THE PROBLEM WITH THE "NON-CLASS" CLASS: AN URGENT CALL FOR IMPROVED GATEKEEPERS IN MERGER OBJECTION LITIGATION

Josh Molder[*]

ABSTRACT

Until recently, class actions dominated merger objection litigation. However, plaintiff's lawyers have constructed a "non-class" class where an individual suit can benefit from the leverage of a certified class without ever meeting the stringent class certification requirements of Federal Rules of Civil Procedure 23. This new development has initiated a shift in merger objection litigation where plaintiffs are increasingly filing individual suits instead of class actions. However, this shift has left shareholders vulnerable to collusive settlements because plaintiff's attorneys have significant control over these suits and a strong incentive to settle quickly for a substantial fee. Additionally, corporate defendants are incentivized to settle these individual suits to avoid the high costs of litigation and secure a broad release of all claims from the underlying transaction.

This Note explores the implications of this shift from class actions to individual suits in merger objection litigation and concludes that the need for a change by litigation gatekeepers is clear. However, as this Note will explain, the "non-class" class is also particularly capable of evading common litigation gatekeepers in shareholder litigation. Therefore, this Note proposes a series of actions by multiple gatekeepers that, if taken, would begin to address the problem of the "non-class" class.

[*] J.D. Candidate, 2024, Fordham University School of Law; B.A., 2020, Georgetown University. I would like to thank the Fordham Journal of Corporate and Financial Law staff and editors for their assistance in making this piece publishable. I would also like to thank Professor Sean Griffith for his invaluable advice and guidance throughout the writing process.

INTRODUCTION ... 385
I. OVERVIEW OF MERGER OBJECTION LITIGATION AND THE "NON-CLASS" CLASS ... 387
- A. Overview of Shareholder Litigation and the "Merger Tax" ... 387
  - 1. Introduction to Shareholder Litigation ... 387
    - a. Derivative Actions ... 389
    - b. Securities Class Actions ... 389
  - 2. Merger Objection Litigation ... 390
    - a. Controlling Shareholder Suits ... 392
    - b. Third-Party Merger Suits ... 394
  - 3. The Emergence of the "Non-Class" Class ... 395
- B. Class Action Procedure, the Attorneys' Fee Award, and Litigation Gatekeepers ... 396
  - 1. Class Action Procedure Explained ... 396
  - 2. Common Benefit Doctrine ... 400
  - 3. Attorneys' Fees in Merger Litigation ... 402
  - 4. Gatekeepers in Merger Litigation Introduced ... 403

II. FRAMING AND ANALYZING THE PROBLEM WITH THE "NON-CLASS" CLASS ... 405
- A. The Plaintiff's Attorney ... 406
- B. Factors that Could Have Incentivized the Shift Away from Class Actions ... 409
  - 1. The PSLRA ... 410
  - 2. In re Trulia ... 411
  - 3. Corporate Boards ... 414
- C. The "Non-Class" Class Highlights the Limits of Litigation Gatekeepers ... 417

III. ACTION BY MULTIPLE GATEKEEPERS IS NECESSARY TO ADDRESS THE PROBLEM OF THE "NON-CLASS" CLASS ... 418
- A. Heightened Pleading Requirement and Increased Implementation of Forum Selection Clauses ... 419
- B. Limited Application of the Common Benefit Doctrine ... 420
- C. Corporate Board Notification and Opportunity to Intervene ... 421

CONCLUSION ... 422

INTRODUCTION

Until recently, merger class actions dominated corporate litigation.[1] In particular, plaintiff's attorneys frequently brought class actions on behalf of shareholders in objection to a merger alleging that management violated its fiduciary duties by failing to disclose information salient to the transaction.[2] Then defendants would settle to avoid extensive litigation costs, and plaintiff's counsel would collect a fee.[3] These suits are disparaged by many scholars as a "merger tax" because these suits allows plaintiff's attorneys to extract substantial attorneys' fees from corporate defendants even though the suits are often frivolous and provide little value to investors.[4]

However, due to the creation of the "non-class" class, plaintiffs are increasingly bringing merger objections as individual suits rather than class actions.[5] This "non-class" class allows plaintiff's attorneys to negotiate and litigate as if they represent a class of shareholders without certifying a class due to the common benefit doctrine[6] and limited judicial

---

1. *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 135 (2004); *see also* Matthew Bultman, *Individual Merger Suits Replacing Class Action in Strategy Shift*, BLOOMBERG L. (Oct. 13, 2022), https://news.bloomberglaw.com/securities-law/individual-merger-suits-replacing-class-action-in-strategy-shift [https://perma.cc/77RA-KAXF].

