IN RE TRULIA: REVISITED AND REVITALIZED

INTRODUCTION

After an escalation in deal litigation that culminated with challenges to 95% of $100,000,000 deals,[1] merger objection litigation that ends in disclosure-only settlements has become a topic of great concern.[2] These cases are concerning because it seems implausible that 95% of all mergers are executed carelessly.[3] The problematic cases all follow a similar pattern. When a merger is announced, multiple shareholder plaintiffs challenge the transaction in multiple jurisdictions.[4] Plaintiffs and corporate defendants then quickly agree to a disclosure-only settlement, wherein the plaintiffs receive trivial supplemental disclosures about the transaction.[5] In return, defendants receive a broad release from liability for future claims.[6] The parties then seek the court's approval of the settlement, and upon receiving approval, the plaintiffs' attorney is rewarded with significant attorney's fees.[7] This cycle is so common it has been dubbed a "deal tax" or "transaction tax."[8]

1. Anthony Rickey & Keola R. Whittaker, *Will* Trulia *Drive "Merger Tax" Suits Out of Delaware?*, LEGAL BACKGROUNDER (Washington Legal Found., Washington, D.C.), Apr. 29, 2016, at 1.

2. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 891–97 (Del. Ch. 2016).

3. As one scholar noted: "[J]ust as merger objection litigation is not per se objectionable, neither are mergers and acquisitions themselves . . . . Yet an overwhelming majority of large public company transactions result in litigation. And . . . it does not seem plausible that 96% of large public company deals involve management wrongdoing . . . ." Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 68 (2014).

4. Rickey & Whittaker, *supra* note 1, at 1.

5. *In re Trulia*, 129 A.3d at 892–93.

6. *Id.* at 892.

7. *Id.* at 893; Rickey & Whittaker, *supra* note 1, at 1.

8. Jeffries, *supra* note 3, at 108 ("[P]laintiffs' attorneys have successfully attached what amounts to a transaction tax to an overwhelming majority of large public company deals."); Daniel Fisher, *Delaware Judge Tells Plaintiff Lawyers: The M&A 'Deal Tax' Game Is Over*, FORBES (Sept. 28, 2015, 3:58 PM), http://www.forbes.com/sites/danielfisher/2015/09/18/delaware-judge-tells-plaintiff-lawyers-the-ma-deal-tax-game-is-over/ ("Critics—including some Delaware judges—have called the tactic a combination of 'deal tax' and 'deal insurance'. . . .").

This cycle is problematic for several reasons. First, many of the cases are meritless.[9] It has been argued that the lack of merit can be seen by three common features of these cases: plaintiffs filing immediately after the merger is announced and then failing to litigate,[10] plaintiffs filing in multiple jurisdictions,[11] and the parties quickly reaching settlements that provide monetary value for plaintiffs' attorneys but not for the shareholders.[12]

These suits are also problematic because allowing this to continue is harmful in the long run for defendant corporations. This is harmful because when considering if they should merge, defendant corporations must automatically factor in paying significant amounts of extra money as a deal tax, even when the transaction is executed legally. In addition to harming defendant corporations, the cycle limits the effectiveness of the legal system in separating good from bad mergers. If every merger is challenged, the stigma associated with being sued diminishes, which reduces the deterrent value of litigation.[13]

Finally, merger objection suits ending in disclosure-only settlements are concerning because plaintiff shareholders risk surrendering valuable future claims by granting defendant corporations broad releases in exchange for trivial disclosures.[14] For example,

9. Jeffries, *supra* note 3, at 68.

10. *Id.* at 69–74.

11. *Id.* at 74–80. While most public companies are incorporated in Delaware, one study proved that only 16% of suits challenging Delaware corporations were solely challenged in the Delaware Court of Chancery. *Id.* at 74.

12. *Id.* at 80–86. Courts are permitted to award attorney's fees when there is a corporate benefit for the shareholders. Sugarland Indus. v. Thomas, 420 A.2d 142, 147 (Del. 1980) ("[A]dditional fees might be sought on the basis of the 'results accomplished for the benefit of all shareholders . . . .' That is the common yardstick by which a plaintiff's counsel is compensated in a successful derivative action."). In these suits, the corporate benefit allegedly comes from disclosing additional information which helps shareholders cast informed votes on the merger, but research shows these disclosures do not actually affect shareholder voting. 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, 561 (2015).

13. Sean Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C.L. REV. 1, 26 (2015) [hereinafter Griffith, *Correcting Corporate Benefit*] ("[B]ad actors are not plausibly deterred by a litigation system that exposes the corporation to little more than payment of attorneys' fees. Moreover, the common perception that such claims lack merit—a view fueled by the high volume of filings and the dearth of significant recoveries—itself diminishes the reputational impact of being made to defendant a suit.").

14. *See In re* Riverbed Tech., Inc. Stockholders Litig., No. 10484-VCG, 2015 Del. Ch. LEXIS 241, at *22 (Ch. Sept. 17, 2015) (discussing how the releases granted to defendants go far beyond the value of the extra disclosures).

in *In re Rural/Metro Corporation Stockholders Litigation*, after deeming it a "very close call," the Delaware Court of Chancery ultimately rejected the proposed disclosure-only settlement.[15] Had the court approved this settlement, the case would not have gone to trial and plaintiffs would not have received over $75,000,000 in damages plus other post-litigation awards.[16] These three concerns make it clear that disclosure-only settlements for merger objection lawsuits are problematic.

However, this problem is difficult to solve. Shareholder litigation, which includes these cases, is different from other types of litigation.[17] Typically, there are three parties involved in supervising litigation: parties to the litigation, courts, and legislatures.[18] To date, these gatekeepers have been ineffective in monitoring this problem. In these cases, plaintiffs are not directly involved in managing their attorneys and their cases, but instead defer to the plaintiffs' attorneys, creating an agency relationship.[19] Defendants are not effective in helping monitor this problem because defendant corporations have incentives to perpetuate this cycle.[20] Courts cannot control suits brought outside their jurisdiction,[21] and the legislature cannot pass legislation that is effective outside the state's borders.[22]

Delaware has tried to solve this problem since it uniquely affects Delaware. As the epicenter of corporate law, and as a state dependent on its reputation as such, Delaware has a vested interest in maintaining the integrity of its corporate law regime.[23] Delaware

15. *In re* Rural/Metro Corp. Stockholders Litig., 102 A.3d 205, 239 (Del. Ch. 2014), *aff'd sub nom*. RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

16. *In re Rural/Metro Corp*., 102 A.3d at 263. Similar outcomes occurred in other cases. *See, e.g.*, *In re* Dole Food Co., S'holder Litig., No. 9079-VCL, 2015 Del. Ch. LEXIS 224, at *158 (Ch. Aug. 27, 2015); *In re* Emerging Commc'ns, Inc. S'holders Litig., No. 16415, 2004 Del. Ch. LEXIS 70, at *155 (Ch. May 3, 2004).

17. Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 OKLA. L. REV. 237, 241 (2017) [hereinafter Erickson, *Gatekeepers*].

18. *See id.* at 240.

19. *Id*. at 245.

20. *See infra* Part I.A.

21. *Cf.* Erickson, *Gatekeepers*, *supra* note 17, at 257.

22. *See* Lesley Daunt, *State vs. Federal Law: Who Really Holds the Trump Card?*, HUFFINGTON POST (Jan. 28, 2014, 4:13 PM), http://www.huffingtonpost.com/lesley-daunt/state-vs-federal-law-who-_b_4676579.html.

