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Introduction

Economist Joseph Schumpeter famously argued that change occurs through a process of creative destruction.[1] Competitors innovate new ways of doing things, which ushers in a new world to which competitors must adapt, sparking further rounds of innovation and adaptation. The law is no less subject to these processes than business, as recent developments in shareholder litigation show.

State corporate law governs the relationship between shareholders and boards of directors and confers upon shareholders the right to sue directors for breaches of fiduciary duty.[2] Most powerful among these,

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1. Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 82–83 (2d ed. 1947).

2. Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp.

at least historically, is the fiduciary duty cause of action available to shareholders when the company they own is merged with or acquired by another company.[3] In merger litigation, shareholders can sue the board of directors for following a flawed sale process[4] or for failing to disclose adequate information prior to the shareholder vote on the transaction.[5] For many years, approximately one-third to one-half of all merger deals valued over $100 million attracted such claims. Then suddenly, in 2009, the proportion of transactions attracting merger

L. 673, 675–76 (2005) ("The central idea of Delaware's approach to corporate law is the social utility of an active, engaged central management. That idea is expressed by our statute, which states the fundamental principle that the 'business and affairs of the corporation are managed by or under the direction of a board of directors.'" (quoting Del. Code Ann. tit. 8, § 141(a) (2018))).

3. *Id.* at 676. Shareholders can sue their directors for a breach of the duty of either care or loyalty. Application of the business judgment rule, however, assures that they will typically lose these cases. *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 Vand. L. Rev. 83, 88–89 (2004) ("The [business judgment rule creates] . . . a presumption that the directors or officers 'of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.'" (quoting Aronson v. Lewis, 473 A.2d 805, 812) (Del. 1984)). Mergers and acquisitions cases, however, often receive a heightened level of judicial scrutiny. *See* J. Travis Laster, Revlon *Is a Standard of Review: Why It's True and What It Means*, 19 Fordham J. Corp. & Fin. L. 5, 6 (2013) (discussing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) and how it changed the extent of judicial deference given to the board's decisions regarding mergers and acquisitions). For brevity, I will refer to merger and acquisition claims collectively as "merger litigation."

4. *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). Mergers involving a controlling shareholder may be reviewed under the exacting "entire fairness" standard. *Id.* at 710–11 (requiring fair dealing and fair price in non-arm's length transactions). However, a board's adoption of procedural protections, such as special committees and majority of the minority vote requirements, may be deployed in such transactions to shift the standard to the deferential business judgment rule. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014). Meanwhile, third-party mergers may be reviewed under the standard of "enhanced scrutiny." Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173, 185 (Del. 1986). However, in a claim for damages, an "uncoerced, informed stockholder vote" will shift the standard to the business judgment rule. Corwin v. KKR Fin. Holdings, 125 A.3d 304, 308–09 (Del. 2015). Furthermore, a claim for injunctive relief will likely not succeed in the absence of an intervening bidder. C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' and Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1066–67 (Del. 2014).

5. *See, e.g.*, Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992) ("[D]irectors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action.").

litigation jumped from about half to approximately 85 percent.[6] The higher number became the new normal. In each year from 2009 until 2016, somewhere between 85 and 95 percent of all deals attracted litigation.[7]

What happened in 2009 that generated this spike in merger litigation? A respected practitioner once explained it to me as a function of a policy change at public relations firms. According to him, in 2009 the two top public relations firms began accepting press releases from law firms announcing "investigations" of board conduct in connection with corporate transactions. Once a deal was announced, plaintiffs' firms could immediately announce an investigation of the board. Inevitably these announcements linked to the plaintiffs' website and suggested that anyone holding stock in the target company contact the law firm for further information on the investigation. Packaged as press releases, these announcements were then picked up by websites, such as Yahoo Finance. As a result, shareholders looking up news of a merger announcement or simply tracking their investments would find, on the same web page, the announcement of an investigation into board misconduct in connection with the transaction. The announcements were, of course, a veiled form of attorney advertising for those lawyers specializing in disclosure-based claims (the "disclosure bar").[8] Anyone

6. Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 Iowa L. Rev. 465, 475 (2015).

7. *See* Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015*, at 2 (Berkeley Ctr. for L., Bus. & Econ., Working Paper, 2017), http://ssrn.com/abstract=2715890 [https://perma.cc/S662-S3BH] (providing empirical evidence of litigation activity and outcomes).

8. On the division of the plaintiffs' bar into two on the basis of those who bring disclosure-based claims and those who do not, see Joel Edan Friedlander, *How* Rural/Metro *Exposed the Systemic Problem of Disclosure Settlements*, 40 Del. J. Corp. L. 877, 904–05 (2016). In Friedlander's words:

> The widespread availability of disclosure settlements led to the creation of a two-tier stockholder-plaintiff bar with very different approaches to litigating the same type of case. One tier of firms has adopted a business model of entering into disclosure settlements and thereby collecting risk-free fee awards near the outset of a case. These firms released *Revlon* claims after a purported investigation of their viability, even though they had no demonstrated track record of pursuing *Revlon* claims for significant monetary relief. Another tier of firms did not present disclosure settlements to the Court of Chancery, and instead litigated preliminary injunction motions and sought damages on *Revlon* claims. In an unknown number of cases, firms in the disclosure settlement bar released valuable *Revlon* claims.

Id. at 882; *see also* Sean J. Griffith & Anthony Rickey, *Who Collects the Deal Tax, Where, and What Delaware Can Do About It*, *in* Research who contacted the law firm was a potential plaintiff who might be willing to let the firm file a suit in their name against the target company. Thus, announcing the "investigation" as a press release became the key to finding a plaintiff. The policy change at the public relations firms enabled the disclosure bar to find a shareholder in, and thus to file a claim against, every deal.

That story may be apocryphal. But at its core is a truth about innovation. It begins with an outside shock that leads to adaptation and, in the view of many, destruction.[9] Delaware responded to the development with a 2016 decision of the Court of Chancery, *In re Trulia*,[10] which made disclosure-based merger claims harder to settle.[11]

Handbook On Representative Shareholder Litigation 140 (Sean Griffith et al. ed., 2018) (noting that the distinction between the disclosure bar and the non-disclosure bar is sometimes porous).

9. *See* John C. Coffee, Jr., Entrepreneurial Litigation: Its Rise and Fall and Future 90 (2015) (noting that in the context of merger class actions, "incentives to sue have become excessive, and litigation is growing out of control, like algae in a petri dish"); *see also* Stephen Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 Del. J. Corp. L. 851, 852 (2016) (contending that merger litigation is a "problem [that] has reached crisis proportions"); James D. Cox & Randall S. Thomas, *Corporate Darwinism: Disciplining Managers in a World with Weak Shareholder Litigation*, 95 N.C. L. Rev. 19, 27 (2016) (noting that "litigation against publicly-held companies that undertake deals is now of epidemic proportions"); Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557, 558–59 (2015) (noting that "[d]eal litigation is pervasive in the United States" and providing statistics); Friedlander, *supra* note 8, at 883 ("The institutionalization of routine disclosure settlements parodied the procedures for adjudicating claims of breach of fiduciary duty."); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. Rev. 1, 2 (2015) ("The defects of shareholder litigation have long been known."); Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 Ohio St. L.J. 829, 841 (2014) (emphasizing indicia of litigation agency costs in merger class actions and arguing that the merits count for little in such claims); Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. Davis L. Rev. 137, 155 (2011) (discussing merger lawsuits as "cookie-cutter complaints"); David H. Webber, *Private Policing of Mergers and Acquisitions: An Empirical Assessment of Institutional Lead Plaintiffs in Transactional Class and Derivative Actions*, 38 Del. J. Corp. L. 907, 909 (2014) ("The debate over transactional class and derivative actions continues to rage both inside and outside academia.").

