[Fordham Journal of Corporate & Financial Law](https://ir.lawnet.fordham.edu/jcfl)

Volume 22 | Issue 1 Article 1

2017

The Sixteenth Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law at the Fordham Corporate Law Center

Sean J. Griffith
Fordham University School of Law

The Honorable Andre G. Bouchard
Chancellor of the Delaware Court of Chancery

Recommended Citation

The Honorable Andre G. Bouchard, The Sixteenth Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law at the Fordham Corporate Law Center: Disclosure Settlements—Before and After Trulia, 22 FORDHAM J. CORP. & FIN. L. 1 (2017).

LECTURE

THE SIXTEENTH ANNUAL ALBERT A. DESTEFANO LECTURE ON CORPORATE, SECURITIES & FINANCIAL LAW AT THE FORDHAM CORPORATE LAW CENTER[†]

DISCLOSURE SETTLEMENTS – BEFORE AND AFTER *TRULIA*

WELCOME AND INTRODUCTORY REMARKS

Sean J. Griffith[*]
Fordham University School of Law

FEATURED LECTURER

The Honorable Andre G. Bouchard[**]
Chancellor of the Delaware Court of Chancery

[†] The lecture was held at Fordham University School of Law on April 11, 2016. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory materials in respect to certain statements made by the speakers.
* Sean J. Griffith is the T.J. Maloney Chair in Business Law and Director of the Fordham Corporate Law Center at Fordham University School of Law.
** Andre G. Bouchard is the Chancellor of the Delaware Court of Chancery.

WELCOME AND INTRODUCTORY REMARKS

SEAN GRIFFITH: Welcome, everyone. My name is Sean Griffith. I am the T.J. Maloney Chair in Corporate Law and the Director of the Fordham Corporate Law Center. It is my job to welcome you here tonight and to give you a two-minute introduction to who we are and what we do, and then to welcome our speaker for the evening. We are the Fordham Corporate Law Center. I like to say that we are the think-tank that Fordham has organized around corporate and securities law issues. We like to bring together three different types of audiences: we organize events for students to give them the opportunity to learn about different areas of business and corporate practice; we like to organize events for our scholars here at Fordham to bring together academics and policymakers on important research questions; and we like to bring together the public with high-profile public speakers on issues of great importance. I am happy to say that tonight we have managed to bring together all three of those groups for a very exciting lecture by Chancellor Bouchard.

This is the Albert A. DeStefano Lecture. It is a lecture that was created in 2001 in honor of Albert A. DeStefano, a former partner at Becker & Ross who specialized in corporate matters, especially M&A. He was a Fordham alum and a Fordham adjunct professor from 1973 to 1983. He has been deceased since 2012, but his daughter is now a practicing lawyer who practices corporate law in Delaware. Of our three lectures, the DeStefano Lecture has traditionally been our Delaware corporate law-focused lecture. Our fall lecture is the A.A. Sommer, Jr. Lecture, typically focused on securities law. In 2013, we had the pleasure of welcoming Vice Chancellor Laster to give the Albert A. DeStefano lecture; in 2014, former Chief Justice Steele gave the DeStefano lecture; and last year, we had a panel of eminent Delaware practitioners to discuss the issue of fee shifting with us, an important issue in Delaware corporate law.

Tonight, we have the Chancellor himself. I am pleased to introduce the Honorable Andre G. Bouchard, who was sworn in as Chancellor of the Court of Chancery on May 5, 2014. Before his appointment, Chancellor Bouchard spent twenty-eight years in private practice in Wilmington, Delaware, including as the managing partner of Bouchard Margules & Friedlander, Professional Association, a corporate and commercial litigation boutique that he founded. Before starting his own firm, Chancellor Bouchard served as a litigator at Skadden, Arps, Slate, Meagher & Flom. Chancellor Bouchard received his law degree from Harvard Law School in 1986 and a bachelor's, summa cum laude, from Boston College in 1983, where he was the recipient of the Edward H. Finnegan Award. He was selected as a Harry S. Truman Scholar from Delaware in 1981, and he has been a past Chairman of the Judicial Nominating Commission, a Fellow of the American College of Trial Lawyers, and a member of The American Law Institute.

Without any further ado, Chancellor Bouchard.

LECTURE

CHANCELLOR BOUCHARD: Thank you for having me tonight. And thank you, Sean, for the very nice introduction. I never knew I would get a hundred people in a room to talk about disclosure settlements. That is a big surprise to me. As Sean said, I have been the Chancellor now for just about two years. I became Chancellor on May 5, 2014. I will start by saying that it is very different than being somebody who runs for political office. When you run for political office, you have an agenda you define to do something proactive. Being a judge is very reactive. You do not know what issues you are going to have, you do not know what kind of cases you are going to get. It is just random, whatever hits the lot.

Notwithstanding that fact, every once in a while some case comes along that gives you the chance to do something more proactive, something more prescriptive, something that can actually change the direction of the law, or the direction of practice. For me—we will see if history shows this to be true—*Trulia*[1] was that opportunity to do something more policy-oriented, to do something that maybe could change the way that business was being conducted before in the area of disclosure settlements.

I know we have a bit of a diverse group, so I have prepared some slides that are going to go through the anatomy of the *Trulia* decision: what came before it, in terms of the dynamics, what the decision was trying to achieve, and the paradigm it laid out.

There will be roughly four parts to this: I will start out with some statistics to show you the magnitude of this issue because it really is an issue of rather significant importance that affects corporate litigation. I will then talk about some of the dynamics that fuel different motivations in the process. Thirdly, from a pre-*Trulia*, traditional perspective, I will look at how we had been doing business in the past and, in particular, some of the challenges of being a judge and reviewing cases and the circumstances that they presented, as well as some of the criticisms that process engendered. Then lastly, the fourth point I want to cover is *Trulia* itself: what the case was about, the nuts and bolts of it, and then, to the extent I could be so bold as to say, the paradigm that I tried to lay out to, hopefully, improve or in some incremental way help the law evolve to be a better way of dealing with these kinds of issues.

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

Some basic statistics—and I have a slide for this:

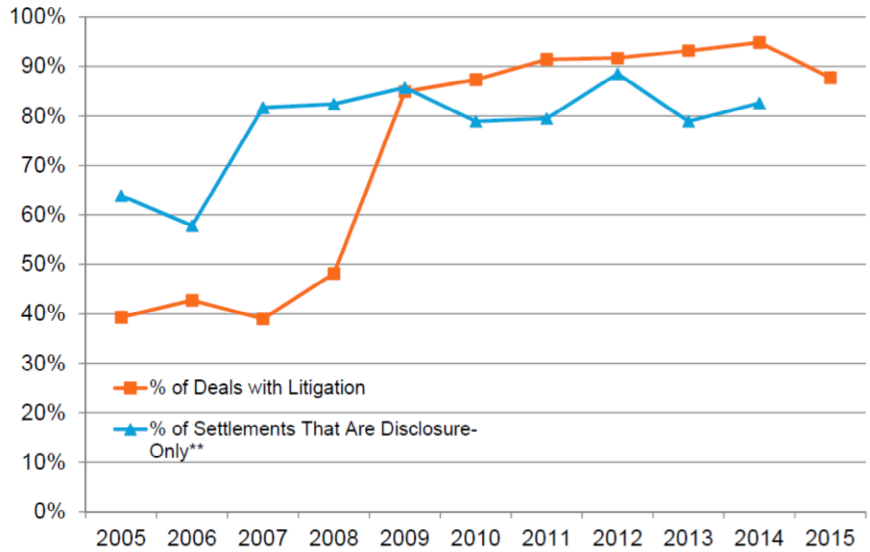

Figure 1: Deal Litigation Slipping from Peak[2]

The two most significant numbers on this page, to me, are the first number on the orange line and the last number on that line.[3] What is the orange line? The orange line is the percentages of deals that result in litigation. To give you an idea, this is not a small sample size. Every one of these boxes represents over a hundred cases, with the exception of two years where there were about seventy-five cases. Some of these involve 200 cases. And we are talking about cases involving public companies, a deal over a $100 million, and there were some other metrics. These data were collected by an SEC economist and Steven Davidoff (who is now at Berkeley), and they are published every year.