2. *See* Sean Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 14 (2015).

3. *See* Bultman, *supra* note 1.

4. *See* Browning Jeffries, *Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 108 (2014); *see also* Andrew J. Pincus, *The Trial Lawyers' New Merger Tax: Corporate Mergers and the Mega Million Dollar Litigation Toll on Our Economy*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Oct. 24, 2012), https://instituteforlegalreform.com/research/the-trial-lawyers-new-merger-tax-corporate-mergers-and-the-mega-million-dollar-litigation-toll-on-our-economy/ [https://perma.cc/EN4U-ZVV2].

5. *See* Virginia Milstead & William J. O'Brien, *Trends in Forum Selection Provisions, Merger Objection Class Actions and SPACs Continue to Shape Securities Litigation*, HARV. L. SCH. F. ON CORP. GOV. (Jan. 19, 2023), https://corpgov.law.harvard.edu/2023/01/19/trends-in-forum-selection-provisions-merger-objection-class-actions-and-spacs-continue-to-shape-securities-litigation/ [https://perma.cc/S3KW-SYQQ]; *see also* Bultman, *supra* note 1.

6. *See infra* Part I.B.

oversight[7] of individual suits.[8] The common benefit doctrine allows plaintiff's lawyers to seek class-based fees without certifying a class so long as they can show that the litigation benefitted the unrepresented shareholders.[9] This effectively gives the plaintiff's individual suit the same posture as a class action because it frames the dispute around the entire class of shareholders. Moreover, class actions require the court to take an active role in supervising the proceedings;[10] thus, by bringing an individual suit, plaintiff's attorneys can take advantage of the comparative lack of supervision to strike a bargain that better suits their interests.[11]

This shift toward the "non-class" class appears to be an attempt to undermine legislative efforts to deter frivolous merger objection suits.[12] The Private Securities Litigation Reform Act ("PSLRA") was passed to address perceived abuses in class action lawsuits such as merger objection suits.[13] One provision of the PSLRA bars individuals from serving as a lead plaintiff in more than five securities class actions within a three-year timeframe.[14] However, the PSLRA only applies to class actions, so plaintiffs can avoid this PSLRA bar by filing an individual action.[15] If the shift to the "non-class" class is an effort to avoid deterrents like the PSLRA, this shift poses a problem for the courts, corporate defendants, and the shareholders themselves.[16] It also reveals the difficulty of enacting reforms that will effectively deter frivolous lawsuits.

---

7. *See id.*

8. *See* Sean Griffith, Frequent Filer Shareholder Suits in the Wake of Trulia: An Empirical Study, 2020 WIS. L. REV. 443, 459–60 (2020).

9. *See* Brief of Law Professors as Amici Curiae at 11, Anderson v. Magellan Health Inc., 298 A.3d 734 (Del. Ch. 2023) (No. 2021-0202-KJSM).

10. *See infra* Part I.B.

11. *See id.*

12. *See* Milstead & O'Brien, *supra* note 5.

13. *See* S. REP. NO. 104–98, at 10 (1995); *see also* H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.) ("Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets.").

14. *See* 15 U.S.C. § 78u-4(a)(3)(B)(vi)(2000).

15. *See* 15 U.S.C. § 78u-4(a)(1).

16. *See* Pincus, *supra* note 4. Additionally, while the courts have a long-standing interest in reducing the number of meritless cases on their dockets, this issue raises concerns about whether shareholders are vulnerable to collusive settlements in this context. *See* Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. 1089, 1127 (2013).

This Note will analyze the "non-class" class and "non-class" merger objection litigation in three parts. Part One will provide an overview of the wider context surrounding merger objection litigation before explaining the emergence of the "non-class" class. Part Two will explore the dynamics between plaintiff's attorneys and their clients. Additionally, it will explain the concept of litigation gatekeepers, gatekeeper efforts to deter frivolous merger litigation suits, and challenges gatekeepers face in trying to deter use of the "non-class" class. Finally, Part Three will propose a solution that seeks to better equip gatekeepers to respond to the "non-class" class.

