Creatures of Habit: Predictions About Delaware’s Future Treatment of Disclosure Only Settlements and What It Means for Plaintiffs’ Attorneys Seeking a Pay Day

Peter Diliberti
Boston College Law School, peter.diliberti@bc.edu

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CREATURES OF HABIT: PREDICTIONS ABOUT DELAWARE’S FUTURE TREATMENT OF DISCLOSURE ONLY SETTLEMENTS AND WHAT IT MEANS FOR PLAINTIFFS’ ATTORNEYS SEEKING A PAY DAY

Abstract: Scholars agree that in order for states to either obtain or maintain the business of corporate merger litigation, they must engage in competition with one another. Delaware has participated in this competition in the past to maintain its position as the country’s leading forum for corporate merger litigation. One of the most prominent aspects of this type of litigation is the “disclosure only settlement.” In the 2016 case In re Trulia, the Delaware Court of Chancery broke from a well-established precedent of approving disclosure only settlements and indicated it would be applying a heightened level of scrutiny to them. As a result of this heightened standard, it is likely that plaintiffs’ attorneys will seek out other forums that do not apply such a level of scrutiny to disclosure only settlements. If Delaware wishes to maintain its status as the leading forum for corporate litigation, it will need to employ new strategies. To this end, Delaware has suggested that plaintiffs use something known as the “mootness dismissal scenario” to circumvent the heightened scrutiny that comes with this common type of settlements. This Note hypothesizes that Delaware will continue to promote the mootness dismissal scenario in an attempt to remain competitive. It will be left to plaintiffs’ attorneys to respond by either continuing to file suit in Delaware or testing the waters in what may be friendlier jurisdictions.

INTRODUCTION

In July of 2014, Trulia, Inc. and Zillow, Inc. announced a proposed merger of their companies. The two corporations delivered similar services, providing information on properties available for sale or rent to customers. In re Trulia, Inc. Stockholder Litig., 129 A.3d 884, 888 (Del. Ch. 2016) (discussing the proposed disclosure only settlement for the merger). The court in In re Trulia noted that a stockholder lawsuit is filed after the announcement of almost every merger of public corporations. Id. at 887. In 2005, the percentage of mergers that resulted in a lawsuit was 39.3%. See Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2013, at 2 tbl.A (Ohio State Pub. Law & Legal Theory, Working Paper Series No. 236, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377001 [https://perma.cc/7NCA-D7YH] (examining the state of merger litigation through data and analytics). By 2013, that number had grown to 97.5%. Id.

In re Trulia, 129 A.3d at 888. More specifically, the companies provide this information in an effort to make it easier on buyers/sellers of real estate to see what is currently available on the market. Id.
September of that same year, Christopher Shue, Matthew Sciabacucci, Chaile Steinberg, and Robert Collier, all Trulia stockholders, filed a lawsuit against both Zillow, Inc. and Zebra Holdco, Inc., which is now Zillow Group, Inc., alleging breach of fiduciary duty arising from this merger. After minimal discovery, the parties arrived at a settlement agreement on November 19, 2014. The agreement required that the defendants make additional disclosures in their filings with the Securities and Exchange Commission (SEC), an agreement commonly known as a “disclosure only settlement.” In exchange, the defendants obtained a broad release of claims from the plaintiffs. The only money to exchange hands in this settlement was from the defendants to the plaintiffs’ attorneys.

Prior to 2016 and the landmark case *In re Trulia*, courts were inclined to approve these disclosure only settlements. The previous standard by which

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3 *Id.* The plaintiffs allege a number of claims in the complaint, but discuss only the inadequate disclosures released by the corporation in advance of the proposed merger. *Id.* at 889. Two of the most prevalent fiduciary duties a board of directors owes to the corporation and its stockholders are the duty of care and the duty of loyalty. See *Malpiede v. Townson*, 780 A.2d 1075, 1083, 1101 (Del. 2001) (holding that duty of care claims cannot be successful when a corporation has adopted an exculpatory provision); Dweck v. Nasser, C.A. No. 1353-VCL, 2012 WL 161590, at *12 (Del. Ch. Jan. 18, 2012) (holding that a defendant corporation breached its duty of loyalty by misusing corporate resources in order to derive a personal benefit). Duty of care claims involve a grossly negligent action, typically by a board of directors, which is then challenged by stockholders. See *Malpiede*, 780 A.3d at 1089 (discussing the plaintiffs’ duty of care claims). Duty of loyalty claims typically arise when an officer or director of the corporation abuses his/her power for personal benefit, rather than for the benefit of the corporation. See *Steiner v. Meyerson*, Civ. A. No. 13139, 1995 WL 441999, at *2 (Del. Ch. July 19, 1995) (discussing the essence of a duty of loyalty claim).

4 *In re Trulia*, 129 A.3d at 888–89. The discovery record contained less than three thousand pages of documents, a record which the court characterized as “sparse.” *See id.* at 893 (implying that the court felt the discovery efforts of the parties were inadequate to allow the court to truly evaluate the fairness of the proposed settlement agreement).

5 *Id.* at 889. The SEC is tasked with regulating the financial markets of the United States, which includes requiring corporations to make certain disclosures for various actions. *What We Do*, U.S. SEC. & EXCHANGE COMMISSION (June 10, 2013), https://www.sec.gov/Article/whatwedo.html [https://perma.cc/8SXU-VWVQ]. An example of a typical disclosure that is made by defendants is providing information that supplements the proxy materials previously distributed ahead of a vote surrounding a proposed merger. *In re Trulia*, 129 A.3d at 891.

6 *In re Trulia*, 129 A.3d at 889–90. The final language of the release prohibited plaintiffs from later bringing “any claims arising under federal, state, statutory, regulatory, common law, or other law or rule” against the defendant. *Id.* at 890. As broad as this language is, it is actually scaled back from what the original language would have been. See *id.* (explaining the original language would have included a release from any “Unknown Claims” and “foreign” claims).

7 *Id.* at 887.

8 *See In re Riverbed Tech., Inc. Stockholders Litig.*, C.A. No. 10484–VCG, 2015 WL 5458041, at *5–8 (Del. Ch. Sept. 17, 2015) (approving a disclosure only settlement when the disclosures were “not of great importance”); *In re Dr. Pepper/Seven Up Cos., Inc. S’holders Litig.*, Civil Action No. 13109, 1996 WL 74214, at *4–6 (Del. Ch. Feb. 9, 1996) (approving a disclosure only settlement when it was “meager” and afforded only a minor benefit to stockholders).
In re Trulia altered that standard and signified a shift in the legal landscape toward a stricter examination of disclosure only settlements. Courts across several jurisdictions seem to be much less likely to approve disclosure only settlements, due to the heightened level of scrutiny being applied to them. There are, however, some jurisdictions that have continued to view disclosure only settlements more favorably post In re Trulia, despite adopting a higher level of scrutiny than the original material standard.

Scholars agree that states compete for corporate filings in various ways. There is more recent evidence to support the position that states also compete with one another to obtain corporate litigation. In the past Delaware has reacted to a loss in litigation by increasing its competitiveness with other states, in an effort to maintain its hold on the market for corporate litigation. This Note suggests that Delaware will continue to adapt its strategies to maintain its competitive position as the leading forum for corporate litigation over other

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9 See In re Riverbed, 2015 WL 5458041, at *4 (determining whether an additional disclosure would have changed the information available to a stockholder in an effort to evaluate a disclosure only settlement under the material standard); In re Dr. Pepper, 1996 WL 74214, at *3 (applying the material standard to disclosure only settlements). The material standard was relatively easy to satisfy, as it required only that the disclosures be related to information that a stockholder would consider in deciding how to vote. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

10 In re Trulia, 129 A.3d at 898.

11 See Farber v. Crestwood Midstream Partner L.P., 863 F.3d 410, 415–16 (5th Cir. 2017) (adopting the plainly material standard established by In re Trulia); In re Walgreen Co. Stockholder Litig., 832 F.3d 718, 725–26 (7th Cir. 2016) (following the plainly material standard in In re Trulia and rejecting a disclosure only settlement because it did not provide adequate consideration to plaintiffs); Bushansky v. Remy Int’l, Inc., 262 F. Supp. 3d 742, 746 (S.D. Ind. 2017) (rejecting a disclosure only settlement because none of the supplemental disclosures were material to the plaintiffs); In re Trulia, 129 A.3d at 898 (holding disclosure only settlements to a higher standard in order to receive judicial approval). The plainly material standard adopted by In re Trulia requires a much higher level of scrutiny than its predecessor, the material standard. In re Trulia, 129 A.3d at 898.


13 See Matthew D. Cain & Steven Davidoff Solomon, A Great Game: The Dynamics of State Competition and Litigation, 100 IOWA L. REV. 465, 472 (2015) (discussing the commonly accepted principle that there is state competition for initial public offering filings); Robert Daines, The Incorporation Choices of IPO Firms, 77 N.Y.U. L. REV. 1559, 1566, 1572 (2002) (providing numerical data to show that Delaware is dominating the competition between states for corporation filings).

14 See Cain & Solomon, supra note 13, at 472 (discussing how states compete for litigation by altering their dismissal rates of cases or increasing attorney’s fees).