10. *In* re Trulia, Inc. Stockholder Litig., 129 A.3d 884 (Del. Ch. 2016). I filed an *amicus curiae* brief in the *Trulia* case. *See* Brief for Sean J. Griffith as Amicus Curiae, *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884 (Del. Ch. 2016) (No. 100020-CB), 2015 WL 6391945.

11. *Trulia*, 129 A.3d at 886–87.

But the story did not end there. It is not so easy to halt the process of creative destruction. *Trulia* only spurred the disclosure bar to further innovation.

This Article treats *Trulia* as a beginning, rather than an end. It shows that the case has spurred the disclosure bar to innovate in order to protect their fees. These innovations have taken the form of both process innovations and product innovations. The disclosure bar's first step after *Trulia* was to seek an alternative forum, bringing disclosure claims in states other than Delaware and in federal courts.[12] This is a process innovation. Soon, however, the disclosure bar began to change the nature of the claims themselves—seeking "mootness fees" instead of "disclosure settlements" and ultimately widening the scope of possible disclosure-based claims.[13] This is a product innovation, a change in the nature of the product itself. This Article examines both forms of innovation in shareholder suits post-*Trulia*. The consistent theme throughout is that so long as the holdup value of litigation exceeds the cost of bringing a lawsuit, meritless claims will persist as the disclosure bar innovates to its advantage.

From this introduction, the Article proceeds as follows: Part I introduces the crisis in shareholder litigation created by the proliferation of disclosure-based claims and the response of the Delaware Court of Chancery in *Trulia*. Part II follows the movement of disclosure-based claims to other state courts in the wake of that case. Part III discusses the transformation of disclosure settlements into disclosure-based mootness fees. Part IV describes the further migration of disclosure claims into federal court and, once there, their mutation into alternative forms of disclosure-based claims.[14] Part V analyzes why the defense bar has lagged behind the disclosure bar in innovation and suggests that the best way for defendants to solve the problem is by credibly committing not to pay the disclosure bar's fees, ultimately arguing that the proliferation of meritless, disclosure-based claims will end only when the holdup value of such claims is lower than the cost of pursuing them.

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12. Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 Vand. L. Rev. 603, 608, 615 (2018).

13. *Trulia*, 129 A.3d at 897 (distinguishing the settlement path from the mootness path).

14. I was involved in many of the cases I discuss in Parts I–IV, either as an expert, an amicus, or an objector. I received no financial compensation from any of these cases and participated only to provide courts with information that they might otherwise not receive, given the non-adversarial nature of settlement hearings. *See infra* note 21 and accompanying text. Nevertheless, I have disclosed any such involvement in the footnotes herein.

I. *TRULIA* TRIGGERS INNOVATION

The crisis in shareholder litigation that began in 2009 was evident not only in the frequency with which merger claims were brought but also in the way in which those claims were typically resolved.[15] Merger litigation was brought in almost every deal, and most merger claims settled.[16] However, the vast majority of these settlements provided no monetary recovery to the plaintiff class.[17] Instead, merger claims typically resulted in supplemental disclosures—so called, "disclosure settlements"—that became the basis of the plaintiffs' attorney's fee award.[18] Defense attorneys insisted that the release bind all shareholders as a class and that it contain a broad release of any and all related claims.[19]

Because these claims were settled on a class basis, courts had to approve the fairness of the settlement.[20] At fairness hearings, judges are

15. Dan Awrey et al., *Resolving the Crisis in U.S. Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine*, 35 YALE J. REG. 1, 12 (2018) ("[T]he core problem is that merger litigation . . . has devolved into a non-adversarial process in which attorneys on both sides . . . extract rents from corporations and their shareholders").

16. Approximately 70 percent of merger cases settle, while the rest are dismissed. CORNERSTONE RESEARCH IN COOPERATION WITH ROBERT DAINES, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 8 (2012), http://www.cornerstone.com/files/upload/Shareholder_MandA_Litigation.pdf [https://perma.cc/3932-WHGT] [hereinafter DEVELOPMENTS IN SHAREHOLDER LITIGATION] (finding that 69 percent of the 565 suits for which the authors could track the resolution resulted in settlement, while 27 percent were voluntarily dismissed by plaintiffs, and 4 percent were dismissed with prejudice); Cain & Solomon, *supra* note 6, at 477 ("[L]itigation with respect to transactions is dismissed by the court 28.4% of the time. The other 71.6% of transaction litigations result in some type of settlement.").

17. DEVELOPMENTS IN SHAREHOLDER LITIGATION, *supra* note 16, at 10 (reporting that less than 5 percent out of 190 settlements sampled resulted in payments to shareholders, while 82 percent resulted in disclosure-based settlements); Cain & Solomon, *supra* note 6, at 478 ("Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement.").

18. Griffith, *supra* note 9, at 15. Claims were brought merely to conclude settlements which were valuable solely as a basis for fees. Claims were brought merely to conclude settlements which were valuable solely as a basis for fees.

19. *Id.* at 16–18.

20. *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 968–69 (2014) ("What binds the class is not the *agreement* between the defendant and the lead plaintiffs or class counsel, but rather the court's *judgment* approving that agreement. The binding effect of a class settlement, in other words, must be understood as a function of judicial power."); William B. Rubenstein, *The Fairness*

ordinarily uninformed about the low value of the settlement disclosures, and the former adversaries work together to keep them that way so that they will approve their settlement agreement.[21] However, the Delaware Court of Chancery had seen enough such cases to worry that meaningful shareholder rights were imperiled by such practices.[22] By

Hearing: Adversarial and Regulatory Approaches, 53 UCLA L. Rev. 1435, 1444 (2006) ("If class action attorneys sell out their clients, the judge should perceive that the settlement does not live up to the value of the claims and reject it accordingly. Conversely, if class action attorneys file a frivolous case, the judge should perceive that the settlement is merely a nuisance payment, reject it for that reason, and dismiss the case.").

21. *See generally* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1082 (1984) ("The contending parties have struck a bargain and have every interest in defending the settlement and in convincing the judge that it is in accord with the law."). Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 46 (1991) (describing settlement hearings as "pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel").

22. *See, e.g.*, *In re* Rural/Metro Corp. Stockholders Litig., No. 6350-VCL, slip op. at 2, 95 (Del. Ch. Oct. 10, 2014) (settling claim for a $91.3 million payment to the stockholder class in spite of having been first presented as a disclosure settlement). Delaware judges rejected disclosure settlements sua sponte in a number of cases. *See, e.g.*, *In re* Transatlantic Holdings Inc. S'holders Litig., No. 6574-CS, slip op. at 8–11 (Del. Ch. Mar. 8, 2013) (refusing to approve settlement for lack of "any real investigation," disclosure of additional background information and in light of the overwhelming vote in favor of the transaction); *In re* Medicis Pharm. Corp. S'holders Litig., No. 7857-CS, slip op. at 24 (Del. Ch. Apr. 4, 2014) (refusing to approve settlement and noting that "giving out releases lightly . . . is something we've got to be careful about"); Rubin v. Obagi Med. Prods., Inc., No. 8433-VCL, slip op. at 8, 10 (Del. Ch. Apr. 30, 2014) (refusing to approve settlement and noting that "there are unknown unknowns in the world, and the type of global release . . . in this case and . . . [similar] disclosure settlements provides expansive protection for the defendants against a broad range of claims, virtually all of which have been completely unexplored by plaintiffs"); *In re* Theragenics Corp. Stockholders Litig., No. 8790-VCL, slip op. at 69–70 (Del. Ch. May 23, 2014) (refusing to approve settlement and noting that "when a fiduciary action settles, I have to have some confidence that the issues in the case were adequately explored, particularly when there is going to be a global, expansive, all-encompassing release given."); Acevedo v. Aeroflex Holding Corp., No. 9730–VCL, slip op. at 73, 79 (Del. Ch. July 8, 2015) (rejecting a disclosure-only settlement where plaintiffs settled for "precisely the type of nonsubstantive disclosures that routinely show up in these types of settlements"); *In re* Aruba Networks, Inc. Stockholder Litig., No. 10765-VCL, slip op. at 73 (Del. Ch. Oct. 9, 2015) (denying settlement approval and emphasizing that representation is inadequate where counsel files litigation when "there wasn't a basis to file

the end of 2015, that court had made it clear that it was considering change.[23] In January 2016, change finally came with *Trulia*.

