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Randall S. Thomas
Vanderbilt University Law School

Matthew D. Cain
Univ. of Calif. Berkeley School of Law

Jill E. Fisch
Univ. of Calif. Berkeley School of Law

Steven D. Solomon
Univ. of Calif. Berkeley School of Law

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

In response to a sharp increase in litigation challenging mergers, the Delaware Chancery Court issued the 2016 Trulia *decision, which substantively reduced the attractiveness of Delaware as a forum for these suits. In this Article, we empirically assess the response of plaintiffs' attorneys to these developments. Specifically, we document a troubling trend—the flight of merger litigation to federal court where these cases are overwhelmingly resolved through voluntary dismissals that provide no benefit to the plaintiff class but generate a payment to plaintiffs' counsel in the form of a mootness fee. In 2018, for example, 77% of deals with litigation were challenged in federal court, and in 63% of litigated cases, plaintiffs' attorneys received a mootness fee. This compares with 2014, when only 4% of deals with litigation had a filing in federal court and no mootness fees were awarded.*

The rise of the mootness fee and the shift to federal court raise several issues, including a lack of transparency in the quality and resolution of merger cases and an increased potential for blackmail litigation. These problems are compounded by the willingness of some courts to permit the payment of a mootness fee in connection with corrective disclosures that are immaterial but possibly helpful, a standard that we argue is unworkable and increases the potential for vexatious litigation. We argue that the widespread payment of mootness fees reflects an inappropriate tax on the judicial system and corporations.

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** 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 Law School.

Although we argue that a shift to federal courts is appropriate for litigation challenging the adequacy of merger disclosure, we maintain that a successful shift requires the federal courts to police the quality and resolution of merger litigation carefully. We conclude that federal courts should require that the payment of mootness fees be subject to judicial review. 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 required by Trulia. *We propose that the Federal Rules of Civil Procedure be amended to implement these requirements or alternatively that federal judges use their inherent authority to adopt these requirements. We ultimately view these changes as necessary to limit frivolous litigation and provide for transparency and judicial oversight of the litigation process.*

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 in 2011 attracting five lawsuits.[3] 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.[4]

This 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[5] and subsequently by the legislature.[6] The Delaware courts also responded in a series of decisions restricting the scope of merger litigation both substantively and procedurally.[7]

The decisions limiting the scope of merger litigation culminated in *In re Trulia Inc. Stockholder Litigation* in 2016. In *Trulia,* the Delaware Chancery Court held that the Delaware courts would no longer approve merger litigation settlements that provided for a release

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 VAND. L. REV. 603 (2018).

2. *Id.* at 620. Private litigation is the dominant mechanism for challenging the price, fairness, or disclosures in connection with a public company merger. Enforcement actions by the Securities and Exchange Commission ("SEC") 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/GT2T-GKK6] (describing SEC enforcement actions in several reverse merger cases in 2011).

3. Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2015, at 3 (Jan. 14, 2016) (unpublished manuscript), http://ssrn.com/abstract=2715890 [https://perma.cc/7SNJ-RSM6].

4. Cain et al., *supra* note 1, at 621. This led to charges of widespread frivolous merger litigation. *See, e.g.*, Gregory A. Markel, Martin L. Seidel & 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/F6GE-5H7D] (observing that "lawsuits are filed after virtually every public merger is announced, in many cases with little regard to the merits of the claim").

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

6. DEL. CODE ANN. tit. 8, § 115 (2019).

7. *See, e.g.*, Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305–06 (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").

and an award of attorneys' fees if they did not achieve meaningful benefits for shareholders.[8] The *Trulia* court specifically rejected a proposed settlement which offered to provide plaintiffs with additional nonmaterial disclosures in exchange for a broad release and a fee award to plaintiffs' counsel.[9] The court noted in dicta that, rather than 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.[10] Six months later, in *In re Xoom Corp. Stockholder Litigation*, a Delaware court awarded a $50,000 mootness fee.[11] 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."[12]

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, however. Instead, the changes resulted in the flight of merger litigation filings from Delaware to the federal courts.[13] These federal suits repackaged state-law claims based on fiduciary duty into antifraud actions under section 14A and Rule 14a-9 thereunder.[14] By 2017, merger litigation rates, which had dipped to 74% of deals in 2016, rose to 83%, but only 10% of litigated deals faced a challenge in

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8. *In re* Trulia Inc., Stockholder Litig., 129 A.3d 884, 907–08 (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.* at 899; *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) (statement of Chancellor Bouchard):

> [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 . . . there is going to be more scrutiny on some of the give and the get of these things.

9. *Trulia*, 129 A.3d at 907.

10. *Id.* at 897–98 ("The preferred scenario of a mootness dismissal appears to be catching on.").

11. No. 11263-VCG, 2016 Del. Ch. LEXIS 117, at *14–15 (Del. Ch. Aug. 4, 2016).

12. *Id.* at *9–10.

13. Cain et al., *supra* note 1, at 631–32.

14. 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 coauthors 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, 562, 601 (2015) (arguing that merger disclosure challenges should be litigated under federal securities laws rather than under Delaware law in order to reduce the frequency of frivolous, disclosure-only settlements). *But see* Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements*, 15 U. PA. J. BUS. L. 669, 675 (2013) (defending the value of disclosure-only settlements in merger litigation).

Delaware, while 87% faced one in federal court.[15] 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.[16]

In prior work, we identified the shift to federal court and posited that the change was due to *Trulia* and other Delaware decisions.[17] 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.[18] 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.[19] 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 the proxy

15. *Infra* Table 1. The percentages do not sum to 100% because of multiple cases in multiple forums.

16. *Infra* Table 1.

17. *See* Cain et al., *supra* note 1.

18. Fisch et al., *supra* note 14, at 601–02.

19. *See also* Jack B. Jacobs, Andrew W. Stern & Jon W. Muenz, *'Mootness Fees' in Deal Litigation: An Argument for a Different Approach*, BLOOMBERG L. 1 (Mar. 28, 2017), https://www.sidley.com/-/media/publications/bloomberg-bna-corporate-counsel-weekly_mootness-fees-final.pdf [https://perma.cc/2PSB-TH6Y] ("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); *In re* Trulia Inc. Stockholder Litig., 129 A.3d 884, 898 (Del. Ch. 2016) ("In using the term 'plainly material,' I mean that it should not be a close call that the supplemental information is material as that term is defined under Delaware law.").

statement.[20] Most federal courts do not review the request for dismissal or the proposed mootness fee payment.[21]

We begin this Article in Part I by conducting an empirical analysis documenting the scope and pervasiveness of the mootness fee.[22] 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.[23] Notably, mootness fees appear to have displaced formal settlements (coupled with releases) entirely in federal court litigation. 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.[24] 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 courts review the mootness fee, their limited ability to bring meaningful scrutiny to bear on the process by evaluating the quality of the supplemental disclosures. Notably, we observe that merger litigation is primarily

20. *See* Rosenfeld v. Time, Inc., No. 17cv9886 (DLC), 2018 U.S. Dist. LEXIS 148394, at *2–3 (S.D.N.Y. Aug. 30, 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*, 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/ [https://perma.cc/2RML-Q7GK] (reporting that "[m]ore recently, median mootness fees are closer to $250,000").

