September 2014

The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals

Browning Jeffries

Follow this and additional works at: https://scholarship.law.berkeley.edu/bblj

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38BK35

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Business Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The Plaintiffs’ Lawyer’s Transaction Tax: 
The New Cost of Doing Business in Public Company Deals

Browning Jeffries

I. Introduction

II. Overview of Agency Costs in Shareholder Litigation
   A. State Law Shareholder Derivative Suits
   B. Federal Securities Class Actions

III. The Rise of Merger Objection Litigation
   A. Overview
   B. Meritless Nature of Much of the Litigation
      1. Quick Filing Followed by a Failure to Litigate
      2. Multi-Jurisdictional Litigation
      3. Settlements Providing Monetary Value Only for Plaintiffs’ Attorneys
   C. Insufficient Oversight

IV. Analysis of Previously Proposed Solutions to the Problem Inherent in Merger Objection Litigation
   A. Outright Rejection of the Common Benefit Doctrine
   B. Limiting Litigation to the State of Incorporation of the Target Company

V. A Suggested Framework for Analyzing Disclosure-only Settlements in Merger Objection Litigation

VI. Conclusion

1. Associate Professor of Law, Atlanta’s John Marshall Law School. The author would like to thank Irena Chernova for her diligent research assistance on this project.
I. INTRODUCTION

Shareholder litigation has historically played an important role in policing the behavior of corporate managers. By allowing shareholders to band together to bring derivative suits or class actions against corrupt or incompetent officers and directors, investors are given a powerful tool to protect their economic interest in the corporation and maintain managerial accountability. Shareholder litigation provides a remedy to the wronged shareholders or to the corporation—in the form of monetary recovery or beneficial corporate changes—and also has the benefit of deterring future wrongdoing. However, along with the benefits of shareholder litigation comes the potential for abuse.

The primary abuse involving shareholder class action suits and representative derivative litigation is the initiation of strike suits—meritless claims filed for their nuisance value—by entrepreneurial plaintiffs’ attorneys. The problem of strike suits in corporate litigation is nothing new, and the agency costs associated with entrepreneurial litigation have been well documented. When these agency costs in one area of corporate litigation get too high, some combination of courts, state legislatures, and the federal legislature typically step in to impose procedural hurdles and other protections to help curb abusive litigation.

The most recent wave of abusive litigation in the corporate arena involves what the author will refer to throughout this Article as “merger objection suits” or, collectively, “merger objection litigation.” Merger objection litigation occurs when a (typically public) company announces a transaction involving a business combination, such as a merger or an acquisition, and the announcement of the deal immediately draws predictable and frequently meritless class

4. Id. at 1147; In re Revlon, Inc. S’holders Litig., 990 A.2d 940, 959 (Del. Ch. 2010).
5. The term “agency costs” refers to the costs that arise out of the principal-agent relationship, including the costs of monitoring the agent and the costs of opportunistic behavior on the part of the agent. John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. CHI. L. REV. 877, 883 (1987) [hereinafter Coffee, Balancing Fairness]. In the attorney-client relationship in this context—i.e., the representative litigation context—a common agency cost is the potential on the part of the attorney to trade a “high fee award for a low recovery” for the class. Id. See Part II infra for a more complete discussion of the agency costs associated with entrepreneurial litigation in the corporate arena.
6. See Part II A infra for examples of protections imposed by state law and Part II B infra for examples of protections imposed by federal law to curb abusive litigation.
The Plaintiffs’ Lawyer’s Transaction Tax

action suits8 claiming, for instance, that the price the target company has negotiated is too low, the process for approving the acquisition was inadequate, or that misleading or incomplete disclosures were given to the shareholders about the transaction.9 These claims are often filed even before the proxy statement is publicly filed and distributed to the shareholders.10 As such, the filing often occurs before the plaintiffs’ attorneys have had an opportunity to actually investigate the merits of the claims asserted.11 Merger objection litigation has been on the rise over the past several years12 despite the fact that the number of transactions overall has decreased.13 A study by Cornerstone Research found that in 2012 93% of mergers and acquisitions valued over $100 million and 96% of such deals valued over $500 million were challenged.14

Merger objection litigation, in its pure form, can provide a useful function in policing management to make sure the shareholders are not getting harmed in the process of a deal.15 However, in this new rash of suits, frequently entre-

12. Brian Cheffins, John Armour, & Bernard Black et al., Delaware Corporate Litigation and the Fragmentation of the Plaintiff’s Bar, 2012 Colum. Bus. L. Rev. 427, 451-52 (2012). A study by Cain and Davidoff found that 39.3% of transactions in their sample incurred litigation in 2005 compared to 92.1% of transactions in 2011. Matthew Cain & Steven Davidoff, A Great Game: The Dynamics of State Competition and Litigation, at 3 (Jan. 31, 2013) (unpublished manuscript), available at http://ssrn.com/abstract=1984758. The sample of 1,117 transactions included all transactions listed in the FactSet MergerMetrics database and announced from 2005 to 2011 that met the following criteria: (1) the target was a U.S. public company, (2) the transaction size was at least $100 million, (3) the offer price was at least $5 per share, (4) the merger agreement was signed and publicly disclosed, and (5) the transaction was completed. Id. at 13.
13. Thomas & Thompson, supra note 2, at 1788-89.
15. For instance, management might make a deal with a bidder that management prefers and put in place tactics to block offers from other bidders that might be more beneficial to shareholders. Management might do so for a number of reasons. Perhaps because the preferred bidder, for example, is one who will retain the same management after the consummation of the deal as opposed to a bidder who might replace the current managers with its own. Thomas & Thompson, supra note 2, at 1778. And just because one of these suits is brought by a “professional plaintiff” does not necessarily mean it is meritless. Brian J. Quinn, Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision, 45 U.C. Davis L. Rev. 137, 158 (2011) (pointing out that some of the most cited opinions in Delaware corporate law such as Weinberger v. UOP and Kahn v. Lynch Comm’ns were brought by plaintiffs’ attorneys on behalf of professional plaintiffs).
entrepreneurial plaintiffs’ attorneys are filing boilerplate complaints for the sole purpose of capitalizing on their ability to hold up the transaction and perhaps force a quick settlement. Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims. Adding to this pressure to settle is the threat of larger-than-normal litigation costs, since most large public company deals that attract litigation draw more than one suit, often in several different jurisdictions. The multi-jurisdictional nature of this litigation adds to the cost of litigation by requiring target corporations to defend virtually identical suits in multiple forums, eating up judicial resources in the process.

Though resolution of these merger objection cases is typically quick—thereby reducing the litigation costs for both sides—the majority of these settlements do not result in any monetary remuneration to the plaintiff shareholder class. Rather, these settlements merely require the target company to provide some additional disclosures to the shareholders—often immaterial and unhelpful—or result in an amendment to the transaction agreement that may ultimately be entirely cosmetic. The fact that many of these suits are filed before a proxy statement is even available makes these disclosure-only settlements even more offensive. And, after settlement, it is typically the case that the share-

19. In one 2012 study of merger transactions valued at over $100 million, 93% resulted in litigation with an average of 4.8 lawsuits per transaction. Daines & Kouminan, supra note 8, at 1.
20. Pincus, supra note 18, at 6-7; Quinn, supra note 15, at 139. See Part III.B.2 infra for a more complete discussion of this issue.
22. In an overwhelming majority of merger objection suits that settle, shareholders are receiving only supplemental disclosures as purported relief. For instance, in a review of 2012 merger objection litigation, Cornerstone Research found that in 81% of the suits that settled, the settlement included only supplemental disclosures for the shareholders. Only one settlement resulted in an increase in the merger price. Daines & Kouminan, supra note 8, at 6. See Part III.B.3 infra for a more complete discussion of this issue.
23. Clearly a disclosure claim could not have even been part of the original complaint if filed before the proxy, yet the only relief being granted in settlement is additional disclosures put into the proxy.

58
The Plaintiffs’ Lawyer’s Transaction Tax

holders overwhelmingly approve the litigated transaction, despite the fact that the only relief received in the settlement was cosmetic and of no real benefit to the shareholders. 24

Despite the fact that these settlements typically result in no monetary recovery for the shareholders, they often result in the payment of millions of dollars in attorneys’ fees to the plaintiffs’ attorneys who brought the suits. 25 Since the plaintiff and defendant present a unified front to the court in presenting the settlement arrangement, judges often accept the fee agreement if it appears reasonable. 26 As such, although courts are charged with making sure that settlements are fair to the class, judges nevertheless often do not raise challenges to these fee awards sua sponte. 27 Moreover, due to the agency costs involved in class action litigation and the lack of motivation of any one plaintiff shareholder to monitor class counsel, these fee awards are rarely objected to and thus rarely appealed. 28 Not only do these settlements often provide no benefit to shareholders, they actually harm shareholders directly by requiring the class to release all future claims relating to the underlying transaction and indirectly by reducing some of the economic benefit of the transaction that would have flowed to the shareholders. 29 The fact that the company’s D&O insurance policy typically covers the attorneys’ fees makes these settlements look even more collusive, as the defendant is able to pass the cost of settlement along to its insurer. 30

Scholars who have studied this trend in merger objection litigation and practitioners who have experienced it first hand have noted the negative economic effects and the inequities of these strike suits that result in no benefits to

Pincus, supra note 18, at 6. Typically, the original complaint makes various claims, which are often all dropped in favor of disclosure claims in an amended complaint, which is filed after the proxy is issued. See infra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.

24. Kazman v. Frontier Oil Corp., 2013 WL 1244376, at *2 (Tex. App. Mar. 28, 2013); Searcey & Jones, supra note 10 (noting that these suits “rarely, if ever, scuttle deals”); Thompson & Thomas, supra note 9, at 198 (describing a study of merger objection litigation that found 85% of the third party acquisitions, 88% of the control shareholder transactions, and 64% of the hostile bid transactions in their study that incurred litigation were not only approved but ultimately closed).

25. Pincus, supra note 18, at 1.


30. Tatum, supra note 26. As costs are passed onto insurers, of course, premiums rise, thus ultimately harming the shareholders of the insured company.
shareholders and windfalls to attorneys.\textsuperscript{31} Many focus on the multi-jurisdictional aspect of this litigation as the primary problem, suggesting that the problems with abusive litigation in this arena would resolve themselves if plaintiffs were limited to filing merger objection suits in the target corporation’s state of incorporation\textsuperscript{32} or if, through judicial comity, merger objection suits were more easily consolidated across jurisdictions.\textsuperscript{33} First, plaintiffs’ attorneys would no longer be able to engage in the “race to the courthouse” in multiple jurisdictions in an attempt to be named lead counsel in the class action.\textsuperscript{34} And because over 60\% of public companies are incorporated in Delaware,\textsuperscript{35} the theory is that the majority of these suits would be brought in Delaware and Delaware courts would adequately police the settlement agreements to avoid collusion between plaintiffs’ attorneys and defendants that would otherwise result in unfair settlements to plaintiff shareholders.\textsuperscript{36} Eliminating the multi-jurisdictional aspect of merger litigation would certainly be a step toward curbing abusive strike suits in this arena. As a result, fewer suits would be filed in any given transaction, thereby alleviating some portion of the settlement pressure imposed on defendants by the high costs of litigating a case in multiple forums. However, the other incentives to settle, particularly those imposed by the pressure of the deal timeline,\textsuperscript{37} would remain, providing continued motivation for plaintiffs’ attorneys to file meritless cases in the hopes of extracting a settlement of attorneys’ fees. Moreover, while Delaware may do a better job policing merger objection litigation than other jurisdictions, Delaware courts still have difficulty assessing settlements due to the information disparity between the advocates on the one hand and the court on

\textsuperscript{31} See, e.g., Thomas & Thompson, supra note 2, at 1787, 1789, 1800; Committee on Securities Litigation, Coordinating Related Securities Litigation: A Position, Paper, ASSN'N OF THE BAR OF THE CITY OF NEW YORK 3 (Apr. 17, 2008), available at http://www.nycbar.org/pdf/report/Securities_Litigation_%20A.pdf; Pincus, supra note 18, at 1-2, 8; Greene, supra note 11; Q&A With King & Spalding’s Paul Bessette; Woolner et al., supra note 7; In re Cox Commc’ns, 879 A.2d at 639; see also Patrick M. Garry, et al., The Irrationality of Shareholder Class Action Lawsuits: a Proposal for Reform, 49 S.D. L. REV. 275, 281 (2003-04) (discussing shareholder class actions generally).

\textsuperscript{32} This could be done through the election of an exclusive forum provision in the company’s charter provision or through the implementation of federal law or individual state laws requiring that all merger-related securities litigation be brought in the state of incorporation of the defendant company. See Part IV.B, infra for a discussion of this proposed solution to multi-jurisdictional litigation.

\textsuperscript{33} See infra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.

\textsuperscript{34} See infra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text for a description of the “race to the courthouse” issue created by many jurisdictions rewarding the first to file as the lead counsel in a class action.


\textsuperscript{36} Thomas & Thompson, supra note 2, at 1808; Greene, supra note 11.

\textsuperscript{37} See supra note 17 and accompanying text.
The Plaintiffs’ Lawyer’s Transaction Tax

38. Vice Chancellor Laster has noted that when the court is tasked with “reviewing an uncontested fee application, [it] suffers from an informational vacuum created when the adversity of interests that drives the common law process dissipates.” In re Sauer-Danfoss Inc. S’holders Litig. 65 A.3d 1116, 1137 (Del. Ch. 2011).

39. For instance, it has been noted that, though the Delaware Chancery Court has identified a number of factors to consider when determining who will serve as lead counsel, the court often ignores the factors in favor of letting the attorneys work out amongst themselves who will serve as lead counsel. See, e.g., Griffith & Lahav, supra note 8, at 35. By way of illustration, in In re Revlon, Inc. Shareholders Litigation, Vice Chancellor Laster refused to grant a motion to consolidate or appoint lead counsel, leaving it up to the attorneys to decide, because the court was “unpersuaded by either motion.” 990 A.2d 940, 945 (Del. Ch. 2010). The practical result of this approach is to reward the first to file, as that is often the attorney who emerges as the victor when the attorneys are left to work it out on their own. Griffith & Lahav, supra note 8, at 34. This issue is discussed in more detail in Part III.C, infra.


41. As Judge Friendly quipped over fifty years ago: “[s]ince a settlement is agreed, the attorneys for the plaintiff stockholders link arms with their former adversaries to defend the joint handiwork.” Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting).
cle discusses the rise of merger objection litigation and explores the agency costs associated with this particular type of class action litigation. Part IV explores some of the previously proposed solutions to abusive merger objection litigation. Part V concludes with the author’s proposal of reform led by a combined legislative and judicial response in Delaware.

II. OVERVIEW OF AGENCY COSTS IN SHAREHOLDER LITIGATION

A. State Law Shareholder Derivative Suits

One of the first types of corporate suits to draw attention to the agency costs associated with representative litigation was the shareholder derivative suit, which was the dominant form of shareholder litigation for most of the twentieth century. Agency costs arise in derivative litigation out of the odd role reversal that takes place when a shareholder sues on behalf of and in the name of the corporation, essentially stepping into the role of management. The shareholder may not be in the best position to make decisions about the litigation, such as whom the corporation should sue, whether the corporation should settle, and for what amount. Because of this dynamic, potential conflicts abound. For instance, the reasons of one individual shareholder for pursuing litigation—particularly when that shareholder has a very small investment interest in the corporation—may conflict with the interests of the other shareholders and the corporation. In addition, because the shareholder is not familiar with the managerial role, he or she may have a more limited or short-sighted vision of the company than those charged with running it. Because shareholders are not typically bound by the fiduciary duties that bind corporate officers and directors, nothing deters them from acting in their own self-interest and ignoring the interests of other shareholders to the extent their interests are not

42. This type of representative litigation allows the shareholder to step into the shoes of the corporation and sue directors or officers in the name of and on behalf of the corporation. Jeffries, Abrogation Debate, supra note 3, at 1089. Not only does derivative litigation provide a remedy to the corporation for losses it suffered at the hands of corrupt or incompetent managers, it also purportedly deters directors and officers from engaging in wrongful behavior in the first place. Id. at 1147. Protection of shareholder interests, however, is not the only policy concern in representative litigation. For instance, courts recognize the importance of allowing corporations to govern themselves to the maximum extent possible without judicial involvement in their internal business affairs. Id. A tension thus exists between allowing shareholders to demand management accountability and requiring shareholders to respect management authority. Id. at 1147-48.

43. Thomas & Thompson, supra note 2, at 1756.
44. Jeffries, Abrogation Debate, supra note 3, at 1148.
47. Id.
The Plaintiffs’ Lawyer’s Transaction Tax

aligned.\(^{48}\)

The emergence of the strike suit in derivative litigation brought concerns over these agency costs to the forefront,\(^ {49}\) beginning as early as the 1940s.\(^ {50}\) In response to these concerns, states began to enact procedural requirements that a plaintiff shareholder would have to meet to bring a derivative suit. One of the first of these requirements was that plaintiffs post a bond at the commencement of the suit to show they would be able to pay the defendants’ attorneys’ fees in the event the action was dismissed as meritless.\(^ {51}\) Another common barrier to litigation that emerged was the concurrent ownership rule, which requires that any plaintiff shareholders who filed suit first establish that they owned their stock at the time of the alleged injury.\(^ {52}\) The most prohibitive hurdle of all—the demand requirement—prevents the plaintiff shareholder from proceeding with a derivative claim before he or she has made a demand on the board to cause the corporation to bring suit against the alleged corporate wrongdoers, some of whom may be on the very board upon which demand is being made.\(^ {53}\) Finally, in Delaware and a minority of jurisdictions, the plaintiff is unable to obtain discovery in a derivative suit until such plaintiff has survived a motion to dismiss.\(^ {54}\) Even in the case where the plaintiff can clear these hurdles, the law in some jurisdictions also allows for the board to wrest control of the litigation back from the shareholder plaintiff through the use of an independent special litigation committee.\(^ {55}\)

B. Federal Securities Class Actions

Reacting against the difficulty these procedural hurdles imposed on litigating corporate law issues through the derivative suit mechanism, plaintiffs’ attorneys began using the federal securities laws to bring class action lawsuits, thereby avoiding the derivative suit requirements.\(^ {56}\) Specifically, plaintiffs used Section 10(b) of the Exchange Act and the related Rule 10b-5 to pursue claims

\(^{48}\) Id.

\(^{49}\) Thomas & Thompson, supra note 2, at 1756. In a strike suit, it is actually the plaintiffs’ attorneys who drive the derivative litigation—not the actual wronged shareholders themselves—bringing suit to realize upon the nuisance value of the suit. Thompson & Thomas, supra note 9, at 149. As an uninterested third party with no economic investment in the corporation, the attorney has no reason to protect the corporation’s interests and is instead the main beneficiary of the litigation. Jeffries, Abrogation Debate, supra note 3, at 1149.