Why do I say this orange line and those two particular data points are significant? It is because just about ten years ago, in 2006, 39% of those deals were litigated, but by the time you get to 2014, the number rises to 95%.[4] That is more than double in the span of just ten years. If you went back in time, for which I do not have the data here, I would

2. Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715890 [https://perma.cc/Y5JD-22BY].

3. *See supra* Figure 1, square plot points for years 2005 and 2014.

4. Cain & Solomon, *supra* note 2; *see supra* Figure 1.

wager to say it would show around 20% of those deals being litigated. Now, how many of those result in disclosure-only settlements?

Let me define what I view as a disclosure-only settlement. It is one of these M&A cases that is filed alleging that a target board breached its fiduciary duty, usually for selling the company for too cheap. That is the core allegation. It is settled on the basis of the consideration that, "We are going to give you additional information to include in the proxy statement that goes to the target shareholders to approve the deal." What is the value of that? The value of that, presumably, is that if you have better qualitative information, you have a more informed franchise, and that has a corporate benefit associated with it.

What the blue line shows, by the way, are the cases that settled in the same time period just for disclosures, i.e., there is no money going to the stockholders. These are just disclosures, or in some cases, a tweak to a deal, a protection measure, or something of that nature in the merger agreement. The numbers there are also very significant. In recent years, about 80% of these cases are settling just for disclosures. So why is this happening? Follow the money. It is a very good business for plaintiffs' lawyers to be in.

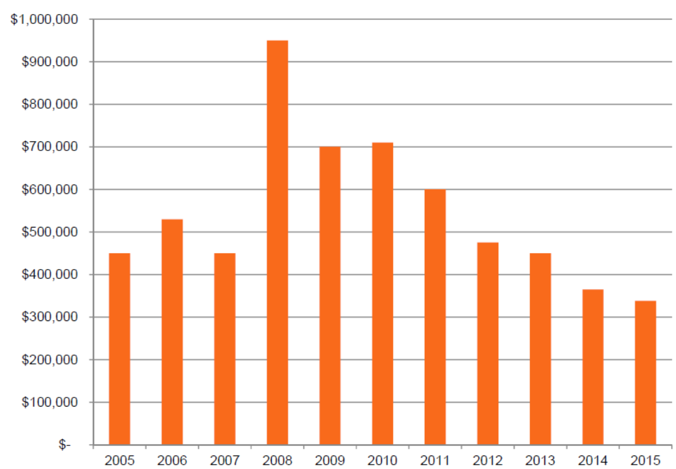

Figure 2: Median Attorneys' Fees in Delaware Settlements[5]

Now, the data here is a little skewed, but let me give you the perspective. First of all, it is a median and this is just Delaware now.

5. Cain & Solomon, *supra* note 2.

The prior data I showed you was national. But most of these cases come to Delaware, although the numbers vary from year to year. These are the fee awards in Delaware. Now, admittedly, because they are not just the disclosure-fee awards and also include other kinds of cases, it is not a perfect proxy. But what you essentially find during this time period is that, on average, in disclosure-only settlements, plaintiffs' lawyers were receiving fees roughly between $300,000 on the low side to $500,000–$600,000 for a case.[6]

Some people may say, "Well, that does not sound like a lot of money in the grand scheme of things." But, for the lawyers doing a lot of these cases it is an inventory business. They would have ten, fifteen, twenty of these cases in a year, potentially. That can run a good, small firm. So, the question becomes, "Does it make any sense that we have gone from the point where essentially every deal is resulting in a lawsuit and every deal is resulting in disclosure-only settlements? Is that really productive or socially useful?" That is the whole point of this exercise, in terms of where the law was and where *Trulia*, hopefully, may have some value in changing things.

Let me start talking about some of the dynamics that surround this settlement process. There is a quote from 1995, from a former Chancellor named Bill Allen. I quoted this in the *Trulia* decision. I also use it because it is the source of this "peppercorn" statement that keeps coming up in the context of discussing disclosure-only settlements. What he says is, "It is a fact evident to all of those who are familiar with shareholder litigation that surviving a motion to dismiss means, as a practical matter, that economical[ly] rational defendants (who are usually not apt to be repeat players in these kinds of cases) will settle such claims, often for a peppercorn and a fee."[7]

The point is that there is leverage in litigation. If you can get by a motion to dismiss—this was not a disclosure-only settlement; it was a motion to dismiss—you have a chip in your pocket. You know you can impose a lot of cost on the other side to go through the process, and so, you have leverage to do a deal. Indeed, there is a lot of leverage on both sides of these deals.

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6. Cain & Solomon, *supra* note 2.

7. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 891 (Del. Ch. 2016) (quoting Solomon v. Pathe Commc'ns Corp., No. CIV. A. 12563, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996)).

This may be the most useful slide in the whole deck, in terms of laying out in one page people's motivation surrounding these deals.[8] What happens? The deal is announced, and the complaint gets filed immediately after the deal is announced—and I mean immediately; sometimes these complaints are filed within minutes of deal announcements—and usually there are several iterations of them. Eventually, they get consolidated. The litigation gets going.

What do people fight about? First and foremost, it is about disclosures, which are in the proxy that goes to the target stockholders. Approximately 80%—and actually probably higher than 80%—of the complaints focus on that, and sometimes on some additional issues. The second most common thing they focus on is some grievance with the deal-protection measures in the merger agreement. What am I talking about?

- Break-up fees: if the transaction does not go forward, then the target company gets a payment from the proposed acquirer. There can be reverse break-ups, but straight break-up fees are usually the focus.
- No-shop clauses, which limit the ability of a target company to communicate with other potential bidders.
- Matching rights.

All of these have been litigated for three decades now in Delaware, all of these have lots of case law behind them, and people should know the rules of the road; and yet, they are still thrown into many complaints. Those first two bullets cover probably 95% of what people litigate or try to litigate in corporate M&A litigation. The stuff that really matters is in the third bullet, but there are very few times it forms the basis of a real, meaningful challenge.

What is the third bullet? It would be when you have a situation where there is an unfair process, such as a process corrupted by some self-interest. *Revlon*[9] is classic example involving a multiple-bidder situation where there was favoritism towards one bidder over another. It could be because management is partial to one bidder versus another for their own self-interest and they want to work with the acquirer to maintain a continuing equity interest, or to cut some sort of side deal, or

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8. Andre G. Bouchard, Chancellor, Delaware Court of Chancery, PowerPoint presentation for the Sixteenth Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law (Apr. 11, 2016) (on file with the Fordham Journal of Corporate and Financial Law).

9. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

something of that nature. That is where the real action is, and those are the cases that are worthy of litigating. But that is not where most of the activity actually occurs. It mostly occurs in the disclosure context and in the deal-protection context to a lesser extent.