21. FED. R. CIV. P. 23(e) only requires court approval of a voluntary dismissal after class certification.

22. 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).

23. As we explain more fully *infra* note 41, we are limited in determining the full number of mootness fee payments because they are not always disclosed by the parties.

24. 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. *See infra* Table 1.

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.[25] 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 Judge Denise Cote of the Southern District of New York describes as conferring "no or little appreciable benefit" on target company shareholders.[26]

We consider the challenge faced by 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") provide even less guidance and invite abusive litigation filed solely for the purpose of extracting a nominal fee payment.[27] 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, they also do not appear to provide appreciable benefits to shareholders.

A related and potentially more problematic issue is the negotiation and payment of mootness fees outside the judicial process. Although Delaware law requires disclosure and judicial review of mootness dismissals,[28] the Federal Rules of Civil Procedure ("FRCP") do not explicitly mandate 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 potential 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

25. 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. & ECON. REV. 122, 124 (2016) ("[T]he top 5 firms, on average, have anywhere between around 5 and 10% each of total market share every sample year.").

26. Rosenfeld v. Time Inc., No. 17cv9886 (DLC), 2018 U.S. Dist. LEXIS 148394, at *12 (S.D.N.Y. Aug. 30, 2018).

27. *See, e.g.*, *In re* Xoom Corp. Stockholder Litig., No. 11263-VCG, 2016 Del. Ch. LEXIS 117, at *10 (Aug. 4, 2016) (awarding a $50,000 mootness fee after concluding that a disclosure that was merely "helpful" could justify a fee award in the context of a voluntary dismissal rather than a settlement).

28. *See infra* notes 71–73 and accompanying text.

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, 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 both the Private Securities Litigation Reform Act ("PSLRA"),[29] which is to limit frivolous litigation, and FRCP 23, which provides for transparency and judicial oversight of the class action process.

I. EMPIRICAL ANALYSIS

To provide the reader with a deeper understanding of mootness fees and their prevalence today, we begin in this Section by presenting the results of an empirical analysis of the changing patterns of merger and acquisition ("M&A") deal litigation over time. We construct a large sample of cases, then use our data to explore the number of case filings by year, the outcomes of those cases, the shift in case filings to federal court, the plaintiffs' law firms that are bringing these cases, and the increasing resolution of these cases through voluntary dismissals coupled with the payment of mootness fees.

A. Data Set

For our analysis, we used a sample that includes 2,320 unique deals. We constructed our sample from the transactions included in the FactSet MergerMetrics database.[30] These transactions were announced between 2003 and 2018 and met all of the five following criteria: (1) the target was a publicly traded U.S. firm, (2) the deal size was at least $100 million, (3) the offer price was at least $5 per share, (4) a merger agreement was signed and publicly disclosed through a filing with the Securities and Exchange Commission ("SEC"), and (5) the transaction was completed as of January 2019.

29. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

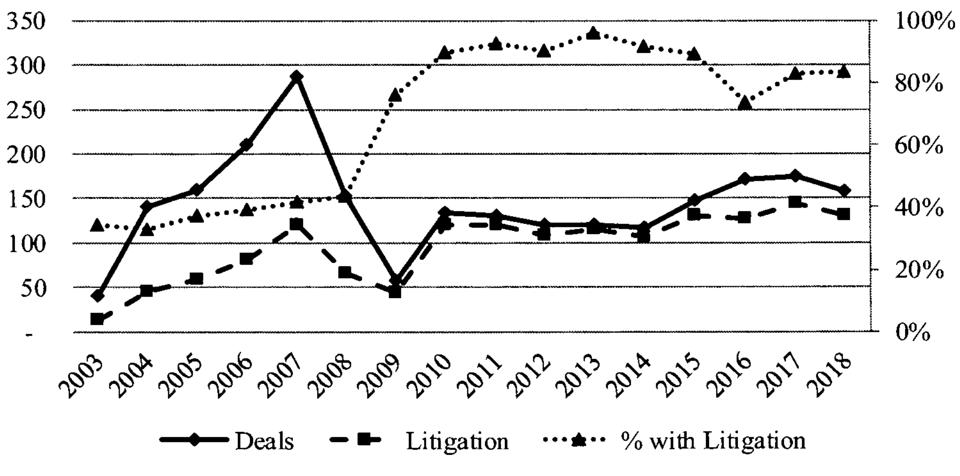
30. *See* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 486 n.102 (2015) (explaining that "MergerMetrics is a database of M&A data which offers '[i]n-depth research on mergers involving US public targets.' " (quoting FACTSET MERGERS, http://www.mergermetrics.com (last visited Oct. 31, 2014))); *see also* FACTSET MERGERS https://www.mergermetrics.com (last visited Nov. 6, 2019) [https://perma.cc/7U34-82CR] for more information about the data set.

We hand reviewed each merger proxy statement and the associated SEC tender offer documents to determine if a lawsuit challenging the transaction was filed. We next examined each class action suit filed in connection with a proposed merger, finding that litigation was brought in 1,536 transactions, or 66% of our sample. To obtain the outcomes of each case, the mootness fees paid (if any), and the settlement terms (if any), we obtained 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 were obtained directly from the court, from public filings on the LexisNexis File and Serve Database, or from Bloomberg Law.[31]

B. Empirical Analysis

Figure 1 sets forth the total number of deals, the number of associated lawsuits, and the percentage of total completed deals with litigation that has a final outcome for each year over our sample period from 2003 to 2018.[32] We include in our sample all mergers with an aggregate value exceeding $100 million irrespective of where the target corporation is incorporated.

FIGURE 1: LITIGATION RATES BY DEAL COMPLETION YEAR



31 The data here was compiled partly from a database utilized in two prior studies. *See* Cain et al., *supra* note 1, at 619; Cain & Solomon, *supra* note 30 at 487. In both studies, the data were hand collected and reviewed with filings obtained directly from the court, public filings on the Lexis/Nexis File and Serve Database, or Bloomberg Law.

32. 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 the remaining tables.

Completed deals during our sample period ranged from a low of 58 in 2009 to a high of 287 in 2007.[33] We observed a post-financial crisis high in 2016 and 2017, with 172 and 174 completed 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 from 2003 to 2008, litigation rates ranged from 33% to 43% of completed deals. This changed dramatically after the financial crisis, rising to 76% in 2009 and then to 90% and higher between 2010 and 2015. Litigation rates peaked in 2013 at 96% of all completed deals and then declined to 83% of deals in 2017 and 2018.

These movements in the overall litigation rates for completed deals were accompanied by some dramatic shifts in the venues for deal litigation. For the period from 2003 to 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 deal.