\(^{50}\) Thompson & Thomas, supra note 9, at 136.

\(^{51}\) Id. at 149.

\(^{52}\) Id. at 150.

\(^{53}\) Id.

\(^{54}\) Armour et al., supra note 35, at 1379.

\(^{55}\) Thompson & Thomas, supra note 9, at 136.

\(^{56}\) Thomas & Thompson, supra note 2, at 1756.
alleging fraud in the purchase and sale of securities. However, it soon became clear that the federal securities litigation mechanism was being abused just as the derivative suit had been previously. The securities class action suits were vulnerable to the same types of opportunistic behavior on the part of plaintiffs’ attorneys, as could be seen in other types of class action litigation. While the benefits of class actions were recognized—such as allowing individuals to combine claims that would otherwise be too small to litigate—it was also clear that in any class action scenario high agency costs would exist due to the nature of the relationship between the attorney and the class members.

For instance, even the most basic aspect of the attorney-client relationship—the client selecting and hiring the attorney—is turned on its head in much representative litigation. Instead of waiting for a plaintiff to materialize, plaintiffs’ attorneys in the securities class action setting routinely use “professional plaintiffs” to bring claims, thus reinforcing the reality that it is the attorney, not the client, driving the litigation. Any individual plaintiff’s ability or willingness to monitor the plaintiffs’ attorney is minimal in these scenarios, allowing plaintiffs’ attorneys to get settlements with high fee awards in exchange for low recoveries for the shareholder plaintiffs.

Plaintiffs’ attorneys took advantage of these agency costs in the securities class action realm, resulting in a proliferation of litigation in this area in the early 1990s. This litigation primarily took the form of “stock drop” cases. In these suits, a drop in stock price or the announcement by an issuer that it was restating its earnings precipitated class action litigation. Upon the announcement, and often without regard to whether there was any wrongdoing on the part of the issuer, plaintiffs’ attorneys secured a plaintiff and filed a securities class action suit, alleging that the corporate officers had misrepresented the fi-

---

58. Thompson & Thomas, supra note 9, at 136.
59. Id.
62. Id. at 631; Garry, supra note 31, at 280, 285.
63. Leslie, supra note 27, at 1046-47. Under a cost-benefit analysis, it simply does not make sense for any one class member to expend the time, effort, and money to monitor class counsel since any incremental increase in settlement amount that individual might see would not be as high as the cost of monitoring. Id. at 1046. Also, class members are afforded very little information. Id. The information disparity between attorney and client in this scenario makes monitoring very difficult. Id.
64. Id. at 1044 (“Defendants know that they can minimize their liability by effectively bribing the class counsel to reduce the class recovery in exchange for a greater payoff for the attorneys.”).
65. Thomas & Thompson, supra note 9, at 136.
66. Pincus, supra note 18, at 8.
The Plaintiffs’ Lawyer’s Transaction Tax

ancial health of the corporation. This litigation was marked by a “race to the courthouse,” as plaintiffs’ attorneys filed hastily drafted complaints in an effort to be the first to file and thus acquire lead plaintiff status, thereby guaranteeing them the largest portion of any fee award. The litigation had the feel of a “sue first, investigate later” mentality, allowing plaintiffs’ attorneys to go on a fishing expedition after the litigation was filed in the hopes of finding facts to support their allegations. Plaintiffs’ attorneys counted on the high costs of litigation to create incentives for defendants to settle, even when the allegations in the complaint were not necessarily supported by underlying facts.

Responding to concerns over the agency costs associated with this federal securities litigation, Congress enacted the Private Securities Litigation Reform Act (PSLRA) in 1995. The PSLRA had a number of features designed to decrease the race to the courthouse and encourage attorneys to investigate the merits of a suit before filing. For instance, it simultaneously imposed requirements of detailed factual pleading, while not allowing discovery until the plaintiff had survived a motion to dismiss. It also included a presumption that the shareholder with the largest holding in the defendant corporation would be the lead plaintiff; rather than rewarding the first to file, it favored attorneys with large institutional investors as clients. The hope was that lawyers would be prevented from using professional plaintiffs with only a few shares of stock in the company and that large institutional shareholders might be incentivized to more adequately monitor class counsel and better protect the interests of the class. The use of professional plaintiffs was further discouraged by incorporating a provision disallowing any plaintiff from serving as lead plaintiff in more than five securities class actions during any three-year period.

After enactment of the PSLRA, many plaintiffs’ attorneys attempted to avoid the requirements of the statute by filing suits in state court rather than federal court. Congress reacted quickly by enacting the Securities Litigation Uniform Standards Act (SLUSA) in 1998. This statute allowed defendants to remove any securities class action suits filed in state court to federal court.

67. Id.; Garry, supra note 31, at 276-77.
68. Garry, supra note 31, at 284.
69. Armour et al., supra note 35, at 1377; Garry, supra note 31, at 294.
70. Armour et al., supra note 35, at 1377.
71. Garry, supra note 31, at 293.
72. Hensler, supra note 40, at 82.
73. 15 USC § 78u-4(b)(3)(B). See also Armour et al., supra note 35, at 1377.
75. Garry, supra note 31, at 294.
77. Armour et al., supra note 35, at 1377.
78. Id.
79. 15 USC § 77p(c).
where the PSLRA would then apply. The result was that SLUSA made federal court the exclusive venue for most securities law class actions.\textsuperscript{80} Though SLUSA did not apply to certain state securities class actions arising out of the sale of non-covered securities, such as those issued by nonpublic business organizations, the 2005 Class Action Fairness Act (CAFA) allowed defendants to remove even these actions to federal court, thereby subjecting them to the stricter requirements of the PSLRA.\textsuperscript{81} In addition to these legislative restrictions, the Supreme Court of the United States has also curtailed the ability of private litigants to pursue claims against issuers through its interpretations of the federal securities laws underlying the claims.\textsuperscript{82} Most recently, in \textit{Janus Capital Group, Inc. v. First Derivative Traders},\textsuperscript{83} the Court significantly limited those individuals who could be considered “makers” of a misstatement for purposes of 10b-5 liability, thereby making it more difficult for plaintiffs to bring 10b-5 claims.\textsuperscript{84}

### III. The Rise of Merger Objection Litigation

#### A. Overview

SLUSA and CAFA federalize much securities class action litigation, but contain an important exception—the so-called “Delaware carve-out”—that allows certain securities class actions arising out of the law of the state of incorporation of the defendant issuer to be brought in state court.\textsuperscript{85} For instance, under SLUSA, a class action can be brought in state court if the claim arises under the law of the issuer’s state of incorporation and involves “the purchase or sale of securities by the issuer . . . from or to holders of equity securities of the issuer” or relates to statements by the issuer relating to things such as shareholders’ voting or appraisal rights.\textsuperscript{86} Similarly, CAFA allows a class action to proceed in state court if the claim “relates to the internal affairs or governance of a corporation . . . that arises under . . . the laws of the State in which such corporation . . . is incorporated.”\textsuperscript{87} These carve-outs effectively allow states to retain jurisdiction over litigation involving mergers and acquisitions.

\textsuperscript{80} Committee on Securities Litigation, \textit{supra} note 31, at 11. SLUSA contained an important carve-out for purposes of this article that allowed certain class actions to still proceed in state court. The SLUSA carve-out is discussed in more detail in Part III.A, infra.


\textsuperscript{82} Jeffries, \textit{Implications of Janus}, \textit{supra} note 57, at 493.

\textsuperscript{83} \textit{Janus Capital Grp., Inc. v. First Derivative Traders}, 131 S. Ct. 2296 (2011).

\textsuperscript{84} Jeffries, \textit{Implications of Janus}, \textit{supra} note 57, at 493.

\textsuperscript{85} Pincus, \textit{supra} note 18, at 8; Thomas & Thompson, \textit{supra} note 2, at 1809.

\textsuperscript{86} 15 USC § 78bb(f)(3)(A).

\textsuperscript{87} 28 USC § 1332(d)(9)(B).
The Plaintiffs’ Lawyer’s Transaction Tax

When plaintiffs’ attorneys began having more trouble litigating stock drop cases and other securities class actions due to the requirements of the PSLRA and the stricter interpretations of federal law mentioned above, the Delaware carve-out made merger objection litigation an attractive substitute. As such, merger objection cases have seen a period of growth over the past several years. For instance, Cain and Davidoff, reviewing a sample of large public company transactions announced from 2005 to 2011, found that 39.3% of transactions resulted in litigation in 2005, compared with 92.1% in 2011. More recently, a 2012 study performed by Cornerstone Research indicated that, of mergers and acquisitions deals involving public company targets, 96% of those valued above $500 million and 93% of those valued above $100 million attracted shareholder litigation.

Merger objection litigation is not per se a bad thing. In its purest form, it can be a useful tool for policing management, thereby providing a mechanism to ensure the shareholders are not being harmed in the course of a transaction. The potential for management self-dealing is not uncommon in the deal context. For instance, if one potential bidder plans to retain management while another plans to replace management, it is easy to see where a conflict of interest can arise between the interests of the shareholders and that of management. Management could employ defensive tactics to favor its preferred bidder in this instance—or in the myriad of other potential scenarios where members of management have some personal stake in the transaction. This preferential treatment might ultimately result in the consummation of a deal that is not in the best interests of the shareholders. Merger objection litigation allows shareholders to bring suits—typically class actions—alleging one or more violations of state fiduciary duty law or related violations under state or

88. Pincus, supra note 18, at 8.
89. Id.; Woolner et al., supra note 7.
90. Cain & Davidoff, supra note 12, at 3. The sample of transactions included all transactions listed in the FactSet MergerMetrics database announced from 2005 to 2011 that involved: (1) a target that is a public company, (2) a transaction size of at least $100 million where the offer price was at least $5 per share, (3) a signed and publicly disclosed agreement, and (4) the transaction was completed. Id. at 13.
91. DAINES & KOUMINAN, supra note 8, at 1. The authors of the report used Thompson Reuters’ SDC database to obtain a list of all acquisitions of U.S. public targets with a value of at least $100 million in 2012. Id. at introduction. They searched SEC filings of both targets and acquirers for discussion of shareholder litigation and used court dockets to trace litigation outcomes. Id.
92. See supra note 15 and accompanying text.
93. Thomas & Thompson, supra note 2, at 1778.
94. Id.
95. Id.
96. Id.
98. Griffith & Lahav, supra note 8, at 10.
federal securities laws. Typical complaints include allegations that the purchase price is too low, that the board failed to disclose information material to the shareholders’ decision-making process in approving the deal, that conflicts of interest exist making management’s judgment biased, that the board failed to take appropriate measures to seek higher bids, or that the board otherwise conducted a flawed sales process that did not maximize shareholder value. When these claims are meritorious, they therefore can provide obvious value to the shareholders.

However, just as merger objection litigation is not per se objectionable, neither are mergers and acquisitions themselves. Among other things, mergers and acquisitions allow companies to take advantage of synergies that result in cost savings, and therefore lower prices. Transactions can allow companies to gain access to new technology, to have access to greater capital resources, and to reorganize inefficiently managed assets. Yet an overwhelming majority of large public company transactions result in litigation. And as one scholar has noted, it does not seem plausible that 96% of large public company deals involve management wrongdoing, or that 96% of such deals support even a colorable claim of such wrongdoing.

B. Meritless Nature of Much of the Litigation

There is empirical evidence of a number of different features of this litigation that suggests many of these claims are meritless. This Part III.B will

---


100. Woolner et al., supra note 7; Griffith & Lahav, supra note 8, at 11; Daines & Kouminan, supra note 8, at introduction.

101. Pincus, supra note 18, at 1.

102. Id.

103. Rodriguez, supra note 21; see also Pincus, supra note 18, at 3 (noting that “[i]f the allegations were real, there would be intense law enforcement focus on such a hotbed of fraud—by the Securities and Exchange Commission, the Department of Justice, and State Attorneys General” and pointing out that this “has not happened.”)

104. Some scholars have rightly pointed out that it is difficult to determine whether nuisance settlements are a meaningful problem because of a lack of empirical data. Lance McMillian, The Nuisance Settlement “Problem”: The Elusive Truth and a Clarifying Proposal, 31 AM. J. TRIAL ADVOC. 221, 222 (2007). For instance, settlement data is often hard to compile since the terms of a given settlement are typically subject to confidentiality agreements. Id. at 236-37. It is also hard to determine the intent of the plaintiffs’ attorney at the time the suit was filed, making it difficult to know if it was brought by someone who knows the claim is meritless or whether the attorney believed it was a good case, only later learning that it was flawed through the process of discovery. Id. at 239-40, 244-45. These concerns are valid in the context of strike suits generally, but are not as present when considering merger objection class actions. First, because the terms of class action settlements are publicly disclosed, they do not suffer from the information barriers in individual strike suits, and therefore information about settlements is
The Plaintiffs’ Lawyer’s Transaction Tax

address three such features for which empirical evidence exists. First, this Part analyzes the speed with which these suits are filed, often followed by a failure on the part of the plaintiffs’ attorneys to actively litigate. Second, this Part discusses the multi-jurisdictional aspect of this litigation and the leverage this provides plaintiffs for settlement negotiations. Finally, this Part looks at probably the most problematic aspect of this litigation: that it typically results solely in non-monetary benefits to the class, which benefits are often of dubious value, but almost always results in attorneys’ fee awards, which may be substantial.

1. Quick Filing Followed by a Failure to Litigate

First, the speed with which these merger objection suits are typically filed makes them potentially suspect. For instance, in a 2012 study performed by Cornerstone Research, lawsuits were filed an average of 14 days after the merger announcement, with plaintiffs’ firms stating on their websites that they are investigating the transaction within hours of the deal’s announcement. Of course, speed of filing alone is not necessarily an indicator of a meritless suit. There is certainly an argument that speed is necessary when these types of

available for purposes of compiling data. Id. at 248. Second, while it is true that the data compiled on these settlements cannot actually allow one to get inside the head of the plaintiffs’ attorneys bringing these suits, it can show behavioral trends that can serve as a good proxy for the attorneys’ intent, as will be discussed in more detail in this Part III.B. See also id. at 256 (“Actions often reveal a party’s true motives.”).

105. DAINES & KOU MINAN, supra note 8, at 1. Another study performed by Cheffins, Armour, and Black that looked at Delaware suits involving a dataset of large merger and acquisition transactions found that, half of the time, the suits were filed within two days of the deal’s announcement. Cheffins, Armour & Black, Delaware Corporate Litigation and the Fragmentation of the Plaintiffs’ Bar, COLUM. BUS. L. REV. 427, n. 189 (2012). It is notable that this is the case even in Delaware, where there has been some movement away from rewarding the winner of the race to the courthouse. Cheffins, Delaware Losing Cases, supra note 35, at 42. One recent example supporting this finding occurred when Teavana Holdings Inc. was sued in the Delaware Chancery Court by shareholders in connection with the approval of a $620 million buyout offer from Starbucks Coffee Co. The deal was announced publicly on November 14, 2012, and suit was filed before the end of that same month. Jamie Santo, Teavana Investor Hopes To Ice Starbucks’ $620M Buyout, LAW 360 (Nov. 28, 2012, 8:08 PM ET), http://www.law360 .com/articles/397061/teavana-investor-hopes-to-ice-starbucks-620m-buyout.

106. For instance, the very same day that Ebix, Inc. announced it would sell to an affiliate of Goldman, Sachs & Co. on May 1, 2013, at least three separate plaintiffs’ firms announced they were investigating whether the Ebix board breached its fiduciary duties to its shareholders. Bernstein Liebhard LLP Announces Investigation of Acquisition By An Affiliate of Goldman, Sachs, & Co., DAILYMARKETS.COM (May 1, 2013), http://www.dailymarkets.com/stock/2013/05/01/ebix-inc-shareholder-alert-bernstein-liebhard-llp-announces-investigation-of-acquisition-by-an-affiliate-of-goldman-sachs-co; Phil Milford, Ebix Investor Sues to Halt $820 Million Goldman Takeover, BLOOMBERG.COM (May 6, 2013, 4:01 PM ET), http://www.bloomberg.com/news/2013-05-06/ebix-investor-sues-to-halt-820-million-goldman-takeover.html. Similarly, two hours and 27 minutes after it was announced in December 2011 that Ventas Inc. would acquire Cogdell Spencer Inc., at least one firm set up a website announcing it was investigating whether the directors breached their fiduciary duties. Woolner et al., supra note 7. Within a week, 11 other firms had posted similar announcements. Id. The Delaware courts have noted this trend. For instance, in In re Revlon Inc. Shareholders’ Litigation, the court noted that “the first cases often appear minutes or hours after the announcement with others following within a matter of days.” 990 A.2d 940, 943 (Del. Ch. 2010).
transactions are involved. Just as it is impossible to un-ring a bell, it is difficult to unwind transactions after completion. Plaintiffs’ attorneys defend their quick filing by noting the need to act before the transaction has been approved and consummated. However, the veracity of these assertions is belied by the fact that these suits are typically filed upon the announcement of the deal, before the issuer has even filed the proxy statement describing the transaction. As discussed in Part III.B.3, the majority of these suits settle for nothing more than providing additional disclosures to the shareholders in the proxy statement. Since the only remedy that shareholders are frequently receiving is for a wrong that cannot even be alleged in a complaint filed before the proxy is filed, these suits are seemingly being filed well before they are ripe and well before the attorneys have had the opportunity to make any meaningful inquiry into the board’s actions.