In *Trulia*, Chancellor Bouchard reaffirmed longstanding Delaware precedent that a supplemental disclosure offered in settlement is an adequate basis for a fee award only if it provides a material benefit to the shareholder class.[24] In Delaware, as in federal law, information is material only "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[25] Lest there be any doubt that Delaware judges would no longer rubber stamp disclosure settlements, the Chancellor wrote:

> [P]ractitioners 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. In using the term "plainly material," I mean that it should not be a close call that the supplemental information is material as that term is defined under Delaware law.[26]

In applying a high standard of materiality as a condition for the approval of disclosure settlements, *Trulia* announced that such settlements would no longer be welcome in Delaware. The disclosure bar would have to take their meritless settlements somewhere else. And so they did.

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in the first place" but subsequently fails to aggressively litigate when discovery turns up valuable information).

23. *See In re* Riverbed Tech., Inc. Stockholders Litig., No. 10484-VCG, 2015 Del. Ch. LEXIS 241, at *21 (Del. Ch. Sept. 17, 2015) (approving settlement but noting that "[i]f it were not for the reasonable reliance of the parties on formerly settled practice in this Court . . . the interests of the Class might merit rejection of a settlement encompassing a release that goes far beyond the claims asserted and the results achieved").

24. *See In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898–99 (Del. Ch. Jan. 22, 2016) (citing Hoffman v. Dann, 205 A.2d 343, 345 (Del. 1964), *cert. denied*, 380 U.S. 973 (1965)); *see also* Chrysler Corp. v. Dann, 223 A.2d 384 (Del. 1966).

25. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985) (adopting standard of TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976)). Said differently, information is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it "significantly alter[s] the 'total mix' of information made available." Arnold v. Soc'y for Sav. Bancorp., 650 A.2d 1270, 1277 (Del. 1994).

26. *Trulia*, 129 A.3d at 898 (citation omitted).

II. Process Innovation: Merger Claims in Other States

Merger claims can be brought in three places: in the state of incorporation, in the headquarters state, or in federal court.[27] When a company's headquarters state is different from its state of incorporation, as is almost always the case for companies incorporated in Delaware, the complaint can be heard in up to three different courts. An early process innovation in the wake of *Trulia* was, therefore, to bring the claim and seek approval of the settlement in an alternative forum. This was an incremental innovation. A willingness to file merger claims outside of Delaware preceded *Trulia*.[28] Nevertheless, the Court of Chancery's apparent hostility to disclosure settlements led to a flood of merger litigation in other states after *Trulia*.[29]

An obvious question raised by merger claims brought in other states is whether *Trulia* applies outside of Delaware, either as controlling or persuasive authority. The answer to this question, in turn, feeds into the litigants' potential obligation to disclose *Trulia* to the court in the alternative forum. Both of these questions are analyzed below.

A. The Extraterritoriality of Trulia

Whether *Trulia* applies to settlements outside of Delaware depends first upon whether the target company is incorporated in Delaware. If so, Delaware law is controlling authority for substantive issues, but the law of the forum controls for procedural issues.[30] But is *Trulia* substantive or procedural?

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27. The substantive law of the state of incorporation will govern wherever the dispute is litigated (except insofar as federal securities claims are raised, to which substantive federal law applies). *See* Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) (noting that state law governs "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders"). The relevant federal venue would be a district court in either the state of incorporation or the headquarters state. 28 U.S.C. § 1391 (2011).

28. *See generally* John Armour et al., *Delaware's Balancing Act*, 87 Ind. L. J. 1345 (2012) (noting increase in post-*Trulia* merger claim filings outside of Delaware); John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. Empirical Legal Stud. 605 (2012) (same); Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 Vand. L. Rev. 1053 (2013) (same).

29. Cain et al., *supra* note 12, at 621 tbl.1 (2018) (finding merger filings in other states jumped in the first year after *Trulia* only to be overtaken the following year by filings in federal court).

30. Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. Ill. L. Rev. 467, 494 (2014).

When Delaware companies settle merger litigation in other states, the rules governing the approval of settlements are procedural and, therefore, subject to the law of the forum.[31] But, in the class action context at least, the applicable standard is consistent across jurisdictions.[32] The court, as a fiduciary of the class, asks whether the settlement is "fair, reasonable, and adequate."[33] Courts may consider an array of factors in this analysis, but a crucial factor in all such analyses is the value received by the plaintiff class in the settlement.[34] In the context of a disclosure settlement, that means courts must weigh the value of the disclosures.[35] That much is procedural.[36]

But what standard applies in analyzing the value of the disclosures? Delaware provides a substantive answer to this question, and that answer under *Trulia* is "plainly material."[37] Some courts have therefore followed the internal affairs doctrine in applying Delaware's "plainly material" standard to disclosure settlements in spite of an alternative standard (such as "useful" or "helpful") under the law of the forum.[38] Courts do not always see it this way, however, and in other cases have insisted upon their own substantive law in determining the value of supplemental disclosures, notwithstanding *Trulia*.[39]

Alternatively, if the company is not incorporated in Delaware (or if the standard for approving settlement is deemed to be procedural), *Trulia* may still apply as persuasive authority. In such settings, *Trulia* constitutes important persuasive authority because no jurisdiction sees

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31. *Id.*

32. *See* Rubenstein, *supra* note 20, at 1468 & n.155.

33. 4 Alba Conte & Herbert Newberg, Newberg on Class Actions § 11:41 (4th ed. 2002). Most state rules in this context—like Delaware Court of Chancery Rule 23—mirror Federal Rule of Civil Procedure 23(e). *See, e.g.*, Elizabeth Cosenza, *The Persistent Problem of Multi-Forum Shareholder Litigation: A Proposed Statutory Response to Reshuffle the Deck*, 10 Va. L. & Bus. Rev. 413, 429 (2016).

34. *See* Conte & Newberg, *supra* note 33.

35. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898 n.46 (Del. Ch. Jan. 22, 2016).

36. *Id.* at 898 & n.45.

37. *Id.* at 898.

38. *See* Order & Statement of Reasons at 6, Vergiev v. Aguero, UNN-L-2276-15 (N.J. Super. Ct. Law Div. June 6, 2016) (rejecting settlement and adopting *Trulia* into New Jersey law). I was the shareholder objector in *Vergiev*.

39. Gordon v. Verizon Commc'ns, Inc., 148 A.D.3d 146, 156 (N.Y. App. Div. 2017) (applying New York law to evaluate the settlement involving a Delaware corporation sued in New York court, refusing to apply *Trulia*, and ultimately arriving at a significantly more deferential standard than Delaware). I was an expert for the objector in *Gordon*.

as much corporate law litigation as Delaware. As a result, state courts have adopted *Trulia* into their law in spite of the fact that the underlying litigation did not involve a Delaware company.[40]

B. The Obligation to Disclose Trulia *as Precedent in Disclosure-Based Settlements*

A gating issue for all of these analyses is whether the court in the settlement forum is aware of *Trulia* at all. Like a tree falling silently in the woods, *Trulia* cannot inform the decision of a court that has not been made aware of it. And there are plenty of reasons to suppose that courts are left unaware.