33. We have only forty-one 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.

TABLE 1: FILINGS BY DEAL COMPLETION YEAR

	Deals	Deals with Litigation	Delaware*	Other States*	Federal*	Mean # of Suits Filed per Deal
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

*Percentages sum to greater than 100% each year due to multi-jurisdictional filings.

We begin by focusing on Delaware because the majority of 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 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.[34] 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

34. This decline was attributed to plaintiffs' lawyers filing suit outside of Delaware to seek better outcomes and created a concern that Delaware was "losing its cases." John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 607 (2012).

they remained until 2015.[35] 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.[36]

Where have the cases gone? If we look first at the data on "Other States," the filing trends differ from what happened in Delaware. Initially, from 2004 to 2007, litigation rates varied from 66% to 86%, with an upward trend over the years 2008 and 2009, flattening out at 88% in 2010–2012. At that point, we started to see a decline in litigation rates, probably because of the adoption of forum selection bylaws beginning in 2013 and accelerating after the *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* decision.[37] This decline became precipitous in 2017–2018, when litigation rates in other states fell to 18–19% of all completed deals. As with Delaware, plaintiffs' lawyers are reducing their filings in other state courts, a trend that likely resulted from the increasing prevalence of forum selection bylaws. As before, we are left with the question: Where are all the deal cases going?

The answer to that query appears 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 from 2003 to 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 to federal courts, a shift that is not generally prevented by forum selection bylaws. This was followed by a flood of federal case filings in 2017 and a peak in 2018, with 92% of deal cases filed in federal court.

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35. Only 65% of the deals in the sample involve targets incorporated or headquartered in Delaware. 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.

36. For 2017–2018, we found only six cases that were filed only in Delaware, while there were an additional eighteen cases that were filed in both Delaware and other state courts.

37. 73 A.3d 934, 963 (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* Joseph A. Grundfest, *The History and Evolution Of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 358–59 (2012) (documenting acceleration in the adoption of forum selection bylaws post-*Boilermakers*); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31, 33 (2017) (finding that as of 2014, the number of Delaware firms adopting forum selection bylaws was 746).

The final column of Table 1 shows that the mean number of suits 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 suits. When deal litigation rates hit the 92% level in 2011, the mean number of suits filed per litigated deal shot up to 5.4 and continued to remain elevated until 2017, when it dropped to 2.5 suits per litigated deal, indicating a decline in litigation intensity.[38]

We turn next to litigation outcomes. Table 2 examines litigation settlements from 2003 to 2018. The first column represents the total number of deals with litigation for which we were able to determine how that litigation was resolved, using court documents, media reports, or other public sources. The second and third columns display the percentages of cases with known outcomes that settled or were dismissed.

38. 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., *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	Settlements that Were 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), settlements tracked in the 55–65% range, which means that dismissals ran from 35–45% since the two numbers must sum to 100% for all of these cases.[39] Settlement percentages rose to a higher level from 2006 to 2013, running from a low of 68% to a high of 82%, before trending downward in 2014 (63%), 2015 (46%), and 2016 (41%), then dropping like a rock in 2017 to 9% and literally disappearing in 2018.[40]

39. There is only one case in our database which resulted in a verdict after trial, the case of *In re Rural Metro Corp. Stockholders Litigation*, 88 A.3d 54 (Del. Ch. 2014), which resulted in a judgment of $75.8 million against a defendant investment bank. *See In re* Rural/Metro Corp. Stockholders Litig., 102 A.3d 205, 213 (Del Ch. 2014). There was a related settlement of $11.6 million in this case against other parties. *See id.* at 223. We classify this total amount as a settlement for purposes of our data analysis. We discuss the *Rural Metro* case *infra* at notes 93–95 and accompanying text.

40. It is important to remember that we are reporting only completed deals with litigation as a known outcome. There were fifty-nine 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 underrepresented 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 included the payment of a mootness fee by the defendants.[41] The rising use of mootness fees is documented in the fourth column 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 payment of mootness fees and accompanying case dismissals reflects the adaptive litigation strategy of plaintiffs' lawyers to *Trulia*.[42]

The final column in Table 2 reports the percentage of disclosure-only settlements. In recent years these settlements became widespread, reaching 93% of all settlements in 2016. This reflects the general demise of other types of settlements, such as, for example, amendment settlements, where the parties agree to a change in the terms of the merger agreement.[43] Disclosure-only settlements are disfavored in Delaware after *Trulia* but could still have some lingering life in federal court.[44]

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

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41. The presence of a mootness fee payment is frequently disclosed by the parties, although the amount of the fee paid is usually not disclosed. 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 a specific disclosure related to a mootness fee, even if the fee was not disclosed; or (2) whether there were indicia that a mootness fee was paid, such as a supplemental disclosure which referred to a mootness issue.

42. For additional discussion, see Richard L. Renck, *Court of Chancery Critically Reviewing "Mootness" Fee Applications*, MONDAQ, http://www.mondaq.com/unitedstates/x/518244/Civil+Law/Court+of+Chancery+Critically+Reviewing+Mootness+Fee+Applications (last updated Aug. 11, 2016) [https://perma.cc/U3K8-S7MQ] (describing recent decisions evaluating mootness fee applications).

43. *See* Fisch et al., *supra* note 14, at 576 (describing amendment settlements).

44. In *In re Walgreen Co. Shareholder Litigation*, 832 F.3d 718 (7th Cir. 2016), the U.S. Court of Appeals for 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* discussion *infra* notes 65–67 and accompanying text.

FIGURE 2: LITIGATION OUTCOMES BY DEAL COMPLETION YEAR

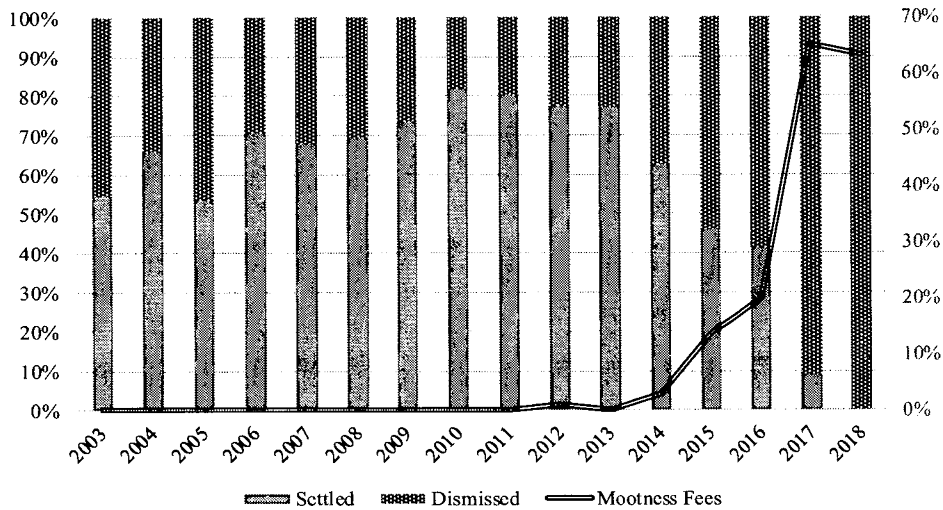

Table 3 provides outcomes of merger litigation in federal court. The first and second columns report the number of federal suits filed per calendar year and the number of those cases that resulted in settlements. The values shown are for deals in which outcomes are known. The third column shows the percentage of all settled merger cases that were 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, 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.[45]

