University of Pennsylvania Law School
Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

5-29-2019

Mootness Fees

Matthew D. Cain
Berkeley Law

Jill E. Fisch
University of Pennsylvania Law School

Steven Davidoff Solomon
Berkeley Law

Randall Thomas
Vanderbilt University

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the Business Organizations Law Commons, Civil Procedure Commons, Corporate Finance Commons, Law and Economics Commons, Legal Profession Commons, Litigation Commons, and the Securities Law Commons

Repository Citation

Cain, Matthew D.; Fisch, Jill E.; Davidoff Solomon, Steven; and Thomas, Randall, "Mootness Fees" (2019). *Faculty Scholarship at Penn Law*. 2083.
https://scholarship.law.upenn.edu/faculty_scholarship/2083

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

Mootness Fees

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

Forthcoming Vanderbilt Law Review

Draft of May 29, 2019

---

* Senior Fellow, University of California, Berkeley, School of Law. We received helpful comments from the participants at the Corporate Accountability Conference of the Institute for Law and Economic Policy and particularly from Stephen Burbank and Minor Myers. The authors also wish to thank James Hicks, Joshua Manning and Xu Ping for research assistance.
** Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Law School
*** Professor, University of California, Berkeley, School of Law
**** Professor, John S. Beasley II Chair in Law and Business, Vanderbilt University School of Law

I. Introduction

The recent history of merger litigation – shareholder lawsuits challenging a merger -- can best be described as schizophrenic.[1] Starting in 2009, merger litigation rates climbed markedly. At the peak in 2013, over 96% of publicly announced mergers were challenged in shareholder litigation.[2] During this time period merger litigation also extended to multiple jurisdictions with the average deal attracting 4.2 lawsuits by 2015. Delaware courts attracted a substantial proportion of these lawsuits; in 2015, 60% of all deals were challenged by a lawsuit filed in the Delaware Chancery Court.[3]

The picture of merger litigation began to change about five years ago. Issuers adopted forum selection bylaws to prevent plaintiffs from filing litigation challenges in multiple states, and these bylaws were upheld first by the Delaware courts[4] and subsequently by the legislature.[5] The Delaware courts also responded in a series of decisions restricting the scope of merger litigation both substantively and procedurally.[6]

[1] We documented this trend in a prior article, Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VANDERBILT L. REV. 603 (2017) [hereinafter "Shifting Tides"].
[2] Private litigation is the dominant mechanism for challenging the price, fairness or disclosures in connection with a public company merger. SEC enforcement actions have typically been limited to particular transaction contexts such as reverse mergers and, even in such cases, are addressed exclusively to disclosure issues. *See, e.g.*, Paul Rodel, *A Look at Market Trends in Reverse Mergers*, LAW360 (Mar. 21, 2017, 2:05 PM), https://www.law360.com/articles/904096/a-look-at-market-trends-in-reverse-mergers [https://perma.cc/E7Y2-WHE5] (describing SEC enforcement actions in several reverse merger cases in 2011).
[3] Cain, et al., *supra* note 1, at 621. This led to charges of widespread, frivolous merger litigation. *See, e.g.*, Gregory A. Markel & Gillian G. Burns, *Assessing a Judicial Solution to Abusive Merger Litigation*, LAW360 (Nov. 19, 2015, 9:59 AM), https://www.law360.com/articles/728061/assessing-a-judicial-solution-to-abusive-merger-litigation [https://perma.cc/YG87-JB2A] (observing that "lawsuits are filed after virtually every public merger is announced, in many cases with little regard to the merits of the claim").
[4] Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013).
[5] *See* DEL. CODE ANN. tit. 8, §§ 102(f), 109(b) (West 2015).
[6] *See, e.g.*, Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305-6 (Del. 2015) (holding that the business judgment rule is "the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders.").

The cases culminated in *In re Trulia* in 2016, which held that the Delaware courts would no longer approve merger litigation settlements that provided for a release and an award of attorneys' fees if they did not achieve meaningful benefits for shareholders.[7] In *Trulia*, the Delaware Chancery Court specifically rejected a proposed settlement which offered to provide plaintiffs with additional non-material disclosures in exchange for a broad release and a fee award to plaintiffs' counsel.[8] In the *Trulia* decision, the court noted in dicta that, rather resolving merger litigation through a court-approved settlement and fee award, the defendant could voluntarily make supplemental disclosures in response to the plaintiffs' challenge, rendering the case moot.[9] Six months later, in *Xoom*, a Delaware court awarded a $50,000 mootness fee.[10] The *Xoom* court stated that the *Trulia* requirement of materiality did not apply to mootness dismissals and that a mootness fee "can be awarded if the disclosure provides some benefit to stockholders, whether or not material to the vote."[11]

These substantive changes in Delaware law, coupled with the *Trulia* decision, reduced the attractiveness of merger litigation in Delaware. Delaware's crackdown did not put an end to merger litigation. Instead, the changes resulted in the flight of merger litigation filings from Delaware to the federal courts. These federal suits repackaged state-law fiduciary duty-based claims into antifraud actions under Section 14A and Rule 14a-9 thereunder.[12] By 2017, merger litigation

---

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

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

[9] *See, e.g.*, *Trulia*, 129 A.3d at 898 ("The preferred scenario of a mootness dismissal appears to be catching on").

[10] In re Xoom Corp. Stockholder Litigation, 2016 Del. Ch. LEXIS 117 (Aug. 4, 2016)

[11] *Id.* at *10.

[12] Federal court filings were consistent with the terms of issuer-adopted forum selection bylaws. The shift to the federal courts was in line with a proposal made by two of the co-authors of this article. *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, 559 (2015). *But see* Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only*

rates, which had dipped to 74% of deals in 2016, rose to 83%, but only 10% of litigated deals faced a challenge in Delaware versus 87% in federal court.[13] By 2018, the numbers were even more dramatic -- 5% of litigated deals were challenged in the Delaware courts, and 92% gave rise to a federal court lawsuit.

In prior work, we identified the shift to federal court and posited that the change was due to *Trulia* and other Delaware decisions.[14] We document here an additional component of the shift to federal court, the increased and distinctive use of mootness dismissals. Although some commentators expected the move to federal court to result in greater scrutiny of plaintiffs' allegations of disclosure violations, scrutiny that would result in the outright (and involuntary) dismissal of cases, that outcome has not yet materialized.[15] Almost all of the federal court mootness dismissals take place without an adversarial process, meaningful judicial oversight or an evaluation of whether the complaint even states a colorable claim.

Based on what we can ascertain from public filings, post-*Trulia* cases filed in federal court are almost invariably terminated through a voluntary dismissal coupled with the payment of a mootness fee to the plaintiffs' attorney.[16] The mootness fee, which is typically in the range of $50,000 to $300,000, is purportedly compensation to the plaintiffs' attorneys for obtaining supplemental disclosures in

---

Settlements, 15 U. PA. J. BUS. L. 669, 674 (2013) (defending the value of disclosure-only settlements in merger litigation).

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

[14] *See Shifting Tides*, *supra* note 1.

[15] *See* Fisch et al., *supra* note 12.

[16] *See also* Jack B. Jacobs, Andrew W. Stern & Jon W. Muenz, *'Mootness Fees' in Deal Litigation: An Argument for a Different Approach*, CORPORATE LAW & ACCOUNTABILITY REPORT, BLOOMBERG LAW, Mar. 28, 2917, ("Delaware courts have facilitated, if not encouraged, such fee applications by applying a standard more lenient than that applied in the context of a disclosure-only settlement fee application: the disclosure need only be ''helpful'' to class members."). In addition, the court has expressed a preference for resolving disclosure-only cases through dismissal and a mootness fee application even when the corrective disclosures meet the "plainly material" standard of Trulia. *See* In re BTU Int'l Stockholders Litig., No. 10310-CB, 2016 Del. Ch. LEXIS 212, at *4 (Del. Ch. Feb. 18, 2016).

the proxy statement.[17] Most federal courts do not review the request for dismissal or the proposed mootness fee payment at all.[18]

We begin this Article in Part I by conducting an empirical analysis documenting the scope and pervasiveness of the mootness fee.[19] We find that in 2018, 92% of completed deal cases were brought in federal court. In that same year, in at least 63% of litigated cases, plaintiffs' attorneys received a mootness fee.[20] Notably, mootness fees appear to have displaced formal settlements (coupled with releases) entirely in federal court litigation; in 2018, not a single case, to date, has resulted in a judgment or settlement – all of the dispositions have been either dismissals with the payment of mootness fees or outright dismissals.[21] We also document a marked shift away from the Delaware courts. Plaintiffs' attorneys are overwhelmingly bringing litigation challenges to mergers in other state courts and federal court.

The rise of the mootness fee and the shift in merger litigation raise several issues, which we take up in Part II. We begin by considering the resolution of cases through corrective disclosure and a mootness fee as an alternative to a court-approved settlement. This development implicates several questions including the quality of the mootness fee cases, the lack of transparency with respect to the size of the mootness fee and, even in cases in which the mootness fee is reviewed by

---

[17] *See* Rosenfeld v. Time, Inc., 2018 U.S. Dist. LEXIS 148394, *3 (S.D.N.Y. 2018) ("Sometimes these settlements are characterized as 'mootness fees,' in which the corporation moots the lawsuit by making the allegedly withheld disclosures, and pays plaintiffs' counsel a "voluntary" fee in return"); *see also* Joseph M. McLaughlin & Shannon K. McGovern, *Mootness Fees in Disclosure-Focused Deal Litigation*, New York L. J., Dec. 12, 2018 (reporting that "More recently, median mootness fees are closer to $250,000.").

[18] Fed. R. Civ. P. 23(e) only requires court approval of a voluntary dismissal after class certification.

[19] Our empirical analysis in this Article examines a dataset of merger litigation for deals over $100 million completed from 2003 through 2018.We limit our analysis to larger transactions, as do many similar studies, because larger deals are more likely to attract interest from the plaintiffs' bar. *See, e.g.*, Elliot J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1823 n.87 (2004) (employing similar approach)).

[20] As we explain more fully in infra note 35, we are limited in determining the full number of mootness fee payments because they are not always disclosed by the parties.