What happens after a case is filed? The first thing that happens is the plaintiffs move to expedite the case or both parties agree to expedite it themselves. A key thing here is that the standard to expedite is a pretty low standard. It is colorability. Basically, you need to have something that is not a frivolous claim. It is a plaintiff-friendly standard deliberately because you are very early in a case, and so, you are giving it a quick look. Typically, you are not going to put the stop on things immediately, so you give the plaintiff the benefit of the doubt, more or less, at the beginning of the case. That is leverage because if you can expedite, then expense comes into play on the defense side: they have to defend the case, and that is enormous leverage for the plaintiff.

The other thing that favors the plaintiffs is that the law favors getting disclosure issues sorted out pre-vote. Why? Because when you vote, you would like to have all the information that is relevant and material, and the easiest way to correct not having it is to go through an injunctive process to force that the information be disseminated in advance, rather than deal with it on the back end.

So, the plaintiffs have a lot of leverage going into this. They know it is a pretty low standard on the merits to obtain expedition so they know they can likely get the case expedited. But then there is also self-interest on the defense side. The defendants have liked this business too because there is the opportunity, potentially, of getting an early global release, a very broad release. I will go through an example of how broad these releases can be. And because they like that, they often agree to stipulate, "Oh, we will just expedite. No need to file a motion to expedite. No need to go to court and ask permission to expedite. We will just agree to expedite."

What form does that take? They will offer to produce the core documents in the case voluntarily. They will arrange a few depositions. You are usually talking about board books, minutes, maybe some emails—maybe not emails, which are the killer in almost every case, so it is a huge issue how many emails you get in the front end of the case. They may make a director available for a deposition, or maybe a banker. They will typically agree to some sort of limited discovery.

Then, in this magic moment that occurs after people have skirmished around, all of a sudden they come to an agreement. They say, "Okay, we will supplement our proxy with XYZ materials. In exchange, you give us a global release and you can apply for a fee." That is really the playbook, and that is what has been going on, with increasing frequency, for a good number of years now.

Now why, by the way, do the defendants want to do this in addition to getting a release? Well, legitimately, they want to avoid the distraction and the expense of what they think is nuisance litigation, and obviously, they do not want to imperil their deal. By settling, they will be able to get closing certainty.

I am going to walk through some nuts and bolts of what we do when we are considering approving a settlement. After an agreement is reached—and it is typically documented initially in a memorandum of understanding (an "MoU")—the defendants will provide the supplemental disclosures. They usually fall in one of three categories: first, more information about the background of the transaction; second, more information about the description of the financial advisors' work to the target board, which is what *Trulia* dealt with substantively; or third, more information that sheds light on a conflict associated with the deal.

A big issue is banker conflicts. Did the bankers who were advising the target also advise somebody on the sell side; did the banker have an interest in staple financing? Were there issues surrounding potential conflicts with the advisors to the board? Also, big fodder for conflict disclosure would be any undisclosed continuing interest of management in the acquiring company, whether by way of employment arrangements, or by way of a continuing equity interest, for example. These are things that all good securities lawyers know how to disclose in the first place. But, believe it or not, they have come up and they have resulted in some meaningful cases. *Del Monte*[10] would be a classic example. So, there is the agreement: you define the universe of supplemental disclosures the target is going to make, the stockholders approve the deal, and the deal closes.

Now, long after the fact—usually it is months, sometimes it is even over a year; I now have cases that are a year and a half post-close that are still in the pipeline for court consideration—the parties will present their settlement for court approval. What happens in the interim? The parties prepare formal settlement papers. The company sends out a notice to the class disclosing the settlement terms. Stockholders are

10. *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011).

given an opportunity to object but it is utilized rather infrequently, and it is an imperfect mechanism for various reasons. At that point, the court has to decide, in a class context, three things:

- Is the settlement fair?
- Should the class be certified and should the settlement bind the class, which go hand in hand?
- Thirdly, what should the plaintiffs get paid? If the settlement was fair, there must have been a benefit conferred to the stockholders as consideration for the deal, so the plaintiffs would be entitled to some fee. And then the question is, "What is the magnitude of that?"

That is the basic settlement process.

There are some legal principles that apply to this. This is from the perspective of pre-*Trulia*. It has evolved a little bit. The first couple of things are basic points. The law favors the settlement of cases. Certainly, that is non-controversial. The second is: what is the standard that we apply in considering whether to approve a settlement? It ultimately boils down to fairness and reasonableness, which are broad terms that give lots of latitude and lots of discretion. Fundamentally, it boils down to: what is the give and the get? From the perspective of shareholders, what do they give up and what do they get in exchange for releasing their claims?

Now, focusing more on disclosures: what is the standard that governs what information must be disclosed in a proxy statement? Delaware law follows the federal standard, and it comes from *TSC/Northway*: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[11] This standard affords incredible discretion in deciding what is material or not material. It is not so easy when you actually get into the weeds of it.

Pre-*Trulia*, the court historically had been very accommodating to allow these settlements to be approved even when disclosures were not necessarily material in the legal sense of the term, i.e., they often were permitted when a disclosure might just be helpful, useful, of some value, marginally helpful—lots of very slippery terms.

Why was that happening? Some of these policies that we have talked about favor settlements. The parties worked to put a deal together. Courts do not generally like to jump in and reject settlements out of hand. There is a lot of momentum behind a settlement. But the

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11. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 439 (1976).

other reason is that if you were rigorous in saying you had to make a finding that something is material—and this is going to come back when we talk about *Trulia* at the end of this—you are in a dangerous position of setting a precedent where everybody thinks, "The minute you call something 'material,' you have to put it in every proxy statement for the rest of time."

For example, if I said, "Oh, it was material in this circumstance and it supports this particular settlement that you disclosed the EBITDA multiples of the seven other transactions that you looked at in a comparable companies analysis or in a selected transaction analysis," then that transcript—or if it was an opinion, but more often a transcript—is going to be quoted back in the next deal saying, "Oh this is material. You have got to have it in there." It is not quite that simple but that is one of the problems.

It is easier, therefore, to slip in looser language so you are not setting those precedents casually in the context of ruling on a settlement. It is easier to say, "Well, it is somewhat helpful." But you would prefer not to bite hard and say, "Oh no, this is material." That aspect was fueling more accommodation to let these settlements go through on a regular basis.

The "give": this is now from the perspective of the shareholder in terms of the "give." The stockholders as a class release not just the directors but also the bankers, the attorneys, the proxy advisers—anybody who had anything to do with the defense side of the deal. The language of that release is extremely broad. They will also include typically—and I cannot remember a release that did not—all federal claims associated with the transaction that somebody in the class would have the ability to bring.

The release would even include, though it may surprise some people, federal claims that I would not even have jurisdiction over in my court in the first place, things that are exclusively within the jurisdiction of a federal court, such as certain securities claims. But it has been upheld that those claims can be within the ambit of this kind of release, and the *Matsushita* case stands for that.[12] It will also include the unknown unknowns: claims you do not even know about.

This example of a release is condensed.[13] This is probably a paragraph that was about a page long, and it gives you the heart of the

12. Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 386 (1996).

13. Bouchard, *supra* note 8.

release that is in the settlement document. Everyone in the class, everybody who owns stock as of a certain date or during some defined period releases any claims because it says "known or unknown."[14] And then, a little later on, it has a defined term "unknown claims"[15]—which by the way, when you go to it, is another page that defines unknown claims. Because the release did not cover it well enough the first time, it says "unknown known," now we have to have another definition to cover that. And it includes federal, state, foreign, statutory, and regulatory claims, etc.

