While M&A deals continue to generate a high volume of costly litigation, the number of these cases is declining since their peak level in 2014. Courts and legislatures have for years grappled with curbing frivolous M&A-related litigation without overly deterring meritorious claims, and recent signs show that their efforts are beginning to take effect.
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After the announcement of any significant merger or acquisition involving a public company, litigation has been (and still is) the norm. In 2007, about 44% of M&A deals worth over $100 million were the subject of litigation. By 2014, that percentage had risen to about 93%, representing nearly every large deal across a variety of industries. (See Cornerstone Research, Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation, at 1 (2015); see also Box, M&A Litigation Trends by Industry.)

Many courts bemoaned this proliferation of M&A litigation. While recognizing the various ostensible constructive purposes of these actions, such as protecting stockholders from director misconduct and policing merger processes, courts found that too often these aims were secondary to the search for attorneys’ fees, resulting in settlements that offered little benefit to stockholders (but that precluded potentially valuable claims).

In recent years, courts and legislatures have sought to encourage meritorious litigation while deterring frivolous claims through a series of key decisions, including Chancellor Bouchard’s decision in In re Trulia, Inc. Stockholder Litigation, and rule changes, including amendments to the Delaware General Corporation Law (DGCL). Recent statistics showing a decline in the percentage of M&A deals subject to litigation suggest that these attempts to curb abuse of the litigation process might at last be succeeding.

Against this backdrop, this article offers an overview of M&A litigation and a look at its recent transformation. In particular, it explores:

- Jurisdictional issues in M&A litigation.
- The categorization of claims as direct or derivative.
- Common claims and defenses.
- Available remedies.
- Discovery issues specific to M&A litigation.
- M&A dispute resolution.
- Current trends and developments in M&A litigation, as well as what counsel should expect going forward.

Because a majority of public companies are incorporated in Delaware and Delaware courts have produced (and still produce) the bulk of decisional authority in the M&A context, this article focuses on Delaware law.

**JURISDICTIONAL ISSUES**

M&A litigation based on a single transaction often is filed in multiple jurisdictions. This is because plaintiffs may bring M&A suits simultaneously in at least:

- The target company’s state of incorporation (which often is Delaware).
- The state in which the target company has its headquarters or principal place of business.
- Federal court in either of the above states, if the case involves diversity jurisdiction or federal securities claims.

Courts and commentators alike have criticized the frequency of multi-jurisdictional M&A litigation, raising concerns that it:

- Poses a costly and an inconvenient distraction to corporate defendants.
- Wastes judicial resources.
- Risks inconsistent results across jurisdictions.
- Potentially discourages plaintiffs’ attorneys from investing in claims because they might need to split fee awards with attorneys prosecuting cases in other forums.
- Can reduce plaintiffs’ bargaining power in the face of various defensive strategies, such as moving to dismiss in the favorable forum and obtaining a favorable decision, and then invoking *res judicata* or collateral estoppel arguments in the less favorable forum based on that decision.

Given these and other concerns, Delaware has sought to reduce multi-jurisdictional M&A litigation, in part by voicing approval of forum selection provisions in corporate charters or by-laws (see below *Enforceable Forum Selection By-Laws*).

**DIRECT VERSUS DERIVATIVE ACTIONS**

M&A litigation may be brought either as a direct or derivative action. In the M&A context, a direct action involves a stockholder suing the company or board for personal harm, and proceeds as a typical civil suit, often as a class action on behalf of other company stockholders. By contrast, a derivative action involves a stockholder stepping into the shoes of the corporation and suing on the corporation’s behalf for damages to the company. (*Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033, 1036 (Del. 2004).)

There are many issues and nuances considered by courts in determining whether a claim is direct or derivative, but generally, the relevant inquiry is whether the plaintiffs individually, or the corporation itself:

- Suffered the alleged harm.
- Would receive the benefit of any remedy.

If the corporation suffered the harm and it, not the stockholders individually, would benefit from the remedy, a court will consider the suit to be derivative. (*Tooley*, 845 A.2d at 1033, 1035.)