Even more egregious are the cases where suit is filed upon the announcement of receipt of a tender offer, before the corporation has even analyzed whether or not to accept the offer. For instance, in In re Sauer-Danfoss Inc. Shareholders Litigation, the day after the announcement was made of receipt of a tender offer, suits were filed alleging that the directors of the target company had breached their fiduciary duties by responding to the offer. A similar situation occurred in In re Cox Communications, Inc. Shareholders Litigation, where the majority shareholder of the target company made a proposal to purchase all of the outstanding public shares of the target. In both cases, in announcing the offer, it was made clear that a special committee of independent directors would be set up to respond to and negotiate the deal. However, beginning on the day of the announcement in Cox and the day after the announcement in Sauer-Danfoss, in each case before the special committee of either board had time to do anything, suits were filed, alleging the suggested

107. Woolner et al., supra note 7.
108. Id.; Searcey & Jones, supra note 10. Though the proxy must be filed within days of the signing of the merger agreement, as a practical matter, the proxy can follow the public announcement of the deal by a few weeks. Woolner et al., supra note 7.
109. See infra note Error! Bookmark not defined., and accompanying text.
110. Pincus, supra note 18, at 6. As a practical matter, these suits are filed alleging various breaches of fiduciary duties by the directors and officers of the target company, but then the complaints are later amended after the filing of the proxy or the release of other information to the shareholders to include disclosure allegations, and often to remove other allegations that have proven to be unsubstantiated. See e.g., In re Dr. Pepper/Seven Up Cos., Inc. S’holders Litig., 1996 WL 74214, at *1 (Del. Ch. 1996). An example of this can be seen in In re Sauer-Danfoss Inc. Shareholders Litigation, where the court pointed out that “[a]t the time they hastily filed their original complaints, the plaintiffs did not and could not raise any disclosure claims for the simple reason that none of the defendants had yet disseminated the substantive disclosure documents required by federal law.” 65 A.3d 1116, 1125 (Del. Ch. 2011).
111. In re Sauer-Danfoss, 65 A.3d at 1120.
112. In re Cox Com’ns, 879 A.2d at 607.
113. Id.; In re Sauer-Danfoss, 65 A.3d at 1120.
The Plaintiffs’ Lawyer’s Transaction Tax

price per share was too low.\textsuperscript{114} In scenarios like those played out in \textit{Sauer-Danfoss} and \textit{Cox}, the plaintiffs are suing merely on a proposal, not a fully negotiated deal, and before the corporation has reacted in any meaningful way, further highlighting how the claims are unripe.\textsuperscript{115}

Compounding the problem of speedy filing is the lack of barriers to merger objection litigation that exist for other types of shareholder litigation. For instance, typically in corporate litigation, the business judgment rule provides a level of protection because of the difficulty inherent in overcoming this presumption, thereby discouraging some would-be claimants.\textsuperscript{116} However, the business judgment rule often is inapplicable in merger objection suits.\textsuperscript{117} For instance, if a merger involves a change of control whereby the shareholders lose voting control of the company, the transaction is subject to enhanced scrutiny and the business judgment rule will not apply.\textsuperscript{118} An even more stringent “entire fairness” test is imposed when, for example, the transaction involves a controlling shareholder attempting to squeeze out the minority shareholder.\textsuperscript{119}

Additionally, the barriers to derivative litigation described in Part II.A supra are not necessarily present because these suits are typically brought as class actions, rather than as derivative suits.\textsuperscript{120} Finally, the enhanced pleading requirements and rules regarding appointing lead counsel of the PSLRA typically do not apply to these suits since they are able to be brought as state law actions under the SLUSA and CAFA carve-outs.\textsuperscript{121} Therefore, there is nothing to discourage plaintiffs’ attorneys from filing these claims quickly, prior to engaging in any pre-suit investigation. In fact, policies in some jurisdictions, such as rewarding the attorney who is the first to file with lead counsel status, actually encourage such fast filing.\textsuperscript{122}

The speed of filing alone would not be as offensive if it were not coupled

\begin{thebibliography}{9}
\bibitem{114} In re Cox Comm'ns, 879 A.2d. at 608; In re Sauer-Danfoss, 65 A.3d at 1120.
\bibitem{115} In re Cox Comm'ns, 879 A.2d. at 621-22.
\bibitem{116} Griffith & Lahav, supra note 8, at 9.
\bibitem{117} Id. at 10.
\bibitem{118} Id.
\bibitem{119} Id. at 10-11.
\bibitem{120} Id. at 10.
\bibitem{121} See supra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.
\bibitem{122} See supra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text; see also Woolner et al., supra note 7 (pointing out that if a plaintiff’s attorney waits until the target has filed its proxy before suing, other lawyers will have already sued, reducing the chances of him or her being appointed lead counsel). Data compiled by Bloomberg News, for instance, showed that of a sample of 57 merger litigation suits, 29 filed within eight days of the deal’s announcement led to a median legal fee of $700,000 and for the 28 filed later, the median legal fee was $568,750. Id. Therefore, there appear to be negative incentives for lawyers to even wait for the proxy statement to come out before suing. Note that the same study indicated the reverse was true for the benefits accruing to shareholders—investors received a monetary recovery in 24% of the cases filed more quickly and in 36% of the suits filed later. Id.
\end{thebibliography}
with a failure to vigorously pursue the litigation once it has been filed. Often these merger objection class actions are characterized by a quick filing followed by a speedy settlement, without much active litigation in between.\footnote{123} Frequently, any active litigation that does occur relates exclusively to the question of who will serve as lead counsel and lead plaintiff, rather than actually litigating the merits of the suit.\footnote{124} When the plaintiffs are engaged in active discovery, briefing and arguing motions, and other indicia of active litigation, the litigation seems, at least on the surface, legitimate.\footnote{125} But when plaintiffs quickly file suits but then fail to further engage, it appears as though the plaintiffs themselves have little belief in the merits of their case.\footnote{126} Litigating merger objection suits can thus be “cheap and easy,” making such suits attractive because they bear little contingency risk for the plaintiffs’ attorneys.\footnote{127}

The Delaware Chancery Court has noted this trend in merger objection litigation of failing to actively pursue the claim. For instance, in In re Revlon, Inc. Shareholders Litigation, the Delaware Chancery Court, in an opinion by Vice Chancellor Laster, noted that the only item on the docket after a June 24 order consolidating cases and approving lead counsel was an August 14 letter advising the court that the parties had reached a settlement agreement.\footnote{128} Prior to the consolidation of cases, the plaintiffs had submitted only one document request—a request that the defendants never responded to and on which the plaintiffs never followed up.\footnote{129} The failure to follow up suggested the perfunc-

\footnote{123. The 2012 study performed by Cornerstone Research found that 119 of the 182 merger objection suits studied settled, and these settlements occurred an average of 42 days after the lawsuit was filed. Daines & Kouminan, supra note 8, at 5.}
\footnote{124. See, e.g., In re Cox Comm’ns, 879 A.2d at 641 (“[M]any of the hours in the case were spent on an organizational feud among the plaintiffs’ firms for the coveted position of lead counsel...And, aside from the dashed-off complaints and confirmatory discovery, there was little actual litigation work done, aside from the settlement negotiations themselves.”).}
\footnote{125. Thompson & Thomas, supra note 9, at 154; McMillian, supra note Error! Bookmark not defined., at 256.}
\footnote{126. Thompson & Thomas, supra note 9, at 154.}
\footnote{127. In re Sauer-Danfoss, 65 A.3d at 1139. For instance, when the plaintiff makes broad discovery requests that the defendant must spend resources addressing—reviewing for privilege and producing—but the plaintiff does not actually intend to review the documents or do much else to prepare for trial, it allows plaintiffs attorneys to keep a large portfolio of these class actions virtually risk-free. Coffee, Policy Primer, supra note Error! Bookmark not defined., at 637; Coffee, Balancing Fairness, supra note 31, at 892. Therefore, even though these cases are brought on a contingency basis, because of the leverage plaintiffs have over defendants in merger litigation and the defendants’ typical willingness to agree to disclosure-only settlements, any risk involved in the typical contingency arrangement is really illusory in this context. In re Dr. Pepper/7Up Cos., Inc., 1996 WL 74214, at *5; In re Sauer-Danfoss, 65 A.3d at 1139. Few of the plaintiffs’ attorneys who take on these suits are set up to be able to “vigorously litigate even a small percentage of the cases they file; instead, these law firms take a low-intensity, high-volume approach.” Greene, supra note 11. And though defendants technically can seek discovery from plaintiffs, in these suits, there is typically not much to gain from doing so since there is not much to learn from the plaintiff. Coffee, Policy Primer, supra note Error! Bookmark not defined., at 637.}
\footnote{128. In re Revlon, Inc. S’holders Litig., 990 A.2d 940, 945 (Del. Ch. 2010).}
\footnote{129. Id.}
The Plaintiffs’ Lawyer’s Transaction Tax

tory nature of the request; the court expressed its belief that the one document request was a “symbolic totem” that the plaintiffs’ attorneys filed so they could point to it as evidence of why they should be appointed lead counsel.130 Similarly, in In re Sauer-Danfoss Inc. Shareholders Litigation, Vice Chancellor Laster noted that the plaintiffs’ attorneys in the merger objection suit did not do much—rather, they “filed fast, sat idle, then shifted into settlement mode.”131 The court pointed out that the attorneys did not conduct any real discovery and “obtained only the standard package of documents that defendants routinely provide to facilitate a disclosure-only settlement,” resulting in a settlement for “insubstantial disclosures.”132 Yet, despite this recognition, these merger objection suits are rarely disposed of on a motion to dismiss.133

Some have suggested that the fact that the plaintiffs’ attorneys must seek class certification is evidence of effort put forth by the plaintiffs’ attorney in the context of some class action suits.134 For instance, to succeed in certifying a class, plaintiffs have to show numerosity, commonality, typicality, and adequacy of representation.135 This can involve requiring plaintiffs to engage in discovery, participate in a hearing, and undergo the scrutiny of the court in determining whether the plaintiff is an adequate class representative and whether proposed class counsel has the wherewithal to properly litigate the case.136 For certain types of class action litigation, this type class certification process will provide some protection from “feigned litigation”—where plaintiffs file complaints and perhaps some perfunctory discovery requests but fail to do much else—by requiring plaintiffs’ attorneys to incur costs by actively engaging in the litigation.137 However, it does not seem to be much protection in the specific context of merger objection litigation. First, the plaintiffs do not have to engage in this investigation at the beginning—they first file the complaint and then later, if ever, have to certify the class. In fact, in merger objection litigation, the class certification is typically approved only after a settlement has

130. Id.
132. Id.
133. Greene, supra note 11; Woolner et al., supra note 7. Recent studies have found that a vast majority of merger objection suits settle not only before the merger has closed, but generally even before a hearing on the plaintiffs’ motion for a preliminary injunction. Griffith & Lahav, supra note 8, at 12.
134. McMillian, supra note Error! Bookmark not defined., at 250.
135. FED. R. CIV. P. 23(g); see also Alistair B. Dawson & Geoff A. Gannaway, In Memoriam: Texas Class Actions, 77 TEX. B. J. 366, 368 (2009), available at www.litigationsection.com/advocate.
136. McMillian, supra note Error! Bookmark not defined., at 250. Generally, a trial court will have discretion to decide how much discovery is warranted on the class certification issue. Christine M. Gimeno, 57 TEX. JUR. 3d Parties § 62 (2013).
137. McMillian, supra note Error! Bookmark not defined., at 250.
been reached in connection with the court’s approval of that settlement.\textsuperscript{138} Second, though the plaintiffs have to satisfy the requirements for class certification, in settling much representative shareholder litigation, this is not a difficult showing. For instance, in securities class actions, it is easy to establish that the plaintiff serves as an adequate and fair representative of the class by showing that the plaintiff bought or sold securities whose value is at issue at the relevant time period.\textsuperscript{139} It would seem that the inquiry in merger objection litigation would be equally straightforward, just establishing that the shareholder was a shareholder at the time of the approval of the transaction and that the shareholder does not have any debilitating conflicts of interest with the interests of the other shareholders.\textsuperscript{140}

2. Multi-Jurisdictional Litigation

In addition to being filed quickly without pre-suit investigation, these suits also tend to be filed in multiple forums, another potential indicator of opportunistic behavior on the part of the plaintiffs’ attorneys. Since 2001, there has been an upward trend in multi-forum litigation, with more suits being filed in multiple courts based on the same underlying set of facts.\textsuperscript{141} A 2012 study by Cornerstone Research indicated that, for deals valued at over $500 million, an average of 5.4 lawsuits per transaction were filed.\textsuperscript{142} Other studies have found similar results.\textsuperscript{143} And a study by Brian Quinn indicated that, of the transactions in his sample that incurred litigation, 85% involved more than one lawsuit.\textsuperscript{144} Though a majority of public companies are incorporated in Delaware, one study showed that for issuers incorporated in Delaware, only 16% of litigated acquisitions were challenged only in the Delaware Court of Chancery.\textsuperscript{145}

\begin{footnotesize}
138. Griffith & Lahav, supra note 8, at 30, n.137. From a study on all securities class actions in 2012 in federal court, it was found that 77% of cases were resolved before a motion for class certification was filed. Comolli et al., supra note \textit{Error! Bookmark not defined.}, at 20.
139. Cheffins et al., supra note \textit{Error! Bookmark not defined.}, at 637.
140. Additionally, many jurisdictions still adhere to the “first-to-file” principal in appointing lead counsel. Armour, Black, & Cheffins, supra note 35, at 1375. Therefore, there is certainly no guarantee that the court will engage in a thoughtful inquiry in these suits about whether the plaintiffs’ attorney requesting lead counsel status is the most adequate person to represent the class.
142. Daines & Kouminan, supra note 8, at 1.
143. For instance, an earlier study by the U.S. Chamber Institute for Legal Reform confirmed similar findings from 2010 and 2011, showing that each transaction valued over $100 million that was subject to litigation attracted an average of 5.1 suits, with some transactions attracting more than 15 suits. Pincus, \textit{supra} note 18, at 2, 6. Similarly, a study by Cain and Davidoff looking at transactions between 2005 and 2011 found that by 2011, for every transaction with litigation, an average of 5 lawsuits per deal were being brought. Cain & Davidoff, supra note 12, at 14.
144. Quinn, \textit{supra} note 15, at 147. One extreme example in the study was a transaction—Blackstone Group’s acquisition of Dynegy Inc.—that attracted 26 lawsuits. Id. at 147.
145. Daines & Kouminan, supra note 8, at 3. Another recent study showed that as few as 7% of merger objection litigation suits were litigated in Delaware alone. Quinn, \textit{supra} note 15, at 147. A study
\end{footnotesize}
The Plaintiffs’ Lawyer’s Transaction Tax

This trend toward multi-jurisdictional litigation in merger objection litigation is not a function of plaintiffs seeking out better or different law to govern the dispute. Under the “internal affairs doctrine,” the substantive laws of the state of a company’s incorporation will apply to any internal disputes, even if the suit is litigated in another forum. Therefore, the choice of law is rarely a litigated issue in these merger objection suits. While plaintiffs are typically not free to choose a different law to apply to the litigation, they are free to bring their claims in different jurisdictions, so long as the court has both personal and subject matter jurisdiction. For instance, plaintiffs can bring suit not only in state court in the state in which the company is incorporated, but also in the state courts of the state in which it is headquartered or where it has substantial operations. Plaintiffs can frequently also bring suits in the federal courts of the state in which a company is headquartered or incorporated.

Presumably, once one suit is filed in one jurisdiction, any interest the shareholders might have in the litigation is being addressed, especially considering that many of the complaints are “virtually identical” but for the different names of counsel and a different named plaintiff. Since the addition of multiple suits in different jurisdictions does not appear to serve the shareholders in any meaningful way, one has to look for other underlying motivations for this proliferation of multi-jurisdictional litigation.

Scholars that have studied this issue have mostly focused on what their research indicates is an “out-of-Delaware” trend for representative shareholder

by Armour, Black, & Cheffins found that, through 2001, Delaware was often the sole forum in merger objection litigation, but from 2002 onward, it has rarely been the sole forum and sometimes is not a forum at all for Delaware corporations. Cheffins, Delaware Losing Cases, supra note 35, at 21. From 2006 to 2010, Delaware was the sole forum for large merger objection cases where the target was a Delaware corporation in only three instances. Id. at 21.

146. Cheffins, Delaware Losing Cases, supra note 35, at 2; Quinn, supra note 15, at 140.
147. DAINES & KOUMINAN, supra note 8, at 3.
148. Id.; Thomas & Thompson, supra note 2, at 1764; Quinn, supra note 15, at 140. Personal jurisdiction over the corporation’s directors and officers is usually available since, for instance, most companies hold at least some board meetings at their headquarters. Armour et al., supra note 35, at 1351; Thomas & Thompson, supra note 2, at 1779.
149. Cheffins, Delaware Losing Cases, supra note 35, at 3; Committee on Securities Litigation, supra note 31, at 3. For instance, the federal courts in the headquarters state will have personal jurisdiction over the directors and officers of the company and plaintiffs can ensure the court will have subject matter jurisdiction, even when there is no diversity jurisdiction, by combining a state law claim with a related federal law claim. 28 USC § 1331-1332,1367 (2012). See also Armour et al., supra note 35, at 1351-52; Griffith & Lahav, supra note 8, at 14. However, it is also fairly likely that diversity jurisdiction will be available as well because the plaintiffs’ attorneys can strategically choose who will serve as the class representative. Id. at 15.
150. Thompson & Thomas, supra note 9, at 155 (“Once a single representative action has been filed, the shareholders’ interest in correcting any wrongs are presumably protected….”).
151. Id. at 183.
152. Id. at 155 (“filing more suits may simply raise the costs to shareholders of challenging the board’s actions”).
For such scholars, there are really two identified issues: (1) that Delaware seems to be losing out to other states as the venue for some of its cases and (2) that Delaware, even for cases filed there, is less and less becoming the sole jurisdiction in which such cases are filed. Scholars have posited a number of reasons for this out-of-Delaware trend, two of which are discussed below. Both involve the heightened level of scrutiny that some Delaware judges are giving to merger objection suits.

First, Delaware has moved away from the strictly “first-to-file” approach to appointing lead counsel, which is still alive and well in other jurisdictions. Historically, Delaware judges did not involve themselves in the selection of lead counsel but rather left the attorneys to work out who would get to direct the litigation. The de facto result of this approach was that the attorney who was the first to file was frequently awarded lead counsel status. Being appointed lead counsel meant that the attorney would be guaranteed much of the control of the litigation and, importantly, would allow him to collect most of the fee award. However, in 2000, in TCW Technology Ltd. Partnership v. Intermedia Communications, Inc., the Chancery Court moved away from the hands-off approach that had previously characterized its process for appointing lead counsel and instead set forth a number of factors that the court would consider in making the decision.

In addition to the two reasons described herein, other reasons for the trend have also been posited. For instance, some have suggested the noticeable increase among Delaware judges of anti-plaintiffs’ attorney rhetoric may be at least partly to blame. Also, Delaware is among the minority of states that do not permit discovery in derivative suits prior to a motion to dismiss and is unlikely to grant expedited discovery requests, making the tag-along derivative suits that often accompany class action litigation more difficult for plaintiffs to win in Delaware. Unrelated to the Delaware courts themselves, some scholars point to the changes in the plaintiffs’ bar over time as another potential reason for the trend.

153. See generally Cheffins, Delaware Losing Cases, supra note 35; Cheffins et al., supra note Error! Bookmark not defined.; Cain & Davidoff, supra note 12.

154. Cheffins, Delaware Losing Cases, supra note 35, at 4. Some more recent studies suggest there has been a slight uptick in Delaware’s ability to retain cases in the past few years. For instance, one study showed that in 2011 Delaware attracted 64.3% of all the litigation relating to corporations incorporated or headquartered in Delaware, up from 44.1% in 2010. Matthew D. Cain & Steven M. Davidoff, Takeover Litigation in 2011 (Feb. 2012) (unpublished manuscript) available at http://ssrn.com/abstract=1998482.