Now, you obviously have to have a private right of action or nobody in the class could bring those types of claims in the first place. You cannot forbid the government from doing whatever it wants to do. But the release is very broad. It could include antitrust claims. It is extremely rare that somebody will have done any inquiry in the context of a fiduciary duty case to probe the merits of a private right of action under the Sherman Act or under the Clayton Act or anything of that nature. It has happened, but it is extremely rare. What is the problem with such a broad release? The problem is, you can give up good claims.

I am going to give you two examples which my firm was involved in before I went on the bench, at least with *Rural/Metro*[16] to the point of the liability judgment, and then there were some other later proceedings in it. These are two examples of cases that were proposed as disclosure settlements. For example, in the *Prime Hospitality*[17] case, for a $325,000 fee, a very broad release was going to be approved that would have cut off claims. My firm objected. It is rare that it happens, but we did.

One of the problems with the objection process is you need somebody who is willing to step in and take control of the case. If you do not have that, as a judge, you are not likely to blow up the settlement and make the plaintiff's lawyer—who is ready to settle the case—continue. It has happened. It is much better if you have an objector, somebody who wants to come in and take over the case. In *Prime Hospitality*, the case was going to settle for disclosures and a fee award of $325,000. We ran the case for a year and a half, and did some

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14. Stipulation & Agreement of Compromise, Settlement & Release, Assad v. World Energy Sols., Inc., No. 10324-CB (Del. Ch. Mar. 27, 2015).

15. *Id.*

16. RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 875 (Del. 2015).

17. *In re* Prime Hosp., Inc., No. CIV.A. 652-N, 2005 WL 1138738 (Del. Ch. May 4, 2005).

discovery. The case later settled for $25 million, generating real money for the stockholders.

A much more celebrated case in this regard is the *Rural/Metro*[18] case. It fundamentally concerned aiding and abetting liability against a financial advisor. In that case, it was RBC Capital. In 2012, Vice Chancellor Laster, in what he called a "very close call," blew up a proposed disclosure settlement—again, our firm was coming in to represent the plaintiffs—where the fee requested was $475,000, and an extremely broad release was proposed.

Two or three years and a lot of litigation activity later, net–net, after some interim settlements with certain defendants and ultimately a trial against RBC, well over $100 million dollars in consideration went to the stockholders. This was not inconsequential. A hundred million dollars does not sound like much if the deal was $50 billion, but $100 million for this case was about 22% of the deal value. It was in the magnitude of the recent *Dole*[19] judgment that was entered, which was in the same ballpark.

So, these cases show the need for concern. If you do not litigate, what do stockholders get in a disclosure settlement? This is a case I had. I am going to show you two slides. I am going to show you one that gives you an example of useful information, meaningful information—I would even bite the bullet and say "material" information. The other one that I will show you in the next slide from the same case was meaningless information from my perspective.

This is from the case called *Assad v. World Energy Solutions*.[20] I think it was about a $100 million deal. It was not a very big deal. This is a picture of part of the summary of the financial advisor to the target's presentation:

18. *RBC Capital Mkts., LLC*, 129 A.3d 816.

19. *In re* Dole Food Co., Inc. Stockholder Litig., No. CV 8703-VCL, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015).

20. Assad v. World Energy Sols., Inc., No. 10324-CB, 2015 WL 4977604 (Del. Ch. Aug. 20, 2015).

Free Cash Flow Calculation (Core Business)
($ in thousands)

	2014E	2015P	2016P	2017P	2018P	2019P	2020P	2021P	2022P	2023P
Adjusted Total Revenue (1)	$ 40,109	$44,041	$48,374	$51,306	$53,977	$56,707	$59,209	$60,985	$62,815	$64,699
Growth	*15.2%*	*9.8%*	*9.8%*	*6.1%*	*5.2%*	*5.1%*	*4.4%*	*3.0%*	*3.0%*	*3.0%*
Adjusted EBITDA (1)	$ 6,131	$ 7,640	$ 9,535	$ 9,856	$10,403	$11,228	$11,934	$12,292	$12,661	$13,041
Adjusted EBITDA Margin	*15.3%*	*17.3%*	*19.7%*	*19.2%*	*19.3%*	*19.8%*	*20.2%*	*20.2%*	*20.2%*	*20.2%*
	10/14-12/14									
Earnings Before Interest, Taxes and Amortization	$ 1,626	$ 7,465	$ 9,361	$ 9,682	$10,226	$11,045	$11,744	$12,095	$12,456	$12,829
Pro Forma Taxes @ 40.0%	(651)	(2,986)	(3,744)	(3,873)	(4,090)	(4,418)	(4,698)	(4,838)	(4,982)	(5,132)
Net Operating Profit After Tax	$ 976	$ 4,479	$ 5,617	$ 5,809	$ 6,136	$ 6,627	$ 7,047	$ 7,257	$ 7,474	$ 7,697
Depreciation	$ 37	$ 174	$ 174	$ 174	$ 177	$ 183	$ 190	$ 197	$ 205	$ 212
Capital Expenditures	(81)	(174)	(174)	(184)	(194)	(204)	(213)	(219)	(226)	(232)
(Increase) Decrease in Working Capital (Excl. Deferred Revenue)	(260)	125	476	(19)	41	20	109	(73)	(76)	(78)
Change in Deferred Revenue	(414)	(2,778)	(1,308)	(334)	(95)	(42)	0	0	0	0
Taxes on Deferred Revenue	166	1,111	523	134	38	17	0	0	0	0
Free Cash Flow	$ 424	$ 2,938	$ 5,308	$ 5,579	$ 6,103	$ 6,602	$ 7,132	$ 7,162	$ 7,377	$ 7,599

Figure 3: Free Cash Flow Calculation[21]

Keep in mind that when you start, before you receive supplemental disclosures, you already have ten or twelve single-spaced pages summarizing a banker's analysis, and you are typically summarizing a DCF (discounted cash flow) model that the banker put together; a comparable companies analysis, if they did one; and analyses of multiples from other deals that the advisor extrapolates and compares to the deal that is on the table.

This is the set of management projections, which are the inputs to do a DCF model. Curiously, in this case what is in the red box is the additive information. Duff & Phelps was the financial advisor in this case. The projection that was disclosed initially ran through 2020, and what was added was three more years to that projection.

Why was that significant? It was significant because the way you do a DCF is you need the free cash flow numbers. In order to do a terminal value, to extrapolate the perpetual value after a discrete period, you need the last year of the projection. For whatever reason, even though Duff & Phelps did a terminal value calculation based on 2023 in the full projection, they only disclosed the projections out to 2020.

There is good law in Delaware, including the *Netsmart*[22] case that then-Chancellor Strine—now our Chief Justice—wrote, that this is typically material information—not always, but typically, material

21. World Energy Sols., Inc., Solicitation/Recommendation Statement (Schedule 14D-9) (Dec. 24, 2014).

22. *See In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 199–200 (Del. Ch. 2007).

information. This would be an example of something that was meaningfully additive. Indeed, I approved this settlement and awarded the fee primarily because of this disclosure.

