FREQUENT FILER SHAREHOLDER SUITS IN THE WAKE OF *TRULIA*: AN EMPIRICAL STUDY

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INTRODUCTION

Shareholder suits challenging mergers and acquisitions (M&A) transactions remain common. Until 2016, they were filed in eighty-five to ninety-five percent of all deals over $100 million,[1] and evidence suggests that any downturn since then may have been temporary.[2] The pattern of these lawsuits is well documented: filings seek injunctive relief and settle (or, more recently, are mooted) by the defendants' release of supplemental disclosures in the merger proxy, on account of which the plaintiffs' lawyers are entitled to a fee based upon the corporate benefit doctrine.[3]

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1. Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2015 (Preliminary Figures) at 2 (Jan. 14, 2016), http://ssrn.com/abstract=2715890.

2. Matthew D. Cain et al., *Mootness Fees*, 72 VAND. L. REV. 1777, 1794 (2019) [hereinafter Cain et al., *Mootness Fees*] (showing deal litigation back over eighty percent in 2017 and 2018 after a brief dip to seventy-four percent in 2016). *Accord Securities Class Action Filings: 2018 Year in Review*, CORNERSTONE RES. (2019), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-Year-in-Review.pdf [https://perma.cc/C5M5-SZDV].

3. Sean J. Griffith, *Innovation in Disclosure-Based Shareholder Suits*, 69 CASE W. RES. L. REV. 927 (2019) [hereinafter Griffith, *Innovation*]; Sean J. Griffith & Anthony

These cases became the bread and butter of the "disclosure bar," a sub-class of plaintiffs' lawyers that have built business models around regularly filing and swiftly resolving merger claims.[4]

The Delaware Court of Chancery moved definitively against such suits in January 2016.[5] *In re Trulia Stockholder Litigation*[6] left no doubt that disclosure settlements would no longer be welcome in Delaware.[7] In that case, the Court of Chancery held that "disclosure settlements" would be met with "disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission . . . ."[8]

This Essay develops a unique dataset to examine the effect of *Trulia* on M&A litigation. Rather than examining patterns in merger litigation filed against public company deals, an empirical strategy followed by several important papers in this area,[9] I examine the litigation patterns of repeat play shareholder plaintiffs. I develop an original hand-collected dataset of litigation filed by seven "frequent filer" shareholder plaintiffs over a five-year period, 2014 through 2018.[10] During this period, these plaintiffs filed a total of 282 shareholder suits. In this Essay, I compile data on their claims, documenting the substantive allegations, procedural form, and the identity of counsel, as well as the outcomes of claims. I find that

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Rickey, *Who Collects the Deal Tax, Where, and What Delaware Can Do About It*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 140 (Sean Griffith et al. eds., 2018); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1 (2015) [hereinafter Griffith, *Correcting Corporate Benefit*].

4. Joel Edan Friedlander, *How* Rural/Metro *Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877, 882 (2016).

5. There had been some prior warning. *See, e.g.*, *In re Riverbed Tech. Inc. Stockholders Litig.*, C.A. No. 10484-VCG, 2015 Del. Ch. LEXIS 241, at *21–22 (Del. Ch. Sept. 17, 2015) ("If it were not for the reasonable reliance of the parties on formerly settled practice in this Court, . . . the interests of the Class might merit rejection of a settlement encompassing a release that goes far beyond the claims asserted and the results achieved."). I was a shareholder objector in *Riverbed*.

6. 129 A.3d 884 (Del. Ch. 2016).

7. *Id.* at 898. I filed a brief as *amicus curiae* in *Trulia*. *See* Brief of Sean J. Griffith as Amicus Curiae, *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. 2016) (No. 10020-CB).

8. *In re Trulia*, 129 A.3d at 898 ("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."). As we shall see, *Trulia* also established a favored "mootness path" to resolution. See *infra* Part II.

9. Cain et al., *supra* note 2, at 1780 n.14, 1800–03 (discussing the empirical analysis in Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015)).

10. The phrase "frequent filer" has been used to refer to the lawyers that regularly bring nuisance litigation on behalf of shareholder plaintiffs. *See In re Revlon, Inc. Shareholders Litig.*, 990 A.2d 940, 943, 943 n.1 (Del. Ch. 2010) (coining the phrase "frequent filer" to refer to "repeat players who regularly bring representative actions on behalf of stockholders with small ownership stakes"). Here I use the phrase to refer to the shareholder plaintiffs themselves rather than the lawyers who file claims on their behalf.

over my sample period, frequent filer suits transformed from state court merger challenges based on fiduciary duty into federal court challenges to disclosure suits based on the federal securities laws. I also find that the outcomes of these suits transformed from class wide settlements based on supplemental disclosures ("disclosure settlements") to mootness dismissals based on the defendants having corrected the alleged disclosure deficiencies ("mootness resolutions").[11] The common denominator between disclosure settlements and mootness resolutions is that both entitle plaintiffs' counsel to collect fees from the corporation while the plaintiff class receives nothing but disclosures.

I also argue that the evolutionary phases of this litigation are direct responses to legislative and judicial efforts to contain these suits. Claims moved from state to federal court to evade state law precedent that had become hostile to disclosure settlements. Once in federal court, these claims mutated again, transforming from disclosure settlements into mootness resolutions in order to avoid judicial scrutiny and the provisions of the Private Securities Litigation Reform Act of 1995 (the PSLRA).[12] Furthermore, there is evidence of further evolution in these federal disclosure-based claims. Plaintiffs have now begun to file disclosure-based claims against corporations in contexts other than M&A. And plaintiffs have begun to file as individuals rather than as a class, apparently as a further precaution against application of the PSLRA.

I argue that the PSLRA, consistently applied, could address these problems. The PSLRA bars the award of attorneys' fees for non-monetary recoveries.[13] It also requires plaintiffs to meet a high standard of materiality at pleading, prevents plaintiffs from seeking to represent a class more than five times in three years, and requires a set of sworn undertakings by class action claimants.[14] Consistent application of the PSLRA, however, requires judicial coordination which has so far been lacking among federal districting courts but which could be achieved through several mechanisms. Courts should use these mechanisms to coordinate their response to the problem of merger- and disclosure-related nuisance suits. Alternatively, repeat-play D&O insurers should incentivize their corporate insureds to resist disclosure-based shareholder suits.

From this introduction, the Essay proceeds as follows. Part I describes the empirical methodology employed in this Essay. Part II reports the findings of my study, discussing filing and outcome characteristics and

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11. *See, e.g.*, *Rosenfeld v. Time Inc.*, No. 17-CV-09971, 2018 WL 4177938, at *1 (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. . . . Such settlements principally benefit plaintiff's counsel.") (internal citations omitted).

12. 15 U.S.C. § 78u–4 (2018).

13. § 78u–4(a)(6).

14. § 78u–4(a)(2).

providing insights on the relationship between frequent filer plaintiffs and the disclosure bar. Part III interprets the findings, arguing that they are evidence of strategic pleading, first to avoid hostile state court precedent and, second, to avoid application of the PSLRA. Part IV offers recommendations on how courts can address the problems uncovered in this chapter. Finally, Part V summarizes and concludes.

I. EMPIRICAL METHODOLOGY

To collect data on the litigation patterns of frequent filer plaintiffs, I assembled a list of plaintiffs whose names I had frequently encountered in my own research or litigation activities.[15] I then supplemented my list by surveying members of the Delaware bench and bar to identify the names of plaintiffs known to repeatedly file shareholder suits. This produced seven plaintiffs—Robert Berg, Stephen Bushansky, Natalie Gordon, Paul Parshall, Matthew Sciabacucci, John Solak, and Shiva Stein—each of whom has repeatedly been a named shareholder plaintiff in merger litigation.[16]

Next, I searched court dockets for these plaintiffs' names to assemble a set of cases in which they had been involved. I restricted my search to the five-year period spanning the Court of Chancery's *Trulia* decision in January 2016. I searched from January 2014 through year-end 2018. I ran these searches in Bloomberg Law, an online service that collects docket information from all federal courts as well as prominent state courts, including the Delaware Court of Chancery. Within the Bloomberg Law