[21] We note that the absence of fully adjudicated cases could just be the product of larger deals now being subject to a higher quality process such that the disclosures and procedures involved do not give rise to potential liability. This result, however, is in tension with the high percentage of deals that continue to be the subject of litigation.

the court, the limited ability of a court to bring meaningful scrutiny to bear upon the process by evaluating the quality of the supplemental disclosures. Notably, we observe that merger litigation is primarily brought in federal court by a small subset of plaintiffs' law firms. Top plaintiffs' firms, which have been documented in other research as consistently obtaining superior monetary settlements for shareholders, are not active in filing these cases.[22] This suggests the possibility 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 a quick disclosure and mootness fee, a practice that S.D.N.Y. Judge Denise Cote describes as conferring "no or little appreciable benefit" on the target company shareholders.[23]

We consider the challenge posed for the court in evaluating these disclosures in the context of an application for mootness fees. Although commentators have criticized the current materiality standard as providing insufficient guidance, we argue that the lesser standards applied by some courts in connection with the evaluation of a mootness fee, such as whether the supplemental disclosures are "helpful" or "of some value" provides even less guidance and invites abusive litigation filed solely for the purpose of extracting a nominal fee payment. To the extent that mootness fees are paid in such cases, they are an inappropriate tax on the judicial system. Mootness fees and the accompanying litigation not only impose costs on parties to the judicial sphere, they also do not appear to provide appreciable benefits to shareholders.

A related and potentially more problematic process is the negotiation and payment of mootness fees outside the judicial process. Although Delaware law requires disclosure and judicial review of mootness dismissals, the Federal Rules of Civil Procedure (FRCP) do not currently require either notice to the shareholders or court approval when merger suits are voluntarily dismissed prior to class certification. The shift to federal court appears to be an attempt to leverage this gap in judicial oversight.

We argue in Part III that the shift of merger litigation to federal court is appropriate and that federal rather than state disclosure law should set the legal standard for the required disclosures in merger and tender offer cases. We maintain, however, that a successful shift requires the federal courts to police the quality and resolution of merger litigation carefully. Given the public interests involved and the nature of plaintiffs' attorneys as quasi representatives of all shareholders,

---

[22] C.N.V. Krishnan, et al., *Who Are the Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, 18 Am. L. and Econ. Rev. 122 (2016).
[23] Rosenfeld v. Time Inc., 2018 U.S. Dist. LEXIS 148394, *12 (S.D.N.Y. 2018).

federal courts should require that mootness fees be submitted to the court and be subject to meaningful judicial oversight. We further argue that the payment of a mootness fee should be conditioned on litigation resulting in a material corrective disclosure -- the same legal standard as required by *Trulia*. We believe that both requirements are consistent with the purpose of the Private Litigation Securities Reform Act (*PLSRA*)[24] which is to limit frivolous litigation as well as FRCP 23 which provides for transparency and judicial oversight of the class action process.

II. Empirical Analysis

A. Data Set

For our analysis, we use a sample that includes 2,320 unique deals. We construct our sample from the transactions included in the FactSet MergerMetrics database.[25] These transactions were announced during the time period 2003 through 2018 and meet all of the five following criteria: (1) the target is a publicly traded U.S. firm, (2) the deal size is at least $100 million, (3) the offer price is at least $5 per share, (4) a merger agreement is signed and publicly disclosed through a filing with the Securities and Exchange Commission (SEC), and (5) the transaction has been completed as of January 2019.

We hand review each merger proxy statement and the associated SEC tender offer documents to determine if a lawsuit challenging the transaction is filed. We next examine each class action suit filed in connection with a proposed merger, finding that litigation is brought in 1,536 transactions or 66% of our sample. To obtain the outcomes of each case, as well as the mootness fees paid (if any), and the settlement terms (if any), we obtain the court filings as well as some additional public filings. In all of our tables, we report only cases that have been concluded. As in our prior studies on this topic, the court documents are obtained directly from the court, from public filings on the Lexis/Nexis File and Serve Database, or from Bloomberg Law.[26]

---

[24] The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995).

[25] *See FactSet Mergers*, FACTSET RESEARCH SYSTEMS INC. (2014), https://www.mergermetrics.com, [http://perma.cc/7U34-82CR] for more information about the data set.

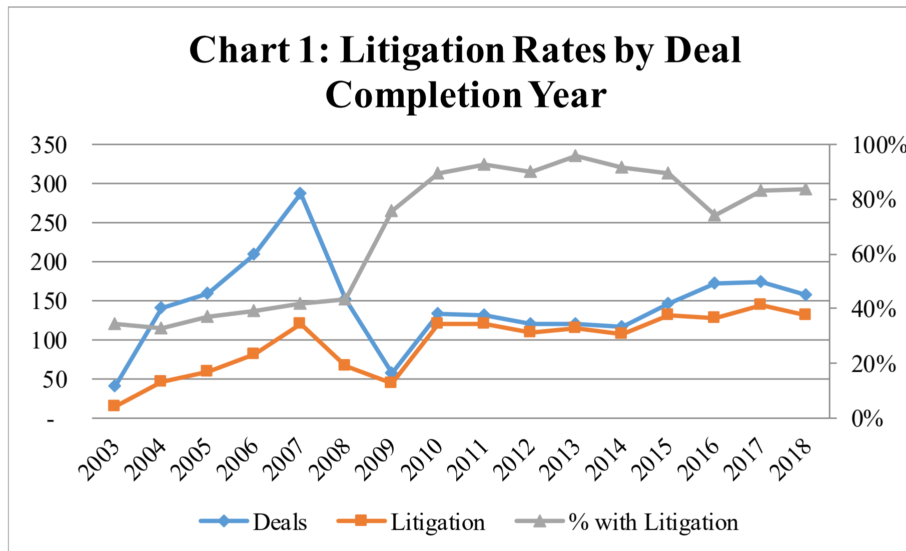
[26] The data here was compiled partly from a database utilized in two prior studies. *See* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and*

B. Empirical Analysis

Chart 1 sets forth the total number of deals in blue, the number of associated lawsuits in yellow, and the percentage of total completed deals with litigation that have a final outcome in grey for each year over our sample period from 2003-2018.[27] We include in our sample all mergers with an aggregate value exceeding $100 million irrespective of where the target corporation is incorporated.

Litigation, 100 IOWA L. REV. 165 (2015) and Matthew D. Cain, et al., Shifting Tides, *supra* note 1. In both studies, the data was hand collected and reviewed with the court filings obtained directly from the court, from public filings on the Lexis/Nexis File and Serve Database, or Bloomberg Law.

[27] We classify deals by the date of their completion. For example, a transaction first announced in 2014, but not completed until 2015, is treated as a 2015 transaction. We follow the same convention for all of the remaining tables.



Completed deals during our sample period range from a low of 58 in 2009, to a high of 287 in 2007.[28] In 2016 and 2017, we have a post-financial crisis high in the number of completed deals with 172 and 174 deals, respectively. The number of deal lawsuits filed peaked in 2017 at 144 with a low of 44 in 2009.

The first two columns of Table 1 provide data on the number of completed deals and the percentage of those deals with completed shareholder litigation. The percentage of deals with completed litigation fluctuated substantially over our sample period. Initially, during the period 2003-2008, litigation rates ranged from 33-43% of completed deals. This changed dramatically after the financial crisis, rising to 76% in 2009 and then to 90% and higher from 2010 to 2015. Litigation rates peaked in 2013 at 96% of all completed deals and then declined to settle at 83% of deals in 2017 and 2018.

These movements in the overall litigation rates for completed deals are accompanied by some dramatic shifts in the venues for deal

[28] We have only 41 deals in our sample in 2003, which underestimates the number for the full year because MergerMetrics coverage began in 2003 with only partial coverage in that year.

litigation. For the period 2003-2018, Table 1 also presents data on venues for deal case filings. The middle three columns break out these filings into three important categories: Delaware, Other States and the Federal courts. These filing percentages do not sum to 100% because almost every deal can be challenged by a lawsuit in Delaware, a lawsuit in another state where the headquarters of the target company is located, and a lawsuit in federal court. The final column details the average number of suits filed per case.

Table 1: Filings by deal completion year

	Deals	% with Litigation	% Delaware*	% Other States*	% Federal*	Mean # Suits Filed per Case
2003	41	34%	7%	100%	7%	1.6
2004	140	33%	43%	78%	0%	2.7
2005	159	37%	39%	66%	7%	2.3
2006	210	39%	21%	82%	12%	2.3
2007	287	42%	28%	86%	13%	3.2
2008	152	43%	23%	92%	21%	2.9
2009	58	76%	34%	98%	20%	3.8
2010	134	90%	49%	88%	26%	4.5
2011	131	92%	50%	88%	40%	5.4
2012	121	90%	56%	88%	34%	5.1
2013	120	96%	52%	83%	32%	4.8
2014	117	91%	55%	73%	15%	4.5
2015	147	89%	60%	51%	19%	4.2
2016	172	74%	34%	62%	37%	3.4
2017	174	83%	10%	19%	87%	2.5
2018	157	83%	5%	18%	92%	2.7
Total	2,320	66%	37%	68%	35%	3.7

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

We begin by focusing on Delaware because most public corporations are incorporated in Delaware and the Delaware Chancery Court is well known for its expertise in corporate law issues. This makes Delaware an available venue for most deal cases, although, as the data show, its popularity among plaintiffs' lawyers as a filing choice has

fluctuated substantially over our sample period. Roughly speaking, Delaware filings prior to 2009 ranged in the area of 30-40% of all completed deals with a short-lived dip in 2006-2008.[29] After 2010, as the percentage of deals with litigation jumped into the 90% region, Delaware filing percentages also shot up into the 50-60% area, where they remained until 2015.[30] By 2016, Delaware litigation rates, perhaps in response to *Trulia*, fell by almost 50%. This downward trend continued in 2017, falling to 10% of completed deals, and dropped even further in 2018 to 5% of completed deals. Without a question, the changes in Delaware law have effectively closed the courthouse doors to a tiny crack for deal litigation.[31]

Where have the cases gone? If we look first at the data on "Other States," the filing trends seem a bit different from what is happening in Delaware. Initially, from 2004-2007, litigation rates vary from 66% to 86% with an upward trend over the years 2008-2009, flattening out at 88% for 2010-2012. At that point, we start to see a decline in litigation rates, most probably because of the adoption of forum selection bylaws beginning in 2013 and accelerating after the *Boilermakers* decision.[32] This decline becomes precipitous in 2017-2018 where litigation rates in

---

[29] This decline was attributed to plaintiffs' lawyers filing suit out of Delaware to seek better outcomes and created a concern that Delaware was "losing its cases." John Armour, Bernard Black & Brian R. Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMP. LEG. STUD. 605 (2012).