15 See id. at 496–97 (providing evidence to show that Delaware has previously reacted to a loss in litigation by increasing its efforts to compete with other states).
states that have declined to apply a similar heightened scrutiny to disclosure only settlements.\textsuperscript{16}

Part I of this Note begins with a discussion of the mechanics and policy behind the requirement for judicial approval of class action settlements.\textsuperscript{17} It also explains the technical aspects of disclosure only settlements, and examines how the courts traditionally treated them.\textsuperscript{18} Part II highlights the evolution of the legal landscape surrounding the approval of disclosure only settlements and introduces the mootness dismissal scenario.\textsuperscript{19} Part III discusses the motivating factors behind class action litigation and how states, including Delaware, have previously competed for litigation.\textsuperscript{20} Part IV concludes that based on its previous behavior, Delaware courts will use the mootness dismissal scenario as its core mechanism for competing with other states to maintain corporate litigation, and that Delaware’s primacy will thus be determine by plaintiffs’ lawyers.\textsuperscript{21}

\section{I. Judicial Approval of Class Action Settlements and an Overview of the Prior Legal Treatment of Disclosure Only Settlements}

The settlement of a class action lawsuit, a common outcome in the realm of corporate law, requires judicial approval.\textsuperscript{22} This often takes the form of a disclosure only settlement.\textsuperscript{23} Section A of this Part explains the policy behind the judicial approval requirement of class action settlements.\textsuperscript{24} Section B goes on to further explicate the disclosure only settlement, and how courts have generally treated them in the past.\textsuperscript{25}

\begin{thebibliography}{99}
\bibitem{noteref16} See \textit{Gordon}, 46 N.Y.S.3d at 565 (showing New York is likely to continue approving disclosure only settlements); \textit{City Trading Fund}, 72 N.Y.S.3d at 371 (stating that New York’s standard is easier to meet than Delaware’s); Cain & Solomon, \textit{supra} note 13, at 496 (noting that Delaware has previously altered its habits when facing a loss in corporate litigation in an effort to maintain it).
\bibitem{noteref17} See \textit{infra} notes 26–48 and accompanying text.
\bibitem{noteref18} See \textit{infra} notes 49–70 and accompanying text.
\bibitem{noteref19} See \textit{infra} notes 71–139 and accompanying text.
\bibitem{noteref20} See \textit{infra} notes 140–173 and accompanying text.
\bibitem{noteref21} See \textit{infra} notes 174–204 and accompanying text.
\bibitem{noteref22} See FED. R. CIV. P. 23 (governing rule on class actions in federal law); DEL. CH. CT. R. 23.1 (governing rule on class actions in Delaware state law); \textit{In re Trulia}, 129 A.3d at 887 (discussing the frequency with which class action lawsuits occur in the corporate realm).
\bibitem{noteref23} See Cain & Solomon, \textit{supra} note 1, at 6 (discussing the rate of disclosure only settlements in Delaware).
\bibitem{noteref24} See \textit{infra} notes 26–48 and accompanying text.
\bibitem{noteref25} See \textit{infra} notes 49–70 and accompanying text.
\end{thebibliography}
A. The Requirement of Judicial Approval of Class Action Settlements

A common vehicle for challenging actions taken by a corporation is the class action lawsuit. A class action lawsuit is one brought on behalf of a group of people who all face a similar harm based upon the action of the defendant. According to Delaware Chancery Court Rules, which mirror the Federal Rules of Civil Procedure, any settlement of a class action lawsuit must be reviewed and approved by a judge in order for it to be valid. A judge must find that the settlement is “reasonable and intrinsically fair.” This approval is necessary because class action settlements have the potential to bind all members of the class to their terms, and courts have an intrinsic mandate to ensure equitable resolutions, especially regarding large classes and binding settlements.

In examining the fairness of a proposed settlement, the court must conduct a thorough investigation into the legal claims presented, assess the likelihood of success, and consider any appropriate defenses. This investigation includes a balancing of the possible outcomes and interests of the plaintiffs and defendants. In doing so, the court must look at the “give” and “get” and en-

26 See In re Trulia, 129 A.3d at 887 (stating that almost all public corporation acquisition is challenged by a class action suit); C.N.V. Krishnan et al., Jurisdictional Effects in M&A Litigation, 11 J. EMPIRICAL LEGAL STUD. 132, 133 (2014) (noting that nearly 86% of M&A lawsuits are class actions). It is a well-established principle that courts generally prefer to have legal disputes settled prior to trial, to save time and avoid unnecessary court costs. Rome v. Archer, 197 A.2d 49, 53 (Del. Ch. 1964).

27 See FED. R. CIV. P. 23 (governing rule on class actions in federal law). There are several prerequisites for a class action lawsuit, including (1) that it be impractical to join all members in the suit; (2) the class shares either common questions of law or fact; (3) the representatives of the class have the same claims or defenses as the other members; and the representatives of the class will protect the class’s interests. Id.

28 Id.; DEL. CH. CT. R. 23.1. Regarding matters of corporate law, states have taken the driver’s seat and federal law has not intervened. See William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 YALE L.J. 663, 663 (1974) (declaring that state law has “always been supreme” on corporate matters and federal law involvement is “limited”). As such, this Note will focus its analysis on state law, specifically Delaware, as it is the leading state on corporate matters. See id. at 664 (noting that in 1913, Delaware took over from New Jersey as the leading state for corporate matters and has not relinquished its position since).

29 See In re Trulia, 129 A.3d at 891, 898 (discussing the underlying rationale behind the plainly material standard being applied to disclosure only settlements). The standard adopted in federal court is that a settlement must be fair, adequate, and reasonable. FED. R. CIV. P. 23. The plainly material standard imposes a heightened level of scrutiny on disclosure only settlements. In re Trulia, 129 A.3d at 898.

30 See Kahn v. Sullivan, 594 A.2d 48, 58–9 (Del. 1991) (reasoning that because the interests of all shareholders must be considered and advanced, judicial approval of a class action settlement that would be binding on the shareholders is necessary); Rome, 197 A.2d at 53 (explaining the important role the judiciary plays in approving a class action settlement).

31 Rome, 197 A.2d at 53.

32 See In re Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1043 (Del. Ch. 2015) (discussing the balancing of interests that the court must do when considering the approval of a settlement).
sure there is an appropriate balance between the two.33 The “give” refers to the
benefit that a defendant corporation receives by the lawsuit being dropped and
a release of claims being signed by the plaintiffs.34 The “get” refers to the ben-
efit the plaintiff class members receive in exchange for granting the defendant
corporation that relief.35 In a disclosure only settlement, that benefit is not
monetary, but rather involves the release of supplemental information about
the defendant corporation.36 When both parties agree to a settlement, the dy-
namics of the lawsuit shift, which necessitates judicial examination of the
terms of the settlement.37

A key aspect of a lawsuit is its adversarial nature.38 When plaintiffs and
defendants reach a settlement agreement, this adversarial element is removed
and the sole goal of both parties is to ensure that the settlement receives judi-
cial approval.39 The defendants are motivated by the nearing end of the lawsuit
against them and limiting their financial liability, whereas the plaintiffs’ attor-
eyes are motivated by the opportunity to receive attorney’s fees.40

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33 Id.
34 Id.
35 See id. (explaining the importance of ensuring that the interests of the class members must be balanced against a corporation’s desire for settlement).
36 See In re Trulia, 129 A.3d at 891 n.15 (explaining what the court means when it uses the term disclosure only settlement). This supplemental information often comes in a Form 8-K filed with the SEC. Id. at 887–89. A Form 8-K is what a corporation files with the SEC to satisfy its filing obliga-
tions under the Securities Exchange Act of 1934. What We Do, supra note 5.
37 See In re Trulia, 129 A.3d at 893 (explaining in detail the various issues surrounding judicial approval of a disclosure only settlement).
39 See In re Trulia, 129 A.3d at 893.
40 See id. at 891–92 (discussing generally the benefits each party receives in a disclosure only settlement). In most cases, the American legal fee system is one in which each party is responsible for paying its own attorneys. See Horsey v. Horsey & Sons, Inc., Civil Action No. 8972-VCG, 2016 WL 1274021, at *1 (Del. Ch. Mar. 21, 2016) (providing an example of the American legal fee system). This is different from the English legal fee system, in which the losing party is often required to pay the winning party’s legal fees. See Mark Lebovitch & Jeroen van Kwawegen, Of Babies and Bath-
water: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims, 40 DEL. J. CORP. L. 491, 517 (2016) (comparing briefly the English and American legal fee systems). In the settlement of class action lawsuits, however, courts have held that the defendant cor-
poration can be responsible for paying the plaintiffs’ attorney’s fees. See Waterside Partners v. C. Brewer & Co., 739 A.2d 768, 769–70 (Del. 1999) (explaining that attorney’s fees can be shifted to defendants when the benefit obtained goes to a class); Allied Artists Pictures Corp. v. Baron, 413 A.2d 876, 878 (Del. 1980) (discussing that if the action taken by defendants during a proposed settle-
ment stems from the actions of the plaintiffs, then the defendants may be responsible for attorney’s
holder plaintiffs, however, receive no monetary compensation and the only benefit they receive is that which they derive from the additional information. Without the adversarial element present in a settlement, the judge must intervene to assess its intrinsic fairness. When plaintiffs and defendants share the same interest of obtaining settlement approval, they will no longer provide arguments against the settlement, or the attorney’s fees accompanying it, and it is left to the court to become a pseudo-advocate to ensure the settlement is truly in the best interests of all parties.

There is an even greater problem inherent to merger litigation settlements than their non-adversarial nature—the expedited nature of proceedings. Because settlements related to a proposed merger or acquisition are often reached quickly in order to allow the deal to go through, discovery tends to be minimal. One example of a typical record for a case involving a disclosure only settlement included no motions being decided, the production of fewer than three thousand documents, and only one deposition taken prior to the settlement agreement being reached. This provides a unique challenge to the judge, who must rule on the intrinsic fairness of deal without having a thor-

fees). Attorney’s fees in Delaware are calculated using a combination of the Sugarland factors: “(1) the benefit achieved in the action; (2) the contingent nature of the undertaking; (3) the difficulty of the litigation and the efforts of counsel; (4) the quality of the work performed; and (5) the standing and ability of counsel.” Franklin Balance Sheet Inv. Fund v. Crowley, No. Civ.A. 888-VCP, 2007 WL 2495018, at *12 (Del. Ch. Aug. 30, 2007) (citing Sugarland Indus., Inc. v. Thomas, 420 A.2d 142, 149–50 (Del. 1980)).

41 See In re Trulia, 129 A.3d at 891–92 (indicating that plaintiffs receive only the benefit of the additional information). The court in In re Trulia went on to say that often times this type of litigation is useless to the stockholder plaintiffs and only provides a true benefit to the plaintiffs’ attorneys. See id. (stating that it is “relatively infrequent” that this type of litigation provides any meaningful benefit to stockholder plaintiffs).

42 See Ginsburg v. Phila. Stock Exch., Inc., Civil Action No. 2202-CC, 2007 WL 2982238, at *1 (Del. Ch. Oct. 9, 2007) (noting that once a settlement has been reached, former adversaries become one with a united interest in obtaining judicial approval).

43 See id. at *1 (explaining that once adversarial parties prior to a settlement join forces to achieve judicial approval of their proposed settlement offer); In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959, 961 (Del. Ch. 1996) (noting that the non-adversarial nature of this stage requires the court to make its own efforts in evaluating the discovery record, something that is inherently less reliable than any judicial finding that is made after the trial process).