What would be less meaningful information? This is the part of the summary of the M&A transaction analysis that Duff & Phelps did:

Selected M&A Transactions Analysis
($ in millions)

Announced Date	Target Name	Target Business Description	Acquirer Name	Enterprise Value	LTM Revenue	LTM EBITDA	EV / Revenue	EV / EBITDA	EBITDA Margin
5/29/2014	Ecova, Inc.	Ecova, Inc., an energy and sustainability management company, provides technology-optimized solutions.	Cofely USA Inc.	$ 335.0	$ 176.8	$ 28.7	1.90x	11.7x	16.3%
1/15/2014	The Wright Insurance Group, LLC	The Wright Insurance Group, LLC supplies insurance and risk management solutions to a braod rancge of industries and consumers across the U.S.	Brown & Brown Inc.	$ 640.0	$ 113.7	$ 53.7	5.63x	11.9x	47.2%
7/11/2013	Invensys plc (nka:Invensys Limited)	Invensys Limited, a technology company, provides software products, systems, and control equipment to various industries worldwide.	Schneider Electric S.A. (nka:Schneider Electric SE)	$ 4,889.2	$2,922.5	$ 235.2	1.67x	20.8x	8.0%
10/3/2013	Procurian Inc.	Procurian Inc. provides procurement solutions for companies in the United States and internationally.	Accenture plc	$ 375.0	$ 140.0	$ 17.9	2.68x	20.9x	12.8%
4/22/2013	Power-One Inc.	Power-One, Inc. is a leading provider of renewable energy and energy-efficient power conversion and power management solutions.	ABB Ltd.	$ 656.4	$1,001.4	$ 112.5	0.66x	5.8x	11.2%
4/15/2013	National Financial Partners Corp.	National Financial Partners Corp., together with its subsidiaries, provides advisory and brokerage services to corporate and high net worth individual clients in the United States and Canada.	Madison Dearborn Partners, LLC	$ 1,169.7	$1,071.1	$ 146.3	1.09x	8.0x	13.7%
10/4/2012	Northeast Energy Partners, LLC	Northeast Energy Partners, LLC operates as an energy management and procurement company.	World Energy Solutions, Inc.	$ 14.1	$ 5.4	$ 1.7	2.60x	8.1x	32.2%

Figure 4: Selected M&A Transactions Analysis[23]

What this is doing is comparing a multiple—in this case, I think it is an enterprise value to EBITDA multiple—of different deals to the enterprise to EBITDA multiple of the company at issue here, which was World Energy, the target. Why do I think this information had little or no value? First of all, almost all of this information is publicly available for anybody who wants to go out and find it.

Now you could say, "Well it is helpful because they put it in a nice spot for you," and that is true to some extent. But it is also much less meaningful because they have already disclosed, in my view, what really matters: they disclosed the banker's judgment about the range of the multiples. For example, already disclosed in this proxy statement was the fact that the highest EBITDA multiple is 20.9 and that the lowest was 5.8 and that the banker when it did its analysis made a judgment to pick a multiple within that range. Everything else, I think you could say, is more marginal in value.

23. World Energy Sols., Inc., *supra* note 21.

This stuff is truly in the weeds. And one of the big problems with disclosure settlements is that judges, without having adversaries presenting both sides of these issues, have to go figure this out themselves, unless you get the rare objector. Before this hearing, I am poring over this proxy and I am trying to figure out if someone is selling me a bill of goods; did this information really have any value?

I am poring through proxy details like this to assess whether the supplemental disclosures were truly meritorious. I have three of my law clerks here, who have done this exercise with me, where you walk through the proxy statement. Nobody is doing it for you on the other side, so you have got to figure it out yourself. This is what I called in *Trulia* the exercise of being, essentially, a forensic examiner of the proxy statement—not what judges do well.

That segues naturally into the challenges of reviewing the record as a judge. The first challenge is: typically, you have not really thought about the case very much. You likely have not decided a motion to dismiss. You have not decided summary judgment. Often, there is not a motion to expedite because the litigants can expedite the cases themselves. Typically, there is very little discovery: maybe three depositions, maybe one or two before an agreement on a tentative basis or an MoU is reached, and one or two later when it is confirmatory. In terms of documents, maybe the banker books have been produced; maybe the minutes; it is questionable how much email; and, if you really do get into those confirmatory depositions, it is a pretty light touch. It is this lack of an adversarial process that was so much a part of why I thought things had to change. The judges were being asked, essentially, to be the check without anything being disputed.

Every other issue we get, both sides, plaintiff and defendant, have presented and the judge is supposed to call the balls and strikes, as Chief Justice Roberts said.[24] It works a little differently for the Supreme Court but it truly works in the state court system. As a state court trial judge, you are largely making calls of balls and strikes. But somebody packages it for you; you do not have to go figure it out for yourself, and that is a real problem when you have to do it yourself because you can get it wrong. The adversary system works well because the smart people on both sides tee up the issue.

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24. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Chief Justice Roberts).

Here is another problem. This is not my phraseology on the bottom here.[25] I stole this from my former partner—Tier I versus Tier II advocacy—to refer to the fact that there are some really good plaintiffs' firms out there who dig deep, take these cases seriously, litigate hard, and they get good results. And then there is sort of inventory management in the plaintiff industry where the approach involves working the docket and making the money on the volume and not necessarily on the home runs or the triples.

As you might imagine, this whole process engendered a lot of criticism by academics and others. Professor Griffith and some of his academic colleagues—this goes back to the "peppercorn" reference in the *Solomon* case I referred to before—did an article last year. They did an analysis saying that the information provided to the stockholders, the supplemental disclosures, had no meaningful effect on the outcome of stockholder voting on deals.[26] *Ipso facto*, that means the supplemental information was not material; it did not move the needle. That article got a lot of attention, a lot of currency.

Second, as you might imagine, there has been a great deal of criticism that this industry was just imposing rents or taxes on deals. There are two types of taxes. One type is the payment of the fee itself to the plaintiffs, if it is not merited; it is about $300,000–$500,000. There have been some that, in the heyday, run around $750,000 pretty regularly. The other tax is on the defense side: the cost of defending the cases. The minute they get filed, I would venture to guess, on average, those defense costs, especially if you have had multiple representation situations, are more significant than the fee award.

Third, there is the problem I have already identified before with *Rural/Metro* and *Prime Hospitality*: the risk that you could lose meaningful claims. Frankly, do they happen that often? No. But they do, and they are there, and you can have them cut off from the beginning without any real rigorous scrutiny.

Fourth, I do not know if this is true or not, but I have been told that given this incentive structure and how this works, could it be that some corporate lawyers actually hold back on what they disclose and just have an extra chip in their pocket to settle a case? It is a little curious why that

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25. Bouchard, *supra* note 8.

26. *See* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015).

projection in the *World Energy* case cut off in 2020 when Duff & Phelps went to 2023 in its analysis. I have no idea; I am totally speculating there. But the point is, it certainly would not be good practice if that was occurring. There have been rumors to that effect but nothing empirical I am aware of.

The other criticism is that objecting—which is supposed to be a failsafe to having a good process, by letting somebody step forward and saying "it is a rotten deal" or "the fee is unfair" or whatever it may be—is really of limited value. It is of limited value because very few people take the time to do it, or make the effort to do it. More importantly, it is one thing to just throw stones at something; it is another thing when an objector steps forward and is actually willing to take over the case. That is a whole different ballgame.

How did we deal with this problem initially? There were two things that were occurring before the ultimate precipitating factor to the *Trulia* decision itself. The first thing that was happening was, notwithstanding how plaintiff-friendly the standard is at the motion-to-expedite phase—I mentioned colorability, a sort of non-frivolous standard—there was more rigor applied within that standard not to expedite some cases. The minute you do not expedite a case, the pressure point of a preliminary injunction before a deal usually comes off.