I. OVERVIEW OF MERGER OBJECTION LITIGATION AND THE "NON-CLASS" CLASS

Part One begins with a brief review of shareholder litigation. This history is useful for understanding the unique agency costs associated with merger objection litigation. Then this section broadly explains merger objection litigation and other key concepts for understanding merger cases such as the requirements for a class action. Lastly, this section will provide an overview of the shift from class actions to the "non-class" class.

A. OVERVIEW OF SHAREHOLDER LITIGATION AND THE "MERGER TAX"

1. Introduction to Shareholder Litigation

Shareholder litigation has emerged as an important mechanism for policing corporate managers.[17] Agency costs—costs incurred when an agent acts on behalf of a principal—[18]can arise when management's interests diverge from the shareholders' interests.[19] Shareholder litigation allows shareholders to recover agency costs by enabling them to police corporate managers by "[banding] together to bring . . . lawsuits" against

---

17. *See* Jeffries, *supra* note 4, at 56.

18. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); *see also* Soo Young Hong, Note, *Curb Your Enthusiasm: The Rise of Hedge Fund Activist Shareholders and the Duty of Loyalty*, 24 FORDHAM J. CORP. & FIN. L. 193, 203 (2018).

19. Corporate governance law has largely focused on addressing concerns regarding agency costs. *See generally* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767 (2017).

wayward management for the value of these costs.[20] In this way, shareholder litigation is a powerful tool for investors to protect their economic interests and maintain managerial accountability.[21]

Three kinds of representative shareholder suits are relevant here: derivative actions, securities class actions, and merger objection litigation.[22] These categories are particularly important because they are the main types of representative shareholder lawsuits.[23] Further, these actions demonstrate that shareholders are vulnerable to agency costs flowing from the attorney-client relationship in addition to agency costs from corporate management.[24] Shareholders are vulnerable to agency costs from the attorney-client relationship in this context because the attorneys exert broad control over the litigation, which raises the risk that they pursue outcomes that serve their best interests at the shareholders' expense.[25]

Accordingly, shareholders seeking to police corporate management face a dilemma: shareholders looking to recover agency costs from wayward management through shareholder litigation make themselves vulnerable to additional agency costs arising out of the attorney-client relationship during the litigation. While the analysis of these costs in the context of merger objection litigation will be the subject of the rest of this Note, a brief summary of the other representative shareholder lawsuits will provide helpful context.[26]

---

20. *See* Jeffries, *supra* note 4, at 56. It is also important to keep in mind that shareholder litigation does not only exist to enable shareholders to recoup agency costs born out of divergent interests. Duty of care claims, for example, enable shareholders to recoup costs from the negligent conduct of management. *See, e.g.*, *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 960 (Del. Ch. 1996).

21. Jeffries, *supra* note 4, at 56.

22. *Id.*

23. *See* Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 OKLA. L. REV. 237, 246 (2017).

24. *See* Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1139–40 (2020); *see also* Thompson & Thomas, *supra* note 1, at 148.

25. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991); see Erickson, supra note 24, at 1139–40.

26. Of course, there are other kinds of actions shareholders can bring, too. *See* Alan K. Koh, *Direct Suits and Derivative Actions: Rethinking Shareholder Protection in Comparative Corporate Law*, 21 WASH. U. GLOB. STUD. L. REV. 391, 398–99 (2022). Many corporate law textbooks introduce shareholder litigation by distinguishing direct

a. Derivative Actions

"Derivative actions were the dominant form of shareholder litigation for most of the twentieth century."[27] In a derivative suit, a shareholder brings an action on behalf of the corporation alleging that management has violated their fiduciary duties to the company.[28] These derivative suits frequently allege board members violated their duty of loyalty because of a conflict of interests.[29] Although they were once the dominant form of shareholder litigation, this is no longer the case.[30]

Some scholars have noted that the problems that plagued derivative suits are present in other, more common, shareholder lawsuits.[31] In particular, derivative suits rarely end with plaintiffs receiving monetary relief as part of the settlement as recovery goes to the corporation itself.[32] They also used to be filed primarily in state courts, but are now being filed in federal courts.[33] Most importantly, just as later sections will discuss in merger objection litigation, derivative suits have entrepreneurial roots.[34] Plaintiff's attorneys drove the litigation in order to generate revenue and had broad control over the nature of the litigation.[35]

b. Securities Class Actions

After plaintiff's attorneys began using these derivative actions to generate attorneys' fees, courts and legislators implemented a wide array of procedural requirements to deter frivolous derivative suits.[36] In response, plaintiff's attorneys began to structure these securities claims as

actions from derivative actions, for example. *Id.* Direct actions are brought by and for the benefit of the shareholders named in the action. *See id.* This is different from representative shareholder lawsuits, like derivative suits and securities class actions, because they allege direct harm suffered by the plaintiffs in the suit personally. *See id.*

27. Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. L. REV. 1753, 1756 (2012).