Courts are unlikely to come upon knowledge of *Trulia* on their own. It would be surprising if busy state court judges whose dockets do not principally consist of corporate law cases kept close tabs on developments in the Delaware Court of Chancery. Instead, courts in other states rely on the adversarial system and, thus, the briefing of the parties before them for information concerning the relevant legal standards.

At settlement, however, there is no adversarial process. The litigants have joined hands to defend their settlement agreement and have no interest in subjecting it to serious judicial scrutiny.[41] As a result, neither side has any incentive to raise *Trulia* to the judge, either in the briefing or in the settlement hearing itself.[42]

Even if the settlement proponents have no interest in raising *Trulia*, they may have an obligation to do so. The rules of professional conduct may obligate counsel under some circumstances to disclose authority contrary to their position even if that authority is not raised by opposing counsel. For example, ABA Model Rule 3.3(a)(2) states that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . ."[43] *Trulia*, in its open hostility to disclosure settlements and in its announcement of a "plainly material" standard

40. *See, e.g.*, Bushansky v. All. Fiber Optics Prods., Inc., No. 16-CV-294245, slip op. at 7–9 (Cal. Super. Ct. Sept. 29, 2017) (adopting *Trulia* standard into California law); Griffith v. Quality Distrib., Inc., No. 2D17-3160, slip op. at 13–14 (Fla. Dist. Ct. App. July 13, 2018) (adopting *Trulia* standard into Florida law). I was the shareholder objector in *Quality*.

41. *See supra* note 21 and accompanying text.

42. *See, e.g.*, Plaintiff's Response to Objection by Lawrence B. Dvores to Plaintiff's Final Approval of Class Action Settlement, Stein v. Symetra Fin. Corp., No. 15-2-20458-1SEA at 3 n.1 (Wash. Super. Ct. May 10, 2016) (citing Delaware authority for approval of disclosure-based fees and discussing the benefits of settlement without mentioning *Trulia*).

43. Model Rules of Prof'l Conduct R. 3.3(a)(2) (Am. Bar Ass'n 2018).

for supplemental disclosures, would seem to be adverse to the position of both proponents to a disclosure settlement. And, following the logic above, if Delaware law controls with regard to the materiality determination, *Trulia* should count as "authority in the controlling jurisdiction."[44] Thus, at least when the settlement involves a Delaware-incorporated company, Model Rule 3.3(a)(2) might impose an ethical obligation to disclose *Trulia* to the court.

It is more difficult to read Model Rule 3.3(a)(2) to compel disclosure when *Trulia* is persuasive, but not controlling, authority. However, in such cases, the ethics rules may compel disclosure by another route. After *Trulia*, plaintiffs often cited pre-2016 Delaware precedent approving disclosure settlements as support for disclosure-based settlements or fees sought in other jurisdictions, while nevertheless remaining conspicuously silent on *Trulia*.[45] This is a plainly material omission. Citing Delaware precedent in favor of settlement without citing *Trulia* is akin to perpetuating fraud upon the court. Under Model Rule 3.3(a)(1), any party making a false statement to a tribunal has a duty to correct it.[46] A statement to the effect that "Delaware law supports disclosure-based settlements like this one" may thus trigger a duty to correct. The ethics rules thus prevent settlement proponents from cherry-picking older Delaware case law supporting broad releases and large fees without also informing the court of Delaware's more recent rulings, most notably *Trulia*.

In sum, the disclosure bar could not necessarily avoid *Trulia* by taking their settlements to another state. As long as their fees depend upon a class settlement, they necessarily face a fairness hearing. This puts them in the position of being compelled to disclose *Trulia* to other courts, which might decide to follow it. This left them vulnerable to shareholder objections to settlement.[47] These constraints led to further innovation. First, to avoid the risk of settlement hearings, the disclosure bar converted their disclosure settlements into mootness fee awards. Second, to avoid *Trulia*, the disclosure bar changed the legal basis of their disclosure claims from Delaware law to section 14A of the federal proxy rules. Each of these innovations is discussed below.[48]

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44. *Id.*

45. Anthony Rickey & Keola R. Whittaker, *Will* Trulia *Drive "Merger Tax" Suits out of Delaware?*, Wash. Legal Found. (Apr. 29, 2016), https://www.wlf.org/2016/04/29/publishing/will-trulia-drive-merger-tax-suits-out-of-delaware/ [https://perma.cc/MW9K-SZ9F] (compiling cases in which plaintiffs in alternative jurisdictions failed to cite recent Delaware case law viewing disclosure-based settlements with disfavor).

46. Model Rules of Prof'l Conduct R. 3.3(a)(1) (Am. Bar Ass'n 2018).

47. *See, e.g.*, Sean J. Griffith & Anthony A. Rickey, *Objections to Disclosure Settlements: A "How To" Guide*, 70 Okla. L. Rev. 281, 302 (2017).

48. *See infra* Parts III & IV.

III. Product Innovation: Mootness Settlements

As an alternative to settlement, a plaintiff with a disclosure-based claim can simply insist that the defendant make additional disclosures and, when they do, claim victory and fees on that basis.[49] In this situation, there is no fairness hearing because there is no settlement. Instead, the plaintiffs' lawyers voluntarily dismiss their claim as moot on account of the defendant's corrective disclosures, but not without asserting a right to fees based on the benefit they created by bringing the disclosures to the defendant's attention.[50] The right to fees can be fought over by the parties and, if the plaintiff is successful, awarded by the court, i.e. a "mootness award."[51] Often, however, they are simply agreed upon by the parties, i.e. a "mootness settlement."[52]

The mootness innovation enables the settlement proponents to avoid the risk of a fairness hearing. Without a class settlement, there is no release of claims, and no res judicata effect on non-party shareholders who would otherwise be members of the class.[53] Thus,

49. Griffith & Rickey, *supra* note 47, at 290.

50. Griffith & Rickey, *supra* note 47, at 284. Mootness fee cases are an offshoot of the basic corporate benefit doctrine. As explained by the Delaware Supreme Court:

> Under the "mootness" exception, a court may award attorneys' fees where the fee applicant demonstrates that: (1) the litigation was meritorious when filed, (2) the action rendering the litigation moot produced the same or a similar benefit sought by the litigation, and (3) there was a causal relationship between the litigation and the action taken producing the benefit.

Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n, 902 A.2d 1084, 1092 (Del. 2006) (accepting the further characterization of "the mootness doctrine [as] an extension of the corporate benefit exception").

51. *See, e.g.*, *In re* First Interstate Bancorp Consol. S'holder Litig., 756 A.2d 353, 357 (Del. Ch. Aug. 26, 1999) (noting that "uncertainty over the nature of the 'benefit' and its relation to the litigation may be expected to occur primarily in moot cases. Where a case has been litigated to a conclusion or settled, the nature of the 'benefit' and its causal connection to the litigation is ordinarily clear"). The mootness award was cited by the Court of Chancery as the "preferred method" for resolving disclosure-based claims because of the potential for adversarial fee litigation to enable the court to value the benefit on an informed basis. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 896–97 (Del. Ch. Jan. 22, 2016). Unfortunately, parties have tended to settle in order to avoid this additional layer of adversarial process. *See* Cain et al., *supra* note 12, at 629, 633 (finding sharply increasing rates of mootness settlements in the wake of *Trulia*).