In a derivative suit, stockholders must satisfy certain threshold standing requirements, such as:

- **Owning stock in the corporation.** A derivative plaintiff must:
  - have been a stockholder at the time of the alleged wrongful act; and
  - remain a stockholder throughout the suit.
  (DGCL § 327; see *Lewis v. Anderson*, 477 A.2d 1040, 1046, 1050 (Del. 1984).)

- **Making a pre-suit demand.** A derivative plaintiff must make a pre-suit demand on the corporation’s board of directors to pursue the suit, unless the plaintiff can demonstrate that the demand would have been futile. (See Del. Ch. Ct. R. 23.1(a).) Generally, demand is excused as futile only if the court determines that the directors:
  - are too self-interested in the demanded claims to decide whether to bring suit, or are controlled by an interested party; or
• took action that was not the product of a valid exercise of business judgment.

Absent a demand, the plaintiff must meet a heightened pleading standard under Court of Chancery Rule 23.1(a). This standard requires a plaintiff to plead particularized facts establishing “reasonable doubt” that the board “could have properly exercised its independent and disinterested business judgment in responding to a demand.” (Rales v. Blasband, 634 A.2d 927, 932-34 (Del. 1993).)

Given these heightened pleading requirements for derivative suits, as well as the fact that most M&A suits claim that the merger consideration for stockholders was too low (therefore harming them directly), plaintiffs often fashion M&A suits as direct class actions, although defendants frequently challenge this designation. Courts tend, however, to consider certain claims as derivative in nature as a matter of law, such as claims alleging:

- Waste.
- Corporate overpayment.
- Mismanagement that harms the corporation or its value.
- Stock dilution.


A breach of fiduciary duty case, a stockholder in certain jurisdictions, including Delaware, may bring an appraisal action following the announcement of certain types of transactions. Appraisal actions provide a statutory remedy for stockholders who dissent from a merger (see below Appraisals).

**BREACH OF FIDUCIARY DUTY CLAIMS**

A company’s officers, directors, and controlling stockholders are generally considered fiduciaries of the company, and owe two separate fiduciary duties to stockholders:

- **The duty of care.** This duty requires fiduciaries to inform themselves in a deliberate manner of all reasonably available, material information before approving a transaction. The propriety of a fiduciary’s exercise of his duty of care is subject to the business judgment rule, which sets the standard of care as gross negligence. (See Smith v. Van Gorkom, 488 A.2d 858, 873-75 (Del. 1985), overruled on other grounds by Gantler v. Stephens, 965 A.2d 695 (Del. 2009).)

- **The duty of loyalty.** This duty, which includes the duty of good faith, requires fiduciaries to act in the company’s best interests. Fiduciaries might breach this duty by:
  - taking actions tainted by conflicts of interest, including engaging in transactions involving self-dealing or in which a controlling stockholder is acting at the expense of a minority; or
  - acting in bad faith, for example, by consciously disregarding their corporate responsibilities.

(See In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 66-67 (Del. 2006).)

**COMMON CLAIMS AND DEFENSES**

M&A litigation arises in many forms, including in disputes between:

- Stockholders and:
  - directors;
  - any of the parties to the merger transaction; or
  - financial advisors.

- Minority and controlling stockholders.

In the classic case, stockholders of the target corporation sue the target company’s directors and officers (and sometimes third parties, such as financial advisors) based on an allegedly flawed merger process. The two types of claims plaintiffs most commonly assert in an M&A litigation are:

- Breach of fiduciary duty claims against the directors and officers.
- Aiding and abetting claims against others.

Additionally, outside the context of a typical fiduciary duty case, a stockholder in certain jurisdictions, including
In the M&A context, plaintiffs often fashion alleged breaches of fiduciary duty as:

- Revlon claims.
- Self-dealing claims.
- Disclosure claims.

Search Fiduciary Duties in M&A Transactions for more on directors’ fiduciary duties in the context of M&A transactions, including the standards of review applied to board conduct in different transaction scenarios and how liability is determined under those standards.

Revlon Claims

A Revlon claim alleges that directors violated their fiduciary duties by failing to maximize the value stockholders would receive in a change-of-control transaction (see Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986)). Whether Revlon duties arise in connection with a particular contemplated transaction is a complicated analysis, but generally speaking, Revlon duties arise:

- When the board has initiated active bidding for the company, making the sale of the company inevitable.
- When a break-up of the company is unavoidable.
- When company ownership will change from dispersed to controlled. (See Paramount Commc’ns Inc. v. QVC Network Inc., 637 A.2d 34, 48 (Del. 1993).)