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

TABLE 3: MERGER CASES IN FEDERAL COURTS BY DEAL COMPLETION

	Federal Suits	Federal Settle-ments	All Settled Cases in Federal Courts	Mootness Fees Paid in Federal Courts	Mootness Fees Paid in Federal Courts	Non-disclosure Settle-ments
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%

The fourth and fifth columns of Table 3 show that many of the dismissals in 2016–2018 resulted in the payment of mootness fees.[46] For example, in 2016, ten federal cases resulted in the payment of mootness fees, which constituted 67% of the total number of mootness fee payment cases. In 2017, both these numbers increased, with the number of federal mootness cases rising to eighty-four and the 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. Meanwhile, as shown in the last column, nondisclosure settlements, which had once been relatively common in federal cases, completely disappeared.[47]

46. See *supra* note 41 for a discussion of how we determined the presence of a mootness fee.

47. 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) of the Securities Exchange Act of 1934 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.

In Table 4, we examine the prevalence of multi-jurisdictional litigation in M&A cases from 2013 to 2018. The first column shows the frequency with which plaintiffs filed their class action litigation in state courts other than the Delaware Chancery Court. From 2013 to 2016, about 27% to 35% of all complaints filed were filed in these other state courts. By 2017, as the impact of forum selection bylaws and *Trulia* became apparent, the filing percentages dropped precipitously to 10%.

The same pattern is apparent in Delaware-only cases. In the fourth column, we show cases that have been filed only in Delaware. While the range in 2013–2016 was wider than that for the other states' data, the sharp decline in 2017–2018 was even more pronounced. Even if we include the cases filed in both Delaware and any other court (shown in the third column), by 2018, only 6% of all complaints were filed in Delaware Chancery Court (4% plus 2%).[48]

TABLE 4: WHERE ARE DEAL CASES BEING FILED?

	Other States	Federal + Other State	Delaware + Other State/ Federal	Delaware Only	Federal	Total
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 the filings that were made in both federal court and other state courts, shown in the second column.

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

48. This differs slightly from the rate shown in Table 1 due to rounding.

FIGURE 3: WHERE ARE DEAL CASES BEING FILED?

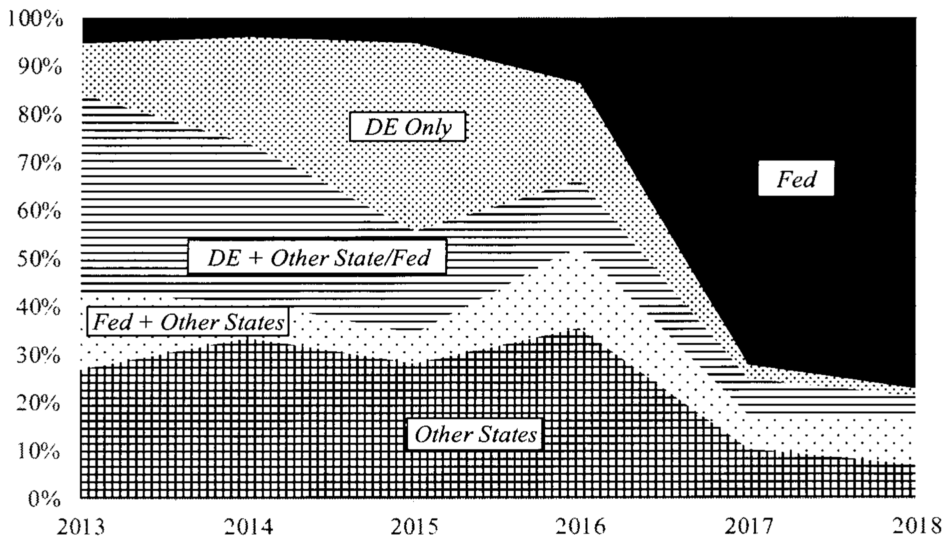

Table 5 examines the importance of the state of incorporation on filing patterns and case outcomes. Table 5 contains three panels: Panel A looks at filing patterns for Delaware-incorporated target companies, Panel B shows filing patterns for non–Delaware-incorporated targets, and Panel C displays the 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 multi-jurisdictional 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 showed smaller movement in this direction, with other states' courts and multi-jurisdictional litigation holding onto about one-third of deal cases. This difference may be attributable to plaintiffs' lawyers anticipating that *Trulia* would 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 companies, shown in Panel C, display strong negative trend lines. For both sets of corporations, settlement percentages began at unusually high levels in 2013 and dropped 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	Federal + Other State	Delaware + Other State/ Federal	Delaware Only	Federal	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	Federal + Other State	Delaware + Other State/ Federal	Delaware Only	Federal	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 State of 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%

*Mootness fees are paid only in cases classified as "dismissed."

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.[49] 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 demonstrated 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.[50]

To gain more insight into which deal litigation is still being filed only in the Delaware Chancery Court, in untabulated data, we broke out the completed transaction merger cases for 2017 and 2018 and examined their characteristics. For the six cases that were filed solely in Delaware during that time period, four of them challenged going-private transactions or management buyouts ("MBOs"), which are generally viewed as deals with potential conflicts of interest, meaning they potentially have 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 (three had 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 filed the most federal court merger cases in 2017, 2018 and January of 2019. The first column shows the names of the law firms, while the second 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 the first column divided by 250. The number of deals sums to more than 250, and the percentages of market share sum to more than 100%, because multiple law firms frequently file suit in connection with a given deal. The third and fourth columns 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.

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49. *See In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 897 (Del. Ch. 2016) (describing the payment of mootness fees as a "preferred scenario").

50. The figures in Table 5 do not take into account pending litigation that will be settled or dismissed at a later date. They therefore understate ultimate settlement figures and dismissal percentages for litigation brought in the last few years. For further discussion of this issue, see *supra* note 40.

TABLE 6: PLAINTIFFS' LAW FIRM RANKINGS IN FILING FEDERAL MERGER LAWSUITS

Law Firm	**Deals**	**Market Share**[51]	**Cases Dismissed Without Fees**	**Cases Dismissed with 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 six most active plaintiffs' law firms in merger litigation filed a disproportionate percentage of the federal cases. In fact, the top two firms collectively filed 268 cases, which exceeds the total number of completed deals in the sample with federal litigation during this period. When we examined the filings of these two firms more closely, we found that every single complaint filed by RM Law was in a deal that was also being challenged by Rigrodsky & Long.[52] The next four firms filed

51. 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.