52. *See* Cain et al., *supra* note 12, at 629, 633.

53. *See, e.g.*, *In re* Advanced Mammography Servs., Inc. S'holders Litig., No. 14831, 1996 WL 633409, at *1 (Del. Ch. Oct. 30, 1996) (denying *res judicata* effect to mootness dismissals because "to release claims that have

insofar as the principal policy concern behind the curtailment of disclosure settlements was the potential waiver of valid claims, mootness fees raise no such concerns.[54] But any hope that a move toward mootness fees would result in the reinsertion of the adversarial element through the contestation of fees has so far not been realized.[55] After a small number of fee proceedings in the wake of *Trulia*, the pattern seems to have moved towards mootness settlements rather than mootness awards.[56] At most, mootness settlements require shareholder notification, not judicial review.[57]

How much do plaintiffs' lawyers get for mootness fees? Early cases in Delaware suggested mootness cases might be worth considerably less than disclosure settlements.[58] However, studies suggest that mootness

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never been advanced, that in some instances may belong to other entities that comprise the class (derivative claims), in which there appears to be no serious discovery record in any event, and most importantly, in exchange for no consideration").

54. *See supra* note 22 and accompanying text.

55. This hope was expressed in *Trulia* itself. The court noted that:

> [In the mootness context,] where securing a release is not at issue, defendants are incentivized to oppose fee requests they view as excessive. Hence, the adversarial process would remain in place and assist the Court in its evaluation of the nature of the benefit conferred (*i.e.*, the value of the supplemental disclosures) for purposes of determining the reasonableness of the requested fee.

In re Trulia, 129 A.3d at 897 (citations omitted).

56. *See infra* note 57. Mootness fees have also often been sought in jurisdictions other than Delaware, thereby avoiding the additional procedural protections provided by Delaware law. *Id*.

57. *See, e.g.*, Swomley v. Schlecht, No. 9355-VCL, 2015 WL 1186126, at *1–2 (Del. Ch. Mar. 12, 2015) (setting forth a class notice procedure for mootness fees, after defendants mooted certain disclosure claims and successfully moved to dismiss rest of case); *In re* Zalicus, Inc. Stockholders Litig., No. 9602-CB, 2015 WL 226109, at *1–2 (Del. Ch. Jan. 16, 2015) (supporting a private mootness fee resolution procedure while requiring that adequate notice be provided to stockholders); *In re* Astex Pharm., Inc. Stockholders Litig., No. 8917-VCL, 2014 WL 4180342, at *1–2 (Del. Ch. Aug. 25, 2014) (same).

58. *See, e.g.*, *In re* Xoom Corp. S'holder Litig., No. 11263-VCG, 2016 WL 4146425, at *3, 5 (Del. Ch. Aug. 4, 2016) (finding disclosures in mootness in a mootness settlement to be merely "helpful," not "material," but nevertheless awarding $50,000 in attorneys' fees); *see also* Stipulated Order Regarding Court-Ordered Notice and Closing the Action at 1, *In re* PMFG Stockholder Litig., No. 11223-VCS (Del. Ch. May 31, 2017) (mootness settlement for $75,000 in attorneys' fees following plaintiff's notice of intent to object to disclosure settlement); Order Granting Plaintiffs' Petition for an Award of Attorneys' Fees and Expenses at 3, *In re* Baker Hughes Inc. Stockholders Litig. Consol., No. 10390-CB (Del. Ch. June 17, 2016) (mootness award of $100,000 in attorneys' fees in merger

settlements have generally risen into the low- to mid- six figures, not far from the going rate for disclosure settlements.[59] Consistent with these studies, data uncovered in response to a sua sponte request from the bench in a recent federal case shows that mootness fees agreed upon in federal district court and in Delaware Court of Chancery cases between January 2016 and September 2018 range from $87,500 to $450,000, with an average of $268,750.[60]

It is notable that plaintiffs' attorneys are achieving these fees without a release to shareholders not named in the compliant. In other words, other shareholders could bring suit for essentially the same cause of action in the underlying complaint. How likely is this? Not very. First, with respect to claims alleging deficiencies of process and price, the substantive law renders damages claims essentially unwinnable once shareholders have voted to approve the transaction.[61] Second, once the vote occurs and the transaction closes, there is no longer any potential for injunctive relief either.[62] As a practical matter, this is why litigants settle mootness claims close in time to the closing of the merger. By doing so, they prevent other shareholder plaintiffs from filing similar disclosure-based claims. Third, the best opportunity to identify deficiencies of disclosure also passes with the shareholder vote.[63] After the vote, it will no longer be possible to settle for supplemental disclosures, or other forms of non-monetary relief.[64] Instead, claimants will be forced to sue for damages claiming that materially deficient disclosures caused the approval of a transaction that should never have occurred.[65] Although such claims may exist, they will be vanishingly

case); Order Granting Plaintiffs' Application for an Award of Attorneys' Fees and Expenses at 1, *In re* Receptos, Inc. Stockholder Litig. Consol., No. 11316-CB (Del. Ch. July 27, 2016) (mootness award of $100,000 in attorneys' fees in merger case).

59. Cain et al., *supra* note 12, at 625 tbl.3 (finding median of $265,000 for mootness settlements compared to median of $300,000 for disclosure settlements in 2017); *see also* Anthony Rickey, *Absent Reform, Little Relief in Sight from Chronic "Merger Tax" Class-Action Litigation*, 32 Wash. Legal Found. 4 fig.1 (Aug. 25, 2017) (compiling post-*Trulia* mootness fee cases).

60. *See* Defendant's Response to Order Ex. 1 at 4–9, Einhorn v. Kindred Healthcare, Inc., No. 1:18-CV-00297-RGA (D. Del. Sept. 19, 2018).

61. *See, e.g.*, Corwin v. KKR Fin. Holdings, 125 A.3d 304, 305–06 (Del. 2015); Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644–45 (Del. 2014).

62. *See* Corwin, 125 A.3d at 312.

63. *See* Kahn, 88 A.3d at 644.

64. *See id.*

65. *See* Corwin, 125 A.3d at 312–14.

rare.[66] This suggests that the breadth of the release that came with disclosure settlements may not have been such an important component of settlement after all.[67] But if this is so, it also suggests that the real value of a merger claim, whether it ends in mootness or settlement, lies in its hold-up value prior to the shareholder vote.

In sum, innovative lawyers found a way to make mootness settlements an effective substitute for disclosures settlements. Defense lawyers get nearly the same protection from concluding a mootness settlement as they achieve in a disclosure settlement. And plaintiffs' lawyers are well compensated either way.

IV. Process and Product Innovation Combined: Federal Court Filings and the Alt-Disclosure Claim

Yet another option for avoiding *Trulia*, and the risk that courts in other states might follow it, is to file the merger claim in federal court instead. Claims that would otherwise be disclosure-based merger cases in state court can also be brought within the subject matter jurisdiction of the federal courts by pleading violations of section 14A of the federal proxy rules. The 14A innovation led not only to a route around *Trulia* but also, eventually, to a world of new claims that could be settled for supplemental disclosures and fees.

A. Merger Claims Under the Federal Securities Laws

If state corporate law is principally focused on shareholders and managers, federal securities law is principally focused on investors and issuers.[68] Because of the substantial overlap between investors and shareholders, on the one hand, and corporate issuers and boards of directors, on the other, there is considerable overlap in coverage between the two regimes. The securities laws give the federal government power to regulate what might otherwise be viewed as core corporate governance functions—functions previously governed solely by state law. For example, in the merger context, the federal securities laws now prescribe tender offer procedures and the form and content of

66. *See id.* at 312. The Bank of America/Merrill Lynch proxy fraud case that resulted in a $2.43 billion settlement is perhaps the best example. *See* Peter J. Henning & Steven Davidoff Solomon, *For Bank of America, More Trouble from Merrill Lynch Merger*, N.Y. Times DealBook (Sept. 28, 2012, 1:31 PM), https://dealbook.nytimes.com/2012/09/28/the-cost-of-putting-the-merrill-lynch-merger-behind-it/ [https://perma.cc/M2XZ-JX4N].

