FROM *TRULIA* TO *AKORN*: A RIDE ON THE ROLLER COASTER OF M&A LITIGATION

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ABSTRACT

In recent years, M&A litigation has experienced a dramatic increase, culminating with a peak in 2015, when over 96% of publicly announced mergers were challenged in a shareholder lawsuit. A large number of these lawsuits were frivolous and vexatious, since most claims were filed by plaintiffs' attorneys just to extract some fees with little effort. Some abusive practices emerged, signalling an alarming exploitation of the system. One scheme that plaintiffs' attorneys put in place was the disclosure-only settlement. There, the stockholders obtained some modest supplemental disclosures, the plaintiff's attorneys got significant fee awards from the defendant directors and the defendant directors secured some blanket class releases from future claims. The scheme relied upon courts' routine practice of approving any settlement, even when there is no benefit for the corporation or its stockholders. A correction became critical. At the beginning of 2016, the Delaware Court of Chancery with In re Trulia marked a doctrinal shift in the standard of judicial review for disclosure-only settlements, by requiring that supplemental disclosures deliver a "plainly material benefit" to stockholders and that any releases from liability be "narrowly circumscribed." But the approach in Trulia is not without some limitations. While federal courts have soon followed Trulia with In Re Walgreen, other states have been slow and sometimes reluctant to do so.

Even if Trulia succeeds in restricting disclosure-only settlements, another tactic has arisen to replace it: the mootness dismissal – that is a voluntary dismissal coupled with the payment of mootness fees to plaintiffs' attorneys by the defendant. Data on merger litigation show that, like on a roller coaster, after a decline post Trulia, the number of litigated

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deals rose again in 2017. Notably, 87% of these claims were brought in a federal court and only 10% in Delaware. This trend is becoming more pronounced. A few of these lawsuits were settled; most cases were voluntarily dismissed, and plaintiffs' attorneys received a mootness fee. Clearly, plaintiffs' attorneys developed an adaptive response to the Trulia standard and devised the new scheme to replace the old stratagem. Unlike in the disclosure-only settlement cases, the mootness dismissal is without prejudice for the class since the defendant obtains no release from future claims. Mootness fees are also on average much lower than the attorneys' fees granted in a typical disclosure-only settlement. But, apart from that, the scheme is not less detrimental to corporations and stockholders. What is more, the Federal Rules of Civil Procedure do not explicitly allow a court to review mootness fees. Hence, in federal courts the new scheme can bypass any judicial scrutiny. This results in an additional opacity in the practice and explains the migration of cases to federal courts.

In June 2019, in House v. Akorn, a U.S. District Court in Illinois invoked its equitable powers and scrutinized the mootness fees. The judge extended the Trulia-Walgreen standard and, accordingly, ordered the plaintiffs' attorney to return the fees to the corporation. An appeal is pending before the 7th Circuit, and a landmark decision could be in the offing. We predict that the appellate court will affirm the district court's decision. Yet, the affirmation may not be enough to halt overlitigation. On the face of it, it would discourage plaintiffs' attorneys from starting a lawsuit just to extract mootness fees. But plaintiffs' attorney could continue in mootness fee practice, exploiting the lack of transparency. In fact, courts could apply Akorn only if they become aware of the mootness fee. Plaintiffs' attorneys could also revert to the scheme of disclosure-only settlements and file claims in those jurisdictions that have a more tolerant standard for these agreements.

Trulia, Walgreen and Akorn (as well as other decisions) prove that the courts are reacting and correcting the abuse of litigation. Nevertheless, these decisions need to be confirmed, implemented and complemented. A failure by Trulia and Akorn to adequately address the issues could call into question the regulation-by-litigation model adopted by U.S. corporate law. The challenge cannot be underestimated, since some commentators are already advocating for a radical shift to a pure regulatory approach, such as the Anglo-Irish code and panel-based model.

Overlitigation, with its significant costs and non-existent benefits for corporations and shareholders, is the manifestation of the crisis of a litigation system which has devolved into a non-adversarial process. We argue that such devolution is the outcome of the delayed and ineffective *management – by legislatures and courts – of some conflicts of interest and of some incentives to collude in the process. But we also contend that the courts are currently addressing those conflicts, collusions and procedural gaps. The roller coaster of M&A litigation is likely to continue but, hopefully, it will be a gentler ride.*

I. INTRODUCTION

U.S. corporate law adopts a regulation-by-litigation model and, in mergers, takeovers and other control transactions, relies heavily upon private lawsuits to police both potential conflicts and disclosures. No regulatory body oversees the transaction process and its completion. Rather, courts will "regulate" deals by deciding the cases brought before them. In this respect, shareholders can enforce disclosure violations under federal law or claim breach of directors' fiduciary duties under the state of incorporation law—mostly Delaware. Actually, through the enforcement of shareholders' rights Delaware law (which all other states follow) also provides for judicial scrutiny of the sufficiency of the information produced by the directors in connection with M&A transactions. This cause of action is a corollary to shareholders' statutory right to vote on the transaction and of the resulting duty of directors to disclose all material information—since effectively the failure to disclose material information may affect shareholders' right to an informed decision. Therefore, while federal courts oversee that the disclosures produced for the merger comply with federal securities law, state courts serve both the principal "regulatory" functions of policing conflicts of interest in the transaction process and ensuring the adequacy of corporate disclosures.[1] This jurisdictional overlap means that shareholders can choose which forum to bring their case.

Two further observations might complete the brief illustration of the scenario. Shareholders often bring their cases on a class basis, with one or a few shareholders representing the class—and often do so in multiple jurisdictions.[2] In addition, in control transactions the business judgment rule[3] does not shield directors' conduct, and the review standard is that of

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[1] *See* Dan Awrey, Blanaid Clarke & Sean J. Griffith, *Resolving the Crisis in U.S. Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine*, 35 YALE J. ON REG. 1, 10 (2018).

[2] *Id.*

[3] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) *overruled by* Brehm v. Eisner, 746 A.2d 244 (2000) (defining the business judgment rule as the well-known "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company") (quoting Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. 1971)); *see* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (Thus, the business decision will be 'insulated' and protected from any judicial second-guessing, as long as the board was not conflicted and, of course, unless the plaintiff proves the absence of *any rational business purpose.*); *see also* Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982); *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66, 74 (Del. 2006). There is a vast amount of literature discussing the rule. *See also* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1289 (2001); Douglas M.

"enhanced scrutiny" (under *Unocal* and *Revlon*[4]) or "entire fairness" if the board is conflicted.[5] In these circumstances, it is not difficult for shareholders to commence litigation that survives any motion to dismiss in an early stage. In state courts, cases usually begin by challenging the merger process under *Revlon,* and, once the provisional proxy statement is released, complaints are amended to include disclosure allegations.[6]

In this model, the plaintiffs' attorneys play a pivotal role, since they are strongly incentivized to start and run the litigation. Lawyers are the driving force of the mechanism: they search for opportunities to litigate and decide where and how to bring the claim. They think entrepreneurially and act like bounty hunters. By contrast, shareholders are merely the ticket of admission to the litigation. This suggests that the plaintiffs' attorneys will look to extract rent from corporations, search for procedural gaps to exploit, and put in place adaptive responses to any countermeasures adopted by legislatures and courts.

Therefore, the efficient balance between incentives and filters is essential for litigation to perform its function. Conversely, overlitigation is not only a detrimental distortion but also a critical indication that the regulating mechanism is not working efficiently, and that some corrective actions are required.

In recent years (at least since 2009), M&A litigation has experienced a dramatic increase[7] with challenges to 95% of deals valued

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Branson, *The Rule That Isn't a Rule - The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 632 (2002); Lynn A. Stout, *In Praise of Procedure: An Economic and Behavioral Defense of Smith v. Van Gorkom and the Business Judgment Rule*, 96 NW. U. L. REV. 675, 675 (2002); Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 398, 401, 403, 405, 432-36, 445-50, 464-65 (2007); Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. KAN. L. REV. 923, 935-37, 947-49, 955-57 (2013); Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 411, 424 (2013).

[4]*See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955-58 (Del. 1985) (discussing takeover defenses); *see also* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986) (examining merger transactions).

[5]*See* Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983); *see also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 350-51 (Del. 1993) *modified,* 636 A.2d 956 (1994); Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1168 (Del. 1995); *see generally* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (containing extensive illustration of the standard), *overruled by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

[6]*See* Emma Weiss, *In Re Trulia: Revisited and Revitalized*, 52 U. RICH. L. REV. 529, 529 (2018).

[7]*See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 894 (Del. Ch. 2016) (noting that increase in M&A litigation has gone "beyond the realm of reason") (citing *In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1135-43 (Del. Ch. 2011)).

at more than $100 million in 2014.[8] It reached a peak in 2015, when over 96% of publicly announced mergers were challenged in shareholder litigation.[9] Delaware courts attracted a substantial proportion of these lawsuits.[10]

It is implausible to think that so many large public company merger deals involve wrongdoing. One commonality confirms the vexatious nature of such litigation: a large part of the cases followed the same opportunistic pattern. Shortly after the filing of case, the claims used to be quickly settled on non-monetary terms, providing for some supplemental disclosure of little or no value to shareholders, some significant fee awards to the plaintiff's attorneys and some broad class release from future claims to defendant directors.[11]

Consequently, a correction was expected. It came with *In re Trulia*, which made the standard of judicial review for disclosure-based settlements much stricter, by requiring that supplemental disclosures deliver a "plainly material" benefit to stockholders and that any releases from liability be "narrowly circumscribed."[12]

Despite the fact that some limitation of the standard emerged quite soon, the initial effect of *Trulia* was that merger litigation rates began to decline, decreasing to 76% of the relevant transactions in 2016.[13] However, *Trulia* failed to end overlitigation and prompted an adaptive response by plaintiffs' attorneys.[14] Like on a roller coaster, in 2017 the number of litigated deals rose significantly, up to 83% of mergers, of which only 87%

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[8]*See In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 894 (noting "[i]n just the past decade, the percentage of transactions of $100 million or more that have triggered stockholder litigation in [Delaware] has more than doubled, from 39.3% in 2005 to a peak of 94.9% in 2014."). The trend has also been documented by many commentators. *See* Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 604 (2018) [hereinafter Cain et al., *The Shifting Tides*]; *see also* Weiss, *supra* note 6, at 529; *see also* Anthony Rickey & Keola R. Whittaker, *Will Trulia Drive "Merger Tax" Suits Out of Delaware?*, 31 WASH. LEGAL FOUND. 1, 1 (Apr. 29, 2016), https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/legalbackgrounder/042916LB_Rickey.pdf; *see generally* Adam Badawi, *Fighting Frivolous Litigation in a Multijurisdictional World*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 110 (Sean Griffith et al. eds., 2018); James D. Cox, *Addressing the "Baseless" Shareholder Suit: Mechanisms and Consequences*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 121 (Sean Griffith et al. eds., 2018).

[9]*See* Cain et al., *The Shifting Tides*, *supra* note 8, at 620.

[10]*Id.* at 621 (showing that in 2015, 60% of all deals were challenged by a lawsuit filed in the Delaware Court of Chancery).

[11]*See* Weiss, *supra* note 6, at 529.

[12]*In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 898-99.

[13]*See* Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon, Randall S. Thomas, *Mootness Fees*, 72 VAND. L. REV. 1777, 1780 (2019) [hereinafter Cain et al., *Mootness Fees*].

[14]*Id.*

were challenged in a federal court and only 10% in Delaware.[15] The shift away from Delaware courts has become even more marked in 2018, when merely 5% of claims against a relevant merger were brought in a Delaware court, whilst 92% were litigated in a federal court.[16] While a few of these lawsuits were settled, a large number of cases were voluntarily dismissed, and plaintiffs' attorneys received a mootness fee.[17] Clearly, this latest increase in M&A litigation is associated with a mutation of its pattern and the rise of a new scheme: the mootness dismissal, devised by plaintiff's attorneys as an adaptive response to *Trulia* – using the aforementioned jurisdictional overlap between federal and state courts.

In Part II, we illustrate the context of *Trulia* and the new standard set by the decision for disclosure-based settlements, along with its rationale and inherent limitations. We contend that, in a sense, the judge in *Trulia* gambled on the inclination of sister courts to adopt the new doctrine: the ultimate result is out of Delaware's hands. The gamble was made in the face of declining odds. Since Delaware's dominance in corporate law and the deference of other courts to Delaware's authority have been slowly declining, *prima facie Trulia*'s success cannot be taken for granted. A federal court in *Walgreen* has promptly adopted the *Trulia* standard[18]; but we document the more len ient approach of some state courts and the open resistance of others. The now-prohibited fee-shifting bylaws and the forum selection bylaws which aim to constrain the litigation in Delaware are also taken into consideration in exploring the underlying policy and the future prospects.

In Part III, we set forth the swift rise of the mootness dismissal scheme. We illustrate how plaintiffs' attorneys responded to *Trulia*, by repackaging state-law fiduciary-duty claims into federal suits for disclosure violations, migrating the claims to federal courts and replacing the disclosure-only settlements with the new scheme. In Delaware, the standard of judicial review for mootness fees set in *Trulia* and in *Xoom* is significantly less demanding than the one applicable for disclosure-only settlements (and associated fees).[19] Other courts, such as federal courts, do not review mootness fees, and some do not even require the parties to disclose those fees.[20] All this results in a lack of transparency and makes

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[15]*Id.* at 1780-81.
[16]*Id.*
[17]*See* Cain et al., *Mootness Fees*, *supra* note 13, at 1781.
[18]*In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 725 (7th Cir. 2016).
[19]*See* Cain et al., *Mootness Fees*, *supra* note 13, at 1801-02.
[20]*Id*. at 1802-03.

the new practice highly desirable for those plaintiff's attorneys who aim to extract some fees with little effort—in particular, if compared to the disclosure-only settlements, now scrutinized under the materiality standard.

Mootness dismissal does not secure any release from future claims for defendant directors. Mootness fees are on average much lower than the fees typically obtained by plaintiffs' attorneys in the context of disclosure-only settlements.[21] Even so, we argue that the new practice of the mootness dismissals is no less detrimental for corporations and shareholders than the old practice of disclosure-only settlements.

We then report and discuss the opinion issued on June 24, 2019 by a U.S. District Court of Illinois in the case *House v. Akorn*.[22] There, the court invoked its equitable powers, scrutinized the mootness fees, and extended the *Walgreen* standard to these cases.[23] Accordingly, the judge ordered the plaintiffs' attorney to return the fees to the corporation.

The same approach was adopted few weeks later in *Scott v. DST Systems*, by the U.S. District Court for the District of Delaware[24]. Although the appeal of the *Akorn* case is currently pending before the 7th Circuit[25], both decisions are a strong signal.[26] After a brief illustration of the appellants' arguments, we argue that the district court's decision has solid legal grounds, is reasonable as a matter of policy, and, as such, the appellate court should affirm it.

Yet, as we argue in Part IV, the confirmation of *Akorn* may not be enough to prevent overlitigation. It would discourage plaintiffs' attorneys from starting meritless lawsuits to the extent that the parties are required either to give notice of the agreement on mootness fees to other shareholders, or to seek the court's approval for those fees when the lawsuit is voluntarily dismissed prior to class certification. Without that, a court could apply *Akorn* only if it becomes aware of the mootness fee – for instance, in the event of an objection.

Putting this difficulty to one side, the federal courts appear to have appropriate safeguards, as some recent decisions demonstrate (*Assad v.*

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[21] *See infra* note 101 and accompanying text.

[22] House v. Akorn, Inc., 385 F. Supp. 3d 616 (N.D. Ill. 2019).

[23] *Id*. at 618.

[24] *Scott v. DST Systems, Inc.*, Civ. A. No. 00286-RGA and 00322-RGA, 2019 WL 3997097, at *5-6 (D. Del. Aug. 23, 2019).

[25] *Shaun A. House v. Akorn, Inc. et al. and Demetrios Pullos v. Akorn, Inc. et al.,* Appellate Court nos. 18-3307, 19-2401, 19-2408 consolidated (U.S. Court of Appeal for the 7th Circuit).

[26] House v. Akorn, Inc., 385 F. Supp. 3d 623, 616 (N.D. Ill. 2019); *Scott v. DST Systems, Inc.*, Civ. A. No. 00286-RGA and 00322-RGA, 2019 WL 3997097, at *5-6 (D. Del. Aug. 23, 2019).