When a plaintiff asserts a Revlon claim, the main defense for directors is that they sought and obtained the best price available. To successfully raise this defense, directors must show that they chose and executed a reasonable strategy to maximize the price. (See Chen v. Howard-Anderson, 87 A.3d 648, 672-73 (Del. Ch. 2014).)

Directors can violate their Revlon duties by:

- Failing to “do all that they should have under the circumstances” (a breach of their duty of care).
- Knowingly failing to undertake their responsibilities (a breach of their duty of loyalty).
- Failing to act independently (a breach of their duty of loyalty).

If a company has adopted a DGCL § 102(b)(7) exculpatory provision, directors need only show that they satisfied their duty of loyalty to avoid personal liability for damages. (See Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243-44 (Del. 2009).)

Self-Dealing Claims

Plaintiffs may raise a duty of loyalty claim based on self-dealing against:

- Directors, when a director deals directly with the corporation or has a substantial interest in an entity that deals with the corporation (see Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1169 (Del. 1995)).
- Controlling stockholders, when a controlling stockholder causes the corporation to act in such a way that the
stockholder gains at the minority stockholders’ expense (see *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). A stockholder is “controlling” if it either:

- owns more than 50% of the voting power of the corporation; or
- exercises control over the corporation’s business affairs.

(*KKR Fin. Holdings LLC S’holder Litig.*, 101 A.3d 980, 991 (Del. Ch. 2014).)

However, even if a director or controlling stockholder has engaged in self-dealing, he may be able to demonstrate that any conflicts of interest were “cleansed” by satisfying either:

- **The permissive business judgment rule.** Under DGCL § 144(a), a court reviews a transaction under the permissive business judgment rule and, therefore, typically will not find a violation of fiduciary duties if, in good faith and after full disclosure, a majority of disinterested directors or the stockholders authorized the transaction. A merger between a controlling stockholder and its corporate subsidiary is similarly subject to business judgment review if it is conditioned on approval by:
  - an independent committee; and
  - an uncoerced, informed vote (or acceptance of a tender offer) by a majority of the minority stockholders.

(*Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 642, 644-45 (Del. 2014).)

- **The entire fairness standard.** The entire fairness standard, which is the highest standard of review in corporate law, shifts the burden of proof to the director or controlling stockholder to establish, based on the totality of the circumstances, that the transaction is fair both in:
  - price (known as the fair price element); and
  - the process used to approve the transaction (known as the fair dealing element).

(See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983) (directors); *Kahn*, 88 A.3d at 642, 644-45 (controlling stockholder).) The defendants can shift the burden of proof back to the plaintiffs if they establish that either an independent committee or an uncoerced, informed vote of the minority stockholders approved the proposed merger (*Kahn*, 88 A.3d at 642).

As with other causes of action, to hold a self-dealing director personally liable for damages where a corporation has adopted an exculpatory provision under DGCL § 102(b)(7), the plaintiffs must establish that the director violated his duty of loyalty. Self-dealing, in and of itself, is an insufficient basis from which to infer director disloyalty. (*See In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173, 1176-77 (Del. 2015).)

**Disclosure Claims**

Plaintiffs asserting disclosure claims allege that a board of directors violated its fiduciary duties by failing to disclose all material facts when seeking stockholder action in connection with a transaction. To succeed, the plaintiffs must demonstrate that the directors omitted reasonably available and material information from the company’s proxy materials. A fact is material if there is “a substantial likelihood” that a reasonable stockholder would consider it important in deciding how to vote on the proposed transaction. (*See Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997).)

Delaware courts have consistently rejected claims of the “tell me more” variety, noting that facts do not become material “simply because they might be helpful” (*Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000)). Accordingly, directors can defend themselves against disclosure claims by arguing that either:

- The proxy disclosures were sufficient.
- The omitted information was immaterial, either on its own or in conjunction with disclosures actually provided, or was otherwise reasonably available.