52. For purposes of filing merger litigation cases, the two firms appear to act on a coordinated basis.

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

Within the group, there was some variation in how frequently the law firm was able to obtain a mootness fee. For example, Monteverde & Associates had the highest percentage (80%) of cases in which they obtained a mootness fee, while RM Law was only paid such a fee in just under two-thirds of its cases (65%). Notably, 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 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 was being filed largely by six plaintiffs' law firms, none of which were represented among the top-tier plaintiffs' firms who had been actively litigating (and winning) deal cases in earlier years.[53]

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 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.[54] 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

53. Krishnan et al., *supra* note 25, at 131–33 (naming "Robbins Geller Rudman and Dowd, Grant and Eisenhofer, Bernstein Litowitz Berger and Grossman, Milberg, and Kessler Topaz Meltzer and Check" the top five plaintiffs' firms from 2006–2012).

54. *See, e.g.*, Fisch et al., *supra* note 14, at 466 (reporting that "nearly 70% of merger claims settle while the rest are dismissed").

class, and sought a court-approved fee award to plaintiffs' counsel.[55] If approved, the settlement bought the target peace from the prospect of further litigation in exchange for the fee award, even though, as some commentators have suggested, the value provided by the supplemental disclosures to the plaintiff shareholders was questionable.[56]

In a prior article, *Confronting the Peppercorn Settlement in Merger Litigation*, two of the authors of this Article examined the value of these types of settlements.[57] The authors found that disclosure-only settlements appeared, on average, to offer little value.[58] 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.[59] 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 are within the core competence of the federal courts, which are accustomed to dealing with questions involving the materiality of alleged disclosure violations.[60]

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.[61] Instead, *Trulia* held that judicial approval of a disclosure-only settlement was appropriate, if and only if, the supplemental disclosures were "plainly material."[62] Disclosures that did not meet that standard would not provide the plaintiff class with sufficient consideration to justify a release of any potential claims.[63] 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.[64]

Outside of Delaware, courts have differed in the degree to which they have accepted *Trulia*. The U.S. Court of Appeals for the Seventh

55. *Id.* (explaining that "[t]he vast majority of suits, however, settle exclusively for supplemental disclosure in the form of additional information in the merger proxy statement").

56. *See id.* at 559–60 (describing scholarly skepticism of the value of disclosure-only settlements).

57. *See id.*

58. *Id.* at 615.

59. *See id.* at 561 (reporting empirical findings that "disclosure-only settlements do not appear to affect shareholder voting in any way").

60. *Id.* at 595–96.

61. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 895 n.29 (Del. Ch. 2016).

62. *Id.* at 898.

63. *Id.* at 907.

64. *Id.*

Circuit explicitly adopted *Trulia*'s "plainly material" standard,[65] and several federal district courts adopted *Trulia* as well.[66] But not all courts agreed. For example, in *Gordon v. Verizon Communications, Inc.*, 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.[67]

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 supplement their disclosures in response to a litigation challenge, thereby mooting the litigation, plaintiffs' counsel can apply to the court for a mootness fee.[68] 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.[69]

Litigation in Delaware has developed in accordance with these principles. In subsequent cases, the Delaware Chancery Court 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."[70] For example, the

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

66. *See* House v. Akorn, Inc., 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019) (applying *Trulia* standard to reverse payment of mootness fee); Sanchez v. IXYS Corp., 2018 U.S. Dist. LEXIS 170332, *14 (N.D. Cal. Oct. 2, 2018) ("I adopt the 'plainly material' standard here."); *In re* Hatteras Fin., Inc., S'holder Litig., 286 F. Supp. 3d 727, 731, 740 (M.D.N.C. 2017) (approving a settlement that resulted in supplemental disclosures that were "technically material" but of "marginal" benefit to the class, and approving fee award of $350,790); Bushansky v. Remy Int'l, Inc., 262 F. Supp. 3d 742, 746 (S.D. Ind. 2017) (dismissing proposed settlement); Malone v. CST Brands, Inc., No. SA–16–CA–0955–FB, 2016 WL 8258791, at *7 (W.D. Tex. Nov. 10, 2016) (denying motion for preliminary injunction); *In re* CytRx Corp. Stockholder Derivative Litig., No. CV 14-6414-GHK (PJWx), 2016 WL 6571265, at *6 (C.D. Cal. Aug. 17, 2016) (rejecting motion to set aside judgment).

67. 148 A.D.3d 146, 159–60 (N.Y. App. Div. 2017). *But see* City Trading Fund v. Nye, 59 Misc. 3d 477, 494 (N.Y. Sup. Ct. 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 Fin. Corp., No. 24-C-16-004740, 2016 Md. Cir. Ct. LEXIS 11, at *11–12 (Md. Cir. Ct. Dec. 8, 2016).

68. 129 A.3d at 896–97.

69. *Id.* at 897.

70. Steven Epstein, Scott B. Luftglass & Gail Weinstein, *A Post-*Trulia *Success Story of Disclosure-Based Settlement*, LAW360 (Apr. 12, 2016, 10:34 AM), https://www.law360.com/articles/782927/a-post-trulia-success-story-of-disclosure-based-settlement [https://perma.cc/YAG2-A4L6].

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.[71]

Notably, however, Delaware has a specific procedure for the oversight of mootness fee payments. 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.[72] The Delaware courts have subjected mootness fees to careful scrutiny, at least in some cases,[73] and on occasion have denied plaintiffs' applications for mootness fees.[74]

Outside of Delaware, the process has not developed in accordance with the prediction of the *Peppercorn* article—that federal courts would scrutinize the resolution of merger litigation in the same manner as the Delaware courts.[75] As noted above, several federal courts have applied the *Trulia* standard to disclosure-only settlements.[76] However, with one exception discussed below,[77] the federal courts have not imposed the same scrutiny on 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.[78] As a result, attorneys' fees in mootness payments in federal court cases

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71. *In re* Xoom Corp. Stockholder Litig., No. 11263-VCG, 2016 Del. Ch. LEXIS 117, at *10, *15 (Del. Ch. Aug. 4, 2016).

72. *See In re* Harman Int'l Indus., Inc. Stockholders Litig., No. 13001-CB, 2016 Del. Ch. LEXIS 291, at *5 (Del. Ch. Dec. 22, 2016) (retaining jurisdiction for the purpose of resolving plaintiffs' fee application following voluntary dismissal); *In re* Zalicus Inc. Stockholders Litig., No. 9602-CB, 2015 Del. Ch. LEXIS 15, at *3 (Jan. 16, 2015) (reasoning 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") (quoting *In re* Advanced Mammography Sys., Inc. S'holders Litig., No. 14831, 1996 Del. Ch. LEXIS 132, at *2 (Oct. 30, 1996)).

73. *See, e.g., In re Xoom*, 2016 Del. Ch. LEXIS 117, at *10, *14–15 (finding that a mootness fee was appropriate when the disclosure provided some benefit to stockholders).

74. *See, e.g., In re Zalicus*, 2015 Del. Ch. LEXIS 15, at *3, *5 (denying mootness fee because notice of the fee was not given to the putative class of stockholders). The approach in other state courts varies. *See supra* note 67 and accompanying text.

75. *See* Fisch et al., *supra* note 14, at 612.