23. *See* Alana Semuels, *The Tiny State Whose Laws Affect Workers Everywhere*, ATLANTIC (Oct. 3, 2016), https://www.theatlantic.com/business/archive/2016/10/corporate-governance/502487/.

set forth two solutions. First, the legislature adopted Delaware General Corporate Law ("DGCL") section 115, which permits corporations to enact forum selection provisions.[24] This helps because Delaware judges are better equipped to scrutinize these cases. Second, the Delaware Court of Chancery decided *In re Trulia, Inc. Stockholder Litig*ation ("*Trulia*"), and held disclosure-only settlements were impermissible unless plaintiffs requested supplemental disclosures that were "plainly material" to the merger documents.[25] The court also held that future disclosure-only settlements would be approached with disfavor, indicating the court would apply a heightened standard of review to these settlements.[26]

After Delaware's efforts, statistics show that while merger objection litigation has decreased in Delaware, it has increased in many other jurisdictions.[27] This indicates that although *Trulia* has been effective in deterring plaintiffs' attorneys from trying their luck with disclosure-only settlements in Delaware, plaintiffs' attorneys are still seeking to file these suits in alternative forums with lower standards of review. If the suits are going elsewhere, Delaware has not solved the problem and needs to adjust the strategy.

The Delaware legislature can solve the disclosure-only settlement problem by amending DGCL section 115, which authorizes forum selection bylaws. Under the current section 115, when corporations are sued they can choose whether to exercise their forum selection bylaws to bring the suit back to Delaware.[28] The legislature should amend section 115 to prevent forum selection bylaws from being optional—to no longer allow corporations to decline to exercise a forum selection bylaw. Thus, if a Delaware corporation

24. 80 Del. Laws, c. 40, § 5 (codified at DEL. CODE ANN. tit. 8, § 115 (Cum. Supp. 2016)).

25. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898–99 (Del. Ch. 2016).

26. *See id.*

27. Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, __ VAND. L. REV. (forthcoming 2018) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922121; Kevin LaCroix, *2016 Securities Lawsuit Filings Surge to Record Levels*, D&O DIARY (Jan. 2, 2017) [hereinafter LaCroix, *2016 Securities Lawsuit Filings*], http://www.dandodiary.com/2017/01/articles/securities-litigation/2016-securities-lawsuit-filings-surge-record-levels/.

28. Tit. 8, § 115; Kevin LaCroix, *More About Litigation Reform Bylaws: Will "No Pay" Provisions Succeed Where Forum Selection Bylaws Have Failed?*, D&O DIARY (Jan. 22, 2017) [hereinafter LaCroix, *Litigation Reform Bylaws*], http://www.dandodiary.com/2017/01/articles/securities-laws/litigation-reform-bylaws-will-no-pay-provisions-succeed-forum-selection-bylaws-failed/.

has a forum selection bylaw, as many do, any case filed in another jurisdiction that objects to the corporation's merger will be brought back to Delaware to be litigated. Once in Delaware, the court will subject any proposed settlement to the heightened standard of *Trulia*. Plaintiffs, knowing they will be subjected to Delaware's heightened standard of review, will no longer bring these suits; thus, Delaware's non-optional forum selection clause will operate as a deterrent, which will effectively end disclosure-only settlements in merger objection litigation.

Part I examines the problem presented, Delaware's attempts to solve the problem, and why Delaware's efforts have not been effective. Part II considers the variety of other solutions that have been posed by academics and courts and each solution's respective limitations. Part III explores non-optional forum selection provisions as a remedy to the problems that Delaware has not yet solved.

I. DISCLOSURE-ONLY SETTLEMENTS: THE PROBLEM AND THE RESPONSE

This problematic sue-and-settle cycle exists because the traditional entities that oversee shareholder litigation are ineffective in responding to this phenomenon. In recent years, Delaware has attempted to spell out the end of these suits with both statutes that allow forum selection bylaws, and judicial decisions, like *Trulia*, which subject disclosure-only settlements to a heightened level of judicial scrutiny.[29] However, Delaware's attempts have not been entirely effective and, thus, Delaware has not yet completely solved the problem.[30] This Part examines how the problem arose, how Delaware tried to fix it, and why this was not effective.

A. *The Rise of the Problematic Disclosure-Only Settlement*

Disclosure-only settlement cases have become prevalent because shareholder litigation is different from other types of litigation. Typically, in litigation we rely on plaintiffs to supervise their at-

29. *In re Trulia*, 129 A.3d at 895–96; Cain et al., *supra* note 27, at 4 (discussing Delaware's legislative efforts).

30. *See generally* Cain et al., *supra* note 27.

torney and their case, and to ensure the attorney acts in the plaintiffs' best interests.[31] However, in shareholder litigation, the stakes for individual plaintiffs are so low that plaintiffs are not actively engaged in monitoring the attorney and their case.[32] Instead, the plaintiffs' attorney acts as the representative agent for all the shareholders.[33] Existence of this agency relationship produces a need for other supervision.[34]

If plaintiffs cannot monitor their own suits, the next line of defense should be the defendants. Typically, when faced with meritless litigation, defendants will fight plaintiffs in court. However, in these cases, defendants do not fight back for several reasons. First, there is a cost asymmetry that incentivizes rational defendants to settle.[35] Defendants have all the relevant documentation and information and thus bear the burden of all discovery costs, whereas the plaintiff will have virtually no discovery costs.[36] Going through discovery and fighting the litigation in court will cost the defendant more than settling. Second, there is also a risk asymmetry. These cases create the risk that the defendants' sale of their company will not go through.[37] Defendants have a vested interest in ensuring the transaction proceeds, and the risk that it may not encourages defendants to quickly settle to make the problem go away. In contrast, plaintiffs have very little on the line. Third, defendants are motivated by the broad release in liability they receive in exchange for the disclosures, as this broad release serves as a type of "deal insurance" that protects the merger in the future.[38] Finally, defendants are also interested in obtaining quick settlements to

31. Erickson, *Gatekeepers*, *supra* note 17, at 241.

32. *Id.* at 238.

33. *Id.*

34. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 679–80 (1986). A system that places an attorney at the helm of litigation without client supervision creates potential for "opportunism and overenforcement" by the plaintiffs' attorneys because the disengagement of the plaintiffs in shareholder litigation creates agency costs and because attorneys have incentives to sue where plaintiffs do not. *Id.*

35. Jessica Erickson, *Heightened Procedure*, 102 IOWA L. REV. 61, 73 (2016).

36. *Id.*

37. *See* Geoffrey H. Coll & Marco Molina, *The End of Disclosure-Only Settlements in Securities Class Actions?*, BAKERHOSTETLER (Nov. 11, 2016), https://www.bakerlaw.com/alerts/-the-end-of-disclosure-only-settlements-in-securities-class-actions.

38. *In re* Riverbed Tech., Inc. Stockholders Litig., No. 10484-VCG, 2015 Del. Ch. LEXIS 241, at *11–12 (Ch. Sept. 17, 2015) (discussing the incentives of defendants).

avoid litigating in multiple forums.[39] The presence of these incentives to settle prevents defendants from acting as effective gatekeepers.

The second traditional gatekeeper is the courts. Delaware courts are an ideal gatekeeper for this type of case. Delaware has unique experience with corporate law and a vested interest in maintaining the integrity of corporate law, because it depends financially on its reputation as the corporate law epicenter.[40] However, in these cases, the courts have not been effective gatekeepers. First, Delaware courts do not have jurisdiction outside state borders, and are thus ineffective any time a disclosure-only settlement is presented to any non-Delaware court.[41] Second, the manner in which Delaware courts review these settlements is challenging. Delaware courts must approve any proposed class action settlement,[42] and courts applying Delaware law should do so, when the settlement is reasonable and intrinsically fair, as judged at the settlement hearing.[43] In these cases, defendants and plaintiffs are very motivated to proceed with the settlement, regardless of reasonableness or fairness; as such, the settlement hearings turn into cheerleading campaigns where both parties try to convince the court the settlement is fair.[44] Additionally, neither party has any motivation to bring anything negative to the judge's attention.[45] Faced with limited time, limited information, and enthusiastic support, there is no reason for the judge not to bless the settlement. Without more, this renders courts ineffective as gatekeepers.

39. Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdiction Litigation: Who Caused This Problem, and Can It be Fixed?*, 37 DEL. J. CORP. L. 1, 4 (2012). If defendants settle, through res judicata, settling in one state precludes all other settlements. *See In re* Wal-Mart Stores, Inc., C.A. No. 7455-CB (Del. Ch. May 13, 2016).

40. *See* Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 67 (2009).

41. *See* Erickson, *Gatekeepers*, *supra* note 17, at 239, 257.

42. DEL. CT. CH. R. 23(e).

43. *In re* Triarc Cos., 791 A.2d 872, 876 (Del. Ch. 2001) (quoting *In re* Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 966 (Del. Ch. 1996)).

44. 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 D. Solomon & Randall S. Thomas, eds.) (forthcoming 2017) (manuscript at 6) [hereinafter Griffith, *Private Ordering*], https://ssrn.com/abstract=2855950.

45. *See id.*

The final gatekeeper is the legislature, who can use statutes to attempt to fix the problem.[46] However, the legislature cannot easily fix this problem either, since any law passed in Delaware is not going to affect the merger objection suits filed in other states. Thus, limited jurisdiction prevents the legislature from easily acting as the gatekeeper in these cases.

With shareholder litigation of this type, the traditional gatekeepers are ineffective. This has led to the prevalence of merger objection cases ending in disclosure-only settlements, since none of the traditional gatekeepers have exercised sufficient oversight. Given the inability of each to be effective standing alone, there should be multiple supervisors acting in conjunction to fix the problem, as one can solve the problems the other cannot.[47]

B. *Delaware Courts Tried to Fix the Problem*

The Delaware Court of Chancery recently tried to eliminate disclosure-only settlements with *Trulia*.[48] In *Trulia*, the court ruled that going forward, deal litigation disclosure settlements would be approached with continued disfavor and that disclosure-only settlements for merger objection suits would be critically examined.[49]

In *Trulia*, a shareholder class action challenged Zillow, Inc.'s ("Zillow") proposed acquisition of Trulia, Inc. ("Trulia").[50] After the merger was announced, four Trulia shareholders quickly sued, alleging Trulia's board of directors breached their fiduciary duties by approving an unfair exchange ratio.[51] Instead of litigating, plaintiffs and defendants quickly reached a settlement in which Trulia was required to produce supplemental disclosures to help the shareholders cast an informed vote.[52] In return, plaintiffs dropped the motion to enjoin the transaction and provided Trulia with a broad release from future claims.[53]

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46. *See* Erickson, *Gatekeepers*, *supra* note 17, at 250, 252.
47. *See id.* at 239–40.
48. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884 (Del. Ch. 2016).
49. *Id.* at 898.
50. *Id.* at 886.
51. *Id.* at 888–89.
52. *Id.* at 887, 889.
53. *Id.* at 887.

The chancellor of the Court of Chancery, Chancellor Bouchard, rejected this proposed settlement, stating the supplemental disclosures were so trivial they were not material or even helpful to Trulia's voting shareholders.[54] The disclosures were so trivial that they also did not serve as meaningful consideration to warrant providing the defendants with the broad release.[55] Chancellor Bouchard proceeded to do more than reject the settlement; he made it clear Delaware would no longer welcome this type of settlement by stating,

> Practitioners should expect . . . disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission . . . . In using the term "plainly material," I mean that it should not be a close call that the supplemental information is material . . . .[56]

With this language, Chancellor Bouchard may have signaled the demise of disclosure-only settlements in Delaware.

C. *Delaware's Solution Helped but Did Not Help Enough*

The court's decision in *Trulia* was meant to send a message to plaintiffs' attorneys that these suits were no longer welcome in Delaware. By holding that settlements would be rejected in the absence of "plainly material" disclosures, the court eliminated the incentive for plaintiffs' attorneys to bring these suits where the incentive is the attorney's fees accompanying settlement approval. The requirement of a higher standard would hopefully result in suits of a higher quality, which would focus more on providing shareholders with benefits.[57] In addition, by saying enough is enough, the decision in *Trulia* would hopefully help preserve "Delaware's credibility as an honest broker in the legal realm."[58]

54. *Id.* at 904, 907.

55. *Id.* at 907.

56. *Id.* at 898.

57. Peter J. Walsh, Jr. & Aaron R. Sims, Trulia *and the Demise of "Disclosure Only" Settlements in Delaware*, BUS. L. TODAY (Feb. 2016), http://www.americanbar.org/publications/blt/2016/02/delaware_insider.html.

58. Transcript of Record at 66, Acevedo v. Aeroflex Holding Corp., C.A. No.7930—VCL (Del. Ch. July 8, 2015), http://blogs.reuters.com/alison-frankel/files/2015/07/acevedovaeroflex-settlementhearingtranscript.pdf.

Trulia may have helped some of these goals, but the preliminary statistics indicate that an unintended result of Delaware's heightened level of scrutiny is the exodus of plaintiffs' attorneys out of Delaware and into other forums.[59] The statistics show that while deal litigation has declined significantly in Delaware after *Trulia*, it has increased in other states and in federal court.[60] Thus, while the Delaware Court of Chancery's attempt to fix the problem does appear to be working in Delaware, the problem is still not resolved—plaintiffs' attorneys are still bringing meritless merger objection suits to obtain a disclosure-only settlement and attorney's fees.

II. PROPOSED FIXES TO MERITLESS DISCLOSURE-ONLY SETTLEMENTS

Accompanying the rise in disclosure-only settlements was a variety of solutions proposed to help end this phenomenon. These solutions included legislative approaches, judicial approaches, and federalization. Each solution has certain benefits, but also presents unique challenges that make them less viable. This Part examines each proposed solution and lays out the benefits and downsides of each.

A. *Legislative Solutions*

The legislature could help eliminate disclosure-only settlements for merger objection litigation in a variety of ways. Proposed legislative solutions include forum selection bylaws, shifting attorney's fees, and no pay provisions.

1. Forum Selection Provisions

Forum selection provisions regulate where a shareholder may bring suit against the corporation and are proposed as a way to

59. Cain et al., *supra* note 27, at 6, 22. Overall, merger litigation has declined. In 2014, 91% of all transactions were challenged. *Id.* at 6. In 2015, that number declined to 89%, and fell further to 73% in 2016. *Id.* However, litigation in the Delaware Court of Chancery has decreased, but litigation elsewhere has increased. *Id.* Of the completed transactions in 2016, only 32% were challenged in Delaware, whereas 65% were challenged in other states and 37% were challenged in federal court. *Id.*

60. *Id*. at 22–23.

curb abuse associated with disclosure-only settlements.[61] Forum selection provisions can be placed in a corporation's bylaws or articles of incorporation, and when inevitable litigation is filed after the corporation has proposed a merger, corporations can exercise the forum selection provision to bring the suit back to Delaware.[62] Having the suit back in Delaware will help curb abuse because judges in a Delaware court will review the suit under *Trulia*'s heightened standard. If the proposed settlement is meritless, the court will find the disclosures are not plainly material and decline to approve the settlement.[63] Forum selection provisions also have deterrent value, since simply knowing the case will end up in Delaware and will be reviewed under *Trulia*'s heightened standard will likely dissuade plaintiffs' attorneys who are simply seeking easy attorney's fees from filing meritless suits.

Forum selection bylaws have received widespread approval. The Delaware Court of Chancery authorized forum selection bylaws in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*,[64] holding forum selection bylaws were authorized under DGCL section 109(b) because they govern disputes related to the internal affairs of the corporation.[65] After *Boilermakers*, the Delaware legislature gave statutory approval to the holding with DGCL section 115, which authorizes corporations to include a provision in their articles of incorporation or bylaws requiring that "any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State."[66] As defined in the statute, "'[i]nternal corporate claims' means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery."[67] After the enactment of DGCL section 115,

61. Jack B. Jacobs, *New DGCL Amendments Endorse Forum Selection Clauses and Prohibit Fee-Shifting*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 17, 2015), https://corpgov.law.harvard.edu/2015/06/17/new-dgcl-amendments-endorse-forum-selection-clauses-and-prohibit-fee-shifting/.

