressly questioned the practice of approving

---

[31] 15 U.S.C. § 78n (a) (2006).

[32] *See, e.g.*, Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

[33] *See, e.g.*, *In re* Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025 (Del. Ch. 2015) ($275 million settlement); *In re* Rural/Metro Corp. S'holders Litig., 102 A.3d 205 (Del. Ch. 2014) (entering judgment against financial advisor for $76 million); *In re* Dole Food Co., C.A. No. 9079-VCL, 2015 Del. Ch. LEXIS 223 (Del. Ch. Aug. 27, 2015) (imposing liability of $148 million for breaches of the duty of loyalty). *See also* Joel E. Friedlander, *How Rural/Metro Exposes the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 878 (2015) (defending the role of merger litigation in securing value for shareholders but warning of the risk that meritorious cases will be settled too cheaply).

[34] 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 3, at 576.

[35] *See* Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015* 2 (Jan. 14, 2016) (unpublished manuscript) (on file with the Berkeley Center for Law, Business and the Economy), http://ssrn.com/abstract=2715890.

[36] *See, e.g.*, *In re* Walgreen Co. S'holder 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").

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.[37] These concerns culminated in Chancellor Bouchard's January 2016 decision in *In re Trulia, Inc. Stockholder Litigation*.[38] *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."[39] Consequently, the court announced an intent to exercise greater vigilance in analyzing the reasonableness of a proposed disclosure-only settlement.[40] 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."[41]

In *Trulia*, Chancellor Bouchard recognized that plaintiffs could respond to these doctrinal developments in several ways. One option, if the litigation involved plainly material disclosure deficiencies, was to seek injunctive relief prior to the closing of the merger.[42] Although the Delaware courts have been reluctant to provide injunctive relief that would interfere with the shareholders' ability to participate in an

[37] *See, e.g.*, *In re* Riverbed Tech., Inc. Stockholders Litig., 2015 Del. Ch. LEXIS 241 (Del. Ch. Sept. 17, 2015); *In re* Aruba Networks, Inc. Stockholder Litig., C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015).
[38] *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884 (Del. Ch. 2016).
[39] *Id.* at 891, 894.
[40] *Id.* at 898.
[41] *Id.*
[42] *In re* Trulia, Inc. Stockholder Litig., at 896.

economically beneficial transaction,[43] an injunction that is limited to corrective disclosure does not present that concern.[44]

Another option is to dismiss the case on mootness grounds with the defendants voluntarily agreeing to pay counsel a mootness fee.[45] The extent to which mootness fees can be justified under a lesser standard than "plainly material" is unclear.[46] In a post-*Trulia* opinion, VC 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.[47]

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.[48] As discussed above, plaintiffs frequently challenge merger litigation by filing suit in state courts outside of Delaware or in federal court.

---

[43] *See, e.g.*, *In re* Delphi Fin. Grp. S'holder Litig., 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; "[B]ecause the deal represents a large premium over market price").

[44] *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").

[45] *Trulia*, 129 A.3d at 897.

[46] One report finds that "Plaintiffs' 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,* JD SUPRA BUSINESS ADVISOR, Feb. 3, 2017, http://www.jdsupra.com/legalnews/key-developments-in-delaware-43114/ (reporting "the court only granted amounts of $50,000 and $100,000, if any at all").

[47] *In re* Xoom Corp. Stockholder Litig., 2016 Del. Ch. LEXIS 117 (Del. Ch. 2016).

[48] *See, e.g.*, John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMP. LEG. STUD. 605, 607 (2012) (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. 17 (2007) (reporting statistics indicating that had become "twice likely as it was previous that the litigation will be brought and litigated outside of Delaware").").

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 law, such as *Corwin*, should govern those claims. [49] On the other hand, the non-adversarial 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.[50]

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.[51] In *Gordon v. Verizon Communications, Inc.*,[52] 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

---

[49] *See, e.g.*, *In re* Crown Castle Int'l Corp., 247 S.W.3d 349, 352-523 (Tex. App. 2008) (holding that Delaware substantive corporate law applied to corporation incorporated in Delaware including pleading requirements that Delaware courts had characterized as substantive). *See also* Quinn v. Knight, 2016 U.S. Dist. LEXIS 151346 (2016) (citing to Corwin in the context of a Virginia corporation)

[50] *See also* Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. ONLINE 467, 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.").