76. See *supra* note 66 and accompanying text.

77. *See infra* notes 111–112 and accompanying text.

78. 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., Inc. Stockholders Litig., No. 13001-CB, 2016 Del. Ch. LEXIS 291, at *5 (Del. Ch. Dec. 22, 2016), 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* Exhibit A to Stipulated [Proposed] Order Closing the Case at 3, *In re* Harman Int'l Indus., Inc. Stockholders Litig., No. 13001-CB (Del. Ch. Sept. 1, 2017) (indicating agreed-upon fee and stating that the court had not determined the reasonableness of the fee).

are not generally disclosed by the parties. Based on our earlier research, median mootness fees ranged from $200,000 to $450,000 over the period 2014 to 2017.[79] 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 rates remain at high levels (and why these cases have moved from Delaware to the federal courts). Although the mootness fee dynamic appears to have reduced the size of plaintiffs' attorneys' fees, it has thus far permitted them to achieve a result similar to what used to be available in Delaware, except without the formal global release.

Several cases have grappled with the issue of whether the federal courts have the power to oversee the dismissal and mootness fee dynamic. In *Berg v. Akorn, Inc.*, plaintiffs argued that, because the case was voluntarily dismissed prior to class certification, the federal court lacked jurisdiction to review the fee award.[80] Notably, the FRCP do not explicitly require judicial approval of a voluntary dismissal if a case has not yet been certified as a class action.[81] In *Akorn*, however, another shareholder moved to intervene, arguing that the payment of the mootness fee injured the interests of other shareholders.[82] Similarly, the court in *Rosenfeld v. Time, Inc.* concluded that the voluntary dismissal of a complaint prior to class certification does not constitute an adjudication, reasoning that, as a result, the court did not even have jurisdiction under the PSLRA to evaluate whether Rule 11 sanctions are warranted.[83] 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.

79. Cain et al., *supra* note 1, at 625 tbl.3. This is consistent with the information reported in the popular press. *See* McLaughlin & McGovern, *supra* note 20 (reporting that "[m]ore recently, median mootness fees are closer to $250,000").

80. *See* No. 17 C 5016, 2017 U.S. Dist. LEXIS 192278, at *3–4 (N.D. Ill. Nov. 21, 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").

81. *Cf.* FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval.").

82. *See* 2017 U.S. Dist. LEXIS 192278, at *4–5.

83. No. 17cv9886 (DLC), 2018 U.S. Dist. LEXIS 148394, at *13 (S.D.N.Y. Aug. 30, 2018).

Moreover, the courts' failure to require disclosure of the existence and amount of mootness fees 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. [84] Indeed, it is hard to believe that the disclosures made in connection with mootness fees are more valuable than those that were previously made in connection with disclosure-only settlements pursuant to court oversight, many of which were found to be of little or no value.[85] One indicator that this is the case is that if plaintiffs' attorneys had valuable cases, they would likely bring them in Delaware courts, which have historically awarded higher attorneys' fees in meritorious cases.

Although the size of the mootness fee payment in any particular case seems relatively small, mootness fees impose real costs on the judicial system and on companies. We can use the data from Table 2 to estimate the total direct dollar cost of mootness fees in merger litigation. Taking the number of merger litigation cases filed annually and multiplying this number of cases by the percentage of cases where mootness fees are paid,[86] 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 above[87] and arrive at an estimate. For example, in 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.[88] Doing the math, the estimated (lower bound) for

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84. To the extent that target boards are agreeing to pay attorneys' fees for litigation that has not provided a benefit to the target company shareholders, they are arguably wasting corporate assets. A waste analysis in the context of mootness fees differs in an important way from the analysis of disclosure-only settlements because the defendant has not received the consideration of a release from future litigation. Because the dismissal only reaches the individual claims of the filing shareholder (claims that would not be cost-effective to litigate on a standalone basis), other shareholders are not barred from filing a similar complaint and raising 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 Co. Derivative Litig., 907 A.2d 693, 748–49 (Del. Ch. 2005) (detailing the standard of waste under Delaware law).

85. *See* Fisch et al., *supra* note 14, at 615 (concluding that, because disclosure-only settlements do not have a demonstrable effect on shareholder voting, they "do not produce a corporate benefit").

86. This number provides 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 were unable to identify.

87. *See* discussion *supra* note 79 and accompanying text.

88. Cain et al., *supra* note 1, at 625 tbl.3. As we note below, this figure may be higher than the mootness fee amounts currently paid.

total mootness fees in 2017 would be $23.32 million.[89] 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 Section, including the risk of blackmail litigation and the 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.[90] From the defendant's perspective, the primary virtue of a settlement was that it resulted in a global release precluding further litigation challenges to the merger.[91] 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, FRCP 23(e).[92] The court thus had some oversight of the process, and would in many instances refuse to approve the settlement if the benefit

89. 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.

90. *See* Fisch et al., *supra* note 14, at 572 (indicating this was the case for 60% of transactions).

91. *See, e.g.*, *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 892 (Del. Ch. 2016) (discussing defendants' motivations for agreeing to disclosure only settlements).

92. *See, e.g.*, *In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1141 (Del. Ch. 2011) (reviewing request for attorneys' fees and awarding $75,000 fee on the basis that "minimal fees [are appropriate] when deal litigation confers minimal benefits"); FED. R. CIV. P. 23(e)(2)(C)(iii) (requiring the court to consider, inter alia, "the terms of any proposed award of attorney's fees" before approving any proposed settlement or dismissal of class).

was not apparent. In some prominent cases, including in *In re Rural Metro Corp. Stockholders Litigation*,[93] other plaintiffs' law firms intervened and took control of the case to prosecute more valuable substantive claims.[94] This court-supervised process eventually culminated in the *Trulia* decision, in which the court determined that many disclosure-only settlements provided little benefit to the class and held that, in such cases, no fee award was appropriate.[95] 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.[96] In other words, as the *City Trading Fund v. Nye* court put it, "The very point of the lawsuit was simply to get paid—*by the shareholders*—to go away. This is a pernicious motive for lawsuit."[97]

In conversations with defense and plaintiffs' attorneys, both 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 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 efforts do not provide a benefit, they lack any incentive to limit litigation to cases involving truly problematic disclosures. Instead,

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93. 88 A.3d 54 (Del. Ch. 2014).

94. Joel Edan Friedlander, *How* Rural/Metro *Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877, 890–91 (2016).

95. *See Trulia*, 129 A.3d at 895, 907.

96. 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.

97. City Trading Fund v. Nye, 59 Misc. 3d 477, 513 n.26 (N.Y. Sup. Ct. 2018).

plaintiffs' firms continue 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 payments of mootness fees were rarely disclosed and, outside of Delaware, mootness fees were virtually never disclosed in court documents,[98] although they sometimes appeared 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 stating 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.