28. *See* Browning Jeffries, *Shareholder Access to Corporate Books and Records: The Abrogation Debate*, 59 DRAKE L. REV. 1087, 1088–89, 1100 (2011).

29. *See* Thompson & Thomas, *supra* note 1, at 167.

30. *See* Jeffries, *supra* note 4, at 67

31. *See generally*, Erickson, *supra* note 24.

32. *Id.* at 1133.

33. *Id.*

34. *Id.* at 1134.

35. *Id.* at 1139–40.

36. *Id.* at 63; *see* Erickson, *supra* note 24, at 1141.

federal securities class actions.[37] Federal securities class actions involve a claim brought on behalf of shareholders who have suffered the same type of harm.[38] While a derivative lawsuit is brought by a shareholder of a corporation for the benefit of the corporation, a class action is brought by a shareholder for the benefit of themselves and the other shareholders.[39] The class certification mechanism allows the rest of the shareholder class to receive the benefit of the litigation without being involved in the suit.[40]

These suits most commonly proceed under section 10b-5 of federal securities law, where a plaintiff will allege that the corporation made a fraudulent misrepresentation that the shareholder relied on to their detriment.[41] In these cases, Plaintiff's attorneys are able to use their leverage as a representative of the shareholder class to facilitate outcomes more favorable than outcomes in derivative suits.[42] Most importantly, plaintiff's attorneys are able to secure settlements even the underlying action would otherwise performing poorly when they made it to trial.[43]

2. Merger Objection Litigation

Mergers and acquisitions ("M&A") has been a common feature of corporate activities for over a century.[44] M&A broadly refers to the

37. *See* Jeffries, *supra* note 4, at 63.

38. *Id.* at 63–64.

39. *See* Griffith, *supra* note 2, at 8.

40. *See infra* Part II.B.

41. *See* Browning Jeffries, *The Implications of Janus on the Liability of Issuers in Jurisdictions Rejecting Collective Scienter*, 43 SETON HALL L. REV. 491, 498 (2013); *see also* 17 C.F.R § 240.10b-5 (1992).

42. *See* Erickson, *supra* note 16, at 1143 (acknowledging that the proportion of class actions with a cash payout to shareholders is higher than a derivative action).

43. *See id.* (acknowledging that settlements justifying the plaintiff's attorney's fee awards were more common than a winning claim at trial); *see also* Jeffries, *supra* note 4, at 64 ("Plaintiffs' attorneys counted on the high costs of [federal securities class actions] to create incentives for defendants to settle, even when the allegations in the complaint were not necessarily supported by underlying facts.").

44. *See* Marina Martynova & Luc Renneboog, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?*, 32 J. BANKING & FIN. 10, 2148 (2008).

various transactions by which one business can combine with another.[45] This typically occurs with public companies, but it can occur in the private context as well.[46]

Merger objection litigation typically arises in M&A shortly after the announcement of some kind of business combination.[47] These lawsuits—objecting to the proposed business combination—are typically brought on behalf of one of the companies (usually the acquired company).[48] Most commonly, these suits allege conflicts of interest on the part of management and directors.[49]

In recent years, merger litigation has become an increasingly dominant form of shareholder litigation.[50] For example, one recent study found that the percentage of M&A deals subjected to merger litigation increased from 39% in 2005 to 92% in 2011.[51] Similarly, 92% of M&A deals valued over $100 million and 96% of deals valued over $500 million were challenged.[52] Further, merger objection suits accounted for nearly 93% of all shareholder litigation in 2018.[53] Currently, suits resulting in a mootness fee is the most common pattern that merger objection suits follow.[54]

Because some combinations are not in the best interest of the shareholders, merger objection litigation protects shareholders because it enables shareholders to voice their grievances with a combination.[55]

---

45. *See Understanding Business Litigation Arising out of Mergers & Acquisitions*, LAW.COM (Oct. 2022), https://lawyers.law.com/article/understanding-business-mergers-acquisitions-litigation.html [https://perma.cc/C2NR-NMBG].