DigitalGlobe and Bushansky v. Remy).[27] In these cases, the courts blocked a new gambit devised by plaintiffs' attorneys: claims to enforce a supposed duty of defendant directors to reconcile non-GAAP financial measures with GAAP financial measures in the disclosure document released in connection with a merger.[28]

However, one issue persists in Delaware. Since the *Trulia* and *Xoom* standard for mootness fees, albeit not a total pass, is not strict enough, mootness dismissal would still be a possible option in Delaware courts. Some commentators argued that such standard is both low and judicially unmanageable. We argue that this standard is also unworkable in terms of policy, because plaintiffs' attorneys tend to put in place the scheme which is subject to the most lenient standard of judicial approval. Hence, a tolerant standard for mootness fees would in fact render *Trulia* standard on disclosure-based settlements redundant.

Finally, should the standard for disclosure-based settlements be extended to mootness fees in Delaware too, another adaptive response is predictable. We argue that plaintiffs' attorneys could revert to the scheme of disclosure-only settlements and file claims in those jurisdictions that have a more tolerant standard for such agreements. Again, litigation would proliferate, and all the related costs would persist. However, other courts are likely to adopt the *Trulia-Walgreen-Akorn* approach to avoid to a flood of meaningless litigation (meaningless in substance and in terms of competition for corporate charters).

Throughout Part V, we discuss the impact of these trends in terms of the migration of cases, the decline of Delaware's dominance in corporate law, and, ultimately, the challenges to the regulation-by-litigation model. We illustrate the alternative solutions proposed by some commentators and argue against some of them. For instance, we contend that currently there is no urgent need for the federal legislature to confer exclusive jurisdictional authority upon federal courts. The federal intrusion into corporate matters would be significant and not easy to justify. Besides, the jurisdictional shift would be hard to carry out in practical terms.

Regarding a more general crisis of the regulation-by-litigation model, a comparison with the Anglo-Irish code and panel-based model calls for an assessment of the efficiency of the system after the *Trulia*-

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[27]*Assad v. DigitalGlobe, Inc., No. 17-CV-01097-PAB-NYW,* 2017 WL 3129700, at *6 (D. Colo. July 21, 2017); Bushansky v. Phoenix Cos., No. X08FSTCV156027891S, 2017 WL 1194768, at *3 (Conn. Super. Ct. Feb. 23, 2017).

[28]*Assad*, 2017 WL 3129700, at *6; *Bushansky*, 2017 WL 1194768, at *4.

Walgreen-Akorn response (and the other 'adjustments' we anticipated). A shift to a model of this kind would be a radical choice for U.S. corporate law and would probably be justifiable only in the light of an unresolved (and unresolvable) crisis.

We conclude that *Trulia* has momentarily succeeded at restricting abusive disclosure-only settlements but has failed in reducing overlitigation, due to the adaptive response of plaintiffs' attorneys. *Trulia* was a step forward but is imperfect and needs to be complemented. *Akorn* is an essential supplement to it. Nevertheless, *Trulia* and *Xoom* should also be corrected in relation to the appropriate judicial standard for mootness fees. We also argue that other courts will soon adopt *Trulia* for disclosure-based settlements, and *Akorn* for mootness fees – otherwise, they would end up inundated by meritless lawsuits.

Effective judicial oversight is critical for the regulation-by-litigation model, both in state and in federal courts. Without it, plaintiffs' attorneys will continue to exploit procedural gaps, if not through disclosure-only settlements or mootness dismissals, then through other similar schemes.

In this model, the ups and downs in litigation rates may simply indicate that an adjustment is necessary. The extent of the fluctuation relative to the timing and impact of any response can make all the difference: effective judicial oversight implies an effective, timely reaction by courts to new collusive practices. This would keep the fluctuation under control – making for a gentler ride on the roller coaster—reducing the cost of the regulation-by-litigation model to an acceptable level. At that point, the assessment of its efficiency should take into account the effectiveness of judicial scrutiny, that is the level of control performed by the model.

The unreasonable number of litigated deals, the minimal benefits for corporations and shareholders, and the levy imposed on virtually every deal are the manifestation of the crisis of a litigation system which has devolved into a non-adversarial process. We contend that such devolution is the outcome of the delayed and ineffective management of the conflicts of interest of the litigants and of some incentives to collude in the process. We maintain that a reaction is underway and there are some positive signals.

Trulia, *Walgreen* and *Akorn* have the aim of restoring the adversarial nature of litigation without which there is no true litigation and private enforcement does not play its role and serve the public interest. The model appears to be on the right track to self-implement the necessary corrections. Should it fail to do so, the whole regulation-by-litigation model might be called into question.

II. CONTEXT AND STANDARDS FOR DISCLOSURE-ONLY SETTLEMENTS

A. *In re Trulia and the materiality standard*

1. The Scheme of Disclosure-only Settlements

The ruling *In re Trulia* is the most important reaction by the courts to overlitigation in the context of mergers and acquisitions in recent years. It was delivered at the beginning of 2016 by the Delaware Court of Chancery and marked a doctrinal shift in the standard of judicial review for disclosure-only settlements.[29]

Other decisions of Delaware courts can also be considered as part of a (presumably synchronized) response to overlitigation: *C&J Energy Services*[30] and *Corwin*[31] were both issued in less than 14 months and

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[29]The case has been widely discussed. *See* William B. Chandler III & Anthony A. Rickey, *The Trouble with Trulia: Reevaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims*, *in* CAN DELAWARE BE DETHRONED?: EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 145, 145 (Stephen M. Bainbridge et al. eds., 2018); *see also* Cain et al., *The Shifting Tides*, *supra* note 8, at 603.

[30]C & J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr., 107 A.3d 1049, 1072-74 (Del. 2014) (with an expedited appeal, the Delaware Supreme Court, *en banc*, vacated the injunction granted by the Court of Chancery and held that an injunction should not be issued each time there is no alternative bidder and therefore stockholders risk derailing the deal if enjoined). In the pre-closing scenario, this rule reduces the threat deriving from postponing the completion of the merger. *See In re* Xerox Corp. Consol. S'holder Litig., No. 650766/2018, 2019 WL 4400296 at *6-7 (N.Y. Sup. Ct. 2019) (citing *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 890-91 (Del. Ch. 2016)); *see also* Deason v. Fujifilm Holdings Corp., 165 A.D.3d 501, 501-02 (N.Y. App. Div. 2018); *see also* Verified Stockholder Complaint at 1, Brigade Leveraged Capital Structures Fund Ltd. v. Kindred Healthcare, Inc., C.A. No. 2018-0165 (Del. Ch. Filed Mar. 8, 2018).

[31]Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312-14 (Del. 2015) (setting an extension of the so-called cleansing effect (for non-*Revlon* context) in post-closing merger lawsuits before Delaware courts—a mechanism which allows a shift to a more favorable standard of judicial scrutiny for directors' decisions); *see* Singh v. Attenborough, 137 A.3d 151, 151 (Del. 2016); *see also In re* Solera Holdings, Inc. Stockholder Litig., No. CV 11524-CB, 2017 WL 57839, at *13 (Del. Ch. Jan. 5, 2017); *see also In re* Volcano Corp. Stockholder Litig., 143 A.3d 727, 743-44 (Del. Ch. 2016); *see also* Lavin v. W. Corp., No. CV 2017-0547-JRS, 2017 WL 6728702, at *16-21 (Del. Ch. Dec. 29, 2017); *see* also Salberg v. Genworth Fin., Inc., No. CV 2017-0018-JRS, 2017 WL 3499807, at *12-14 (Del. Ch. July 27, 2017); *see also In re* Tesla Motors, Inc. Stockholder Litig., No. CV 12711-VCS, 2018 WL 1560293, at *31-32, *47 (Del. Ch. Mar. 28, 2018); *see also* Morrison v. Berry, 191 A.3d 268, 274-75 (Del. 2018); *see also* Appel v. Berkman, 180 A.3d 1055, 1064 (Del. 2018); *see also* Robert S. Reder, *Delaware Chancery Court Extends "Cleansing Effect" of Stockholder Approval Under KKR to Two-Step Acquisition Structure*, 69 VAND. L. REV. EN BANC 227, 233 (2016); *see also* Robert S. Reder & Tiffany M. Burba, *Delaware Courts Diverge on Whether "Cleansing Effect" of Corwin Applies to Duty of Loyalty Claims*, 70 VAND. L. REV. EN BANC 1, 9 (2017); *see also* Robert S. Reder &

intended to curb M&A overlitigation. But at this juncture, *Trulia* serves two functions.[32] It is the brightest illustration of the perverse mechanism generated by the routine course of proceedings in merger objection lawsuits.[33] At the same time, it is the most definitive statement of courts' firm intentions to carefully scrutinize any settlement that does not include a monetary recovery (or other kind of plainly material benefit) for the class.[34] In other words, this decision addressed the root cause of a disturbing practice that underpinned the distortion and indicated the frivolous and vexatious nature of many (if not most) of those lawsuits.[35] As we noted earlier, a disclosure-only settlement was the common feature of these lawsuits: shortly after the announcement of a merger, plaintiffs' attorneys used to file a case challenging the deal and then quickly settle it on non-monetary terms.[36] The agreement typically provided for modest supplemental disclosures in exchange for blanket class releases and attorneys' fee awards.[37]

Tiffinay M. Burba, *Delaware Courts Confront Question Whether "Cleansing Effect" of Corwin Applies to Duty of Loyalty Claims*, 70 VAND. L. REV. EN BANC 187, 196-97 (2017); *see also* Matthew Schoenfeld, *From Corwin to Dell: The Cost of Turning a Blind Eye*, 1, 2-6 (Feb. 12, 2018), https://ssrn.com/abstract=3122511; *see also* Ann M. Lipton, *After Corwin: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 1978-86, 2005 (2019); *see also* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 645-46 (Del. 2014) (finding that in a *Revlon*-context, the conditions for a cleansing effect are set in), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018); *see also* Lyman Johnson & Roberta Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167, 200-227 (2014); *see generally* Daniel Wilson, *Desirable Resistance: Kahn v. M&F Worldwide and the Fight for the Business Judgment Rule in Going-Private Mergers*, 17 U. PA. J. BUS. L. 643 (2015); Fernán Restrepo & Guhan Subramanian, *The Effect of Delaware Doctrine on Freezeout Structure & Outcomes: Evidence on the Unified Approach*, 5 HARV. BUS. L. REV. 205 (2015); Itai Fiegenbaum, *The Geography of MFW-Land*, 41 DEL. J. CORP. L. 763 (2017); *see also* Mohsen Manesh, *Nearing 30, Is Revlon Showing Its Age?*, 71 WASH. & LEE L. REV. ONLINE 107, 130-49 (2014); *see generally* Brandon Mordue, *The Revlon Divergence: Evolution of Judicial Review of Merger Litigation*, 12 VA. L. & BUS. REV. 531 (2018); *see also* Franklin A. Gevurtz, *The Shareholder Approval Conundrum*, 60 B.C. L. REV. 1831, 1844-63 (2019); *see generally* Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161 (2019). For further references, *see generally* Pierluigi Matera & Ferruccio M. Sbarbaro, *Cleansing Effect e Dtandard di Judicial Review nella recente giurisprudenza statunitense*, 1 COMPARISON & CIV. L. 171 (2017), http://www.comparazionedirittocivile.it/download/volumi/201701.pdf.

[32]*See generally In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 884.

[33]*Id.*

[34]*Id.*

[35]*Id.*

[36]*See In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 887.

[37]*See* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 562 (2015); *see also* J. Travis Laster, *A Milder Prescription for the Peppercorn Settlement Problem in Merger Litigation*, 93 TEX. L. REV. 129, 129-30 (2015); *see also* Sean J. Griffith, *Private Ordering Post-Trulia: Why No-Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*, *in* THE CORPORATE CONTRACT IN CHANGING

The dynamics underlying this scheme were very peculiar, since there was a collusive alignment of the interests of both the plaintiffs' attorneys and the defendants: the former were rewarded with some significant fees with relatively little effort; the latter were granted a broad release from liability for future claims. Both relied upon the routine practice of the courts in approving any settlement—even a disclosure-only settlement with supplemental information that was not material or of minor value to stockholders.[38]

Plaintiffs also had a substantial leverage in such lawsuits: "the threat of an injunction to prevent a transaction from closing."[39] These transactions are usually time-sensitive and the risk of a motion to enjoin the deal is a strong incentive for defendants to settle quickly.[40] Delaware's standard for awarding expedited discovery requires a "colorable claim" and the possibility of an "irreparable injury";[41] and shareholders can always argue that they will suffer from an irreparable injury by the failure to disclose material information prior to the shareholder vote on the transaction. Therefore, particularly when the complaints include disclosure allegations, stockholder plaintiffs are virtually certain to be granted expedited discovery.

TIMES: IS THE LAW KEEPING UP? 292, 294-95 (Steven Davidoff Solomon & Randall S. Thomas eds., 2019) [hereinafter *Private Ordering*]; *see also* Eric L. Talley & Giuseppe Dari-Mattiacci, *Being True to Trulia: Do Disclosure-Only Settlements in Merger Objection Lawsuits Harm Shareholders?* (Mar. 7, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347327; *see also* Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKLEY BUS. L.J. 55, 99-108 (2014).

[38]*See In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 893 (The routine approval offered "a particularly easy 'give' for defendants to make in exchange for a release."); *see also* Weiss, *supra* note 6, at 529. In more detail, the settlement between the parties used to include: (1) some supplemental disclosure of minor or no value; (2) an agreement to jointly seek approval of a settlement class consisting of all shareholders, (3) a broad class-wide release of defendants without any economic benefits coming to the class; and (4) an agreement by the defendants to take no position on plaintiffs' application for their attorney's fees and to pay for it. A subsequent notice of the settlement was issued and sent to the class, for any objector to appear. Then, a final fairness hearing provided for the approval of the settlement—which made the release effective, created a *res judicata* protection for defendants and allowed the plaintiffs' attorney to submit a request for fee award to the court's approval.

[39]*In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 892.

[40]*See id.* at 887.

[41]*See* Giammargo v. Snapple Beverage Corp., No. CIV. A. 13845, 1994 WL 672698, at *6 (Del. Ch. Nov. 15, 1994). The "colorability" standard simply implies a non-frivolous set of issues and is even lower than the "conceivability" standard applied on a motion to dismiss. *See also In re* BioClinica, Inc. S'holder Litig., No. CV 8272-VCG, 2013 WL 5631233, at *2-4 (Del. Ch. Oct. 16, 2013); *see also* Sinchareonkul v. Fahnemann, No. CV 10543-VCL, 2015 WL 292314, at *1 n. 1 (Del. Ch. Jan. 22, 2015).

In the disclosure-only settlement scheme, once the lawsuit was on an expedited track and the prospect of an injunction hearing loomed, "the most common currency used to procure a settlement [was] the issuance of supplemental disclosures to the target's stockholders before they are asked to vote on the proposed transaction."[42] In the perspective of defendant directors, this kind of settlement could "mitigate the considerable expense of litigation and the distraction it entails," achieve "closing certainty," and "obtain broad releases as a form of 'deal insurance.'"[43] These motivations were so persuasive that many defendants self-expedited the litigation "by volunteering to produce 'core documents' to plaintiffs' counsel."[44] As the court in *Trulia* noted, this obviated "the need for plaintiffs to seek the Court's permission to expedite the proceedings in aid of a preliminary injunction application … thereby avoiding the only gating mechanism (albeit one friendly to plaintiffs) the Court [had] to screen out frivolous cases."[45]

Then, once the parties agreed on the terms of the settlement to submit, and the defendant averted the risk of an injunctive relief blocking the closing, the context of the lawsuit changed radically—its character became non-adversarial.[46] Both parties had a common interest in extracting the validation by the court and had no interest in filing a motion to provide the court with information.[47] Courts are familiar with assessing settlements of stockholder class and derivative actions without the benefit of hearing opposing viewpoints; but in an expedited deal litigation, the discovery record is typically sparse.[48] For this reason, apart from the fact that it is customary for courts to approve any settlement as a matter of course, even an experienced judge could have a hard time scrutinising a disclosure-only settlement.[49]

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[42]*In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 892

[43]*Id.*

[44]*Id.*

[45]*See id.*; *see also* Sean J. Griffith & Anthony A. Rickey, *Objections to Disclosure Settlements: A How-To Guide*, 70 OKLA. L. REV. 281, 289 (2017).

[46]*See In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 893.

[47]*Id.* ("The next step, after notice has been provided to the stockholders, is a hearing in which the Court must evaluate the fairness of the proposed settlement. Significantly, in advance of such hearings, the Court receives briefs and affidavits from plaintiffs extolling the value of the supplemental disclosures and advocating for approval of the proposed settlement, but rarely receives any submissions expressing an opposing viewpoint.").