155. In addition to the two reasons described herein, other reasons for the trend have also been posited. For instance, some have noticed the increase among Delaware judges of anti-plaintiffs’ attorney rhetoric may be at least partly to blame. Also, Delaware is among the minority of states that do not permit discovery in derivative suits prior to a motion to dismiss and is unlikely to grant expedited discovery requests, making the tag-along derivative suits that often accompany class action litigation more difficult for plaintiffs to win in Delaware. Unrelated to the Delaware courts themselves, some scholars point to the changes in the plaintiffs’ bar over time as another potential reason for the trend. Cheffins et al., supra note Error! Bookmark not defined., at 431-32. Finally, plaintiffs’ attorneys may in some instances be filing outside of Delaware to take advantage of another court’s perceived lack of experience with applying Delaware law and with adjudicating complex corporate transactions. For instance, attorneys may have the belief that a less experienced court will be less likely to weed out meritorious suits related to complicated deals. Thomas & Thompson, supra note 2, at 1795.

156. Armour et al., supra note 35, at 1375.

157. Cheffins, Delaware Losing Cases, supra note 35, at 42; Griffith & Lahav, supra note 8, at 34-35.

158. Cheffins, Delaware Losing Cases, supra note 35, at 42.

159. Garry, supra note 31, at 284.

The Plaintiffs’ Lawyer’s Transaction Tax

Co., the Chancery Court affirmed the approach taken in TCW and articulated some additional factors. 161 Under TCW and Hirt, the court is to consider the following in appointing lead counsel: (1) the quality of the pleadings, (2) the size and economic stake of the various plaintiff shareholders, (3) the willingness and ability of the lawyers to “litigate vigorously” on behalf of the plaintiffs, (4) the absence of any conflicts of interest between the plaintiffs awarded lead status and the other shareholders, (5) the enthusiasm with which the particular lawyer has pursued the litigation thus far, and (6) the competence of and resources available to the lawyer seeking lead status. 162

Though the Delaware Chancery Court articulated these factors and appeared to be taking a more active role in the appointment of lead counsel, the court has arguably stepped away from this at times since it first articulated its more hands-on approach. 163 Regardless, scholars suggest that Delaware’s refusal to simply follow the first-to-file rule in all cases, as is the case in many other jurisdictions, has led plaintiffs’ attorneys to look elsewhere for their venue of choice. 164 For instance, an attorney who does not have a large institutional client, or an attorney who does not have a reputation in Delaware as one capable of successfully litigating securities class actions, will recognize that he or she will not be appointed lead plaintiff for suits filed in Delaware. 165 However, if the attorney files in a jurisdiction recognizing the first-to-file principal, the attorney still has the opportunity to be appointed lead counsel, at least in the suits filed in that jurisdiction, and thus is encouraged, out of concern for personal gain, to file elsewhere. 166

In addition to scrutinizing the selection of lead counsel, Delaware courts have also reviewed plaintiffs’ attorney fee awards with more care. In 2001, Delaware courts began reducing requested fee awards in a series of representative shareholder litigation suits. 167 While Delaware courts will still award high

---

162. Hirt, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002). It has been noted that the second of these factors—the relative size of the various plaintiff shareholders—mirrors somewhat the PSLRA provision that favors large institutional investors as lead plaintiff over smaller shareholders. TCW Tech. Ltd. P’ship, 2000 WL 1654501, at *4 (Del. Ch. Oct. 17, 2000); Cheffins et al., supra note Error! Bookmark not defined., at 483; Armour et al., supra note 35, at 1373.
163. Griffith & Lahav, supra note 8, at 35. For instance, in 2010 in In re Revlon, Inc. Shareholders Litigation, the judge ignored the factors in favor of letting the plaintiffs’ attorneys decide amongst themselves who would be lead counsel. 990 A.2d 940, 945 (Del. Ch. 2010). The court noted that the judge to whom the case was previously assigned refused to grant the motion to appoint lead counsel, instead strongly urging the parties “to make further attempts to resolve [the] dispute in a manner that [would] enable the cases to be prosecuted efficiently.” Id.
164. Cheffins, Delaware Losing Cases, supra note 35, at 42.
165. Armour et al., supra note 35, at 1375.
166. Id.
fees where the court thinks it is warranted, some have noted that Delaware judges have moved away from rubber stamping fees in favor of requiring attorneys to provide meaningful justification for their requests. Therefore, plaintiffs’ attorneys’ desire for higher fees is a second speculated reason for the rise in this multi-jurisdictional litigation in merger objection cases.

Having merger objection suits filed in multiple jurisdictions would not be such a problem if there were an efficient mechanism for consolidating cases across jurisdictions. For multiple overlapping suits based on the same underlying claim that are filed within a particular state, courts have provisions for change of venue and other transfer mechanisms in place that allow for fairly routine consolidation of cases. The same is true for cases filed within the federal system—defendants can use the multidistrict litigation panel to transfer cases to one forum. However, there are no such mechanisms in place for suits filed in different states or even for suits filed in state court and in a federal court in the same city. When multiple overlapping suits are filed in different jurisdictions, defendants can move to stay or dismiss the proceedings in one jurisdiction on the grounds of forum non conveniens. Alternatively, defendants might use a one-forum motion to ask the all the courts involved to confer and determine where the case should proceed.

Sometimes in the interest of judicial comity, courts will grant these motions to dispense with overlapping suits. However, defendants may be hesitant to make such petitions in the first place for fear of alienating the judge if the suit ends up proceeding in that jurisdiction. Even when defendants are not deterred from making these petitions, they are often unsuccessful. They will be

168. Id. at 41. For instance, in the 2011 litigation involving Southern Peru Copper Corporation, the Court of Chancery awarded plaintiff lawyers a fee of $285 million. Id. at 40.
169. Id. at 39–40; Woolner et al., supra note 7. However, though Delaware judges have moved away from routinely rubber stamping fee awards, Delaware still exhibits inconsistency in its approach, particularly in the instance of disclosure-only or other non-monetary settlements. Part III.C, infra addresses this issue in more detail.
170. Pincus, supra note 18, at 7.
171. Committee on Securities Litigation, supra note 31, at 1; Thomas & Thompson, supra note 2, at 1790.
172. Thomas & Thompson, supra note 2, at 1769.
173. Committee on Securities Litigation, supra note 31, at 1; Thomas & Thompson, supra note 2, at 1790; Pincus, supra note 18, at 9.
174. Cheffins, Delaware Losing Cases, supra note 35, at 6; Thomas & Thompson, supra note 2, at 1769.
175. Armour et al., supra note 35, at 1352.
176. Quinn, supra note 15, at 164. For instance, in Nierenberg v. CKx, Inc., Nos. 5545-CC, 6519-CC, 6524-CC, 2011 WL 2185614 (Del. Ch. May 27, 2011), plaintiffs filed identical cases in Delaware and New York. The two judges agreed it would be duplicative to allow both suits to proceed. Thomas & Thompson, supra note 2, at 1804. The cases were consolidated in Delaware and the New York plaintiffs joined the Delaware case, voluntarily staying their suit. Thomas & Thompson, supra note 2, at 1804.
The Plaintiffs’ Lawyer’s Transaction Tax

unsuccessful, for instance, if the court being asked to dismiss the suit in favor of another jurisdiction is unwilling to do so because the court feels that its jurisdiction has a greater interest in the litigation. Illustrating this point, Delaware courts, asserting an interest in weighing in on important matters of corporate law, are unlikely to grant a forum non conveniens request for a suit involving a Delaware company, even where the suit was filed first in the other jurisdiction. In these cases, Delaware courts require the defendants to show “overwhelming hardship” before such a motion will be granted. Similarly, federal courts have a presumption against deferring to a state court action, doing so only after considering the court’s “heavy obligation” to exercise its jurisdiction. Also, in jurisdictions following a first-to-file approach, the courts may not be willing to defer to another jurisdiction when the original complaint was first filed in its own. In addition to these legitimate concerns about a court’s jurisdiction, there may be some seemingly less legitimate concerns at play as well. An elected judge, for example, might not want to give up a particularly high-profile case when she or he does not have to.

Because there is no efficient way for suits in different state and federal courts to be consolidated, combined with the fact that many jurisdictions still follow the first-to-file principal when awarding lead counsel status, plaintiffs’ attorneys are motivated to participate in the litigation, even when duplicative suits have already been filed. They hope to be named lead plaintiff by quickly filing a hastily compiled complaint in a foreign jurisdiction. Even if the cases are ultimately consolidated and an attorney finds himself no longer lead counsel, the attorney who controlled the foreign litigation will still be able to participate in any settlement that is reached. As a result, companies are forced to simultaneously defend identical suits in multiple jurisdictions. Corporate litig-
tion, even in one jurisdiction, can be costly for the defense, but the costs are multiplied when litigation proceeds in multiple jurisdictions, not to mention the strain this puts on judicial resources. Adding to the increased cost of this multi-jurisdictional litigation is the fact that no settlement will likely be approved unless all of the attorneys involved agree to it, which may increase the amount of attorneys’ fees awarded as part of the settlement. These costs imposed upon defendants add to the leverage that plaintiffs’ attorneys have in forcing a quick settlement in merger objection suits. Ultimately, it is the company that bears these costs and, thus, the shareholders suffer as the costs of litigation detract from the economic value of the transaction.

3. Settlements Providing Monetary Value Only for Plaintiffs’ Attorneys

Probably the most problematic aspect of merger objection litigation is the fact that most of these cases settle and, of those that settle, an overwhelming majority of cases do not result in any monetary benefit for the shareholders. Rather, the settlement agreement in these cases typically requires the target to issue some supplemental disclosures to the shareholders or, in a smaller percentage of settlements, results in the amendment of a deal term in the transaction agreement, such as the elimination of a no-shop provision, the reduction of

---

186. Garry, supra note 31, at 283.
187. Committee on Securities Litigation, supra note 31, at 2; Pincus, supra note 18, at 7.
188. Pincus, supra note 18, at 6. Defendants prefer a global settlement when sued simultaneously in multiple jurisdictions because this allows them to get a release of all claims related to the transaction and, as such, even small firms can hold up the settlement process by refusing to settle until they are satisfied with the fee award. Thomas & Thompson, supra note 2, at 1799. One study looking at judgments of the Delaware Court of Chancery between 2007 and 2012 found that each additional lawsuit consolidated into the settlement of the settled cases that included attorneys’ fees was associated with additional attorneys’ fees of on average $86,000. Daines & Kouminan, supra note 8, at 10.
189. Also giving plaintiffs settlement leverage is the fear of a bad ruling in one jurisdiction. Greene, supra note 11.
190. Pincus, supra note 18, at 6. Shareholders, therefore, will be worse off after the litigation than before, at least when the suit is a meritless one filed in multiple jurisdictions. Garry, supra note 31, at 281. It may be the case in most of these suits that the company’s D&O insurance policy actually covers the fees. Tatum, supra note 26. Though sometimes insurance providers will argue that attorneys’ fees are not included in the coverage, the term “loss” as defined in these policies typically includes defense costs and settlements and few expressly exclude costs of attorneys’ fees. Id. Even when the insurance company is paying the fees, however, the company still is negatively harmed by the increased price of premiums for these insurance policies.
191. Daines & Kouminan, supra note 8, at 1. In fact, one study found that only one merger objection suit in 2012 resulted in a monetary award to the shareholders. Hoffman, supra note 21.
192. In the 2012 study by Cornerstone Research, the authors found that in more than 80% of settlements, the only relief to shareholders was a set of additional disclosures. Daines & Kouminan, supra note 8, at 1. Another study performed by the US Chamber Institute of Legal Reform confirmed similar findings, noting that 84% of settlements in its study of 2011 merger objection cases were disclosure-only settlements. Pincus, supra note 18, at 4.
The Plaintiffs’ Lawyer’s Transaction Tax

a termination fee, or the expansion of shareholder appraisal rights.\(^{193}\)

When supplemental disclosures are the result, it is sometimes the case that these provide a meaningful benefit to the shareholder class. For instance, a disclosure providing previously withheld information about a genuine conflict of interest of management with respect to the transaction is information that may impact a reasonable shareholder’s decision about whether to vote in favor of the transaction.\(^{194}\) However, frequently in merger objection suits, the disclosures are completely meaningless to the purported beneficiaries. For instance, supplementing a disclosure with information that can already be gleaned from elsewhere in the proxy is immaterial.\(^{195}\) Correcting typographical errors also does not likely provide meaningful relief to shareholders.\(^{196}\) A recent case out of Texas provides a good example of plaintiffs’ counsel requesting sizeable fees—over half a million dollars—for achieving disclosures that were “at best of ‘marginal’ value.”\(^{197}\) In Kazman v. Frontier Oil Corporation, the supplemental disclosures added up to just over 1,300 words.\(^{198}\) One such additional disclosure explained that the merger agreement would contain “reciprocal and customary” terms.\(^{199}\) Another additional disclosure in that case specified the exact number of analysts publishing price targets the financial advisor considered in rendering its opinion, rather than the unspecified number of analysts.

\(^{193}\) See Pincus, supra note 18, at 4; Woolner et al., supra note 7. For instance, the 2012 study by Cornerstone Research found that in four of the 67 unique settlements that made up the study, the deal termination fee was reduced, and in six suits, the parties reached agreements extending shareholder appraisal rights. Daines & Kouminan, supra note 8, at 6.

\(^{194}\) See, e.g., In re Lear Corp. Shareholder Litig., C.A. 2728-VCS (Del. Ch. June 3, 2008) (Order (awarding $800,000 in fees for obtaining disclosure of CEO’s conflict of interest and major role in negotiations); see also In re Sauer-Danfoss, 65 A.3d 1120, (Appendix A, Appendix C) (Del. Ch. April 29, 2011) (providing a summary of cases that involved what the court described as meaningful disclosures, including several involving conflicts of interest).

\(^{195}\) See, e.g., Kazman, 2013 WL 1244376, at *2 (describing inclusion of a table summarizing information that appears elsewhere in the original proxy as providing “at best ‘marginal’ value.”); Order Granting Def.’s Mot. to Dismiss Pl.’s Amended Compl. at 5, Iron Workers of W. Penn. Pension Plan v. Pead, No. 10A-057656 (Ga. Super. Ct. July 27, 2010) (“Plaintiff’s disclosure allegations are defective in that they are… based on alleged omissions of information that was actually disclosed in [the] Proxy Statement.”).

\(^{196}\) For instance, in In re BEA Systems Inc. Shareholders Litigation, the plaintiffs’ attorneys requested fees in the amount of $350,000 for achieving two supplemental disclosures. 2008 WL 116338 (Del. Ch. Jan 4, 2008). Specifically, one of the supplemental disclosures fixed an error in the original proxy where the name of an analyst on whose work the investment banker relied had been misidentified (though it had been stated correctly elsewhere in the original proxy). See Pls.’ Br. Supp. Fees & Expenses, Ex. D at 33, Ex. E at 33, In re BEA Sys., Inc. S’holders Litig., C.A. 3298-VCL (Del. Ch. filed Mar. 26, 2009). Second, the original proxy had stated that a press release was issued after a particular board meeting and the supplemental disclosure amended this to indicate the press release came before the meeting. See id. For these “unmistakably modest” benefits, the court reduced the fee award from the requested $350,000 to $81,297. In re BEA Sys., Inc. S’holders Litig., 2009 WL 1931641, at *1 (Del. Ch. June 24, 2009).

\(^{197}\) Kazman, 2013 WL 1244376, at *2.

\(^{198}\) Id.

\(^{199}\) Id.
mentioned in the original proxy. The original proxy had also stated that the financial advisor would receive a “portion” of its fee upon announcement of the deal and a “substantial portion” upon closing. In the supplemental disclosure, this was revised to indicate the exact percentages of its fees the advisor would receive upon announcement and closing. Additional supplemental disclosures were merely summaries of information that already appeared elsewhere in the original proxy.

The notion that meaningless disclosures are frequently sought out in settlement is supported by the fact that often these merger objection suits that result in disclosure-only settlements are filed before the company has even made its preliminary disclosures. Since the suits are settling only for disclosures but are being brought before the time that such disclosure claims can be properly asserted, these claims appear to serve essentially as placeholders, merely being filed by attorneys in the hopes of gaining lead counsel status and thus collecting most of the fees. These disingenuous attempts by attorneys to grab fees are usually successful since corporations tend to be willing to settle for supplemental disclosures, which do not cost the company anything, in exchange for getting a general release of claims related to the transaction and clearing the way for consummation of the deal.

When a deal term is amended as a result of the settlement, sometimes the amendment provides a benefit to the class. For instance, an amended deal term might modify voting agreements or other coercive protective measures; narrowing or eliminating exclusivity provisions to increase the likelihood of the emergence of competing bids; or, finally, extending the time that stockholders

---

200. Id.
201. Id.
202. Id.
203. Id.
204. Woolner et al., supra note 7. A recent example of this can be seen in the litigation involving Stratasys Inc., which announced in April 2012 a proposed $1.4 billion merger with Object Ltd. Sindhu Sundar, 3-D Printer Co. Resolves Investor Suits Over $1.4B Merger, LAW 360 (Sept. 6, 2012, 9:26 PM ET), http://www.law360.com/articles/376176/print?section=securities. Lawsuits were filed in June and July. Id. A settlement was reached on September 6, 2012 to make additional disclosures in the proxy. Id. However, the disclosure claims must have been added after the original complaints were filed since the proxy was not released until August—one to two months after the initiation of the lawsuits. Id.
205. Vice Chancellor Laster has noted that, since most merger objection suits are disclosure claims, when they are filed prior to the publication of the preliminary proxy, it signals that the attorneys are “trying to get control of the case” rather than “acting for the benefit of the stockholders.” Griffith & Lawhav, supra note 8, at 65-66 (quoting In re Compellent Technologies, Inc. S’holders Litig., 2011 WL 6382523, at *21-*23 (Del. Ch. Dec. 9, 2011)).
The Plaintiffs’ Lawyer’s Transaction Tax

have to exercise appraisal rights.\textsuperscript{207} But the amended deal term is frequently one that is immaterial.\textsuperscript{208} For instance, if a termination fee is amended but, at the time of settlement, the transaction is a \textit{fait accompli} that almost certainly will be consummated, the amendment is rendered pointless.\textsuperscript{209} The transactions that are the subjects of these settlements go on to win overwhelming approval by the shareholders, despite the fact that typically no real changes were made to the structure of the transaction, suggesting the transaction was not objectionable in the first place.\textsuperscript{210} The only types of claims that typically result in a monetary award for the shareholders are those alleging colorable claims of conflicts of interest.\textsuperscript{211}

Yet, despite the fact that these suits rarely result in any monetary compensation to the shareholders, virtually all result in the award of attorneys’ fees.\textsuperscript{212} This is made possible due to the adoption of the “common benefit” doctrine, also referred to as the “corporate benefit” or “substantial benefit” doctrine. The common benefit doctrine arose out of the common fund doctrine.\textsuperscript{213} Both are exceptions to the basic American rule that the prevailing party in litigation is not able to collect attorneys’ fees from the loser.\textsuperscript{214} The common fund doctrine allows a plaintiff, who has recovered from the defendant a common fund for the benefit of persons other than himself, to receive reasonable attorneys’ fees out of that fund.\textsuperscript{215} The common benefit doctrine, recognized by the Supreme Court of the United States as far back as the 1970s\textsuperscript{216} as an extension of the


\textsuperscript{208} Pincus, supra note 18, at 4.