67. *See supra* notes 58–59 and accompanying text.

68. The two principal securities laws for our purposes here are the Securities Act of 1933, 15 U.S.C. §§ 77a–77mm (2012), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2012).

disclosures provided in connection with shareholder voting.[69] Rules promulgated by the SEC regulate proxy disclosures.[70] Most notably, Rule 14a-9 proscribes the solicitation of proxies by means of a materially false or misleading proxy statement.[71] The U.S. Supreme Court has held that investors have a private right of action to enforce Rule 14a-9.[72]

In the merger context, Rule 14a-9 claims allege that the target company did not fully and fairly disclose all material information in the merger proxy—essentially the same allegations underlying state law fiduciary duty claims.[73] Additional state law claims, such as *Revlon* claims alleging defects in the merger process or price,[74] can be appended to the 14a-9 claims and brought in federal court.[75] Alternatively, plaintiffs may simply file the 14a-9 claim and seek a disclosure or mootness settlement in federal court.[76] In either case, section 27 of the Securities Exchange Act of 1934 guarantees that the 14a-9 claim cannot be removed to state court.[77]

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69. *See* Securities Exchange Act § 78n-1.

70. Rule 14a-3, for example, specifies the information that must be furnished to voting security holders by cross-referencing detailed disclosure forms. *See* 17 C.F.R. § 240.14a-3(a) (2018) (cross-referencing Schedule 14A and Forms S-4 and F-4); *see also* 17 C.F.R. § 240.14a-101 Schedule 14A (2018) (setting forth information required in proxy statement).

71. The rule states that:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240.14a-9(a) (2018).

72. J.I. Case Co. v. Borak, 377 U.S. 426, 430–32 (1964).

73. *See id.* at 431–32.

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

75. *See, e.g.*, Brown v. Brewer, No. CV 06-3731-GHK (SHx), 2010 WL 2472182 (C.D. Cal. June 17, 2010).

76. *See Borak*, 377 U.S. at 430–31.

77. Section 27 of the Securities Exchange Act of 1934 provides that federal courts “shall have exclusive jurisdiction” over “violations of [the Act] or the rules and regulations thereunder, and of all suits in equity and actions

Within a year of *Trulia*, state law merger claims had converted almost entirely to federal law merger claims.[78] There is good reason for this. Both before and after *Trulia*, many federal courts had shown themselves to be receptive to disclosure-based settlements.[79] But, this strategy does not always work. In *In Re: Walgreen Co. Stockholder Litigation*,[80] Judge Posner reversed a district court decision approving a disclosure settlement in the Walgreen-Boots merger.[81] In holding that the settlement should have been rejected because the disclosures provided no benefit to the plaintiff class, Judge Posner expressly endorsed the *Trulia* opinion and the "plainly material" standard.[82] He concluded that the district court on remand should "give serious consideration to either appointing new class counsel, or dismissing the suit."[83] As a result, *Trulia* via *Walgreen* now applies in the Seventh Circuit and, going forward, settlement proponents in that circuit have an obligation under Rule 3.3(a)(2) to raise *Trulia* at the settlement hearing.[84]

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at law brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a) (2012).

78. Stephan Boettrich & Svetlana Starykh, Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review 5–6 (25th ed. 2018); *see also* Cain et al., *supra* note 12, tbls.1 & 5 (showing an increase in the percentage of cases filed in federal courts).

79. Typical disclosure settlements recently approved by federal courts include Taxman v. Covidien PLC, 1:14-cv-12949-LTS (D. Mass. Sept. 21, 2015), ECF No. 78; Leitz v. Kraft Foods Group, Inc., 3:15-CV-262-HEH, 2016 WL 1043021 (E.D. Va. Mar. 10, 2016); McGill v. Hake, 1:15-cv-00217-TWP-DKL (S.D. Ind. Mar. 10, 2016), ECF No. 54; Li v. Bowers, 1:15-cv-00373-LCB-LPA (M.D. N.C. Mar. 22, 2016), ECF No. 26; *In re* Meadowbrook Ins. Grp., Inc., 5:15-cv-10057-JCO-MJH (E.D. Mich. Apr. 7, 2016). I was involved in *Covidien* as an expert for the objector but had no role in the other cases.

80. 832 F.3d 718 (7th Cir. 2016).

81. *Id.*

82. *Id.* at 725.

83. *Id.* at 726.

84. Even when a jurisdiction adopts the *Trulia* standard, the non-adversarial nature of the settlement process can lead to striking omissions. For example, after *Walgreen*, one plaintiff filed papers in support of a disclosure settlement with a single citation to the Seventh Circuit's recent decision, for the proposition that "the trial judge should ask whether the [supplemental disclosures] *would be likely* to matter to a reasonable investor." Memorandum of Law in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, Class Certification, and Application for Award of Attorney's Fees and Expenses at 12, Bushansky v. Remy Int'l, Inc., 262 F. Supp. 3d 742 (S.D. Ind. 2017) (No. 1:15-cv-01385-TWP-TAB) (emphasis added) (quoting *Walgreen*, 832 F.3d at 724). In spite of being filed in a district court (Indiana) within the Seventh Circuit, there

As a result of *Walgreen*, federal cases have now largely converted to mootness settlements rather than disclosure settlements, mirroring early patterns in state courts after *Trulia*.[85] This is, of course, another example of innovation. In response to *Trulia* at the state level, plaintiffs brought their cases in federal court, and in response to *Walgreen* at the federal level, plaintiffs converted them into mootness dismissals. The most significant innovation, however, may prove to be the transformation of merger claims into something else entirely.

B. Alternative Disclosure Claims Under Federal Law

The federal proxy rules do not mandate disclosure concerning mergers alone. The proxy rules require detailed disclosure of a number of items, including the prior experience and compensation of directors and officers,[86] details of fees paid to the company's independent public accountants,[87] and details concerning stock-based compensation plans.[88] Any one of these areas presents a potential for disclosure-based litigation under the federal proxy rules.

In another example of destructive innovation, 14A disclosure claims have begun to mutate from merger cases into these other forms. For example, one alternative disclosure-based claim under 14A alleges that a proposed proxy statement violates the proxy rules by failing to disclose details purportedly required by Item 10(a), such as the number of persons in each class of participants in a stock incentive plan.[89] The complaint seeks an injunction to prevent the vote or, alternatively, supplemental disclosures to prevent the vote from being uninformed.[90] Defendants can fight the injunction or make the disclosures and pay a fee to the plaintiffs' lawyers. Such alternative disclosure claims have proliferated in the post-*Trulia* environment as frequent-filer plaintiffs

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was no mention of the "plainly material" standard or *Trulia*'s other requirements, let alone Judge Posner's striking description of disclosure settlements as "no better than a racket" that "must end." *Walgreen*, 832 F.3d at 724. I appeared as an objector to this settlement. Following adversarial argument over the value of the disclosures, the district court refused to approve the settlement. *See Bushansky*, 262 F. Supp. 3d at 754.

85. *See* Cain et al., *supra* note 12, at 483 tbl.V.A.

86. 17 C.F.R. § 14a-101 (2018).