44 See In re Trulia, 129 A.3d at 893 (providing an example of the speedy timeline disclosure only settlements typically have). The difficulty with the expedited timeline of proceedings is that it limits the discovery record and, as such the court has less information to examine when deciding whether to approve a settlement. Id.

45 Id. In 2008 the average civil lawsuit involving major companies would include nearly five million pages of documents during discovery. LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES 1, 3 (2010), http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies _0.pdf [https://perma.cc/ZMC9-WQR3]. For contrast, the discovery record the court was asked to review during In re Trulia involved less than three thousand pages. In re Trulia, 129 A.3d at 893.

46 In re Trulia, 129 A.3d at 893.
ough record on the matter. As a result, judges often find themselves becoming finders of fact—a position that is generally reserved for a jury.

B. Technical Aspects of Disclosure Only Settlements and the Prior Treatment of Them

Disclosure only settlements have become remarkably popular and effective in resolving corporate lawsuits. In a disclosure only settlement, plaintiffs agree to drop a lawsuit against the defendant corporation in exchange for the release of further information from the defendant. This additional information can be anything from more information about the technical details surrounding a merger, to information supplementing the materials distributed ahead of a stockholder vote for a specific transaction. Often times, these disclosure only settlements include a broad release of claims against the defendant—including claims that may not be specifically mentioned in the lawsuit.

47 Id. at 894.
48 See U.S. CONST. amend. XII (including explicitly the right to a jury trial). The founders included in the Bill of Rights the right to a jury trial in civil cases. Id. In doing so, they established the jury, and not the judge, as the primary fact finder in such trials. Id.
49 See In re Walgreen Co., 832 F.3d at 725 (discussing further In re Trulia and disclosure only settlements); Bushansky, 262 F. Supp. 3d at 746 (denying a proposed disclosure only settlement because it fails the In re Trulia plainly material standard). From 2005 to 2013, the percentage of all Delaware settlements with resolutions involving disclosures rose from 46.4% to 78.6%. See Cain & Solomon, supra note 1, at 5 tbl.C (discussing the rise in disclosure only settlements in Delaware).
50 In re Trulia, 129 A.3d at 891 n.15. This Note has discussed how the actual stockholder plaintiffs receive little to no benefit from disclosure only settlements. See supra note 41 and accompanying text. The underlying theory about why these types of settlements are beneficial to plaintiffs is that it may provide further information that might influence a stockholders vote on a proposed transaction. See In re Trulia, 129 A.3d at 887 (explaining that the fundamental theory behind disclosure only settlements is to better inform stockholders in advance of a transaction vote). Ultimately, scholars have found that this does not seem to be the true motivating factor behind these lawsuits and their accompanying settlements. See Cain & Solomon, supra note 13, at 480 (discussing that plaintiffs’ attorneys must file a high volume of lawsuits in order to maintain their business); John C. Coffee, Jr., Understanding the Plaintiffs’ Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669, 677 (1986) (explaining that plaintiffs’ attorneys operate under an assumption that only a few of their cases will be successful, so they must file numerous lawsuits in order to maintain their business). Instead, they have found that plaintiffs’ attorneys are the true lifeblood of lawsuits challenging merger transactions and their primary motivation is obtaining attorney’s fees. See Elliot J. Weiss & Lawrence J. White, File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions, 57 VAND. L. REV. 1797, 1851–52 (2004) (finding that stockholder litigation is propelled by lawyers and not for the stockholders’ benefit).
51 In re Trulia, 129 A.3d at 891 n.15.
52 See In re Walgreen, 832 F.3d at 725 (discussing that courts have traditionally granted broad releases to corporations with the approval of disclosure only settlements); In re Trulia, 129 A.3d at 894 (contending that because of the routine approval of disclosure only settlements and the broad releases that often accompany it, there has been an increase in litigation filed). The initial release that both parties agreed to was characterized by the court as “extremely broad” and even included any claims that if a plaintiff had known about would have prevented said plaintiff from agreeing to the
In a disclosure only settlement, the plaintiffs do not receive any money—instead the only actors who receive money are the plaintiffs’ attorneys. This idea was famously encapsulated in Solomon v. Pathe Communications Corp., when the Supreme Court of Delaware reasoned that economically rational defendants will settle stockholder litigation claims for a “peppercorn and a fee.” As it pertains to disclosure only settlements, the peppercorn is the minimal supplemental disclosure made by the defendants that effectively leads to the settlement, and the fee is the money that the plaintiffs’ attorneys receive.

Until recently, courts in Delaware would routinely approve disclosure only settlements. In fact, courts seemed to go to great lengths to approve such settlements by including qualifying language such as “meager” and “some” to the terms settlement and benefit in their written opinions. The language implies that so long as there is “some” benefit from the disclosures to plaintiffs, no matter how small, the court will approve the settlement. For example, the court in In re Dr. Pepper/Seven Up alluded to the fact that if parties came to a settlement agreement it would be approved, as long as there was some benefit conferred to the plaintiffs, no matter how small. A more recent case, In re Riverbed, resulted in judicial approval of a disclosure only settlement, despite the fact that the record showed the additional disclosures made by the defendants made no impact on stockholders.

settlement. In re Trulia, 129 A.3d at 889. A full analysis of this ostensibly inequitable outcome is beyond the scope of this Note.

53 In re Trulia, 129 A.3d at 887.
55 See In re Trulia, 129 A.3d at 891–92 (discussing the benefits various parties in a disclosure only settlement receive).
56 See In re Riverbed, 2015 WL 5458041, at *8 (approving a disclosure only settlement even when the disclosures were of little or no importance to stockholders); In re Dr. Pepper, 1996 WL 74214, at *4, *6 (Del. Ch. 1996) (approving a disclosure only settlement that only had a meager benefit to stockholders).
57 See In re Dr. Pepper, 1996 WL 74214, at *4. The court indicated that even if the disclosures are of minimal benefit to a plaintiff, the settlement will be approved. See id. (explaining the relatively low standard disclosure only settlements previously had to meet). In doing so, the court seems to be putting a great deal of emphasis on the judicial preference of settlements instead of trials. See id. (approving a disclosure only settlement); Rome, 197 A.2d at 53 (discussing the overall preference of the courts to have cases resolved by voluntary settlement).
58 See In re Dr. Pepper, 1996 WL 74214, at *4 (discussing the approval of a disclosure only settlement that only provided a minimal benefit to plaintiffs).
59 Id. This case arose from a holding company’s offer to purchase the outstanding shares in order to acquire Dr. Pepper/Seven Up. Id.
60 See In re Riverbed, 2015 WL 5458041, at *5 (noting “99.48% [of shares] voted in favor of the Merger despite the disclosures”). The judge went on to approve the disclosure only settlement, while remarking that “the disclosure here was not of great importance.” Id. More specifically, the disclosures offered seemed to imply that there was an ongoing relationship between the parties and the “independent” assessor that provided the price that was to be used in the transaction. See id. (discussing the ongoing relationships between the defendants and Goldman Sachs). The court also briefly mentioned tax disclosures that were made to make the transaction more attractive to potential voters,
Until *In re Trulia*, courts evaluated the supplemental disclosures under a material standard. As long as the supplemental disclosures provided additional information about a “material misrepresentation or omission,” they would be approved. The U.S. Supreme Court considers an omitted fact to be material if there is a “substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” The Supreme Court also emphasized that an omitted fact is material if it would “significantly alter the total mix of information made available.” This material standard provides a great deal of leeway to the courts because it does not require that the supplemental disclosures would have changed the vote of any shareholder, but simply that the information would be a consideration in deciding how to vote.

As a result of the lenient material standard of settlement approval, a number of lawsuits were filed against corporations, particularly following the announcement of a public merger or acquisition. Plaintiffs’ attorneys saw the opportunity to make a business out of filing lawsuits and having them quickly settled in exchange for minimal information and a small fee provided by the defendants. Defendants were inclined to settle in order to allow their deals to continue uninterrupted, and furthermore would frequently use the opportunity obtain a broad release of claims against them, even potential future claims that

which is contrary to the idea that these disclosures are supposed to inform stockholders of arguments against the act the corporation wants them to take. See *id.* (noting the tax disclosures were of minimal benefit to stockholders because they only served to make the merger “more attractive to the Class”).

61 *See id.* at *4 (applying the material standard to a disclosure only settlement before ultimately approving it); *In re Dr. Pepper*, 1996 WL 74214, at *3 (using the material standard and approving a disclosure only settlement).

62 *See In re Trulia*, 129 A.3d at 898 (overhauling the standard by which courts consider approval of a disclosure only settlement); *In re Riverbed*, 2015 WL 5458041, at *4 (approving a disclosure only settlement under the material standard); *In re Dr. Pepper*, 1996 WL 74214, at *3 (allowing a disclosure only settlement because the supplemental disclosures were material).


64 *TSC Indus., Inc.*, 426 U.S. at 449.

65 *See id.* (discussing broadly the standard of materiality and its relation to corporate disclosures).

66 *See In re Resorts Int’l S’holders Litig. Appeals*, 570 A.2d 259, 261 (Del. 1990) (resolving a lawsuit that was filed shortly after the announcement of an attempted corporate takeover); *In re Riverbed*, 2015 WL 5458041, at *4 (approving a disclosure only settlement for a lawsuit filed shortly after a merger announcement); *In re Dr. Pepper*, 1996 WL 74214, at *3 (using the materiality standard to approve a disclosure only settlement for a lawsuit filed promptly after an announced merger).

67 *See Solomon*, 672 A.2d at 38 (stating that plaintiff stockholders can often file frivolous class action lawsuits, because a loose reading of Chancery Rule 23.1 allows them to do so). Chancery Rule 23.1 governs what a plaintiff must include in a complaint, and if there is a stricter interpretation of this rule, it would likely result in less litigation overall. DEL. CH. CT. R. 23.1. This could result in fewer disclosure only settlements. *See Solomon*, 672 A.2d at 38 (alluding to the idea that a stricter reading of Rule 23.1 and other rules would result in fewer frivolous lawsuits).
were unknown to plaintiffs arising from the same facts. In exchange, defendant corporations merely had to make minimal disclosures to the public, many of which related to technical details about a deal that would likely not influence any shareholder’s vote on the matter. Plaintiffs and defendants alike became accustomed to this legal framework and learned to exist in it.