[30] Only 65% of the deals in the sample involve Delaware incorporated or headquartered targets. Practically speaking, this means that the percentage of Delaware filings cannot exceed 65% and thus the 2015 60% filing rate is near the maximum litigation rate possible for Delaware.

[31] In 2017-2018, we found only six cases that were filed only in Delaware, while there were an additional 18 cases that are filed in both Delaware and in other state courts.

[32] Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013) (upholding a Delaware incorporated company's adoption of a forum selection bylaw selecting Delaware as the situs for all state fiduciary duty litigation). In the wake of Boilermakers, Delaware firms moved quickly to adopt these types of bylaws. *See*
Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. Emp. Leg. Stud. 31, 33 (2017) (finding that as of 2014, the number of Delaware firms adopting forum selection bylaws was 746); Joseph A. Grundfest, *The History And Evolution Of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 Del. J. Corp. L. 333 (2012).

other states fall to 18-19% of all completed deals. Just as with Delaware, it appears that plaintiffs' lawyers have decided to seek more fertile venues for their cases than what they are finding in other states' courthouses. As before, we are left with the question, where are all the deal cases going?

The answer to that query appears vividly when we look at the federal courts. Federal court filings were relatively "small potatoes," compared to those in Delaware and other states during the period 2003-2009, constituting roughly 10-20% of filings. As the percentage of deals with litigation escalated in 2010, there was a corresponding increase in federal court litigation rates into the 30-40% range, but this tapered off into the high teens in 2014-2015. As Delaware clamped down on deal litigation in 2016 and forum selection bylaws began to limit the ability of plaintiffs to file in other state courts, filings shifted noticeably federal courts (forum selection bylaws do not generally prevent federal court filings) in 2016, which was followed by a flood of federal case filings in 2017, peaking in 2018 with 92% of deal cases filed in federal court.

The final column of Table 1 shows that the mean number of cases filed per transaction has returned to pre-financial crisis levels. Prior to 2009, this value ran from a low of 1.6 suits per litigated deal in 2003 to a high of 3.2 such cases. When deal litigation rates hit the 90% level in 2010, the mean number of suits filed per litigated deal shot up to 4.5 cases and continued to remain elevated until 2017 when it dropped to 2.5 cases per litigated deal indicating a decline in litigation intensity.[33]

We turn next to litigation outcomes. Table 2 examines litigation settlements from 2003-2018. The first column represents the total number of deals with litigation for which we were able to determine from court documents or elsewhere how a case was resolved. Columns two and three display the percentages of cases with known outcomes that settled or were dismissed.

---

[33] As we noted in our earlier work, the number of suits filed per litigated deal was previously a good indicator of plaintiffs' law firms' interest in merger litigation and a solid measure of these attorneys' "belief in their ability to bring cases that are sufficiently successful to warrant a reasonable fee award, either on the merits or through a settlement." Cain, et al., *Shifting Tides*, *supra* note 1, at 629. With the increasing adoption of forum selection bylaws, this measure has become less meaningful.

Table 2: Litigation outcomes by deal completion year

	N	Settled	Dismissed	Mootness Fees	% of Settlements that are Disclosure-Only
2003	11	55%	45%	0%	83%
2004	44	66%	34%	0%	41%
2005	56	54%	46%	0%	63%
2006	78	71%	29%	0%	58%
2007	109	68%	32%	0%	68%
2008	65	69%	31%	0%	82%
2009	41	73%	27%	0%	90%
2010	110	82%	18%	0%	79%
2011	110	80%	20%	0%	69%
2012	102	77%	23%	1%	85%
2013	109	77%	23%	0%	76%
2014	104	63%	38%	3%	75%
2015	124	46%	54%	14%	87%
2016	111	41%	59%	20%	93%
2017	135	9%	91%	65%	92%
2018	120	0%	100%	63%	N/A

Settlement and dismissal percentages show quite a bit of movement over the sample period. During the early years (2003-2005), the data show settlements tracking in the 55-65% range, which means that dismissals run from 35-45% since the two numbers must sum to 100% for all these cases. Settlement percentages rise to a higher level from 2006-2013, running from a low of 68% to a high of 82%, before trending downward in 2014 (63%), 2015 (46%), 2016 (41%), then dropping like a rock in 2017 to 9% and literally disappearing in 2018.[34]

[34] It is important to remember that we are reporting only completed deals with litigation as a known outcome. There are 59 deals in our sample that had yet to be completed when we finalized our coding in January, 2019. In addition, even for completed deals, unresolved litigation and settlement numbers trail case filings because of the delays associated with litigation. This is particularly true for trials or settlements providing monetary damages. As a result, for recent years settlements are likely to be under-represented in our data.

As noted above, merger cases are increasingly terminated through voluntary dismissals coupled with the payment of a mootness fee rather than through court-approved settlements. As a result, some of the dismissals in our data include the payment of a mootness fee by the defendants.[35] The rising use of mootness fees is documented in column 4 of Table 2. The payment of mootness fees was virtually nonexistent prior to 2014, but then began rising in the wake of *Trulia*. By 2015, mootness fees were paid in 14% of litigated cases, increasing to 20% of cases in 2016. In 2017, mootness fees were paid in 65% of litigated cases, and this practice continued at a similar level in 2018. The widespread payments of mootness fees and accompanying case dismissals reflects plaintiffs' lawyers' adaptive litigation strategy in light of *Trulia.*[36]

The final column in Table 2 reports the percentage of settlements that are of the disclosure-only variety. In recent years, such as 2016-2017, these settlements have become widespread, reaching 93% of all settlements in 2016, and thus reflecting the general demise of other types of settlements, such as amendment settlements, where the parties agree to a change in the terms of the merger agreement for example.[37] Disclosure-only settlements are disfavored in Delaware after *Trulia*, but could still have some lingering life in federal court.[38]

---

[35] The presence of a mootness fee payment is frequently disclosed by the parties, although the amount of the fee paid is usually not included in the disclosure. Unfortunately, sometimes the parties do not disclose the payment of a mootness fee even though one was paid. As a result, the figures in Table 2 for mootness fee payments should be regarded as a lower bound estimate for the number of cases in which such fees are actually paid. Our metric for determining whether a mootness fee was paid was thus 1) whether there was specific disclosure related to a mootness fee even if the fee was not disclosed, or 2) there were indicia that a mootness fee was paid such as supplemental disclosure which referred to a mootness issue.

[36] For additional discussion, *see* Richard L. Renck, *Court of Chancery Critically Reviewing "Mootness" Fee Applications*, LEXOLOGY, Aug. 20, 2016 (describing recent decisions evaluating mootness fee applications).

[37] *See* Fisch, et al., *supra* note 12, at 576 (describing amendment settlements).

[38] In In re Walgreen Co. S'holder Litig., 832 F.3d 718 (7th Cir. 2016), the Seventh Circuit adopted the *Trulia* standard for review of disclosure only settlements. However, it remains to be seen whether the other federal circuits will follow. To date all federal courts to have considered the issue have followed the Trulia standard though not all state courts have. *See infra* notes 53-54 and accompanying text.

Chart 2 graphically illustrates the sharp decline in settlement outcomes over recent years along with the corresponding rise of mootness fees during the same time.

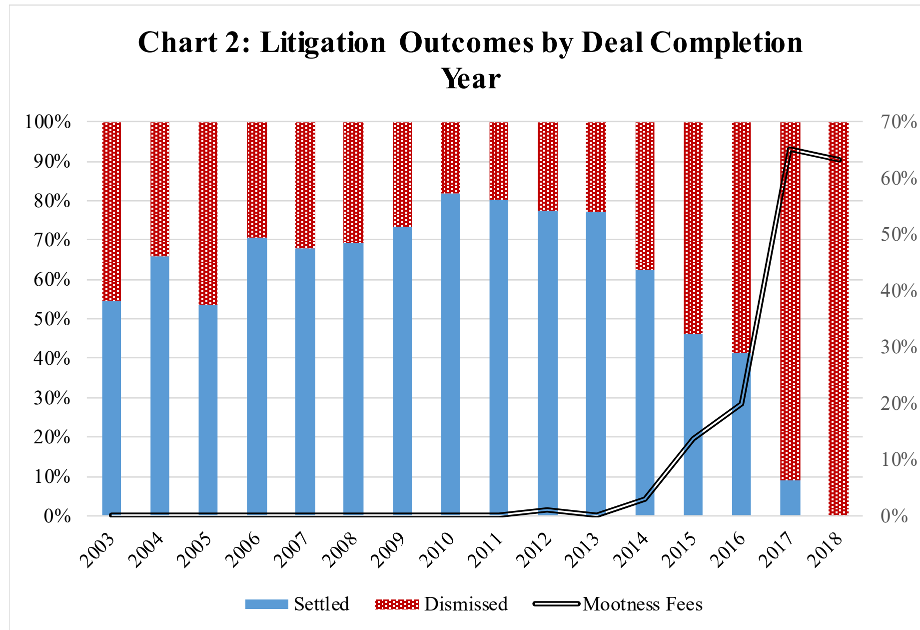


Table 3 provides outcomes of merger litigation in federal court. Columns one and two report the number of federal suits filed per calendar year and the number of those cases that result in settlements. The values shown are for deals in which outcomes are known. Column three shows the percentage of all settled merger cases that are settled in federal court.