46. *See* Eva Davis & John Schreiber, *Eight Key Differences: Public vs. Private Company Acquisitions in the US*, WINSTON & STRAWN LLP (Jan. 2017), https://www.winston.com/images/content/1/1/v4/119086/Corp-8-Key-Differences-article-JAN2017.pdf [https://archive.li/2BVpz].

47. *See* Griffith, *supra* note 2, at 15.

48. *Id.* at n.59.

49. *See* Jeffries, *supra* note 4, at 67.

50. *See* Thompson & Thomas, *supra* note 1, at 137.

51. *See* Matthew Cain & Steven Davidoff, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 469 (2015).

52. *See* Robert M. Daines & Olga Kouminan, *Shareholder Litigation Involving Mergers and Acquisitions*, CORNERSTONE RSCH. 1 (2013).

53. *See Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2018 M&A Litigation*, CONERSTONE RSCH. 1 (2019), https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-of-Public-Companies-Review-of-2018-M-and-A-Litigation-pdf [https://archive.li/JFLWm].

54. *See* Sean Griffith, *Innovation in Disclosure-Based Shareholder Suits*, 69 CASE W. RSRV. L. Rev. 927, 939 (2019).

55. *Id.*

Additionally, especially in instances involving minority shareholders, this litigation subjects the terms of the underlying transaction to judicial review.[56]

However, merger objection litigation has often been criticized as a way for plaintiff's attorneys to collect a quick fee.[57] Merger objection litigation is pervasive among court dockets because the cases often require little effort to file, and defendants usually settle these cases quickly to avoid impairing the underlying deal.[58] Plaintiff's attorneys receive substantial fees in these settlements even when the plaintiff's recovery is non-monetary.[59] Scholars call this litigation the "merger tax" or "deal tax" because it so frequently compels companies to pay out whenever they announce a deal.[60] These suits tend to follow two forms: controlling shareholder suits and third-party merger suits.[61]

a. Controlling Shareholder Suits

Merger objection litigation objecting to a controlling shareholder merger usually alleges that a controlling shareholder breached its fiduciary duties through a conflict of interests.[62] A controlling shareholder merger typically involves a transaction where a shareholder exercising voting control over the corporation forces minority shareholders into a transaction that will terminate their shareholder interest.[63] Since the

56. *See* Griffith, *supra* note 2, at 12; *see also* Shannon Rose Selden, *(Self-)Policing the Market: Congress's Flawed Approach to Securities Law Reform*, 33 J. LEGIS. 57, 97 (2006) (defending litigation as a valuable tool for addressing malfeasance from corporate actors).

57. *See* Erickson, *supra* note 16, at 1148–49.

58. *See In re* Revlon Inc. S'holders Litig., 990 A.2d 940, 943 (Del. Ch. 2010) (noting "the first cases often appear minutes or hours after the announcement with others following within a matter of days"); Jeffries, *supra* note 4, at 70 (explaining that transactions unwind quickly, affecting the rate at which these actions are resolved); Bultman, *supra* note 1 ("[T]hese are actions that companies will just pay to get rid of.").

59. *See* Jeffries, *supra* note 4, at 108.

60. *See* Griffith, *supra* note 2, at 46.

61. *Id.* at 11–12.

62. *Id.* at 11–13.

63. *Id.* at 11–12. A shareholder is a controlling shareholder if the shareholder owns more than 50% of the voting power in a corporation or "exercises control over the business affairs of the corporation." Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113–14 (Del. 1994). Thus, the shareholder can single-handedly satisfy the requirement that a majority of shareholders vote to approve a proposed transaction. *See When Is*

controlling shareholder has control over the shareholder vote to approve the transaction, they can dictate terms to the minority and vote in favor of a deal that favors the controlling shareholder's interests rather than the interests of the corporation and the minority shareholders.[64]

These cases tend to follow a clear pattern.[65] The process starts with a special committee negotiating the terms of the deal with the controlling shareholder.[66] Even though this often yields an increase in the merger price, plaintiff shareholders almost simultaneously file suit alleging a conflict of interest due to the controlling shareholder and claim that they are being undercompensated in the deal.[67]