[48]*Id.*

[49]*Id.* ("Although the Court commonly evaluates the proposed settlement of stockholder class and derivative actions without the benefit of hearing opposing viewpoints, disclosure settlements present some unique challenges. It is one thing for the Court to judge the fairness of a settlement, even in a non-adversarial context, when there has been significant discovery or meaningful motion practice to inform the Court's evaluation. It is quite another to do so when

Thus, even in the absence of a misstatement, mistake, or omission in connection with the deal, this scheme would effectively impose a levy on the transaction. That is why it was commonly known as a "deal tax" or "transaction tax," and the disclosure-only settlements were often referred to as "peppercorn settlements."[50]

2. The New Standard and Its Rationale

Prior to *Trulia*, in *C&J Energy Services,* the Delaware Supreme Court had made it more difficult to award plaintiffs with an injunction to enjoin the transaction and consequently reduced the threat of a delay in the completion of the deal.[51] In the following months, the Delaware Court of Chancery intensified its criticism of disclosure-only settlements, showing open scepticism in *Acevedo* and *Riverbed Technology* and almost anticipating a corrective action.[52] The most logical form that this correction

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little or no motion practice has occurred and the discovery record is sparse, as is typically the case in an expedited deal litigation leading to an equally expedited resolution based on supplemental disclosures before the transaction closes."). Notably, in *Trulia*, no motion was decided, not even a motion to expedite. And, as the court remarked, "discovery was limited to the production of less than 3,000 pages of documents and the taking of three depositions, two of which were taken before the parties agreed in principle to settle and one of which was a 'confirmatory' deposition taken thereafter."

[50]*See* Jeffries, *supra* note 36, at 108; *see also* Chandler & Rickey, *supra* note 28, at 145 n.2 ("[T]he ubiquity and multiplicity of merger lawsuits, colloquially known as a 'merger tax,' has caused many to view such lawsuits with a certain degree of skepticism.") (quoting City Trading Fund v. Nye, 59 Misc. 3d 477, 506 (N.Y. Sup. Ct. 2018)); *see also* Solomon v. Pathe Commc'ns Corp., No. CIV. A. 12563, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995) (referring to these settlements as "peppercorn and a fee"),), *reprinted in* 20 DEL. J. CORP. L. 1123, *aff'd,* 672 A.2d 35 (Del. 1996); *see also In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 892 (These settlements "generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal….").

[51]*See* C & J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr., 107 A.3d 1049, 1067-71 (Del. 2014); *see also See In re* Xerox Corp. Consol. S'holder Litig., No. 650766/2018, 2019 WL 4400296, at *24 (N.Y. App. Div. Oct. 7, 2019); *see also In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 892; *see generally* Deason v. Fujifilm Holdings Corp., 165 A.D.3d 501 (N.Y. App. Div. 2018).

[52]*See* Transcript of Settlement Hearing at 64-65, Acevedo v. Aeroflex Holding Corp., C.A. No. 7930-VCL (Del. Ch. July 8, 2015); *see also In re* Riverbed Tech., Inc. Stockholders Litig., No. CV 10484-VCG, 2015 WL 5458041, at *5 (Del. Ch. Sept. 17, 2015); *see* Hao Jiang, *Enforcing the Bargain v. Materiality Requirement: The Future of Disclosure-Only Settlements Post-Trulia*, 38 PACE L. REV. 569, 574 (2018) (citing *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014)). *In re Rural Metro Corp. Stockholders Litig.* was a triggering event. *See generally* Joel Edan Friedlander, *How Rural/Metro Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877, 884-919 (2016).

could take was an action to make the judicial oversight of this kind of settlement effective.

In *Trulia* the court proclaimed its intention to validate disclosure-based settlements only after a careful scrutiny on actual shareholders' benefits and held that only supplemental disclosures that deliver a "plainly material benefit" to stockholders can be an adequate consideration for settlement.[53] Disclosure is material each time "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[54] That is to say, conversely, that the omission "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[55] According to the court in *Trulia*, the benefit must not only be material but must be *plainly* material—which implies that "it should not be a close call that the supplemental information is material as that term is defined under Delaware law."[56]

The test adopted by *Trulia* also includes a second requirement. In addition to the materiality, the court stated that the release from liability must be "narrowly circumscribed"[57]—which means that it could not be too broad and must be confined to the settled claims.

Thus, in the judge's words, a court must not approve the agreement "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."[58]

By these means, the court intended to deprive plaintiffs' attorneys and defendant directors of the incentives to the collusion, without precluding the possibilities for meritorious disclosure-based settlements.[59]

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[53]*In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 898.

[54]TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[55]*Id.*; Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).

[56]*In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 898-99. (The judge also added that "[w]here the supplemental information is not plainly material, it may be appropriate for the Court to appoint an *amicus curiae* to assist the Court in its evaluation of the alleged benefits of the supplemental disclosures, given the challenges posed by the non-adversarial nature of the typical disclosure settlement hearing.").

[57]*Id.* at 898.

[58]*Id.*

[59]*Id.*

B. *The Effectiveness of the New Standard: Limitations, In Re Walgreen and the Jurisdictional Disunity*

Under this enhanced standard of judicial review set by *Trulia*, the "case-by-case assessment of the reasonableness of the 'give' and 'get' of such settlements" has become remarkably stricter.[60] Disclosure-only settlements are now looked upon with some disfavor, and filing a merger objection lawsuit in Delaware has become remarkably less desirable for plaintiffs' attorneys.

Since the new standard aims to discourage the collusive dynamics we mentioned earlier, *Trulia* might appear as a decision that should be immediately agreed with. Yet, a closer look casts doubt on the legal grounds for the new standard and also on its effectiveness in deterring nuisance litigation.

Some commentators argue that directors have a pre-existing duty to disclose all material information, and shareholders have a right to such information. Hence, any supplemental disclosure, even if material, cannot provide the necessary consideration for a settlement, because it is not "fresh" consideration.[61] Nevertheless, it could also be argued that, at that stage of the case, the omission or misstatement is just one party's allegation. In the "*aliquid datum, aliquid retentum*" structure of a settlement, the concession on the defendant's side is exactly the additional information the plaintiff alleged was missing.

What is unquestionably true, instead, is that the requirement to disclose material information could ironically give directors an incentive to withhold information in anticipation of a prospective settlement.[62]

Other critics have remarked upon some further limitations of *Trulia*'s approach. As predicted in *Trulia,*[63] the success of the new standard

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[60]*In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 898.

[61]*See* Jiang, *supra* note 51, at 606 (according to which a settlement is a contract and "contract law preserves fairness by enforcing the bargain as it is." For this reason, the materiality requirement contradicts the very notion that the enforcement of pre-existing legal duty is no consideration. Thus, the standard should be the fairness. "[F]inality of settlement can be challenged and overbroad release can still be rescinded applying two contract law doctrines: fraudulent misrepresentation and unconscionability.") *Id*. However, the corollary of this approach is undesirable: the burden of the action and ultimately of the proof would be shifted on those shareholders who intend to rescind contract. By contrast, the materiality test has the advantage to place the burden on the potentially collusive parties, which means those who have the information and already are before the court.

[62]*Id*. at 606-07.

[63]*In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 899 ("[E]nhanced judicial scrutiny of disclosure settlements could lead plaintiffs to sue fiduciaries of Delaware corporations in other

in curbing the strike suits rests on the premise that Delaware's companies would constrain merger lawsuits to the Delaware courts with forum-selection bylaws—now expressly permitted by Delaware General Corporation Law[64]—or, that other jurisdictions would follow Delaware's lead and apply an equally restrictive standard on disclosure settlements. Otherwise, should the sister courts not adopt the stricter standard and should the companies not introduce forum-selection provisions in their bylaws, plaintiffs' attorneys might merely file the case in other jurisdictions and bypass Delaware's limits. There would be a migration, rather than a reduction in litigation.

In other words, the effect of *Trulia* on overlitigation depends upon some conditions that are out of Delaware's hands. In a sense, the court in *Trulia* gambled on the inclination of non-Delaware courts to adopt the new doctrine—as we noted earlier. It did so in the face of declining odds, since Delaware's dominance and the deference of other courts to Delaware's authority have been slowly fading.

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jurisdictions in the hope of finding a forum more hospitable to signing off on settlements of no genuine value.") The court also clarified that it was "within the power of a Delaware corporation to enact a forum selection bylaw to address this concern" and remarked the "hope and trust that … sister courts will reach the same conclusion if confronted with the issue".).

[64]DEL CODE ANN. tit. 8, § 115 (2020). (An amendment to Delaware's legislation was passed to expressly permit the adoption of charter or bylaw provisions that designate Delaware as the exclusive forum for adjudicating internal corporate 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"); *see* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 955-56 (Del. Ch. 2013) (Actually, the amendment just codified a case law principle, which permitted the adoption of these provisions.). Several courts outside Delaware, including courts in New York, Texas, California, Illinois, Ohio and Missouri, had already enforced Delaware forum selection bylaws to dismiss fiduciary duty actions, on the grounds of *Boilermakers*. *See, e.g.*, Hemg Inc. v. Aspen Univ., No. 650457/13, 2013 WL 5958388, at *3 (N.Y. Sup. Ct. Nov. 4, 2013); *In re* MetroPCS Commc'ns, Inc., 391 S.W.3d 329, 333-34 (Tex. App. 2013); Groen v. Safeway Inc., No. RG14716641, 2014 WL 3405752, at *2 (Cal. Super. May 14, 2014); Miller v. Beam, Inc., No. 2014CH00932, 2014 WL 2727089, at *1 (Ill. Cir. Ct. Mar. 5, 2014); North v. McNamara, 47 F. Supp. 3d 635, 641 (S.D. Ohio 2014); Gawrych v. Monsanto Co., No. 16SL-CC04220 (Mo. Cir. Ct. St. Louis Cty. Dec. 12, 2016); *see also* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CAL. L. REV. 373, 376-77 (2018); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1667 (2016); Verity Winship, *Contracting Around Securities Litigation: Some Thoughts on the Scope of Litigation Bylaws*, 68 SMU L. REV. 913, 915 (2015); Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 503-04 (2016); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 36-37 (2015) [hereinafter Griffith, *Correcting Corporate Benefit*]; Lawrence A. Hamermesh, *How Long Do We Have to Play the "Great Game"?*, 100 IOWA L. REV. BULL. 31, 31-32 (2015); J. Robert Brown, Jr., *The Future Direction of Delaware Law (Including a Brief Exegesis on Fee Shifting Bylaws)*, 92 DEN. U. L. REV. ONLINE 49, 54 (2015).

In the case *In Re Walgreen*, the U.S. Court of Appeals for the 7th Circuit promptly followed and backed up *Trulia*[65] so decisively that the standard is now referred to as the *Trulia-Walgreen* standard.[66] The federal court called the practice a "racket" and stated that "[n]o class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand."[67]

While the reaction of federal courts to *Trulia* was immediate and deferential, and some states adopted it, other states have been slow and sometimes reluctant to follow its authority.

Florida,[68] California,[69] and Connecticut,[70] for instance, adopted the *Trulia* standard.

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

[66]*See, e.g.*, Brief for Plaintiff-Appellee at 18-19, Farber v. Crestwood Midstream Partners L.P., No. 16-20742 (5th Cir. Feb. 3, 2017) (referring to the standard as the *Trulia/Walgreen* standard).

[67]*In re Walgreen Co. Stockholder Litig.*, 832 F.3d at 724; *see also In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F.3d 551, 554 (7th Cir. 2017); *see also* Ross-Williams v. Bennett, No. 11CV1688, 2016 WL 6888094, at *16 (Kan. Dist. Ct. Nov. 22, 2016) (This case concerned a failed merger between Sprint and Nextel and featured a settlement agreement providing for changes to corporate governance and Board composition, as well as $4.25 million for plaintiff's attorneys' fees. In scrutinizing the settlement, the court explicitly recalled the *Walgreen* standard and assessed the agreement "through Judge Posner's suggested lens." It then concluded that the disclosures were of "marginal benefit, if any, to its shareholders" and reduced attorneys' fees to $450,000.00.).

[68]*See* Delman v. Quality Distribution, Inc., et al., No. 15-CA-005553, 2017 WL 2694490, at *8 (Fla. Cir. Ct. June 21, 2017) (validating a disclosure-based settlement of a litigation challenging the sale of Quality Distribution Inc., a Florida company, to certain funds advised by Apax Partners). The trial Court argued that "[e]ven if the court assumes the incremental disclosure … is immaterial, it can still approve the settlement because that is the better choice among the alternatives." *See also* Griffith v. Quality Distribution, Inc., No. 2D17-3160, 2018 WL 3403537, at *7 (Fla. Dist. Ct. App. July 13, 2018) (Fordham School of Law Professor Sean J. Griffith objected under the same reasons set forth in *Trulia*, holding that the suit underlying the settlement was meritless, and the benefit for shareholders was valueless. The Florida Second District Court of Appeal reversed the lower court's decision and held that "the In re Trulia standard is applicable" in Florida.). The ruling is binding on Florida trial courts in all circuits.

[69]Even earlier than Florida, a court of California's Silicon Valley followed Delaware's lead. *See* Drulias v. 1st Century Bancshares, Inc., No. 16-CV-294673 (Cal. Super. Ct. Nov. 18, 2016) (The plaintiff filed a putative class action challenging the sale of 1st Century Bancshares to Midland Financial Co. and then settled the claims. The Court declined to approve the settlement, largely on *Trulia*'s basis, and also stigmatized that plaintiff had not cited the "crucial new published opinion by the Delaware Court of Chancery on this subject"); *see also* Anderson v. Alexza Pharms., Inc., No. 16-CV-295357 (Cal. Super. Ct. Apr. 3, 2017) (The same judge also declined the approval of a disclosure-only settlement).

[70]*See* Bushansky v. Phoenix Cos., No. X08FSTCV156027891S, 2017 WL 1194768, at *3-4 (Conn. Super. Ct. Feb. 23, 2017) (citing *Trulia* and adopting it as the new standard).

But in *Gordon v. Verizon Communications*,[71] the New York Appellate Division declined to follow *Trulia* and adopted a standard which is an improvement on the routine validation but not as strict as *Trulia.*[72] A few weeks later, in *City Trading Fund v. Nye*, a New York trial court, although following the new *Gordon* standard, expressed substantial reservations on the approach and advocated the adoption of the *Trulia* test before New York becomes "celebrated as the jurisdiction of the judicial

Nevertheless, it approved the disclosure-only settlement since, comparing the "give" and the "get", the judge found the additional disclosures as "plainly material" and the releases as appropriately tailored only to the alleged misconduct raised in the litigation. *Id.* at *4. *See also* Stein v. UIL Holdings Corp., No. X08FSTCV156025536S, 2017 WL 1656891, at *3 (Conn. Super. Ct. Apr. 10, 2017) (In this case, the challenged transaction was the acquisition of Phoenix, a Delaware corporation, by Nassau Reinsurance Group Holdings, L.P. The Connecticut court declined to validate the disclosure-only settlement of a claim challenging the acquisition of UIL Holdings Corp., a Connecticut corporation, by Iberdrola USA, Inc. The court argued that Connecticut should not "embrace a lesser standard than that suggested by the Delaware courts and the federal courts which have recently considered these types of settlements."). In actuality, the Court focused its criticism on the overly broad scope of the release more than strictly applying the materiality test; however, the trend appears to be set.

[71] *See* Gordon v. Verizon Commc'ns, Inc., 148 A.D.3d 146 (N.Y. App. Div. 2017) (this decision has been harshly criticized); *see also* John C. Coffee, Jr., *The Race to the Bottom: Is the Last Stop New York?*, THE CLS BLUE SKY BLOG (Mar. 20, 2017), http://clsbluesky.law.columbia.edu/2017/03/20/the-race-to-the-bottom-is-the-last-stop-new-york/.