[51] Gordon v. Verizon Communications, Inc., No. 653084/13, 2017 WL 442871 (App. Div. 1st Dep't 2017) (approving a $2 million disclosure settlement and promulgating a multi-factor 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 Shareholder Litigation, No. 652188/2011 (N.Y. Sup. Ct. Oct. 23, 2015); City Trading Fund v. Nye, 9 N.Y.S.3d WL 93894, at *19 (N.Y. Sup. Ct. 2015).

[52] Gordon v. Verizon Communications, No. 653084/13, 2017 WL 442871 (App. Div. 1st Dep't 2017).

to award the requested fee, the appellate court reversed.[53] 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".[54] 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 trial."[55] The court also considered the time and labor involved in the action, and awarded the full $2 million fee to the attorneys.

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.[56] Whether other courts will follow these decisions is unclear. Indeed, even prior to *Trulia*, Texas had adopted another method of discouraging disclosure-only settlements.[57]

In federal court, Judge Posner has explicitly endorsed the *Trulia* standard for the Seventh Circuit Court of Appeals.[58] 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.[59] In addition, the federal securities laws contain a

---

[53] *Id.* at 1.
[54] *Id.*
[55] *Id.*
[56] 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.
[57] 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 3, 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 (Tex. App. 2013).
[58] *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 725 (7th Cir. 2016).
[59] Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

number of safeguards to permit early dismissal of non-meritorious claims.[60]

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.[61] Forum-selection provisions enable a corporation to designate the jurisdiction in which shareholder suits must be filed; for Delaware corporations, that jurisdiction is typically Delaware.[62] Vice-Chancellor Laster first suggested approval of forum-selection charter provisions in 2010.[63] For some years, the validity of such provisions was questionable.[64] In 2013, however, then-Chancellor Strine upheld their validity in *Boilermakers Local 154 Retirement Fund v. Chevron Corp*.[65] The Delaware legislature subsequently ratified his decision and explicitly authorized Delaware corporations to adopt both forum-selection charter and bylaw provisions.[66]

As of August 2014, 746 U.S. public companies had adopted forum-selection provisions.[67] 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

---

[60] *See* Fisch, et al., *supra* note 3, at 613.

[61] 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) (2015).

[62] The 2015 legislation requires that forum selection provisions for Delaware corporations designate a Delaware forum, but that designation need not be exclusive. DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (2015).

[63] *In re* Revlon Inc. S'holders Litig., 990 A.2d 940, 960 (2010).)

[64] Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, (Eur. Corp. Governance Inst. Working Paper Grp., Paper No. 295, 2015) (manuscript at 3), http://ssrn.com/abstract=2624951.

[65] 73 A.3d 934 (Del. Ch. 2013).

[66] DEL CODE ANN. tit. 8, §§ 102(f), 109(b) (2015).

[67] Romano & Sanga, *supra* note 75, at 3.

application.[68] 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.

Over the past several years, the Delaware courts have also cut back on the reach of fiduciary duty law.[69] 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*.[70] 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 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." The effect of *Corwin* was to provide a streamlined basis for a court facing a claim

[68] *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 (observing that "at least some companies are [waiving the application of a forum-selection bylaw] to obtain the certainty associated with settlement").

[69] In *MFW*, the Delaware Supreme Court 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). Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014). 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.". *Id.* at 644. In *Leal v. Meeks* (*In re* Cornerstone Therapeutics, Inc.), 2015 Del. LEXIS 231 (Del., May 14, 2015), the Court held that a plaintiff must plead non-exculpated claims against a defendant director to survive a motion to dismiss, regardless of the underlying standard of review. The Court held that a board could satisfy its *Revlon* duties without conducting a market check in *C&J Energy Servs. v. City of Miami Gen. Employees' & Sanitation Employees' Ret. Trust*, 107 A.3d 1049 (Del. 2014).