15. I have filed objections to disclosure settlements. *See, e.g.*, *In re Riverbed, Inc. Stockholders Litig.*, No. 10484-VCG, 2015 WL 5458041, at *5 nn.16–17 (Del. Ch. Sept. 17, 2015); *Vergiev v. Aguero*, L-2276-15 (N.J. Super. Ct. Law Div. June 6, 2016); *Griffith v. Quality Distribution, Inc.*, No. 2D17-3160 (Fla. Dist. Ct. App. July 13, 2018); *Stein v. Blankenfein*, No. 2017-0354-SG, 2019 WL 2750100 (Del. Ch. July 1, 2019); *In re PMFG, Inc. Stockholder Litig.*, No. 11223-VCS (Del. Ch. Sept. 1, 2016); *Bushansky v. Remy Int'l, Inc.*, 262 F. Supp. 3d 742, 750 (S.D. Ind. Aug. 16, 2017); *In re Pharmacyclics, Inc. S'holder Litig.*, No. 2015-1-CV-278055, 2020 WL 780961 (Cal. App. Dep't Super. Ct. July 19, 2016). I have also provided expert testimony in merger litigation. *See, e.g.*, Declaration of Sean J. Griffith in Support of Defendants FX Energy, Inc. and Kiwi Acquisition Corp's Opposition to Motion for Award of Attorneys' Fees and Expenses, *Richards v. FX Energy, Inc.*, No. A-15-726409-C (Dist. Ct., Clark County, Nev., June 17, 2016); *Corwin v. British Am. Tobacco*, No. 14 CVS 8130, 2016 WL 635191 (N.C. Super. Ct. Feb. 17, 2016); Declaration of Sean J. Griffith in Support of Plaintiffs David D. Essig and City of Sunrise Police Officer's Retirement Plan Opposition to Motion for Final Approval and Objection to the Proposed Settlement, *In re Compuware S'holder Litig.*, 14-011437-CB (Mich. Cir. Ct. Wayne Cty. Sept. 29, 2015); *Gordon v. Verizon Commc'ns, Inc.*, No. 653084/13, 2014 WL 7250212 (NY Sup. Ct. Dec. 19, 2014).

16. I know nothing about these people other than the fact that their names regularly appear as named plaintiffs in shareholder litigation. I know nothing about their motives, nor am I certain that a single person has in fact filed all of the complaints listed under a single name. It is possible, if highly unlikely, that more than one person sharing the same name has filed some of these suits.

dockets database, I searched all federal and state trial court filings involving any of my seven named plaintiffs. I then sorted these results by hand, eliminating any suits that did not involve "shareholder litigation," which I defined as litigation filed on the basis of the plaintiff's status as a shareholder, principally including federal securities law claims and state fiduciary duty claims. After throwing out unrelated litigation and rejecting cases where critical docket information, such as the complaint, was missing and otherwise unattainable, I was left with a sample of 281 shareholder suits filed by these plaintiffs over a five-year period.

With regard to sample construction, some caveats are in order. First, the list of named plaintiffs for which I searched was informally obtained. I did not attempt to write a code that would identify all repeat shareholder plaintiffs who had filed claims in electronically searchable dockets, although such a search is at least theoretically possible. Instead, I relied on my own experience and the suggestions of those members of the Delaware bench and bar that were willing to respond to my queries. As a result, the sample is not comprehensive. There may be repeat shareholder plaintiffs whose filings I missed. And the sample may not be representative of the litigation activity of all repeat play plaintiffs. For example, there may be other repeat claimants who pursue predominantly meritorious claims, but if so, they are not the claimants studied here. Nevertheless, I do not claim that my sample is comprehensive or even, necessarily, representative. My only claim is that the litigation activity of these seven plaintiffs sheds light on how some repeat claimants have pursued merger litigation, both before and after *Trulia*.

Second, the Bloomberg Law dockets database does not contain all merger litigation filed in the United States. For the 2014 through 2018 time period, Bloomberg Law offers comprehensive coverage of federal district court dockets and, critically, of the Delaware Court of Chancery docket. However, docket coverage in Bloomberg Law is less exhaustive for other state trial courts.[17] As a result, filings in Delaware and in federal district courts may be over-represented in the sample, and filings in other state courts may be missing. However, Delaware's predominance as the leading state of incorporation and the fact that shareholder suits can only be filed in three places—in the state of incorporation, the headquarters state, or federal district court—suggest that the predominance of Delaware and federal court filings is not entirely coincidental.

17. For details on dockets covered in Bloomberg Law, see *Product Help & Walkthrough: Docket Coverage – U.S. and International*, BLOOMBERG L. (2020), https://help.bloomberglaw.com/docs/blh-040-dockets.html#breaking-complaints-overview [https://perma.cc/SHG6-ZKFP].

II. FINDINGS

This Part presents data from my frequent filer dataset. Table 1 below summarizes the data by category. The subsections following the table discuss what the data reveal about lawsuit characteristics, outcomes, and the relationship between frequent filer plaintiffs and the disclosure bar.

Table 1: Summary Data

		Year				
		2018	2017	2016	2015	2014
Type of Filing	Merger	43	97	24	25	24
	Derivative	3	4	4	8	2
	Proxy	13	15	8	0	0
	Traditional Securities	0	0	0	4	1
	Other	1	2	1	1	1
Forum	Federal	52	112	23	12	5
	State	7	6	14	26	23
Outcome	Settlement	2	2	4	13	13
	Dismissal	51	106	25	9	5
	Motion	0	2	3	5	1

A. Filing Characteristics

Two features jump out of the lawsuit filings in the sample. First, the vast majority of filings (76%) are merger claims. Second, although the vast majority of these claims were initially filed in state courts, this trend shifted dramatically over the sample period. In 2014, 82% of these plaintiffs' claims were brought in state courts. In 2015, the percentage of claims brought in state court fell to 68%, then in 2016, fell even more, to 41%. By 2017 and 2018, the relationship had reversed entirely, with 96% and 87% of their claims being brought in federal rather than state court. These relationships are depicted in the figures below.

Figure 1: Lawsuit Filings by Type of Claim

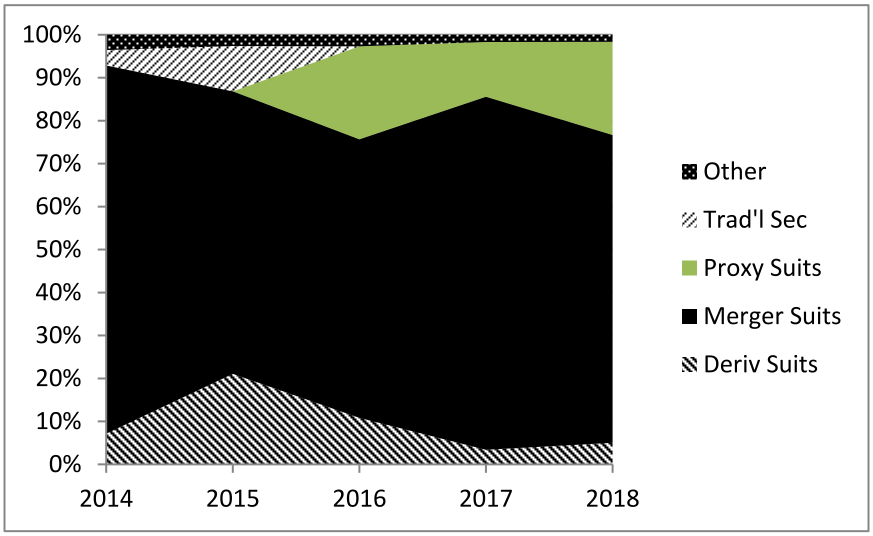


Figure 1 breaks plaintiff filings into types of claims. It categorizes claim types as merger suits, derivative suits, traditional securities class actions, proxy suits, and other. Merger suits include state law merger claims as well as federal court filings challenging merger proxy statements under Rule 14a-9, a Securities and Exchange Commission (SEC) rule applying to misstatements and omissions in the proxy materials of public companies.[18] Because shareholders may bring class action claims to enforce Rule 14a-9, merger claims brought under it mirror the disclosure aspects of state law fiduciary duty claims. Moreover, like state merger claims, federal claims under Rule 14a-9 can be settled for supplemental disclosures.

"Proxy suits" are defined to include claims alleging inadequate proxy statement disclosures under Rule 14a-9 that do *not* relate to M&A transactions. The proxy rules require detailed disclosure of a number of items, including the prior experience and compensation of directors and officers, details of fees paid to the company's independent public accountants, and details concerning stock-based compensation plans. As a result, shareholders could bring claims alleging disclosure violations touching any subject on which shareholders are asked to vote. However, non-merger proxy suits arise most often in compensation-related disclosures. For example, Item 10(a) of Form S-K requires fairly detailed disclosure of stock incentive and other compensation plans, including the number of persons in each class of participants entitled to participate in the plan. Errors or omissions in such disclosures could thus give rise to

18. 17 C.F.R. § 240.14a-9 (2020).