II. THE SHIFTING LEGAL LANDSCAPE REGARDING DISCLOSURE ONLY SETTLEMENTS: THE NEW PLAINLY MATERIAL STANDARD

Delaware’s jurisprudence surrounding disclosure only settlements changed dramatically with the Chancery Court’s decision in 2016, *In re Trulia*. With its decision, the court also mentioned possible alternative routes to the traditional disclosure only settlement that plaintiffs and defendants might take. Section A of this Part focuses on *In re Trulia* and how it changed Delaware’s law surrounding disclosure only settlements. Section B of this Part introduces one alternative approach, the mootness dismissal scenario, and highlights the differences between mootness dismissals and disclosure only settlements.

A. In re Trulia’s Effect on Disclosure Only Settlements

*In re Trulia* marks a monumental shift in Delaware’s treatment of disclosure only settlements. The case involved a merger agreement between Trulia
Inc., a Delaware corporation, and Zillow Inc., a Washington corporation.\textsuperscript{76} Shortly after the companies announced the agreement, several stockholders filed class action lawsuits.\textsuperscript{77} They claimed that the defendants breached their fiduciary duties by failing to provide enough information to stockholders ahead of the scheduled vote on the proposed merger.\textsuperscript{78} Shortly after the individual plaintiffs filed their respective lawsuits, the court consolidated them into one action, appointed lead counsel, and discovery began.\textsuperscript{79} The discovery in this case was modest, amounting to around three thousand pages of documents and three depositions.\textsuperscript{80} After the approximately four-month discovery period, the parties agreed to a disclosure only settlement, and sought judicial approval.\textsuperscript{81}

In the past, judges routinely approved these disclosure only settlements, often with minimal discussion.\textsuperscript{82} The In re Trulia court abandoned its material standard and instead adopted a stricter “plainly material” standard.\textsuperscript{83} The court indicated that going forward, disclosure only settlements would be more heavily scrutinized.\textsuperscript{84} By doing so, the court implied that the old standard was ineffective and resulted in unfavorable settlements for plaintiffs.\textsuperscript{85} The new standard would require that any supplemental disclosures must address “plainly ma-

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\item \textsuperscript{76} Id. at 888.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id. The plaintiffs in In re Trulia also allege a number of other fiduciary duty violations by the defendants; however, they only provided evidence and discussion of the lack of information/disclosures by the defendants. Id. at 889. See supra note 3 for a more complete description of fiduciary duties.
\item \textsuperscript{79} In re Trulia, 129 A.3d at 888.
\item \textsuperscript{80} Id. at 893. A study conducted on the general costs of litigation found that in 2008, the average number of pages produced in discovery for lawsuits that went to trial involving major Fortune 500 companies totaled nearly five million. See LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, supra note 45, at 15–16 (discussing the numerical costs of litigation and the burden this imposes on litigants). In the same year, the study found that these companies spent a mean value of $621,880 on discovery costs. Id. at 15. These numbers provide some context to the typical discovery record in civil litigation cases and show the contrast between this and the sparse discovery record found in disclosure only settlements. See In re Trulia, 129 A.3d at 893 (showing that fewer than three thousand pages of documents were produced in the discovery process for this case); LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, supra note 45, at 15–16 (providing data on the typical amount of discovery taken in Fortune 500 litigation that goes to trial).
\item \textsuperscript{81} In re Trulia, 129 A.3d. at 889–90.
\item \textsuperscript{82} See In re Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, 2015 WL 5458041, at *8 (Del. Ch. Sept. 17, 2015) (including minimal discussion before granting a settlement); In re Dr. Pepper/Seven Up Cos., Inc. S’holders Litig., 1996 WL 74214, at *6 (Del. Ch. Feb. 9, 1996) (approving a settlement after acknowledging that the disclosures are meager and provide a minimal, mostly therapeutic, benefit).
\item \textsuperscript{83} See In re Trulia, 129 A.3d at 898 (discussing in detail the shift in precedent towards a higher level of scrutiny for disclosure only settlements).
\item \textsuperscript{84} See id. (warning practitioners that Delaware courts are likely to look unfavorably upon disclosure only settlements in the future).
\item \textsuperscript{85} See id. (referring to the disclosure only settlement method of resolving merger litigation as “historically trodden but suboptimal”).
\end{itemize}
\end{footnotesize}
“Material” omitted facts to receive judicial approval. In order to eliminate any possible confusion about the new approach it was taking, the court went one step further and indicated that if it were a close call as to whether or not a supplemental disclosure satisfied this plainly material standard, then the settlement would not be approved. Under this more stringent standard, the court examined the disclosures made by the defendants, found that they were not plainly material, and ultimately denied the settlement.

The court in In re Trulia briefly discussed the possible effects of this “enhanced judicial scrutiny” on disclosure only settlements. It noted the possibility that the increased likelihood of rejection of such settlements in Delaware might lead plaintiffs to file lawsuits against Delaware corporations in other jurisdictions. In response, the court clarified that corporations maintain authority to adopt forum selection bylaws limiting the jurisdiction of any suit against it to Delaware. The court in In re Trulia realized that it was marking a shift in the legal landscape and it appealed to other jurisdictions to follow its approach of heightened scrutiny.

Following In re Trulia, lawyers and scholars alike wondered whether other jurisdictions would follow the plainly material approach, or whether they would continue to approve disclosure only settlements with minimal scrutiny.

86 Id.
87 See id. (“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.”). The court appears to be going to great lengths to make it clear that it does not favor disclosure only settlements going forward. See id. (including language that implies that disclosure only settlements are not preferable to this court).
88 Id. at 907.
89 See id at 899 (suggesting that this decision may cause plaintiffs’ attorneys to engage in forum shopping to move the litigation, and request that other jurisdictions follow this precedent).
90 Id.
91 Id. The authority for a corporation to unilaterally adopt a forum selection bylaw was first established in Delaware in 2013. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 938–39 (Del. Ch. 2013). A forum selection bylaw requires that certain lawsuits and issues be litigated in the forum established by the corporation in its bylaws. Id. at 937–38.
92 See In re Trulia, 129 A.3d at 899 (urging other courts to follow a similar line of thinking). The court explicitly says in the section regarding the plainly material standard, “We hope and trust that our sister courts will reach the same conclusion if confronted with the issue.” Id.
The well-known law firm Fried Frank, LLP released a briefing a few weeks after the decision stating that it was uncertain how other jurisdictions would react, and advised its corporate clients to wait and see before taking action.94 Legal scholars wrote articles discussing In re Trulia and hypothesizing what it would mean for the broader, countrywide treatment of disclosure only settlements.95

In August of 2016, eight months after In re Trulia, the United States Court of Appeals for the Seventh Circuit released an opinion adopting a heightened level of scrutiny for disclosure only settlements.96 This case, In re Walgreen Co. Stockholder Litigation, followed a similar fact pattern to In re Trulia.97 The Seventh Circuit came to the same conclusion as the Delaware Chancery Court and refused to approve the disclosure only settlement.98 Following the Seventh Circuit’s adoption of In re Trulia, several lower courts have applied this stricter analysis of the “give” and “get” of a disclosure only settlement and thus have refused to approve such settlements when the disclosures do not address a plainly material omitted fact.99

Although it is a higher standard, the plainly material standard laid out in In re Trulia and adopted by other jurisdictions does not necessitate that all dis-

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94 Bomba et al., supra note 93, at 4–5 (instructing corporate clients to wait and see how various jurisdictions will react to In re Trulia before making any decisions about how to proceed).
95 See Barkasy & Pereira, supra note 93, at *1 (discussing the broader effects of In re Trulia on New York and indicating that New York might not take the same attitude towards disclosure only settlements as Delaware); Holleman & Murkowski, supra note 93, at 17 (discussing the possible reach of In re Trulia to Michigan and discussing how the precedent established would impact Michigan’s treatment of disclosure only settlements).
96 See In re Walgreen, 832 F.3d at 725–26 (formally adopting the plainly material standard established in the Seventh Circuit by In re Trulia). The United States Court of Appeals for the Fifth Circuit has also adopted the plainly material standard. See Farber v. Crestwood Midstream Partners L.P., 863 F.3d 410, 415–16 (5th Cir. 2017) (adopting the plainly material standard established by In re Trulia).
97 In re Walgreen, 832 F.3d at 725–26. The case also involved a merger announcement of two corporations and a shareholder lawsuit to challenge it. Id. at 721–22. Like In re Trulia, it included relatively limited discovery, a disclosure only settlement being agreed to, and court approval being sought. Id.
98 See id. at 725–26 (explicitly naming In re Trulia and announcing that the Seventh Circuit was going to follow the precedent established and use the plainly material standard for evaluating disclosure only settlements). In its opinion, the Seventh Circuit explicitly named In re Trulia and its plainly material standard, while stating that it would adopt this more stringent standard going forward. Id. at 725.
closure only settlements be rejected. On January 2, 2018, a North Carolina court approved a disclosure only settlement while applying the plainly material standard espoused in In re Trulia. The court emphasized that although the plainly material standard calls for a more in-depth analysis into disclosure only settlements, it does not necessitate that the settlement be rejected per se. While pointing out this nuance that could limit In re Trulia, the court found that the disclosures made by the defendant successfully addressed a plainly material omitted fact or misrepresentation, and as such, felt it appropriate to approve of the settlement. More specifically, the additional disclosures the defendant made contained financial information used to value the company for sale.

Even the Delaware Chancery Court has displayed a willingness to approve disclosure only settlements. In re BTU was decided post In re Trulia, and involved a stockholder class action challenge to a proposed merger. Thus, it appears that defendants and plaintiffs seeking to resolve merger disputes may still use disclosure only settlements as a means to do so—despite their negative treatment in In re Trulia.

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100 See In re BTU Int’l, Inc. Stockholders Litig., No. 10310-CB, 2016 WL 680252, at *2–3 (Del. Ch. Feb. 18, 2016) (approving a disclosure only settlement just a month after In re Trulia was decided); Gordon, 46 N.Y.S.3d at 565 (approving a disclosure only settlement under a different level of heightened scrutiny); In re Krispy Kreme, 2018 WL 264537, at *5–6 (approving a disclosure only settlement by applying the plainly material standard).