[70] Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305-6 (Del. 2015).

for damages in a third-party merger to dismiss the case on the pleadings.[71]

These substantive cutbacks may also help explain a related development, the rapid increase in Delaware appraisal litigation.[72] Although class actions alleging a breach of fiduciary duty have traditionally been the dominant litigation strategy,[73] both the frequency and size of appraisal claims has grown dramatically in the last several years.[74] 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.[75] 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.[76]

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

---

[71] Subsequent decisions reaffirmed Corwin and applied it to mergers accomplished by means of a tender offer. *See In re* Zale Corp. Stockholders Litig., 2015 Del. Ch. LEXIS 274, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015); Singh v. Attenborough, 137 A.3d 151; *In re* Volcano Corp. Stockholder Litig., 143 A.3d 727

[72] *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).

[73] *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").

[74] Korsmo & Myers, *supra* note 37, at 1572-74.

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

[76] Boyd, *supra* note 38, at 522. *But see* Jiang, et al., *supra* note 40, at 698 (documenting growth in use of appraisal but defending its importance as a corporate governance remedy).

to the statutory interest rate by tendering some or all the merger consideration to plaintiffs before the resolution of the case.[77]

However, despite the legislative cutbacks on the scope of the appraisal remedy, the *Corwin* decision may have led plaintiffs to shift their approach to deal litigation. We find, in 2016, a sharp movement away from class action fiduciary duty cases toward filing appraisal cases. In 2015, for instance, 33 deals were targeted with 51 appraisal petitions. By comparison, in 2016, 48 deals were challenged by 77 appraisal petitions. Both 2015 and 2016 were record years with respect to both the number of deals challenged and number of petitions filed. This has led some commentators to criticize the appraisal amendments as insufficient[78] because they have not stopped the substantial volume of appraisal cases in Delaware.[79]

In the next section, we examine 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."[80] Although it is too early to evaluate the long-term effects, we present in the next part some preliminary statistics.

III. Empirical Analysis

A. Data Set

Our sample contains all the transactions listed in the FactSet

---

[77] Boyd, *supra* note 38, at 508.
[78] Stanley Onyeador, *The Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 70 VAND. L. REV. 339 (2017); *But see* Jiang, *supra* note 40, at 700 (arguing that statutory changes should mitigate appraisal litigation problems).
[79] Michael Greene, *M&A Deal Price Challenges Spiking in Delaware*, BLOOMBERG BNA BIG LAW BUSINESS, Jan. 1218, 2017.
[80] Lynch & Micheletti, *supra* note 57.

MergerMetrics[81] database and announced from 2003 through 2016 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 $5 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 December 1, 2016. This constitutes 1,971 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 1,246 transactions or 63% 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 Lexis/Nexis File and Serve Database, or Bloomberg Law and are also reviewed by hand.[82]

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 2003-2016.[83] The sample includes all mergers with an aggregate value exceeding $100 million wherever the target corporation is incorporated.

---

[81] More information about the database can be found at *FactSet Mergers*, FACTSET RESEARCH SYSTEMS INC. (2014), https://www.mergermetrics.com, [http://perma.cc/7U34-82CR]..

[82] The data collection here is taken in part from a database compiled for a prior study by two of the co-authors. *See* Cain & Davidoff, *supra* note 15, at 487 (stating that the court filings are obtained directly from the court, from public filings on the Lexis/Nexis File and Serve Database or Bloomberg Law and are also reviewed by hand).

[83] 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.