[72] *See Gordon*, 148 A.D.3d at 159 (Under *Gordon*, a judicial approval shall be granted to a disclosure-only settlement as long as "some additional benefit" is obtained for stockholders. The appellate court reversed the trial court's decision, which had declined the approval of a disclosure-based settlement related to Verizon Communications' purchase of Vodafone Group's assets at an allegedly excessive price. The trial court held that the supplemental disclosures individually and collectively failed to materially enhance the shareholders' knowledge about the merger and provided no legally cognizable benefit to the shareholder class.); *id.* at 154-55 (By contrast, the Appellate Division ordered that the settlement be validated, stating "[a]lthough some commentators have opined that recent decisions, including *Trulia*, … may signal the extinction of 'disclosure-only' settlements, this conclusion may be premature.") (citation omitted); *id.* at 156 (The court also held that, even if Verizon is a Delaware corporation, New York rather than Delaware law should regulate the case because the parties expressly agreed that the settlement would be "governed by and construed in accordance with the laws of the State of New York"); *id.* at 156-58 (In applying New York law, the court scrutinized the settlement under the five factors set forth in *In re Colt Indus. S'holders Litig.*, 155 A.D.2d 154 (N.Y. Sup. Ct. 1990). The likelihood of success, the extent of support from the parties, the judgement of counsels, the presence of bargaining in good faith, and the nature of the issues of law and fact; as well as two additional criteria: whether the proposed settlement is in the best interests of the putative settlement class as a whole, and whether the settlement is in the best interest of the corporation); *Gordon*, 148 A.D.3d at 158-59 (According to *Gordon*, the sixth factor, regarding the best interests of the class, is satisfied when the supplemental disclosures provide shareholders with some benefit. The court held that the settlement met this "enhanced standard" and remanded the case to the Supreme Court to determine an appropriate award of attorneys' fees.).

rubber stamp."[73] Yet, by declining the approval in the case, the court in *City Trading Fund* proved that even under the *Gordon* test the approval of disclosure-only settlements in New York is no longer a matter of course.[74]

Similarly, in New Jersey,[75] the court held that disclosure-only settlements must be subject to a more exacting scrutiny but refused to raise the standard to the degree set by *Trulia*. The judge argued that, when scrutinising a disclosure-based settlement, New Jersey courts should determine whether the supplemental disclosure is "material" (which means that "there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote"),[76] but not necessarily "plainly material," as in *Trulia*.

North Carolina is still hesitant: in *Krispy Kreme Doughnuts*, the court cited *Trulia* but adopted an intermediate approach.[77] *In re Journal*

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[73]City Trading Fund v. Nye, 59 Misc. 3d 477, 482 n.4 (N.Y. Sup. Ct. 2018); *id*. at 481 (Justice Kornreich expressly recalled *Trulia* and twice declined to approve the disclosure-only settlement, openly referring to it as a "peppercorn and a fee."). It is likely he could not go as far as the adoption of the Delaware plainly material standard because, while pending remand, the Appellate Division adopted the less exacting *Gordon* standard.

[74]*See* City Trading Fund v. Nye, 171 A.D.3d 508 (N.Y. App. Div. 2019) (confirming the trial court's decision under the *Gordon* standard).

[75]*See* Strougo v. Ocean Shore Holding Co., 198 A.3d 309, 324 (N.J. Super. Ct. Ch. Div. 2017); *see also* Anthony Rickey, *Approved Disclosure Settlements Post-Trulia*, MARGRAVE L. LLC, https://margravelaw.com/2016/08/approved-disclosure-settlements-post-trulia/ (last updated June 26, 2018) (stating that a New Jersey court approved a disclosure-only settlement, providing fees and expenses of $624,712.98, in *In re* The Chubb Corp. S'holder Litig., No. C-012040-15 (N.J. Super. Ct. Ch. Div. Somerset Cty. Mar. 24, 2017).

[76]*Strougo*, 198 A.3d at 325; *id.* at 325 (concluding that the supplemental disclosures were material, since they provided for "more meaningful information regarding the valuation of the stock they were asked to give up" and "more transparency regarding any potential conflict of interest in the transaction." As a result, the release of the information prior to the vote supported stockholders in making a better-informed decision about how to vote on the proposed merger or whether to sell the stock before its consummation.).

[77]*See In re* Krispy Kreme Doughnuts, Inc. S'holder Litig., No. 16-CVS-3101, 2018 WL 264537, at *6-7 (N.C. Super. Jan. 2, 2018) (The North Carolina Business Court referred to *Trulia* favorably in scrutinizing a disclosure-only settlement but stopped short of explicitly adopting the new standard of *Trulia*. The court declared to be "fully in accord with *Trulia*'s enhanced scrutiny to determine whether the release is narrowly circumscribed" and remarked that any court should conduct "a careful examination of the 'give' and the 'get' of the class settlement" to "satisfy itself that the supplemental disclosures are 'material'".); *id*. at 7 (Nevertheless, the court also argued that "a reflexive rejection of a class settlement on grounds of immateriality or insufficient consideration" would be unwise "[u]nless the value of the supplemental disclosures are plainly disproportionate to the scope of the proffered release".); *id*. (The court concluded that trial courts are "less well-equipped to measure a disclosure's worth than are competent and experienced counsel." In contrast, they are "generally well-equipped to conduct a reasoned inquiry into whether a fee award is reasonably related to the degree to which supplemental disclosures significantly added to the information that was otherwise already available to

Media Group,[78] a Wisconsin state court ruled on grounds that did not involve *Trulia*'s standards but did not make any express statements against *Trulia*'s doctrine, leaving the door ajar for a prospective shift.[79]

One reason for this jurisdictional disunity may be that the parties, when submitting disclosure settlements outside Delaware, have little interest in citing newer Delaware authority with its stricter standard.[80] But it could also mean that some jurisdictions are tempted to set a lower standard for these settlements in order to attract corporate litigation and challenge Delaware's dominance.[81]

Furthermore, although rather popular among Delaware's corporations, forum selection bylaws are less effective than expected.[82] They are not self-executing in the sense that a defendant corporation must invoke them before a court can enforce them.[83] In some ways, forum

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shareholders."). Accordingly, the court approved the request for attorneys' fees but denied the request for expenses.

[78]*See In re* Journal Media Grp., Inc. S'holder Litig., No. 15-CV-9686 (Wis. Cir. Ct. July 24, 2017).

[79]In the case, an objector challenged Gannett's acquisition of Journal Media Group, but the court denied the objector's motion to intervene on two specific grounds, because it was untimely and because the objector failed to identify any "actual claims that he believe[d] that he ha[d] against th[e] merger." As a consequence, the court approved the settlement and awarded plaintiffs' counsel $425,000.00 in attorneys' fees. *See* Edward B. Micheletti et al., *Continuing Trends in M&A Disclosure Litigation*, SKADDEN, APRS, SLATE, MEAGHER & FLOM LLP: INSIGHTS (Nov. 21, 2017), https://www.skadden.com/insights/publications/2017/11/insights-the-delaware-edition/continuing-trends-in-ma-disclosure-litigation (alteration in original) (quoting *In re Journal Media Grp.*, No. 15-CV-9686 (Wis. Cir. Ct. July 24, 2017)); *see also* Anthony Rickey, *Approved Disclosure Settlements Post-Trulia*, MARGRAVE L. LLC, https://margravelaw.com/2016/08/approved-disclosure-settlements-post-trulia/ (last updated June 26, 2018) (noting cases with approved settlements, specifically: McGill v. Hake, No. 1:15-cv-00217-TWP-DKL (S.D. Ind. Mar. 10, 2016)—awarding attorney fees and expenses of $410,000.00; Stein v. Symetra Fin. Corp., No. 15-2-20458-1-SEA (Wash. Super. Ct. May 18, 2016)—awarding fees and expenses of $288,907.76); and Stein v. StanCorp Fin. Grp., Inc., No. 15-CV-20372 (Or. Cir. Ct. Jan 23, 2017)—awarding fees and expenses of $315,000.00).

[80]*See* Griffith, *Private Ordering*, *supra* note 36, at 299 ("It is more difficult to read Model Rule 3.3(a)(2) to compel disclosure in this situation[,]" but it is also true that, "where Delaware law is widely cited by the settlement proponents as persuasive authority, failing to cite recent adverse authority in that jurisdiction arguably amounts to making a false statement of law to the tribunal, triggering a duty to correct under Model Rule 3.3(a)(1)." This interpretation of the ethics rules should deter 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, especially *Trulia*.").

[81]*See* James L. Gale, *Disclosure Settlements in the State Courts Post-Trulia: Practical Considerations*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 191, 192 (Sean Griffith et al. eds., 2018); *see generally* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 467 (2015) (analyzing the cause and effects of competition among states for corporate litigation, specifically class action litigation).

[82]*See* Griffith, *Private Ordering*, *supra* note 36, at 293-94.

[83]*Id.* at 302.

selection bylaws offer a defense-side option, as the board of directors may opt to waive the application of forum selection provisions and accede to a lawsuit before a non-Delaware forum in order to negotiate a broad release on terms that currently would not be approved in Delaware under *Trulia*.[84] Forum selection bylaws fail in constraining disputes to Delaware also because federal claims under Sections 10(b) or 14(a) of the Exchange Act are subject to mandatory federal jurisdiction that these provisions cannot overtake.[85]

When discussing *Trulia*, we must also make mention of the fee-shifting bylaws. These provisions require stockholder plaintiffs to reimburse the company for the costs of an unsuccessful lawsuit—sometimes, even if the lawsuit was only partially unsuccessful. Clearly, the fee-shifting bylaws have an undeniable potential to deter frivolous lawsuits, and, before *Trulia*, the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund*[86] had upheld their validity. But many—including the Delaware State Bar Association—saw the fee-shifting mechanism as a threat to all corporate litigation, a solution that threw "the baby out with the bathwater."[87] Thus, they demanded and obtained a statutory ban on this kind of bylaws.[88] This is why some critics see *Trulia* as part of a grand bargain that Delaware's legal community struck with its corporate citizens: on one side, the Delaware legislature prohibited Delaware companies from enacting fee-shifting bylaws, and on the other side, about seven months after that ban on fee-shifting, the Delaware Court

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[84]*See id.*

[85]*Id.* at 301.

[86]ATP Tour, Inc., v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014).

[87]Mark Lebovitch & Jeroen van Kwawegen, *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*, 40 DEL. J. CORP. L. 491, 494 (2016); *see* Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 A.B.A. BUS. LAW. SEC. 161, 166 (2014) (Being the so-called American rule—according to which each party pays its own lawyers—a cornerstone of the American legal system, any exception raises some criticism. In this case, it would be unfair to discharge any criticism as utterly groundless. The now prohibited fee-shifting bylaws did not introduce a "loser pays" rule but "prescribed a one-sided rule—only the plaintiff has to pay the other side's costs—and it has to pay those costs not just if it loses, but even if it wins many of its claims but fails to get substantially all the relief it sought."); *see also* Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-inflicted Wound*, 40 DEL. J. CORP. L. 851, 856 n.36 (2016) [hereinafter Bainbridge, *Fee-Shifting*].

[88]Delaware General Corporation Law was amended and a ban to fee-shifting bylaws or articles was introduced by S.B. 75, 2015 Leg., 148th Gen. Assemb., Reg. Sess. (Del. 2015) [hereinafter S.B. 75], passed by the Delaware Senate on May 12, 2015, approved by the Delaware House on June 11, 2015, and signed by Governor Markell on June 24, 2015. The bill became effective on August 1, 2015.

of Chancery issued the *Trulia* decision as an alternative way of reducing wasteful litigation.[89] So should *Trulia* fail in curbing nuisance litigation, it would mean that Delaware's regulators and judiciary opted for a bad deal.

III. VOLUNTARY DISMISSAL AND MOOTNESS FEES

A. *The Rise of a New Tactic*

We noted earlier that the role of plaintiffs' attorneys in this litigation-centric model implies that they devise adaptive responses to the attempts of legislatures and courts to halt the exploitation of corporations through litigation—and vice versa. M&A litigation is no exception, and its frequency follows the ups and downs of these adaptive responses. As anticipated, after *Trulia*, merger litigation declined to 76% of the relevant[90] transactions in 2016. Yet, in 2017 the number of litigated deals rose again, reaching 83% of the mergers.[91] Notably, only 10% of these claims were brought in Delaware, while 87% were before a federal court.[92] The shift away from Delaware courts continued in 2018, when merely 5% of these cases were filed in a Delaware court, compared to 92% in a federal court.[93] Not only did the litigation experience a migration but also the pattern changed: a few of these lawsuits were settled; most cases (63%) were voluntarily dismissed, and plaintiffs' attorneys received a mootness fee.[94]

In other words, the new increase in M&A litigation was associated with a migration to federal jurisdiction and with a mutation of its pattern, since plaintiffs' attorneys started to repackage state-law fiduciary-duty claims into federal suits for disclosure violations, brought under Section 14(a) of the Securities Exchange Act of 1934—and its implementing Rule 14a-9.[95]

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[89] *See* Chandler & Rickey, *supra* note 28, at 146. For a critical position about the ban on fee-shifting bylaws, *see* Bainbridge, *Fee-Shifting, supra* note 86, at 851. *See also* John C. Coffee, Jr., *Fee-Shifting and the SEC: Does It Still Believe in Private Enforcement?*, THE CLS BLUE SKY BLOG (Oct. 14, 2014), https://perma.cc/QD6P-N9TX; *see also* Albert H. Choi, *Fee-Shifting and Shareholder Litigation,* 104 VA. L. REV. 59, 63 (2018).

[90] *See supra* Introduction.

[91] Cain et al., *Mootness Fees*, *supra* note 13, at 1780.

[92] *Id.* at 1782.

[93] *Id.*

[94] *Id.* ("As of January 2019, not a single case initiated in 2018 had resulted in a judgment or settlement—all of the dispositions as of that date have been either dismissals with the payment of mootness fees or outright dismissals.").

[95] *See* 17 C.F.R. § 240.14a-9 (2020) ("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

Clearly, a new tactic has arisen to outflank *Trulia* and to replace disclosure-only settlements: the mootness dismissal—that is a voluntary dismissal coupled with the payment of mootness fees to plaintiffs' attorneys by the defendant.[96]

The scheme is pretty simple: plaintiffs voluntarily dismiss their case without settling, and the defendant pays a mootness fee on the grounds that the mere filing of the case prompted increased disclosures that benefited the shareholders.[97]

As stated 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."[98]

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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"). These rules prohibit material misrepresentations and omissions in proxy statements sent to stockholders of registered securities. *See also* 15 U.S.C. § 78n(e) (2012) (This rule applies to omission or misleading statements "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.").

[96]*In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 897 (Del. Ch. 2016) (Chancellor Bouchard noticed this trend and reported that "[i]n the wake of the Court's increasing scrutiny of disclosure settlements, the Court has observed an increase in the filing of stipulations in which, after disclosure claims have been mooted by defendants electing to supplement their proxy materials, plaintiffs dismiss their actions without prejudice to the other members of the putative class (which has not yet been certified)").

[97]The new practice is already debated. *See* Rosenfeld v. Time Inc., No. 17-CV-9886 (DLC), 2018 WL 4177938, at *10-13 (S.D.N.Y. Aug. 30, 2018); *see also* Cain et al., *Mootness Fees*, *supra* note 13, at 1799-1810; *see also* Pierluigi Matera & Ferruccio M. Sbarbaro, *"Trulia," "Akorn," and the Roller Coaster of M&A Litigation*, THE CLS BLUE SKY BLOG (Nov. 29. 2019), http://clsbluesky.law.columbia.edu/2019/11/29/trulia-akornand-the-roller-coaster-of-ma-litigation/.

[98]Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n, 902 A.2d 1084, 1092 (Del. 2006) (confirming that the mootness doctrine is an extension of the corporate benefit exception and that in these cases courts exercise their equitable powers) (*see also Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375, 392 (1970)). Otherwise, "the award of attorney's fees in the absence of statutory or contractual authorization" would be difficult to grant, since the traditional American rule strongly disfavours it (*Polanski v. Trump Taj Mahal Assocs.,* 137 F.3d 139, 145

Therefore, mootness fees are awarded under "a subspecies of the common-benefit doctrine, which recognizes that, where a litigation provides a benefit to a class or group, costs necessary to the generation of that benefit should also be shared by the group or its successor."[99] Simply put, the payment is justified because of that benefit rather than on the grounds of a beneficial settlement of the class action—a settlement that might be scrutinized by a court under the new standard set in *Trulia*.

Since the basis of the mootness fee award is the benefit that plaintiffs secured to the corporation or its shareholders, the amount of the fee will vary depending on whether the benefit is pecuniary or non-pecuniary in form.[100]

(3d Cir. 1998)). Nevertheless, the benefit could be rather controversial and far from simple to ascertain. *See In re* First Interstate Bancorp Consol. S'holder Litig., 756 A.2d 353, 357 (Del. Ch. 1999) (stating that a court already argued the "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."), *aff'd sub nom.* First Interstate Bancorp v. Williamson, 755 A.2d 388 (Del. 2000). Regarding the aforementioned three elements to meet in order to apply this doctrine and award a fee, when a suit is mooted prior to final judgment, it is necessary to determine whether the suit was meritorious when filed and caused the benefit. In *Kahan v. Rosenstiel*, 424 F .2d 161, 167 (3d Cir. 1970) the court stated that in this case a suit is 'meritorious' if it could have survived a motion to dismiss. The plaintiff bears the burden of the proof both on merit and benefit. If the plaintiff is successful, the burden shifts to the defendant who can "prove that the lawsuit did not in any way cause their action which ultimately rendered the suit moot" – as remarked in Cooperstock v. Pennwalt Corp., 820 F. Supp. 921, 923 (E.D. Pa. 1993); *see also* Koppel v. Wien, 743 F.2d 129, 135 (2d Cir. 1984), both quoted in Scott v. DST Systems, Inc., Civ. A. No. 00286-RGA and 00322-RGA at *5 (D. Del. Aug. 23, 2019).