62. Fisch et al., *supra* note 12, at 605.

63. *See In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 887 (Del. Ch. 2016).

64. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013).

65. *Id.* at 962–63; *see also* DEL. CODE ANN. tit. 8, § 109(b) (Cum. Supp. 2016).

66. 80 Del. Laws, c. 40, § 5 (2015) (codified at DEL. CODE ANN. tit. 8, § 115 (Cum. Supp. 2016)).

67. Tit. 8, § 115.

many corporations were quick to adopt forum selection provisions.[68] In addition, in *Trulia*, Chancellor Bouchard endorsed the use of forum selection provisions as an additional way to counteract disclosure-only settlements.[69]

Forum selection bylaws are helpful but cannot solve the problem on their own for several reasons. First, forum selection bylaws are not automatically executing—defendant corporations must choose to invoke them.[70] Given these defendants' incentives to engage in this cycle, they do not always invoke their forum selection bylaw, but only do so when it is in their best interest.[71] The ease with which corporate defendants can choose not to invoke these provisions, and their failure to do so, can be seen as a "revealed preference" that "demonstrates defendants' continued interest in retaining the option of a cheap settlement and a broad release in an alternative jurisdiction."[72] The result is that these provisions do not function as exclusive forum provisions, but rather as "[e]xclusive [f]orum *options*."[73]

The second problem with forum selection provisions is that they are ineffective when plaintiffs file in federal court, as opposed to state court. Plaintiffs can frame a merger objection lawsuit in federal terms and append a state merger claim to that federal case.[74] For example, plaintiffs can sue in federal court alleging the company's proxy statements omitted material information in violation of section 14(a) of the Securities Exchange Act of 1934 ("Exchange Act") and as a violation of Rule 14a-9.[75] This subjects the claim to section 27 of the Exchange Act, which gives federal courts exclusive

68. Cain et al., *supra* note 27, at 4–5.

69. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 899 (Del. Ch. 2016).

70. LaCroix, *Litigation Reform Bylaws*, *supra* note 28.

71. Alison Frankel, *How Corporations Can Game Their Own Forum Selection Clauses*, REUTERS (Nov. 17, 2015), http://blogs.reuters.com/alison-frankel/2015/11/17/how-corporations-can-game-their-own-forum-selection-clauses/ (discussing FX Energy's manipulation of the corporation's forum selection clause); *see also* Griffith, *Private Ordering*, *supra* note 44, at 12 (There are "plain examples of the opportunistic use of forum selection provisions by defendants—situations, that is, in which companies with forum selection bylaws have chosen not to assert them but have instead settled instead [sic] (for non-monetary relief) in an alternative jurisdiction.").

72. Griffith, *Private Ordering*, *supra* note 44, at 3.

73. *Id.*

74. *Id.* at 5–6.

75. *Id.* at 9.

jurisdiction over actions alleging violations of the Exchange Act.[76] If plaintiffs append a state claim to this federal claim, that must only be brought in federal court, the forum selection clause will not command the suit back to Delaware. A federal court judge could decline jurisdiction over the state law claims, but probably would not. The other claim has to be made in federal court under section 27, and it does not make sense to separate the two claims.[77] Thus, forum selection provisions can be thwarted in this way by plaintiffs' attorneys, and the preliminary data shows this is in fact occurring.[78]

While forum selection provisions cannot solve the problem on their own, they may help when used in conjunction with other tools. This is clear because many corporations have already enacted forum selection provisions as they are statutorily authorized and will be upheld in court. [79]

2. Shifting Attorney's Fees

A second legislative solution is enabling fee-shifting provisions. These provisions impose the cost of attorney's fees for certain types of shareholder litigation upon the plaintiff.[80] Fee-shifting provisions curb abuse by forcing plaintiffs to have more skin in the game, since they risk being forced to pay extraordinarily high attorney's fees. This risk will deter plaintiffs from bringing these suits.[81]

This solution was initially welcomed by corporate officers and directors, because fee-shifting provisions naturally chill litigation.[82] The Delaware Court of Chancery also initially endorsed fee-shifting provisions in these cases in *ATP Tour, Inc. v. Deutscher Tennis Bund* ("*ATP Tour*").[83] In *ATP Tour*, the board adopted a fee-

76. *Id.*

77. *Id.* at 11.

78. *See, e.g.*, Cain et al., *supra* note 27, at 17 (noting the rise in state appraisal claims brought by plaintiffs' attorneys in federal merger litigation).

79. Griffith, *Private Ordering*, *supra* note 44, at 2.

80. DEL. CORP. LAW COUNCIL, EXPLANATION OF COUNCIL LEGISLATIVE PROPOSAL 1 (2015) [hereinafter EXPLANATION OF PROPOSAL], http://www.corporatedefensedisputes.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-EXPLANATORY-PAPER-3-6-15-U0124513.pdf.

81. *Id.* at 3–4.

82. *Id.* at 3.

83. *See* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 555 (Del. 2014).

shifting provision in the bylaws that required the plaintiffs to pay all attorney's fees and expenses incurred during internal corporate litigation if the plaintiffs failed to substantially achieve "the full remedy sought."[84] The court held fee-shifting provisions in bylaws were valid and enforceable under the DGCL.[85] When the court upheld the fee-shifting provision at issue in *ATP Tour*, no Delaware statute forbade fee-shifting bylaws.[86]

While fee-shifting provisions make sense as a natural deterrent, there are too many problems with this solution for it to be truly viable. After *ATP Tour*, the Delaware Corporate Council (the "Council") quickly proposed legislation prohibiting fee-shifting under these circumstances.[87] The Council identified three main problems with fee-shifting.[88] First, fee-shifting provisions would have a severe effect on shareholder litigation, since the risk of the suit for shareholders (paying high attorney's fees) would significantly outweigh the potential gain (non-monetary settlement).[89] Anything that severely chills shareholder litigation is discouraged, since shareholder litigation is one of the few ways shareholders can monitor corporations and boards.[90]

Second, fee-shifting provisions would curtail the development of corporate common law.[91] Delaware corporate law relies on the law of fiduciary duty, administered by the courts, to fill in the gaps that the DGCL does not cover.[92] For example, the DGCL does not cover many tools that corporations frequently employ, such as poison pills.[93] Instead, these tools are regulated through the common law.[94] Common law is developed through shareholder litigation, so stifling shareholder litigation would stifle Delaware common law.[95]

84. *Id.* at 556.

85. *Id.* at 560.

86. *See id*. at 558.

87. EXPLANATION OF PROPOSAL, *supra* note 80, at 3.

88. *See id*. at 3–6.

89. Griffith, *Correcting Corporate Benefit*, *supra* note 13, at 3. Fee-shifting provisions make bringing these suits "economically irrational" for plaintiff shareholders, so it is unlikely they will continue to use shareholder litigation as a tool to enforce their rights. EXPLANATION OF PROPOSAL, *supra* note 80, at 3.

90. *See* EXPLANATION OF PROPOSAL, *supra* note 80, at 6.

91. *Id.* at 4.

92. *Id.*

93. *Id.* at 5.

94. *Id.*

95. *See id.* at 4–5.