As Table 3 shows, there were relatively few merger cases filed in federal court prior to 2009, with an increase in the 2010-2013 period, a short decline during the 2014-2015 interval and a very large increase in 2017-2018. Federal cases accounted for a small percentage (less than 10% annually) of all settled merger cases up until 2015. As noted above, following changes to Delaware law rules, more deal cases moved into federal court and the percentage of all settlements in federal court

increased significantly during 2016-2017. However, in 2018, all 120 federal deal cases that were finally resolved were dismissed.[39]

Table 3: Merger cases in federal courts by deal completion

	# of Federal Suits	# of Federal Settlements	% of All Settled Cases in Federal Courts	# of Mootness Fees Paid in Federal Courts	% of Mootness Fees Paid in Federal Courts	Non-Disclosure Settlements
2003	1	0	0%	0	N/A	N/A
2004	0	0	0%	0	N/A	N/A
2005	4	2	6%	0	N/A	50%
2006	10	3	6%	0	N/A	0%
2007	15	0	0%	0	N/A	N/A
2008	14	0	0%	0	N/A	N/A
2009	9	0	0%	0	N/A	N/A
2010	31	3	3%	0	N/A	33%
2011	49	1	1%	0	N/A	100%
2012	37	6	8%	0	N/A	33%
2013	37	6	8%	0	N/A	17%
2014	16	5	8%	0	0%	20%
2015	25	10	14%	0	0%	0%
2016	47	14	30%	10	67%	0%
2017	125	5	45%	84	99%	0%
2018	120	0	N/A	70	92%	N/A
Total	540	55	7%	164	92%	13%

Columns four and five of Table 3 show that many of the dismissals in 2016-2018 resulted in the payment of mootness fees.[40] For example, in 2016 ten federal cases resulted in the payment of mootness

[39] As we noted earlier, we only report completed litigation in the tables. As we show in Table 2, all of the completed deal cases in 2018 were dismissed. However, there are still some unresolved deal cases that may yet settle in the future.

[40] *See supra* note 35 for a discussion of how we determine the presence of a mootness fee.

fees, which constituted 67% of all of the total number of mootness fee payment cases. In 2017, both these numbers increased with the number of federal mootness cases rising to 84 and their percentage of the total number of all mootness fee cases going up to 99%. Slightly lower, but still elevated, values of these variables were recorded in 2018.[41] Meanwhile, as shown in the last column, non-disclosure settlements, which had once been relatively common in federal cases, completely disappeared.[42]

In Table 4, we examine the prevalence of multijurisdictional litigation in M&A cases from 2013-2018. Column 1, for instance, shows the frequency with which plaintiffs file their class action litigation in other states' courts, outside of the Delaware Chancery Court. From 2013-2016, about 27% to 35% of all complaints filed are filed in these other states' courts. By 2017, as the impact of forum selection bylaws and *Trulia* becomes apparent, the filing percentages drop precipitously to 10%.

The same pattern is apparent in Delaware-only cases. In this column, we show cases that have been filed only in Delaware. While the range in 2013-2016 is wider than that for the other states' data, the sharp decline in 2017-2018 is even more pronounced. Even if we include the cases filed in both Delaware as well as any other court (shown in column 3), by 2018, only 6% of all complaints are filed in Delaware Chancery Court (4% plus 2%).[43]

Table 4: Where are deal cases being filed?

	Other States	Fed + Other State	DE + Other State/Fed	DE Only	Fed	Total

[41] Our statistics may underestimate the incidence of mootness fees if they are not disclosed in any litigation documents for a given case. *See supra* note 35.

[42] All the federal court cases settled in 2015 through 2017 were disclosure-only settlements. This is not surprising; filings in federal court usually allege a disclosure violation under section 14(a) as a basis for jurisdiction, even if they also include pendent state law claims. Moreover, a federal court that dismisses a disclosure claim can choose not to exercise supplemental jurisdiction over any state law fiduciary duty claims.

[43] This differs slightly from the rate shown in Table 1 due to rounding.

2013	27%	16%	42%	10%	5%	100%
2014	34%	7%	33%	22%	4%	100%
2015	28%	6%	21%	39%	5%	100%
2016	35%	17%	13%	20%	13%	100%
2017	10%	7%	8%	3%	72%	100%
2018	7%	11%	4%	2%	77%	100%

The federal court data show the opposite trend. Prior to 2016, a relatively small percentage of cases were filed exclusively in federal court. This changed drastically in 2017, as the percentage of all deal complaints filed only in federal court soared to over 70%. This trend toward filing in federal court is further heightened if we add in the filings that were made in both federal court and other state courts shown in column two.

Chart 3 illustrates these shifts graphically. The blue area across the top in 2017 and 2018 shows that the shift into federal courts has swamped all other venues.

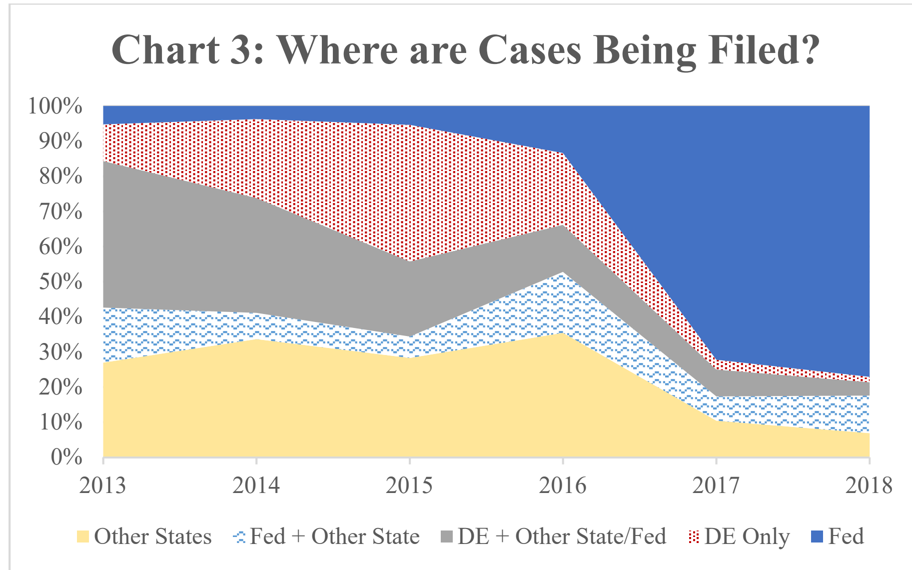


Table 5 examines the importance of the state of incorporation on filing patterns and case outcomes. Table 5 contains three panels: Panel A looks at filing patterns for Delaware-incorporated target companies;

Panel B shows filing patterns for non-Delaware-incorporated firms; and Panel C displays the case outcomes by place of incorporation of the target firm.

For Delaware-incorporated target firms, deal litigation prior to 2016 was heavily concentrated in the Delaware Chancery Court, either in cases filed only in Delaware or in multijurisdictional cases filed in Delaware as well as other venues. By 2017, the vast majority of this litigation had shifted into federal court. Non-Delaware incorporated target firms show smaller movement in this direction, with other states' courts and multijurisdictional litigation holding onto about one-third of deal cases. This difference may be attributable to plaintiffs' lawyers anticipating that *Trulia* will not be applied to cases or by efforts to avoid the Delaware courts' scrutiny of mootness dismissals, as detailed further below.

The case settlement data for Delaware and non-Delaware-incorporated, shown in Panel C, display strong negative trend lines. For both sets of corporations, settlement percentages begin at unusually high levels in 2013 and drop to zero by 2018. The reverse trend is apparent for dismissal rates.

Table 5: Case filings by incorporation

Panel A: Delaware-incorporated targets

	Other States	Fed + Other State	DE + Other State/Fed	DE Only	Fed	Total
2013	13%	6%	62%	16%	3%	100%
2014	13%	0%	50%	34%	3%	100%
2015	8%	2%	31%	57%	1%	100%
2016	23%	12%	19%	31%	15%	100%
2017	5%	4%	11%	4%	75%	100%
2018	4%	6%	6%	2%	82%	100%

Panel B: Non-Delaware-incorporated targets

	Other States	Fed + Other State	DE + Other State/Fed	DE Only	Fed	Total
2013	55%	34%	0%	0%	11%	100%
2014	73%	22%	0%	0%	5%	100%
2015	68%	14%	2%	2%	14%	100%
2016	60%	28%	2%	0%	9%	100%
2017	21%	13%	0%	0%	66%	100%
2018	12%	18%	0%	0%	69%	100%

Panel C: Case outcomes by incorporation

	Delaware-Incorporated			Non-Delaware-Incorporated		
	Settled	Dismissed	Mootness Fees*	Settled	Dismissed	Mootness Fees*
2013	74%	26%	0%	84%	16%	0%
2014	57%	43%	3%	74%	26%	3%
2015	34%	66%	20%	72%	28%	0%
2016	29%	71%	27%	71%	29%	3%
2017	3%	97%	73%	20%	80%	50%
2018	0%	100%	64%	0%	100%	63%

*Subset of dismissals

Panel C demonstrates the remarkably sharp upward trend in the payment of mootness fees. As discussed above, these fees were relatively rare prior to 2015. The change appears to stem from Chancellor Bouchard's decision in *Trulia*, which implicitly gave judicial approval to the practice. For Delaware-incorporated firms, resolution of litigation by means of a voluntary dismissal coupled with the payment of a mootness fee rose from 20% of all cases in 2015 to a high of 73% of these cases in 2017, before dropping slightly to 64% of cases in 2018. Cases involving non-Delaware corporations demonstrate a slightly slower shift to mootness fees; the rise began in earnest in 2017 and has just recently reached the same level as for Delaware corporations.

To gain a better insight into which deal litigation is still being filed only in the Delaware Chancery Court, in untabulated data, we break out the completed transaction merger cases for 2017 and 2018 and examine their characteristics. For the six cases that were filed solely in Delaware during that time period, four of them challenged transactions involving going private transactions or MBOs, which are generally viewed as deals with potential conflicts of interest and therefore as having potentially greater value for plaintiffs. One of these cases settled with a substantial increase in the deal price paid to the shareholders, four others were dismissed but with three having mootness fee payments, and one case is still pending. Based on this limited set of observations, it appears that plaintiffs are still willing to file higher quality deal cases in Delaware.

Table 6 reports data about the ten plaintiffs' law firms that are filing the most federal court merger cases in 2017, 2018 and January 2019. Column 1 gives the names of the law firms, while column 2 displays the number of deals that they challenged by filing a federal lawsuit. The total number of completed deals with federal lawsuits is 250. Market share is defined as the number of cases filed by the particular law firm divided by the total number of deals, or column one divided by 250. The number of deals sums to more than 250, and the percentages of market share sum to more than 100%, because there are frequently multiple law firms filing suit in any given deal. Columns three and four provide data on the percentage of each firm's cases that were dismissed, and the percentage of each firm's cases in which a mootness fee was paid, respectively. The final column lists the percentage of the firm's cases that settled.