**AIDING AND ABETTING CLAIMS**

Third parties with no primary fiduciary relationship to a corporation or its stockholders can still be held liable for aiding and abetting a breach of a fiduciary duty. Aiding and abetting claims typically allege that a person or an entity knowingly misled fiduciaries into or actively encouraged a breach. Plaintiffs often raise these claims against the acquiring company or the target company’s financial advisors.

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If a company has adopted a DGCL § 102(b)(7) exculpatory provision, directors need only show that they satisfied their duty of loyalty to avoid personal liability for damages.
AVAILABILITY REMEDIES

The remedies available in M&A litigation generally include:

- An appraisal.
- Pre-closing injunctive relief that, for example, precludes or delays consummation of the transaction.
- Post-closing monetary damages.

Typically, the same conduct can serve as the basis for an injunction or a damages award. However, certain types of claims, such as a Revlon claim based on a fiduciary’s failure to seek the best price available, are more likely to succeed in a proceeding for injunctive relief than in a post-closing damages action, due to the “cleaning” effect of a fully informed vote of stockholders (see Corwin v. KKR Fin. Holdings, LLC, 125 A.3d 304, 312 (Del. 2015)).

APPRAISALS

Stockholders who dissent from a merger may bring an appraisal claim under DGCL § 262. This statutory remedy provides stockholders with the right to obtain a judicial determination of the fair value of their stock, which the corporation must then pay. Courts have considerable discretion in measuring fair value, and must “take into account all relevant factors,” including value or synergies created by the merger (DGCL § 262(h)). Historically, Delaware courts have determined fair value using one of the following methods:

- The discounted cash flow approach.
- The comparable transactions approach.
- The comparable companies approach.
- The merger price, less any synergies.

Generally, any stockholder may seek an appraisal in connection with a typical merger consummated under DGCL § 251, but not mergers completed by asset or stock acquisition. Notably, appraisal rights are unavailable if the corporation’s stock either:

- Is listed on a national exchange.
- Has over 2,000 record holders.
- (DGCL § 262(b)(1).)

Despite these exceptions, however, appraisal rights are available for stockholders who receive cash (in whole or in part, except in the case of fractional shares) for their shares (DGCL § 262(b)(2)).

PRE-CLOSING INJUNCTIVE RELIEF

In the M&A context, plaintiffs usually seek pre-closing injunctive relief to either:

- Prevent a transaction from closing.
- Delay a transaction from closing until the defendants can make additional disclosures to the stockholders.
- Require the defendants to take affirmative action, such as soliciting additional bids to purchase the company.

Preliminary injunctions are an “extraordinary remedy” and difficult to obtain. Plaintiffs must show that:

- Their claims have a reasonable likelihood of success.
- They would face irreparable injury in the absence of an injunction.
- The balance of the equities favors an injunction.

POST-CLOSING DAMAGES

Courts have considerable discretion in calculating the amount owed when the plaintiffs seek monetary damages following the closing of the transaction. For example, courts may award:

- Rescissory damages. These damages are the monetary equivalent of rescission. They are awarded if rescission is impractical, which is generally the case after a transaction has closed. Rescissory damages are available for a breach of the duty of loyalty, and aim to restore the plaintiffs to their pre-breath financial position and force the defendant to disgorge improper profits. They can be measured as of the time of:
  - judgment;
  - resale; or
  - an intervening point when the stock had a higher value and was controlled by the fiduciary.

- Quasi-appraisal damages. These damages provide stockholders with the share value that they would have received in an appraisal action (see above Appraisals). Quasi-appraisal damages may be awarded for any fiduciary duty breach and are especially appropriate if rescissory damages are unavailable. Courts can use any valuation methodology available in an appraisal action, and the calculation is based on the appraisal value minus the merger consideration. (See generally In re Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 38–48 (Del. Ch. 2014)).
Courts have considerable discretion in measuring fair value, and must take into account all relevant factors, excluding value or synergies created by the merger.

For disclosure claims, courts have more limited discretion in determining damages awards. In these cases, the plaintiffs may recover only the specific, quantifiable amount that they have proved to be “logically and reasonably related” to the failure to disclose material information. (*In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 360 (Del. Ch. 2008).)