[99]*In re* Xoom Corp. Stockholder Litig., No. CV 11263-VCG, 2016 WL 4146425, at *8-9 (Del. Ch. Aug. 4, 2016). *See also* Cooperstock v. Pennwalt Corp., 820 F. Supp. 923: "This well recognized exception, known as the 'common benefit' or 'common fund' equitable doctrine, is premised upon the rationale that it would be unfair to require one party to bear the entire expense which results in the benefit to a large class of persons". In *Kahan v. Rosenstiel,* 424 F .2d at 166, the court clarified that "the award of attorney's fees is not limited to circumstances in which there is a monetary fund from which fees may be paid, but extends to any situation in which the litigation has conferred a substantial benefit on the members of an ascertainable class". But *cf*. Griffith, *Correcting Corporate Benefit*, *supra* note 63, at 22 ("When fees are awarded for a monetary recovery or on the basis of a fund, the amount of which is either increased or protected by the settlement, then fees are awarded on the basis of the common fund doctrine." By contrast, when "the only relief is non-pecuniary in nature, fees can be awarded only on the basis of the corporate benefit doctrine. Although courts occasionally mix the terminology, the doctrines are not interchangeable."); *see also* Goodrich v. E.F. Hutton Grp., Inc., 681 A.2d 1039, 1045 (Del. 1996); *In re* Dunkin' Donuts S'holders Litig., No. CIV. A. 10825, 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990), *reprinted in* 16 DEL. J. CORP. L. 1443, 1451 (1990); Franklin Balance Sheet Inv. Fund v. Crowley, No. CIV. A. 888-VCP, 2007 WL 2495018, at *6 (Del. Ch. 2007).

[100]*See In re Trulia Inc. Stockholder Litig.*, 129 A.3d at 898 n. 46 (In the mootness scenario, fees "would be commensurate with the value of the benefit conferred. Thus, for example, a supplemental disclosure of nominal value would warrant only a nominal fee award.").

Unlike in the disclosure-only settlement cases, in the voluntary dismissal/mootness fee scheme the dismissal is without prejudice for the class, and the defendant obtains no release from future claims.[101] Mootness fees are also on average much lower than the attorneys' fees granted in a typical disclosure-only settlement.[102]

According to Chancellor Bouchard in *Trulia*, the mootness dismissal is "the preferred scenario" from the court's perspective and "provides a logical and sensible framework for concluding the litigation": after being afforded some discovery, "plaintiffs can exit the litigation without needing to expend additional resources (or causing the Court and other parties to expend further resources)."[103]

On these grounds, mootness fees are subject to the more lenient standard set forth in *Trulia* and remarked upon in *Xoom*, according to which, when determining whether to grant an award of fees, a court does not need to weigh the benefit of the supplemental disclosures (the "get", in the court's own words) against the cost of a release (the "give").[104] Therefore, the *Trulia* requirement of materiality does not apply to a voluntary dismissal, and – unlike in a settlement – a disclosure that is not "particularly strong" and is merely "helpful" – that is, representing "a modest benefit to the stockholders"—can justify a fee award.[105] That does not imply that in Delaware the test for mootness fees is a total pass, but just that it is less demanding.

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[101]Later (most likely after the closing of the transaction) another plaintiff could file a similar lawsuit asserting claims for the same class. But *cf. In re Trulia Inc. Stockholder Litig.*, 129 A.3d 897-98 (Although defendants have not obtained a formal release, the filing of a stipulation of dismissal likely signifies the end of fiduciary challenges over the transaction as a practical matter).

[102]*See* Cain et al., *Mootness Fees*, *supra* note 13, at 1781 (mootness fees are typically in the range of $50,000 to $300,000); *see also* Joseph M. McLaughlin & Shannon K. McGovern, *Mootness Fees in Disclosure-Focused Deal Litigation*, N.Y.L.J. (Dec. 12, 2018, 2:46 PM), https://www.law.com/newyorklawjournal/2018/12/12/mootness-fees-in-disclosure-focused-deal-litigation/?slreturn=20200306135103 (reporting that recently "median mootness fees are closer to $250,000"). Data might however be incomplete, since parties sometimes do not disclose the mootness fee payments.

[103]*In re Trulia Inc. Stockholder Litig.*, 129 A.3d at 897.

[104]*Id.* at 898 n.46; *see In re Xoom*, 2016 WL 4146425, at *3-4; *see also In re* BTU Int'l Stockholders Litig., No. 10310-CB, 2016 WL 680252, at *2 (Del. Ch. Feb. 18, 2016) (noting that the court did not expressly state it weighed the benefit of disclosures against the cost of a release).

[105]*See In re Xoom*, 2016 WL 4146425, at *3-5 (In this case, the court scrutinized the supplemental disclosures and concluded that, although the additional information was of "modest benefit to the stockholders," the mootness fee could be approved. Nevertheless the judge reduced the fee from $275,000.00 to $50,000.00).

However, Delaware does have a specific procedure for the oversight of mootness fees: Delaware courts require notice to the putative class and reserve jurisdiction solely to hear a mootness fee application.[106] The notice to the putative class is a crucial step in such procedure and "must be provided to protect against 'the risk of buy off' of plaintiffs' counsel."[107] It allows an interested shareholder to raise an objection to the use of corporate funds and thereby allows the court to review the payment.[108]

In fact, the litigants also appear to have the option to resolve the fee application privately without applying for court approval.[109] The notice to stockholders is designed to guard against potential abuses, and, with that protection in place, Delaware courts have sometimes accommodated the use of the private resolution—a way of proceeding, the propriety of which was reiterated by Chancellor Bouchard in *Trulia.*[110] In *In re Harman,* the court granted the plaintiffs' request for voluntary dismissal and expressly retained jurisdiction for the purpose of determining the plaintiffs' fee application.[111] However, the parties agreed on the payment of some mootness fees and never submitted the amount to the court for approval.[112]

The procedure is a key point, and the lack of transparency clearly works in favor of collusive litigants. Outside Delaware, some courts do not scrutinize mootness fees, and some do not even require the parties to disclose these fees, adding further opacity to the practice.[113] In federal

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[106]*In re Trulia Inc. Stockholder Litig.*, 129 A.3d at 897-98 (referencing *In re* Family Dollar Stores, Inc. S'holder Litig., No. CV 9985-CB, 2014 WL 7246436 (Del. Ch. Aug. 4, 2015) (Order) and *In re* Zalicus, Inc. S'holder Litig., No. CV 9602-CB, 2015 WL 226109 (Del. Ch. Jan. 16, 2015) (Order)).

[107]*In re Trulia Inc. Stockholder Litig.*, 129 A.3d at 898. (citing *In re* Advanced Mammography Sys., Inc. S'holders Litig., No. CIV. A. 14831, 1996 WL 633409, at *1 (Del. Ch. Oct. 30, 1996) and *In re Zalicus*, 2015 WL 226109, at *1).

[108]*See In re Zalicus*, 2015 WL 226109, at *2.

[109]*See In re Trulia Inc. Stockholder Litig.*, 129 A.3d at 898 ("Twenty years ago, Chancellor Allen acknowledged the right of a corporation's directors to exercise business judgment to expend corporate funds (typically funds of the acquirer, who assumes the expense of defending the litigation after the transaction closes) to resolve an application for attorneys' fees when the litigation has become moot, with the caveat that notice must be provided to the stockholders . . . .").

[110]*Id.*

[111]*See In re* Harman Int'l Indus., Inc. Stockholders Litig., No. 13001-CB, 2016 Del. Ch. LEXIS 291, at *4 (Del. Ch. Dec. 22, 2016).

[112]*Id.* at *2 (an amount of $195,000 as mootness fees was agreed.); *see also* Cain et al., *Mootness Fees*, *supra* note 13, at 1802 n.78.

[113]*See* Rosenfeld v. Time Inc., No. 17-CV-9886 (DLC), 2018 WL 4177938, at *1-3, *5 (S.D.N.Y. Aug. 30, 2018) (The parties mooted and indicated that plaintiffs would have dismissed their individual claims with prejudice and the putative class claims without prejudice. The court argued against the elusive strategy of seeking equitable relief on behalf of a putative class of shareholders for federal securities law violations. The judge noted that the real intentions typically surface once the case gets quickly dismissed by the named plaintiffs before a lead

courts, before the latest developments, the mootness dismissal and the related fees were not subject to court approval.[114] This explains the mutation and the migration—namely, why plaintiffs' attorneys have started bringing the claims in federal courts under securities law and why mootness dismissals have displaced and substituted for disclosure-only settlements. It also proves the effectiveness of the adaptive response put in place by plaintiffs' attorneys in the search for litigation opportunities.

The mootness dismissal structure is vulnerable and apt to be distorted; and this has been clearly underestimated. In *Trulia*, the court held that in the mootness dismissal scenario, "where securing a release is not at issue, defendants are incentivized to oppose fee requests they view as excessive."[115] We contend that this assumption is not correct. In fact, it does not take into account that the mootness fees are the result of an agreed scheme, where defendant directors can obtain, if not a release from future claims, something they value greatly: the closing of the transaction. In

plaintiff could be appointed pursuant to the procedures set out in the PSLRA—therefore before any courts' review. In these lawsuits, the plaintiffs challenging the transaction are basically mere tickets of admission to the action for the law firms who commence the case on their behalf. The specific case in *Rosenfeld* was no exception: in the conference held by the court, the Rosenfeld's counsels "had difficulty offering even basic details about his client, such as his age and occupation" and "remembering who in his law firm had spoken to Rosenfeld regarding the lawsuit." In addition, both plaintiffs Rosenfeld and Pills held little interest in the companies, owning just few shares each; and had already served as named plaintiffs in several actions, mainly M&A litigation, filed by the same law firms. The court questioned whether such practice constituted an abuse and whether the court "has an obligation to conduct a mandatory review for compliance with Rule 11(b), Fed. R. Civ. P., otherwise contemplated by the PSLRA." Nevertheless, it concluded that these dismissals were not adjudications on the merits, and "no review for compliance with Rule 11 is required by the PSLRA" since PSLRA requires a judicial review if a securities claim is adjudicated on the merits.) (quoting Blaser v. Bessemer Tr. Co., No. 01 CIV. 11599(DLC), 2002 WL 31359015, at *3 (S.D.N.Y. Oct. 21, 2002)) (quoting Unite Here v. Cintas Corp., 500 F. Supp. 2d. 332, 336-37 (S.D.N.Y. 2007)); *see also* Manchester Mgmt. Co., LLC v. Echo Therapeutics, Inc., 297 F. Supp. 3d 451, 465-66 (S.D.N.Y. 2018) (What is more, the judge also questioned for another day literally, "[b]ecause of the swift dismissal here, this is not the case in which these issues may be more fully explored." Whether a putative class is entitled to even obtain preliminary injunctive relief before a lead plaintiff is appointed and a class certified by the court.).

[114] *See* FED. R. CIV. P. 23(e). (Rule 23(e) only requires court approval of a voluntary dismissal after class certification. When the class is uncertified, the dismissal would clearly dismiss an individual claim and is not required to be validated.).

[115] *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884 , 897 (adding "[h]ence, 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."); *id.* at 897 n.39 (Conversely, "[i]f defendants do not oppose a mootness fee application, then the Court presumably would not have the benefit of any opposing position . . . . But, in that case, the Court would have some indication of the reasonableness of the fee request.").

other words, they get rid of the litigation and remove the potential delay or impediment to a large transaction—and that is no small achievement in such a time-sensitive context. The leverage used by plaintiffs' attorneys is no different from the one employed in disclosure-only settlement practice; neither is there any difference between the motivations which can induce the defendants to agree to pay the mootness fees.

Therefore, apart from the absence of a release and the lower fees on average, we argue that the new scheme stimulates the same collusion as the disclosure-only settlement and is no less detrimental for corporations and shareholders than the old practice. The number of cases mooted with fees and the associated lack of transparency herald a distortion of the litigation system that must cause substantial concerns.

Further evidence suggests that these suits are not being filed with the expectation of obtaining a meaningful recovery for the plaintiff class but rather in order to obtain valueless disclosures and some mootness fees. Top plaintiffs' firms, which have been documented as being consistently able to obtain superior monetary settlements for shareholders, are not active in filing these cases.[116] Moreover, if plaintiffs' attorneys had valuable cases, they would rather bring them in Delaware courts, which have historically awarded higher attorneys' fees in meritorious cases.[117]

B. *The Response to Mootness Fee Practice: House v. Akorn*

In an opinion issued on June 24, 2019 (*House v. Akorn*), a U.S. District Court in Illinois scrutinized an out-of-court agreement to pay mootness fees to plaintiffs' counsel after supplemental disclosures and a voluntary dismissal.[118] Although the claims were filed as prospective class actions,[119] they were then dismissed by individual shareholders and not settled on behalf of all the shareholders. Accordingly, no class-action settlement was filed that would have required court approval covered under the *Trulia-Walgreen* standard.[120]

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[116] *See* Cain et al., *Mootness Fees*, *supra* note 13, at 1783 (citing C.N.V. Krishnan, Steven Davidoff Solomon & Randall S. Thomas, *Who Are the Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, 18 AM. L. & ECON. REV. 122, 124 (2016)).

[117] *See id.* at 1804.

[118] *See* House v. Akorn, Inc., 385 F. Supp. 3d 616, 619 (N.D. Ill. 2019).

[119] *See id.* (They were six separate lawsuits against Akorn, Inc., and each of them alleged that the directors had made omissions or misstatements in connection with Fresenius Kabi AG's bid to acquire the company.).

[120] *Id.*

When an Akorn shareholder[121] challenged the scheme and moved to enjoin the payment of the mootness fees, the judge denied the motion to intervene in the case[122] but seized the opportunity to scrutinize the additional disclosures and the fees. He found the disclosures not plainly material and "worthless to the shareholders,"[123] since it provided "nothing of value" for shareholders and "instead caused the company in which they hold an interest to lose money."[124] The judge also emphasized that "plaintiffs' attorneys were rewarded for suggesting immaterial changes to the proxy statement," so that "Akorn paid plaintiffs' attorney's fees to avoid the nuisance of ultimately frivolous lawsuits disrupting the transaction."[125] In this light, the court referred to the practice as "the 'racket' described in *Walgreen*, which stands the purpose of Rule 23's class mechanism on its head";[126] and, accordingly, abrogated the agreement and ordered the plaintiffs' attorneys to return the fees to Akorn.[127]

Since the Federal Rules of Civil Procedure do not explicitly allow a court to review mootness fees,[128] the *Akorn* court invoked its equitable powers—its "inherent authority,"[129] in Judge Durkin's words—and extended *Walgreen*, thereby imposing a standard stricter than the one applicable to mootness fees under *Trulia* and *Xoom*.[130]

Notably, the *Akorn* court cited the formula of *Walgreen* already illustrated,[131] but clarified that, since no class was certified, nor were any class claims released in the settlement, the case was "in the procedural posture suggested by the second half of the sentence,"[132] according to

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[121]*Id.* at 623. (The class action watchdog, Ted Frank, who was fresh off of the 2016 significant win of *Walgreen*. He actually acquired the shares after the first claims were filed and Akorn shareholders voted on the deal).

[122]*See Akorn*, *Inc.*, 385 F. Supp. 3d at 618 (But permitted the objector to argue against the mootness fees as an *amicus*. Consequently, the objector filed an opposition brief.).

[123]*Id.* at 623.

[124]*Id.* at 619 (The judge also clarified that "the Court must assess whether the disclosures Plaintiffs' *sought* in their complaints—not the disclosures Akorn made after the complaints were filed in the revised proxy and Form 8-K—are plainly material.").

[125]*Id.* at 623.

[126]*Akorn, Inc*., 385 F. Supp. 3d at 623.

[127]*See id.*

[128]*In re* Trulia Inc. Stockholder Litig., 129 A.3d 884, 897-98 (Del. Ch. 2016).

[129]*Akorn, Inc*., 385 F. Supp. 3d at 623.

[130]*In re Trulia Inc. Stockholder Litig.*, 129 A.3d at 891; *In re* Xoom Corp. Stockholder Litig., No. CV 11263-VCG, 2016 WL 4146425, at *3 (Del. Ch. Aug. 4, 2016).

[131]*Akorn, Inc*., 385 F. Supp. 3d at 618-19.

[132]*Id.* at 619.

which "a class action that seeks only worthless benefits for the class should be dismissed out of hand."[133]

It is also quite interesting that just few weeks before *Akorn* some commentators had invited federal courts to submit mootness fees to meaningful judicial oversight.[134] They contended "that the payment of a mootness fee should be conditioned on litigation resulting in a material corrective disclosure";[135] that is to say, extending to mootness fees the same legal standard as required by *Trulia* for disclosure-only settlements.