Table 6: Plaintiffs' Law Firm Rankings in Filing Federal Merger Lawsuits

Law Firm	# of Deals	Market Share[44]	% Cases Dismissed w/o Fees	% Cases Dismissed w/ Mootness Fees	% Cases Settled
Rigrodsky & Long	149	60%	30%	68%	1%
RM Law	119	48%	34%	65%	2%
Levi & Korsinsky	78	31%	23%	76%	1%
Faruqi & Faruqi	56	22%	25%	71%	4%
Monteverde & Associates	45	18%	16%	80%	4%
WeissLaw	50	20%	30%	68%	2%
Brodsky & Smith	22	9%	27%	73%	0%
O'Kelly Ernst & Joyce, LLC	15	6%	33%	67%	0%
Kendall Law Group	12	5%	42%	58%	0%
Matorin Law Office	12	5%	42%	58%	0%
Total Cases	250				

The most active six plaintiffs' law firms in merger litigation file a disproportionate percentage of the federal cases. In fact, the two highest firms collectively filed 268 cases, which exceeds the total number of completed deals in the sample with federal litigation during this time period. When we examine the filings of these first two firms more closely, we find that every single complaint filed by RM Law is in a deal that is also being challenged by Rigrodsky & Long.[45] In addition,

[44] Market Share is Number of Deals / Total Cases. Total Cases includes deals completed in 2017, 2018, and January 2019 with federal lawsuit filings. Number of deals sums to more than 250 and market share sums to more than 100% since multiple firms may file on a given transaction.
[45] For purposes of filing merger litigation cases, the two firms appear to act on a coordinated basis.

the next four firms filed another 229 federal merger lawsuits. Taken together, these six law firms in total filed 497 federal lawsuits, or almost two lawsuits per completed deal!

Second, each of these firms succeeded in collecting mootness fees in roughly two thirds of the cases that they filed.[46] Within the group, there is some variation in how frequently the law firm is able to obtain a mootness fee. For example, Monteverde & Associates has the highest percentage (80%) of cases in which they obtained a mootness fee, while RM Law is only paid such a fee in just under two thirds of its cases (65%). Third, each of these law firms settled a very small percentage of their cases, ranging from 1% to 4% of the federal cases that they filed. Based on these data, we conclude that these law firms appear to be more interested in collecting mootness fees than in actively litigating the cases that they file.

To summarize our findings, there have been at least four significant changes in merger litigation practice post-*Trulia*. First, Delaware is no longer the center of this litigation; rather the main action has moved to federal court. Second, settlements have virtually disappeared, and instead, virtually all the cases are terminated by dismissals. Third, most of the dismissals are voluntary and are accompanied by the payment of a mootness fee; the percentage of dismissals coupled with mootness fees has gone up significantly, especially for Delaware-incorporated firms. Fourth, in 2017-2018, merger litigation is being filed largely by six plaintiffs' law firms, none of which is represented among the top tier plaintiffs' firms who were actively litigating (and winning) deal cases in earlier years.[47]

II. Assessing Mootness Fees

A. Resolution by Dismissal and Mootness Fee

In order to understand the significance of the shift in litigation, we next examine the manner in which merger cases are currently being

[46] Again, our data is based on publicly disclosed information about mootness fees and may well underestimate the number of cases in which they are paid.
[47] Krishnan, et al, *supra* note **Error! Bookmark not defined.**.

resolved. Prior to *Trulia*, the standard resolution of a litigation challenge to a deal was the rapid negotiation of a settlement between the plaintiff class and the target company. The settlement typically required the target to make supplemental disclosures in the proxy statement, provided for a general release of all claims by the plaintiff class and sought a court-approved fee award to plaintiffs' counsel. If approved, the settlement therefore bought the target peace from the prospect of further litigation in exchange for the fee award, even though, as some commentators suggested, the value provided by the supplemental disclosures to the plaintiff shareholders was questionable.

In a prior article, *Confronting the Peppercorn*, two of the authors of this article examined the value of these types of settlements.[48] The authors found that disclosure-only settlements appeared on average to offer little value. More particularly, these settlements, and the "corrective disclosures" they entailed, did not significantly change the votes in merger transactions, something that one might expect if the disclosures revealed material information.[49] In that article, the authors recommended that the exclusive forum for these suits be federal court because issues of materiality would both be highlighted in a complaint predicated on section 14(a) and would be within the core competence of the federal courts accustomed to dealing with questions involving the materiality of alleged disclosure violations.[50]

The *Trulia* decision cited these findings in concluding that, in light of the limited value of these disclosure-only settlements, the courts should not routinely approve them. Instead, *Trulia* held that judicial approval of a disclosure-only settlement was appropriate if and only if the supplemental disclosures were "plainly material."[51]

---

[48] *See* Fisch, et al., *supra* note 12.
[49] *Id*. at 561 ("Second, and more importantly, we find no support for the second hypothesis--that is, disclosure-only settlements do not appear to affect shareholder voting in any way.")
[50] *Id.* at 562 ("To the extent that merger disclosures are meaningfully deficient, we argue that plaintiffs should be required to litigate challenges to disclosure quality under the federal securities laws.")
[51] In re Trulia, 129 A.3d 884, 899.

Disclosures that did not meet that standard would not provide the plaintiff class with sufficient consideration to justify a release of any potential claims. On the facts in the *Trulia* case itself, the court determined that the supplemental disclosures provided pursuant to the settlement were neither material nor even helpful to the shareholders and therefore refused to approve the proposed settlement.[52]

Outside of Delaware, courts have differed in the degree to which they accepted *Trulia*. The courts in the 5th and 7th Circuits explicitly adopted *Trulia's* "plainly material" standard.[53] But not all courts agreed. So, for example, in *Gordon*, the New York First Department adopted a lesser standard of review, concluding that approval of a proposed settlement was warranted where the settlement conferred "some benefit" on the plaintiff class.[54]

The absence of a settlement and a release does not preclude the possibility of a fee award for plaintiffs' counsel. The *Trulia* court recognized that, in a case in which the defendants voluntarily

---

[52] *Id.* at 907.

[53] Farber v Crestwood Midstream Partners L.P., 863 F3d 410, 415-416 (5th Cir 2017); In re Walgreen Co. Stockholder Litig., 832 F3d 718, 725 (7th Cir 2016). Several federal district courts have adopted *Trulia* as well. See Bushansky v. Remy International, Inc., 262 F. Supp.3d 742, 746 (S.D. Indiana 2017) (dismissing proposed settlement); In re Hatteras Financial, Inc., Shareholder Litig., 286 F. Supp. 3d 727, 732, 740 (M.D.N.C. 2017) (approving a settlement that resulted in supplemental disclosure that were "technically material" but of "marginal" benefit to the class and approving fee award of $350,790); In re Cytrx Corp. Stockholder Litigation, 2016 WL 6571265 (C.D. California August 17, 2016), at *5 (rejecting motion to set aside judgment); Rosenfeld v. Time Inc., 2019 WL 4177938 (S.D.N.Y. Aug. 30, 2018), at *1 (discussing Trulia in detail); Sanchez v. IXYS Corp., 2018 WL 4787070 (N.D. California October 02, 2018), at *5 (adopting Trulia and dismissing case); Berg v. Akorn, 2017 WL 5593349 (N.D. Illinois November 21, 2017), at *2 (denying without prejudice a motion to intervene); Malone v. CST Brands, Inc., 2016 WL 8258791 (W.D. Texas November 10, 2016), at *6 (denying motion for preliminary injunction).

[54] Gordon v. Verizon Commc'ns, Inc., 148 AD3d 146 (1st Dept. 2017). But see City Trading Fund v. Nye, 59 Misc. 3d 477 (2018) (concluding that this standard did not require award of a mootness fee for disclosures that were of no value). In Maryland, a court held that the courts will not award mootness fees for corrective disclosures unless the original litigation was "meritorious when filed." Dexter v. ZAIS Financial Corp., 24-C-16-004740 (Md. Cir. Ct. Dec. 8, 2016).

supplement their disclosures in response to a litigation challenge, thereby mooting the litigation, plaintiffs' counsel can apply to the court for a mootness fee. The *Trulia* court characterized this as the "preferred scenario" because, in the absence of a settlement agreement, defendants would have an incentive to oppose excessive fee awards, and the court's determination of an appropriate fee would have the benefit of an adversarial process.[55]

Litigation in Delaware has developed in accordance with these principles. The Delaware Chancery Court in subsequent cases awarded mootness fees under a more lenient legal standard than that required by *Trulia*. As one commentator explained, in Delaware, "[a] mootness process involves a company providing supplemental disclosures; the plaintiff stockholders not providing a formal release of claims; and, through an adversarial court proceeding, the parties litigating what fee (if any) is appropriate for plaintiffs' counsel for their having obtained disclosure that "moots" the disclosure claims made."[56] For example, the Chancery Court in *Xoom* awarded counsel a $50,000 mootness fee and concluded that a disclosure that was merely "helpful" could nonetheless justify a fee award in the context of a voluntary dismissal rather than a settlement.[57]

Perhaps most notably Delaware has a specific procedure for oversight of the mootness fee process. Payment of a mootness fee in connection with the voluntary dismissal of a proposed class action in Delaware requires notice to the putative class and court approval.[58] The Delaware courts have subjected mootness fees to careful scrutiny,

---

[55] In re Trulia, 129 A.3d at 897.

[56] Steven Epstein, Scott Luftglass & Gail Weinstein, *A Post-Trulia Success Story Of Disclosure-Based Settlement*, LAW360, Apr. 12, 2016.