**DISCOVERY ISSUES**

In Delaware, a court sometimes will stay discovery in an M&A action until after it decides the defendant’s motion to dismiss. Delaware courts will grant motions for stays of discovery where the moving party can articulate “some practical reason” for the stay. These courts have noted that the desire to avoid unnecessary discovery while a potentially dispositive motion remains pending “is usually sufficient.” (*Barton v. Club Ventures Invs. LLC*, 2013 WL 6797407, at *1 (Del. Ch. Dec. 23, 2013).)

However, the plaintiffs may obtain earlier discovery in both:

- **Expedited proceedings.** A court may expedite proceedings to resolve certain issues quickly. These proceedings typically call for early discovery to aid in a preliminary injunction hearing seeking to enjoin the merger or require additional disclosures. To prevail on a motion to expedite the proceedings, the plaintiffs must demonstrate that:
  - their claims are “sufficiently colorable;” and
  - there is a “sufficient possibility of a threatened irreparable injury” that justifies imposing on “the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding.” (*Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).)

- **Proceedings to inspect corporate books and records.** Under DGCL § 220, stockholders may inspect a corporation’s books and records for any proper purpose that is reasonably related to their interests as stockholders, such as investigating corporate mismanagement or potential fiduciary duty breaches based on some credible evidence of wrongdoing. Stockholders often use DGCL § 220 as a tool to obtain facts necessary to plead a claim in an anticipated, future litigation. The scope of inspection DGCL § 220 permits is narrower than the scope of discovery in ordinary civil litigation. Stockholders are entitled to inspect only books and records that are “necessary and essential” to the accomplishment of a proper purpose, which is often limited to relevant board minutes, board-level materials, and company policies.

**TYPICAL RESOLUTIONS**

Most M&A litigation is resolved before trial. Of the M&A cases filed in 2015:

- 36% of cases settled.
- 27% were voluntarily dismissed (and, for a portion of these actions, likely as a result of settlement).
- 11% were dismissed by the court.
- 23% remained pending as of July 1, 2016.  

A court should not act as a mere rubber stamp for the parties’ negotiated settlement terms, particularly in disclosure-only settlements. Recent events show that many courts are taking this obligation seriously (see below Scrutiny of Disclosure-Only Settlements and Attorneys’ Fee Awards). A court should assess whether, applying “its own business judgment,” the settlement is fair and reasonable. In making this assessment, a court typically considers:

- The validity of the plaintiffs’ claims based on the information provided to the court.
- The collectability of any judgment.
- The delay, expense, and trouble of litigation.
- The amount of the compromise as compared with the amount and collectability of the judgment.
- The views of the parties involved, both in favor of and against the proposed settlement. (*In re Countrywide Corp. S’holders Litig.*, 2009 WL 846019, at *6 (Del. Ch. Mar. 31, 2009).)

**RECENT DEVELOPMENTS**

As M&A litigation increased consistently over the last decade, courts grew wary of the potential for abuse. In particular, courts became alert to the threat posed by plaintiffs’ attorneys...
reflexively filing suit following the announcement of any significant transaction, regardless of merit, to pursue fee awards while returning little or no benefit to stockholders. Many of the recent developments in M&A litigation have been geared toward fundamentally curbing abusive litigation tactics, including:

- Defenses based on the cleansing effect of a fully informed, non-coerced stockholder vote approving a transaction.
- Enhanced judicial scrutiny of disclosure-only settlements and attorneys’ fee awards.
- Increased availability of forum selection provisions.
- Statutory amendments designed to preclude appraisal actions from being used as interest arbitrage.

FULLY INFORMED, NON-COERCED STOCKHOLDER VOTE DEFENSE

In two recent decisions, the Delaware Supreme Court held that if a fully informed and disinterested majority of stockholders vote in favor of a merger, a court reviewing that board’s decision should apply the deferential business judgment rule.

In Corwin v. KKR Financial Holdings LLC, stockholders brought a post-closing damages action for, among other things, breach of fiduciary duty related to a merger. In affirming the Court of Chancery’s dismissal of the action, the Delaware Supreme Court held that, when the entire fairness standard is inapplicable (that is, so long as any self-dealing has been “cleansed”) and a transaction is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies. The court reasoned that “the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders had the free and informed chance to decide on the economic merits of a transaction for themselves.” (125 A.3d at 310, 312-14.)