It has been argued that this approach is consistent with the purpose of the Private Litigation Securities Reform Act (*PLSRA*), which is to limit frivolous litigation, as well as with FRCP 23, which provides for transparency and judicial oversight of the class action process.[136] Therefore, "given the public interests involved and the nature of plaintiffs' attorneys as quasi-representatives of all shareholders," the scrutiny of mootness fees under the *Walgreen* standard is in line with the scope of the law.[137]

The court also held that "[t]he quick settlements obviously took place in an effort to avoid the judicial review this decision imposes."[138] In this way, the judge recognized the collusive strategy the parties put in place to outflank the procedural safeguards – which in this case was also the outcome of an adaptive response to the *Trulia-Walgreen* approach, as in a Darwinian mutation of the pattern.[139] In addition, the judge also stated a principle: this kind of practice invites a judicial review.[140]

In other words, under the *Akorn* doctrine mootness fees in federal jurisdictions are to be both subject to court approval and scrutinized through the same materiality standard provided for disclosure-only settlements.[141]

Two months later, on August 23, 2019 another federal court cited *Walgreen* in a mootness fee case and came to the same conclusion of *Akorn*: in *Scott v. DST Systems*, the District Court for the District of Delaware held that in cases mooted after the defendant had issued additional disclosures a plaintiff "must establish, as a factual predicate, that the supplemental information was material". Failing to do so, the

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[133]*In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 724 (7th Cir. 2016).
[134]Cain et al., *Mootness Fees*, *supra* note 13, at 1784.
[135]*Id.*
[136]*Id.*
[137]*Id.* at 1784, 1809.
[138]*See* House v. Akorn, Inc., 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019).
[139]*Id.*
[140]*Id.*
[141]*See id.*

plaintiff will not meet the requirement of the "substantial benefit" which is requested by the common benefit doctrine in order to award attorneys' fees[142]. This confirms that when a federal court has to ascertain a benefit for the corporation in order to award mootness fees, and this benefit concerns supplemental information, that information has to be material, or it will not constitute a benefit for the purpose.

Moreover, in *Scott* the court clarified that the plaintiff will not succeed in carrying the evidentiary burden by merely arguing that the defendant disclosed previously withheld information[143], but will have to develop a factual record or proffer expert opinions in support of the motion[144].

Although the decision arose out of a peculiar context, where the defendant contested the mootness fee, the case is not less significant than *Akorn*. Both decisions are certainly indicating that federal courts are paying attention to the issue and are now receptive and responsive to new tactics devised by plaintiffs' attorneys.[145] What's more, they might induce corporate defendants to contest fee applications more often, so restoring the adversarial nature of litigation.

However, the district court's decision in *Akorn* is still to be confirmed. In fact, two related appeals against it are pending before the 7th Circuit—the same court that in *Walgreen* embraced *Trulia*.[146] The Akorn

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[142] *Scott v. DST Systems, Inc.*, Civ. A. No. 00286-RGA and 00322-RGA at *5-6 (D. Del. Aug. 23, 2019). The decision stemmed from the March 2018 acquisition of DST Systems Inc. The transaction was challenged by three stockholder-plaintiffs, who separately brought suits alleging the omission of material information in the proxy statement soliciting stockholder approval. After some settlement discussions and in less than five weeks, DST issued supplemental disclosures regarding analyses performed by its financial adviser. The disclosures were expressly made to moot the suit. However, the parties did not agree on the amount of mootness fees and proceeded to litigate that issue. When the judge requested supplemental briefing after the initial submission, one of three plaintiffs withdrew its fee application, and the other two respectively sought $115,000 and $100,000. The Judge Andrews turned directly to the issue of the benefit for the corporation – without even deciding whether the lawsuit was meritorious when filed – and concluded that the plaintiff failed to carry the burden of proof. As a result, he denied the motion for attorney's fees (*Id*. at *12).

[143] Which means by simply relying on the bald fact of the supplemental disclosure. *See Id* at *6 and *12.

[144] *Id*. at *12. Since usually the parties moot the action before discovery and consequently plaintiffs' attorney may find hard to carry that burden, the indication that expert opinions on materiality may also be sufficient is rather relevant.

[145] *Akorn,* 385 F. Supp. 3d at 623.

[146] *See In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 724 (7th Cir. 2016). Shaun A. House v. Akorn, Inc. et al. and Demetrios Pullos v. Akorn, Inc. et al, Appellate Court nos. 18-3307, 19-2401, 19-2408 consolidated (U.S. Court of Appeal for the 7th Circuit). Remarkably, the Chamber of Commerce of the United States of America filed an *amicus brief* as *amicus*

shareholder, who had his motion to intervene denied by the District Court, is appealing the denial on the grounds that the plaintiffs' counsel had fiduciary obligations to all shareholders, not just his specific clients.[147] As a result, by breaching these duties to him as shareholder, the counsel provided him with an interest in asserting a claim (namely, an interest to intervene in the case).[148]

At the same time, the plaintiffs filed an appeal against Judge Durkin's invocation of his equitable power to scrutinize the agreement and to order the restitution.[149] According to the plaintiffs, since there was no longer a case pending before the court, and "since a federal judge's authority to issue orders depends (with immaterial exceptions) on the existence of a case," the court's order is void.[150] This point is crucial: if the court has no inherent authority to review mootness fees unless a case is pending before it, then scrutiny will be possible only when a motion to intervene is filed and granted.[151] By contrast, if a federal court is implicitly conferred with this power, it will be allowed to scrutinize the mootness fees in any case—provided that the court becomes aware of it.[152]

We maintain that the appellate court should affirm the district court's decision, since it has solid legal grounds. Moreover, in terms of policy, a lesser standard would encourage the proliferation of vexatious lawsuits and would not block the exploitation by the plaintiff's attorneys.

A landmark decision could be in the offing—a decision which could cause the demise of mootness fees as a substitute for the peppercorn and fee settlements, at least in federal courts.

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curiae in support of defendants-appellees in nos. 19-2401 and 19-2408, concluding that "the Court should either affirm or at minimum provide guidance for district courts to follow in policing against meritless merger-objection cases". As of April 14, 2020, the Appeals are still pending.

[147] *See* Berg v. Akorn, Inc., No. 17-C-5016, 2017 WL 5593349, at *1 (N.D. Ill. Nov. 21, 2017).

[148] *See id.* at *4.

[149] Joint Cons. Opening Brief & Required Short Appendix for Plaintiffs-Appellants Shaun A. House & Demetrios Pullos at 2-3, House v. Akorn, Inc., 385 F. Supp. 3d 616 (7th Cir. 2019), Nos. 18-3307, 19-2401, and 19-2408.

[150] *Id.* at 3.

[151] *See id.*

[152] *Id.*

IV. PROSPECTIVE DEVELOPMENTS AND ADAPTIVE RESPONSES AFTER *AKORN*

A. *The Mootness Fee Scheme in Federal Courts After Akorn*

1. The Requirement of Reporting to the Court Any Payment of Mootness Fees

Alone, the confirmation of *Akorn* may not be enough to block overlitigation. It would discourage plaintiffs' attorneys from starting a meritless lawsuit to extract some mootness fees, but only to the extent that a court may effectively hold a hearing to determine if the payments were justified under the materiality standard. As noted earlier, a judge can assess mootness fees in the event of an objection. But if the parties are not required either to give notice of the agreement on mootness fees to other shareholders, or to apply for a judicial approval of those fees (when the lawsuit is voluntarily dismissed prior to class certification), the court might have no way of becoming aware of such payment—unless an objection is raised. This is true regardless of the existence of a court's inherent authority to review mootness fees when a case is not pending before it—as held in *Akorn*—since knowledge of the payment is a logical precondition.[153] In other words, it is an issue that would persist even if the 7th Circuit were to affirm the district court's decision in *Akorn*, because the power to review those fees is one thing, and triggering an assessment is quite another. The shift from Delaware courts to federal courts is also an attempt to leverage this gap in judicial oversight of the federal courts—because in Delaware, notice is required.[154]

Some commentators have proposed the introduction of a rule explicitly mandating that parties provide notice of mootness fees to the putative class and apply for judicial approval.[155] In this way, objectors

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[153] *See Akorn, Inc.*, 385 F. Supp. 3d at 623.

[154] *In re* Trulia Inc. Stockholder Litig., 129 A.3d 884, 898 (Del. Ch. 2016).

[155] *See* Cain et al., *Mootness Fees*, *supra* note 13, at 1811-12 (noting that Fed. R. Civ. P. 23, as it is currently formulated, does not apply to mootness fees because in this scheme the case is dismissed prior to class certification—but in *Akorn* the judge found an alternative basis). The amendment to the Rule 23 should require that "[u]nless approved by the court after a hearing, no payment or other consideration may be provided in connection with the voluntary dismissal of a proposed class action." *Id.* At 1812. These commentators claimed that such amendment is necessary since the "*Akorn* court's decision was only possible because the parties had disclosed the payment of a mootness fee and because an objector sought to intervene, triggering the court decision." *Id.* at 1811. As we noted earlier, this is correct but only to the extent that the disclosure

could have the opportunity to make their case in court, and the courts could assess whether the payment is justified.[156]

Notably, this proposal recommends the introduction of notice to stockholders as well as judicial approval.[157] By contrast, in *Trulia*, the court held that in the mootness fees scenario, the mere requirement of notice is an appropriate guard against abuses, since it would solicit interested shareholders to object.[158] On this view, the fact that defendants did not oppose, and no objector appeared would be an indication of the reasonableness of the fee request.[159] The notice-only approach can sound a little optimistic in this context; however, it is consistent with the transparency that FRCP 23 aims to promote.[160]

We contend that, since in *Akorn* Judge Durkin stated that the court has equitable powers to scrutinize the mootness fees even without an objection, the problem of lack of awareness would be technically resolved with a standing order requiring that any fee payment be reported to the court prior to payment.[161] If the courts routinely issued this order in all merger lawsuits, should *Akorn* be affirmed, the gap would be filled.

Clearly, given that an opposition by the defendant directors is unlikely for the aforementioned reasons, without an objector the court would not have the benefit of any opposing position when assessing the mootness fees. Also considering the uncertainties on the procedure in

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of the fees and the objection are seen as the occasion for the court to become aware of and assess the mootness fees and not as the legal grounds for the review. *See Akorn,* 385 F. Supp. 3d at 623 (The motion to intervene was in fact dismissed and court ordered to return the fees on the grounds of its equitable powers—that is to say the court held to have already an "inherent authority to rectify the injustice" and review the mootness fees.).

[156] *See* Cain et al., *Mootness Fees*, *supra* note 13, at 1813, (noting that the proposal is consistent with the purpose of Fed. R. Civ. P. 23 as well as the approach in Delaware). The court also noted that the same Rule was previously amended to address similar concerns in connection with the filing and subsequent withdrawal of objections to settlements. The amendment was passed in 2017 to require court approval for any payment to an objector to a class settlement in connection with the objector's withdrawal of the objection. The standing committee explicitly cited as rationale for the amendment the need for impeding payments which perpetuates a system that encourages objections advanced for improper purposes. *See Comm. on Rules of Practice and Procedure*, *Summary of the Report of the Judicial Conference Comm. on Rules of Practice & Procedure*, Agenda E-19 (Appendix C) (2017), https://www.uscourts.gov/sites/default/files/2017-09-jcus-report_0.pdf [hereinafter *Comm. on Rules of Practice and Procedure*].

[157] *Comm. on Rules of Practice and Procedure*, *supra* note 152.

[158] *See In re Trulia Inc. Stockholder Litig.*, 129 A.3d at 897.

[159] *See id.*

[160] *See* FED. R. CIV. P. 23.

[161] *See* Cain et al., *Mootness Fees*, *supra* note 13, at 1812 n.126; *see also* House v. Akorn, Inc., 385 F. Supp. 3d 616, 622-23 (N.D. Ill. 2019).

Delaware (only notice or notice and judicial approval), the proposed amendment could clear up any ambiguity.[162]

Yet, a variation of the scheme could already be on the rise. It could present an alternative plaintiff-side strategy, in which the implicit agreement underlying the mootness fee is kept well away from the courts: the (prospective) plaintiff's attorney writes a letter to a corporation alleging material non-disclosures in a proxy statement; the corporation makes corrective disclosures, and the (prospective) plaintiff seeks a mootness fee from the corporation. Obviously, it is impossible to tell with any statistical rigor how often such scheme has been successfully employed. Some evidence can be extracted from those cases in which the scheme ends up in a court because, for instance, the corporation files a complaint for a declaratory judgments: namely, when the corporation requests a judgment declaring that the plaintiff who wrote the letter had no viable claim and provided no substantial benefit[163].

Evidently, these cases could generate a fee without a lawsuit ever being filed. They could make the scheme even closer to an extortion, where the mootness fees become the price to silence serial litigants, opportunists and exploiters of any kind, and where the courts stay completely out of the way.

2. Effectiveness of the Other Safeguards: The PSLRA, Assad v. DigitalGlobe *and* Bushansky v. Remy

If the procedural gap of mootness fees is bridged by the decision in the *Akorn* appeal and the courts manage to scrutinize those payments, repackaging a state-law fiduciary-duty action into a federal disclosure violation case will no longer be convenient for plaintiffs' attorneys.[164] Notably, in order to bring a claim under Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9, a plaintiff must establish that: (1) a proxy statement contained a material misrepresentation or omission; (2) the defendants were at least negligent in drafting the proxy statement; (3)

[162]*See* Cain et al., *Mootness Fees*, *supra* note 13, at 1813.

[163]An example of this – even if related to executive compensation – is *Avalon Holding Corporations v. Stein*, No. 4:2019CV01210 (N.D. Ohio), where the plaintiff company requested entry of a judgment declaring that the defendant shareholder was not entitled to attorney's fees pursuant to *Mills v. The Electric Auto-Lite Co*., 396 U.S. 375 (1970) and *Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991), because she provided no substantial benefit to the defendant through her meritless threat of starting an action under Section 14(a). The case ended in a voluntary dismissal on June 26, 2019.

[164]*See Akorn, Inc.*, 385 F. Supp. 3d at 622-23.

the misrepresentation or omission caused the plaintiff injury; and (4) the proxy solicitation was an essential link in accomplishing the transaction.[165] In other words, in addition to the materiality of the misrepresentation or omission, a plaintiff must demonstrate an "actual economic harm"[166]—the "injury" requirement and the "essential link" element will require the plaintiff to show causation.[167]

In order to curb potential abuses of federal litigation, the federal legislature also enacted the Private Securities Litigation Reform Act (the "PSLRA"),[168] strictly applied by courts to Section 14 claims. This added some filters to enhance the screening of unmeritorious proceedings, such as a heightened "particularity" requirement for plaintiff's pleadings and an automatic discovery stay pending resolution of the defendant's motion to dismiss.[169] Both constitute a significant hurdle in this scenario. The particularity requirement[170] imposes a high level of detail in the pleadings while in this context allegations are usually vague. The automatic discovery stay[171] weakens any threat from the plaintiffs' attorneys to block the merger completion—on which these lawyers rely more than on the actual success of the lawsuit. Therefore, federal claims under "Section 14 have a better chance of surviving a motion to dismiss where plaintiffs can plead a truly incorrect statement regarding something of remarkable and indisputable significance for stockholders: the consideration offered."[172]

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[165]*See* Gen. Elec. Co. v. Cathcart, 980 F.2d 927, 932 (3d Cir. 1992) (quoting Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 385 (1970)); Herskowitz v. Nutri/Sys., Inc., 857 F.2d 179, 190 (3d Cir. 1988); Shidler v. All Am. Life & Fin. Corp., 775 F.2d 917, 927 (8th Cir. 1985); *see also* Atlantic Coast Airlines Holdings, Inc. v. Mesa Air Grp., Inc., 295 F. Supp. 2d 75, 81-82 (D.D.C. 2003); Lane v. Page, 727 F. Supp. 2d 1214, 1241 (D.N.M. 2010).

[166]New York City Emps.' Ret. Sys. v. Jobs, 593 F.3d 1018, 1023 (9th Cir. 2010), *overruled by* Lacey v. Maricopa Cty., 693 F.3d 896 (9th Cir. 2012) (noting the case was overruled on other grounds).

[167]*In re* NAHC, Inc. Sec. Litig., 306 F.3d 1314, 1329 (3d Cir. 2002).