For example, on August 10, 2018, Radisys filed a proxy statement in connection with a proposed merger with Reliance Industries.[99] Plaintiffs filed a complaint in federal court on August 17, 2018, alleging disclosure violations.[100] 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."[101] 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.[102]

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98. Also, as stated in *Trulia*, Delaware requires that mootness fees be disclosed to shareholders. *Trulia*, 129 A.3d at 898. This disclosure may take the form of an 8-K filing. *See, e.g.*, VAALCO Energy, Inc., Current Report (Form 8-K), at 2 (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. The practice has now changed, and mootness fees are rarely disclosed.

99. Radisys Corp., Proxy Statement (Schedule 14A) (Aug. 10, 2018), https://www.sec.gov/Archives/edgar/data/873044/000119312518246139/d502287ddefm14a.htm [https://perma.cc/XHY5-5VGC].

100. Plaintiffs also filed a state court complaint, which was similarly dismissed. Radisys Corp., Current Report (Form 8-K) (Aug. 28, 2018), https://www.sec.gov/Archives/edgar/data/873044/000087304418000097/a082918mergerlitigation.htm [https://perma.cc/MH6Y-6PUT].

101. *Id.*

102. U.S. District Court District of Oregon (Portland (3)) Civil Docket for Case #: 3:18-cv-01525-SI, Shemali v. Radisys Corp., No. 3:18-cv-01525-SI (D. Or. Aug. 28, 2018), http://securities.stanford.edu/filings-documents/1067/RC00_15/2018817_f02k_18CV01525.pdf [https://perma.cc/K7NE-3ZDT].

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.[103]

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 provided in these circumstances. As we discuss in the next Section, we believe that courts should be more rigorous in the level of oversight they provide.

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."[104] 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 Industries v. Northway, Inc.*[105] Critically, it rewards plaintiffs for filing 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—"tell me more" disclosures in the words of the *Nye* court—is both a low standard and judicially unmanageable.[106] As the court observed in *Nye*, "Since 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."[107] Consequently, providing a fee award for any cases that secure a disclosure that is immaterial yet

103. *See, e.g.,* Rosenfeld v. Time, Inc., No. 17cv9886 (DLC), 2018 U.S. Dist. LEXIS 148394 (S.D.N.Y. Aug. 30, 2018); Berg v. Akorn, Inc., No. 17 C 5016, 2017 U.S. Dist. LEXIS 192278 (N.D. Ill. Nov. 21, 2017).

104. *In re* Xoom Corp. Stockholder Litig., 2016 Del Ch. LEXIS 117, at *10 (Aug. 4, 2016).

105. 426 U.S. 438, 459 (1976) ("The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.").

106. City Trading Fund v. Nye, 59 Misc. 3d 477, 513 n.26 (N.Y. Sup. Ct. 2018).

107. *Id.*

provides some benefit "incentivizes a lawsuit in connection with every single merger."[108] 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

The fundamental question underlying judicial review of mootness fees is 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.[109] 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 eighty-five–year history of 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 review process that also includes rulemaking 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 both the SEC 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. In this regard, *Trulia* can be seen as an adoption of that principle. *Trulia* asserted that materiality as annunciated by the federal courts should be the guiding standard for regulating disclosure-only litigation.[110] It was a statement that these standards would govern when the state court decided the validity of a settlement. Some federal courts have adopted *Trulia*'s precepts. For example, in *In re Walgreen Co. Stockholder Litigation*, Judge Richard Posner adopted the *Trulia* standard for the Seventh Circuit.[111] He wrote that these settlements should be rejected unless the disclosure was "plainly material."[112] *Trulia*'s standard has also been adopted in other courts.[113]

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108. *Id.*

109. *See* Fisch et al., *supra* note 14.

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

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

112. *Id.*

113. *See In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F.3d 551, 557 (7th Cir. 2017); *see also* Bushansky v. Remy Int'l, Inc., 262 F. Supp. 3d 742, 754 (S.D. Ind. 2017).

Walgreen was decided in the context of FRCP 23 and the requirements set out thereunder for judicial review of class action settlements. FRCP 23, as currently written, does not apply to mootness fees because the case is dismissed prior to class certification. As a result, courts must find an alternative basis for overseeing the mootness fee payment.

In the recent *Akorn* decision, the court concluded that it could exercise its "inherent authority to rectify the injustice that occurred as a result [of the dismissal and mootness fee payment]."[114] In *Akorn*, plaintiffs filed a motion for entry of stipulation and voluntary dismissal. A supporting document indicated that the parties had agreed to an attorneys' fee payment of $322,500.[115] The parties then argued to the court that the "matter is fully resolved and no further issues remain in dispute, and, there being no reason for the Court to retain jurisdiction over this matter, the case should be closed for all purposes."[116]

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.' "[117] In an opinion issued on June 24, 2019, the judge in *Akorn* ordered that the plaintiffs' attorneys return the fee award.[118] The judge noted that this was not a request for approval of a class action settlement. Nonetheless, the court cited *Walgreen* for the proposition that "a class action that seeks only worthless benefits for the class should be dismissed out of hand."[119] The court then ordered the fees returned, stating:

> The quick settlements obviously took place in an effort to avoid the judicial review this decision imposes. This is the "racket" described in *Walgreen*, which stands the purpose of Rule 23's class mechanism on its head; this sharp practice "must end." Plaintiffs' cases should have been "dismissed out of hand."[120]

Akorn is important because it shows that a court can use its inherent equitable authority to police the payment of a mootness fee.[121]

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114. House v. Akorn, Inc., 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019).

115. Berg v. Akorn, Inc., No. 17 C 5016, 2017 U.S. Dist. LEXIS 192278, at *4 (N.D. Ill. Nov. 21, 2017).

116. *Id.* (quoting Stipulation and Proposed Order Closing Case for All Purposes at 6, *Berg*, 2017 U.S. Dist. LEXIS 192278 (No. 17 C 5016)).

117. *Id.* (quoting the record).

118. *Akorn*, 385 F. Supp. 3d at 623.

119. *Id.* at 619 (quoting *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 724 (7th Cir. 2016)).

120. *Id.* at 623 (citations omitted) (quoting *Walgreen*, 832 F.3d at 724).

121. *See supra* notes 105–108 and accompanying text. *See also* Pearson v. Target Corp., 893 F.3d 980, 982 (7th Cir. 2018) (noting that counsel and parties should not be permitted to "leverage" the class mechanism "for a purely personal gain"). As of the publication date of this Article, the plaintiffs in *Akorn* are appealing the district court's decision to the Seventh Circuit on the grounds that "[s]ince there was no longer a case pending before [the judge], and since a federal judge's

The court in *Akorn* did not rely on the PSLRA or general disclosure precedent. Although *Akorn* offers a path for courts to apply the *Walgreen* standard to mootness fees, 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. 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. This is why, in the next Section, we propose an amendment to the FRCP to expressly permit the review conducted by the *Akorn* court.