\textsuperscript{209} Id.

\textsuperscript{210} For instance, a study performed by Thompson and Thomas on Delaware merger objection suits from 1999 to 2000 found that about 85% of the third party acquisitions, 88% of the control shareholder transactions, and 75% of the management buyouts that incurred litigation ended up closing. Thompson & Thomas, supra note 9, at 198. See also Seacey & Jones, supra note 10 (“[m]erger objection strike suits] rarely, if ever, scuttle deals”). An example of this can be seen in Kazman v. Frontier Oil Corporation, where the shareholder class received a disclosure-only settlement that provided additional disclosures the court found to be of little value, but the shareholders had nonetheless gone on to “overwhelmingly” vote in favor of the merger. 2013 WL 1244376, at *2.

\textsuperscript{211} Such conflicts of interest might include undisclosed side dealings of members of management, a controlling shareholder on both sides of the deal, or other conflicts. Hoffman, supra note 21.

\textsuperscript{212} According to one study, the average attorneys’ fees for disclosure-only settlements in 2012 was approximately $540,000. Daines & Kouminan, supra note 8, at 9.

\textsuperscript{213} Mykkeltvedt, supra note \textit{Error! Bookmark not defined.}, at 1160.

\textsuperscript{214} Id. at 1156.

\textsuperscript{215} Id. at 1157; Michael Northrup, \textit{Restrictions on Class-Action Attorney-Fee Awards}, 46 S. TEX. L. REV. 953, 995 (2005); Stukes, supra note 17, at 2069.

\textsuperscript{216} Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970). The Supreme Court curbed expansion of the common benefit doctrine five years later in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). However, the Supreme Court still recognizes the common benefit doctrine in its less expansive form. See Breman v. United Steelworkers of America AFL-CIO-CLC, 554
common fund doctrine, applied to cases where there are only non-monetary benefits bestowed upon a class of persons due to the plaintiff’s efforts. In other words, under the doctrine, attorneys’ fees can be awarded regardless of the fact that there is no fund from which to recover so long as a benefit was conferred on the class. The doctrine is an equitable principle aimed at spreading the costs of litigation among the beneficiaries. Delaware and a majority of states have adopted the common or corporate benefit doctrine, thereby allowing plaintiffs’ attorneys to recover fees in merger objection litigation suits, even in disclosure-only settlements that provide no economic benefit to the shareholder plaintiffs.

Therefore, courts continue to award fees in merger objection litigation, even when there is no resultant monetary benefit to the plaintiff class. If we assume that the benefits gained by the plaintiffs in these disclosure-only type settlements are due to hard-fought efforts by the plaintiffs’ attorneys and if we assume that the benefits gained are actually meaningful to the shareholder plaintiffs, then the awarding of fees should not be a problem. In such cases, the award would seem to support the policy underlying the common benefit doctrine—that plaintiffs’ attorneys should be encouraged to represent classes of individuals who have been wronged, even if the representation will not result in a monetary recovery. However, as discussed above, courts and scholars have become skeptical about both the meaningfulness of the “benefits” achieved in these settlements and the amount of effort exerted by many plaintiffs’ attorneys in litigating these claims.

---


217. Mykkelvedt, supra note Error! Bookmark not defined., at 1153.

218. Id. at 1160.

219. Mills, 396 U.S. at 392 (“To allow others to obtain full benefit from the plaintiff’s efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff’s expense.”); Mykkelvedt, supra note Error! Bookmark not defined., at 1151.

220. In re Wachovia S’holders Litig., 168 NC App 135, 138 (2005). In Delaware, to establish that attorneys’ fees are warranted under the corporate benefit doctrine, the plaintiffs’ attorney must show that the suit was meritorious when filed, the action producing the benefit was taken by the defendants before the court decided the issue, and the resulting corporate benefit was causally related to the lawsuit. Cal Maine Foods, Inc. v. Pyles, 858 A.2d 927, 927 (Del. 2004). Once it has been determined that a fee award is appropriate, there should be a separate inquiry into the appropriateness of the amount of the fee award, using the Sugarland factors described in Part III.C, infra.

221. See, e.g., In re Dr. Pepper/7Up Companies, Inc., 1996 WL 74214, at *5.

222. The U.S. Supreme Court has pointed out that in many instances of representative litigation, disallowing attorneys’ fees would effectively bar many meritorious claims, as an individual plaintiff would not have sufficient resources to pursue the litigation. See, e.g., Hall v. Cole, 412 U.S. 1, 13 (1973) (applying the common benefit doctrine in the context of a union case and recognizing that an individual union member would not have the financial capacity to fight the union if it were responsible for fees).

223. See supra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.

224. For a more complete discussion of this problem of attorneys sometimes putting very little work into these disclosure-only merger objection suits, see supra notes Error! Bookmark not defined.-
The Plaintiffs’ Lawyer’s Transaction Tax

Even in cases where the plaintiffs receive meaningful additional disclosures or even some sort of monetary remuneration as part of the settlement, there may be very little causal connection between the benefits conferred and the efforts of plaintiffs’ counsel.\textsuperscript{225} For instance, where a suit is filed based on the receipt of a tender offer before the corporation has fully responded to the offer, any perceived benefit may have been the result of negotiations by a special committee formed for the purpose of analyzing the offer.\textsuperscript{226} Alternatively, an increased price could have been the result of a competing bid that would have materialized and been considered regardless of the presence of the litigation.\textsuperscript{227} Or additional disclosures may have resulted from communications with the Securities and Exchange Commission (SEC) rather than a product of the efforts of

\textit{Error! Bookmark not defined.} and accompanying text. Even in cases where there is no obvious shirking by the plaintiffs’ attorneys, these cases still are typically resolved quickly. For instance, a study performed by the US Chamber Institute for Legal Reform found that the average fee award for cases resolved in 2009 through 2011 was $1.3 million, yet typically these cases were resolved within 100 days. Pincus, \textit{supra} note 18, at 5. Another study found that cases were resolved even more swiftly. The 2012 study performed by Cornerstone Research found that, of the 119 merger objection suits in the study that settled, they settled an average of 42 days after the suit was filed. DAINES \& KOUMINAN, \textit{supra} note 8, at 5.

\textsuperscript{225} Quinn, \textit{supra} note 15, at 150; Thompson \& Thomas, \textit{supra} note 9, at 164.

\textsuperscript{226} In In re Sauer-Danfoss Inc. Shareholders Litigation, the plaintiffs did not receive monetary remuneration because the transaction fell through, although, had the deal ultimately been consummated, it would have been at a higher price than originally offered prior to the instigation of the litigation. 65 A.3d at 1122 (“[the majority shareholder] increased its tender offer price [from $10.10] to $14.00 per share.”). The court, however, suggested that any benefit that might have inured to the plaintiffs did not appear to be due to the work of the attorneys, but rather to the work of a special committee of the target’s board, formed to negotiate the deal. \textit{Id.} at 1126. In that case, the majority shareholder of Sauer-Danfoss announced its intention to launch a tender offer. \textit{Id.} at 1119. Sauer-Danfoss issued a statement indicating its intent to assemble an independent committee of the board to analyze the tender offer. \textit{Id.}

Class actions were filed the day after the announcement, alleging that the price was too low. \textit{Id.} at 1120. After the independent committee was assembled, the committee received updated internal projections that reflected better-than-expected sales and earnings. \textit{Id.} With this information in hand, the committee pushed the majority shareholder for a higher price. \textit{Id.} Before the deal fell through, the majority shareholder agreed to a higher price as part of its negotiations with the committee. \textit{Id.} at 1121-22. The majority shareholder expressly stated that its increased offer was based on its discussions with the special committee (i.e., not because of the concurrent litigation). \textit{Id.} at 1122. The court also found unpersuasive plaintiffs’ counsel’s argument that it was responsible for the supplemental disclosures the target provided in that case. \textit{Id.} at *8. The court pointed out that the claim by the plaintiffs’ attorneys of credit for the additional disclosures that the target company provided was belied by the fact that the attorneys had not even filed their amended complaint—asserting disclosure claims for the first time—at the time the first round of disclosures were made so they could not have been the cause. \textit{Id.} A similar scenario arose in \textit{In re Cox Communications, Inc. Shareholders Litigation}, where suits were filed based on a tender offer alone, rather than based on the target board’s decision regarding the offer. 879 A.2d at 608. The court in that case pointed out that the plaintiffs’ lawyers were attempting to “claim that they [were] responsible…for price increases in a deal context in which price increases [were] overwhelmingly likely to occur” anyway. \textit{Id.} at 622. The court expressed frustration that the claims were not ripe for litigation, as indicated by the fact that the plaintiffs were not attacking a “completed fiduciary decision,” but rather were just filing complaints to serve as a placeholder for a later attack. \textit{Id.} at 636-37. The court held that the increase in price was almost entirely due to the efforts of the independent committee formed by the target, and not the plaintiffs’ attorneys. \textit{Id.} at 641.

\textsuperscript{227} Quinn, \textit{supra} note 15, at 150.
the private litigants.\textsuperscript{228}

\textit{C. Insufficient Oversight}

The above-described three features of merger objection litigation are compounded by the fact that there is insufficient review by the courts of the settlement process. Courts are supposed to provide independent oversight to ensure that these settlements are appropriate. For instance, Federal Rule of Civil Procedure 23(e) provides that a class action cannot be “dismissed or compromised” without the approval of the court.\textsuperscript{229} The rule asks courts to ensure that settlements are “fair, reasonable, and adequate” and requires a fairness hearing before settlement.\textsuperscript{230} States typically have a state law equivalent of this rule.\textsuperscript{231}

There is supposed to be an additional layer of protection that may apply in the context of merger objection litigation over and above that afforded by FRCP 23(e) and its state law counterparts. Where a court is going to use the common benefit doctrine to support the award of attorneys’ fees when there has been no monetary recovery for the class, there is an additional analysis the court is supposed to undertake to determine whether a fee is warranted and, if so, if the fee amount is appropriate. Under the corporate benefit doctrine, as articulated under Delaware law, a fee is only appropriate if the suit was meritorious when filed, the action was benefiting the corporation or a class formed before judicial resolution of the matter, and the resulting benefit was causally related to the actions of the plaintiffs’ attorneys.\textsuperscript{232} After it is determined that the award of a fee is appropriate, courts are then to look to the amount requested.\textsuperscript{233} After \textit{Sugarland Industries, Inc. v. Thomas}, Delaware courts are to consider the following factors in determining whether the amount requested is reasonable: (i) the results that were accomplished for the benefit of the shareholders; (ii) the time, effort, and expense put forth by plaintiffs’ counsel;

\begin{itemize}
  \item \textsuperscript{228} See, e.g., In re TD Banknorth, 938 A.2d 654, 669 (Del. Ch. 2007) (concluding that the disclosures involved in the case did not provide an adequate basis for approving settlement because an “examination of the record…reveals that most of the disclosures for which the plaintiffs claim partial credit were made primarily in response to SEC comment letters.”)
  \item \textsuperscript{229} Fed. R. Civ. P. 23(e).
  \item \textsuperscript{230} Fed. R. Civ. P. 23(e); see also Hensler, \textit{supra} note 40, at 56; Leslie, \textit{supra} note 27, at 1053. The burden is on the parties proposing the settlement to show that it is fair and reasonable. Painewebber R & D Partners II, L.P. v. Centocor, Inc., 1999 WL 160123, at *15 (Del. Ch. 1999).
  \item \textsuperscript{231} For instance, Delaware Chancery Court Rule 23(e) states that “a class action shall not be dismissed or compromised without the approval of the Court.” And the Delaware Chancery Court has noted its obligation to “exercise its own business judgment about the fairness of the settlement.” \textit{In re Cox Comm’ns}, 879 A.2d at 634. Delaware courts are tasked with making sure that the class members’ interests are being served by the settlement in light of the fact that, in exchange for whatever benefit they are receiving, they are most likely releasing future claims regarding the litigated matter. \textit{Id}.
  \item \textsuperscript{232} Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1167 (Del. 1989); see also Griffith & Lahav, \textit{supra} note 8, at 36-37.
  \item \textsuperscript{233} Griffith & Lahav, \textit{supra} note 8, at 37-38.
\end{itemize}
The Plaintiffs’ Lawyer’s Transaction Tax

(iii) the risk involved due to the contingent nature of the relationship; (iv) the difficulty of the litigation; (v) the ability of counsel; (vi) at what point the litigation was resolved; and (vii) whether the attorney’s actions actually caused the benefit conferred. Federal courts engage in a similar analysis. Theoretically, then, a court, using the seven *Sugarland* factors, could deny attorneys’ fees altogether or could reduce an agreed-upon amount of fees.

Despite the fact that the rules suggest courts should not rubber-stamp settlement agreements, they do so on a routine basis. Courts are set up to preside over, and function best in, an adversarial process. Yet by the time plaintiffs’ and defendant’s counsel have reached a settlement agreement, they are united in their goal of having the court approve the arrangement. The court does not get to be a part of the settlement negotiations, so it relies on the representations made by counsel. Additionally, the court has purportedly already been through an analysis of whether or not counsel was appropriate to represent the class. Having decided that issue in the affirmative, the court has little reason not to trust that the settlement is fair and is not a product of counsel selling out its client in exchange for a higher fee. Moreover, the court has an interest in a speedy settlement over a long, complex trial, which further increases the likelihood that the court will approve an arrangement to which no one before the court is objecting.

There are, of course, exceptions to this basic fact that courts tend to rubber stamp attorneys’ fee awards in settlement agreements, particularly among Del-

aware courts. For instance, in In re Sauer-Danfoss Inc. Shareholders Litigation, Vice Chancellor Laster issued a twenty-plus-page opinion on the issue of attorneys’ fees in a merger objection suit. However, there, the litigation had been mooted by the withdrawal of the tender offer at issue in the suit and the defendants were arguing against any award. Therefore, this was not a case where the court was initiating the investigation into the fee award on its own but instead was the result of the adversarial process. Typically, when a court analyzes a fee award in a settlement agreement, it is due to the presence of an objector. Though there are certainly examples where the court has done so even without an objector, these seem to be the exception rather than the rule, even in Delaware.

244. See In re Sauer-Danfoss S’holders Litig., 65 A.3d 1116 (Del. Ch. 2011).
245. See id. at 1119.
246. See Hensler, supra note 40, at 95 (“Not surprisingly, when faced with a proposed settlement agreement that both parties support, the court almost always rubber-stamps the settlement.”).
247. For instance, in In re SS & C Technologies, Inc. Shareholders Litigation, the court, on its own review of the settlement, refused to approve attorneys’ fees in a disclosure-only settlement based on the fact that counsel had not adequately represented the class and the court was not convinced that the terms of the settlement were fair and reasonable. 911 A.2d 816, 820 (Del. Ch. 2006). See also, In re Cox Commc’ns, 879 A.2d at 639 (“[T]his court has never yielded to plaintiffs and defendants the right to set the level of fees that are awarded in representative actions. Even when defendants agree to pay the requested fee fully, the settlement benefits to the class are concededly adequate, and there has been no objection, this court has often reduced the requested fee to a smaller number.”); In re PAETEC Holding Corp. S’holders Litig., 2013 WL 1108111, at *5 (Del. Ch. March 19, 2013) (noting the court’s “longstanding practice of exercising judicial scrutiny over attorneys’ fees even in cases where the fee request is uncontested”); Brinkerhoff v. Texas Eastern Prods. Pipeline Co., LLC, 986 A.2d 370, 374 (Del Ch. 2010) (finding the record inadequate to approve the settlement as requested jointly by the parties).
The Plaintiffs’ Lawyer’s Transaction Tax

And there are rarely objectors to these arrangements, even when there is a fee award in a settlement that provides no monetary benefit to the class members. Federal Rule of Civil Procedure 23(e) requires the court to direct notice to shareholder members of the class prior to approval of a settlement, and shareholders are given the opportunity to object to the settlement. When objectors enter the settlement approval process, arguably the problems illustrated above disappear, as the objector reinstates the adversarial nature of the litigation process. However, there are no specific requirements as to what the notice must include; as such, the details of the settlement arrangement are sometimes obscured. Even when the details of the settlement are clearly set out, including the amount of the attorneys’ fee award, there is little incentive for any individual member of the class to engage in the cost of monitoring the settlement since that individual’s stake in the litigation is so small. Because of these disincentives to monitor, it is really the plaintiffs’ attorney driving the settlement. As a result, his or her interest may be in conflict with the interests of the class members. Moreover, even if an individual member of the class felt compelled to monitor the litigation and object to what it perceived as an unfair settlement, the objector may lack resources to mount an aggressive challenge and regardless may ultimately be unsuccessful if the court does not engage in a proper analysis of the settlement for the reasons set forth above in this Part III.C.


249. See Leslie, supra note 27, at 1046–47. A 2006 study by Willing and Wheatman showed that less than 7% of attorneys’ fee awards are appealed. Cain & Davidoff, supra note 12, at 13.

250. Specifically, Federal Rule of Civil Procedure 23(e)(1) states that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal” but does not specify what the notice must include. Fed. R. Civ. P. 23(e)(1). States will typically have a state law counterpart to this rule, such as the Delaware requirements that are described in Geller v. Tarbas. 462 A.2d 1078, 1080 (Del. 1983).

251. Griffith & Lahav, supra note 8, at 1084.

252. Id. at 1084, n.142.

253. See Hensler, supra note 40, at 96–97. It should be noted, however, that the PSLRA does specifically require notice of a class action settlement to include the amount of fees and costs sought, including a brief explanation supporting the fee request. 15 U.S.C, § 77z-1(a)(7)(C) (2012).