[57] In re Xoom Corp. Stockholder Litigation, 2016 Del. Ch. LEXIS 117, at *10 (Aug. 4, 2016)

[58] *See* In re Zalicus Inc. Stockholders Litig., 2015 Del. Ch. LEXIS 15, citing In re Advanced Mammography Sys., Inc. S'holders Litig., 1996 Del. Ch. LEXIS 132, in which Chancellor Allen held that "notice of the joint application must be given to the putative class because of 'the risk of buy off' presented by the proposed fee payment"; In re Harman Int'l Indus., 2016 Del. Ch. LEXIS 291 (retaining jurisdiction for the purpose of resolving plaintiffs' fee application following voluntary dismissal).

at least in some cases, and, on occasion have denied plaintiffs' applications for mootness fees. [59]

Outside Delaware, the process did not develop the same way as was hypothesized in the *Peppercorn* article, namely that federal courts would impose the same scrutiny as Delaware courts to merger litigation. In federal litigation, the courts have imposed the Trulia standard to disclosure-only settlements. However, the federal courts have not imposed the same scrutiny upon mootness fee payments. Instead, it has become common for plaintiffs to dismiss their complaints voluntarily and then negotiate privately with the target company for payment of a mootness fee without seeking court approval of that fee.[60] As a result, attorneys' fees in mootness payments in federal court cases are not generally disclosed by the parties. Based on our earlier research, median mootness fees ranged from $200,000 to $$450,000 over the time period 2014 to 2017.[61] Our more recent conversations with attorneys suggest that these values may have declined to a range of $50,000 to $150,000, depending on the negotiation between the attorneys involved.

Because mootness fees are paid in connection with cases that are voluntarily dismissed prior to class certification, federal courts have almost uniformly failed to oversee, approve, or even require disclosure of, these fees. This lack of federal court supervision, and the dynamic which has developed post-*Trulia*, is why merger litigation

---

[59] The approach in other state courts varies. See supra notes 53-54 and accompanying text.

[60] It appears that plaintiffs, at least in some cases, were able to employ this same process in Delaware. In In re Harman Int'l Indus., 2016 Del. Ch. LEXIS 291, for example, the court issued an order granting plaintiffs' request for voluntary dismissal and expressly retaining jurisdiction for the purpose of determining the plaintiffs' fee application. Subsequently, however, the defendants agreed to pay plaintiffs' counsel a fee of $195,000, and the amount of that fee does not appear to have been submitted to the court for approval. *See* In re Harman, Notice of Dismissal (indicating agreed-upon fee and stating that the court had not determined the reasonableness of the fee).

[61] Cain, et al., *Shifting Tides*, *supra* note 1 , at 625 Table 1. This is consistent with the information reported in the popular press. Joseph M. McLaughlin & Shannon K. McGovern, *Mootness Fees in Disclosure-Focused Deal Litigation*, New York L. J., Dec. 12, 2018 (reporting that "More recently, median mootness fees are closer to $250,000.").

rates remain at high levels (and why these cases have disappeared from Delaware). Although the mootness fee dynamic appears to have reduced the size of plaintiffs' attorneys' fees, it has thus far permitted them to achieve a similar result to what used to be available in Delaware except without the formal global release.[62]

Several cases have grappled with the issue of whether the federal courts have the power to oversee the dismissal and mootness fee dynamic. In *Akorn*, plaintiffs successfully argued that, because the case was voluntarily dismissed prior to class certification, the federal court lacked jurisdiction to review the fee award. Notably, the Federal Rules of Civil Procedure do not require judicial approval of a voluntary dismissal if a case has not yet been certified as a class action. If the case is dismissed prior to class certification, other shareholders also lack a procedural mechanism to intervene and object to the award.[63] Similarly, as the court in *Rosenfeld v. Time*[64] concluded, the voluntary dismissal of a complaint prior to class certification does not constitute an adjudication, so the court may not even have jurisdiction under the PSLRA to evaluate whether Rule 11 sanctions are warranted. These limitations have not just limited judicial scrutiny of mootness fee payments, in most cases, the courts have not even required that such payments be disclosed.

The failure to require disclosure of the existence and amount of the mootness fee raises the possibility that plaintiffs' attorneys are receiving mootness fees for valueless disclosures or disclosures that were not causally related to the filing of the complaint. Indeed, it is hard to believe that the disclosures made in connection with mootness fees are more valuable than those which were previously made in

---

[62] *See, e.g.*, Berg v. Akorn, Inc., 2017 U.S. Dist. LEXIS 192278, *4 (N.D. Ill. 2017) (reporting that plaintiffs filed a document with the court reporting that "Defendants have agreed to provide Plaintiffs with a single payment of $322,500 in attorneys' fees and expenses to resolve any and all Fee Claims, and thus there are no Fee Claims to be adjudicated by the Court Defendants have agreed to provide Plaintiffs with a single payment of $322,500 in attorneys' fees and expenses to resolve any and all Fee Claims, and thus there are no Fee Claims to be adjudicated by the Court")

[63] *See id.* (noting "the Court is sympathetic to Frank's frustration with Plaintiffs' engineering of a device to evade review under Rule 23").

[64] Rosenfeld v. Time, Inc., 2018 U.S. Dist. Lexis 148394, at *12.

connection with disclosure-only settlements pursuant to court oversight, many of which were found to be of little or no value.[65] One indicator that this is the case is that Plaintiffs' attorneys would likely bring valuable cases in Delaware courts which historically have awarded high attorneys' fees in meritorious cases. Moreover, to the extent that target boards are agreeing to fee awards for litigation that has not provided a benefit to the target company shareholders, they are arguably wasting corporate assets.[66]

Regardless of the legal issue of waste, mootness fees impose real costs on the judicial system and companies. We can estimate the total direct dollar cost of mootness fees in merger litigation. If we use the data from Table 2 on the number of merger litigation cases filed annually, then multiply this number of cases by the percentage of cases where mootness fees are paid,[67] we can calculate the annual number of cases where such fees are paid. We can then multiply this value by the median mootness payments discussed in the prior paragraph to arrive at an estimate. For example, for 2017, we have 135 deal cases, of which 65% resulted in a mootness fee payment, or approximately 88 cases. If we use our data on mootness fees, the median mootness fee payment was $265,000 per case.[68] Doing the math, the estimated

---

[65] *See* Fisch et al., *supra* note 12., at 615 (concluding that, because disclosure-only settlements do not have a demonstrable effect on shareholder voting, they "do not produce a corporate benefit").

[66] A waste analysis in the context of mootness fees differs in an important way from the analysis of disclosure-only settlements. When a class action challenging a merger is settled, the defendant receives, in consideration for the settlement, relief from the potential costs of litigating the case. In the mootness context, the defendant receives no such relief because the dismissal only reaches the individual claims of the filing shareholder (claims that would not be cost-effective to litigate on a stand-alone basis). Other prospective class members would not be barred from filing a similar complaint and raising the identical issues. It is thus questionable whether the justification of litigation settlement and deterrence is an appropriate defense to a waste claim. *See generally* In re Walt Disney Derivative Litigation, 907 A 2d 693 (2005) (detailing the standard of waste under Delaware law).

[67] We remind the reader that this is a lower bound on the number of cases in which mootness fees are paid because there may be some unreported mootness fee payments that we are unable to identify.

[68] Cain, et al., *Shifting Tides*, *supra* note 1, at 625, Table 3. As we note infra, this figure may be higher than the mootness fee amounts currently paid.

(lower bound) for total mootness fees in 2017 would be $23.32 million dollars.[69] While this number may seem small in comparison to the total dollar value of the deals being completed, it is not insignificant.

B. The Problem of Mootness Fees

The lack of oversight, the continuing prevalence of merger litigation, and the payment of attorneys' fees in mootness fee cases all raise troubling issues. We discuss these issues in this subsection, including the risk of blackmail litigation and lack of transparency. We conclude by discussing whether the current mootness fee review standards in both state and federal court, to the extent they exist, are workable.

1. Risk of blackmail litigation

The primary concerns with mootness fee litigation are related to those involving disclosure-only settlements. Prior to *Trulia*, a substantial number of merger cases were settled for additional so-called corrective disclosures.[70] From the defendant's perspective, the primary virtue of a settlement was that it received a global release precluding further litigation challenges to the merger. In effect, the plaintiffs' attorneys were selling a form of insurance, which allowed the deal parties to obtain a release from all breach of fiduciary duty claims as well as any other claims arising from the transaction. This was a valuable right, and the defendants were willing to pay for it.

For the settlement to have value then, it required that the plaintiff class be certified, at least for settlement purposes. As a result, the settlement and fee award were subject to review in Delaware by the court under the substantial benefit test or, in federal court, Fed. R. Civ.

[69] Of course, this value is highly sensitive to changes in the assumptions used in the calculations, but even at $100,000 per case on average the amount is $8.8 million per year in costs. From conversations with practitioners we believe that the $235,000 figure is closer to the norm and understates the average amounts paid.
[70] See Fisch et al., *supra* note 12.

P. 23(e).[71] The court thus had some oversight of the process, and would in many instances refuse to approve the settlement if the benefit was not apparent. In some prominent cases, including in *In re Rural Metro Corp. Stockholders Litigation*,[72] other plaintiffs' law firms intervened and took control of the case to prosecute more valuable substantive claims.[73] This court-supervised process eventually culminated in the *Trulia* line of cases, which determined that many disclosure-only settlements provided little benefit to the class and held that, in such cases, no fee award was appropriate. Importantly, by imposing meaningful judicial scrutiny on proposed disclosure-only settlements, *Trulia* limited the potential for plaintiffs' attorneys to exercise a form of blackmail by filing weak cases that defendants could not litigate on a cost-effective basis.

Because mootness fee cases outside of Delaware are not subject to the same judicial scrutiny, they too raise the potential for a form of blackmail. More explicitly, although the plaintiffs' law firm can hold out the prospect of litigating the issue of whether the target's disclosure is sufficient, the prototypical mootness dismissal involves a case in which there is no reasonable prospect of identifying a disclosure deficiency, and the only rationale for payment is that it is less costly for the defendants to pay the mootness fee than to challenge the complaint on the merits.[74] In other words, as the *Nye* court put it, "[t]he very point of the lawsuit was simply to get paid—by the shareholders—to go away. This is a pernicious motive for a lawsuit."[75]

In conversations with both defense and plaintiffs' attorneys, they report that this dynamic appears to be driving the payment of mootness fees. The fact that these cases are overwhelmingly brought by a small handful of non-top tier plaintiffs' law firms, firms that are not

---

[71] *See, e.g.*, In re Sauer–Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1127 (Del. Ch. 2011).
[72] 102 A.3d 205 (Del. Ch. 2014), aff'd sub nom. RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).
[73] Joel Edan Friedlander, *How Rural/Metro Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877 (2016).
[74] At least one defense counsel has informed us that some repeat buyers have refused to pay this fee, preferring to litigate. As one might expect, after the first assertion of this right, subsequent transactions have not been met with mootness fee demands.
[75] City Trading Fund v. Nye, 59 Misc. 3d 477 n. 26.

commonly involved in litigating cases that result in substantial recoveries to the plaintiff class, is consistent with this dynamic. These firms are well known to the defense bar and their appearance on the complaint signals to the defense bar that the mootness fee dance is to begin.