A third problem the Council identified is that eliminating shareholder litigation would "eliminate the only extant regulation of substantive corporate law."[96] No government body regulates the relationship between shareholders and management, so the only method for addressing management misconduct is through shareholder litigation.[97] Minimizing the impact of shareholder litigation would eliminate the only effective enforcement mechanism for statutory or fiduciary obligations.[98] If regulation diminished over time and statutory rights and fiduciary obligations became essentially meaningless, investors would eventually lose confidence in corporations, which would negatively affect capital formation.[99]

The Delaware legislature recognized all the problems posed by fee-shifting provisions, and in response, amended DGCL section 109(b).[100] Section 109(b) disallows this type of fee-shifting by stating, "[t]he 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 . . . ."[101] This statutory rejection, along with the variety of problems fee-shifting provisions present in this context, makes it clear that fee-shifting provisions are not the correct approach for this problem.

3. No Pay Provisions

A third legislative solution is a no pay provision, which has been proposed within academia. A no pay provision bars a corporation from reimbursing plaintiffs for attorney's fees and expenses resulting from merger litigation.[102] Corporations pre-commit not to pay in advance in litigation when they are not influenced by the variety of incentives to settle.[103] Under these circumstances, defendants

96. *Id.* at 6.
97. *Id.*
98. *Id.*
99. *Id.*
100. 80 Del. Laws, c. 40, § 3 (2015) (codified at DEL. CODE ANN. tit. 8, § 109(b) (Cum. Supp. 2016)).
101. Tit. 8, § 109(b).
102. *See* Griffith, *Private Ordering*, *supra* note 44, at 3.
103. *Id.* at 14.

can see clearly enough to prioritize the desire to not pay meritless settlements over the short-term incentives.[104]

In contrast to other solutions, no pay provisions have certain advantages. Unlike fee-shifting provisions, no pay provisions are more likely to be enforceable because they are different in several ways.[105] The no pay provision does not impose the risk of paying significant fees on shareholders.[106] Accordingly, the no pay provision does not punish plaintiffs, so many of the concerns with fee-shifting, like chilling shareholder litigation, are not raised.[107] No pay provisions do not face the optionality problem of forum selection provisions because corporations can make the no pay provisions binding.[108] The non-optionality will help deter litigation, since plaintiffs' attorneys will be more hesitant to sue if they know the corporation cannot automatically pay attorney's fees and expenses.[109]

However, there are also many problems with no pay provisions. First, some companies may hesitate to adopt these because "they will lose the ability in some future dispute of being able to just pay the plaintiffs' lawyers to go away."[110] Defendants may prefer to retain their ability to provide trivial supplemental disclosures to ensure the transaction goes through. Second, there is the concern that "overly extensive efforts to restrict the availability of shareholder remedies could wind up eliminating the availability of remedies for meritorious claims."[111] In some cases, non-monetary relief may be the right remedy. Third, this solution could prevent meritorious claims from being pursued, and "merger objection litigation, in its pure form, can provide a useful function in policing management to make sure the shareholders are not getting harmed in

104. *See id.*
105. *See id.* at 16.
106. *Id.*
107. *Id.*
108. *Id.* at 17.
109. *See id.* at 18.
110. LaCroix, *Litigation Reform Bylaws*, *supra* note 28.
111. Kevin LaCroix, *A "Tidal Wave of Change" in Merger Objection Litigation*, D&O DIARY (Mar. 2, 2017) [hereinafter LaCroix, *Tidal Wave of Change*], http://www.dandodiary.com/2017/03/articles/merger-litigation/tidal-wave-change-merger-objection-litigation/.

the process of a deal."[112] A blanket restriction on fees for plaintiffs' attorneys eliminates their incentive to bring even the good suits.[113]

Delaware courts must strike the appropriate balance between protecting shareholders and limiting litigation abuse, and a blanket restriction on attorney's fees in this type of suit may tip the balance too far away from protecting shareholders.[114] Thus, while no pay provisions may be a helpful tool, they are not sufficient on their own to prevent abuses.

B. *Judicial Solutions*

Judicial solutions are a very effective way to monitor these cases. Proposed solutions include courts no longer awarding plaintiffs' attorney's fees and the solution from *Trulia*.

1. Stop Awarding Attorney's Fees

The first proposed judicial solution is for courts to stop awarding plaintiffs' attorney's fees for achieving a disclosure-only settlement. Under the corporate benefit doctrine, attorney's fees are awarded when the litigation provides benefits for the shareholders.[115] Research shows the supplemental disclosures obtained in these cases do not provide the shareholders any benefits.[116] Accordingly, since shareholders are not receiving benefits, there is no reason for courts to award attorney's fees for disclosure-only settlements.[117] Without the incentive of attorney's fees, there is no reason for plaintiffs' attorneys to continue bringing these meritless suits.[118]

112. Jeffries, *supra* note 3, at 57.

113. Griffith, *Correcting Corporate Benefit*, *supra* note 13, at 30 ("The problem . . . is not that they deter shareholder litigation, but that they deter it indiscriminately . . . tak[ing] no account of the merits of the underlying claim and, considering the amplified deterrent effect on representative actions, thus will discourage good and bad cases alike from ever being brought.").

114. *See* LaCroix, *Tidal Wave of Change*, *supra* note 111.

115. *See* United Vanguard Fund, Inc. v. Takecare, Inc., 693 A.2d 1076, 1079 (Del. 1997); Sugarland Indus. v. Thomas, 420 A.2d 142, 147 (Del. 1980).

116. *See* Fisch et al., *supra* note 12, at 561.

117. *Id.*

118. *See id.* at 561–62.

While this solution logically makes sense, it is too broad to succeed. First, Delaware judges' hands are tied. While they would prefer to not award attorney's fees, if they refuse to do so they would drive merger litigation away from Delaware.[119] Delaware depends heavily on its reputation as the epicenter of corporate law, and as such, judges do not want to act against their own self-interest by forcing the cases to leave the state. Proponents of this solution argue that this can be avoided through the use of forum selection clauses;[120] however, as discussed above, the various problems with forum selection clauses prevent them from truly eliminating the problem.

A second problem with a blanket restriction on attorney's fees is that it will chill shareholder litigation. As discussed in the context of no pay provisions, plaintiffs' attorneys need incentives to bring even the good suits, and eliminating the incentives will dispose of both good and bad cases. Anything that too significantly chills shareholder litigation in this way is discouraged.[121] Given these problems, no pay provisions are not a sufficient solution.

2. *Trulia*

Trulia presented a judicial solution which proposed the courts subject these settlements to a heightened standard of review. If the disclosures that the plaintiffs have settled for are not "plainly material," the Delaware court will not approve the settlement.[122]

Trulia has several advantages over the other proposed solutions. First, *Trulia* has been a strong deterrent in Delaware for plaintiffs' attorneys.[123] After *Trulia*, the number of merger litigation suits decreased, which logically points to plaintiffs' attorneys being concerned about the heightened standard of review.[124] Second, *Trulia* avoids many of the other critical problems that other solutions cre-

119. *Id.* at 604.
120. *Id.* at 605.
121. *See generally* EXPLANATION OF PROPOSAL, *supra* note 80, at 1–4.
122. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898 (Del. Ch. 2016).
123. Cain et al., *supra* note 27, at 6 ("[O]verall 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.").
124. *See* LaCroix, *Litigation Reform Bylaws*, *supra* note 28.

ate, such as chilling shareholder litigation and limiting meritorious suits.[125] Under *Trulia*, it is still possible to obtain a disclosure-only settlement for a merger objection case, but there is a requirement that the disclosures be valuable.[126] So, while *Trulia*'s heightened settlement standard is high enough to dissuade meritless suits, it is low enough that if the suits have real value, the standard will not have a chilling effect on shareholder litigation.

However, *Trulia* is not without limitations. The primary concern after *Trulia* is that plaintiffs' attorneys will not stop bringing frivolous suits, but will instead simply file in other forums that do not have to apply *Trulia*'s heightened settlement standard.[127] Early statistics confirm that this is occurring because although there has been a significant drop in the number of merger objection lawsuits filed in Delaware,[128] there has been a rise of class actions filed in the federal courts and a rise of suits filed in other states.[129]

A second related concern is uniformity. If plaintiffs flee from Delaware and choose to file in alternate forums, *Trulia* is only effective if other courts adopt the same standard or apply Delaware law.[130]

125. *See* LaCroix, *Tidal Wave of Change*, *supra* note 111.