This kicks off the settlement negotiating process.[68] As the special committee finalizes the terms of the deal with the controlling shareholder, defense counsel offers a settlement.[69] Usually, the settlement offer hinges on a new price for the underlying merger, a price that is determined through the special committee's negotiation.[70] Because the defendants determine the new price in the settlement offer during their negotiations with the special committee, plaintiff's attorneys are essentially "free riding" on the committee's efforts and provide no real value to the process of negotiating a new merger price.[71] Nonetheless, plaintiff's attorneys can accept the deal at this new price to satisfy their clients. Most importantly,

Shareholder Approval Required?, S'HOLDER VOTE EXCH. (last visited Nov. 18, 2023), https://www.svegroup.com/education/when-shareholder-approval-required [https://perma.cc/62R2-JGPR].

64. *See id.* at 11–12; *see also* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345 (Del. 1987) ("[D]irectors must eschew any conflict between duty and self-interest.").

65. *See, e.g.*, *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604 (Del. Ch. 2005).

66. *Id.* at 620.

67. *Id.* ("Instead of suing once a controller actually signs up a merger agreement with a special committee of independent directors, plaintiffs sue as soon as there is a public announcement of the controller's intention to propose a merger.").

68. *Id.*

69. *Id.* at 621 ("When [the final] price is known but before there is a definitive deal, defense counsel . . . makes its 'final and best offer' to plaintiffs' counsel. The plaintiffs' counsel then accepts . . . .").

70. *Id.*

71. *See* Griffith, *supra* note 2, at 13 (suggesting the special committee's negotiation would yield that price anyway as the attorney's incentive is to "free ride" on their negotiations).

the attorneys can recover attorneys' fees since plaintiffs receive monetary relief.[72]

b. Third-Party Merger Suits

Merger objection litigation objecting to third-party mergers usually alleges that the corporation's board breached its fiduciary duties by adopting a flawed merger process.[73] This is often due to hidden conflicts of interest, suggesting the deal does not reflect adequate consideration.[74] These suits strike quickly, usually between the signing and closing of the deal.[75] Because the only relief accorded to plaintiffs is in the form of additional disclosures rather than monetary compensation, many critics refer to these cases as "disclosure-only" settlements.[76] Nonetheless, even though plaintiffs receive no monetary relief, plaintiff's attorneys receive fees ranging from $350,000 to $700,000 on average.[77]

In addition, plaintiff's attorneys have developed a new type of merger objection suit in the third-party merger context: the mootness fee suit.[78] A mootness fee refers to the fee plaintiff's lawyers receive after corporate action outside of the lawsuit provides the relief plaintiffs pray for in the suit.[79] For example, a corporate defendant can moot a suit seeking certain disclosure by simply making the disclosures.[80] The attorneys receive a fee reward nonetheless on the theory that their actions spurred the corporate defendant to take this corrective action.[81]

72. *See id.*

73. *Id.* at 14; *see, e.g.*, Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1264 (Del. 1988).

74. *See* Jefferies, *supra* note 4, at 68.

75. *Id.* at 69–70.

76. *See* Griffith, *supra* note 2, at 18; *see also* Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013* 16 (Ohio State Pub. L. Working Paper No. 236, 2014) ("84.8 percent of settlement were "disclosure only" in 2013 compared to approximately 85.7 percent in 2012.").

77. *See* Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV 557, 568 (2015).

78. *See* Griffith, *supra* note 54, at 939.

79. *Id.*

80. *Id.*

81. *Id.*

3. The Emergence of the "Non-Class" Class

Recently, there has been a notable shift away from using the class action for merger objection litigation.[82] Instead, plaintiffs have begun bringing individual suits to challenge deals.[83] According to one study, in 2017, about 25% of transactions were challenged through individual suits, whereas in 2021, 90% of transactions were challenged through individual suits.[84] The trend is particularly notable this year, where only one transaction has been challenged through a class action, but ninety were challenged through an individual suit.[85]

Individual suits are typically brought by a single shareholder or a small group of shareholders.[86] Apart from being filed individually, these suits are essentially identical to their class action counterparts.[87] Most individual merger objection suits resolve with a mootness fee.[88] And most individual suits result in negotiations with defendants and are resolved rapidly.[89]

Like class action suits, individual suits can also allow plaintiff's attorneys to earn large attorneys' fees.[90] Even though individual suits are only brought on behalf of a single shareholder or small group of shareholders, the common benefit doctrine allows plaintiff's attorneys to generate fees based on a benefit to *all* the shareholders.[91] Thus, plaintiff's attorneys are essentially being paid as if they brought a class action without having to undertake any of the steps necessary to create a class. This has given rise to a sort of "non-class" class where the named plaintiff is an individual or group of individuals, but the attorney is able to negotiate and receive a fee as if they were representing a certified class.