This situation is exacerbated by the lack of judicial oversight in federal courts. If the plaintiffs' attorneys receive a fee in cases in which their litigation does not provide a benefit, they lack any incentive to limit litigation to cases involving truly problematic disclosures. Instead, plaintiffs' firms continue regularly to file these cases, expecting them to result in a quick resolution and fee payment. This pattern is readily apparent in our data.

2. Lack of Transparency

Our second objection to mootness fees is the lack of transparency. In our empirical data collection, we found that the payments of mootness fees were rarely disclosed and, outside of Delaware, mootness fees are virtually never disclosed in court documents,[76] although they may appear in a press release or corporate filing with the SEC. Because of the lack of transparency, it is uncertain in many cases whether a mootness fee is even paid. For example, in some cases, disclosure is made with specific reference to mooting a pending complaint without reference to whether a mootness fee will be paid. In other cases, there is only supplemental disclosure with a subsequent dismissal but no mention of attempting to moot the pending case. In a third set of cases, there is no supplemental disclosure and no record of a mootness fee paid, simply a dismissal.

[76] Also, as stated in *Trulia*, Delaware requires that mootness fees be disclosed to shareholders. This disclosure may take the form of an 8-K filing. *See, e.g.*, VAALCO Energy, Inc. 8-K Apr 26 2016 (disclosing mootness fee). When the practice of dismissal coupled with payment of a mootness fee initially developed, it was the norm to disclose that a fee was being paid as well as the amount of the fee. We used this metric to record mootness fee payments in our *Shifting Tides* article. The practice has now changed, and mootness fees are rarely disclosed. *See supra* note 35.

For example, on August 10, 2018, Radisys filed a proxy statement in connection with a proposed merger with Reliance Industries. Plaintiffs filed a complaint in federal court on August 17, 2018 alleging disclosure violations.[77] On August 28, that complaint was voluntarily dismissed, and, Radisys filed an 8-K announcing that the dismissals had been made following supplemental disclosures and that plaintiffs' counsel "stated their intent to seek mootness fees from RSYS."[78] Neither the court docket nor Radisys's corporate disclosures provide any additional information as to whether a mootness fee was subsequently paid and, if so, the amount of that fee. [79]

A transparent process would require disclosure of these fees both to the court and in a public filing. Disclosure would provide an opportunity for affected stockholders to step in and object, thereby offering the possibility of an adversarial process even in a case in which the target board is unwilling to defend against the complaint.[80] The *Akorn* case demonstrates the prospect of such a process.[81] In *Akorn*, a shareholder sought to intervene to object to the requested fee award on the basis that the case was "part of a 'racket,' pursued for the sole purpose of obtaining fees for the plaintiffs' counsel."[82]

Disclosures also provide a level of court oversight, which ensures the integrity of this process and interrupts the current blackmail dynamic of mootness fees. This principle applies even if the costs – anywhere from approximately $5 million to $25 million per year are dismissed as relatively trivial. In addition, oversight allows for court intervention to ensure that an actual benefit is being exchanged in these circumstances. As we discuss in the next subsection, we believe that courts should be more rigorous in the level of oversight they provide.

---

[77] Plaintiffs also filed a state court complaint which was similarly dismissed.
[78] Radisys Form 8-K dated Aug. 28, 2018.
[79] U.S. District Court District of Oregon (Portland (3)) Civil Docket for Case#: 3:18-cv-01525-SI (as of Aug. 28, 2018) http://securities.stanford.edu/filings-documents/1067/RC00_15/2018817_f02k_18CV01525.pdf
[80] *See* Berg v. Akorn, Inc., 2017 U.S. Dist. LEXIS 192278; Rosenfeld v. Time, Inc., 2018 U.S. Dist. Lexis 148394, at *12.
[81] Berg v. Akorn, Inc., 2017 U.S. Dist. LEXIS 192278.
[82] *Id.* at *4.

3. The Standard in Mootness Cases is Unworkable

Judicial oversight of mootness fee applications does not, however, fully address the problem. Remember that the standard, at least as annunciated in *Xoom,* is that a mootness fee can be awarded "if the disclosure provides some benefit to stockholders, whether or not material to the vote."[83] The problem with this standard is that it appears to be contrary to the long precedent on disclosure and materiality as set forth in the federal securities law starting with *TSC Indus. v. Northway, Inc*.[84] Critically, it rewards plaintiffs for filings complaints in cases in which there is no violation of the law – because section 14(a) imposes liability only for "material" disclosure violations.

Awarding a mootness fee for disclosures that provide minimal value to the plaintiff class, disclosures that the *Nye* court termed "tell me more" disclosures, is both a low standard and judicially unmanageable.[85] As the court observed in *Nye*, "[s]ince companies are only legally required to disclose all material facts in connection with a merger, every single proxy will surely omit at least some immaterial fact that might be of some benefit to the shareholders." Consequently, providing a fee award for any cases that secures a disclosure that is immaterial yet provides some benefit "incentivizes a lawsuit in connection with every single merger."[86] Information that is not legally required should not be the basis of a fee award.

III. Merger Disclosure Issues should be a Matter of Federal Law and the Federal Rules of Civil Procedure should Address Mootness Fees

A. The Case for Federal Oversight

[83] Xoom, 2016 Del Ch. LEXIS 117, *10, 2016 WL 4146425 *3
[84] 426 U.S. 438.
[85] City Trading Fund v. Nye, 59 Misc. 3d 477,499 (Sup. Ct. N.Y. 2018).
[86] *Id.* at fn 26.

The fundamental question underlying judicial review of mootness fees is the issue of whether this should be a matter for a state or federal court. As discussed above, two of us argued in the *Peppercorn* article that federal courts rather than state courts should police merger disclosure. We based our arguments on the core competencies of the federal courts and the copious amount of federal law on this issue. Succinctly, the federal courts have an 85-year history regulating and policing securities disclosure. This has supplied a robust body of case law concerning the appropriate standards of disclosure. The SEC has adopted an enforcement and a review process that also includes rule making and guidance to issuers on the proper scope and level of disclosure. The federal rules have also more directly engaged with issues surrounding frivolous lawsuits. Indeed the PSLRA was adopted to police these suits, and the standards behind Rule 10b-5, Rule 14(a) and other disclosure liability have been detailed and annunciated by both the SEC and the Supreme Court including the requirements of scienter and materiality. In this regard, *Trulia* can be seen as an adoption of that principle. *Trulia* was a case that asserted that materiality as annunciated by the federal courts should be the guiding standard for regulating disclosure-only litigation. It was a statement that these standards would govern when the state court decided the validity of a settlement. *Trulia's* precepts have been adopted by some federal courts. In *Walgreen*, Judge Richard Posner adopted the *Trulia* standard for the Seventh Circuit.[87] He wrote that these settlements should be rejected unless the disclosure was “"plainly material”.[88] *Trulia's* standard also saw adoption in other courts.[89]

Walgreen's posture was set under Rule 23 and the requirements set out thereunder for judicial review of class action settlements. Rule 23 is currently inapplicable with respect to mootness fees because no class is ever certified. However, we believe that the standard in *Walgreen* is the appropriate standard to review mootness fees. In other words, because of concerns over the integrity of the litigation process

---

[87] In re Walgreen Co. S'holder Litig., 832 F.3d 718 (7th Cir. 2016).
[88] *Walgreen*, 832 F.3d at 724, 725.
[89] *In re Subway Footlong Sandwich Mktg. and Sales Prac. Litig.,* 869 F.3d 551, 557 (7th Cir. 2017); *see also Bushansky v. Remy Int'l, Inc.,* 262 F.Supp.3d 742 (S.D. Ind. 2017).

and detriments to shareholders, the courts should adopt a requirement that a mootness fee payment provide a threshold level of benefit before such fees can be paid. This threshold level should be set at a sufficient level to deter frivolous litigation and yet at the same time provide shareholders true benefits. The *Walgreen* standard, which relies on the long precedent of federal courts in this area, is a sufficient one. Indeed, the decline of disclosure settlements highlights that *Walgreen* set a sufficiently high standard – that of materiality.

Some federal courts have shown a willingness to police the resolution of merger litigation in accord with the *Walgreen* standard. One example is in *Akorn*, in which the court faced a shareholder's challenge to the target's agreement to pay a $225,000 mootness fee in connection with the voluntary dismissal of six lawsuits challenging Akorn's disclosures about its proposed merger with Frensenius Kabi AG following Akorn's voluntary agreement to provide supplemental disclosures. The court determined that the Seventh Circuit's concern in *Walgreen* over fee awards in weak disclosure cases extended to the mootness fee context and ordered further proceedings to determine whether the fee payment met the Walgreen standard. [90] More specifically, the court stated that, "courts should not permit plaintiffs' counsel to file cases purely to exact attorneys' fees from corporate defendants under any circumstances."[91] The court thus exercised its "inherent powers to police potential abuse of the judicial process" to require that the plaintiffs demonstrate "that the disclosures for which they claim credit meet the Walgreen standard."

Akorn is important because it shows the ability of a court to use its inherent equitable authority to police the payment of mootness fees. The court in *Akorn* did not rely upon the PLSRA or general disclosure precedent. Although *Akorn* offers a path for the court to apply the *Walgreen* standard to mootness fees, the court's decision was only possible because the parties had disclosed the payment of a mootness fee. This allowed an objector to step in, triggering the court decision.

---

[90] *Walgreen,* 832 F.3d at 718.

[91] *See also* Pearson v. Target Corp., 893 F.3d 980, 982 (7th Cir. 2018) (counsel and parties should not be permitted to "leverage" the class mechanism "for a purely personal gain").