14a-9 complaints seeking to enjoin shareholder voting on the plan until corrective disclosure can be made. As Figure 1 shows, such claims have become an increasingly common claim pursued by the plaintiffs in my study.[19]

The rest of the categories are fairly obvious. Derivative suits are fiduciary duty claims filed by individual shareholders seeking redress for a harm done to the corporation itself. Traditional securities class actions are claims filed under the sections of the federal securities laws that shareholder plaintiffs have historically used to seek relief—principally Rule 10b-5 promulgated under Section 10 of the Securities Exchange Act of 1934. The plaintiffs in my sample filed only five traditional securities class action filings (three by Stein, one by Sciabacucchi, one by Solak), all of which allege claims under Rule 10b-5. Finally, Figure 1 includes a catch-all category for "other" shareholder suits, predominantly including books and records actions filed under Section 220 of the Delaware General Corporation Law.

Figure 1 demonstrates that merger claims brought by frequent filer claimants did not disappear after *Trulia*. Moreover, the ratio by which merger suits predominate other shareholder claims <u>increased</u> slightly in the wake of *Trulia*. Prior to 2016, the sample contains roughly three merger suits for every other type of shareholder claim. After 2016, there are four times as many merger suits as there are other forms of shareholder suits. In 2016, the year in which *Trulia* was decided, there were only twice as many merger suits as there were other types of shareholder filings.

Nevertheless, Figure 1 reveals that the type of suit that accounts for most *non*-merger litigation has changed in the wake of *Trulia*. Proxy suits challenging non-merger disclosures have largely taken the place of both derivative suits and traditional securities filings in the sample. These proxy suits were first filed in 2015 but have become increasingly common since *Trulia*. Moreover, they share a critical feature with most merger claims filed in the wake of *Trulia*: they are filed in federal court under Rule 14a-9 of the federal proxy rules.

19. Interestingly, however, all but one of the non-merger proxy claims in the sample were filed by a single litigant, Stein, with the sole remaining non-merger proxy claim brought by Bushansky.

Figure 2: Lawsuit Filings by Jurisdiction

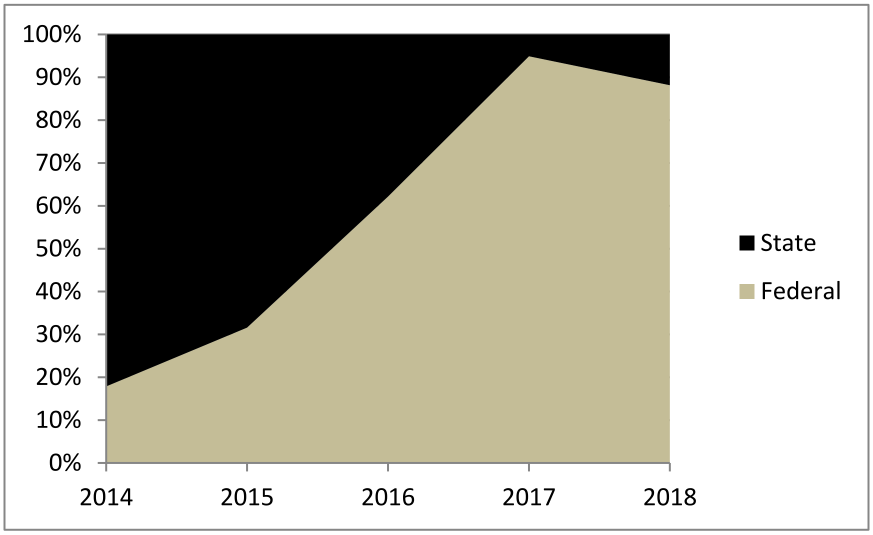


Figure 2 demonstrates what may be the most significant change in litigation activity in the wake of *Trulia*. The vast majority of shareholder suits in the sample are now filed in federal court. As the figure illustrates, this trend began in earnest in the year prior to *Trulia*, a time when Delaware courts began to suggest that they might soon act to restrain merger litigation. Having brought only two federal claims in 2014 and five in 2015, all but one of the frequent filers in my sample started filing federal claims aggressively in 2016.[20] From 2016 through 2018, the remaining six frequent filers brought 148 federal securities lawsuits. This is consistent with other researchers' findings. For example, a Cornerstone study shows that in 2015, the year before *Trulia*, thirty-four lawsuits were filed in federal courts relating to mergers; in 2017, the year after *Trulia*, there were 198, and in 2018, there were 182.[21]

Combining the insights of Figures 1 and 2 reveals that frequent filer plaintiffs are now bringing merger claims at an even greater rate than they brought them pre-*Trulia*. However, they are now bringing these claims in federal rather than state court, subject to Rule 14a-9 rather than state corporate law. Moreover, the next most common form of frequent filer suit from 2015 on, non-merger proxy claims, are also filed federal court cases under Rule 14a-9. In sum, frequent filer plaintiffs seem to have responded

20. The exception is Gordon, most of whose claims were brought before 2016 and all of which were brought under state law. *See, e.g.*, *Gordon v. Ford Motor Co.*, No. 10269 (Del. Ch. Oct. 22, 2014); *Gordon v. Pepco Holdings, Inc.*, No. 9612 (Del. Ch. May 5, 2014); *Gordon v. Bindra*, No. 2:15-cv-01058 (C.D. Cal. Feb. 11, 2014).

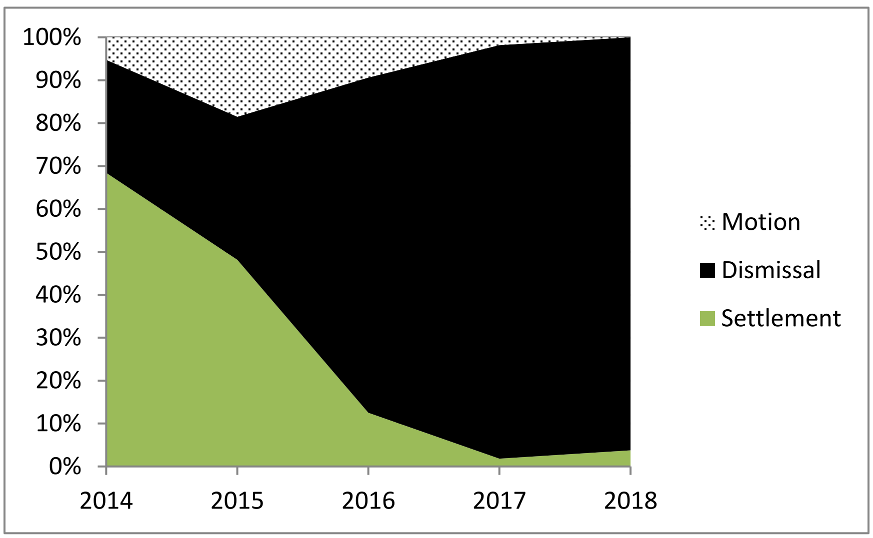
21. *Securities Class Action Filings: 2018 Year in Review*, *supra* note 2, at 14; *see also* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 631–32 (2018) [hereinafter Cain et al., *Shifting Tides*].

to *Trulia* by substituting Rule 14a-9 claims for state law merger claims and, having found their way into federal court under the proxy rules, by bringing additional proxy claims wherever they could find them.

B. Outcome Characteristics

Docket analysis also reveals a shift in outcomes. To analyze outcomes, I separated claims that had reached a conclusion into three categories: settlements, dismissals, and successful defendant motions. At the beginning of the sample period, settlements strongly predominated dismissals. In 2014 and 2015, for example, there were two times as many settlements as dismissals and over four times as many settlements as successful defendant motions. But this trend reversed sharply in 2016, as illustrated in Figure 3, below.

Figure 3: Lawsuit Outcomes



It is important to note that the dismissals captured in Figure 3 are not the result of a motion to dismiss or any other defense-side motion. Such dispositive motions are coded as "Motions." Instead, these dismissals are some form of voluntary dismissal. Most often, these claims are dismissed because the defendant has taken some action that has the effect of "mooting" the plaintiffs' claim, typically by making corrective disclosures to eliminate the alleged deficiencies of the proxy statement. As shown in Figure 3, mootness resolutions replaced disclosure settlements, more or less immediately after *Trulia*.