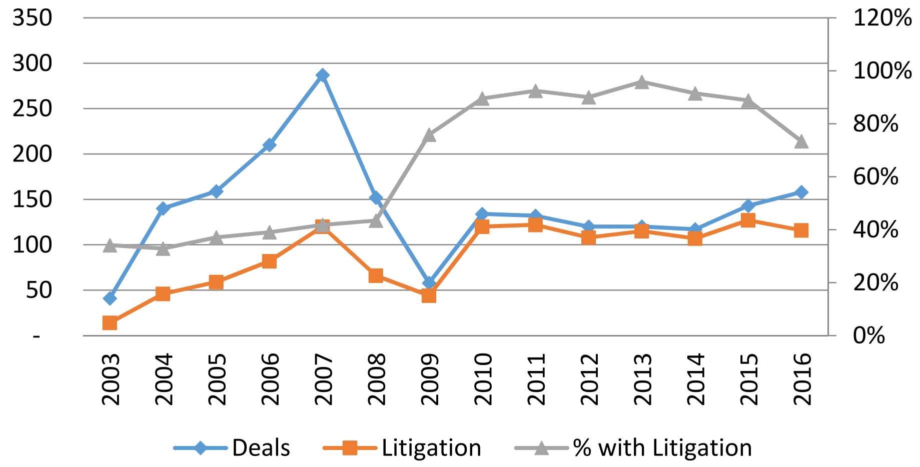
Litigation Rates by Deal Completion Year
350
300
250
200
150
100
50
-
120%
100%
80%
60%
40%
20%
0%
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
Deals
Litigation
% with Litigation

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 143 and 158, respectively, a slight rise from 2010-2014 during which time the number of completed deals ranged from 117 to 134 deals. Litigation rates have fluctuated substantially over our sample period. From 2003-2008, litigation challenges ranged from 34% of completed deals (2003) to 43% of completed deals (2008). There was a sharp rise in litigation in 2009 to 76% of completed deals. This rise continued to 2010 when 90% of completed deals attracted litigation.

Litigation then peaked in 2013 at an astounding 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 number of litigation deals fell to 73% of all completed deals, below the 2009 rate.

The rise in overall litigation rates was accompanied by a sharp rise in multi-jurisdictional 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

	% Delaware*	% Other States*	% Federal*	% Filed in Multiple Jurisdictions
2003	7%	100%	7%	7%
2004	43%	78%	0%	33%
2005	39%	66%	7%	14%
2006	21%	82%	12%	17%

2007	28%	86%	13%	35%
2008	23%	92%	21%	31%
2009	34%	98%	20%	50%
2010	49%	88%	26%	53%
2011	51%	88%	40%	64%
2012	56%	88%	34%	69%
2013	52%	83%	32%	61%
2014	55%	73%	15%	41%
2015	61%	51%	20%	32%
2016	32%	65%	37%	37%
Total	43%	79%	23%	43%

* Note: Percentages sum to > 100% each year due to multi-jurisdictional filings.

The percentages in the first three columns of each row do not sum to 100% because of multiple filings. However, these numbers show that the number of filings in Delaware has fluctuated substantially. Most notably, filings in Delaware fell by half in 2016. 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 2006-2008 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."[84] As litigation rates increased starting in 2009, cases migrated back to Delaware, however. Delaware filings peaked in 2015; when 61% of completed deals had a Delaware filing, compared with a rate of other state filings of 51%.[85]

The 2016 filing numbers show the immediate impact of *Trulia* and its cohort. In addition to the fact that 2016 filings in Delaware are

[84] *See* John Armour, Bernard Black & Brian R. Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMP. LEG. STUD. 605 (2012) (finding that in a period from 1994-2010 Delaware courts were losing market share in lawsuits).

[85] 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 headquartered targets is 65% of the sample and so the 2015 rate is near the maximum litigation rate for Delaware.

half the 2015 number, other state filings have increased from 51% to 65%. The most significant increase in 2016 filings is in federal court which increased from 20% of filings to 37% of filings – the second highest rate of federal filings in our sample period.

In Table II we further explore the effects of the *Trulia* decision and its cohort by examining litigation settlements over our sample period.