126. Kevin LaCroix, *Cornerstone Research: Since* Trulia, *Merger Objection Lawsuit Filings Have Plunged*, D&O DIARY (Aug. 2, 2016) [hereinafter LaCroix, *Cornerstone Research*], http://www.dandodiary.com/2016/08/articles/director-and-officer-liability/cornerstone-research-since-trulia-merger-objection-lawsuit-filings-have-plunged/ ("It is worth noting that *Trulia* did not establish that disclosure-only settlements would never survive judicial scrutiny but rather it established the features the Chancery Court will require in order for a proposed settlement to pass muster. . . . [T]here are three ways to help a Chancery Court M&A lawsuit settlement survive *Trulia*. The first is ensuring that the disclosures required by the settlement are meaningful and substantive."). In fact, after *Trulia*, the Delaware Court of Chancery has approved several settlements. Anthony Rickey, *Approved Disclosure Settlements Post-*Trulia, MARGRAVE LAW LLC (Aug. 16, 2016), https://margravelaw.com/2016/08/approved-disclosure-settlements-post-trulia/ (listing cases in which the ruling court has approved disclosure settlements post-*Trulia*, including the Delaware Court of Chancery).

127. LaCroix, *Cornerstone Research*, *supra* note 126.

128. *Id.*

129. LaCroix, *2016 Securities Lawsuit Filings*, *supra* note 27 ("There were a total of 270 federal court securities class action lawsuits filed in 2016, which represents a whopping 43% increase over the number of filings in 2015, when there were only 189 federal court securities suit [sic] filed."). In other states, filings have increased from 51% in 2015 to 65% in 2016. Cain et al., *supra* note 27, at 22–23.

130. Chancellor Bouchard acknowledged this reality in *Trulia*, when he stated, "Finally, some have expressed concern that enhanced judicial scrutiny of disclosure settlements could lead plaintiffs to sue fiduciaries of Delaware corporations in other jurisdictions in the hope of finding a forum more hospitable to signing off on settlements of no genuine value. . . . We hope and trust that our sister courts will reach the same conclusion if confronted with the issue." *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 899 (2016).

Delaware law is frequently the correct choice of law in these cases, even when the suit is filed outside of Delaware. In alternate forums, "Delaware law applies to matters of substance, and the law of the forum applies to matter of procedure."[131] The rules governing settlement approval are procedural, and in every jurisdiction, the court must determine if the settlement is "fair, reasonable, and adequate."[132] Courts consider several factors to determine this, including the value of the disclosures.[133] Determining the value of disclosures is a substantive question, so Delaware law controls.[134] After *Trulia*, the standard for determining the value of the disclosures is whether they are "plainly material."[135]

While the *Trulia* standard is controlling when applying Delaware law, more times than not the judge in the alternate forum has not even heard of the case since neither party at the settlement hearing would have any incentive to bring *Trulia* to the judge's attention.[136] Although *Trulia* technically controls, lack of knowledge prevents the judge from applying this standard. Thus, uniformity is a true challenge to the effectiveness of *Trulia*. This is made clear by looking at the many post-*Trulia* disclosure-only settlements involving Delaware corporations where *Trulia* was not raised.[137]

C. *Other Solutions*

The final proposed solution is shifting disclosure policing to federal court with the federal securities laws. Under this regime, public company merger disclosures would be policed by federal securities laws, and state laws would focus on the substantive fairness of mergers.[138] The advantage to this solution is that litigation under federal securities laws focuses specifically on deficiencies in disclosures, whereas in state court merger litigation, claims are first based on merger process and fair merger prices.[139] When plaintiffs

131. Griffith, *Private Ordering*, *supra* note 44, at 6.
132. *Id.*
133. *Id.* at 6–7.
134. *Id.* at 7.
135. *Id.*
136. *Id.*
137. *Id.* at 7–8 (discussing eight disclosure settlements, in four of which *Trulia* was never raised).
138. Fisch et al., *supra* note 12, at 602.
139. *Id.* at 591–92.

cannot succeed on these counts, they then change the focus to supplemental disclosures to ensure they receive attorney's fees.[140]

Another advantage to shifting disclosure policing to federal court is the depth and manner in which federal courts analyze the disclosures. In federal court, misstatements and omissions from disclosure documents are actionable only if material.[141] Federal judges have developed a significant body of law concerning materiality, and the issue will be fully briefed and argued by both parties.[142] State courts have also adopted a materiality standard, but the standard is applied in a non-adversarial way in Delaware.[143] Thus, in contrast to federal courts, the issue is not fully briefed and argued, so state court judges have less information when making their decisions. In addition, Delaware courts decide cases "on an expedited basis" because the parties want to quickly remove the case as an obstacle to the transaction.[144] In contrast, cases in federal court are typically litigated after the transaction closes.[145] Accordingly, the rush to dispose of the cases before the transaction closes is not a factor in federal courts, allowing them to review the issues in more depth.[146]

Finally, proponents argue federal litigation is superior because the Private Securities Litigation Reform Act ("PSLRA") addresses the potential for frivolous litigation by attempting to balance the scope of required disclosures and the extent to which violations of regulatory requirements are allowed to be challenged through litigation.[147] In light of all these benefits of the federal system, the federal solution proposes disclosure claims move to the federal level.[148]

However, the federal solution presents significant obstacles to enforceability. First, the federal solution has faced backlash from Delaware judges, who take issue with eliminating Delaware's role

140. *Id.* at 591.

141. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976) (quoting Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 385 (1970)).

142. Fisch et al., *supra* note 12, at 596.

143. *Id.* at 598–99.

144. *Id.*

145. *Id.* at 599.

146. *Id.*

147. *Id.* at 597–98.

148. *Id.* at 602.

in these suits.[149] Delaware courts will not give up their dominance in corporate law since the state depends financially on their reputation as a corporate law hub.[150] In addition to concerns with eliminating Delaware's role, Delaware judges have pointed out that this approach "would eliminate disclosure-only settlements, not just disclosure-only fee awards."[151]

Opponents also point out that "federalization is a recurring academic response to the perceived shortcomings of the extant state-based corporate law system. . . . [b]ut in the real world, the call for federalization often rests on debatable premises."[152] Especially here, the problem would not be fixed in the real world, since the settlements would simply be relocated to federal court and not be eliminated.[153] In federal court, the settlements would be subject to the PSLRA, which has substantive and procedural reforms that are designed to discourage meritless challenges, such as heightened pleading standards.[154] While proponents believe this will solve the problems, many others say that the PSLRA "has done little to remedy several key problems."[155] Furthermore, this ignores the fact that there is rarely opposition from corporate defendants in these cases, because defendants like disclosure-only settlements.[156] Thus, instead of solving the problem, the federal solution merely relocates it "while harming [Delaware] corporate law in the process."[157]

Final concerns include that, while proponents of the federal solution tout the federal regulatory system's advancement and robust body of law, in other work, one of the same authors has argued for a renewed federal oversight of takeover litigation premised on the belief that federal regulators have failed to provide appropriate

149. *See* J. Travis Laster, *A Milder Prescription for the Peppercorn Settlement Problem in Merger Litigation*, 93 TEX. L. REV. 129, 130 (2015) (outlining one vice chancellor of the Delaware Court of Chancery's response and objections to the federal solution).

150. *See* Stevelman, *supra* note 40, at 57, 67.

151. Laster, *supra* note 149, at 129–30.

152. *Id.* at 131.

153. *Id.* at 132.