From a tactical perspective, mootness resolutions have the benefit of clearing the way for plaintiffs' attorneys to recover fees without the risk inherent in a fairness hearing. Because the defendant has made corrective disclosures in response to the compliant, the plaintiff's attorney is entitled to recover fees from the defendant under the corporate benefit doctrine.[22] In theory, these fees can be contested by defendants and, if the plaintiff prevails in a hearing, ordered by the court. In practice, however, defendants often elect not to oppose fee requests. Figure 3 depicts the transformation of disclosure settlement into mootness resolutions.

Why would defendants willingly pay plaintiffs' fees without receiving the release of claims? Are not defendants who settle for mootness vulnerable to copycat claims filed by other shareholder plaintiffs challenging different aspects of disclosure? Again, the answer is in theory, yes; in practice, no. The corrective disclosures that moot shareholder claims typically issue very shortly before the shareholder vote. Once the shareholder vote occurs, the ability to receive a fee award in exchange for non-pecuniary relief disappears. Plaintiffs may still pursue damages claims, but in such cases the applicable legal standards are no longer favorable to plaintiffs. Both sides thus know that once the vote passes, the hold up value of the plaintiffs' claim returns to near zero. As a result, mootness resolutions offer something for the lawyers on both sides. By waiting until shortly before the vote, defendants minimize the window available to other potential claimants and, in making the disclosures, effectively eliminate the potential for an injunction. At the same time, plaintiffs' lawyers receive fees averaging $265,000 for claims that they need scarcely litigate.[23]

C. Frequent Filer Plaintiffs and the Disclosure Bar

Docket analysis also reveals patterns in the relationship between frequent filer plaintiffs and the law firms that bring their claims. Coding the law firms listed on frequent filer complaints reveals the recurrence of a core set of plaintiffs' law firms. This is no surprise. Prior research on merger litigation has tended to focus on the law firms bringing the most complaints.[24] Many of the same law firms appear in the frequent filer data as well—including, for example, Barrack Roddos, Faruqi & Faruqi, Pomerantz, Rigrodsky & Long, RM Law, WeissLaw, and Wolf Haldenstein. But starting with the plaintiff rather than the law firm allows

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22. Griffith, *Correcting Corporate Benefit*, *supra* note 3.

23. Cain et al., *Shifting Tides*, *supra* note 21; Cain et al., *Mootness Fees*, *supra* note 2, at 1804.

24. Adam B. Badawi & David H. Webber, *Does the Quality of the Plaintiffs' Law Firm Matter in Deal Litigation?*, 41 J. CORP. L. 359 (2015); Friedlander, *supra* note 4; Griffith & Rickey, *supra* note 3; 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 (2015); David H. Webber, *Lead Plaintiffs and Lead Counsel in Deal Litigation*, *in* RESEARCH HANDBOOK ON MERGERS & ACQUISITIONS 319, 328–31 (Claire A. Hill & Steven Davidoff Solomon eds., 2016).

the lawyer-client relationship to be examined from a different angle, shedding light on the relationship between the plaintiff and the law firm.[25]

What does the data reveal about specific claimants and law firms? Four of the seven claimants in my study regularly file litigation with the same law firm. For example, RM Law was involved in twenty-five of thirty-one of Berg's filings, WeissLaw was involved in forty-two out of forty-three of Bushansky's filings, Faruqi & Faruqi was involved in all of Gordon's filings, and Rigrodsky & Long was involved in fifty-seven out of fifty-nine of Parshall's filings. These patterns may suggest that it is the lawyer, not the client, that is the interested party behind most of these filings. However, the pattern is also not inconsistent with an engaged plaintiff who has developed a relationship of trust and confidence with a particular lawyer or law firm.

The remaining three claimants, however, reveal different filing patterns. For example, fourteen different firms brought Solak's eighteen cases. Although many law firms recur in these filings—for example, Robbins & Arroyo was involved in six Solak cases, Wolf Haldenstein was involved in four, and Rigrodsky & Long was involved in three—it is difficult to discern a consistent pattern in the Solak cases. Likewise, although Rigrodsky & Long was involved in eleven of twenty-one of Sciabacucchi's lawsuits, various other law firms were involved in the other ten. Similarly, Stein's ninety-six suits were filed by thirty-eight different combinations of law firms. Three of these recur more frequently than the others—Wolf Haldenstein (forty-two), Barrack Rodos & Bacine (thirty-eight), and Pomerantz (eighteen)—but it is difficult to discern a consistent relationship between the plaintiff and a single law firm.

Cross-referencing law firm and claim type, however, reveals further patterns. As already noted, the vast majority of the claims in my sample are merger claims. The only other type of claim regularly filed by these plaintiffs in recent years are proxy suits—that is 14a-9 claims *not* related to M&A. There are thirty-six proxy suits in the sample, and as noted above, thirty-five of them were brought by Stein. Who were the lawyers?

There is greater consistency in the law firms bringing Stein's proxy suits than there is among the firms bringing her litigation as a whole. Of Stein's thirty-five proxy suits, thirty-three of them were brought by either Wolf Haldenstein or Barrack Roddos & Racine. In two such cases, both firms were involved. In contrast, the remainder of Stein's suits, including her forty-five merger suits, were brought by an assortment of firms, from which it is difficult to discern any pattern. This indicates specialization within the plaintiffs' bar. These two firms bring claims that other law firms

25. *See generally* Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. 1089 (2013).

are not bringing.[26] While it remains unclear whether the plaintiff chooses the lawyer or the lawyer chooses the plaintiff, it appears to be true that the type of case makes a difference in the choice.

Finally, if we consider qualitative factors, it is possible to observe that although the vast majority of these lawsuits end in disclosure settlements and mootness resolutions, a small number of them were litigated seriously enough to result in significant pro-plaintiff judicial decisions. Three of these, both brought by Sciabacucchi, stand out. In the first, *Sciabacucchi v. Liberty Broadband Corp.*,[27] plaintiffs produced a meaningful doctrinal development when they successfully argued that a shareholder vote could be coerced when it involves a choice made "in avoidance of a detriment created by the structure of the transaction . . . rather than a free choice to accept or reject the proposition voted on."[28] In the second, *Sciabacucchi v. Salzberg*,[29] plaintiffs succeeded in arguing that forum selection provisions adopted by Delaware corporations are invalid to the extent that they require any claim under the Securities Act of 1933 to be filed only in federal court, a significant and controversial holding both limiting the scope of forum selection provisions and affirming concurrent state and federal jurisdiction over Securities Act claims. A third Sciabacucchi case, *In re Tangoe*,[30] resulted in a judicial opinion holding the business judgment rule inapplicable to a merger in light of the inadequacy of corporate disclosures prior to the shareholder vote.[31] Interestingly, these three cases were brought by a law firm that filed only five of Sciabacucchi's twenty-two claims: Heyman Enerio.[32] The other two Sciabacucchi claims brought by this firm resulted in significant monetary recoveries at settlement.[33]

The Sciabacucchi cases brought by Heyman Enerio suggest further specialization. The Heyman Enerio firm was not listed on any other cases in the dataset, whether filed by Sciabacucchi or any of the six other

26. The only proxy suit not involving Stein was brought by Bushansky and involved WeissLaw. *Bushansky v. Carlucci*, No. 1:17-cv-12091 (D. Mass. Jan. 24, 2019).

27. No 11418-VCG, 2017 WL 2352152 (Del. Ch. May 31, 2017).

28. *Id.* at *2.

29. No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).

30. No. 2017-0650-JRS, 2018 WL 6074435 (Del. Ch. Nov. 20, 2018).

31. *Id*. (holding *Corwin* "cleansing" inapplicable in light of inadequate disclosures).

32. The firm changed names during the sample period, from Proctor Heyman Enerio LLP to Heyman Enerio Gattuso & Hirzel LLP. For the sake of brevity, I refer to the firm by the two names that persisted in each iteration: "Heyman Enerio." *Compare, e.g.*, *In re Schawk Inc. Stockholders Litig.*, No. 9510 (Del. Ch. Apr. 4, 2014), *with Sciabacucci v. Malone*, No. 11418 (Del. Ch. Aug. 21, 2015).

33. *In re Handy & Harman, Ltd. S'holders Litig.*, No. 2017-882-TMR (Del. Ch. July 10, 2019) (stating a preliminary settlement for $30 million); *In re Pilgrim's Pride Corp. Deriv. Litig.*, No. 0058-JTL (Del. Ch. Jan. 24., 2018) (stating a preliminary settlement of $42.5 million).

plaintiffs, yet the firm succeeded in litigating or settling the five cases into which it was brought. This suggests that at least some frequent filer plaintiffs (or, alternatively, the law firms with the client relationship) differentiate between high value and low value claims, and for their high value claims, partner with law firms not otherwise associated with high-volume, low-value litigation.