254. Leslie, supra note 27, at 1046–47; Quinn, supra note 15, at 151.

255. Quinn, supra note 15, at 151. For instance, it may be in the plaintiffs’ attorney’s interest to negotiate a settlement with the defendant in which the attorney gives up benefits that would inure to the class in exchange for a promise by the defendant not to dispute a fee request. See Leslie, supra note 27, at 1044–45.

256. See Leslie, supra note 27, at 1047–48. A study by the Federal Judicial Center in 1996 indicated that in class actions where objections to the settlement were filed, more than 90% of the settlements were approved by the court without any changes to the terms of the settlement. Id. at 1063. Objectors’ lack of success could also reflect a reaction of courts against “professional objectors,” who, like professional plaintiffs, may also be represented by money-driven plaintiffs’ attorneys who will abandon valid objections in exchange for a share of the attorneys’ fees. Griffith & Lahav, supra note 8, at 1095.
Largely because of this lack of meaningful objectors—and even in the face of judicial recognition that (i) the benefits in a settlement of a merger objection suit may be insubstantial or nonexistent, (ii) the fact that there may be little to no causal relationship between whatever benefit was achieved and the actual litigation, and (iii) the fact that the plaintiffs’ attorneys may have exerted little effort in the actual litigation of the substantive issues at hand—courts continue to award attorneys’ fees in merger objection suits.\textsuperscript{257} For instance, in \textit{In re Cox Communications, Inc. Shareholder Litigation}, though the Delaware Chancery Court refused to award the requested fees in that case—$4.95 million\textsuperscript{258}—it still went on to approve a fee of $1.275 million.\textsuperscript{259} This was true even in light of the court’s recognition that the plaintiffs’ attorneys in that case took on no risk in litigating the suit, filed a boilerplate complaint, and that most of the benefit achieved was more likely the results of the efforts of the target’s special committee negotiating the deal, rather than due to the efforts of plaintiffs’ counsel.\textsuperscript{260} Admittedly, the settlement in the Cox case involved a monetary benefit that inured to the plaintiff shareholders.\textsuperscript{261} However, even in disclosure-only cases, fees are still being awarded, though typically in lesser amounts. For instance, in a 2010 hearing, Chancery Court Judge John W. Noble disagreed with plaintiffs’ attorneys that a fee award of $700,000 was justified because the disclosures that were achieved were low-hanging fruit in the eyes of the court.\textsuperscript{262} Yet despite acknowledging the lack of effort put in by the attorneys, he still awarded half a million dollars in fees for the disclosure-only settlement.\textsuperscript{263}

There is some empirical evidence that shows that attorneys’ fees in disclosure-only settlements have been declining over the past three years. For instance, one study showed that the average fees for 2012 in such suits was $540,000, compared to an average of $725,000 for all settlements that year.\textsuperscript{264} This represented a decline in average fee amounts for disclosure-only settlements for the third year in a row.\textsuperscript{265} Even though the average attorneys’ fees may be declining, a study of 2012 merger objection suits filed in federal courts
The Plaintiffs’ Lawyer’s Transaction Tax

found that, for suits settling with no payment to investors, 28% still resulted in fee awards of $1 million or more.\textsuperscript{266} And, even assuming there is a downward trend in fees for non-monetary settlements, there is no guarantee that this downward trend will continue as pressure mounts for Delaware to retain cases that it is losing to other states.\textsuperscript{267} Certainly one option for Delaware judges, cognizant of the fact that plaintiffs’ attorneys are preferring other jurisdictions, would be to be more generous with fee awards in an effort to encourage plaintiffs’ attorneys to file in Delaware, thereby retaining more cases and securing its dominance in corporate law jurisprudence.\textsuperscript{268} Moreover, average fees of $540,000, even if this number remains constant, are still significant, particularly when viewed in light of the lack of risk for plaintiffs’ attorneys that these suits involve, the minimal time and effort that plaintiffs’ attorneys typically put into these cases,\textsuperscript{269} and the fact that fees could far exceed the average in any given case.

When the lack of judicial oversight of class action settlements is viewed in combination with the three facets of merger objection litigation described in Part III.B infra they paint a picture of plaintiffs’ attorneys engaging in opportunistic behavior that provides little to no value to the clients these attorneys purportedly represent. Meritless suits that provide no value to the plaintiff class actually harm the class by causing the corporation in which the class members are shareholders to incur unnecessary cost.

IV. ANALYSIS OF PREVIOUSLY PROPOSED SOLUTIONS TO THE PROBLEM INHERENT IN MERGER OBJECTION LITIGATION

This Part IV explores some of the previously suggested or implemented solutions to the problem of merger objection litigation strike suits. The previously suggested or implemented solutions help provide the basis of the framework

\textsuperscript{266} Comolli et al., supra note Error! Bookmark not defined., at 35.
\textsuperscript{267} See Armour et al., supra note 35, at 1384. As discussed in Part III.B.2., empirical evidence establishes that merger objection suits are being filed more and more in states other than the state of incorporation of the target company. See generally Cheffins, Delaware Losing Cases, supra note 35; Cheffins et al., supra note 35; Cain & Davidoff, supra note 12.
\textsuperscript{268} As one scholar has noted, if the judges get very punitive with fees, litigation is more apt to leave Delaware. Woolner et al., supra note 7. See also Armour et al., supra note 35, at 1384. Of course, if the cases that Delaware is losing are considered low-quality nuisance suits, it is not at all clear that Delaware judges would react against this trend by allowing for greater attorneys’ fees. Cheffins, Delaware Losing Cases, supra note 35, at 49. And even if Delaware judges do react to the out-of-Delaware trend, they may do so in ways that do not directly relate to attorneys’ fees. For instance, they might instead move back to the first-to-file method of awarding lead counsel status or step back from some of the anti-plaintiffs’ attorney rhetoric that has surfaced in recent years. See Armour, et al., supra note 35, at 1384-85.
\textsuperscript{269} See In re Sauer-Danfoss, 65 A.3d at 1139–40.
proposed in Part V for addressing merger objection strike suits. First, this section looks at jurisdictions that have completely rejected the common benefit doctrine as a means of discouraging attorneys from bringing suits when they do not anticipate a monetary award for the class. Then, this section discusses ideas proposed for funneling merger objection litigation to the state of incorporation of the target company as a means of curbing the multi-jurisdictional aspect of the litigation.

A. Outright Rejection of the Common Benefit Doctrine

A minority of state courts and legislatures have reacted against the problems inherent in these non-monetary settlements that award attorneys’ fees by rejecting the common benefit doctrine, thereby refusing to approve settlements awarding attorneys’ fees when there has been no common fund created in the settlement. For instance, in In re Wachovia Shareholders Litigation, the Court of Appeals of North Carolina refused to adopt the common benefit theory, holding that litigation that resulted in only non-pecuniary benefits to the shareholders could not warrant an award of attorneys’ fees.270 At least two other states’ legislatures have codified this rejection of the corporate or common benefit doctrine. Specifically, in 2003, the Texas legislature enacted a statute that provided, in a class action, “[i]f any portion of the benefits recovered . . . are in the form of . . . noncash common benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery of the class.”271 The practical result of this statute for purposes of merger objection litigation is that a Texas court will not approve an award of attorneys’ fees in a disclosure-only settlement.272 Oklahoma enacted a similar

271. TEX. R. CIV. P. 42(i)(2). Legislative history suggests that the statute was enacted to curb the “collusion settlements” between defendants and plaintiffs’ attorneys that amounted to “sweetheart deals” for plaintiffs’ attorneys. See Kazman v. Frontier Oil Corp., 398 S.W.3d 377, 383–85 (Tex. App. 2013).
272. See Kazman, 398 S.W.3d at 388. This is at least the case where the claim is brought in Texas court and relates to a target company incorporated in Texas. In this instance, the internal affairs doctrine would mandate application of Texas law to resolution of the dispute. See Cheffins, Delaware Losing Cases, supra note 35, at 2. However, the outcome could potentially be different for a suit being litigated in Texas but involving a target company incorporated elsewhere, or for a suit being litigated outside of Texas but involving a target company incorporated in Texas. This is because a forum state can apply its own procedural rules even when it must apply the substantive rules of the state of incorporation. See Thomas & Thompson, supra note 2, at 1780–81 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. d (1972)); Griffith & Lahav, supra note 8, at 67. Therefore, the question of whether the Texas statute rejecting the common benefit doctrine would apply in either such scenario would depend on the forum state’s choice of law rules, and whether it viewed such a rule as the Texas statute as one of substance or procedure. Until Texas or other states have considered the question directly, it is unclear how it would be viewed. For instance, the rule is technically labeled one of procedure, given that it is included in the Texas Rules of Civil Procedure. TEX R. CIV. P. 42(i)(2). However, there is precedent to suggest some states would view a rule regarding the awarding of attorneys’ fees as one of substance. See e.g., McMahan v. Toto, 256 F.3d 1120, 1133 (11th Cir. 2001) (holding that the Supreme Court of
The Plaintiffs’ Lawyer’s Transaction Tax statute, though it was subsequently declared unconstitutional in 2013 by the Oklahoma Supreme Court for reasons unrelated to the substantive content of the attorneys’ fee provision.

These statutory and common law rejections of the common benefit doctrine certainly will deter frivolous merger objection litigation. However, they are also overbroad in the sense that they will deter not only frivolous merger objection suits but also some potentially meritorious merger objection suits, as well as meritorious suits in a host of other contexts. Even members of the Texas legislature recognized that the solution might have a chilling effect on the willingness of plaintiffs’ attorneys to take on valid claims that would likely not result in monetary recovery. For instance, one member of the legislature used as an example of the potentially harsh effects of the rule environmental suits where the requested remedy is the cessation of an environmentally harmful practice and pointed out that plaintiffs’ counsel would have no impetus to take on these meritorious cases in light of the fact that they would not be compensated. Even if limited just in the context of corporations, this remedy is likely

Florida would likely hold that the Florida attorneys’ fee statute modifies the substantive rights of the parties and therefore the Florida statute would not apply to a case otherwise governed by Virginia substantive law. But see State v. Otis Elevator Co., 95 A.2d 715, 717 (N.J. 1953) (“[T]he allowance of costs and counsel fees ha[s] been uniformly considered by the courts of this State to be a matter of procedure rather than substantive law.”); El Paso Natural Gas Co. v. Amoco Prod. Co., CIV.A. 12083, 1994 WL 728816, at *4 (Del. Ch. Dec. 16, 1994) (stating in dicta that typically in instances involving adjudication of a foreign law issue, “attorneys’ fees will involve a non-substantive (procedural) issue.”) However, it may be the case that it is not possible to draw bright line rules classifying attorneys’ fees as substantive or procedural. Rather, it may depend on what type of attorneys’ fee rule is at issue. For instance, in Texas, the recovery of attorneys’ fees for breach of contract is considered substantive, but awards of attorneys’ fees in a declaratory judgment action are procedural. Man Indus., Ltd. v. Midcontinent Exp. Pipeline, LLC, 407 S.W.3d 342, 353–54 (Tex. App. 2013). However, if a suit were being litigated in Texas but involved a foreign target corporation, and the attorneys’ fee statute were viewed as substantive rather than procedural, a Texas court would apply the law of the state of incorporation, which could theoretically—and contrary to the above statement—result in a Texas court approving of an award of attorneys’ fees in a disclosure-only settlement.

273. The Oklahoma statute states that “if any portion of the benefits recovered for the class . . . are in the form of . . . noncash common benefits, the attorney fees awarded in the class action shall be in cash and noncash amounts in the same proportion as the recovery for the class.” OKLA. STAT. ANN. tit. 12, § 2023(G)(4)(f) (West 2009).


275. If attorneys in these jurisdictions believe they have a good claim that the transaction price is too low, then they will still be motivated to bring suit, hoping to recover a monetary fund from which attorneys’ fees could be drawn. However, if they do not think they have such a claim, plaintiffs’ attorneys will have no incentive to bring these suits, at least not where the law of these jurisdictions would apply.

276. See Northrup, supra note Error! Bookmark not defined., at 962.

277. Id. at 383. There are certainly plenty of other examples of potentially meritorious cases outside the corporate context that plaintiffs’ attorneys might be discouraged to bring if the common benefit doctrine were entirely rejected. For instance, where a union member sued a union for violation of his free

93

overbroad. As discussed in Part III.B.3, even when the remedy in a merger objection suit is simply additional disclosures or an amendment to a deal term—i.e., with no monetary award—these settlements are sometimes still beneficial.279 This is likely the reason that so few jurisdictions have adopted this approach.280 Because it is incredibly over-inclusive and not narrowly tailored to the issue at hand, it does not seem a viable solution to the problem of reducing meritless merger objection suits.

B. Limiting Litigation to the State of Incorporation of the Target Company

Scholars and practitioners who have addressed this issue of merger objection strike suits have focused largely on the problem of the multi-jurisdictional aspect of the litigation. The conventional wisdom seems to be that cases should be funneled to the target corporation’s state of incorporation and, since a majority of public companies are incorporated in Delaware, more cases would be filed in Delaware (and only Delaware), and the Chancery Court or Delaware legislature would adopt any needed reforms to address these suits.281 This would have the added benefit of eliminating one of the principal forms of leverage that the plaintiffs have over the target corporation in merger objection litigation—the threat of having to defend the lawsuit on multiple fronts.282 Additionally, if these cases were better coordinated, there might be a more meaningful competition for lead plaintiff status, with plaintiffs with the willingness, ability, and resources to actively litigate these suits predominating, thereby discouraging those not in that position from filing in the first place.283

A number of alternative methods have been suggested to funnel cases to the target corporation’s state of incorporation. One of the least intrusive mechanisms that has been proposed for remedying this issue is to encourage judicial comity so that judges will, on a sua sponte basis or in response to a Savitt or one-forum motion, contact the other judges in courts with pending litigation from the same transaction and discuss which forum is the most appropriate to

speech rights, as was the case in Hall v. Cole, had the court not permitted the award of attorneys’ fees under the common benefit theory, such a suit might not have been brought. 421 U.S. 1, 15 (1973). Similarly, civil rights cases rarely involve a monetary recovery, yet frequently result in a societal good. Coffee, Policy Primer, supra note Error! Bookmark not defined., at 630.

279. For instance, in Mills v. Electric Auto-Lite Company, Auto-Lite was being merged into Mergenthaler. 396 U.S. 375, 377 (2010). Mergenthaler owned over 50% of the stock of Auto-Lite and all of the Auto-Lite directors were Mergenthaler nominees. Id. at 378. The proxy did not disclose the directors’ conflicts of interest and suit was filed. Id. at 377–78. Without the benefit of the common benefit doctrine, plaintiffs’ attorneys would have little incentive to bring such class actions, even when a non-monetary result can provide a benefit to the class, such as exposing a conflict of interest that might affect their decision to approve a transaction as in Mills. See id. at 375.


281. See Greene, supra note 11.

282. See Pincus, supra note 18, at 9.

283. See Greene, supra note 11.
The Plaintiffs’ Lawyer’s Transaction Tax

handle the litigated matter. This solution asks judges to weigh factors, such as: their court’s docket delays, their expertise in deciding corporate law issues, and the strength of their jurisdiction’s interest in the target corporation and the dispute at issue. It has the advantage of not requiring any structural changes to the existing system, yet still would result in all cases being consolidated in one jurisdiction. Of course, proponents of this solution recognize that it is not without its weaknesses. The same reasons why judicial coordination often does not occur now, discussed in more detail in Part III.B.2., would apply to any solution asking for judicial comity but not mandating it by any legislative or judicial rule. Without any sort of “policing mechanism,” it would be impossible to get 100% buy-in.

Another similarly hands-off approach is to encourage corporations to engage in self-help by incorporating a forum selection provision into their charters or bylaws. As corporations become subject to multi-jurisdictional litigation, particularly in the context of merger objection suits, some have responded by adopting these types of provisions. In 2010, fewer than 5% of companies

284. See Thomas & Thompson, supra note 2, at 1803–04.
285. Id. at 1804.
286. See id.
287. For instance, judges might not agree about what the proper forum is, or a judge might exert his or her power to retain high profile cases, even when it makes more sense to litigate the issue in a different jurisdiction. See id. at 1805.
288. Thomas & Thompson, supra note 2, at 1804.
289. For instance, this was the approach espoused in a 2008 report by the Committee on Securities Regulation of the Bar of the City of New York. Committee on Securities Litigation, supra note 31, at 9. In addition to consolidation benefiting the target companies themselves, the Committee pointed out this would also conserve judicial resources and increase consistency of decisions by leaving those decisions in the hands of the judges with the most familiarity with the applicable law. Id. Others who support this approach have recommended that Delaware enact a statute expressly allowing corporations to adopt such provisions, thereby encouraging corporations to opt in. Quinn, supra note 15, at 182.
290. The first forum selection clauses adopted tended to be mandatory clauses, which required any litigation involving internal matters to proceed in the state of incorporation. See Griffith & Lahav, supra note 8, at 58; Thomas & Thompson, supra note 2, at 1812–13. However, more recently, the provisions adopted tend to be elective, allowing the corporation to permit the litigation to proceed elsewhere if it chooses or to enforce the provision to return the litigation to Delaware (or whatever the chosen forum is). See Griffith & Lahav, supra note 8, at 58; Thomas & Thompson, supra note 2, at 1812. An example of an exclusive forum provision adopted by Chevron Corporation and addressed in the 2013 decision Boilermakers Local 154 Retirement Fund v. Chevron Corporation is below:

Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to these provisions.
that went public included an exclusive forum provision in their charter.\textsuperscript{291} But in 2010, the number began to climb.\textsuperscript{292} Between 2010 and 2012, almost 200 companies adopted provisions naming Delaware as the exclusive forum for corporate litigation in their bylaws or included them in their charters.\textsuperscript{293} However, incorporating an exclusive forum provision has problems as well, most notably (i) concerns over enforceability and (ii) the potential for shareholder opposition.\textsuperscript{294}

Choice of forum provisions in contracts have long been accepted as generally enforceable.\textsuperscript{295} And corporate bylaws and charters have frequently been analogized to contracts when analyzing their provisions.\textsuperscript{296} However, because the bylaws can be adopted or amended unilaterally by the board without shareholder consent, the analogy to a contractual relationship weakens, and leaves open the argument that forum selection provisions—at least those adopted in a company’s bylaws rather than its charter—are unenforceable.\textsuperscript{297} In fact, in 2011, the United States District Court for the Northern District of California held that such a forum selection provision in a bylaw unilaterally adopted by the board was unenforceable.\textsuperscript{298}

More recently, however, in June 2013, the Court of Chancery of Delaware weighed in on this issue, finding that an exclusive forum provision, even when in a company’s bylaws and adopted without shareholder approval, was not invalid on its face. In \textit{Boilermakers Local Retirement Fund v. Chevron Corp.}, the court reviewed exclusive forum provisions adopted by Chevron Corp. and FedEx Corp. that shareholders challenged as being facially invalid.\textsuperscript{299} The corporations defended adoption of the provisions as being a reasonable response to the problem of having to engage in the costly defense of the same claim involving the same transaction in multiple courts.\textsuperscript{300} The charters of both companies delegated to the directors the ability to adopt and amend the bylaws of the
The Plaintiffs’ Lawyer’s Transaction Tax

company without shareholder approval. Because of this charter provision, of which presumably all shareholders were aware when they purchased stock in the company, combined with the fact that Delaware law would still allow the shareholders to repeal any director-made amendments to the bylaws by majority vote of the shareholders, the court held that the bylaws of both companies were not invalid on their face. The court left open the possibility that there could perhaps be some successful real-world challenges to the enforceability of a bylaw provision, but ultimately seemed skeptical that any set of facts would realistically arise that would invalidate the bylaw provisions.