For example, in *Anderson v. Magellan*, plaintiff Bryan Anderson objected to a deal where Centene Corporation would acquire Magellan

---

82. *See* Milstead & O'Brien, *supra* note 5.
83. *Id.*
84. *See* Bultman, *supra* note 1.
85. *Id.*
86. *See* Griffith, *supra* note 8, at 459.
87. *Id.* (explaining that individual suits "are otherwise indistinguishable from class actions claims").
88. *See id.* at 462–63.
89. *See* Milstead & O'Brien, *supra* note 5.
90. *See* Brief of Law Professors as Amici Curiae, *supra* note 9, at 11.
91. *See id.*; *see also* Tandycraft, Inc. v. Initio Partners, 562 A.2d 1162, 1166–67 (Del. 1989) (explaining that the court's plenary power when applying this framework will ensure only meritorious litigants receive fee award).

Health, Inc. by alleging Magellan failed to properly disclose information about the bidding process.[92] Magellan later made supplemental disclosures that mooted Anderson's litigation.[93] Nonetheless, Anderson's attorneys moved for and received an attorneys' fee award of $1.1 million to reflect the benefit they produced by bringing the claim.[94] Importantly, this award was later challenged and substantially reduced in subsequent litigation.[95]

B. Class Action Procedure, the Attorneys' Fee Award, and Litigation Gatekeepers

This section will explain why shareholders are vulnerable to collusive settlements in merger objection litigation. First, this section will review how class action procedure works and how these procedures protect shareholders. This will suggest that shareholders are more vulnerable to collusive settlements when suits are brought individually. Then, it will explain the plaintiff's attorney fee award as part of a larger bargaining process in which plaintiff's attorneys, in essence, exchange a liability release for a substantial fee. This clarifies why settlements in merger objection litigation run the risk of being collusive settlements: Corporate managers and plaintiff's attorneys benefit from a bargain at the shareholder's expense. Lastly, this section will explain litigation gatekeepers and the role they can play in deterring frivolous merger objection suits.

1. Class Action Procedure Explained

Understanding class action procedure is an important part of understanding merger objection litigation. Historically, merger objection cases were brought as class actions governed by Rule 23 and its state counterparts.[96] Rule 23 lays out three different kinds of class action lawsuits which can be distinguished by their purpose and the kind of relief

92. *See* Anderson v. Magellan Health, Inc., 298 A.3d 734, 737 (Del. Ch. 2023).

93. *Id.*

94. *Id.* at 740–41. This amount is consistent with fees awarded to counsel in class action merger objection suits. *See* Pincus, *supra* note 4.

95. *See Anderson*, 298 A.3d at 755.

96. *See* FED. R. CIV. P. 23; *see also* N.Y. C.P.L.R. § 901 (state counterpart).

they make available to the putative class.[97] For example, a 23(b)(1) class action, the first kind of class action, addresses "limited fund" and "incompatible standards" situations.[98]

"Prejudice class actions" address situations in which individual actions might create prejudice that a class action would avoid.[99] A "limited fund" class action ensure all plaintiffs receive some kind of relief by creating a common fund to pay out plaintiffs.[100] This avoids a situation in which a defendant is bankrupted by a lawsuit before a later in time plaintiff even has the opportunity to file suit.[101] A 23(b)(2) class action limits plaintiffs to injunctive or declaratory relief.[102] Lastly, 23(b)(3) "damages class actions" entitle the class to monetary relief in addition to injunctive or declaratory relief.[103] Importantly, 23(b)(3) class actions also impose a higher bar for certification.[104]

For a court to certify any kind of class, the putative class must first show that: (1) the class members are sufficiently numerous; (2) common questions of law or fact support their claims; (3) the named plaintiffs are typical of the larger class; and (4) their counsel is adequate to represent the entire class.[105] To be certified as a class that could receive monetary relief, a class must then also show that: (1) the common questions outweigh individual questions; and (2) the class action is the superior method for bringing this action.[106]

These certification requirements are not the only procedural protections built into Rule 23. For example, all class action settlements require court approval.[107] While individual claimants bringing a suit usually retain the ability to enter into a private settlement with their adversary and then withdraw their claim from the court, plaintiffs in a class action cannot settle without court approval of the settlement.[108] This

97. *See generally* RICHARD L. MARCUS ET AL., COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 230–51 (7th ed. 2021); *compare* FED. R. CIV. P. 23 (b)(1), (b)(2), *with* FED. R. CIV. P. 23 (b)(3); *see also* FED. R. CIV. P. 23 (c)(2).