III. IMPLICATIONS

A basic implication from these findings is that plaintiffs and their lawyers are highly adaptive. The data demonstrates two significant shifts in frequent filer claims during the sample period: first, litigants shifted their claims from state to federal courts at the beginning of 2016. Second, around the same time, litigants began to shift from settlements to mootness resolutions. The first of these shifts likely reflects *Trulia*. The second may partially reflect federal receptivity to *Trulia*, but it likely also reflects the PSLRA.

A. Evading Trulia

As described above, *Trulia* left no doubt that disclosure settlements were no longer welcome in Delaware. Settlements would no longer be certified unless they presented "plainly material" disclosures.[34] The disclosure bar's choice was stark: adapt or die.

The response to *Trulia* was immediate. Merger litigation quickly shifted to federal court under Section 14(a) of the Securities Exchange Act. In 2015, the year before *Trulia*, there were thirty-four total lawsuits filed in federal courts relating to mergers; in 2017, the year after *Trulia*, there were 198, and in 2018, there were 182.[35] In the years since *Trulia*, federal courts have continued to experience high rates of merger-related filings, with the Third Circuit (which contains Delaware) experiencing the largest individual portion of this increased volume.[36]

Initially, these plaintiffs presented settlements in federal court much as they had in state court prior to *Trulia*. But fairness hearings are required in class settlements, leaving them vulnerable to the risk that federal judges might refuse to approve settlements for what are effectively nuisance

34. *In re Trulia, Inc. Stockholders Litig.*, 129 A.3d. 884, 898 (Del. Ch. 2016).
35. *Securities Class Action Filings: 2018 Year in Review*, *supra* note 2, at 14.
36. *Id.*

suits.[37] For example, in *In re Walgreen Co. Stockholder Litigation*,[38] the Seventh Circuit Court of Appeals referred to disclosure settlements as "no better than a racket" and expressly adopted *Trulia'*s "plainly material" language.[39]

In response, the disclosure bar shifted tactics again, this time converting disclosure settlements to resolutions based on mootness. Mootness fees avoid judicial scrutiny when, as is often the case, defendants agree to the plaintiffs' fee request. Because there is no class settlement and therefore no class-wide release of claims, there is no fairness hearing and, often, no further filing other than the notice of dismissal. Unsurprisingly, once federal judges began to express skepticism concerning disclosure settlements, plaintiffs shifted to mootness resolutions. This is now the most common form of merger claim: "In 2018, [ninety-two percent] of completed deal cases were brought in federal court. In that same year, in at least [sixty-three percent] of litigated cases, plaintiffs' attorneys received a mootness fee."[40]

Mootness resolutions have tactical value to the disclosure bar not only because they avoid the judicial scrutiny otherwise associated with settlement. Mootness resolutions are also valuable to the disclosure bar in federal cases because they enable them to evade potential application of the PSLRA.

B. Evading the PSLRA

Congress enacted the PSLRA to contain the perceived spread of non-meritorious securities class actions. Several provisions of the PSLRA are directly relevant to the 14a-9 claims into which most merger litigation has now evolved. First, the PSLRA expressly limits attorney's fees to a fraction of damages recovered.[41] Hence, if no damages are recovered, courts cannot award fees from the company. Second, the PSLRA requires plaintiffs to state with specificity why each alleged misstatement or omission is materially misleading.[42] Third, the PSLRA requires plaintiffs

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37. *See* William B. Rubenstein, *The Fariness Hearing: Adversarial and Regulatory Appraoches*, 53 UCLA L. REV. 1435, 1467–68 (2006) (explaining that because the release of claims provided in connection with class settlements affects the rights of absent class members, courts must approve the fairness of the settlement).

38. 832 F.3d 718 (7th Cir. 2016).

39. *Id.* at 724–25. The Seventh Circuit has since doubled down on *Walgreen*, recognizing the "racket" of non-meritorious class action filings in contexts other than merger litigation. *In re Subway Footlong Sandwich Litig.*, 869 F.3d 551, 553 (7th Cir. 2017) ("A class action that 'seeks only worthless benefits for the class' and 'yields [only] fees for class counsel' is 'no better than a racket' and 'should be dismissed out of hand.'").

40. Cain et al., *Mootness Fees*, *supra* note 2, at 1782.

41. 15 U.S.C. § 78u–4(a)(6) (2018).

42. § 78u–4(b)(1).

to identify, at the time of filing, other securities claims filed during the prior three years "in which the plaintiff has sought to serve as a representative party on behalf of a class."[43] Fourth, the PSLRA bars any plaintiff from leading more than five securities class actions in any three-year period.[44] Fifth, and finally, the PSLRA requires courts to make Rule 11 findings with regard to any "complaint, responsive pleading, or dispositive motion" filed by plaintiffs' attorneys.[45] These provisions would seem to substantively impede the proliferation of merger-related nuisance claims in federal court. However, each of these requirements has a different trigger—some are triggered upon filing, some upon class certification, others upon final adjudication. This provides plaintiffs with an opportunity to avoid them through strategic pleading.

First, with regard to the provision limiting attorneys' fees to a fraction of damages, the PSLRA states that: "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[46] Because no damages or prejudgment interest are paid to the class in a disclosure settlement or a mootness resolution, a straightforward reading of the plain text of this provision, uncontradicted by the legislative history, bars courts from awarding attorneys' fees in such cases.[47] Although some district courts have hesitated to accept this reading of the statutory text,[48] others have adopted it.[49]

43. § 78u–4(a)(2)(A)(v). The certification also requires the plaintiff to commit not to accept any payment in connection with the litigation other than her pro rata share of any recovery, except as approved by the court. § 78u–4(a)(2)(A)(vi).

44. § 78u–4(a)(3)(B)(vi).

45. § 78u–4(c)(1).

46. § 78u–4(a)(6).

47. An alternative interpretation—that Congress intended only to limit attorneys' fees to a reasonable percentage of damages when damages are paid, not to ban fee awards for non-pecuniary relief—imports assumed meanings into otherwise unambiguous statutory text and is, in any event, unsupported by legislative history. Courts in other jurisdictions have read parallel statutes to bar non-pecuniary relief in class action settlements. *See, e.g.*, *Kazman v. Frontier Oil Corp.*, 398 S.W.3d 377, 387 (Tex. Ct. App. 2013).

48. *See, e.g.*, Transcript of Settlement Conference at 48, *Taxman v. Covidien PLC*, No. 1-14-cv-12949-LTS (D. Mass. Oct. 2, 2015) ("[I]t is an awful lot of weight to read on that one sentence, that Congress rewrote the common benefit rule with respect to federal securities litigation in that sort of backhanded way, rather than directly. . . . I don't read the language quite as powerfully as you do.").

49. *See Franchi v. Bay Bancorp, Inc.*, No. GLR-17-3699, 2018 WL 8415675, at *2 (D. Md. Oct. 25, 2018) (holding that because the plaintiff's complaint was filed under the Exchange Act and was mooted by defendant's supplemental disclosures, resulting in "no monetary benefit [to plaintiff] or the putative class. . . . [plaintiff] and the putative class are not entitled to an award of attorney's fees."); *see also Mostaed v. Crawford*, Nos. 3:11-cv-00079-JAG, 3:11-cv-00082-JAG, 2012 WL 3947978, at *7 (E.D. Va. Sept. 10, 2012) ("[P]laintiffs must be denied attorneys' fees because the [PSLRA] amended the [Exchange

On its face, this provision applies only to fees "awarded by the court." This applies most obviously to settlements. As discussed above, fees paid in most mootness resolutions are privately negotiated between plaintiffs and defense counsel.[50] Hence, no court award. However, should a defendant contest a fee request, the only way for plaintiffs' counsel to be paid would be for the fee to be awarded by a court on the basis of the attorneys' efforts on behalf of the class. In this case, the PSLRA would appear to apply. As a result, an attorney petitioning for fees based upon her efforts in a class-based claim is asking for something the PSLRA bars the court from awarding.[51]

Nevertheless, a route around the PSRLA's ban on fees for non-monetary relief remains. This provision, like many provisions of the PSLRA, depends upon the existence of a class. The provision applies to fees awarded "to counsel for the plaintiff class."[52] Whether settled or resolved for mootness, when claims are filed as class actions and assert a right to recovery on that basis, any fee award derives from the existence of a class claim and should therefore be covered under the PSLRA. But individual claims—that is, claims filed by a plaintiff in her individual capacity not claiming to represent a class—would seem to evade this provision. Indeed, the provisions of the PSLRA are generally applicable to "each private action arising under [the federal securities laws] . . . brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure."[53] By negative inference, it is not applicable to individual actions.