101 See In re Krispy Kreme, 2018 WL 264537, at *5–6 (including a discussion of In re Trulia, a formal adoption of the plainly material standard it established, and the approval of a disclosure only settlement under the heightened standard of scrutiny).

102 Id.

103 See id. (approving a disclosure only settlement while applying the plainly material standard established by In re Trulia).

104 See id. at *7–8 (discussing in detail what the additional disclosures contained). The court further broke down the additional disclosures by classifying them into four main groups: 1) information about the cash flows used by the financial advisor to value the company; 2) plans for future employment opportunities after the merger; 3) any potential conflicts of interest that the financial advisors may have; and 4) what standards and figures the company used to compare itself to similar companies. Id. The court reasoned that these additional disclosures were “sufficiently material” and approved the settlement. See id. at *8 (approving a settlement based on the additional disclosures made).

105 In re BTU, 2016 WL 680252, at *2–3. The author of this opinion is Chancellor Bouchard, who wrote the opinion for In re Trulia. See id. at *4 (indicating Chancellor Bouchard’s signature on the opinion); see also In re Trulia, 129 A.3d at 886 (indicating Chancellor Bouchard as the issuer of the opinion). In re Trulia was decided in January of 2016 and In re BTU was decided in February 2016, meaning it is likely that Chancellor Bouchard had the plainly material standard in his mind when deciding the case, despite not explicitly mentioning it anywhere in this opinion. See In re BTU, 2016 WL 680252, at *2–3 (approving a disclosure only settlement without ever mentioning the plainly material standard); In re Trulia, 129 A.3d at 889 (establishing the plainly material standard that is to be used to evaluate future disclosure only settlements).

106 See Verified Consolidated Amended Class Action Complaint at 1–3, In re BTU, 2016 WL 680252 (No. 72939522) (discussing the plaintiffs’ cause of action against the defendant corporation). The merger in question was between two companies that supplied manufacturing products. Id.

107 See In re Krispy Kreme, 2018 WL 264537, at *5–6 (approving a disclosure only settlement post In re Trulia); In re BTU, 2016 WL 680252, at *2–3 (approving a disclosure only settlement in
The court in *In re Trulia* was wary of the possibility that other jurisdictions might not adopt this standard and would continue to freely approve disclosure only settlements.108 Some scholars believe that these lawsuits may start to migrate towards New York in the wake of a number of favorable decisions.109 Various court decisions post *In re Trulia* seem to indicate that New York views disclosure only settlements more favorably than Delaware.110 New York uses a slightly different test when it considers approval of settlements, resulting in frequent approval of disclosure only settlements.111 In *Gordon v. Verizon*, a New York court approved a disclosure only settlement and explicitly questioned the hypothesis that states would follow Delaware in treating such settlements unfavorably.112 *City Trading Fund v. Nye*, a case decided by the Supreme Court of New York in 2018, discussed disclosure only settlements in even greater detail.113 In that case, the court implied that the standard established in *Gordon* was easier to meet than the plainly material standard from *In Delaware, post *In re Trulia*, without discussing the plainly material standard); *In re Trulia*, 129 A.3d at 898 (containing strong language expressing the court’s negative view of disclosure only settlements); *Gordon*, 46 N.Y.S.3d at 565 (approving a disclosure only settlement while applying a similar standard to the plainly material one established in *In re Trulia*).108 *In re Trulia*, 129 A.3d at 899 (discussing the possibility that other courts and jurisdictions may not adopt this heightened level of scrutiny for disclosure only settlements).109 See *Gordon*, 46 N.Y.S.3d at 565 (approving a disclosure only settlement while discussing *In re Trulia* and the possibility impacts of it on New York); *City Trading Fund v. Nye*, 72 N.Y.S.3d 371, 371 (Sup. Ct. 2018) (noting that New York’s standard for approving judicial settlements is less strict than Delaware’s plainly material standard); Barkasy & Pereira, supra note 93, at *1 (discussing the possibility that these suits will move to New York as plaintiffs’ attorneys seek to find a forum that will provide a more favorable outcome, namely the approval of disclosure only settlements).110 See *Gordon*, 46 N.Y.S.3d at 565 (discussing *In re Trulia* specifically before approving a disclosure only settlement under a different heightened level of scrutiny); *City Trading Fund*, 72 N.Y.S.3d at 378–79 (comparing *Gordon* to *In re Trulia* and noting that the New York standard is easier to meet).111 See *Gordon*, 46 N.Y.S.3d at 565 (adding two factors to the traditional five factor test in New York for evaluating a settlement). The original five factors that New York applied included: 1) the likelihood of success; 2) the extent of support from the parties; 3) the judgment of counsel; 4) the presence of bargaining in good faith; and 5) the nature of the issues of law and fact. See Barkasy & Pereira, supra note 93, at *3 (discussing the factors New York previously used to evaluate proposed stockholder class action settlements). The two factors added by *Gordon* are: 1) is the settlement in the best interest of the whole class; and 2) is it in the best interest of the defendant corporation. Id.112 See Barkasy & Pereira, supra note 93, at *1, *3 (providing a discussion of how a jurisdiction other than Delaware might view disclosure only settlements more favorably in the future).113 See *City Trading Fund*, 72 N.Y.S.3d at 371, 378–79 (expanding on *Gordon* and discussing in greater detail the future of disclosure only settlements). The court in *City Trading Fund* ultimately did not end up approving the disclosure only settlement on the grounds that the supplemental disclosures were “worthless.” See id. at 391–92 (comparing the disclosures made in several cases to the ones made in this one, while noting that the disclosures here mean nothing to plaintiffs). While, like *In re Trulia*, this case resulted in the denial of a disclosure only settlement, it is clear that New York is evaluating these settlements by a lesser level of scrutiny. See id. at 374 (noting that New York’s standard is “more lenient” than Delaware’s).
It is thus important to recognize that disclosure only settlements are not rendered useless as a tool in the process of settling litigation, as some jurisdictions have a more lenient standard in place for evaluating them.\textsuperscript{115}

\section*{B. The Mootness Dismissal Scenario and How It Compares to a Typical Disclosure Only Settlement}

The court in \textit{In re Trulia} discussed an alternative scenario in which plaintiffs and defendants could avoid the stricter plainly material standard altogether.\textsuperscript{116} The court referred to this solution as a mootness dismissal scenario.\textsuperscript{117} In this scenario, upon the filing of a lawsuit, defendants respond by voluntarily providing additional disclosures to provide the information the plaintiffs are seeking.\textsuperscript{118} As a result, some of the plaintiffs’ claims are mooted.\textsuperscript{119} In order to avoid the plainly material standard, plaintiffs and defendants agree to stipulations that accompany the request for attorney’s fees to dismiss the claims without prejudice.\textsuperscript{120} Because the release of claims only binds the named plaintiff, defendants do not obtain a broad release of claims in this scenario, and the plainly material standard does not apply.\textsuperscript{121} The plaintiffs’ attorneys receive the fees they are seeking without having to survive the heightened level of scrutiny required by the plainly material standard.\textsuperscript{122} The defendants are willing to agree to these settlements because, according to the court, the statement of

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  \item \textsuperscript{114} See \textit{id.} at 381 (stating that the New York standard “requires a lesser showing” than \textit{In re Trulia}, as the New York standard does not require that all doubt as to the materiality of the disclosures be removed).
  \item \textsuperscript{115} See \textit{In re Krispy Kreme}, 2018 WL 264537, at *5–6 (approving a disclosure only settlement post \textit{In re Trulia}); \textit{In re BTU}, 2016 WL 680252, at *2 (approving a disclosure only settlement in Delaware, post \textit{In re Trulia}, without discussing the plainly material standard); \textit{Gordon}, 46 N.Y.S.3d at 565 (approving a disclosure only settlement while applying a similar standard to the plainly material one established in \textit{In re Trulia}).
  \item \textsuperscript{116} See \textit{In re Trulia}, 129 A.3d at 896–97 (discussing two possible routes for plaintiffs and defendants to take in order to avoid the heightened level of scrutiny for which the plainly material standard calls). For the purposes of this Note, only the mootness dismissal route will be discussed further. See \textit{infra} notes 117–139 and accompanying text. The other scenario involves a preliminary injunction motion and is not the focus of this Note, as it does not appear to be a route that attorneys are taking. See \textit{In re Trulia}, 129 A.3d at 896–97 (discussing the two possible routes attorneys could take but noting that the mootness dismissal route seems to be much more prevalent).
  \item \textsuperscript{117} \textit{In re Trulia}, 129 A.3d at 896–97.
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{Id.} at 897. The Supreme Court has explained that “dismissal without prejudice” means a plaintiff is not prohibited from returning to court at a later date with the same underlying claim made in the case that was dismissed without prejudice. See \textit{Semtek Int’l Inc. v. Lockheed Martin Corp.}, 531 U.S. 497, 505–06 (2001) (explaining the primary definition of dismissal without prejudice).
  \item \textsuperscript{121} \textit{In re Trulia}, 129 A.3d at 897.
  \item \textsuperscript{122} \textit{Id.}
\end{itemize}
dismissal without prejudice effectively marks an end to litigation about the issues regarding the proposed merger.\textsuperscript{123}

The key difference between a traditional disclosure only settlement and the mootness dismissal scenario lies in the release obtained.\textsuperscript{124} In a traditional disclosure only settlement, the defendants obtain a broad release of claims from the plaintiffs that precludes the class from later filing a lawsuit based on the same issues.\textsuperscript{125} As a result, the defendants have no motivation to fight the settlement or argue for appropriate attorney’s fees because the release they obtain is worth much more.\textsuperscript{126} On the other hand, in a mootness dismissal scenario only the named plaintiff in the class releases the defendant from liability.\textsuperscript{127} Because the defendants no longer have a broad release of claims at stake, they are more willing to advocate for appropriate attorney’s fees because it is in their best interest to minimize the amount they would have to pay.\textsuperscript{128}