[168]Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

[169]*Id.*

[170]*See* Bond Opportunity Fund v. Unilab Corp., 87 F. App'x 772, 773 (2d Cir. 2004) (citing 15 U.S.C. § 78u–4(b)(1)). In order to meet it, plaintiffs must specify in the complaints each allegedly false or misleading statement and also must explain why, otherwise the suit will not survive a motion to dismiss. Furthermore, if an allegation about falsity is made on information and belief, the complaint must "state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u–4(b)(1)(B). *See also* Beck *ex rel.* Equity Office Properties Tr. v. Dobrowski, No. 06-C-6411, 2007 WL 3407132, at *9-10 (N.D. Ill. Nov. 14, 2007), *aff'd sub nom.* Beck v. Dobrowski, 559 F.3d 680 (7th Cir. 2009).

[171]15 U.S.C. § 78u-4(b)(3)(B) ("[A]ll discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.").

[172]Abby F. Rudzin, R. Scott Widen & Matthew T. Murphy, *From Chancery Court to Federal Court: The Obstacles to a Post-Trulia Migration*, 50 REV. SEC. & COMMODITIES REG.

Moreover, Section 14 claims are based on "alleged defects in the final proxy statement mailed to shareholders."[173] By contrast, a state law claim may be brought even before the proxy statement is distributed, by using *Revlon* to challenge the merger process,[174] For example, in *Trulia,* "the first complaint was filed about a week after the deal was announced, that is more than a month before the preliminary proxy statement was filed with the SEC."[175] Thus, a shareholder-plaintiff bringing an action under Section 14 may already "be far behind a state-court plaintiff, only to be further delayed by the PSLRA's automatic discovery stay."[176]

All these requirements and peculiarities, along with *Walgreen* and *Akorn* (if affirmed), should provide federal courts with an effective safeguard against nuisance litigation.[177]

Two decisions (issued in 2017) also demonstrate how federal courts are on the alert. After *Trulia*, some lawyers tried to migrate the litigation to the federal courts by filing claims with a novel kind of request: that the operative disclosure document produced by the company (in connection with the merger) reconcile non-GAAP financial measures (used in the company's projections) with GAAP financial measures.[178]

Quite soon, two rulings closed the door to such a gambit. In *Assad v. DigitalGlobe,*[179] the U.S. District Court for the District of Colorado rejected a stockholder plaintiff's argument that a registration statement circulated was materially misleading because it disclosed non-GAAP projections but did not reconcile those figures to GAAP financial metrics.[180] The court rejected the assumption that all financial projections and their underlying financial information are necessarily material or must be disclosed and held that the burden to prove "the actual significance to

41, 45 (2017); *see also* Bensinger v. Denbury Res. Inc., No. 10-CV-1917-JG, 2011 WL 3648277 (E.D.N.Y. Aug. 17, 2011).

[173] *Id.*

[174] *See id.*; *see also* Awrey et al., *supra* note 1, at 10.

[175] Rudzin et al., *supra* note 167, at 45; *see also In re* Trulia Inc. Stockholder Litig., 129 A.3d 884, 888 (Del. Ch. 2016).

[176] Rudzin et al., *supra* note 167, at. 45.

[177] *See id.* at 46.

[178] *See Assad v. DigitalGlobe, Inc., No. 17-CV-01097-PAB-NYW,* 2017 WL 3129700, at *2 (D. Colo. July 21, 2017) (discussing the financial measures which do not comply with generally accepted accounting principles (non-GAAP) with those financial measures which do comply with these principles (GAAP)).

[179] *See id.*

[180] *Id.* at *6-7.

a shareholder in determining how to vote" remains on the plaintiff.[181] Similarly, in *Bushansky v. Remy International*,[182] the United States District Court for the Southern District of Indiana, applied *Trulia* and *Walgreen*, rejected a disclosure-only settlement, and stated that disclosures reconciling GAAP and non-GAAP financial measures were not material.[183]

B. *Unsustainability of the Trulia and Xoom Standard for Mootness Fees and Alternatives*

The affirmation of the district court's decision in *Akorn* would leave unresolved another issue in Delaware: the standard for scrutinizing the mootness fees. As we noted earlier, *Trulia* and *Xoom* only require "some benefit to stockholder" in order to justify a mootness fee.[184]

Some commentators argued that such standard is both low and judicially unmanageable: "it rewards plaintiffs for filing complaints in cases in which there is no violation of the law - because section 14(a)

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[181]*Id*. at *5-6 (adding that non-GAAP "measures have been extensively used in financial disclosures even after Regulation G was finalized in 2003"). The court held that the plaintiff failed to show he was likely to succeed in proving that the non-GAAP financial measures were materially misleading. The court also rejected the plaintiff's conclusion that, by adopting Regulation G, SEC heightened its scrutiny of unreconciled, non-GAAP projections and placed certain conditions on the use of non-GAAP financial measures.

[182]Bushansky v. Remy Int'l, Inc., 262 F. Supp. 3d 742, 750 (S.D. Ind. 2017) (Here, the stockholders claimed that the directors of Remy International violated Section 14(a) of the Exchange Act by causing a materially incomplete and misleading proxy statement to be filed with the SEC in connection with a proposed sale of Remy, a Delaware corporation, to BorgWarner Inc. The parties agreed to a disclosure-only settlement, according to which the defendants would have compensate the plaintiffs' counsel up to $400,000.00 in fees and $15,000.00 in expenses and the defendants would have received class-wide releases. In declining the approval of the settlement, the court asserted that the additional disclosures failed to "address a plainly material misrepresentation or omission" and do not benefit the proposed class.).

[183]*Id*. at 747-48 (Because it is not true that Regulation G prohibits the use of non-GAAP financial measures unless they are accompanied by a comparable GAAP accounting measure, as instead alleged by the plaintiff. Some questions can be raised on the further explanation provided by the court. The judge held that the projections disclosed in the proxy statement "were not prepared with a view toward public disclosure" and towards "the published guidelines of the SEC regarding projections and the use of non-GAAP measures," so that Regulation G would not apply.) (citations omitted); U.S. SECURITIES & EXCHANGE COMM'N, *Compliance and Disclosure Interpretations: Non-GAAP Financial Measures* (Apr. 4, 2018), https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm (But SEC Non-GAAP Financial Measures state that financial measures provided to a financial advisor are excluded from the definition of non-GAAP financial measures and as such are not subject to Regulation G to the extent that "the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction; and the forecasts are being disclosed in order to comply with Item 1015 of Regulation M-A or requirements under state or foreign law, including case law, regarding disclosure of the financial advisor's analyses or substantive work.") (citations omitted).

[184]*See supra* Section II.A.

imposes liability only for 'material' disclosure violations."[185] These commentators outlined that this standard is contrary to the long precedent on disclosure and materiality as set forth in *TSC Industries v. Northway.*[186] It is also illogical because—as stated in *Nye*[187]—if a fact is not material for the decision and the vote that stockholders have to make, there is no duty for directors to disclose it. The conclusion—from this viewpoint—is that "information that is not legally required should not be the basis of a fee award."[188]

Regardless the difference in the scenarios of a federal claim and a state fiduciary claim, *prima facie* the remark sounds reasonable. In large transactions, information is reasonably omitted when it is not relevant; and an overflow of information would make the proxy unmanageable for stockholders, generate confusion, and hide the material disclosure.[189]

Yet, it could also be argued—again quoting *Nye*—that "companies are only legally required to disclose all material facts in connection with a merger" and so "every single proxy will surely omit at least some *immaterial* fact that might be of some *benefit* to the shareholders."[190] Mootness fees are not the consideration for the enforcement of a breached duty; and should not be dependent on whether the case has legal grounds. Rather, they are awarded under the common-benefit doctrine.[191] In other words, it is conceivable that a proxy complies with the law and provides for the legally required disclosure but omits some information that, albeit immaterial, can be of some benefit to the shareholders.[192] Hence, a claim which challenged a legally complete proxy but results in some

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[185]Cain et al., *Mootness Fees*, *supra* note 13, at 1808.

[186]*See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (noted in Cain et al., *Mootness Fees*, *supra* note 13, at 1808); *see also supra* Section I.A.2.

[187]City Trading Fund v. Nye, 59 Misc. 3d 477, 515 (N.Y. Sup. Ct. 2018) (noted in Cain et al., *Mootness Fees*, *supra* note 13, at 1808).

[188]Cain et al., *Mootness Fees*, *supra* note 13, at 1809.

[189]*See, e.g.*, *TSC Indus., Inc.*, 426 U.S. at 449 n.10 (noting "the SEC's view of the proper balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability"); Wieglos v. Commonwealth Edison Co., 892 F.2d 509, 517 (7th Cir. 1989) (remarking that "[r]easonable investors do not want to know everything that could go wrong, without regard to probabilities; that would clutter registration documents and obscure important information. Issuers must winnow things to produce manageable, informative filings."). Note that borth are quoted in House v. Akorn, Inc., 385 F. Supp. 3d 616, 618 (N.D. Ill. 2019).

[190]*City Trading Fund*, 59 Misc. 3d at 513 n.26 (referring to this kind of disclosure of minimal value as the "'tell me more' disclosures.") (emphasis added).

[191]*See* Griffith, *Private Ordering*, *supra* note 36, at 306-07.

[192]*See* Cain et al., *Mootness Fees*, *supra* note 13, at 1808-09.

supplemental immaterial disclosure can procure a benefit—even a modest one—to stockholders and justify a mootness fee in theory.

Nevertheless, along such path, we would end up on an unsustainable differentiation of standards. We contend that the *Trulia* and *Xoom* standard on mootness fees is actually unworkable in terms of policy, because plaintiffs' attorneys tend to put in place the scheme which is subject to the most lenient standard of judicial approval. Thus, a tolerant standard for mootness fees would incentivize a lawsuit against every single merger[193] and, moreover, would make *Trulia* standards on disclosure-based settlements redundant.

Indeed, in applying *Walgreen*, *Akorn*'s court was using the second half of its formula and dismissed the case as a class action seeking only worthless benefits for the class.[194] In other words, the district court judge did argue in terms of policy, referring to a "racket" that must end and against which the Rule 23 class mechanism is applicable.[195]

Finally, even if the materiality standard for disclosure-based settlements were extended to mootness fees in Delaware, plaintiffs' attorneys could put in place another adaptive response: they could revert to the scheme of disclosure-only settlements and file claims in those jurisdictions that have a more lenient standard for such agreements. As a result, nuisance litigation would proliferate again.

Nevertheless, we argue that a correspondent response of courts outside Delaware is also predictable. Sooner or later, other courts will adopt *Trulia* for disclosure-based settlements and *Akorn* for mootness fees; otherwise, rather than attracting cases—and so incorporators—they would end up inundated by meritless lawsuits, while meritorious litigation would stay in Delaware or federal courts.

Some have also suggested a solution in terms of private ordering: the introduction of a no pay provision in corporations' charters or bylaws.[196] Such a clause would bar corporations and their directors from reimbursing stockholders for attorneys' fees and expenses incurred in a lawsuit.[197] Hence, the plaintiffs' attorneys would be deprived of their incentive to file a groundless case, and the defendant directors would be deprived of their bargaining chip.[198]

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[193]*See City Trading Fund*, 59 Misc. 3d 447, 513 (quoted in Cain et al., *Mootness Fees*, *supra* note 13, at 1809).

[194]*See Akorn, Inc.*, 385 F. Supp. 3d at 619.

[195]*See id*. at 623.

[196]*See* Griffith, *Private Ordering*, *supra* note 36, at 307.

[197]*See id.* at 305-06.

[198]*See* Griffith, *Private Ordering*, *supra* note 36, at 305-06; *see generally* Ann M. Lipton, *Limiting Litigation Through Corporate Governance Documents*, *in* RESEARCH

If binding,[199] a no pay provision would be enforceable to impede the payment of attorneys' fees for disclosure settlements regardless of whether the settlement is agreed under state corporate law or SEC Rule 14a-9—unlike exclusive forum bylaws which are not applicable in federal securities cases.[200] Thus, the mere existence of this term in charters or bylaws could deter nuisance litigation and encourage plaintiffs' attorneys to press only those claims where a substantial relief realistically stands a chance.[201]

In addition, this solution would also impede the other potential variation of the scheme mentioned above—in which plaintiff's attorneys extract fees without even filing a lawsuit, just by writing a letter and alleging a lack of material information in the disclosure.

A no pay provision is definitely less radical than a fee-shifting mechanism. Besides, no doubt can be cast on its validity: a Maryland Circuit Court, for instance, upheld a term of this kind and excluded that it could impede the ability of shareholders to seek redress even for grievous wrongs.[202] However, it might have some undesirable effects: a no pay provision would also reduce any plaintiffs' inclination to settle, since the plaintiffs should bear the cost of the action even when the agreement procured a material benefit for stockholders.[203]

HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 176 (Sean Griffith et al. eds., 2018) (discussing the alternatives to litigation).

[199] *See* Griffith, *Private Ordering*, *supra* note 36, at 308 (adopted "in the form of a charter provision or, alternatively, in the form of a bylaw term requiring shareholder approval for waiver or amendment.").

[200] *See id.*

[201] *Id.* at 306.

[202] *See* Katz v. Commonwealth REIT, No. 24-C-13-001299, slip op. at 30-41 (Md. Cir. Ct. Feb. 19, 2014) (per curiam), http://perma.cc/K7K8-UW99. The provision was embedded in an arbitration bylaw. The Maryland court invoked the U.S. Supreme Court precedent in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310-11 (2013), according to which "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *See also* Griffith, *Private Ordering*, *supra* note 36, at 308. (Since the "corporate benefit" doctrine is the legal ground to compensate plaintiffs' attorneys in a settlement both in a state and in a federal jurisdiction, if a no pay provision is valid under state law, there is no reason to question its enforceability in federal courts. "Indeed, there is an elegance to the enforcement of a no-pay provision in the context of a Rule 14a-9 disclosure settlement, because it amounts to opting in to a right that is arguably already provided by statute. A no-fee provision essentially contracts for the reading of the Private Securities Litigation Reform Act advanced above.") (citation omitted); *see generally* Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L. J. 583 (2016).

[203] *See* Griffith, *Private Ordering*, *supra* note 36, at 307-08.

V. DELAWARE'S DOMINANCE AND THE REGULATION-BY-LITIGATION MODEL IN LIGHT OF *TRULIA* AND *AKORN*

A. *Future Prospect of Delaware's Dominance in the Wake of Trulia and Akorn*

Trulia and *Akorn* must be explored not only under the perspective of the correction to the abuses in M&A litigation, but also from the viewpoint of the future prospects of Delaware's dominance in corporate law.[204]

Since M&A litigation is a significant part of corporate litigation, retaining its leadership in M&A litigation (issuing a conspicuous number of opinions as well as preserving other courts' traditional deference to Delaware's authority) is essential for Delaware to retain its hegemony over corporate litigation and, ultimately, over corporate law.[205] But should the approach in *Trulia* fail, the migration of the litigation to more tolerant jurisdictions might lead to questions over Delaware's dominance.[206]

This pre-eminence has been experiencing a gradual erosion for years;[207] and the intensification of federal incursions into corporate

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[204]*See* Stephen M. Bainbridge, *Introduction: Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law*, *in* CAN DELAWARE BE DETHRONED?: EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 1, 13-15 (Stephen M. Bainbridge et al. eds., 2018); *see generally* Jill, E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (discussing the fact that Delaware has been the dominate state for incorporation in the early 1900s); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (identifying that the pressure for other states to compete with Delaware for incorporation comes from the federal government).

[205]*See* Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 658 (2018).

[206]*But see id.* at 657 (whose empirical research "suggests that demographic markers of sophistication, such as choice of law firm" can predict the jurisdictional incorporation choice better than state law or the business attributes of companies. In more detail, "[c]ompanies with more demographic markers of sophistication tend to choose Delaware incorporation, [while] companies with fewer demographic markers of sophistication" are inclined to incorporate in their home-state. From this viewpoint, the doctrinal shift of *Trulia* or the adoption of any other exacting standard would affect marginally the decision of incorporating in Delaware.).