In a later case, Singh v. Attenborough, the Delaware Supreme Court clarified that application of the business judgment rule in a post-closing damages action involving a fully informed, uncoerced vote should typically result in dismissal. The court reasoned that applying a gross negligence standard of care both before and after a stockholder vote “would give no standard-of-review-shifting effect to the vote.” (137 A.3d 151, 151-52 (Del. 2016).)

These decisions establish a powerful potential defense against fiduciary breach claims for post-closing damages. Because DGCL § 251(c) requires mergers to be approved by a majority of shares entitled to vote, in M&A litigation subject to Delaware law, a court’s focus in this type of litigation will often be on whether the vote was fully informed and uncoerced.

SCRUTINY OF DISCLOSURE-ONLY SETTLEMENTS AND ATTORNEYS’ FEE AWARDS

As discussed above, Delaware courts have become increasingly skeptical of disclosure-only settlements, including the amount of attorneys’ fees agreed to by the parties in the associated settlement agreements. These settlements typically arise in cases where the plaintiffs allege deficiencies in the company’s SEC disclosures, and the defendants agree to supplement the filing with additional information that is theoretically valuable to stockholders. In return, the defendants receive a broad release, typically from the entire class and not merely the stockholder who filed the suit, from liability for claims related to the merger and not merely the claims asserted in the suit, and plaintiffs’ counsel receives a fee award.

The landmark In re Trulia, Inc. Stockholder Litigation decision highlights the Court of Chancery’s dim view of disclosure-only settlements. In Trulia, the court refused to approve the parties’ proposed settlement as “fair and reasonable” because the supplemental disclosures were not sufficiently material. While acknowledging that its previous approval of disclosure-only settlements had contributed substantially to the M&A litigation explosion, the court warned that, going forward, courts (at least in Delaware) were likely to reject these settlements unless both:

- The proposed supplemental disclosures address a plainly material alleged misrepresentation or omission.
- The scope of the proposed release is narrowly circumscribed to ‘encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.” (129 A.3d 884, 894, 898-99 (Del. Ch. 2016); see In re Receptos Inc., Stockholder Litig., C.A. No. 11316 (Del. Ch. July 21, 2016) (reducing fee award where the disclosures were not sufficiently material and did not benefit stockholders).)

In lieu of disclosure-only settlements, the court recommended that disclosure issues be resolved through either:

- Preliminary injunction motions. A preliminary injunction motion permits the adversarial process to “remain intact” and
requires the plaintiffs to show a "reasonable likelihood" that "the alleged omission or misrepresentation is material."

- **"Mootness" fees.** This remedy contemplates the plaintiff dismissing its action, without prejudice to the other members of the putative class, after the parties file stipulations that the defendants voluntarily supplemented their proxy materials and that the disclosure claims have been mooted by those supplemental disclosures. After dismissal, the court retains jurisdiction for the sole purpose of hearing a mootness fee application.  

**(Trulia, 129 A.3d at 896-98.)**

Search Expert Q&A on Judicial Activism and Disclosure-Only Settlements in Delaware and Developments in Disclosure-Based Deal Litigation Settlements for more on disclosure-only settlements.

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**ENFORCEABLE FORUM SELECTION BY-LAWS**

In 2015, the Delaware legislature amended the DGCL to explicitly permit companies to include forum selection provisions in company by-laws. Under the amended DGCL § 115,

**DGCL § 115 should encourage companies to include forum selection by-laws choosing Delaware as the exclusive forum, which could both reduce multi-forum litigation and increase Delaware-based litigation.**

Even where courts have not rejected settlements entirely, courts have exercised their discretion to reduce fee awards, accusing some in the plaintiffs' bar of using M&A litigation as a pretext for harvesting fees (see, for example, **Trulia, 129 A.3d at 892** (suggesting that M&A litigation often "serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent")). There are a number of recent examples of this trend (see, for example, **In re Tower Grp. Int'l, Ltd. Shareholder Litig., No. 14-254, slip op. at 6** (S.D.N.Y. Apr. 14, 2016) (reducing fee award from $395,000 to $75,000 in connection with disclosure-only settlement)).