Assuming this holding stands up to a likely appeal, more corporations may join Chevron and FedEx in adopting exclusive forum provisions in their by-laws. However, some commentators still have concerns over these provisions, noting the unlikelihood of the shareholders actually repealing a director-made bylaw unless there are “major governance lapses.” Therefore, even though the shareholders have a check and balance in their technical ability to repeal, it is not likely this tool would actually ever be utilized. Moreover, enforcing these exclusive forum provisions will largely end up in the hands of judges in other jurisdictions. And though those courts are instructed to apply the law of the state of incorporation, plaintiffs may be able to make a claim that the particular set of facts and circumstances at issue in their case would make the application of the exclusive forum provision unreasonable under the law of the other state.

Even if these provisions are ultimately enforceable, they will likely not be adopted in the first place if they are met with significant stockholder disapproval. The fact that most companies that have adopted these exclusive forum provisions have done so via director-passed bylaws may reflect a concern that public company shareholders might vote against them if given the choice. In fact, many of the public companies that adopted these types of bylaw provisions after 2010 ultimately repealed them after being sued by investors.

301. Id. at 956.
302. Id. at 956-57.
303. For instance, when addressing the plaintiff’s hypothetical concern that the bylaw could somehow preclude a plaintiff from bringing a claim that must be brought in a federal court, the court stated its belief that, “there likely are pragmatic solutions to the imagined scenarios that the plaintiffs cite, which would both respect the forum selection bylaws’ requirement that state law internal affairs claims be adjudicated in the courts of the state of incorporation, while preserving any substantive claims that must be brought in federal court.” Id. at 962-63.
304. Hoffman, supra note Error! Bookmark not defined.
305. Id.
306. Id.; see also Thomas & Thompson, supra note 2, at 1812.
307. Thomas & Thompson, supra note 2, at 1812.
308. Hoffman, supra note Error! Bookmark not defined. (“Chevron and FedEx were among about a dozen large public companies that adopted bylaws. Most dropped them after a flurry of investor suits…..”).
However, this concern loses importance in light of the *Boilermaker* ruling described above. There is some evidence that we actually may see the beginnings of large institutional investors supporting these provisions to avoid the high costs of duplicative litigation.\(^{309}\) Therefore, the addition of exclusive forum provisions in charters or bylaws remains a potentially viable option for public companies to engage in self-help and avoid multi-jurisdictional litigation, but it has yet to be fully tested in terms of both stockholder support and enforceability.

The more aggressive proposed changes to address the multi-jurisdictional aspect of the problem involve the imposition of state or federal regulation. On the state level, some have suggested that states themselves could enact laws providing that lawsuits brought against a company or its officers or directors challenging a transaction must be brought in the state of incorporation of the target corporation.\(^{310}\) The obvious problem to this solution is that many states would need to enact such statutes before they would have any meaningful effect.\(^{311}\)

On the federal level, a number of solutions have been proposed. For instance, one possibility is to amend CAFA and SLUSA so that the carve-outs in those statutes—that allow certain corporate matters to be litigated in state rather than federal court—allow litigation to proceed only in the state of incorporation of the defendant.\(^{312}\) This might include the enactment of a tag-along federal statute that would require any merger objection suits filed in federal court to be transferred to a federal court in the state of incorporation of the target company.\(^{313}\) Such legislation would have the benefit of disallowing multi-district litigation in merger objection suits. Additionally, presumably it would take the pressure off of the Delaware judges—to the extent they actually feel any—to compete with other states to retain cases.\(^{314}\) Therefore, there would be poten-

\(^{309}\) Id.
\(^{310}\) Pincus, supra note 18, at 9.
\(^{311}\) But defenders of this solution suggest that if such a provision were adopted in the Model Business Corporation Act (MBCA), and by certain commercially important states like New York, Delaware, and California (even though they are not MBCA states), these state exclusive forum provisions would gain traction. Thomas & Thompson, supra note 2, at 1810.
\(^{312}\) Armour et al., supra note 35, at 1395; Pincus, supra note 18, at 9. This could also be achieved through insertion of a new statutory provision requiring that all merger objection litigation be brought in the state of incorporation of the target company, as advocated by the Committee on Securities Regulation of the New York City Bar in 2008. Committee on Securities Litigation, supra note 31, at 9-10. The Committee proposed the following language:

Notwithstanding any statute or rule to the contrary, any action brought under state law against a publicly listed company challenging either (i) the company’s decision to merge with or be acquired by another entity, or (ii) the company’s decision to take action to prevent a change in control of the company, shall only be brought in the courts of the state of the company’s incorporation. Id.

\(^{313}\) Pincus, supra note 18, at 9.
\(^{314}\) See supra note Error! Bookmark not defined. and accompanying text.
The Plaintiffs’ Lawyer’s Transaction Tax

tially less concern that Delaware judges would lighten up on plaintiffs’ attorneys by failing to scrutinize fee awards and allowing more suits to survive a motion to dismiss.

Some scholars have gone even further to suggest that the CAFA and SLUSA carve-outs should be revisited—not to force suits into the state of incorporation but to force suits to be litigated in federal court, where the plaintiffs would have to overcome the more burdensome requirements of the PSLRA, thereby discouraging frivolous filings.\footnote{315} The most extreme suggestion along those lines has been to not only require these suits be brought in a federal forum where the law of the state of incorporation would still apply, but to actually federalize the substance of corporate law.\footnote{316} All of these proposals, particularly the latter two, have been met with some criticism. For instance, if merger objection suits were required to proceed only in federal, not state, court, these cases would be handled entirely by federal district court judges across the country who may have little experience with applying the laws of another state.\footnote{317} And entirely federalizing the substance of corporate law is an even more overbroad solution to the problem than denying the applicability of the common benefit doctrine.\footnote{318}

\textbf{V. A Suggested Framework for Analyzing Disclosure-only Settlements in Merger Objection Litigation}

The rejection of the common benefit doctrine in Texas and other states, the suggestion that all merger objection litigation be required to be litigated in federal court, and the suggestion of the federalization of corporate law generally all suffer from being overbroad, as discussed above. However, the other possible solutions, such as allowing corporations to enact exclusive forum provisions or revising CAFA and SLUSA to require class action merger objection suits to be litigated in the state of incorporation, are certainly viable. But, even assuming that one or more of these solutions were successfully implemented, this will not sufficiently alleviate the problems faced by corporations defending frivolous merger objection suits. Ridding plaintiffs of the ability to bring suits in multiple jurisdictions would decrease some of the leverage plaintiffs have over target companies in these suits because the litigation would not be as costly for the target if it only has to defend itself in one jurisdiction. However, the ultimate cost that is of concern to the defendant corporation in these merger

\footnote{315} Thomas & Thompson, \textit{supra} note 2, at 1809; Quinn, \textit{supra} note 15, at 160.  
\footnote{316} Thomas & Thompson, \textit{supra} note 2, at 1810.  
\footnote{317} \textit{Id}.  
\footnote{318} Moreover, Congress has debated federalizing corporate law for years, but has never chosen to do so. \textit{Id}.  

99
suits is, not the litigation costs, but the cost of losing the transaction.\footnote{See supra notes 17-18 and accompanying text.} Therefore, the plaintiffs will still retain their biggest source of leverage over the defendant—the defendant’s sense of urgency imposed by the deal timeline. Even if plaintiffs are limited to filing in just one jurisdiction, thereby making the competition for lead plaintiff status more robust, defendants will still be willing to settle even non-meritorious suits, particularly if the settlement only involves providing some additional meaningless disclosures and paying attorneys’ fees.\footnote{See supra notes 17-18 and accompanying text.} Though the costs of the litigation may be marginally less for defendants, there is no promise that limiting these suits to the state of incorporation will lessen the percentage of transactions that incur litigation.

It is true that some evidence exists that Delaware does a more thorough job analyzing settlements and making sure that they are fair to the class, rather than merely rubber-stamping them.\footnote{See supra notes 17-18 and accompanying text.} This kind of scrutiny would arguably deter the filing of frivolous cases, at least for target companies incorporated in Delaware. Because a majority of public companies are incorporated in Delaware,\footnote{See supra note 35 and accompanying text.} it would perhaps deter the filing of frivolous cases a majority of the time. However, this argument falls short for two reasons. First, while a majority of public companies are incorporated in Delaware, there are still 30 to 40% that are not. That is not insignificant, and assuming other states have not yet followed Delaware’s lead, there is no guarantee that they will in the future.\footnote{An argument could be made, however, that once a statute was in place requiring litigation only in the state of incorporation of these issues, other states would no longer feel the need to compete with Delaware to win cases and, as such, might see less of a reason not to follow Delaware. Delaware, after all, has historically served as a standard-setter for other state’s corporate jurisprudence. See, e.g., City of Inkster Policeman and Fireman Ret. Sys. v. Kinder, CIV.A. 19575, 2009 WL 1562909, at *2 (Tex. App. June 4, 2009) (“Kansas courts often look to Delaware law on substantive corporate law issues”); Lane v. Sharp Packaging Sys., Inc., 251 Wis. 2d 68, 127 (2002) (“Wisconsin courts often look to Delaware law for guidance on matters of corporate law”); Konstand v. Prime Grp. Realty Trust, No. 110388-U, 2011 WL 10088207, at *3 (III. App. Ct., Sept. 29, 2011) (“In the absence of Maryland law on corporate governance issues, Maryland courts look to Delaware law”); Kurtz v. Clark, 290 P.3d 779, 787 (Okla. Civ. App. 2012) (“We find no material difference between Oklahoma and Nevada law, both of which look to Delaware law for guidance on this [corporate law] issue”); MD Acquisition L.L.C. v. Meyers, 878 N.E.2d 37, 39 (Ohio Ct. App. 2007) (“Because Ohio courts have had little opportunity to address advancement [of legal expenses] issues in a comparable context, we would certainly not preclude turning to Delaware law”); Lynch v. John W. Kennedy Co., No. 14405, 2005 WL 1530469, at *6 (R.I. Super. June 23, 2005) (“The Court, therefore, will turn to Delaware law for guidance and support when considering corporate law issues, such as the business judgment rule, that have yet to be fully developed in this jurisdiction”). See also Shani Fuller, Shareholders, Directors, and Other Constituencies: Who’s First In Oregon Corporate Takeover Law?, 30 Willamette L. Rev. 347, 355 n.52 (1994) (“Because of the large number of businesses which incorporate in Delaware and the resulting large volume of litigation, states often turn to Delaware law for guidance”)}

\footnote{See supra notes 17-18 and accompanying text.} Moreover, though there are some cases that seem to indicate Delaware has provided much-

---

319. See supra notes 17-18 and accompanying text.
320. See supra notes 17-18 and accompanying text.
321. See supra notes 17-18 and accompanying text.
322. See supra note 35 and accompanying text.
323. See also Shani Fuller, Shareholders, Directors, and Other Constituencies: Who’s First In Oregon Corporate Takeover Law?, 30 Willamette L. Rev. 347, 355 n.52 (1994) (“Because of the large number of businesses which incorporate in Delaware and the resulting large volume of litigation, states often turn to Delaware law for guidance”).
The Plaintiffs’ Lawyer’s Transaction Tax

needed scrutiny to these merger objection suit settlements, there still exist inconsistencies in Delaware’s approach. Therefore, any solution that merely limits the multi-jurisdictional aspect of merger objection litigation may be insufficient. Building upon such a solution, this section sets out a proposal for state action to specifically target disclosure-only settlements in meritless merger objection suits. Delaware seems the obvious choice to lead the reform in this area, so this article proposes a combination of (i) legislative action in Delaware, and (ii) more consistent vigilance by the Delaware Chancery Court of merger objection settlements to help curb abusive litigation in this arena.

In terms of legislative action, the central component would be for Delaware to adopt a rule, much like the Texas statute, that attorneys’ fee awards are generally prohibited in non-monetary settlements. However, the over-breadth of the Texas rule could be tempered in two important ways. First, the Delaware rule could apply only to non-monetary settlements in merger objection suits, thereby specifically targeting the concern without also having a chilling effect on other types of class action litigation. Second, the Delaware rule could allow for a pre-litigation waiver of the prohibition against an award of plaintiffs’ attorneys’ fees by a large institutional shareholder—for instance, a shareholder holding more than 5% of the stock of the target company. Common wisdom suggests that some of the plaintiff shareholders’ failure to monitor counsel that is typically associated with shareholder class actions would be alleviated if there were a large institutional shareholder serving as the lead plaintiff. In fact, there is at least some empirical evidence that attorneys’ fee awards tend to be lower and settlements tend to be more valuable when a large institutional shareholder is involved. Therefore, it might be the case that allowing attorneys’ fees only where a large institutional investor has waived the prohibition against fee awards would adequately protect the interests of the shareholder class and make it more likely that there would be an objector in the instance of an unfair or collusive settlement agreement. Fees could still be awarded even when no monetary recovery is sought if a large enough shareholder believed

324. See supra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.
325. In a company that does not have a large institutional shareholder—to the extent any such company would be affected by this legislation—this provision might be revised to allow for waiver by one of the five largest shareholders of the company.
326. Coffee, Policy Primer, supra note Error! Bookmark not defined., at 643; Coffee, Balancing Fairness, supra note 5, at 894; Quinn, supra note 15, at 151. The same rationale was asserted to support the inclusion in the PSLRA of a provision favoring the appointment of large institutional investors as the lead plaintiff. Garry, supra note 31, at 294 (“The law creates a rebuttable presumption that deems the person having the largest financial stake in the lawsuit as the ‘most adequate plaintiff.’ This provision seeks to prevent lawyers from using professional plaintiffs…who have no incentive to monitor the litigation.”)
327. Cain & Davidoff, supra note 12, at 13; Thomas & Thompson, supra note 2, at 1809.
the suit was meritorious.

Critics of this approach might point out that, in disclosure-only settlements, a large shareholder is getting the same value as a small shareholder.\textsuperscript{328} Having a large institutional shareholder monitoring class counsel in a stock drop or other type of securities fraud case makes sense because whatever monetary recovery is achieved through the litigation—for instance, a per share price increase—will have a proportionally larger effect on that shareholder than on smaller individual shareholders. The large shareholder—entitled to a larger portion of the recovery—has more of a vested interest in making sure the recovery is appropriate. On the other hand, in a merger objection suit alleging only improper disclosures, the large shareholder is getting the exact same thing as the small shareholder—a set of additional disclosures. It is not clear that a large shareholder would have any more incentive to monitor class counsel in an action where there will clearly be no monetary award than a smaller investor would. However, even though the large institutional shareholder may not be receiving any monetary recovery in a suit, that shareholder is still motivated to ensure that the company—and, therefore, the value of his investment, which is proportionately more valuable than that of any individual small shareholder—is not harmed from the litigation. There is thus no reason to think that the large institutional shareholder in a merger objection suit would be any less motivated than in other corporate class action suits to refuse to enter frivolous litigation and to refuse to accept a settlement that provides no value to the company just to pay off a lawyer.

Implementing a rule that disallows attorneys’ fees in non-monetary settlements of merger objection suits would also have an impact on the selection of lead counsel. Delaware courts have already shown a willingness to move away from the first-to-file approach and instead look at factors such as the size of the plaintiff in determining who will be the lead plaintiff.\textsuperscript{329} However, Delaware courts have not been consistent in this approach, sometimes reverting to allowing the plaintiffs’ attorneys to work it out for themselves, which has the effect of rewarding the first to file.\textsuperscript{330} In merger objection suits that have no colorable claims other than disclosure claims, the competition among plaintiffs’ attorneys would automatically be largely curtailed by the fact that attorneys who do not have large institutional clients will not find it worthwhile to file suit, knowing fees will not be awarded. The preference for large institutional plaintiffs would further encourage not only the appointment of a lead plaintiff who has more of

\textsuperscript{328} The benefit of a disclosure only settlement will not vary with the size of the deal or the size of the stockholder base. In re Sauer-Danfoss, 65 A.3d at 1136.

\textsuperscript{329} See supra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.

\textsuperscript{330} See supra note Error! Bookmark not defined. and accompanying text.
The Plaintiffs’ Lawyer’s Transaction Tax

a stake in the litigation and more of an impetus to monitor the litigation but also could have the effect of appointing lead counsel with more resources and more ability to vigorously litigate the suits.\(^{331}\) To the extent any competition remained, Delaware courts should refuse to allow the plaintiffs’ attorneys to decide amongst themselves who will serve as lead counsel and instead consistently use the Hirt factors to appoint lead counsel.

In addition to disallowing attorneys’ fee awards in non-monetary settlements of merger objection suits, Delaware courts could adopt two procedural rules. The first would require the dismissal without prejudice of any complaint in a merger objection suit involving a public target filed before the target has issued its proxy statement about the transaction.\(^{332}\) In merger objection suits involving disclosure-only settlements, the hastily filed complaints are often amended after the proxy is filed, adding disclosure claims and dropping all other claims.\(^{333}\) This is because disclosure claims cannot possibly be made prior to the company’s filing of the proxy, since the disclosures in the proxy typically form the basis of these claims. Additionally, it is difficult for plaintiffs to make claims about inadequate process prior to the filing of the proxy since plaintiffs are not likely to be granted access to discovery at this stage of the litigation.\(^{334}\) Implementing a rule like this could certainly increase the tendency of plaintiffs’ attorneys to engage in forum shopping to avoid the negative effects of such a procedural rule, contributing to the previously discussed out-of-Delaware trend. However, if it is coupled with a mechanism limiting merger objection litigation to the target’s state of incorporation as discussed in Part IV, this would not be an issue.

The second procedural rule involves amending the Delaware requirements for the notice that must be provided to members of a class in a class action settlement. Specifically, the notice requirements for shareholders could be strengthened to help guard against collusion between plaintiffs’ counsel and the defendant. Currently, under Delaware law, a notice of a class action settlement is legally adequate “if it contains a fair description of the proposed settlement, puts stockholders upon notice as to the general nature of the subject matter, and warns them that their substantial interests are involved.”\(^{335}\) It is not required “to

\(^{331}\) As discovered with the enactment of the PSLRA and its favoring of large institutional clients, these clients are typically represented by “firms that could invest in the intensive fact development” necessary on the front end of the suit. Cheffins et al., supra note Error! Bookmark not defined., at 491.