154. Fisch et al., *supra* note 12, at 597.

155. Catherine Fredenburgh, *10 Years Later, Experts Call for PSLRA Reform*, LAW360 (Feb. 21, 2006, 12:00 AM), https://www.law360.com/securities/articles/5382/10-years-later-experts-call-for-pslra-reform.

156. Laster, *supra* note 149, at 145.

157. *Id.* at 132.

national oversight.[158] Additionally, there is concern that federal takeover-disclosure law would be influenced by political factors, which are not present at the state level, as Delaware's economic incentives encourage state lawmakers to retain a fair balance between protecting both managers and shareholders.[159]

III. *TRULIA* CANNOT SOLVE THE PROBLEM ALONE BUT *TRULIA* "PLUS" WILL

In the same way that the alternative solutions discussed above have problems, so too does *Trulia*. Yet unlike the other solutions, *Trulia* fits well into the existing framework, and there is a reasonable solution for the problems. By addressing and solving *Trulia*'s problems, an effective solution can be created to stop the problems presented by disclosure-only merger objection lawsuits. Thus, this part argues that *Trulia* "plus" an extra legislative step is the best solution to this problem, where the extra legislative step is an amendment to DGCL section 115 making exclusive forum provisions non-optional.

A. *Proposed Two-Part Solution*

1. Retain *Trulia*

While *Trulia* faces problems on a nationwide scale, *Trulia* has proven effective in Delaware. After *Trulia*, the volume of merger litigation in Delaware has decreased, the number of cases dismissed has increased, and the amount of attorney's fees awarded has decreased.[160] In 2013, 96% of all merger objection lawsuits attracted at least one lawsuit.[161] By contrast, in 2016 only 73% of all transactions attracted at least one lawsuit.[162] In Delaware, the number of challenged deals dropped from 61% in 2015 to 32% in

158. *Id.*
159. *Id.* at 132–33.
160. *See* LaCroix, *2016 Securities Lawsuit Filings*, *supra* note 27; Cain et al., *supra* note 27, at 6–7.
161. Cain et al., *supra* note 27, at 22–23.
162. *Id.* at 6.

2016.[163] Also in 2016, 22% of settlements were rejected or dismissed, in comparison to a 0% rate prior to 2014.[164] Finally, the median in awarded attorney's fees dropped from $575,000 in 2009 to $320,000 during 2016.[165] These statistics show that the heightened standard in Delaware is enough of a deterrent for plaintiffs' attorneys that they are less willing to try their chances, that judges are less willing to bless these settlements, and that judges award lower attorney's fees.

2. Enhance *Trulia* with a Legislative Amendment

In addition to retaining *Trulia*, the Delaware legislature should amend DGCL section 115 to bolster *Trulia*. The statute should specify that forum selection provisions cannot be waived when litigation is already pending or inevitable—defendants should not be able to game the system by waiving the provision when it works for them. Amended section 115 should read:

> The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. [*Such provision in the certificate of incorporation or bylaws will not be later waivable by the corporation at a time when there is a threat of litigation pending or litigating pending*.] "Internal corporate claims" means claims, including claims in the right to the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.[166]

This amendment would reduce a corporation's ability to waive the forum selection clause when faced with the threat of litigation, and would force it to bring the suit to Delaware, where any potential settlement will face *Trulia*'s heightened scrutiny.

163. *Id.* at 6, 22.
164. *Id.* at 24.
165. *Id.* at 27.
166. *See* DEL. CODE ANN. tit. 8, § 115 (Cum. Supp. 2016) (proposed amendment indicated by italicized text).

B. *Why This Two-Step Solution Would Curb the Abuse*

Trulia's primary challenges are keeping the merger objection suits in Delaware and/or ensuring uniformity. If Delaware can keep the suits within the state, uniformity among other courts is a less pressing concern. If states across the nation adopt a uniform approach, it is less concerning that the suits may not be filed in Delaware since plaintiffs' attorneys will face the same deterrent everywhere. Given that the challenges are inherently connected, solving one would make the other a non-issue. Between confronting uniformity or attempting to keep the suits in Delaware, keeping the suits in Delaware is the challenge to solve for several reasons.

1. Advantages of Keeping Merger Objection Suits in Delaware

The first reason merger objection suits ending in disclosure-only settlements should stay in Delaware is because Delaware judges are uniquely qualified to attack these settlements. The Delaware Court of Chancery is entirely focused on corporate law, and a substantial number of the cases the court hears concern mergers.[167] The focused jurisdiction allows Delaware judges to develop significant expertise in corporate matters.[168] Most corporations choose to incorporate in Delaware,[169] largely so their disputes will be heard in the Court of Chancery and so Delaware law will apply.[170] Accordingly, funneling suits back to Delaware is advantageous for both the corporations, who have their disputes heard in the Court of Chancery, and for the market, because Delaware will apply a heightened standard to deter meritless proceedings.

Another reason to keep the suits in Delaware is because Delaware has a strong interest in solving this problem, so Delaware

167. Laster, *supra* 149, at 134.

168. *Litigation in the Delaware Court of Chancery and the Delaware Supreme Court*, DELAWARE.GOV, http://corplaw.delaware.gov/delaware-court-chancery-supreme-court (last visited Nov. 15, 2017).

169. More than half of publicly traded companies are incorporated in Delaware, and two-thirds of Fortune 500 companies are incorporated in Delaware. Semuels, *supra* note 23.

170. *See* Paul Sponaugle, *The Court of Chancery: Part of the Delaware Advantage*, HARV. BUS. SERVS., INC.: THE HBS BLOG (Nov. 8, 2016), https://www.delawareinc.com/blog/the-court-of-chancery-part-of-the-delaware-advantage/ (discussing how the Delaware Court of Chancery is widely regarded as one of the best forums for settling corporate disputes).

courts will give these cases significant attention. Delaware is very financially dependent on their reputation as the preeminent state for corporate law, as the "franchise taxes and filing fees paid annually by Delaware-incorporated entities make up a sizeable percentage of the state's annual tax revenue. . . . [A] drop in franchise fees from existing or new charters could impair the state's budget, i.e., the funding of essential services including construction, education, and health care."[171] Other states, which may be bigger and may not depend on corporations to finance their education systems, do not have the same motivation to put energy into this problem.

Considering the way these settlements appear before judges, it is important that the reviewing judge has sufficient incentives to really consider the settlement. A judge's task in reviewing and approving these settlements is complicated in three ways.[172] First, the settlement process is usually non-adversarial, so the parties have no incentives to show the judge anything negative about the settlement.[173] Second, the process is quick and occurs before extensive discovery has taken place, so the factual record presented to the court at the settlement hearing is limited.[174] Third, because the merger weighing in the balance is likely beneficial to the shareholders, judges hesitate to place obstacles in the transaction's path.[175] Given these problems, it is important that judges have sufficient incentives to give the settlements the full review they are due, and the Delaware judges do have these incentives.

Finally, it is preferable for suits to stay in Delaware because Delaware law is predictable. Courts in other states may not be willing to follow *Trulia* or may simply not know about *Trulia*. After *Trulia*, at least one non-Delaware court has declined to follow it,[176] and several cases have been settled where *Trulia* was not brought to the court's attention.[177] In contrast, other non-Delaware courts

171. Stevelman, *supra* note 40, at 67.

172. Fisch et al., *supra* note 12, at 569.

173. *Id.*

174. *Id.*

175. *Id.*

176. For example, in *Gordon v. Verizon Communications*, the New York Supreme Court, Appellate Division, declined to follow *Trulia*, choosing instead to apply its own test which considered whether the proposed settlement was in the shareholder's, the class's, and the corporation's best interest. Gordon v. Verizon Commc'ns, Inc., 46 N.Y.S.3d 557, 568 (N.Y. App. Div. 2017).