Search Attorneys' Fees in Class Action Settlements for more on how courts navigate fee awards in class action settlements.

Following the **Trulia decision**, plaintiffs' attorneys became wary of filing their suits in Delaware for fear of being unable to extract significant fees through quick, disclosure-only settlements. For litigation in which the target company was incorporated in Delaware, plaintiffs filed suit in Delaware for 74% of litigated deals in 2015. By contrast, in the first two quarters of 2016, the rate dropped to 36%. (Cornerstone Research, **Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2015 and 1H 2016 M&A Litigation**, at 3.)

Attempting to avoid Delaware may ultimately prove to be fruitless as well. Although the extent to which courts outside of Delaware will adopt the standard set in **Trulia** remains in question, some courts have recently refused to approve disclosure-only settlements for the same reasons. (See **In re Walgreen Co. Stockholder Litig., 2016 WL 4207962**, at *4-5* (7th Cir. Aug. 10, 2016); **Vergiev v. Aguero**, No. L-2776-15 (N.J. Super. Ct. Law Div. June 6, 2016); **In re Allied Healthcare Shareholder Litig., 2015 WL 6499467**, at *2-3.*

Given that companies generally wish to avoid the expense and legal complexity of multi-jurisdictional litigation, DGCL § 115 should encourage companies to include forum selection by-laws choosing Delaware as the exclusive forum, which could both reduce multi-forum litigation and increase Delaware-based litigation. Indeed, since the amendment went into effect, over 1,000 companies have adopted these provisions, and multi-jurisdictional M&A litigation subsequently declined from 53% in 2011 to about 23% in 2015 (see **Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2015**, at 2-3 (2016); **Steven Davidoff Solomon, A Three-Pronged Front to Limit Shareholder Litigation, N.Y. Times DealBook** (Apr. 2, 2015)).

Notably, whether these forum selection by-laws are binding on enacting companies if they choose to waive them remains an open question. In some circumstances, a company with a forum selection by-law might find it advantageous to litigate an M&A
action outside the selected forum. For example, a Delaware corporation that has adopted a Delaware-only provision might, in certain circumstances, wish to litigate in a forum more receptive to disclosure-only settlements and general releases of liability.

The early indications are that waivers will be permitted if they are not used to forum shop or intentionally evade Delaware law. In Neidermayer v. Kriegsman, a corporation adopted a forum selection by-law under DGCL § 115 that explicitly permitted it to waive the by-law. The plaintiffs appealed the dismissal of a derivative case outside Delaware on forum non conveniens grounds based on the by-law, but agreed to settle if the defendants waived the by-law and submitted to the foreign jurisdiction. When a similar derivative case was also filed in Delaware, the defendants sought to stay that case to allow the settlement with the first derivative plaintiffs to proceed.

The Delaware plaintiffs opposed the waiver, arguing, in part, that it might lead to a “reverse auction,” in which the defendants would negotiate the settlement with the most ineffectual class action plaintiffs’ counsel they could find. The court rejected these arguments and permitted the waiver, noting that it found no evidence of forum shopping or running a reverse auction. (2016 WL 4367531 (Del. Ch. May 2, 2016).)

LOOKING AHEAD

The effect that the recent developments discussed above will have on the M&A boom, or their ability to stem the tide of meritless M&A litigation, remains uncertain. The various amendments and judicial pronouncements should:

- Limit plaintiffs’ ability to obtain quick and easy settlements for substantial fees on disclosure-only settlements.
- Deter some frivolous claims in the face of the increased availability of an informed stockholder vote defense, and encourage companies to bring motions to dismiss.
- Shift the critical time period in M&A litigation from the preliminary injunction stage to the motion to dismiss stage.

Statistics suggest that these developments might be contributing to a decline in M&A litigation rates. According to a recent study, 84% of M&A deals valued over $100 million were subject to litigation challenges in 2015, and that number fell to 64% in the first half of 2016. This is the first time since 2009 that these M&A litigation rates have dropped below 90%. (Cornerstone Research, Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2015 and 1H 2016 M&A Litigation, at 1.)

Nevertheless, plaintiffs still have ample opportunity and incentive to file claims of questionable validity. And, perversely, in the absence of easy avenues to settlement, some litigation might become even lengthier and costlier than before.

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