Perhaps following this logic, a pattern of filing 14a-9 claims as individual rather than class actions has begun to emerge in my frequent filer data. The first individual (rather than class or derivative) complaint filed by a plaintiff in my dataset appeared in 2015, with the number of such claims steadily increasing each year: seven in 2016, fourteen in 2017, and twenty-two in 2018. Apart from being filed as individual complaints, with no reference to a class, these complaints are otherwise indistinguishable from class action claims. The only meaningful difference is that as non-class filings, they are not subject to the PSLRA.

Other provisions of the PSLRA can also be evaded even more easily, either by filing as a class but never seeking certification, or instead, by

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Act] to prevent the award of attorneys' fees except where counsel's efforts have led to monetary relief that is 'actually paid to the class' of claimants."); *In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 784–85 (E.D. Va. 2001) (holding that the PSLRA operates as a "*limitation* on the fees and expenses awarded by a court").

50. *See supra* notes 40, 46–47 and accompanying text.

51. *Franchi*, 2018 WL 8415675, at *2. *See also Mostaed*, 2012 WL 3947978, at *7 (holding "federal law clearly precludes" attorneys' fees when plaintiffs have not received a monetary judgment).

52. 15 U.S.C. § 78u–4(a)(6) (2018).

53. § 78u–4(a)(1).

filing individual actions. For example the provision requiring courts to make Rule 11 findings is triggered by "final adjudication of the action."[54] In the case of mootness resolutions, therefore, Rule 11 findings are not required because courts do not treat voluntary dismissals, with or without prejudice, as "final adjudication."[55] Likewise, the PSLRA's presumptive prohibition against leading more than five class actions in a three-year period may only apply at class certification, when lead plaintiffs are actually appointing. Nevertheless, there is at least an argument that a plaintiff seeks to lead a class action when she files a class complaint and that therefore the presumptive ban should be interpreted to apply at filing, not only at certification.

The PSLRA's pleading and certification requirements, however, are clearly applicable at the time of filing.[56] Plaintiffs therefore cannot avoid the requirement that they plead with specificity by seeking a mootness resolution. Applied strictly, this requirement would force plaintiffs to articulate precisely why specific misstatements or omissions make the proxy materially misleading. Pleading with specificity means not merely claiming, as plaintiffs often do, that disclosure is good, and more is better. Rather, it means stating precisely why each claimed omission—such as non-GAAP financial measures left out of the summary of the fairness opinion—makes the proxy statement materially misleading. For example, a federal court recently abrogated a disclosure-based mootness resolution on the basis of the materiality of the disclosures alleged in the complaint.[57] Holding that the proper inquiry was the materiality of the alleged disclosure deficiencies, not the corrective disclosures made by defendant subsequent to the filing of the complaint, the court found that none of the alleged disclosures met the standard of materiality and should therefore have been "dismissed out of hand."[58]

Likewise, the PSLRA's certification requirement applies at filing, irrespective of class certification.[59] Pursuant to this requirement, plaintiffs must certify that they are "willing to serve as a representative party on behalf of a class" and disclose the number of actions "in which the plaintiff has sought to serve as a representative party on behalf of a class" in the

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54. § 78u–4(c)(1).

55. *Rosenfeld v. Time Inc.*, No. 17-CV-09971, 2018 WL 4177938, at *5 (S.D.N.Y. Aug. 30, 2018); *Blaser v. Bessemer Trust Co., N.A.*, No. 01cv11599 (DLC), 2002 WL 31359015, at *3 (S.D.N.Y. Oct. 21, 2002); *Unite Here v. Cintas Corp.*, 500 F. Supp. 2d. 332, 336–37 (S.D.N.Y. 2007); *see also Manchester Mgmt. Co. v. Echo Therapeutics, Inc.*, 297 F. Supp. 3d 451, 465–66 (S.D.N.Y. 2018) (collecting cases).

56. §§ 78u–4(a)(2)(A), (c)(1)–(3)(A).

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

58. *Id.* at 619.

59. § 78u–4(a)(2)(A) (applicable to "[e]ach plaintiff seeking to serve as a representative party on behalf of a class").

last three years.[60] Because a plaintiff seeks to represent a class every time she files a class action, mootness claims filed as class actions therefore cannot evade the certification requirement.

The plaintiff's filing of the undertakings required in the certification creates an opening for further judicial inquiry into the adequacy of the plaintiff and her counsel. For example, if a plaintiff disclosed that she had filed multiple representative actions during that period, the court could ask additional questions, such as:

- What results were obtained by the plaintiff in her representative actions filed over the past three years?
- Has plaintiff's counsel filed other representative actions on behalf of other plaintiffs over the same period? If so, what were the results obtained in these actions?

Such questions would reveal whether the plaintiff was a frequent filer and unmask her counsel as a member of the disclosure bar. The court may also inquire into the relationship between the named plaintiff and plaintiff's counsel. Are there financial or familial relationships that suggest the named plaintiff may be an inadequate monitor of class counsel? Federal courts have authority to inquire into these matters under Rule 23(a)(4), which requires the court to determine whether "the representative parties will fairly and adequately protect the interests of the class."[61] If the court is troubled by what it finds, it might inquire further:

- Is the plaintiff willing to provide the putative class with notice and an opportunity to object to any resolution of the claim?
- Would the parties consent to the judicial appointment of an *amicus* to evaluate the materiality of the allegations in the complaint, with such costs to be taxed to the parties?

The point here is that courts can and should use the certification requirement as an opening to seek further undertakings and commitments from the parties in order to safeguard the interests of the putative class.

However, like the bar on attorneys' fees for non-pecuniary relief, the certification and pleading requirements can be avoided by filing individual, rather than class actions. The PSLRA applies to litigation in which a plaintiff has either been certified as a class representative or files a claim seeking class certification.[62] Individual actions are neither of those things. It would therefore seem that plaintiffs can avoid the PSLRA by filing individual actions and resolving them for mootness. How the law should respond to these tactics is the subject of the next section.

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60. § 78u–4(a)(2)(A)(iii)–(v).
61. FED. R. CIV. P. 23(a)(4).
62. § 78u–4(a).

IV. RECOMMENDATIONS

The PSLRA ought to stop the flood of merger-related nuisance litigation into federal court and reverse the flow back into state courts. Not only does the PSLRA bar the award of attorneys' fees for non-monetary recoveries, it also requires plaintiffs to meet a high standard of materiality at pleading, prevents plaintiffs from seeking to represent a class more than five times in three years, and requires sworn undertakings by class action claimants.[63] Recognizing their inability to recover fees in federal court, plaintiffs' lawyers would move their cases back to state court, where even if the salad days of disclosure settlements are over, courts remain receptive to awarding attorneys' fees based on mootness resolutions.[64]

Why, then, has this not happened? The obvious answer is that the PSLRA is not applied consistently. Indeed, that six plaintiffs brought 148 securities lawsuits over a three-year period when the PSLRA would have limited them to a maximum of thirty suggests that the statute is often not applied at all.[65] But why is that?

This Part argues that three parties are to blame for the inconsistent application of the PSLRA: plaintiffs, defendants, and judges. First, plaintiffs thwart the PSLRA by pleading strategically. Second, defendants frustrate the PSLRA because they so frequently acquiesce to paying plaintiffs' attorneys' fees rather than contesting them. Third, judges have been unable (or unwilling) to coalesce around a single interpretation of the PSLRA and a coherent approach to mootness resolutions. In the sections below, I sketch these problems and offer solutions to each, noting the obstacles that remain.

A. Prevent Strategic Pleading by Plaintiffs

Plaintiffs plead strategically to avoid application of the PSLRA. By aiming for mootness resolutions rather than disclosure settlements, they are able to avoid class certification and "final adjudication." Furthermore,

63. § 78u–4(a)(2); *see also* Sean J. Griffith, *Class Action Nuisance Suits: Evidence from Frequent Filer Shareholder Plaintiffs* 4 (European Corp. Governance Institute, Working Paper No. 502, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470330.