Table 2: Litigation outcomes by deal completion year

	N	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%	2%	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	110	82%	18%	0%	0%	79%
2011	110	80%	20%	0%	0%	69%
2012	102	77%	23%	1%	1%	85%
2013	109	77%	23%	1%	0%	76%
2014	104	63%	38%	8%	3%	73%
2015	118	46%	54%	20%	15%	85%
2016	91	47%	53%	22%	18%	100%

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

** 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 which have affected the ability to settle cases for a disclosure-only outcome are clear. In 2016, 22% of settlements were rejected or otherwise withdrawn by counsel. This compares to a largely 0% rate in years before 2014. In the case of withdrawn cases, these are cases in which settlements were reached pre-Trulia and the entire case was subsequently dismissed, presumably

because plaintiffs' lawyers did not think the settlement would be approved. In some of these cases there was a dismissal and a payment of a mootness fee by the defendants. We include both these types of cases in our rejection numbers because we view this outcome as an effective rejection of the settlement. Our decision to include effective rejections explains the 2014 number of 8% which encompasses settlements that were pending at the time of Trulia but subsequently withdrawn.

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 and comprised 18% of cases. The payment of mootness fees for cases from 2014 and 2015 can be largely explained as payment made to plaintiffs' lawyers abandoning already existing settlements that were negotiated prior to *Trulia*. However, in 2016 there were still significant numbers of mootness fee payments and accompanying case dismissals. Because *Trulia* highlighted the availability of privately-negotiated mootness settlements between plaintiffs and defendants as an alternative route for disclosure-only cases, these numbers may reflect the parties' use of this adaptive litigation strategy.[86]

A final development reflected in Table 2 is the decline of the amendment settlement, a settlement which changes the terms of the agreement.[87] In 2016 there were no amendment settlements compared to 11% 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 and 2016 until future years although this seems unlikely as the deals at issue have already been completed. 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

---

[86] See also Richard L. Renck, *Court of Chancery Critically Reviewing "Mootness" Fee Applications*, LEXOLOGY, Aug. 20, 2016 (describing recent decisions evaluating mootness fee applications).

[87] *See* Fisch, et al., *supra* note 3, at 576 (describing amendment settlements).

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.[88]

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

Table 3: Median attorneys' fees by deal completion year and litigation outcome (in $thousands)

	# of Non-Zero Fees	**All Non-Zero Fees**	**Non-Disclosure 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	$1,400	$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	55	$370	$825	$400	$200
2016	16	$275	N/A	$320	$238

* Note: $4mm mootness fee in 2012 for Ancestry.com.

** Note: Disclosure-only fees in 2003 are higher than non-disclosure settlement fees.

Table 3 in the first two columns reports median attorneys' fees for all settlements by year of deal completion. Again, because of a lag

[88] See id. at 610 (discussing this possibility).

in consideration settlements figures are lower for immediate years. However, median attorneys' fees in disclosure-only settlements decline from a high of $575 thousand in 2009, to $320 thousand in 2016. 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.[89] But from 2015 and 2016 median mootness fees were $200 thousand and $238 thousand, respectively. These numbers are significantly 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

	% Cases Going to DE	Attorneys' Fees ($k)		Median Attorneys' Fees ($k) for Disclosure-only
		Mean	**Median**	
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

[89] *In re* Ancestry.com S'holder Litig., C.A. No. 7988-CS (Del. Ch. 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.

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	40%	$1,337	$350	$315
2016	5%	N/A	N/A	N/A

Trulia's consequences are reflected in the first column which records those cases which 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 5% in 2016 from 55% in 2014 and 40% in 2015. This drop documents that plaintiffs' attorneys are avoiding Delaware for their settlements and dispositive litigation. In this table, we also denote changes in aggregate attorneys' fees over the years. The findings in Table 4 are consistent with a prior paper by Cain & Davidoff which finds that overall, Delaware awards higher attorneys' fees and dismisses more cases than other states, perhaps to compensate for this dismissal rate.[90] This is reflected in this table as median fees for disclosure-only cases range from $315,000 to $440,000 from 2012 to 2015.

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

Table 5: % of cases going to federal courts by deal completion year

	# of Federal Settlements	% of All Settled Cases in Federal Courts	Non-Disclosure Settlements
2003	0	0%	N/A
2004	0	0%	N/A
2005	2	6%	50%
2006	3	6%	0%
2007	0	0%	N/A
2008	0	0%	N/A
2009	0	0%	N/A
2010	3	3%	33%
2011	1	1%	100%
2012	6	8%	33%

[90] Cain & Davidoff, *supra* note 15, at 469.