In most cases, neither the court nor potential objectors are aware that a mootness fee has been paid, and no such objection is ever raised.

B. Amendment of the Federal Rules of Civil Procedure

Change is needed.

First, we propose that the federal courts should follow Delaware's approach and require both disclosure and judicial approval of mootness fee payments. We recommend that the federal courts require that any proposed mootness fee be reported to the court when there is a voluntary dismissal of a proposed class action. The court should also be required to approve that payment, even if the class has not been certified.[92] Finally, we recommend that the defendant corporation be required to file a Form 8-K or make other public disclosure, prior to the judicial hearing, alerting investors as to any request by plaintiff's counsel for a mootness fee, the position of board of directors with respect to the request, and the amount of the proposed payment.[93]

We believe that the federal courts could adopt these requirements on their own, as the Delaware courts have done. In addition, these requirements could be limited by judicial decision to the context of class action merger litigation. On the other hand, the potential for plaintiffs' counsel to extract mootness fee payments in exchange for voluntarily dismissing frivolous complaints is not limited

[92] We note that merger litigation filed as a derivative suit is already subject to FRCP 23.1 (c)'s requirement that any derivative case can be "settled, voluntarily dismissed, or compromised only with the court's approval." This provision is designed to permit objectors to "question the overall fairness of a settlement and to prevent a secret settlement in which the plaintiff and his attorney receive a clandestine payment from the defendant." JAMES D. COX AND THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS, at 988 (2d ed. 2003). It seems inequitable that plaintiffs can circumvent these judicial protections merely by recasting a derivative complaint as one that purports to be a class action.

[93] Although the federal courts could potentially order such disclosures based on their power to protect the shareholders of the defendant corporation, these requirements are arguably better implemented through SEC rulemaking.

to the merger context. As a result, it may be desirable for the Federal Rules Committee to consider incorporating these requirements into the FRCP. Rule 23 should be amended to require disclosure and court approval if counsel seeks a fee award or other payment in connection with the voluntary dismissal of a proposed class action, even if that dismissal occurs prior to class certification.[94]

We propose the following amendment to FRCP Rule 23:

FRCP Rule 23(e)(5)(B)(iii)

"Unless 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."

By providing notice and requiring judicial approval, the court would be able to hear from objectors to the payment, and determine if the payments were justified under the appropriate legal standard, such as the one provided in the *Trulia* case.[95] Given the dubious nature of the benefits to defendants of mootness fee payments, and the likelihood that shareholders would object to the practice, we anticipate that disclosure would substantially reduce defendants' willingness to pay mootness fees.[96]

Our proposal would align with both the purpose of Rule 23 as well as Delaware's approach to the subject; specifically, it would

---

[94] As it currently stands, FRCP Rule 41 allows for voluntary dismissal without court approval, subject to FRCP 23(e). FRCP 23 was amended recently in order to stop a similar practice of objector blackmail, whereby an objector to a class action settlement would intervene for non-meritorious reasons to delay the closing of the settlement until the delay pressured class counsel or the defendant to pay them to go away. FRCP 23(e)(5)(B-C) were added to require court approval of a payment "provided in connection with: (i) forgoing or withdrawing an objection, or (ii) forgoing, dismissing, or abandoning an appeal…" This practice was documented in Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009). The Standing Committee's report to the Judicial Conference discusses these amendments. https://www.uscourts.gov/sites/default/files/2017-09-jcus-report_0.pdf.

[95] Alternatively, courts should issue standing orders in merger litigation cases that any payment of fees should be reported to the court prior to payment.

[96] We recognize that plaintiff's attorneys could attempt to style their cases as individual and not class actions to avoid this rule. However, we believe that mootness fee payments in such a circumstance would constitute waste given the unreasonably outsize relationship between the payment and individual benefit.

address the risk of non-meritorious cases that are filed for the purpose of attempting to extract a fee payment. We note that Rule 23 was previously amended to address similar concerns in connection with the filing and subsequent withdrawal of objections to settlements. In 2017, F.R.C.P. Rule 23 was amended to require court approval for any payment to an objector to a class settlement in connection with the objectors' withdrawal of the objection. The rationale cited by the standing committee was that "[a]lthough the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes."[97] A rule requiring court approval of mootness fee payments would align with this approach to preventing rent-seeking through judicial oversight of similar fee payments. It would also align with the transparency and court-supervised process which F.R.C.P. 23 promotes.

Similarly, our proposal is consistent with Delaware law on the subject. Delaware law specifically requires that the payment of a mootness fee be accompanied by notice to shareholders to prevent "'the risk of buy off' of plaintiffs' counsel."[98] In *Trulia* the court stated that:

> As the Court recently stated, "notice is appropriate because it provides the information necessary for an interested person to object to the use of corporate funds, such as by 'challeng[ing] the fee payment as waste in a separate litigation,' if the circumstances warrant." In other words, notice to stockholders is designed to

[97] Pp. 291-92. https://apc01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.uscourts.gov%2Fsites%2Fdefault%2Ffiles%2F2017-09-jcus-report_0.pdf&data=02%7C01%7C%7C7db84a20ed754cc3fe1708d6dfc4ddbc%7C84df9e7fe9f640afb435aaaaaaaaaaaa%7C1%7C0%7C636942433960326630&sdata=iVm5YGLt8LtmO3KrtiJCa9Jn05LjOcZ4fgWBybBjqxQ%3D&reserved=0

[98] Trulia, 129 A.3d 884, at 898.

guard against potential abuses in the private resolution of fee demands for mooted representative actions.[99]

Amendment of Rule 23 would thus align with notions of transparency and shareholder interests that are embedded in both the federal and Delaware civil procedure rules.[100] In this regard, we would advocate that Delaware further modify its standard either by amending the Chancery Court rules to explicitly formalize procedure notice to the court and judicial approval of mootness fees in proposed class actions.

C. Revision of the Substantive Mootness Fee Standard

We also propose that courts in Delaware and elsewhere revise the substantive standard for the approval of mootness fees and limit that approval to cases in which the supplemental disclosures that have the effect of rendering the litigation moot are clearly material under the *Trulia* standard. Plaintiffs' counsel should not be rewarded for uncovering and correcting immaterial disclosure violations. Elimination of the weakened standard for recovery of fee awards in mootness cases would substantially reduce the frequency with which litigation is filed that does not benefit the company or its shareholders.

From a cost-benefit perspective, these simple changes would undoubtedly be beneficial. As we estimated earlier, the direct costs of mootness fees likely amounted to at least $23 million dollars in 2017. Of course, mootness litigation creates other significant and important indirect costs arising out of the lack of transparency and the lost judicial time from trying to apply the unworkable legal standard for adjudicating these cases. These costs would all be saved from the rule change although there might be some offsetting increase in the amount

---

[99] *Id.*

[100] We note that, because our proposal extends to complaints that are filed as proposed class actions but dismissed prior to certification, it could be understood as interfering with a litigant's right voluntarily to dismiss an individual claim. Our response is that, at least in merger litigation, the purported justification for the mootness fee is the class-wide benefit in the form of supplemental disclosures, and that a mootness fee would not be warranted absent that justification. Because plaintiffs' counsel is leveraging class status to obtain a fee payment, these cases should be understood in those terms.

of judicial review. However, if courts adopt the *Trulia* standard, even these costs should quickly decrease as fewer of these cases are filed.

Subsequent events in the Delaware courts post-*Trulia* support our proposal. As our analysis shows, post-*Trulia* the largely weak merger cases wholesale migrated out of Delaware, but litigation in Delaware did not end. Instead, as we discussed in Section I, the cases brought in Delaware appear to be the more meritorious ones—those that offer the potential for counsel to obtain real, substantive benefits to the class. They involve allegations of conflict, the focus of Delaware courts these days, and for the large part they cases are litigated more extensively. At least one thus far – *In re Calamos Asset Management Stockholder Litigation*[101] -- has resulted in a settlement of $30 million, a clearly significant result.

III. Conclusion

In this article, we empirically analyze the latest development in merger litigation: the mootness fee. We find that this type of disposition now dominates merger litigation. In 2018, 83% of deals were subject to litigation, and an average of 63% of these cases resulted in the payment of a mootness fee. The rise of the mootness fee has resulted in the demise of the disclosure-only settlement. It has also resulted in the precipitous decline of merger litigation filed in Delaware; only 2% of cases brought in 2018 involving Delaware-incorporated targets were filed exclusively in Delaware, a remarkable decline from 57% of these cases filed in 2015.

We argue that the rise of the mootness fee is not beneficial from a capital markets perspective and is instead a form of blackmail in which defendants pay mootness fees not on the merits but simply to avoid vexatious litigation. This practice persists due to a lack of transparency associated with mootness fee payments and the absence of sufficient judicial oversight.

We conclude that change is needed. First, the migration of disclosure-based merger litigation to federal courts is not the source of the problem. Federal courts have core competences in evaluating disclosure claims, and they should apply those competencies to merger

[101] C.A. 2017-0058-JTL (Del. Ch. 2019).

litigation cases. Federal courts should, however, adopt mechanisms to ensure that mootness fees are rendered transparent to both the courts and to shareholders. This transparency can be accomplished by individual courts requiring the disclosure of mootness fees or, alternatively, standardizing the requirement of disclosure and court approval of mootness fees in merger litigation through an amendment to the Federal Rules of Civil Procedure. Second, we argue that in evaluating the proposed payment of a mootness fee in cases involving supplemental merger disclosures, courts should reject the *Xoom* standard – which does not require materiality but allows payment of a mootness fee in cases in which the disclosures provide any arguable benefit. Instead, the courts should condition the payment of mootness fees on the correction of material disclosure violations.

Merger litigation has existed for decades, and challenges to merger processes and disclosures have led to important reforms and, in many cases, substantial recoveries for class members. The cases that result in voluntary dismissals and the payment of mootness fees are not meritorious cases. *Trulia* has reduced the import and cost of merger litigation challenges that do not produce meaningful value for the plaintiff class by increasing judicial scrutiny of disclosure-only settlements coupled with fee awards. It has also resulted in the filing of these cases where they belong – in federal court. A final step is needed, and mootness fees in federal court should be subjected to the same scrutiny imposed by the *Trulia* line of cases. This would eliminate this type of frivolous litigation altogether and finally end the era of widespread merger litigation.