\textit{In re Family Dollar Stores, Inc. Stockholder Litigation} involved a plaintiff that filed a class action challenging the proposed merger between Family Dollar and Dollar Tree, Inc.\textsuperscript{129} The plaintiff alleged several claims of breach of fiduciary duty, most notable being a failure to provide enough information to stockholders ahead of the merger.\textsuperscript{130} The defendant subsequently made additional disclosures that were available to the stockholders through its SEC filings.\textsuperscript{131} The plaintiff and defendant then agreed to dismiss the case without prejudice to the class because any claims that were likely to be successful were mooted by the supplemental disclosures.\textsuperscript{132} The court approved this mootness dismissal and then invited the parties to file briefs requesting appropriate attorney’s fees.\textsuperscript{133} As a result of the plainly material standard being circumvented, the defendant received the benefit of the merger being completed without fur-

\textsuperscript{123} See id. at 897–98 (stating clearly that a dismissal is likely to be the end of the litigation over a particular transaction).
\textsuperscript{124} See \textit{In re Krispy Kreme}, 2018 WL 264537, at *5 (providing insight into the mootness dismissal scenario discussed in \textit{In re Trulia}).
\textsuperscript{125} See \textit{In re Trulia}, 129 A.3d at 889–90 (discussing the release that the plaintiffs and defendant had agreed to and submitted to the court for approval).
\textsuperscript{126} See \textit{In re Krispy Kreme}, 2018 WL 264537, at *5 (stating that when a defendant obtains this broad release, it “no longer has an incentive” to fight the proposed settlement).
\textsuperscript{127} See id. (explaining the difference between the mootness fee dismissal scenario and a traditional disclosure only settlement).
\textsuperscript{128} See id. (stating that defendants in the mootness dismissal scenario have the ability to challenge the amount of attorney’s fees while maintaining the settlement).
\textsuperscript{129} See \textit{In re Family Dollar Stores, Inc. Stockholder Litig.}, C.A. No. 9985-CB, 2015 WL 4642210, at *1–3 (Del. Ch. Aug. 4, 2015) (ordering the claims be dismissed without prejudice with respect to the class of plaintiffs).
\textsuperscript{130} Id.
\textsuperscript{131} See id. at *1–2 (noting the specific forms that the Defendant supplemented with the SEC).
\textsuperscript{132} Id. at *3.
\textsuperscript{133} See id. (inviting the plaintiff to submit a request for attorney’s fees and the Defendant to submit any opposition to such request).
ther impediment, and the plaintiffs’ attorneys received appropriate attorney’s fees.  

From the court’s perspective, the alternative outcome suggested by *In re Trulia* and illustrated by *In re Family Dollar Stores* is preferable for several reasons. First, the dismissal without prejudice towards the class does not provide a broad release for defendants, meaning that a different plaintiff is not prohibited from challenging the proposed merger as a matter of law. This is beneficial because it ensures that future plaintiffs do not have their access to justice cut-off. Second, the adversarial nature of the litigation process is preserved when the dismissal is without prejudice. Finally, because defendants can still be sued regarding the proposed merger in question, they have the motivation to argue their case effectively in order to reduce attorney’s fees.

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134 See *In re Family Dollar Stores*, 2015 WL 4642210, at *3 (explaining that the merger was allowed to proceed, and that the plaintiff was permitted to request attorney’s fees). Notably, discussion of the plainly material standard or close examination the disclosures never arises in this dispute due to the mootness dismal approach. See id. (inviting the plaintiff to submit a request for attorney’s fees and the defendant to submit any opposition to such request). The mootness dismissal scenario is not as good of a deal for defendants, as there is no guarantee that plaintiffs will never bring a similar lawsuit at a later date. *See In re Trulia*, 129 A.3d at 898 (discussing the mootness dismissal scenario); *In re Riverbed*, 2015 WL 5458041, at *4 (discussing the “broad release from liability” typically obtained by a defendant as a result of a disclosure only settlement).

135 See *In re Trulia*, 129 A.3d at 897 (referring to mootness dismissal as the favored scenario when dealing with disclosure only settlements).

136 See id. at 897–98 (discussing implicitly res judicata/collateral estoppel). The term *res judicata* translates directly to “a thing adjudicated.” *Res Judicata*, BLACK’S LAW DICTIONARY (10th ed. 2014). This doctrine precludes the same parties to a lawsuit that reached a final decision on the merits from litigating the same claim again. See id. (barring a party to a lawsuit from re-litigating a claim that was already litigated and decided). Similarly, the term *collateral estoppel* prevents the parties to a lawsuit that was actually litigated from subsequently litigating a new claim based on the same facts. *See Collateral Estoppel*, BLACK’S LAW DICTIONARY (10th ed. 2014) (indicating that even if the second action a party is attempting to bring is different from the first one decided, it will be barred because it is based on an issue that was previously litigated and decided).

137 See *In re Krispy Kreme*, 2018 WL 264537, at *5 (highlighting that only the named plaintiff releases the defendant of claims, implicitly reasoning that this is more acceptable than an entire class releasing its claims).

138 See *In re Trulia*, 129 A.3d at 897 (noting that “the adversarial process would remain in place” in the mootness dismissal scenario because defendants that are no longer concerned with obtaining a broad release of claims have sufficient motivation to contest outlandish attorney’s fees). In the mootness dismissal scenario, the release the defendants obtain is only from the named plaintiff, meaning another member of the class can sue them in the future. *See In re Krispy Kreme*, 2018 WL 264537, at *5 (stating that in the mootness dismissal scenario only the named plaintiff releases the defendant of any claims).

139 See *In re Trulia*, 129 A.3d at 897 (discussing that in the mootness dismissal scenario, there is still an incentive for defendants to argue against the attorney’s fees associated with a proposed settlement, which preserves the adversarial aspect that is crucial to these lawsuits).
III. THE INTERPLAY BETWEEN STATES AND PLAINTIFFS’ ATTORNEYS

It is well established that there is competition among the states to be the hub of incorporation.140 Delaware is widely recognized as the forerunner of this competition, as the state with the most corporate filings.141 More recently, scholars have focused on state competition regarding corporate litigation, primarily as a means of maintaining corporate charters, and thus keeping revenue generating businesses in state.142 Specifically, these scholars tend to focus on merger litigation, as it is the most common form of corporate litigation.143 There is empirical data that suggests attorney’s fees and the dismissal rates of lawsuits affect the number of lawsuits that are filed within a given state.144 These numbers support the claim that states can impact the amount of litigation they receive and that states are responsive to declining litigation rates in an effort retain lawsuits.145

The typical form of merger litigation is the class action lawsuit, and the main proponents behind it are the stockholder plaintiffs’ attorney’s firms.146 A study out of Columbia Law School argues that plaintiffs’ attorneys in corporate litigation see a successful business opportunity in filing class action lawsuits.147 The study further contends that these attorneys are motivated not by the possibility of obtaining a positive outcome for their clients, but rather by the “collusive settlements” that provide a financial benefit of attorney’s fees

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140 See Cain & Solomon, supra note 13, at 471–72 (discussing the commonly accepted principle that there is state competition for initial public offering filings); Daines, supra note 13, at 1566, 1572 (providing numerical data to show that Delaware is dominating the competition between states for corporation filings). The main motivation behind this state competition is that corporate filings are a large source of tax revenue for states. See Cary, supra note 28, at 664–65, 668–69 (describing how Delaware initially changed its law to attract the revenue associated with corporations). The General Assembly of Delaware has even declared it a formal public policy of the state to remain attractive to corporations in order to maintain the primary revenue generator that is the corporate business. See id. at 663 (explaining that Delaware’s efforts to maintain the corporate business are rooted in the desire to maintain the revenue associated with it).

141 See Daines, supra note 13, at 1566, 1572 & tbl.3 (showing that from 1995 to 1998, around 50% of Fortune 500 companies and 77% of companies making an initial public offering were filed in Delaware).

142 See Cain & Solomon, supra note 13, at 471–72 (discussing broadly the possible motivations states have for competing for corporate litigation).


144 Cain & Solomon, supra note 13, at 483 & tbl.V.A.

145 See id. at 497–98 (discussing that the broad results of the statistical analysis conducted shows that there is state competition for litigation).

146 Id. at 480; Thompson & Thomas, supra note 143, at 135.

147 See Coffee, supra note 50, at 677 (explaining that a potential cause of non-meritorious litigation may be the plaintiffs’ attorney’s need to maintain a business).
for themselves.148 Other professors have supported this argument through subsequent studies.149 The consensus among scholars is that obtaining attorney’s fees is what drives the pervasiveness of stockholder litigation, not the desire of obtaining a benefit or relief for the stockholders.150

Armed with the knowledge of what motivates merger litigation broadly, scholars have sought to understand what factors influence where these lawsuits are filed.151 One study suggests that the two main factors influencing plaintiffs’ forum selection are attorney’s fees and lawsuit dismissal rate.152 The logic behind attorney’s fees as a motivating factor is fairly straightforward.153 Plaintiffs’ attorneys will choose to file suit in a forum that offers higher attorney’s fees.154 The logic behind lawsuit dismissal rate as a factor is slightly more complicated.155

148 See id. (discussing possible causes for frivolous lawsuits). Coffee implies that these lawsuits are frivolous in nature and are only motivated by the plaintiffs’ attorneys seeking attorney’s fees. See id. (discussing the financial motivations that plaintiffs’ attorneys have in filing class action lawsuits). Scholars have written on attorney’s fees in other contexts, including shareholder litigation. See generally Sean J. Griffith, Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees, 56 B.C. L. REV. 1 (2015) (discussing the problematic relationship between fee-shifting and shareholder litigation).

149 See Weiss & White, supra note 50, 1851–52, 1855–56 (explaining that the primary motive behind class action litigation is to obtain settlement and subsequent attorney’s fees). These scholars conducted a study comparing cases litigated by lawyers with “real clients” to those with more “traditional clients.” Id. at 1841–42. The scholars use the term “real clients” to refer to those who have a substantial financial interest in the outcome of the lawsuit, and the term “traditional clients” to refer to the more common class action phenomenon, whereby the client is more of a namesake and the plaintiffs’ attorneys are the ones truly litigating the case. See id. (highlighting the difference between “real clients” and “traditional clients” for the purposes of this study). The scholars hypothesized that if there was no difference in how the cases were litigated between “real clients” and “traditional clients,” then it would not be an attorney driven process. See id. (describing attorneys in such situations as “faithful champions”). Ultimately, the scholars found that those cases with “real clients” were litigated much differently from those with “traditional clients.” See id. (highlighting the differences between the types of cases studied). For example, cases with “real clients” had complaints that were much more detailed and filed several days after the announcement of a merger. Id. On the other hand, cases with “traditional clients” had complaints that were described as “bare bones” and that were filed only one to two days after the announcement of a merger. Id. at 1842. As a result, the scholars concluded that the vast majority of class action lawsuits challenging a merger are driven by the plaintiffs’ attorneys and not by the individual plaintiffs. See id. at 1855–56 (concluding that lawsuits filed in Delaware challenging mergers are primarily motivated by plaintiffs’ attorneys and not by the actual plaintiffs).