2013	6	8%	17%
2014	5	8%	20%
2015	10	18%	0%
2016	14	31%	0%
Total	50	7%	14%

Table 5 shows a substantial uptick in federal lawsuits and settled cases in federal courts. Cases settled in federal court represented 0% of cases resolved in 2009. In contrast, in 2016, 31% of all settlements were in federal court. Table 5 also documents that the primary driver of the federal court shift is due to a rise in disclosure-only settlements. None of the federal court cases settled in 2015 and 2016 were non-disclosure settlements, meaning that all 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.[91]

The question is whether federal courts will be more receptive to disclosure claims and disclosure-only settlements than the Delaware state courts. Currently, we are aware of only one federal court addressing this issue to date, the Seventh Circuit, and that decision adopted the reasoning of the *Trulia* decision.[92] If other federal courts follow *Walgreens*, we would expect to see the rate of federal court filings to decline in the future.

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

[91] Fisch, et al., *supra* note 3, at 596-98.
[92] *See supra* notes 69-60.

explore this possibility, we examine 2016 announced deals with litigation. The issuers in 59.32% of these cases (n=35) have a forum-selection clause which selects Delaware as the exclusive forum for state litigation. The issuers in 11.9% (n=7) have a forum-selection clause which names a jurisdiction other than Delaware. Of these cases, in four the case was 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 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. Nonetheless, these cases 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 merger cases.

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

Table 6: Mean number of suits filed (2015-2016)

Mean # Suits, for Filings in:	DE Only	DE+Fed	DE+Fed +Other State	DE+ Other State	Fed	Other State	Over
2015	3.7	4.5	9.8	6.0	3.0	3.0	4.5
[N]	*47*	*6*	*4*	*17*	*1*	*7*	*84*
2016	2.3	5.5	6.0	4.3	2.1	2.4	2.9
[N]	*23*	*4*	*2*	*7*	*11*	*17*	*74*

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 4.5 in 2015 to 2.9 in 2016. Delaware-only suits dropped from an average of 3.7 suits to 2.3 suits per completed deal. Meanwhile, in multijurisdictional litigation involving Delaware and federal court the number rises from 4.5 to 5.5 suits. This rise further reflects the shift to federal court evidenced in other tables and is likely attributable to plaintiffs' lawyers' beliefs 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 rise in 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* has brought a tidal wave of change to the merger litigation industry.

IV. 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.[93] 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.[94] If one avenue for vindicating investor rights shuts down, entrepreneurial agents in the plaintiffs' bar will seek others, while defendants' attorneys will in turn react to those changes in their own way.[95]

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' fees awards in these cases, plaintiffs' counsel 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.

The changes in Delaware have had some spillover effects as well. One practical response to multi-forum 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 have been filed elsewhere otherwise 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.

---

[93] Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and its Application to Multijurisdictional Litigation*, 106 NORTHWESTERN L. REV. 1753, 1755 (2012).

[94] *See* Hillary Sale & Robert B. Thompson, *Market intermediation, publicness, and securities class actions*, 93 WASH. U. L. REV. 487 (2015).

[95] *See* Cain & Davidoff, *supra* note 15, at 487-96 (empirically documenting the actions and reactions of plaintiffs' attorneys to shifting legal standards).

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.[96] 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 in other states' courts. In federal 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. Furthermore, cases that might once have settled as disclosure-only settlements are now being litigated as mootness cases, and the frequency of the payment of mootness settlement fees has risen dramatically. Moreover, a small number of those mootness settlements have been in cases filed outside of Delaware, which may indicate potential collusion amongst plaintiffs' and defendants' counsel in achieving cheap settlements.

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.

---

[96] *See supra* notes 67-7057 60and accompanying text.

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 in 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.[97] Nonetheless, it is far too soon to reject this possibility.

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.[98] 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 big 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.[99]

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

[98] Thomas & Thompson, *supra* note 92, at 1756.