87. *Id.*

88. *Id.*

89. *See, e.g.*, Complaint at 4–6, Stein v. Gibraltar Indus., Inc., No. 1:18-cv-01893-CBA-SMG (E.D.N.Y. Mar. 28, 2018), ECF No. 80.

90. *Id.* at 1 (seeking "an injunction to prevent a vote by its shareholders on Management Proposal 3 in the 2018 Proxy Statement . . . . The grounds for this injunction are Defendant's failures to comply with the SEC's disclosure requirements for proxy statements").

shift their targets from mergers to a wider array of allegedly improper proxy disclosures.

The settlement dynamics of these alt-disclosure cases closely resemble merger claims. Plaintiffs file disclosure-based claims, which defendants moot by making supplemental disclosures shortly before the shareholder vote, after which the plaintiffs and defendants negotiate a fee. As a result, defendants eliminate the threat of an injunction, thus obtaining essentially the same benefit as a disclosure settlement, and avoid the cost of litigating the size of the plaintiffs' mootness fee.[91] Plaintiffs' lawyers get six-figure fees that may, on average, be somewhat smaller than their fees in disclosure settlements. On a per-hour basis, however, their recoveries may be just as good.[92] And the discovery of new sources of disclosure-based claims may enable the disclosure bar to maintain overall revenue levels, in spite of accepting slightly lower fees on a per-claim basis. At the end of the day, however, the extent to which the disclosure bar profits from such cases is difficult to measure because the notices of dismissal often do not disclose whether fees have been paid and, if so, in what amount.[93]

The common elements uniting proxy and merger claims are the ability to settle for disclosures and the hold-up value of enjoining the vote. The risk that the vote might be enjoined is enough to justify making the requested disclosures, even if they are very likely immaterial. And, once the disclosures have been made, the cost of disputing fees in adversarial proceedings may be greater than simply agreeing to a mootness settlement.[94] The basic business strategy of the disclosure bar, in other words, is the monetization of two hold-up problems: the hold-up value of potentially enjoining the vote and the

91. This is roughly the same benefit as a disclosure settlement because the passing of the vote, not the settlement itself, eliminates the threat of injunction. Because there is no preclusive settlement, the defendant remains exposed to a very low probability of threat of a subsequent damages claim for fraud in the proxy, as in the Bank of America/Merrill Lynch merger. *See* Henning & Solomon, *supra* note 66. But such cases are unicorns. Were a case as strong as the Bank of America/Merrill Lynch proxy fraud case to present itself after a disclosure settlement, it is by no means clear that the judge in the subsequent case would view herself as precluded by the prior settlement. *See supra* notes 66–67 and accompanying text.

92. *See, e.g.*, Stein v. Acuity Brands, Inc., No. 1:17-cv-06945-NGG-RER, at 2 (E.D.N.Y. Feb. 12, 2018), ECF No. 15 (requesting a $300,000 mootness fee for 7.7 hours of work); Stein v. Rusnack, No. 1:16-cv-02487-KPF (S.D.N.Y Feb. 28, 2017), ECF No. 35 (receiving a fee award of $560,000 based on a lodestar of less than half that amount).

93. *See, e.g.*, Notice of Voluntary Dismissal, *Gibraltar Indus., Inc.*, No. 1:18-cv-01893-CBA-SMG.

94. *See supra* notes 68–69 and accompanying text.

hold-up cost of fighting over the fee. Once the disclosure bar found their way into federal court under federal law, they innovated new ways to extract hold-up value using the proxy rules.

V. Competitive Innovation

But what about the defendants? So far, this Article has emphasized the relentless creativity of the disclosure bar. But what about the other side? How have corporate defendants adapted, responded, and innovated themselves? What can corporate defendants do to respond to the migration of disclosure-based litigation and the mutation of disclosure-based claims into new causes of action?

It is worth observing, as an initial matter, that insofar as disclosure-based claims have proliferated as securities class actions, something already has been done about it. In 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA"),[95] which, among other things, bars fee awards for non-pecuniary relief in securities class actions.[96] The PSLRA expressly provides that: "[t]otal attorney fees and expenses awarded by the court to counsel for the plaintiff class" in securities class actions may "not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[97] Because no damages or prejudgment interest are paid to the class in a disclosure-based settlement, attorneys' fees in such settlements must also be zero. Although some courts have rejected this interpretation of the statute, it is the only interpretation consistent with the statutory text.[98] An alternative interpretation—that Congress intended only to limit attorneys' fees to a reasonable percentage of damages when damages are paid, not to ban fee awards for non-pecuniary relief—imports assumed meanings into otherwise unambiguous statutory text and is, in any event, unsupported by legislative history.[99] Courts in other jurisdictions have read parallel

95. Pub L. No. 104-67, 109 Stat 737.

96. George Coppolo, OLR Research Report, 2002-R-0695 Private Litigation Reform Act (2002).

97. 15 U.S.C. § 78u-4 (2018).

98. Transcript of Settlement Conference at 48, Taxman v. Covidien P.L.C., No. 1:14-cv-12949-LTS (D. Mass. Sept. 21, 2015), ECF No. 80 ("[I]t is an awful lot of weight to read on that one sentence, that Congress rewrote the common benefit rule with respect to federal securities litigation in that sort of backhanded way, rather than directly . . . . I don't read the language quite as powerfully as you do."). I was an expert for the objector in *Covidien*.

99. *See generally* H.R. Rep No. 104-369 (1995) (Conf. Rep.) (focusing on the total amount of fees awarded, not how those fees were calculated).

statutes to bar non-pecuniary relief in class action settlements.[100] Unfortunately, notwithstanding the clarity of the statutory text, federal courts have a history of disregarding the PSRLA.[101]

Even if it were correctly interpreted and consistently applied, however, the PSLRA would not solve the problem of disclosure-based shareholder suits. The PSLRA provision quoted above bans fees only in connection with class action settlements. Mootness fees, now the most common litigation pattern in federal court, are apparently unaffected. Moreover, plaintiffs can evade other provisions of the PSLRA by filing on an individual rather than a class basis. For example, the PSLRA seeks to avoid the problem of "professional plaintiffs" by preventing any person from acting as a lead plaintiff in more than five securities class actions during a three-year period.[102] But again, because this and other procedural protections of the PSLRA speak only to class actions, the protections can be avoided by filing on an individual rather than a class basis.[103] In spite of claiming rights held by all shareholders and seeking relief that would benefit all stockholders, plaintiffs file individual actions without seeking class certification. This is another example of innovation from the plaintiffs' disclosure bar. By careful pleading, they evade the PSLRA.

But rather than waiting for Congress or the courts to clarify the PSRLA, corporate defendants may be able to adopt an innovative solution of their own to address the proliferation of meritless disclosure-based litigation. As I have argued at length elsewhere, corporations can solve these problems through private ordering by enacting no-pay provisions.[104]

A no-pay provision would commit the corporation, *ex ante*, to a policy of not paying attorneys' fees and costs for a specified form of

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100. *See* Kazman v. Frontier Oil Corp., 398 S.W.3d 377, 387 (Tex. App. 2013) (interpreting a Texas statute to prohibit the payment of attorneys' fees in a disclosure settlement).

101. *See generally* M. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Private Securities Litigation Reform Act*, 44 J. LEGAL STUD. S87 (2015) (noting judges' general reluctance to impose sanctions for PSLRA violations).

102. 15 U.S.C. § 78u-4(a)(3)(B)(vi) (2018) (allowing more than five lead plaintiff appointments only upon express approval of the court).

103. *See* § 78u-4(a)(1). Other procedural protections of the PSLRA require plaintiffs to certify certain information regarding their shareholding at the time a complaint is filed, *see* § 78u-4(a)(2)(A), and to disclose any proposed settlement to other class members, § 78u-4(a)(7).