150 See id. (explaining that the primary motive behind class action litigation is to obtain settlement and subsequent attorney’s fees).

151 See Cain & Solomon, supra note 13, at 469 (explaining the purpose of the study is to test the hypothesis that states compete for litigation by altering attorney’s fees and the rate at which they dismiss lawsuits).

152 See id. (discussing that the rates at which a jurisdiction dismisses cases and the amount of attorney’s fees it awards are factors that impact where lawsuits are filed).

153 See id. at 496–97 (explaining the general idea that plaintiffs’ attorneys are motivated by the possibility of receiving attorney’s fees).

154 Id.

155 Id.
Because merger litigation nearly always comes in the form of a class action, judicial approval of the settlement is required in order for attorney’s fees to be awarded. Therefore, plaintiffs’ attorneys are more likely to file a merger litigation lawsuit in a forum that has a lower lawsuit dismissal rate, because that gives them a greater chance of obtaining attorney’s fees. Turning from the logic behind these factors towards supporting statistics is helpful to illustrate these points.

A study conducted on merger litigation between 2005 and 2011 provides data to support the theory discussed above. Over this time period, Delaware received almost thirty percent of the merger litigation filed. Its two closest competitors were California and New York, which together received about twenty percent of merger lawsuits. The mean and median fees were higher in Delaware than in both California and New York. This suggests, at a bare minimum, that there is a correlation between the amount of attorney’s fees awarded in a particular jurisdiction and the number of lawsuits filed there. Further, there is evidence to show that if a jurisdiction decreases attorney’s fees, plaintiffs’ attorneys will file future lawsuits in states that give higher awards.

The study goes on to examine whether or not states react to this shifting in forum by plaintiffs’ firms. Ultimately, it finds that states will often increase the amount of attorney’s fees they award or decrease the number of law-

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156 See FED. R. CIV. P. 23 (governing rule on class actions in federal law); Krishnan et al., supra note 26, at 133 (noting that nearly 86% of M&A lawsuits are class actions). If a court is more likely to dismiss a case, then it is less likely to award attorney’s fees. See Cain & Solomon, supra note 13, at 496–97 (discussing how Delaware reacts to a loss on litigation to explain the two factors).

157 See Cain & Solomon, supra note 13, at 496–97 (showing that plaintiffs’ attorneys file lawsuits in jurisdictions with lower dismissal rates).

158 See id. at 469 (discussing the two factors that the authors hypothesize influence forum selection are attorney’s fees and dismissal rates).

159 See id. at 481–82, 481 tbl.IV.A (displaying the results from the scholars data analysis in a table).

160 Id. at 482 & tbl.IV.B.

161 Id.

162 See Cain & Solomon, supra note 13, at 482–83, 482 tbl.IV.B (including a graph to compare different venues and their mean and median amount of attorney’s fees).

163 See id. (providing visual aids to document information regarding attorney’s fees). The study acknowledges that there are other possible causes for these numbers. Id. at 497. It discusses the possibility that plaintiffs might prefer to file in Delaware for reasons other than the size of its attorney’s fees and low dismissal rate. Id. One major reason posited is that plaintiffs might view Delaware as the jurisdiction with the best chance of success for the lawsuit. Id. The study also acknowledges that states may compete for litigation for a variety of different reasons, and it might not be because they want to receive more lawsuits. See id. (reasoning implicitly that correlation is not causation and that their findings should be understood through this lens). Some states might compete for litigation as a means for obtaining corporate charters. Id.

164 See id. at 496 (explaining more broadly the implications of the study).

165 See id. at 496–97 (discussing that states react to plaintiffs filing lawsuits elsewhere by either raising the amount of attorney’s fees they award or decreasing the rate at which they dismiss lawsuits, therefore making it more likely that the plaintiffs’ attorneys receive their fees).
suits they dismiss in an effort to maintain or increase the litigation they receive. 166 Interestingly, the study found that Delaware generally does not seek to improve its chances of obtaining merger litigation through increasing attorney’s fees, but rather focuses on lowering its dismissal rate—a more effective way of impacting the rate of litigation. 167

A second study included similar data from the years 2012 and 2013. 168 The study found that the share of litigation that Delaware received decreased slightly from 2012 to 2013. 169 The study went on to conclude that during this time, Delaware allowed the same percentage of cases to settle, while slightly decreasing the mean and median amount of attorney’s fees awarded. 170 This is beneficial to plaintiffs’ attorneys who are motivated by the favorable outcome of settlement, which leads to attorney’s fees. 171 There is evidence to suggest that when Delaware experiences a lag in merger litigation, it seeks to decrease its dismissal rate of lawsuits in order to be more attractive to plaintiffs’ attorneys seeking to obtain attorney’s fees through settlement. 172 Overall, when there is a lower chance that a lawsuit is dismissed, there is a greater chance that attorney’s fees will be awarded to plaintiffs’ attorneys. 173

IV. DELAWARE AS A CREATURE OF HABIT: A RECENT TREND TOWARD THE MOOTNESS DISMISSAL SCENARIO

Because Delaware has previously responded to a loss of merger litigation by lowering its dismissal rate of lawsuits in an effort to influence the forum selection of plaintiffs’ attorneys, this Note posits that it will act similarly in the wake of In re Trulia. 174 In re Trulia is too recent of a case for an empirical

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166 See id. (explaining possible state reactions to losing litigation).
167 See id. (discussing various responses states have previously made when they experience declining litigation).
168 See Cain & Solomon, supra note 1, at 5–6 (continuing their study from Cain & Solomon, supra note 13, and looking at data from 2012 and 2013).
169 Id.
170 Id. From 2012 to 2013, the percentage of applicable cases in Delaware that settled remained at 72.7%. Id. at 5. In contrast, the mean attorney’s fees awarded dropped from $650,000 to $450,000, while the median dropped from $500,000 to $450,000. Id. at 2 tbl.C.
171 See Coffee, supra note 50, at 677 (explaining that a potential cause of non-meritorious litigation may be the plaintiffs’ attorney’s need to maintain a business); Weiss & White, supra note 50, at 1851–52, 1855–56 (explaining that the primary motive behind class action litigation is to obtain settlement and subsequent attorney’s fees).
172 See Cain & Solomon, supra note 13, at 496–97 (discussing Delaware’s specific reaction to plaintiffs’ attorneys forum shopping). The study indicated that lowering the dismissal rate of lawsuits had a greater impact on plaintiffs’ attorneys forum selection than awarding a greater amount in attorney’s fees. Id. at 497.
173 See id. at 496–97 (operating under the unstated assumption that attorney’s fees cannot be awarded in a case that is dismissed).
174 See In re Trulia, Inc. Stockholder Litig., 129 A.3d 884, 887–8 (Del. Ch. 2016) (discussing the proposed disclosure only settlement for the merger); Cain & Solomon, supra note 13, at 496–97 (dis-
study indicating whether or not there has been an increase or decrease in the lawsuits filed in Delaware.\textsuperscript{175} Anecdotally, it seems that plaintiffs’ attorneys are looking elsewhere in an effort to obtain a more favorable outcome.\textsuperscript{176} There has been at least one case filed in New York after \textit{In re Trulia}, which resulted in the approval of a disclosure only settlement.\textsuperscript{177} This suggests that the plaintiffs’ attorneys were successful in obtaining a more favorable outcome by filing suit in a forum other than Delaware.\textsuperscript{178}

Assuming that Delaware is losing litigation business as a result of \textit{In re Trulia}, it follows that it will attempt to mitigate this loss and retain merger litigation.\textsuperscript{179} Its previous method of solving this problem involved decreasing its dismissal rates of lawsuits in order to increase settlement rates, to stimulate outcomes that resulted in plaintiffs’ attorney’s fees.\textsuperscript{180} The problem with \textit{In re Trulia} is that the issue does not stem from dismissal of a lawsuit, but rather the fact that it is a denial of the settlement that plaintiffs’ attorneys sought.\textsuperscript{181}

This slightly different problem facing Delaware requires a new solution.\textsuperscript{182} \textit{In re Trulia} makes it more challenging for disclosure only settlements to be approved, which in turn makes it more difficult for attorney’s fees to be awarded.\textsuperscript{183} Since Delaware cannot stop the loss of merger litigation caused by \textit{In re Trulia} by decreasing its dismissal rate, it could seek to walk back its hold-

\textsuperscript{175} \textit{In re Trulia}, 129 A.3d (deciding this case in 2016).

\textsuperscript{176} See Gordon v. Verizon Commc’ns, Inc., 46 N.Y.S.3d 557, 565 (App. Div. 2017) (mentioning \textit{In re Trulia} while going on to approve a disclosure only settlement, implying that there is a more favorable view of disclosure only settlements in New York). Verizon is incorporated in Delaware, yet chose in this settlement agreement to include a clause establishing that the laws of New York would govern the terms, implying that Verizon felt that New York would view the terms of the settlement more favorably than Delaware. See \textit{id.} at 566 (describing the choice-of-law clause included in the settlement). In Gordon, the court evaluated a proposed disclosure only settlement in response to a lawsuit challenging Verizon Wireless’s acquisition of Vodafone Group PLC. \textit{id.} at 561–62. The court ended up applying what it called an “enhanced standard” to the disclosure only settlement. See \textit{id.} at 566–68 (discussing the need to apply the original five factor test as well as an additional two factors established in Gordon to evaluating proposed class action settlements). The court ultimately approved the disclosure only settlement under its enhanced scrutiny. \textit{id.} at 572–73.

\textsuperscript{177} See \textit{id.} at 570–72 (explaining New York’s stance on disclosure only settlements in light of \textit{In re Trulia}).

\textsuperscript{178} See \textit{id.} (discussing \textit{In re Trulia} and how New York will treat disclosure only settlements).