[207]*See* John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 605 (2012) (Relying on four separate data sets, the authors proved a decline in the Delaware courts' market share of cases and opinions); *see* Cain et al., *The Shifting Tides*, *supra* note 8, at 608-09 (The trend has even become more pronounced in 2017 and 2018); *see also* Robert B. Thompson, *Delaware's Dominance: A Peculiar Illustration of American Federalism*, *in* CAN DELAWARE BE DETHRONED?: EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 57, 75-77 (Stephen M. Bainbridge et al. eds., 2018); *see generally* Pierluigi Matera, *It is Winter in Delaware for Merger Litigation. And it Might be Autumn for Delaware's Dominance*, 1 COMPARISON & CIV. L. 58 (2018), http://www.comparazionedirittocivile.it/download/volumi/201801.pdf.

matters[208] is generally displacing state law.[209] It has also been claimed that the ban on fee-shifting bylaws has already caused a self-inflicted wound which has seriously undermined Delaware's profitable position.[210] On this view, the poor effectiveness of *Trulia* left the problem of disclosure-only settlements unresolved and indeed created a risk for Delaware's dominance.[211]

The failure by the 7th Circuit to provide an effective response for collusive mootness fees would similarly affect that pre-eminence: plaintiffs' attorneys would continue to file the cases in federal courts in order to avoid any scrutiny on the mootness fees, and Delaware would be cut off.[212]

Nevertheless, since attorneys' fees are historically higher in cases litigated before Delaware courts, a plaintiff's attorney having a well-grounded claim would rather file the case in a Delaware court.[213] Therefore, the migration could mostly concern frivolous suits, leaving the

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[208]For instance, pursuant to Sarbanes-Oxley Act of 2002, 116 Stat. 745 (codified as 15 U.S.C. § 7201) and Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (codified as 12 U.S.C.A. § 5301.

[209]Especially in some areas of law, such as audit oversight and executive compensation, a uniform federal legislation reduces the space for differentiation of state regulations and so reduces Delaware's competitive advantage. *See* Charles M. Elson, *Why Delaware Must Retain Its Corporate Dominance and Why It May Not*, *in* CAN DELAWARE BE DETHRONED?: EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 225, 226 (Stephen M. Bainbridge et al. eds., 2018).

[210]*See* Bainbridge, *Fee-Shifting, supra* note 86, at 869, 876 (according to which, "the local bar has captured the State's legislative process," thereby altering the historic and reasonable relationship between the corporate bar and the state government that made the fortune of Delaware's corporate law). A politicized judiciary or a manipulated regulatory process may damage the reputation for neutrality that is critical to retain a dominant position. On this view, S.B. 75 could even cause to Delaware what the Seven Sisters Act did to New Jersey—and it might push incorporators to establish companies elsewhere. *See also* Elson*, supra* note 205, at 231-37 (where it is also reported a recent decision of the Court of Chancery in *In re TransPerfect Glob., Inc.*, No. CV 10449-CB, 2019 WL 5260362 (Del. Ch. Oct. 17, 2019). In this case, Chancellor Bouchard ordered the dissolution of a privately held corporation on deadlock grounds. Although he applied well-established closed-corporation law principles, one of the parties, in an effort to reverse the decision, engaged in a massive state-wide public relations campaign to persuade the Legislature to amend the state's corporate statute in the area. Petitions, rallies, editorials, radio and newspaper advertisements under the moniker "Citizens For a Pro-Business Delaware" were initiated and conducted to short-circuit the traditional corporate law reform process. The effort did not have the support of the Delaware corporate bar. There was also some significant opposition to this initiative. Nevertheless, should this attempt have been successful, a dangerous precedent would have been set for a private litigant expending funds to co-opt the bar's traditional rule in the development of the state's corporate law.)

[211]*See* Elson*, supra* note 209, at 229.

[212]*See* Cain et al., *Mootness Fees*, *supra* note 13, at 1803.

[213]*See id.* at 1814.

meritorious cases for Delaware.[214] In other words, regardless of whether the appellate court affirms *Akorn*, more tolerant jurisdictions would be unlikely to garner valuable litigation in the long run. We see no reason for any jurisdiction to attract frivolous or strike suits, where there is usually no need for a hefty judicial opinion to be issued—while solid cases stay in Delaware. With respect to Delaware's dominance, therefore, the reach and the implication of any migration is uncertain.

Also—as we noted earlier—since meritless cases are in fact of little significance in the state competition over corporate law primacy, we maintain that other courts are likely to adopt the *Trulia-Walgreen-Akorn* approach to avoid to a flood of nuisance litigation.

Yet, in the debate about mootness fees there is a position which can endanger Delaware's dominance.[215] For some commentators "federal rather than state disclosure law should set the legal standard for the required disclosures in merger and tender offer cases," and "federal courts rather than state courts should police merger disclosure."[216] This would be in line with the core competencies of the federal courts and the copious amount of federal law on this issue[217] – and, we add, with the mentioned trend of the federal erosion of state competence over corporate matters.

These commentators remarked that, apart from the body of case law developed by the federal courts, "the PSLRA was adopted to police these suits."[218] Moreover, both the SEC[219] and the Supreme Court have articulated the standards behind Rule 10b-5, Rule 14(a), and other disclosure liability rules, including the requirements of scienter and materiality"; so that, in this regard, *Trulia* can be seen as an adoption of the principle found in those rules.[220]

Quite interestingly, some scholars also claimed that the wave of merger objection class actions that arose in the mid-2000s could be viewed as federal securities law claims "dressed in disguise" as corporate law claims, in order to avoid the heightened securities class-action requirements of the 1990s. This view casts *Trulia* as a response by

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[214]*Id.*

[215]*Id.* at 1780.

[216]Cain et al., *Mootness Fees*, *supra* note 13, at 1783, 1809.

[217]*See id.* at 1809 (noting that "the federal courts have an eighty-five–year history of regulating and policing securities disclosure" and that "[t]his has supplied a robust body of case law concerning the appropriate standards of disclosure."); *see also* Fisch et al., *supra* note 36, at 562, 601 (noting the position is already in).

[218]Cain et al., *Mootness Fees*, *supra* note 13, at 1809.

[219]In addition to the specific rules and guidance to issuers on the proper scope and level of disclosure that the SEC issues.

[220]*See* Cain et al., *Mootness Fees*, *supra* note 13, at 1809 (adding that the federal rules have "more directly engaged with issues surrounding frivolous lawsuits").

Delaware courts to deficient enforcement of federal securities laws, and the increase of M&A litigation rates in federal courts as a return of those claims to their proper forum.[221]

Nevertheless, the strict need for the proposed jurisdictional shift is debatable. Certainly, if all disclosure cases were attracted to the exclusive federal forum, the system would achieve a significant degree of consistency and uniformity. Correspondingly, plaintiffs' attorneys would be deprived of some opportunities in terms of collusive schemes and adaptive strategies. But conferring an exclusive jurisdictional authority upon federal courts would also imply a further intrusion into state corporate matters which could not be so easy to justify. Actually, Delaware courts still provide for the most important expertise on corporate law and are likely to correct and improve the *Trulia*/*Xoom* standard on mootness fees. In addition, as we argue, other state courts are expected to set an appropriate standard in order to restrict the proliferation of nuisance litigation. Thus, the system is reacting and addressing the crisis.

Besides, in practical terms, preventing the repackaging of those federal disclosure claims as state law claims would be difficult, unless very radical legislation was passed to allow the federal courts to arrogate to themselves exclusive jurisdiction over all disclosure-related claims – which means jurisdiction over any claim after and about the release of information in connection with a merger.

Effective judicial oversight is crucial for the regulation-by-litigation model; and in this regard, there is no difference between state or federal courts.

B. *Questions Over the Sustainability of the Regulation-by-Litigation Model*

For some commentators, the slow reaction of Delaware courts to the unreasonable increase in M&A litigation, the hesitation of some courts to follow *Trulia,* and the swift rise of mootness fees cast doubt on the regulation-by-litigation approach upon which U.S. corporate law relies significantly. On this view, the crisis calls into question the choice of model itself, suggesting that new models should be explored. As an alternative approach, merger transactions could be strictly regulated by

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[221] *See* Ryan Lewis, *What Happens in Delaware Need Not Stay in Delaware: How Trulia Can Strengthen Private Enforcement of the Federal Securities Laws*, BYU L. REV. 715, 737 (2017).

legislation, such as a detailed *ex ante* code. These codes are usually drafted, interpreted and enforced by administrative panels, comprised of bankers, lawyers and other experts. It has been argued that this model might be more predictable and more flexible in its corrective actions than a litigation-centric model, "with lower overall administrative expense"; and that the Anglo-Irish code and panel-based model could be a source of inspiration.[222]

This conclusion may be an enticing prospect. However, it is also open to debate. A model of this kind is not free of costs. For instance, the panel should be staffed in an appropriate fashion, since an understaffed panel could create distortions.[223] This would entail significant costs. A panel would also require time to develop a body of precedents or a depth of expertise comparable to that of the Delaware courts. Besides, shareholders should be entitled to challenge the panel's decisions; and that would generate some form of litigation. The independence of the panel from the corporate bar cannot be taken for granted, both because its staff would inevitably come from professionals operating in the sector, and because administrative panels can be lobbied and captured by interest groups—similar complaints have been levelled at Delaware's legislative process.[224]

A cost-benefit analysis is definitely not simple and would require a further consideration. But the uncertainties of these uncharted waters are not to be underestimated. A shift to a pure regulatory model would be a radical choice for the U.S. corporate law and would be reasonably justifiable only in the light of an unresolved (and unresolvable) crisis.

By contrast, *Trulia*, *Walgreen*, *Akorn* are an indication that the system is reacting in some way—and, as we noted earlier, there are several positive signals. Thus, the cost-benefit assessment must not be made at the peak of the crisis but must be carried out in the light of recent developments and the related reduction in costs—which means after *Trulia-Walgreen-Akorn* and the other recommended "adjustments." In addition, such analysis should also consider the benefits in terms of

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[222]*See* Awrey et al., *supra* note 1, at 21-53, 64 (for an extensive comparison.); *see also* Sean J. Griffith, *Product Differentiation in the Market for Corporate Law: A Regulatory Alternative to Delaware Corporate Law*, *in* CAN DELAWARE BE DETHRONED?: EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 16, 20-31 (Stephen M. Bainbridge et al. eds., 2018); *see generally* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L. J. 1727 (2007) (discussing the differences in takeovers that occur in the United States versus the United Kingdom).

[223]The concern is not groundless since understaffing is a chronic issue of several state agencies.

[224]*See* Cain et al., *Mootness Fees*, *supra* note 13, at 1783, 1809.

effectiveness of judicial scrutiny. These benefits are difficult to measure, especially at the present time, in relation to a system in which for years merger litigation has not been 'litigation' at all, and attorneys on both sides of the "v" have just extracted rents from corporations and their shareholders.[225]

Finally, this comparison is likely to generate a different outcome if conducted in reference to Delaware's system, to the federal system, to other states or to the sum/average of some (Delaware and federal) or all of these.

Certainly, Delaware offers the predictability and speed which these commentators maintained to be the advantages of the Anglo-Irish model. Other states are not as predictable and quick in providing decisions. Notably, these commentators suggested that a code and panel-based model could be a valuable choice for a state seeking to compete with Delaware in the market for incorporations. In this respect, a panel could exploit Delaware's expertise, to some extent, by taking inspiration from Delaware's solutions and regularly replicating its effective responses without importing its principal weakness.[226] As stated in *New State Ice v. Liebman*, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[227]

We do agree that the unreasonable number of litigated deals, the limited benefits that shareholders obtain by those claims, and the levy imposed on virtually every deal are the symptoms of the crisis in a litigation system which has devolved into a non-adversarial process. However—as we noted earlier—we contend that such devolution is the outcome of a slow, inefficient management of the conflicts of interest and of incentives for parties in the process to collude. The judicial reactions discussed above are cause for cautious optimism, at least on the model's ability to self-implement the necessary corrections. Should it fail to do so, the whole regulation-by-litigation model could be called into question.

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[225] *See* Awrey et al., *supra* note 1, at 12.

[226] *See id*. at 65.

[227] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (also quoted but for different purposes in Awrey et al., *supra* note 1, at 4 n.9).

VI. CONCLUSION

Trulia, *Walgreen*, *Akon, Scott* and a series of other decisions issued in the recent years constitute the response of the regulation-by-litigation system to overlitigation in the M&A context—resulting in the challenge to virtually every large transaction. Such excessive litigation generated costs for the corporation and only benefited the attorneys representing the parties. By these means, merger litigation has become the mere extraction of fees and served no effective function of policing the deals and protecting shareholders' rights. This was the result of the failure of the adversarial system due to the collusion between plaintiffs' attorneys and defendant directors.

The courts have been slow in reacting. The recent rulings are an attempt to rebalance a mechanism which has been off balance for a long time, and to rescue the model from a point of no return. Yet, these decisions need to be confirmed, implemented and supplemented.

In *Akorn*, the district court offered a path for all federal courts to apply the *Walgreen* standard to mootness fees. As such, we argue that the appellate court should affirm the district court's decision and confirm this approach. We support both the existence of an inherent authority of a federal judge to scrutinize a mootness fee and the legal grounds for applying the *Walgreen* standard in such scrutiny—a standard also applied in *Scott* on the same grounds. In addition, the introduction of a provision to explicitly mandate either a notice to other shareholders or the application for federal court approval (when merger lawsuits are voluntarily dismissed prior to class certification) would clear up any ambiguity. In this way, any lack of transparency would be removed: potential objectors would be aware that a mootness fee is about to be paid and would have the opportunity to bring a case to the court; or courts would scrutinize the fees in any case.

Nevertheless, we argue that the success of courts' efforts depends upon a further combination of circumstances. Should the courts outside Delaware not adopt *Trulia* on disclosure settlements, the affirmation of the district court's decision by the appellate court in *Akorn* may not be enough. Plaintiffs' attorneys could try to exploit corporations by returning to state-law fiduciary-duty claims and filing the cases in those jurisdictions where disclosure-only settlements meet a more tolerant standard of judicial review. It is also possible that the consequent proliferation of disclosure-only settlements in non-Delaware courts may trigger a reaction and induce any reluctant state to overcome the resistance and follow *Trulia*. As a matter of competition for incorporations, other states would have no incentive to attract frivolous suits, in which no significant judicial opinion is necessary. Solid cases would stay in Delaware, where attorneys' fees are traditionally higher. We believe that the growing awareness of the crisis of merger litigation will result in a heightening of the standards in every jurisdiction—and the resistance that *Gordon* and other similar cases showed will be overcome.

Eventually, plaintiffs' attorneys could put in place the mootness fee scheme in Delaware, taking advantage of the more lenient standard for its review set by *Trulia* and *Xoom*. In this respect, the *Trulia* and *Xoom* standard for mootness fees is imperfect, unmanageable by the courts and detrimental in terms of policy. A correction is expected and could come soon.

Some contend that federal rather than state disclosure law should set the legal standard for the required disclosures in control transactions, and, as a consequence, disclosure-duties violations should be enforced before federal courts rather than state courts. The shift would present some advantages with regard to the consistency and uniformity of the system and would be in line with the trend of the federal legislature to extend the competence over corporate matters. Nevertheless, it would be hard to justify in theory and even harder to achieve in practice.

An effective judicial oversight is critical in federal as well as in state courts; and it is essential for the regulation-by-litigation model. Without it, plaintiffs' attorneys will continue to exploit procedural gaps, if not through disclosure-only settlements or mootness dismissals, then through other similar schemes.

In this model, the ups and downs in litigation rates are inherent and unavoidable and are to be monitored to calibrate the response of courts, the selection of the standards, and the policy choices. Overlitigation calls for an adjustment, and effective judicial oversight is supposed to react in a timely fashion. If an imbalance were to persist, then questions would be raised on the efficiency of the model.

Actually, some commentators have already contended that the regulation-by-litigation model is experiencing a persistent crisis, and time may be ripe for reform: namely, a shift to a pure regulatory model, such as the code and panel-based model adopted on the other side of the Atlantic.

Certainly, the roller coaster suggests a modest performance of the mechanism in the last decade. But a reaction is underway: *C&J Energy*, *Trulia*, *Walgreen*, *Akorn*, as well as *Assad v. DigitalGlobe and Bushansky* *v. Remy*[228] represent a probably coordinated suite of rulings conceived specifically to rectify the procedural gaps exploited by plaintiffs' attorneys and halt collusive schemes. In particular, the triad *Trulia*/*Walgreen*/*Akorn* has the more general aim of restoring the adversarial nature of the litigation, without which there is no true litigation—and private enforcement cannot play its role and serve the public interest.

In other words, there are multiple positive signals indicating that the model could soon be back on the right track, and expert courts are unlikely to be caught off guard again. Provided that costs are reduced to an acceptable level, and soon, a comparison between the models should also take into account the performance in terms of the effectiveness of the judicial scrutiny. This is not an easy task.

Notably, those commentators advocating for the adoption of a code and panel-based model also suggest that this approach could be a competitive solution for a state seeking to challenge Delaware in the market for incorporations. Nevertheless, in Delaware, until an assessment on the corrective actions in progress is carried out, we argue that a radical change of model might be premature and should require further consideration. In the meantime, we maintain there are reasons to be mildly optimistic, while "enjoying" a gentler ride on the roller coaster of M&A litigation.

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[228] *See also* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305, 312 (Del. 2015); *see also* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 638 (Del. 2014) (for the post-closing), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).