Now, it once was a dirty little secret—not so much a secret since the *El Paso*[27] and *Delphi*[28] cases a few years ago—that, as a practical matter, you were not likely to get an injunction for a *Revlon*[29] case, a sale of control of the company case, if there was only one bidder for the company in the first place. Disclosures on their own, if they are something truly material, could separately be a basis for a showing of irreparable harm and, therefore, an injunction. But it is a limited injunction. Putting disclosures aside, deals typically would not be enjoined if you had only one bidder in the case. Why? Because a court is going to be very reluctant to play with the shareholders' money, and usually will let them make the decision for themselves about whether to approve a deal. Plus, what plaintiff is going to realistically post a bond to cover an injunction?

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27. *In re* El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. 2012).

28. *In re* Delphi Fin. Grp. S'holder Litig., No. CIV.A. 7144-VCG, 2012 WL 729232 (Del. Ch. Mar. 6, 2012).

29. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986).

That was sort of what "everybody knew in the business," as I am sure many of the practitioners in the room know, for a good period of time, the practical reality of most of these cases—again putting the disclosure part aside. But it was stated explicitly in the *El Paso* case, when then-Chancellor Strine, in the context of balancing the hardships or weighing the equities of the case, stated it outright. He was not going to deprive the El Paso shareholders of the opportunity to accept the deal, even though he had concerns about the deal. He thought there might be some conflict issues in that deal, but he was not going to enter the injunction. Instead, he would let the shareholders decide if they wanted to take a premium transaction or not.[30]

So, the first approach was, "Okay, let us deny expedition and try to take the pressure off of the process and make it go on a normal litigation track." The second way these cases were dealt with was to reduce the fee and to cut off, from at least one side of the equation, the incentive, the money, the lucre. The concept started becoming: "Well, we will have fees that are proportional to what you really provided, and if it was marginal disclosure, the fee would be less."

But the problem with that, the biggest problem with that, is that the releases still remain and they are still excruciatingly broad. Notwithstanding some fee reduction that you would probably see if the empirical data were done, it sloped down from the $500,000–$600,000 range, I would say, in the 2006 to 2007 period, to more of in the $300,000 range, roughly.[31] But notwithstanding that, the volume would keep coming, and indeed it has been coming.

What is the third option? The third option finally started happening, and that was to just reject the settlements. Just say, "Enough is enough. What you produced is not worthy of giving the release of the breadth that you are seeking." Probably the most vocal proponent of doing that—Vice Chancellor Strine did it once—was Vice Chancellor Laster, who did a series of them in 2015, the most celebrated one being the *Aeroflex*[32] decision where he rejected a proposed settlement and said he would give the parties options. The defense could come back and move to dismiss. Now remember, *Revlon* at this point—some people here

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30. *In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at *19 (citing *In re* El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. 2012)).

31. Cain & Solomon, *supra* note 2; *supra* Figure 2.

32. Acevedo v. Aeroflex Holding Corp., No. 9730-VCL, 2015 WL 7069591 (Del. Ch. July 8, 2015).

litigated *Revlon*—was thirty years old. There is a lot of case law describing how *Revlon* is supposed to work and what really matters. So, there is a lot of precedent here. This was not new business, so people could file motions to dismiss and there was a good body of precedent to facilitate those motions. In the post-*Corwin*[33] world where there is now precedent that if you get the vote to approve the deal and it is a fully informed vote—ergo, the disclosure issue is still in play—the standard would revert to the business judgment rule, even if it was initially a *Revlon* case.

The other option was for the parties to narrow the release and the court would reconsider the settlement or the parties could just moot it.[34] You will see that these are all early strains of what becomes part of *Trulia*. This happened a number of times in 2015 and led up to where we are now with the *Trulia* decision itself.

What was *Trulia*? *Trulia* was about two online real estate firms that combined. It was a $3.5 billion deal. An interesting fact lost in everything is it was a stock-for-stock merger, which meant that *Revlon* was not likely to be triggered. It was presumptively a business judgment rule case from the outset, which is a very tough case for a plaintiff to bring from the outset. At least in *Revlon*, there was intermediate reasonableness review for the plaintiff to start with. But this was presumptively going to be a business judgment case.

What was the fight about? The fight was about the exchange ratio: how much stock the target shareholders would receive in the combined entity. In this case, right to the playbook of what I have already covered, I never got the chance to rule on a motion to expedite. The parties agreed to do it themselves. There was a motion for expedition filed, and I think within two hours there was a stipulation for a schedule to proceed with expedited discovery, and then promptly thereafter there was an agreement on supplemental disclosures.

Classic example: very limited record, two depositions before a memorandum of understanding was reached and one deposition after, about 3000 pages of documents produced, the vast majority of which were copies of the banker's books, some SEC disclosure documents, and minutes, and then the deal closes. The plaintiffs come in after the fact and they ask for $375,000 in fees. That was in the ballpark of the range for this type of fee award at that point.

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33. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).
34. *Aeroflex Holding Corp.*, 2015 WL 7069591.

This slide[35] shows the true holding of *Trulia*. This is what was in this settlement that was useful. There are only two things about this slide[36] that are interesting to me. The first one on the top is a synergy estimate for a value creation analysis. What this was about was there was an analysis comparing the value of the target, Trulia, on a standalone basis to the *pro forma* value of the combined entity. To do that analysis you needed to input into the model this value creation analysis, the expected synergies of the deal.

The plaintiffs were so happy. They said, "We got this supplemental disclosure of how much the synergies are worth in this deal. Now you can understand this analysis." My law clerk and I sat down and read through this proxy statement, and I said, "The disclosure they said was so valuable was already in the proxy statement; it was just three pages ahead in a part that described the actual synergies." That was a revelation, by the way, to the plaintiff's lawyer who was presenting the case at argument when I pointed out that this information already was in the proxy statement. He was a little embarrassed about that.

Then all of sudden—I often do the same thing when I have one of these cases—I typically ask, "Well give me your best two or best three," and he led with this as his first. I said, "This is too good to be true." So he laid it out. I said, "Was that not already in here?" and I showed him the page. He said, "I have got another better one," and he went right to his second one. His other "better one" were these two, two and three on the slide,[37] and, frankly, most of that was information for comparables that were available from other sources somewhere in the public domain.

The key thing about these comparable analyses is you already start with a proxy statement that has ten or fifteen pages summarizing this, and it is a summary; you are not required to disclose every detail in the world. But in discovery, somebody gets a banker's book and you can always find something in there that is not in the proxy. If you have been to law school and you have a degree and you are good on your feet, you can always say, "It is more information." It is easy to sound persuasive by saying "more information is better," when it is often just clutter, in

35. Bouchard, *supra* note 8 (listing the supplemental disclosures found to be useful in *Trulia*).

36. *Id.*

37. Bouchard, *supra* note 8 (listing "Comparable transaction multiples" and "Comparable company trading multiples" as disclosures).

terms of describing and summarizing fairly what the financial advisors' advice was based on.

I did reject the *Trulia* proposed settlement. I found that the fair summary did not mean you have to give every little piece of minutia you can ever imagine. I thought that not only were the financial disclosures not material, they were not even helpful to the stockholders. In fact, I thought they were counterproductive in many cases, and, based on that, there was so little on the "get" for the stockholders that the "give" of the release was not appropriate.