B. Amendment of the Federal Rules of Civil Procedure

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.[122] Finally, we recommend that the defendant corporation be required to file a Form 8-K or make another public disclosure, prior to the judicial hearing, alerting investors to any request by plaintiffs' counsel for a mootness fee, the position of the board of directors with respect to the request, and the amount of the proposed payment.[123]

We believe that the federal courts could adopt these requirements on their own, as the court in *Akorn* did.[124] If federal courts choose to do so, they could limit these requirements to the context of class action merger litigation.

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authority to issue orders depends (with immaterial exceptions) on the existence of a case, [the judge's] order was void." Joint Consolidated Opening Brief And Required Short Appendix For Plaintiffs-Appellants Shaun A. House And Demetrios Pullos, House v. Akorn, Inc., Nos. 1:17-cv-05018 and 1:17-cv-05026 (7th Cir. Oct. 16, 2019) (quoting Smith v. Potter, 513 F.3d 782–83 (7th Cir. 2008)). We note that an amendment to the FRCP would address any potential ambiguity on this issue.

122. We note that merger litigation filed as a derivative suit is already subject to FED. R. CIV. P. 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 & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS 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.

123. 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.

124. At least one of the complaints in the *Akorn* action styled itself as a class action. Complaint at 1, *Akorn*, 385 F. Supp. 3d 616 (N.D. Ill. 2019) (No. 1:17-cv-05018).

On the other hand, the potential for plaintiffs' counsel to extract mootness fee payments in exchange for voluntarily dismissing frivolous complaints is not limited to merger cases. As a result, we suggest that it may be desirable for the Federal Rules Committee to consider incorporating these requirements into FRCP 23. To address the potential for plaintiffs' counsel to use a putative class action to obtain a mootness fee without obtaining meaningful recovery for the plaintiff class, we propose that FRCP 23 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.[125]

Our proposed amendment to FRCP 23 takes the following form:

FRCP 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.[126] 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.[127]

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125. As it currently stands, FED. R. CIV. P. 41 allows for voluntary dismissal without court approval, subject to FED. R. CIV. P. 23(e). FED. R. CIV. P. 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 nonmeritorious reasons to delay the closing of the settlement until the delay pressured class counsel or the defendant to pay them to go away. FED. R. CIV. P. 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. COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2017), https://www.uscourts.gov/sites/default/files/2017-09-jcus-report_0.pdf [https://perma.cc/D2WC-6FK5] [hereinafter SUMMARY OF JCC REPORT].

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

127. We recognize that plaintiffs' attorneys could attempt to style their cases as individual and not class actions to avoid this rule. However, the commentary to the rule should specifically note that an action providing class-wide benefits such as a disclosure settlement would be considered covered by the Rule. We also believe that, to the extent plaintiffs' counsel sought mootness fee payments in a case not involving a class action, payment of a mootness fee could potentially

Our proposal would align with both the purpose of FRCP 23 as well as Delaware's approach to the subject; specifically, it would address the risk of nonmeritorious cases that are filed for the purpose of attempting to extract a fee payment. We note that FRCP 23 was previously amended to address similar concerns in connection with the filing and subsequent withdrawal of objections to settlements. In 2017, FRCP 23 was amended 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 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."[128] A rule requiring court approval of mootness fee payments would align with this approach of preventing rent seeking through judicial oversight of similar fee payments. It would also align with the transparency and court-supervised process that FRCP 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."[129] As explained in *Trulia*:

> 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 guard against potential abuses in the private resolution of fee demands for mooted representative actions.[130]

To the extent federal courts do not impose this regime under their inherent authority, as the *Akorn* court did, an amendment of FRCP 23 would thus align with notions of transparency and shareholder interests that are embedded in both the federal and Delaware civil procedure rules.[131] In this regard, we advocate that Delaware further modify its standard to formalize the requirements of

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constitute waste given the discrepancy between the payment and an individual plaintiff's potential interest in the litigation.

128. SUMMARY OF JCC REPORT, *supra* note 125, at 291.

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

130. *Id.*

131. 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 to voluntarily 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, the cases should be understood in those terms.

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. We note that the *Akorn* court adopted this approach. Applying *Walgreen*, the court determined that the relevant issue was whether the supplemental disclosures requested in plaintiffs' initial complaint were "plainly material."[132] It then reviewed the additional disclosures to determine whether they met this standard and concluded that they did not.[133]

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 in 2017. Of course, mootness litigation creates other significant indirect costs arising out of the lack of transparency and the judicial time lost when trying to apply the unworkable legal standard for adjudicating these cases. These costs would all be saved by the rule change, although there might be some offsetting increase in the effort associated with judicial review. If courts adopt the *Trulia* standard, however, even these costs should quickly decrease as fewer of these cases are filed.

Events in the Delaware courts subsequent to *Trulia* support our proposal. As our analysis shows, weak merger cases migrated out of Delaware after *Trulia*, but litigation in Delaware did not end. Instead, as we discussed in Part I, plaintiffs' lawyers continue to file lawsuits raising meaningful challenges to mergers in Delaware. These cases commonly involve allegations of conflict of interest, the focus of the Delaware courts these days, and in large part they are litigated more extensively and often result in substantial benefits for the plaintiff

132. House v. Akorn, Inc., 385 F. Supp. 3d 616, 622–23 (N.D. Ill. 2019).
133. *Id.*

class.[134] Most recently, *In re Calamos Asset Management Stockholder Litigation* resulted in a settlement of $30 million.[135]

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 competencies in evaluating disclosure claims, and they should apply those competencies to merger litigation cases. However, federal courts should also 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 like the one in *Akorn* 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,

134. Examples include the settlements related to the buyouts of Examworks ($86.5 million), FrontFour ($47 million), Good Technology ($52 million), and Starz ($92.5 million). *See* Joel Friedlander, *Confronting the Problem of Fraud on the Board*, BUS. LAW. (forthcoming Winter 2019–2020) (manuscript at 37–40), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359402&download=yes [https://perma.cc/U7SG-26ZV] (discussing the Good Technology and Examworks settlements); *Medley and FrontFour Reach Settlement Terms on Proposed Merger, Postpone Shareholder Vote*, DI WIRE (Apr. 9, 2019), https://thediwire.com/medley-frontfour-reach-settlement-terms-proposed-merger-postpone-shareholder-vote/ [https://perma.cc/GUM2-9FHJ]; Jeff Montgomery, *Chancery OKs $92.5M Deal To End $4.4B Starz Merger Suit*, LAW360 (Dec. 10, 2018), https://www.law360.com/articles/1109603/chancery-oks-92-5m-deal-to-end-4-4b-starz-merger-suit [https://perma.cc/23SY-V6C4].

135. Stipulation and Agreement of Compromise and Settlement at 23, *In re* Calamos Asset Mgmt., Inc. Stockholder Litig., No. 2017-0058-JTL (Del. Ch. Jan. 11, 2019).

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, however, are not meritorious cases. *Trulia* reduced the impact 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 also resulted in the filing of disclosure challenges where they belong—in federal court. A final step is needed, subjecting mootness fees in federal court to the same scrutiny imposed by the *Trulia* line of cases. Such a step would eliminate this type of frivolous litigation altogether and finally end the era of widespread merger litigation.