64. Indeed, *Trulia* suggested that mootness was the "preferred scenario" for resolving disclosure-based claims. *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 897 (Del. Ch. 2016). Moreover, subsequent decisions in Delaware have suggested a lower standard of materiality for awarding mootness fees as opposed to disclosure settlements. *See In re Xoom Corp. Stockholder Litig.*, No. 11263-VCG, 2016 Del. Ch. LEXIS 117, at *10 (Del. Ch. Aug. 4, 2016) (awarding a $50,000 mootness fee for "disclosure provid[ing] some benefit to stockholders, whether or not material"). Under the circumstances, plaintiffs seem to have stayed away given Delaware's tendency to award mid five-figure fees rather than the low six-figure fees now common in federal court.

65. *See* discussion of Figure 2 *supra* Part II.A.

by filing individual rather than class actions, they are able to avoid any risk that the PSLRA will be applied to them. Consistent with this account, I found that the plaintiffs in my sample increasingly filed 14a-9 claims as individual rather than class actions. Courts should respond to this trend by refusing to award attorneys' fees to individual claimants based on the value of class-wide relief and instead award fees, if at all, only on the basis of the named plaintiff's proportional share of the benefit. Awarding fees to individual claimants based on class-wide relief is unsupported by doctrine and inconsistent with fundamental norms of equity.

Underlying both the common fund doctrine, under which courts award attorneys' fees for monetary recoveries, and the corporate benefit doctrine, under which courts award fees for non-monetary recoveries, is a principle of fee-*sharing*.[66] Under both doctrines, the attorney is awarded by the class of beneficiaries on the basis of the benefit they share. This is most apparent when the attorney's fee is taken from the monetary recovery to be shared by the class. But the principle also operates in derivative suits and class actions when attorneys' fees for non-monetary benefits are assessed against the corporation. In the derivative suit context, the corporation is the legal plaintiff and therefore the attorney's client, thus justifying the assessment of fees against it. In the context of a certified class, assessing fees against the corporation is justified by the fact that, through certification of the class and appointment of lead counsel, the attorney is made the legal representative of all shareholders. Because the corporation is an asset of all shareholders, assessing fees against the corporation ensures that they are shared by the class of beneficiaries represented by the attorney.

There is no equivalent basis for fee-sharing when the plaintiff files an individual suit rather than a class action. When plaintiffs' lawyers bring individual actions, their client is the named plaintiff and no one else. Just as any monetary recovery from the suit would belong exclusively to the named plaintiff, not the corporation (as in a derivative suit) or all shareholders (as in a class action), the common fund doctrine does not apply, and attorneys' fees must be recovered from the named plaintiff. Likewise, in the absence of a derivative suit or a certified class, there is no legal basis for fee-sharing. In an individual action, the attorney does not represent the corporation or all shareholders as a class. Assessing attorneys' fees against the corporation in the context of an individual action therefore amounts to fee-*shifting*, not fee-*sharing*. Fee-shifting is not supported by either the common fund or corporate benefit doctrines.[67]

A logically consistent approach to attorneys' fees for individual actions would limit an attorney's fees in such cases to her client's proportional interest in the class-wide benefit. Outside of the context of

66. Griffith, *Correcting Corporate Benefit*, *supra* note 3, at 37–41.

67. *See id.* at 38–41.

derivative suits and certified class actions, courts should not award fees on the basis of class-wide benefits. Instead, the attorney should be awarded a sum based on the value the disclosure achieves for the specific named plaintiff. So, if, for example, a shareholder plaintiff has 0.0001% of the common stock of a company, the proportionality principle implies that the plaintiffs' attorney should receive a fee no greater than 0.0001% of the value of the class-wide benefit. Thus, assuming the total aggregate value of a highly material supplemental disclosure is $500,000, a court should award plaintiffs' counsel no more than $50 in fees.

This does not mean that attorneys cannot be compensated for having achieved class-wide relief. It means only that if they wish to recover fees on that basis, then they must do so under one of the two recognized procedural methods for doing so. They must file either a derivative suit or a class action. The derivative suit is the traditional vehicle for obtaining equitable or injunctive relief—benefits such as the prevention of an unlawfully convened meeting or reversal of an *ultra vires* action—from a corporation, but such benefits may also be achieved through class actions. Indeed, the history of merger litigation pre-*Trulia* typically involved state fiduciary duty suits brought as class actions.[68]

The distinction between class and derivative actions, on the one hand, and individual complaints, on the other, is not a procedural peccadillo. Both the class and derivative suit contain substantive mechanisms to prevent abuse. Foremost among these in the derivative suit context is the demand requirement, which prevents individual plaintiffs from bringing representative litigation to which the board of directors objects.[69] The theory here is that shareholders already have representatives (the board), and unless these representatives harbor some conflict of interest, they are the ones to determine whether the lawsuit is in the interests of all shareholders. Likewise, certification provides important protections for class members. Class certification provides a mechanism for shareholders to object to the appointment of lead plaintiff and lead counsel. Class certification also creates mechanisms for class members to opt out of the representation or object to the outcome. Finally, securities class actions trigger the additional protections of the PSLRA reviewed above.

Individual actions provide no such protections. When an individual action is resolved for mootness, there is no opportunity for other shareholders to object to either the benefit or to the fees. As non-parties to the dispute, they have no standing to intervene. Attributing benefits and taxing fees to them thus amounts to an imposition of outcome and a

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68. Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 167, 181–82 (2004).

69. TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES THE SHAREHOLDER LITIGATION 28–29 (2010).

shifting of fees without giving them any choice in the matter. Not only is this contrary to the procedural requirements of Rule 23, more fundamentally it is contrary to basic norms of equity to appoint a de facto shareholder representative in a process that denies shareholders the opportunity to question the appointment, to contest the adequacy of the representative, and to object to the value of the resulting relief. Treating individual actions as the equivalent of representative actions lets a single plaintiff speak for a corporation's entire shareholder base when no one—no court, no corporation, and no shareholder—has evaluated that shareholder's adequacy as a representative or inquired into her motivations.

Another way of seeing this is through the lens of litigation agency costs. Representative actions—class and derivative suits—contain mechanisms for ensuring that the agent (the attorney) remains accountable to the principal (the shareholders). Individual actions, because the attorney is assumed to be directly accountable to her client, do not. Allowing attorneys to recover representative fees for filing individual actions avoids these mechanisms and renders the lawyers wholly unaccountable to the broader interests attributed to them. It would not be surprising if such unconstrained agents represented no one but themselves.

Courts should therefore refuse to award representative fees to attorneys that file individual actions. Awarding class-based attorneys' fees to individual claimants is inconsistent with fundamental principles of fairness and unsupported by the theory underlying both the common fund and corporate benefit doctrines. If courts consistently refused to award representative fees for individual actions, plaintiffs could still file individual claims. And some large institutional investors probably would do so. But most individuals probably would not, simply because they are likely unwilling to pay their lawyers directly and their lawyers, unable to recover fees from the corporation, would likely be unwilling to take the case. Instead, the lawyers would channel such claims back into class or derivative suit filings—a salutary result since class and derivative claims, unlike individual suits, contain mechanisms for ensuring the accountability of the attorney-agent to the interests of the shareholder class.

B. Motivate Defendants to Resist

All of the above focuses on the judicial *award* of fees. However, as already noted, most merger suits today are not resolved with a judicial award of fees, but rather with the corporate defendant acquiescing to pay the plaintiffs' attorneys based on mootness. How, then, does clarifying the basis on which fees may and may not be awarded by courts affect a system in which fees are not collected by judicial order? Even if courts could not award class-based fees for individual filings, claimants could still file individual actions and resolve them for mootness fees without involving a court. Alternatively, plaintiffs might not even file a complaint at all, but simply send defendants a letter threatening to do so unless they moot their concerns and acquiesce to paying them a fee for their troubles. Considering their willingness to pay rather than fight, defendants appear to be complicit in this arrangement, which explains why the strongest arguments under the PSLRA are so rarely raised. How, then, does a reform focusing on the judicial award of fees respond to a world in which fees are often paid without ever being awarded by a court?

The answer lies in the notion that all bargaining takes place in the shadow of the law.[70] What parties agree to do privately depends upon what they may be ordered to do publicly. Applied here, this means that the amount that judges can reasonably be expected to award in a contested fee application sets a ceiling on plaintiffs' ability to claim fees from the defendant. As a result, plaintiffs' inability to recover fees in court should reduce or even eliminate defendants' willingness to pay them in private negotiations.