That is the real holding of *Trulia.* But I did something a little different in *Trulia* that I have not had a chance to do in too many cases. I tried to lay out a different way to go or a different approach to looking at these cases. This is the prescriptive aspect of the work I did. This was evolutionary. Sean participated in some of this. I had been dealing with seven or eight of these cases by this point. I had a pretty good idea of the rules of the road. Obviously, I had practiced in this area for a long time beforehand; the Chief Justice had me up at Harvard and I used an early form of these slides for a class of his, and we had a program at Penn that Sean participated in. This all started coming in my head: "There has got to be a different approach here. We are going to have to evolve from the way we have been doing this."

I tried to sketch out a paradigm of what I thought was the better way to do it. Basically, the preferred way is to maintain the adversarial process. Judges need people on both sides of an issue so it can be teed up and they can be the umpire calling the balls and strikes. They should not be out there figuring it out for themselves. That is not good for the process. We can certainly get it wrong if we are left to our own devices. So, we need people to tee it up and have adversity, such that both sides are presenting.

There are two ways you do it. One is you actually litigate the disclosure issues, and the other is you moot them out. Then, when you have the release out of the equation, you still have adversity over the quality of the supplemental information that was disclosed and, for that matter, over the appropriateness of a fee. That is the core concept.

And then, the less desirable way: if you are going to still go the traditional settlement route, the rules are going to be tougher. They are going to be tougher in the sense that what you give up, the release, is going to have to be much more tailored, and what you get is going to have to be something that is "plainly material." I will talk about that in a second.

Before I expand on those options, there is a caveat to all of this. This is the concern I have, and I stated it expressly in *Trulia*, that if people do not like this, if it is too tough on somebody, will they forum shop? Will they go elsewhere?

Delaware upheld, in the *Chevron*[38] case a few years ago, forum selection bylaws so that companies can adopt a bylaw and mandate that derivative and class litigation, fiduciary duty-based litigation, be litigated in Delaware. Over 1000 companies now have adopted them. But the concern remains, how do you prevent people from going elsewhere? Certainly, if you adopt a bylaw and you stick with it, then you can impose discipline. The good news here, from my perspective, as somebody who defends the honor of the State of Delaware in this enterprise, is that a lot of companies have adopted them, and that other jurisdictions have been respecting them—not all, but most. The most prominent one is a recent Oregon Supreme Court decision in the *TriQuint* case,[39] which upheld the validity of a Delaware forum-selection bylaw that was adopted in conjunction with the approval of a merger. It is the highest appellate court to do that. Good signs.

The other sign is, I am hearing from practitioners that they are including in their merger agreements, not only the requirement that people adopt such a bylaw as part of their merger deal if they do not already have one, but that they also agree not to waive the bylaw. So, there is some mechanism being implemented to sort of keep everybody in the room so you can have the discipline that you need to have. Now, a caveat to that is you can always be mischievous. A forum-selection bylaw is optionality for a target.

This is not a Delaware case, but there was a case that was called *FX Energy*,[40] which was a Nevada corporation based in Utah that had a forum-selection clause selecting Utah. When it came to the point of litigation over a deal, the defendants ended up litigating the case in Nevada, notwithstanding the fact that the company picked a Utah forum, its home state, for a forum-selection bylaw. The defendants did that. Who knows why? But people like the broad release. It is a concern. It

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

39. Roberts v. TriQuint Semiconductor, Inc., 362 P.3d 328 (Or. 2015).

40. Haworth v. FX Energy, Inc., No. 150907699 (Utah Dist. Ct. filed Oct. 27, 2015).

definitely can cause leakage on the ability to really enforce a different discipline.

Let me go through the options in a little more detail about what *Trulia* is suggesting and why I think they are preferable. The preliminary injunction context is good old-fashioned litigation: one side will argue about why information is material; the other side will argue why it is not; and judges will do what they are supposed to do, they will call the balls and strikes, but they will do it with the information on the table, presented by both sides, marshalling all the case law.

The defendants have the advantage of having their M&A advisors accessible to them so that they are particularly prepared, unlike a judge who would be reading a proxy statement for the first time, to know what matters or what does not matter. They can get to the heart of it much more effectively.

There is a downside to this, because nobody wants their deal enjoined, but the downside is very narrow. The downside is that, for a very limited period of time, a deal can be enjoined so additional information can be disseminated. The downside is totally controlled by the defendants because they can always moot the dispute; they just supplement the proxy and issue the information and fight another day.

That gets to mootness applications in terms of the fee context. Defendants always have that choice. They can just disseminate the information and then fight later about whether it was material or not, whether it is worthy of any sort of fee or not. When I say mootness, what I am talking about is you are pre-close: some initial proxy materials have gone out, and people add the additional information either in your definitive, final version of proxy, or in a separate supplement, an 8-K disclosure or something of that nature. The information goes out.

In the mootness context, you get to a point where the plaintiffs say, "Well you know what? We may not have a release here, but that information conferred a benefit and we are entitled to a fee." That is a mootness fee application. The defendants in that circumstance are incentivized to fight if they think the information is junk, so they do not have to pay a big fee. The adversarial process remains intact.

When you take the release out of the equation, the defendants are untethered to any concern about the settlement going through and can just be focused on the quality of what was actually disclosed in terms of whether or not it is worth paying a fee for it. That, to me, is the key thing: that the adversarial process is back in place. For the court, it gives us the flexibility that if somebody got a very marginal supplemental disclosure, they will not necessarily get a rich fee. It could be a zero fee if it had no value. That optionality remains.

The other option is that you can do mootness deals, not just by coming to court and having the court determine whether a fee is appropriate for a mooted case when supplemental disclosures have been offered, but also privately. This goes back to a case about twenty years ago that Chancellor Allen decided, which sanctioned the use of this. But there is a caveat to this. It is basically a private agreement where a defendant is willing to pay a certain amount not to have to argue about a fee application any further, and it can be done outside of the court. So, the court is out of the decision-making, and critically, there is no release, so the release is out of the equation as well.

The one thing we do require—and this comes way back from Chancellor Allen and is reflected in a number of decisions in the meantime—is disclosure to the shareholders of the paying entity, typically the acquiring company, which inherits the cost of the defense. We do that to avoid the risk of a buyoff so that there is some sunlight on the fact that money is being paid. Typically, I require it to be done in an 8-K that discloses the amount, gives enough background about what the case was about, discloses the fee payment, and makes it explicitly clear that the court did not pass on the fee one way or the other.

Is there concern about this? I think it works pretty well. There is always, ultimately, the ability for a stockholder to challenge that fee payment. It would probably be a tough case if it was truly an arm's-length decision, as I think most of them are. It would probably be a waste standard, a very tough claim to make, in order to challenge a company's decision to pay a fee just to get rid of the litigation and put an end to the expense. There could be circumstances, I suppose, where somebody could say, "There is some egregious set of circumstances where self-interest was at play." But I have not seen that kind of case yet.

Let us go back to the settlement route and the traditional way of doing business, and examine how the rules I think have changed, or at least we are suggesting that they change. And that is, fundamentally, to be much more circumspect and rigorous on analyzing what you give up and what you get in the settlement.

On the "get" side of the disclosures, I articulated the standard of "plainly material."[41] It was not intended to make a new standard of materiality; it was really just intended to say, "It should be obvious that something is material." The point is we are not going to go with just useful, or something marginal; the supplemental information is going to have to be something that under the traditional standards of materiality is "obviously material." That is the bar.

On the other side of the equation, because it is still a legitimate consideration, if you have actually conferred material information, which is a benefit, we are going to tighten up on the release. They are not going to be global in nature. The releases will be narrowed to basically two things: one is disclosures themselves, the real subject matter that was the basis for the consideration coming the other way; and, if the record is sufficiently developed, the fiduciary duty claims surrounding the deal itself, assuming you have a decent record that somebody kicked the tires and looked at the issues in a meaningful way. But it will not be a carte blanche release for any federal securities law claim or any antitrust claim or regulatory claim. It will be narrow and focused.