[99] 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 40. 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. Thomas & Thompson, *supra* note 92 at 698. Seven Wall

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 pre-judgment interest accruals. In both instances, the winning argument for reforms was to cut back on strike suits using the appraisal statute.[100]

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 have determined that the merger price is fair value for purposes of the appraisal proceeding.[101] This has led some commentators to suggest that the courts in appraisal proceedings adopt a presumption that, in a well-shopped deal, the merger price represents the fair value of the target company's stock.[102] This presumption,

---

Street law firms then petitioned the Delaware legislature to amend the appraisal statute to eliminate smaller cases and to reduce the pre-judgment interest rate awarded, among other things. Ultimately, the Delaware legislature did make some, but not all, of the changes requested. *Id.*

[100] *Council of the Corp. Law Section of the Del. State Bar Ass'n, Section 262 Appraisal Amendments*, LOWENSTEIN (Mar. 6, 2015), https://www.lowenstein.com/files/upload/DGCL%20262 %20Proposal%203-6-15%20Explanatory%20Paper.pdf [https://perma.cc/RYE6-2PGQ].]

[101] *See, e.g*., Huff Fund Inc. Inv. P'ship v. Ckx, Inc., 2013 Del. Ch. LEXIS 262, *49 (Del. Ch. 2013), aff'd, 2015 Del. LEXIS 77 (Del., Feb. 12, 2015) (finding "the sales price to be the most relevant exemplar of valuation available");
Merion Capital L.P. v. Lender Processing Servs., 2016 Del. Ch. LEXIS 189, *89 (Del. Ch. 2016) (giving "100% weight to the transaction price" where "The Company ran a sale process that generated reliable evidence of fair value.").

[102] DFC Global Corp. v. Muirfield Value Partners LP, No. 518, 2016 Del. Ch. LEXIS at *103, (Del. 2016). *See, e.g*., Guhan Subramanian, *Using the Deal Price for Determining "Fair Value" in Appraisal Proceedings*, 23 *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (U. Chi. Press) (forthcoming 2017), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2911880 (arguing that "in a

coupled with the 2016 legislation would have the effect of dramatically reducing the potential upside from bringing an appraisal claim.

Using merger price as fair value rather than conducting a full valuation analysis has been controversial. Whether this approach is appropriate is currently before the Delaware Supreme Court in a case titled *DFC Global Corporation v. Muirfield Value Partners LP.*[103] Defense counsel have been pushing for this change. If the Supreme Court accepts this view, it seems likely that far fewer appraisal cases will be filed.

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 vs 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 (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

---

true arms-length deal with meaningful price discovery, there should be a strong presumption that the deal price represents fair value in an appraisal proceeding").

[103] See *id.* at 25 (describing issues on appeal to Supreme Court).

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 that you get rid of good cases that might have been brought under the old rules.[104]

Corporate law commentators have referred to this as the tradeoff between Type I error (false positives) and Type II error (false negatives).[105] 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.[106] 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 increased Type II error by blocking non-nuisance suits.[107] One empirical study has confirmed that this tradeoff occurred after the implementation of the PSLRA.[108]

These tradeoffs 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 be 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 case will we lose and what will be the impact of their disappearance? In 2015 alone, one commentator identifies six major settlements in breach of fiduciary duty litigation in the range of $70 to $275 million dollars in the Delaware Chancery Court.[109]

---

[104] *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.

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

[106] *Id.*; Choi, *supra* note 103.

[107] *Stout,* supra note 105, at 603.

[108] *Id.*

[109] *See* Joel E. Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 3–5 (Univ. of Penn. Institute for Law and Economics, Working Paper No. 17-1, 2017), https://ssrn.com/abstract.