104. 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: IS THE LAW KEEPING UP? (Steven D. Solomon & Randall S. Thomas, eds., 2019).

representative litigation.[105] Such provisions could be broad (banning corporate payment of plaintiffs' fees in shareholder litigation generally) or narrow (banning corporate payment of plaintiffs' fees only for disclosure-based claims). In either case, no-pay provisions operate as an agreement among shareholders to opt-out of a default term of corporate law—the corporate benefit doctrine—that, although originally designed to benefit shareholders, instead has come to harm them.[106] Such provisions operate essentially as a waiver of the right to recover attorneys' fees from the corporation. The provision is consistent with both state and federal law.[107]

Why then would corporations *not* adopt no-pay provisions?[108] It may be that corporate defendants are less innovative than the

105. For an example of such a provision consider:

> To the fullest extent permitted by law, in the event that any Claiming Party initiates or asserts any Claim or joins, offers substantial assistance to, or has a direct financial interest in any Claim against any Corporation Parties, then, regardless whether the Claiming Party is successful on its Claim in whole or in part, (i) the Claiming Party shall bear its own Litigation Costs, and (ii) the Claiming Party and the Claiming Party's attorneys shall not be entitled to recover any Litigation Costs or, in a derivative or class action, to receive any fees or expenses as the result of the creation of any common fund, or from a corporate benefit purportedly conferred upon the corporation.

Bridgeline Digital, Inc., Amended and Restated By-laws (Form 10-Q, Ex. 3.2) 20 (Feb. 17, 2015).

106. *See* Griffith, *supra* note 9, at 40–41 (discussing the origin of the corporate benefit doctrine).

107. No-pay provisions are unaffected by the Delaware General Corporation Law's prohibition of fee shifting in bylaw and charter provisions. The statute bars efforts to "impose liability on a stockholder for the attorneys' fees or expenses of the corporation." Del. Code Ann. tit. 8, § 102(f) (2019). A no-pay provision does not impose liability on any stockholder for the fees and expenses of the corporation; it merely forces the stockholder to bear his or her own fees and costs. *See id.* § 109(b) ("The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim . . . ."). With regard to federal law, there is no reason to suppose that the corporate benefit doctrine is an immutable rule. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390–97 (1970) (awarding attorneys' fees in a § 14(a) claim resulting in non-pecuniary relief on the basis of the traditional "corporate benefit" doctrine). A No-Fee provision essentially contracts for the reading of the PSLRA advanced in this Article.

108. It is worth noting that some have. Anthony Rickey & Benjamin P. Edwards, *"No Pay" Bylaws May Threaten Shareholder Lawsuits*, CLS Blue Sky Blog (Mar. 27, 2017), http://clsbluesky.law.columbia.edu/2017/03/27/no-pay-bylaws-may-threaten-shareholder-lawsuits/#_ftn6

disclosure bar because the stakes are lower.[109] Corporations, of course, would like to reduce the cost of non-meritorious disclosure-based claims, but, however wasteful such claims may be, they are a manageable cost and do not threaten the existence of the firm. By contrast, if the disclosure bar did not adapt to changes making disclosure claims harder to bring, they would go extinct.[110] Necessity, it is often said, is the mother of invention, and this may go far in explaining the greater inventiveness of the disclosure bar compared to the corporate defense bar.

Also, innovative corporate governance provisions likely increase litigation risk, at least among early adopters, and plaintiffs are especially primed to challenge provisions, such as no-pay provisions, that threaten to impact their livelihood. For example, plaintiffs challenged forum-selection bylaws at over a dozen companies, most of which repealed the bylaw rather than litigate the issue, before the provisions were finally upheld by the Delaware Supreme Court in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*[111] More recently, plaintiffs have been rewarded for knocking down fee-shifting bylaws[112] and federal forum-selection provisions.[113] Early adopters of no-pay provisions are likewise open to challenges and, similar to early adopters of forum-selection provisions, likely to settle the cases by removing the provision (and paying attorneys' fees). This is a Catch-22. Corporations can either incur significant litigation costs in order to prove the enforceability of a term designed to spare them wasteful litigation costs or they can settle for lower litigation costs but, also, eliminate the term. Most, unsurprisingly, have decided not to adopt the provision in the

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[https://perma.cc/4JE2-VXE2] (surveying EDGAR filings and finding few instances of no-pay adoptions).

109. *See* Friedlander, *supra* note 8, at 885–89 (recounting the high monetary risks associated with disclosure litigation).

110. At least they would cease to exist as the disclosure bar. It is possible, of course, that they could shift to specialize in a wholly different type of litigation.

111. 73 A.3d 934 (Del. Ch. 2013). For more of the backstory on those claims, see Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 Del. J. Corp. L. 333, 346 n.61 (2012).

112. Solak v. Sarowitz, 153 A.3d 729 (Del. Ch. 2016).

113. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. 2018).

first place.[114] Corporations need a test case—a *Moran v. Household Int'l, Inc.*,[115] for no-pays—before they widely adopt the provision.[116]

All of this suggests that the transaction costs of change in this area are not zero and are not symmetrical. The corporate benefit rule imposes obstacles to opting out. It is, thus, a "sticky" default.[117] Sticky defaults can enshrine inefficient rules, and corporate law scholars have argued that the best way to prevent this is to set corporate law default rules in favor of shareholders.[118] In this case, however, the default rule would appear to be set in favor of the disclosure bar and the defense lawyers that generate fees from them. Because attorneys' fees are paid with shareholders' money, a pro-shareholder default rule would be a clear statutory provision or judicial ruling that blessed the adoption of no-pay provisions.

Conclusion

This Article has traced innovations in disclosure-based shareholder litigation following the Delaware Court of Chancery's opinion in *Trulia*. It has found ample innovation on the plaintiffs' side, starting with the migration of merger cases to other courts and their eventual mutation into other kinds of disclosure claims, first designed to avoid *Trulia*, then redesigned to evade *Walgreen* and the PSLRA. There has not been a parallel amount of innovation on the defense side. The best way to spur

114. *See* Rickey & Edwards, *supra* note 108; Kevin M. LaCroix, *More About Litigation Reform Bylaws: Will "No-Pay" Provisions Succeed Where Forum Selection Bylaws Have Failed?*, The D&O Diary (Jan. 22, 2017), https://www.dandodiary.com/2017/01/articles/securities-laws/litigation-reform-bylaws-will-no-pay-provisions-succeed-forum-selection-bylaws-failed/ [https://perma.cc/2SEU-47MV].

115. 500 A.2d 1346 (Del. 1985). *See generally* David Ronald Ellin, *The Poison Pill Warrant—Apothecary and Antidote:* Moran v. Household International, Inc., 36 DePaul L. Rev. 413 (1987) (describing the importance of the *Moran* court's decision to uphold an anti-takeover device as an exercise of business judgment).

116. *See id.* (holding that poison pills generally could not be challenged when adopted); *see also* Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 Colum. L. Rev. 1931, 1985 (1991) (describing *Moran* as the test case for poison pills).

117. *See generally* Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 Fla. St. L. Rev. 651 (2006); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. Rev. 383 (2007) (discussing implications of sticky default rules for corporate law theory).

118. *See* Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 Nw. U. L. Rev. 489, 492 (2002) (emphasizing difficulties associated with opting-out of pro-management terms given management's power to control the voting generally and therefore advocating pro-shareholder default terms).

defense side innovation is to allow shareholders to agree to an arrangement *ex ante* that precludes the payment of attorneys' fees for disclosure suits *ex post*.