177. *See* Rickey, *supra* note 126.

have explicitly adopted *Trulia*'s standard.[178] These alternative viewpoints show that if suits are filed in a variety of different jurisdictions, it will be challenging to predict how the law will be applied in different situations.

2. How to Keep Suits in Delaware

If the goal is keeping the suits in Delaware, the question becomes how to do so. In *Trulia*, Chancellor Bouchard touted forum selection clauses as the natural counterpart to *Trulia*'s heightened standard of review.[179] Forum selection clauses have also been proposed by academics as a valuable way to keep suits in Delaware.[180] In addition to receiving judicial and scholarly approval, as of 2014, 746 public companies in the United States had adopted forum selection clauses.[181] However, while forum selection clauses are advanced as a solution to *Trulia*'s problems and are widely adopted, the problems associated with forum selection clauses discussed above are still present.

Forum selection clauses seem like the natural second step to bolster *Trulia*, but they need to become more effective. The main problem is that defendants can waive forum selection provisions when they do not work to their advantage.[182] Accordingly, a simple solution is to remove the optionality from exclusive forum provisions through an amendment to DGCL section 115.[183] Before corporations are subjected to litigation, they can commit to bringing future suits back to Delaware.[184] Corporations have shown they are willing to adopt forum selection clauses, since so many have done so since the initial passage of DGCL section 115. Forcing corporations to actually use these forum selection clauses essentially forces them to remember why they adopted the clause in the first place, eliminates the temptation that arises the instant litigation is filed,

178. For example, in *In re Walgreen Co. Stockholder Litigation*, the United States Court of Appeals for the Seventh Circuit explicitly adopted *Trulia*, recognizing that because Delaware has much more experience with this type of case, they should heed Delaware's advice. *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 725 (7th Cir. 2016).

179. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 899 (Del. Ch. 2016).

180. Fisch et al., *supra* note 12, at 605.

181. Cain et al., *supra* note 27, at 15.

182. *See* LaCroix, *Litigation Reform Bylaws*, *supra* note 28.

183. *See* Griffith, *Private Ordering*, *supra* note 44, at 14.

184. *Id.*

and forces corporations to choose the long-term benefit over the short-term incentives.

3. How This Ultimately Helps Curb Abuse

Once the suits are exclusively filed and/or heard in Delaware, Delaware courts will apply the *Trulia* standard when reviewing these settlements. As discussed above, plaintiffs' attorneys have been hesitant to bring these suits to Delaware after *Trulia*.[185] Presumably, if plaintiffs' attorneys knew any suit they filed would be removed to Delaware, eventually they would stop bringing meritless suits. If corporations continue to adopt forum selection bylaws, plaintiffs' ability to avoid *Trulia* will be limited further, as their merger venue choices will be limited to Delaware and federal court.[186] Thus, the *Trulia* standard "plus" a legislative amendment to DGCL section 115 that eliminates the optionality from exclusive forum provisions will solve the problem presented by disclosure-only settlements for merger objection lawsuits.

C. *Counterarguments*

1. Not All Suits Belong in Delaware

In some situations, it does not make sense for a suit to be filed in Delaware, and opponents may argue that overly broad forum selection provisions do not account for such situations. However, the primary situation where these cases should be filed and/or heard elsewhere is when the state merger claim is appended to a federal securities law.[187] In that situation, it makes sense for the case to stay in federal court—thus reducing the costs and inefficiencies that would result from two similar cases being litigated separately. Forum selection provisions will not bring these appended cases back to Delaware while leaving the other case in federal court, because judges will rarely decline jurisdiction over these cases, as discussed above.[188] Alternatively, defendant corporations could draft the forum selection provisions narrowly to account for this situation.

185. *See supra* Part II.B.2.
186. *See* Cain et al., *supra* note 27, at 33.
187. *See supra* Part II.C.
188. *See supra* Part II.A.1.

2. Forum Selection Provisions Violate Directors' Fiduciary Duties

A second argument against non-optional forum selection provisions is that directors need a "'fiduciary out,' which creates the flexibility necessary to preserve directors' obligations to fulfill their fiduciary duties to shareholders if it is in the best interests of the shareholders and the corporation that the litigation proceed outside of Delaware."[189] The forum selection provision needs to be drafted in a way that directors may waive the forum selection provision if not doing so would violate the director's fiduciary duties.[190] Delaware law is clear that a board of directors cannot be bound in a way that violates the fiduciary duties the board owes to the shareholders.[191] However, it is unlikely that a non-optional forum selection provision would violate the fiduciary duties of a board of directors. These settlements typically result in defendant corporations paying significant attorney's fees to dismiss meritless suits. Paying significant amounts of money for nothing—essentially wasting money—is certainly not in the best interests of the shareholders. Thus, if adopting a non-optional forum selection bylaw could prevent wasting money by subjecting the suits to the heightened scrutiny in Delaware, then it would actually be in the best interests of the shareholders. Accordingly, the board would fulfill its fiduciary duties by keeping these suits in Delaware.

3. Other States' Reaction to Delaware's Power Grab

A final concern is how other states will react to Delaware's mandate of non-exclusive forum selection bylaws. Delaware, by insisting that all these suits be litigated in Delaware court, is asserting dominance over corporate law, and it is possible that states will decline to accept Delaware's authority. For instance, in *Galaviz v. Berg*, the United States District Court for the Northern District of California declined to enforce Oracle Corporation's forum selection bylaw.[192] However, this case was decided years ago, and several courts have recently deferred to Delaware's expertise in corporate matters. For example, in *In re Walgreen Co. Stockholder Litigation*,

189. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 383 (2012).

190. *Id.*

191. *Id.*

192. 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011).

Judge Posner recognized that "Delaware's Court of Chancery sees many more cases involving large transactions by public companies than the federal courts of our circuit do, and so we should heed the recent retraction by a judge of that court . . . ."[193] Other courts have made similar statements in the wake of *Trulia*, such as, "The North Carolina Business Court has historically been guided in its consideration of motions to approve, and award attorneys' fees in connection with, 'disclosure-based' settlements of merger-based class action litigation by the body of persuasive case law developed by the Delaware courts over a period of many years."[194] While this is certainly an assertion of power by Delaware, it is necessary given Delaware's preeminence in corporate law, and it is likely that other courts will recognize this as such.

CONCLUSION

In the wake of *Trulia*, it is clear that, despite the success *Trulia* has had in Delaware, more needs to be done. While there are a variety of approaches proposed, each on its own presents significant problems, indicating a need to combine approaches in order to solve this problem. After analyzing each approach, it is clear that *Trulia* is the best solution, although *Trulia* too comes with its own problems. The main challenges *Trulia* faces in its effectiveness are (i) keeping the suits in Delaware, or (ii) if the suits leave Delaware, creating a uniform, nation-wide approach where all judges approach these settlements with a heightened standard of review. Since these problems are intertwined, solving one can solve the other, and it is more desirable to keep the suits in Delaware. Thus, the next step forward in the battle against meritless merger objection suits ending in disclosure-only settlements is to find a way to keep the suits in Delaware.

Delaware should amend DGCL section 115 to prohibit corporations from waiving their forum selection clauses. In doing so, the Delaware legislature will fix many of the problems associated with forum selection clauses, which in turn fixes the main problem with the *Trulia* solution. If these problems are fixed, *Trulia* can become even more effective than it has already been in Delaware, and this

193. 832 F.3d 718, 725 (7th Cir. 2016).

194. *In re* Newbridge Bancorp S'holder Litig., No. 15CVS9251, 2016 LEXIS 6885882, at *2 (N.C. Sup. Ct. Nov. 22, 2016).

epidemic will be curtailed. Plaintiffs will be left with only a choice between filing in Delaware or filing in federal court—neither of which will be attractive options. Eventually, as settlements become harder to win and no longer produce easy money, plaintiffs' attorneys will stop filing them and can move on to other issues, hopefully ones with more merit.

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