Collectively, these cases resulted in one year of over $900 million in recoveries for the shareholders in these companies.[110] 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[111] and give judges a pulpit from which they preach to corporate directors about the perils of wrongdoing.[112]

These tradeoffs highlight the need to carefully assess the costs and benefits of the litigation reform efforts in Delaware 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 will 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 more needs to be done to stop frivolous litigation.[113] 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

---

[110] 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 law suits challenging Southern Peru Copper Corporation's acquisition of an affiliate. *See* Americas Mining Corp. v. Theriault, C.A. No. 30, 2012 (Del. Aug 27, 2012).
[111] *See* Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards* (Eur. Corp. Governance Inst. Working Paper Grp., Paper No. 329, 2016), https://ssrn.com/abstract=2830257.
[112] Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997).
[113] William B. Chandler III & Anthony A. Rickey, *The Trouble with Trulia: Re-evaluating the Case for Fee-Shifting Bylaws as a Solution to the Over Litigation of Corporate Claims* (2017) (unpublished manuscript) (on file with authors).

eradicate the problem of socially detrimental litigation, Delaware should reconsider its prohibition on fee-shifting bylaws."[114]

In essence what these commentators are calling for is an extreme tradeoff 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.[115]

C. Delaware's (Re-)Balancing Act

These changes in deal litigation and more broadly in shareholders' rights 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 race to the top centers on whether corporate codes benefit shareholders.[116] Many corporate law academics have contributed to this debate over the competition between the states

---

[114] Chandler & Rickey, *supra* note 112, at 1-2. *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 AND RANDALL S. THOMAS, EDS., (forthcoming 2017), https://ssrn.com/abstract=2855950.

[115] 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, 1184-1185 (Del. 1982).

[116] *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).

for corporate charters and more generally the revenue streams that come to a state and the various agents that service its corporations, especially its corporate lawyers. 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.

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 other jurisdictions as safer havens. States that had lost out to Delaware in earlier times, now became preferred venues for shareholders.[117]

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.[118] 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.[119]

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,[120] 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

---

[117] Such an event has been theoretically predicted by a number of papers on this subject. *See, e.g.,* Cain & Davidoff, *supra* note 15, at 499-500; Black, et al., *supra* note 22, at 40.

[118] CNV Krishnan, et al., *Who Are The Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, 18 AMER. L. & ECON. REV. 88 (2016).

[119] Gordon v. Verizon Communications, Inc., No. 653084/13, 2017 WL 442871 (1st Dep't 2017).

[120] Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest Group Theory of Corporate Law*, 65 TEXAS L. REV. 469 (1987).

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

Another possibility is that as more deal litigation shifts into federal court, we may see the SEC and federal bench becoming more active as disclosure monitors. Delaware's competition with Washington for control of corporate law could enter a new phase if this occurs.[121] Given the current political environment, this shift is unlikely to occur in the short term, but Delaware will need to keep one eye on the federal government to make sure developments in federal disclosure litigation do not impede its policies with respect to substantive merger law.

We do not suggest in this Article 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.

V. Conclusion

We examine the shifts in merger litigation following substantial developments in Delaware law regarding merger litigation, including

---

[121] For an in-depth exploration of the vertical competition between Delaware and Washington, see Mark J. Roe, Delaware's Competition, 117 HARV. L. REV. 588 (2003).

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. 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. At that time, Delaware can determine whether its litigation system provides an appropriate balance between protecting shareholder value and limiting litigation abuse.

european corporate governance institute

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

www.ecgi.org

european corporate governance institute

ECGI Working Paper Series in Law

Editorial Board

Editor	Luca Enriques, Allen & Overy Professor of Corporate Law, Faculty of Law, University of Oxford
Consulting Editors	John Coates, John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School
	Paul Davies, Senior Research Fellow, Centre for Commercial Law, Harris Manchester College, University of Oxford
	Horst Eidenmüller, Freshfields Professor of Commercial Law, University of Oxford
	Amir Licht, Professor of Law, Radzyner Law School, Interdisciplinary Center Herzliya
	Roberta Romano, Sterling Professor of Law and Director, Yale Law School Center for the Study of Corporate Law, Yale Law School
Editorial Assistants	Tamas Barko , University of Mannheim Julia Keith, University of Mannheim

www.ecgi.org\wp

european corporate governance institute

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (www.ecgi.org/wp) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html