\textsuperscript{179} See \textit{In re Trulia}, 129 A.3d at 899 (expressing concerns about plaintiffs engaging in forum shopping as a result of this decision); Cain & Solomon, supra note 13, at 496–97 (discussing how Delaware responds to a loss of litigation by decreasing its dismissal rate).

\textsuperscript{180} See Cain & Solomon, supra note 13, at 496–97.

\textsuperscript{181} See \textit{In re Trulia}, 129 A.3d at 899 (discussing the possibility of forum shopping, implying that the plainly material standard is likely to result in the plaintiffs’ attorneys not receiving the settlements for which they are looking).

\textsuperscript{182} See \textit{id.} (discussing disclosure only settlements and the problems they create).

\textsuperscript{183} See \textit{id.} (explaining the interaction between disclosure only settlements and attorney’s fees).
ing in the case.\textsuperscript{184} This might be difficult because the court in \textit{In re Trulia} used fairly strong language about disclosure only settlements and made it clear that these settlements will be viewed less favorably.\textsuperscript{185} As it is unlikely that the court can overcome the clear distaste for disclosure only settlements it showed in \textit{In re Trulia}, another method for obtaining the plaintiffs’ attorney’s desired outcome must be utilized.\textsuperscript{186}

This other method might well be the mootness dismissal scenario that was discussed at some length by the court in \textit{In re Trulia}.\textsuperscript{187} In its opinion, the court noted that even prior to \textit{In re Trulia}, there seemed to be a shift towards this route by plaintiffs and defendants.\textsuperscript{188} Since \textit{In re Trulia}, there have been cases where parties have chosen this mootness dismissal route.\textsuperscript{189} In \textit{In re Xoom Corp. Stockholder Litigation}, plaintiffs and defendants agreed to a mootness dismissal stipulation as a result of supplemental disclosures that were made.\textsuperscript{190} The court mentioned \textit{In re Trulia} specifically and noted that the plainly material standard does not apply in the mootness dismissal scenario.\textsuperscript{191} Instead, plaintiffs are entitled to receive attorney’s fees if the supplemental disclosures provided any benefit to the stockholders.\textsuperscript{192}

\begin{footnotes}
\item[184] See id. (including strong language indicating Delaware’s skepticism towards disclosure only settlements).
\item[185] See id. at 898–99 (calling disclosure only settlements the “suboptimal path” and declaring that courts going forward will have heightened awareness in their evaluation of these settlements). By its nature, an established precedent is difficult to overturn, particularly a precedent that was so recently established with such clear language. See Dickinson v. United States, 530 U.S. 428, 443 (2000) (noting that stare decisis carries so much weight that in order to break an established precedent, there needs to be a unique reason).
\item[186] See \textit{In re Trulia}, 129 A.3d at 898–99 (discussing two alternative routes for plaintiffs and defendants to take in order to avoid the heightened level of scrutiny for which the plainly material standard calls).
\item[187] See id. at 896–97 (discussing the two possible routes attorneys could take but noting that the mootness dismissal route seems to be much more prevalent).
\item[188] See id. at 897 (noting that the mootness dismissal scenario is gaining traction).
\item[189] See \textit{In re Xoom}, 2016 WL 4146425, at *3 (explaining that the mootness dismissal scenario requires a different analysis than the a traditional disclosure only settlement that includes a broad release of claims).
\item[190] See id. (comparing the mootness dismissal scenario with traditional disclosure only settlements).
\item[191] See id. (explaining the differences between the mootness dismissal scenario and the more traditional disclosure only settlements). This seems to harken back to the precedent prior to \textit{In re Trulia}, under which even a meager benefit to plaintiffs warranted approval of a disclosure only settlement. See \textit{In re Riverbed Tech., Inc. Stockholders Litig.}, C.A. No. 10484-VCG, 2015 WL 5458041, at *8 (Del. Ch. Sept. 17, 2015) (approving a disclosure only settlement even when the disclosures were of little or no importance to stockholders); \textit{In re Dr. Pepper/Seven Up Cos, Inc. S’holders Litig.}, Civil Action No. 13109, 1996 WL 74214, at *6 (Del. Ch. Feb. 9, 1996) (approving a disclosure only settlement that only had a meager benefit to stockholders).
\end{footnotes}
The mootness dismissal scenario has also been discussed to some extent by New York courts. In City Trading Fund, the court notes that the lesser standard established by Gordon seems to mirror the mootness dismissal standard from Delaware. This lesser standard is explained as one requiring that additional disclosures be helpful to plaintiff stockholders. As New York seems to be adopting this lesser standard for its evaluation of disclosure only settlements, it is likely that plaintiffs’ attorneys will file suit in New York, as it is the jurisdiction that is more likely to grant the attorney’s fees they are seeking.

Based on a recent trend towards the mootness dismissal scenario by plaintiffs, defendants, and the Delaware courts, it seems likely that Delaware will further rely on this approach going forward. The dismissal of a suit without prejudice is a successful way for plaintiffs’ attorneys to both avoid the plainly material standard and to obtain the favorable outcome of attorney’s fees. In re Trulia explains that defendants are effectively in the same position as obtaining a broad release of claims because a dismissal without prejudice often means that the issues brought by plaintiffs will not be brought in future lawsuits. Thus, Delaware will likely attempt to compete for merger litigation by continuing to advocate for mootness dismissal orders by awarding attorney’s fees in such cases it receives.

The uncertainty lies in what future plaintiffs and defendants are likely to do. Plaintiffs may engage in forum shopping to find a venue that will approve

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193 See Gordon, 46 N.Y.S.3d at 567–69 (discussing that additional disclosures must have some benefit to the plaintiff stockholders); City Trading Fund v. Nye, 72 N.Y.S.3d 371, 381 (Sup. Ct. 2018) (comparing Gordon and In re Xoom to determine the relatedness of the standards).

194 See City Trading Fund, 72 N.Y.S.3d at 381 (discussing In re Xoom, In re Trulia, and Gordon and noting that the “some benefit” test seems to come from Delaware jurisprudence).

195 See id. (explicitly talking about In re Xoom and how Gordon has informally adopted this standard into its analysis for evaluating disclosure only settlements).

196 See id. (implying that New York has a lower bar to meet for approval of disclosure only settlements than Delaware); Coffee, supra note 50, at 677 (explaining that plaintiffs’ attorneys are the driving force behind class action lawsuits that challenge mergers); Weiss & White, supra note 50, at 1851–52, 1855–56 (explaining that the primary motive behind class action litigation is to obtain attorney’s fees).

197 See Cain & Solomon, supra note 13, at 496–97 (discussing how Delaware reacts to plaintiffs filing lawsuits elsewhere by decreasing its dismissal rate).


199 See In re Trulia, 129 A.3d at 897–98 (noting that a mootness dismissal ends any future lawsuit on these facts as a practical matter).


201 See In re Trulia, 129 A.3d at 898–99 (describing different ways that plaintiffs and defendants might respond in the wake of this heightened scrutiny of disclosure only settlements).
the traditional disclosure only settlement, which would mean that more cases could make their way to places like New York. Alternatively, they may hear Delaware’s not so quiet pleading and answer by following the mootness dismissal scenario to obtain attorney’s fees and continue to file lawsuits in Delaware. Regardless, the relationship between state competition for litigation and disclosure only settlements will continue to evolve over time, as dictated by plaintiffs’ attorneys ever so constant motivation of achieving attorney’s fees.

CONCLUSION

For some time, scholars have recognized that states participate in a competition in order to obtain a favorable share of the nation’s corporate litigation. States accomplish this by either raising attorney’s fees or decreasing the dismissal rates of lawsuits. Additionally, plaintiffs’ attorneys are primarily motivated by the opportunity to collect attorney’s fees from the settlement of a class action. Although Delaware is widely considered the leading state when it comes to matters of corporate law, it is not immune from the need to compete to maintain its status. In the past, whenever Delaware has lost some of its primacy, it has responded by decreasing the rate at which it dismisses lawsuits in an effort to entice plaintiffs’ attorneys to continue filing there.

*In re Trulia* is a case that makes it less likely that plaintiffs’ attorneys will receive the attorney’s fees they are seeking, as it provides a more difficult standard to obtain approval of disclosure only settlements. As a result, there has been an emerging trend of corporate merger litigation being filed in other jurisdictions. The most likely result of this trend is that Delaware will begin to walk back its hard-lined stance from *In re Trulia* and approve more disclosure only settlements. This may be difficult, however, because of the firmness of the *In re Trulia* opinion. Thus, another solution that plaintiffs and defendants have recently taken is the mootness dismissal scenario discussed in *In re Trulia*. In this scenario, disclosures are made by agreement but the case is dismissed without prejudice. This route avoids the plainly material standard es-

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202 See Gordon, 46 N.Y.S.3d at 572–73 (approving a disclosure only settlement under a lesser standard of scrutiny than *In re Trulia*); City Trading Fund, 72 N.Y.S.3d at 381 (indicating that New York is likely a more favorable jurisdiction for disclosure only settlements). On the other hand, defendants have the possibility of including forum selection bylaws to avail themselves of a specific jurisdiction’s law. See Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013) (upholding a corporation’s right to unilaterally adopt a forum selection bylaw in its corporate documents).

203 See *In re Trulia*, 129 A.3d at 896–97 (briefly discussing the mootness dismissal scenario and implying that it is a route that plaintiffs and defendants can take in order to avoid the plainly material standard and obtain attorney’s fees).

204 See Coffee, *supra* note 50, at 677 (explaining that plaintiffs’ attorneys are the driving force behind class action lawsuits that challenge mergers); Weiss & White, *supra* note 50, at 1851–52, 1855–56 (explaining that the primary motive behind class action litigation is to obtain attorney’s fees).
tablished in *In re Trulia* and makes it more likely that plaintiffs’ attorneys will receive the desired outcome of attorney’s fees that they seek. States are creatures of habit, and when presented with a familiar situation, they will reach for a solution that is similar to one that has worked in the past. In the wake of *In re Trulia* and its treatment of disclosure only settlements, the new, yet similar solution is the mootness dismissal scenario. What remains to be seen is whether plaintiffs’ attorneys will keep their litigation business in Delaware, or continue to test the waters of a seemingly friendlier jurisdiction, such as New York.

**PETER DILIBERTI**