In addition to the legal merits, a second contributing factor to settlement value is the cost of deciding a claim. If the process for determining a claim's value is long and costly, it may have positive settlement value without regard to its underlying legal merit. Thus, even if plaintiffs' attorneys are not entitled to a judicial award of fees, they may nevertheless be able to extract fees from the defendant up to the cost of litigating the claim.

A clear means of addressing these costs is for defendants to credibly commit not to pay plaintiffs' attorneys' fees in nuisance suits. If defendants did not pay, plaintiffs would not bring claims for hold-up value. The situation has the structure of a collective action problem: all defendants would prefer that no defendants pay fees to hold-up plaintiffs, but individual defendants would generally prefer to pay fees to get out of their own claim. Defendants cannot coordinate. Therefore, defendants cannot credibly commit.

There is, however, a repeat-play defendant behind the settlement of every claim: the D&O insurer.[71] Insurers could insist that their corporate insureds refuse to pay mootness fees, either *ex post* by litigating cases to the motion to dismiss, or *ex ante* by adopting "no-pay" bylaws that

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70. *See generally* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) (explaining that when courts encourage private bargaining between parties, bargaining occurs in the shadow of the law).

71. *See* BAKER & GRIFFITH, *supra* note 69, at 2–3 (observing that virtually all public companies carry D&O insurance and examining how D&O insurers change corporate incentives in governance and litigation).

preclude them from paying attorneys' fees in nuisance suits.[72] Because insurers play the bank in shareholder litigation, funding the conduct of litigation and settlements under the terms of the D&O policy, they have strong incentives to eliminate waste from the system. Moreover, they could motivate defendants by providing incentives (for example, by offering to pay litigation expenses in excess of limits) to policyholders for litigating the motion to dismiss or adopt no-pay bylaws. Moreover, litigation would not be necessary in every case but likely only a handful of cases, since once the credible commitment mechanism was established, plaintiffs would likely no longer waste their own resources on non-meritorious suits.

C. Coordinate the Judicial Response

In a prior co-authored article, I argued that the problem of merger-related nuisance suits would be solved by moving this litigation into federal court.[73] My co-authors and I reasoned, consistent with the arguments above, that such claims would not survive an encounter with the PSLRA.[74] Since the publication of that article, however, *Trulia* solved the problem in Delaware, yet merger-related nuisance litigation continues, largely unabated, in federal court.

Our mistake lay in failing to account for differences in the organizational structure of the Delaware judiciary, on the one hand, and the federal judiciary, on the other. These differences give Delaware an advantage over the federal courts in responding to perceived litigation excesses. Most notably, in Delaware, a single court, the Court of Chancery, hears all corporate law cases, and although the judges on that court sit individually, the court has only seven (then five) members. Moreover, because the members of the Court of Chancery hear so many related cases and regularly meet to discuss them, it is relatively easy for the court to design a coherent and consistent approach to recurring issues or, as in the case of disclosure-based merger litigation, systemic problems.

The federal judiciary, by contrast, consists of approximately 650 district court judges scattered across the country.[75] They do not specialize in a particular type of case. Moreover, in spite of the relatively large number of 14a-9 claims filed in federal district courts, individual judges

72. Sean J. Griffith, *Private Ordering Post-*Trulia*: Why No-Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 292, 304–307 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (explaining how no-pay bylaws could solve the nuisance suit problem).

73. Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015).

74. *Id.* at 608–12.

75. KAREN E. HAYDEN, SOCIETY AND LAW 89 (2020).

are not especially likely to be assigned one and may rarely encounter securities class actions during their entire career on the bench. Most federal judges do not have a background in corporate or securities law and are therefore unlikely to be familiar with the operation of the PSRLA or the policy issues surrounding it.[76] They do not generally meet to coordinate their approach on issues and are not bound to follow other district court rulings even within the same circuit. Although district courts are bound to follow the rulings of their Circuit Court of Appeals, rulings in merger-related nuisance suits are rarely appealed. For this reason, binding appellate precedent is largely absent in this area—the notable exception being the Seventh Circuit[77]—leaving federal district courts largely uncoordinated and unconstrained.

Additionally, federal judges are likely to be operating in an informational vacuum when the 14a-9 claims they have been assigned are resolved for mootness. Judges operating in an adversarial system, as opposed to an inquisitorial system, rely on the parties to inform them of relevant legal issues. However, unless the defendant contests the fee, there is no adversarial process before the judge in a mootness resolution. As a result, neither the requirements of the PSLRA, nor any other serious issue, such as the filing of individual as opposed to class actions, is raised to the judge. Only a highly motivated judge thoroughly steeped in corporate and securities law issues is likely to raise concerns *sua sponte*. Moreover, district court judges have a history of disregarding the PSLRA, even when the terms of the statute require them to act—for example, by requiring certified undertakings or making Rule 11 filings.[78] When, as in the case of a mootness resolution, the parties have arranged for the discrete disappearance of their dispute, judges are unlikely to intervene to prevent the removal of a case from their docket.

As a result, it is somewhat naïve to expect individual federal judges to solve the problem of merger-related nuisance suits.[79] Were one federal district court judge to read the PSLRA and apply it as written, there would

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76. Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 85–86 (2002).

77. *See supra* note 39 and accompanying text.

78. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the PSLRA*, 44 J. LEGAL STUD. S87 (2015).

79. My former co-authors have doubled down on this approach in a new paper, advocating amendments to FRCP 23 to require mootness awards to be approved by a federal district court judge. Cain et al., *Mootness Fees*, *supra* note 2, at 1805, 1810–14. However, without some means of coordinating the judiciary, such an approach essentially creates a lottery in which success depends largely upon the judge one draws, the same basic system that prevailed in disclosure settlements pre-*Trulia*. Marianna Wonder, *The Changing Odds of the Chancery Lottery*, 84 FORDHAM L. REV. 2381 (2016). A simpler and more promising approach, I argue, lies in coordinating the federal judiciary around consistent application of the PSLRA.

still be 649 or so that might not.[80] In order for federal courts to solve the nuisance suit problem rather than exacerbating it, there must be a coordination mechanism around which federal district courts can organize a unified approach to 14a-9 filings and application of the PSLRA to them. Fortunately, coordination mechanisms exist.

The Federal Judicial Conference (the "Conference") consists of representatives from all levels of the federal judiciary and, through its standing and advisory committees, develops judicial policy for U.S. courts.[81] The Conference could and should consider changes to procedural rules to develop a coherent and coordinated approach to merger- and disclosure-related litigation filed in federal courts. Specifically, the Conference should adopt a rule precluding judges from awarding attorneys' fees based on class-wide benefits for filing individual actions. Fees based on class-wide benefits should only be available to attorneys filing class or derivative actions. Furthermore, the Conference could and should require federal district court judges to apply the provisions of the PSLRA to all securities class action filings.

In addition to the Conference, the Federal Judicial Center (the "Center") offers educational programming to federal judges on various substantive and procedural matters.[82] The Center could and should design educational programming around the trends in merger-related nuisance suits described in this Essay. It should also design educational programming about the provisions of the PSLRA and their applicability to these suits.

Coordination through the Conference and the Center would enable the federal judiciary to develop a unified approach to what has become a systemic problem. Merger- and disclosure-related claims filed under the federal securities laws and the mootness-based resolutions that accompany them are problematic not only because they impose a meaningless tax on corporations and their investors, but because the easy availability of fee-based resolutions may disincentivize attorneys from investing in cases of legitimate wrongdoing. And taxing fees and costs to corporations without giving the shareholders an opportunity to opt-out or object is fundamentally inequitable and deprives them of statutory rights under Rule 23 and the provisions of the PSLRA.

CONCLUSION

This Essay has examined the problem of merger-related nuisance suits. It has supplied empirical evidence from a dataset of frequent filer

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80. One is an exaggeration. There are at least three. *See supra* note 49 and accompanying text.

81. 28 U.S.C. § 331 (2018) (creating the Federal Judicial Conference).

82. § 620 (creating the Federal Judicial Center).

plaintiffs, finding that over a five-year period seven individual plaintiffs filed 282 shareholder suits. Analysis of these filings reveals that they have been designed strategically to avoid hostile state court precedent as well as application of the PSRLA. The most recent innovation along these lines appears to be filing of individual rather than class-based complaints.

Federal courts already have the means, through the PSLRA, to correct these problems. However, doing so requires coordination. Fortunately, coordination mechanisms exist. The Federal Judicial Conference and the Federal Judicial Center should be used to develop a unified approach to stop the flood of merger-related nuisance litigation.