Now, I do not know where this will go for sure but I can tell you what I have seen anecdotally. I have had one case since *Trulia* that came in because it was already in the pipeline with a supplemental disclosure, which I did approve because it did involve some material information and the release was crafted down to exactly what I suggested in *Trulia*. Almost invariably, what I have seen more often than anything else are the mootness applications. Typically, I will get a letter from a plaintiff's lawyer saying, "Well, we have agreed with the other side to just present a fee application and dismiss our case with prejudice as to the named plaintiff and without prejudice as to the balance of the class." That probably has happened for me in six cases already, and it is happening fairly routinely across the court at this point.

So, the message of doing this in the mootness context seems to be occurring. This is only anecdotal. We will have to see with time. But that seems to be the direction. Those cases have started with, "Well we are going to dismiss our case, the substance and merits of the case. We will present the fee application." And then, a month or two later, I will often get a letter saying, "We have worked out something with the

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

defendants on a fee. We do not need you at all." Case over, no release; it is gone.

You might say that this is a raw deal for defendants. The truth is most of this litigation, once it is dismissed, is never coming back. It is basically the end of the road for most deal-related challenges. And frankly, on the rare ones where it may actually have merit—the *Rural/Metros* of the world—there is something to be said for leaving that door open so those claims can be pursued in a legitimate post-closing kind of way.

I have not seen a lot of write-up yet in other jurisdictions about *Trulia*. In North Carolina, in the only case I know of that has cited *Trulia*, the judge there did not follow it. The reason that he could not was because, apparently, North Carolina does not have the corporate benefit doctrine and he did not think he could consider a fee on a mootness basis.[42] There were some other wrinkles as well. I am not aware of other, at least published decisions or decisions available on Westlaw that have provided any insight yet.

To sum up, I never in a million years, when I became a judge, thought this would be something I would be writing about. I never saw that coming. But it goes back to what I was saying at the beginning, which is you never know what is going to take up your time, and you never know when it will give you an opportunity to maybe change things. Maybe this will and maybe it will not. I hope, in at least some marginal way, it does change the practice for the better.

I thank you for your attention. I would be glad to answer any questions.

AUDIENCE MEMBER: It sounds like your focus is on the difficulty for the court in assessing settlements without an adversarial process and that you are inclined not to approve general releases without an adversarial process. Is there any reason why this structure is not applicable to other kinds of cases?

CHANCELLOR BOUCHARD: It could be.

AUDIENCE MEMBER: The absence of an adversarial process is just as bad in fairness cases.

CHANCELLOR BOUCHARD: Yes. I talked a little bit about that. Here is the thing: if you have had a motion to dismiss, a summary judgment motion, some real litigation, you are more informed in making

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42. Strougo v. N. State Bancorp, No. 15 CVS 14696, 2016 WL 615709, at *1 (N.C. Super. Feb. 16, 2016).

that judgment. You do not always, but in many cases you do. Poring over the intricacies of those proxy statements is a particularly tough task for a judge to figure out. But yes, it is a problem in other cases.

Interestingly enough, one of the things I talk about in *Trulia* is if we confronted it, we could appoint amici to take up the other side. In the old *Chrysler v. Dann*[43] case, the predecessor of it, a very complicated case sorting out all sorts of very meaty claims, Chancellor Seitz appointed amici and they looked through those issues exhaustively, exactly for that reason. I mention in *Trulia* that we could even resort to doing that in the future.

Part of this is intensely selfish when you put it that way. We do have to consider settlements all the time, and they are non-adversarial. But it is a little different here. If you take out the class and you just have two combatants going at it, you have replicated the adversarial process in that settlement, and that is one you are going to be very reluctant to disturb. It is the class that makes it difficult.

AUDIENCE MEMBER: But the damages cases are also class cases.

CHANCELLOR BOUCHARD: They can be, certainly.

AUDIENCE MEMBER: You talked about the forum bylaw being an example of a solution to corral things into Delaware. But I think the thinking in general is that it does not apply to federal claims. So, at least what I have been seeing is that some opportunistic plaintiff lawyers are now going to federal courts and filing federal securities claims. As you also said, the same materiality standard applies to both securities claims and the breach of fiduciary duty claims. And yet, now, for a release you can tentatively release price and process and breach of the duty of disclosures but you cannot release the federal securities claims. I was just curious as to what is the thinking behind that.

CHANCELLOR BOUCHARD: Federal courts are very good at applying federal securities laws and determining whether things are material or not, and what they decide to do on the back end will be up to them. If there is concern about the frequency of what was happening that was causing us concern, they can apply the same model in terms of what they are willing to approve on the back end. It will just be a decision they have to make.

43. Chrysler Corp. v. Dann, 223 A.2d 384 (Del. 1966).

AUDIENCE MEMBER: Has there not been an effort to pass a Rule 11[44] or a PSLRA[45]-type measure to ensure that if cases are brought, they have a meritorious basis? It sounds to me like all this tinkering with materiality is a very slippery slope, especially when you say that if something is in the public domain it cannot be *ipso facto* material—I disagree with that—but why is not there a Rule 11 process which comes out of all of this to police what is a small percentage of the Delaware bar that is bringing these voluminous cases one after another without any substance or ability to litigate?

CHANCELLOR BOUCHARD: Obviously, we do have Rule 11. It is also a pretty low bar to filing claims. There have been some incremental rule changes. We started making people verify complaints, asking for greater transparency in disclosure by plaintiffs and their holdings when we do class certification, and greater disclosure (particularly Vice Chancellor Laster in this area) about the plaintiff's positions and their willingness—if they have a large position—not to sell during the duration of the case.

Could more be done? Perhaps. But there has been a ratcheting up of those kinds of rules and those kinds of efforts. This does not lend itself to legislation because, ultimately, you are making a judicial judgment about whether a settlement is fair. Maybe there is a judicial resolution for that. But it is just not natural for a piece of legislation.

AUDIENCE MEMBER: As you think about the reasons why this problem came up, one could point to greedy lawyers; one could point to a lot of different directions. It is just interesting, in terms of the solution that you came up with, that the bench is now just going to use "plainly material" instead of "material." During the course of your comments you described how the bar was lowered to "helpful" or some other measure. Listening to your presentation, it is largely the bench fixing a problem that the bench created. I am just wondering what merit that has?

CHANCELLOR BOUCHARD: Well, I guess time will tell. Early indications are that the number of these cases that are being filed is down dramatically. In the fourth quarter of 2015, the number was down

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44. FED. R. CIV. P. 11.

45. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

to 21% of deals being challenged.[46] That is a staggering change from a year before.

Now, I think the market is slow. I think deal buying, generally, is down. It is early. There was this pent-up series of cases, about seven or eight in about a two-year period, that rejected a settlement. So, the word was getting out even before *Trulia* was decided. It was just the cap to that. I think the long term will be defined by the volume of this kind of litigation and the frequency and whether the curve is bent on that.

I cannot say much more about "plainly material." I do not want to say much more about it. I put it out there. I thought long and hard about it. That was not an easy thing to do—you know, you are putting a stake in the ground. But I thought the message had to be that the game had changed and it was the most effective way I could communicate it.

SEAN GRIFFITH: Will you join me in thanking the Chancellor?

46. Cain & Solomon, *supra* note 2.