\(^{332}\) Griffith & Lahav, supra note 8, at 68.

\(^{333}\) See supra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.

\(^{334}\) It is the proxy that typically sets forth information about the process the board used in analyzing the transaction. Griffith & Lahav, supra note 8, at 65-66.

eliminate . . . all diligence on the part of the stockholders.”

The notice provision could be revised to require disclosure of the amount of attorneys’ fees being agreed to and an express statement of the fact that the shareholders will not receive any monetary award, if that is in fact the case. Since one issue in many merger objection suits is a failure of the plaintiffs’ attorneys to perform much work on the case, the rule could require the notice to include a detailed description of the work performed by the attorneys to whom fees will be awarded. This would allow the class members to better evaluate the value conferred. The notice might also disclose whether the plaintiffs’ attorney has a relationship with the named plaintiff in the class action—i.e., it might indicate if the attorney has used a “professional plaintiff” to file suit—allowing the class members to evaluate any potential conflict of interest the attorney might have. Delaware requires board members to disclose any conflicts of interest prior to submitting a matter to a vote; it seems, therefore, only fitting that the plaintiffs’ attorneys be held to the same standard. Making sure the lead plaintiff has a clear understanding of the proposed settlement will help focus the lead plaintiff’s monitoring efforts. This would, in turn, have the effect of counteracting the current reality that there are rarely objectors to settlements in merger objection suits, even where the settlement seems a result of opportunistic behavior on the part of the plaintiffs’ attorneys.

In addition to the legislative response, the Delaware Chancery Court must be vigilant in its review of any proposed settlement, particularly in disclosure-only settlements of merger objection suits. This must be the case even in the absence of an objector. Delaware courts—and other jurisdictions adopting this approach—should consistently apply the Sugarland factors to the analysis of the appropriateness of attorneys’ fees. Though Delaware courts have stated that they “consistently have applied a multifactor approach—originally articulated in Sugarland—in determining reasonable attorney’s fees,” a review of a sampling of cases citing Sugarland indicates most of these involve fee awards that were contested by an objector. Though Delaware courts have engaged in independent analysis of fee awards in uncontested cases, this needs to become the rule in all jurisdictions rather than the exception. While plaintiffs’ attorneys presenting a proposed fee award in a settlement bear the burden of es-

336. *Id.* at 1080.
337. If the conflict is not disclosed and the transaction approved regardless of the conflict, it must be shown to have been entirely fair to the corporation or else it will be potentially voidable. *Del. Code Ann.* tit. 8, § 144(a) (2013).
338. *See supra* note *Error! Bookmark not defined.* and accompanying text.
340. *See supra* note *Error! Bookmark not defined.* and accompanying text.
341. *See supra* note *Error! Bookmark not defined.* and accompanying text.
The Plaintiffs’ Lawyer’s Transaction Tax

tablishing the appropriateness of the award, courts should demand more of plaintiffs’ attorneys in doing so. For instance, to the extent that the attorney uses fee awards granted in uncontested cases to support his or her fee award, the court should discount this precedent. In other words, cases that may represent a court rubber-stamping a fee award will not be sufficient support for a fee award in a non-monetary settlement. Rather, plaintiffs’ attorneys will have the burden of showing the court how the fee award meets each of the Sugarland factors, using only cases that involved contested fee awards as precedent.

Moreover, courts should recognize that in disclosure-only settlements of merger objection suits, some of the Sugarland factors deserve particular attention. The Delaware Chancery Court could adopt uniform guidelines to assist in the analysis of these particular factors to allow for consistency across cases. By publishing these guidelines, Delaware could help guide other courts in their analysis of these disclosure-only settlements, overcoming the problem that much of the adjudication of merger objection settlements is through unreported transcript rulings.

One such factor from Sugarland that deserves particular attention is the review of the results obtained for the benefit of the class. With disclosure-only settlements—where the only result achieved is additional disclosures to the shareholders—courts must recognize that not all disclosures are equal. The basic test for determining whether the supplemental disclosures were beneficial is one of materiality. Specifically, courts are to look at whether the fact that is revealed in a supplemental disclosure as part of a proposed settlement is one that “would have assumed actual significance in the deliberations of a reasonable shareholder.” Stated differently, there must have been a “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information

343. Vice Chancellor Laster recognized this issue in In re Sauer-Danfoss Inc. Shareholders Litigation, pointing out that when the “requested fee is uncontested, the plaintiff frequently does not parse the benefit-to-fee relationship to a meaningful degree,” instead providing string cites to cases where an uncontested fee award was approved in the range the plaintiff in the current case is requesting. 65 A.3d at 1137. But as Vice Chancellor Laster pointed out, these are not helpful precedents since they say nothing about the type of disclosures achieved in those cases, the efforts counsel took in those cases to warrant the fee, or similar considerations. Id. As such, Laster suggested “de-emphasizing the precedential value of uncontested fee awards.” Id.
344. Id. at 1136; Griffith & Lahav, supra note 8, at 65. Griffith and Lahav suggest that Delaware move away from transcript opinions and report more of these outcomes through traditional mechanisms like Lexis and Westlaw or invest in its own searchable database system. Griffith & Lahav, supra note 8, at 67.
made available.” however, this standard gives the courts a lot of flexibility in application. As such, it may make sense for Delaware courts to publish guidelines that would help courts make distinctions between different types of disclosures. The guidelines could delineate a particular set of disclosures that would carry a presumption of immateriality that would have to be overcome by the proponent of the fee award. For instance, supplemental disclosures that merely fix typographical errors, amount to less than one page of additional material, or that disclose something that could have been gleaned from elsewhere in the proxy materials might carry this presumption of immateriality. This type of disclosure would be distinguished from purportedly material supplemental disclosures that, for instance, reveal previously undisclosed conflicts of interest or higher-than-expected performance projections.

Other Sugarland factors that have particular importance in the context of non-monetary settlements of merger objection suits are (i) the time, effort, and expense put forth by plaintiffs’ counsel and (ii) the causal relationship between the efforts of counsel and the benefit achieved. Even if the court determines that in fact a benefit was achieved for shareholder plaintiffs, the court must still ensure that the benefit was the result of counsel’s efforts and must also ensure that the fee being requested is reasonable in light of the effort expended. With respect to causation, the Delaware court may want to implement guidelines similar to those implemented with respect to materiality. For instance, in cases that involve a tender offer, even where the shareholders ultimately get a higher price than the original offer, the court might impose a presumption against causation where the suit was filed prior to the target forming an independent committee to respond to the tender offer. Similarly, in cases involving supple-


348. Whatever guidelines are established would need to consider the interests of the shareholders in having sufficient information to make a meaningful decision about a transaction. The requirements on the corporation, however, should not be so stringent that corporations are encouraged to bury the shareholders in an avalanche of documentation, since this would have a counterproductive effect for shareholders and would in fact potentially hinder informed decision-making. Basic v. Levinson, 485 U.S. 224, 231 (1988); Solomon v. Armstrong, 747 A.2d 1098, 1128 (Del. Ch. 1999). Without guidelines, some corporations may be encouraged to engage in a data dump. Corporations have a rational fear that every new disclosure that is made subjects the corporation to a possible claim that even more information backing up the disclosure is necessary. Batts & Priebe, supra note Error! Bookmark not defined., and accompanying text.

349. See supra note Error! Bookmark not defined., and accompanying text.

350. As (then Vice) Chancellor Strine has pointed out, merely “suing on the proposal” rather than the negotiated deal allows lawyers to claim credit for “price increases in a deal context in which price increases are overwhelmingly likely to occur” anyway, even in the absence of litigation. In re Cox Commc’ns, 879 A.2d at 622.
The Plaintiffs’ Lawyer’s Transaction Tax

mental disclosures where the SEC has simultaneously undertaken a review of the transaction, a court might impose a presumption against causation related to supplemental disclosures that were also requested by the SEC.

Even if a material benefit has been conferred and a causal connection has been established between the benefit conferred and the efforts of counsel for at least some portion of that benefit, a court should only award fees that are reasonable in light of the effort expended. Courts should consider looking at the actual work performed in these cases, rather than at the hours worked in analyzing this factor. Looking solely at hours worked has been found to encourage some plaintiffs’ attorneys to engage in intentional delay, perform unnecessary or duplicative work, to overstaff matters, and to pad bills. Instead, courts should look at what effort counsel expended. Signs of effort would include “actively engaging in adversarial discovery” by making and following up on document requests and performing depositions, obtaining documents from third parties, pursuing motions to compel, and litigating substantive issues. Any effort exerted to establish lead counsel status should be discounted. The less time between the filing of the complaint and the decision of the attorneys to settle, the more likely the suit was a nuisance suit that the plaintiffs’ attorney recognized was without merit from the get-go. However, in merger objection suits, the speed of settlement cannot, by itself, serve as evidence that no attorneys’ fees should be awarded. Typically, these suits (meritorious or not) are resolved quickly, often within 100 days. Speed of settlement is necessitated by the transaction timeline and the need for defendants to move quickly to pre-

351. See e.g., supra note Error! Bookmark not defined. and accompanying text.

352. The same concerns have been raised about courts employing the Lodestar method of calculating attorneys’ fees, which essentially compensates the plaintiffs’ attorney based on hours worked on the matter, as opposed to based on a percentage of recovery achieved. Coffee, Policy Primer, supra note Error! Bookmark not defined., at 650; Northrup, supra note Error! Bookmark not defined., at 121. For instance, in one case, the court reviewed the fees and found a number of billing abnormalities, including attorneys billing over 400 hours, some of which occurred after the court’s ruling on the matter in question, to compile a report which did not appear to have been reviewed by anyone for more than fifteen minutes. In re Wachovia S’holders Litig., Harbor Fin. Partners, 01 CVS 8036, 2003 WL 22996328, at *19 (N.C. Super. Dec. 19, 2003) rev’d, 168 N.C. App. 135 (2005). Hours worked can still, however, be an effective cross-check to guard against windfall compensation to attorneys when awarding large fees. In re Sauer-Danfoss Inc., 65 A.3d at 1139.

353. Id. at 1139 (citing McMillian, supra note Error! Bookmark not defined., at 258, 236 n.49). The absence of engaging in actual litigation should result in a decision to award no or low fees. For instance, in Sanders v. Wang, the Supreme Court of Delaware rejected a request for fees where the attorney had merely “substantially copied” a complaint filed by another attorney in another action based on the same set of underlying facts. 2001 WL 599901, at *3 (Del. May 29, 2001). Though the attorney argued he had “independently researched” the legal validity of the claims set forth in the complaint, the court pointed out that this work was duplicative of work performed in other suits filed months earlier and of no value to the class members. Id. In such cases, the court held fees were not warranted. Id.

354. McMillian, supra note Error! Bookmark not defined., at 255.

355. Pincus, supra note 18, at 5.
serve the deal.356 But if the only litigation activity in the time before settlement, other than squabbling over lead counsel status, is the filing of a complaint and perhaps a cursory document request, plaintiffs’ attorneys should have to overcome a presumption that no fees or only minimal fees should be awarded.

VI. CONCLUSION

In 2012, over 90% of public company mergers and acquisitions valued at over $100 million and over 95% of such transactions valued over $500 million incurred litigation instituted by objecting shareholders. Through this overabundance of litigation, plaintiffs’ attorneys have successfully attached what amounts to a transaction tax to an overwhelming majority of large public company deals. Attorneys extort this tax—in the form of attorneys’ fees—from defendant companies who fear their deals will die after being tied up in lengthy, often frivolous litigation. Armed with the knowledge that time is of the essence in these transactions, plaintiffs’ attorneys understand the leverage they have to force a quick settlement with a defendant company’s board. Adding to the attorneys’ leverage and the pressure on defendants to settle is the threat of larger-than-normal litigation costs since most large public company deals that attract litigation incur more than one suit, often in several different jurisdictions. When given the choice of either paying plaintiffs’ attorneys’ fees—particularly when the settlement is typically otherwise non-monetary—or jeopardizing a multi-million dollar transaction, boards of defendant companies seem, understandably, eager to choose the former.

In disclosure-only settlements, which occur in a majority of these suits, the additional disclosures in the proxy provided to the plaintiff class are frequently immaterial and unhelpful, yet these settlements always involve a (sometimes substantial) fee award as part of the negotiated settlement. This is the case even when the plaintiffs’ attorneys in the suit exerted little effort. Although courts are charged with making sure that settlements are fair to the class, judges nevertheless often do not raise challenges to these fee awards on their own. Because of the agency costs involved in class action litigation and the lack of motivation of any one plaintiff shareholder to monitor class counsel, these fee awards are rarely objected to and thus rarely appealed.

Scholars who have analyzed this issue of frivolous merger objection litigation previously have focused on the multi-jurisdictional aspect of the litigation. Such scholars have made thoughtful proposals calling for easier consolidation of cases across jurisdictions or the funneling of all cases to the jurisdiction of incorporation of the target company. Eliminating the multi-jurisdictional aspect

356. See supra notes 17-18 and accompanying text.
The Plaintiffs’ Lawyer’s Transaction Tax

of merger litigation would, no doubt, be a step toward curbing abusive strike suits in this arena by alleviating some of the settlement pressure imposed on defendants by the high costs of litigating a case in multiple forums. However, the other incentives to settle, particularly those imposed by the pressure of the deal timeline, would remain. As such, in addition to implementing a way to eliminate filings in multiple jurisdictions based on the same underlying transaction, there needs to be a solution that would further deter strike suits in merger objection litigation. State action specifically targeting merger objection suits is needed. Delaware seems the obvious choice to lead the reform in this area through a combination of (i) legislative action and (ii) enhanced scrutiny of merger objection settlements by the Delaware Chancery Court.

The main crux of this article’s proposed legislative action is the adoption of a rule in Delaware that attorneys’ fee awards are generally prohibited in non-monetary settlements, but it should be tempered in two important ways. First, the Delaware rule should apply only to non-monetary settlements in merger objection suits, thereby specifically targeting the concern without also having a chilling effect on other types of class action litigation. Second, the Delaware rule could allow for a pre-litigation waiver of the prohibition against fee awards by a large institutional shareholder—for instance, a shareholder holding more than 5% of the stock of the target company. Allowing attorneys’ fees only where a large institutional investor has waived the prohibition would better protect the interests of the shareholder class and make it more likely that there would be an objector in the instance of an unfair or collusive settlement agreement, while still allowing fees to be awarded even if no monetary recovery is sought or achieved, so long as a large shareholder believed the suit was meritorious.

The legislative response might also include the implementation of two procedural rules. The first would require the dismissal without prejudice of any complaint in a merger objection suit involving a public target filed before the target has issued the proxy statement about the transaction. Requiring the plaintiffs’ attorneys to have a better understanding of the transaction and the process that led to approval of the transaction by the target’s board before they are able to file suit might slow the race to the courthouse and deter some frivolous filings. The second procedural rule would involve the strengthening of the notice requirements in class action settlements to help guard against collusion between plaintiffs’ counsel and the defendant. Currently, the notice of settlement in Delaware need only contain “a fair description of the proposed settlement.” The notice provision could be revised to require disclosure of the amount of attorneys’ fees being agreed to and an express statement of the fact that the shareholders will not receive any monetary award, if that is the case. The notice might also require that the attorneys provide a statement detailing the work per-
formed and disclosing whether any conflicts of interest exist between the attorneys’ interests and those of the class.

In addition to the legislative response, the Delaware Chancery Court must be vigilant in its review of any proposed settlement, particularly in disclosure-only settlements of merger objection suits. This must be the case even in the absence of an objector. Delaware courts should, in each case, work through an analysis of the Sugarland factors in determining the propriety of a fee award and courts should demand more of plaintiffs’ attorneys in carrying their burden to show the factors have been met. Though applying the Sugarland factors to a fee award in an uncontested case is not a new concept, it has been done inconsistently in the past, which must be remedied.

Moreover, courts should recognize that in disclosure-only settlements of merger objection suits, some of the Sugarland factors deserve particular attention. One of the Sugarland factors of primary importance in this arena is the review of the results that were accomplished for the benefit of the shareholders. The Delaware Chancery Court should consider implementing a set of presumptions for what kinds of disclosures are material—and therefore considered beneficial for the shareholders—and what kinds of disclosures are immaterial. For instance, supplemental disclosures that merely fix typographical errors, amount to less than one page of additional material, or that disclose something that could have been gleaned from elsewhere in the proxy materials might carry a presumption of immateriality.

Similarly, even when a court has determined that a material benefit was achieved, under Sugarland, the court still must analyze the attorney’s role in achieving the benefit. Just as the court might implement a set of presumptions for the materiality issue, a court might also implement a set of presumptions related to causation. For instance, in cases involving supplemental disclosures where the SEC has simultaneously undertaken a review of the transaction, a court might impose a presumption against causation related to supplemental disclosures that were also requested by the SEC.

Finally, even if a material benefit was achieved and a court has determined a causal connection exists between the benefit conferred and the efforts of counsel, the court under Sugarland must still look to the time, effort, and expense put forth by plaintiffs’ counsel. Again, implementing a set of presumptions could be useful in performing this analysis. If, for instance, the only litigation activity in the time before settlement (other than squabbling over lead counsel status) is the filing of a boilerplate complaint and perhaps a cursory document request, plaintiffs’ attorneys should have to overcome a presumption that no fees or only minimal fees should be awarded.

The above changes would be most successful if made in concert with the implementation of a rule that would funnel these merger objection suits to the
The Plaintiffs’ Lawyer’s Transaction Tax

state of the target’s incorporation. If that were the case, then presumably a majority of these merger objection suits would be required to be filed in Delaware. The proposed solutions above—a combination of legislative action and judicial oversight—would hopefully deter frivolous merger objection suits by eliminating the perverse incentives that currently exist. Moreover, if plaintiffs’ attorneys were limited to filing these suits in the target’s state of incorporation, courts in other jurisdictions then would have no need to try to attract plaintiffs’ attorneys away from Delaware and other states through more relaxed (more plaintiffs’ attorney-friendly) rules. With this incentive to attract litigation removed, other jurisdictions would potentially follow Delaware’s lead and adopt a similar approach to addressing merger objection strike suits.

Meritorious merger objection suits—even those that result in no monetary recovery—can and do provide a useful function in policing management to make sure shareholders are not harmed in the process of a deal. However, when a merger tax in the form of plaintiffs’ attorney fees has become the accepted cost of doing business for public companies, it is time for reform.