98. *See* MARCUS ET AL., *supra* note 97, at 230–51.

99. FED. R. CIV. P. 23 (b)(1); MARCUS ET AL., *supra* note 97, at 230–33.

100. *Id.*

101. *Id.*

102. FED. R. CIV. P. 23 (b)(2); MARCUS ET AL., *supra* note 97, at 238.

103. FED. R. CIV. P. 23 (b)(3); MARCUS ET AL., *supra* note 97, at 251.

104. *Compare* FED. R. CIV. P. 23 (b)(1), (b)(2), *with* FED. R. CIV. P. 23 (b)(3); *see also* FED. R. CIV. P. 23 (c)(2).

105. *See* Oplchenski v. Parfums Givenchy, Inc., 254 F.R.D. 489, 492 (N.D. Ill. 2008).

106. FED. R. CIV. P. 23(b)(3).

107. *Id.* 23(e).

108. *See* Milstead & O'Brien, *supra* note 5.

procedural requirement protects shareholders because it allows courts to scrutinize class action settlements to ensure that the settlement is fair to the class.[109] Because of these procedures, class actions have a preclusive effect on all class members, meaning subsequent plaintiffs cannot bring suits on the same claim.[110] These procedures are important because they allow class actions to bind nonparties.[111]

Additionally, in class actions, before the court can approve a settlement, the court must allow any member of the class to object to the settlement.[112] This opportunity to object to a settlement in a class action gives class members the ability to monitor the settlement to ensure it accords with their interests. Therefore, the members of the class are afforded a chance to combat wayward counsel who may not have adequately protected the class's interests.[113] Overall, these procedural requirements are in place to protect shareholders from collusive settlements in merger litigation.[114]

Furthermore, because class actions encompass global resolution of the underlying claim and have a preclusive effect[115] on all members of the class,[116] these procedures are in place for the protection of the shareholder class. The preclusive effect of settlements incentivizes corporate defendants to settle because it resolves their liability for all the claims that might arise out of the underlying facts, including theories and claims never asserted by the plaintiffs.[117]

However, in an individual suit, there is no such market for global preclusion. Without the mechanisms of a class action to bind the terms of the settlement on all members of the class, the settlement in an individual merger objection suit only precludes the named plaintiff from filing the

---

109. *See* Griffith, *supra* note 8, at 459 (discussing the ways class action procedure protects shareholders); *see also* Griffith, *supra* note 2, at 19–20.

110. *See* Griffith, *supra* note 2, at 16 (explaining how preclusion "extinguish[es] the ability of shareholders to litigate related claims in any U.S. court").

111. *See* Taylor v Sturgell, 553 U.S. 880, 880 (2008) (noting that class actions are exempt from the principle that nonparties are not bound by a judgment).

112. FED. R. CIV. P. 23(e)(5).

113. *See* Griffith, *supra* note 8, at 459 (discussing the importance of objecting to a settlement).

114. *See* Erickson, *supra* note 16, at 1127.

115. *See* Griffith, *supra* note 2, at 16 ("Moreover, once approved by a state court, settlements extinguish the ability of shareholders to litigate related claims in any U.S. court. Preclusion of subsequent claims is a source of considerable value to defendants.").

116. *See* MARCUS ET AL., *supra* note 97, at 673–74.

117. *See* Griffith, *supra* note 2, at 15–16.

same claim.[118] Nonetheless, defendants' incentive to settle likely remains to be the preclusive effect of each individual settlement.[119]

Because bargaining takes place privately, direct evidence is limited in this context.[120] Nonetheless, a recent case exposed that defendants negotiate with some knowledge about how much they can expect to pay in attorney's fees for the settlements.[121] Further, Defendants tend to have a clear idea about the number of shareholders that are likely to challenge the underlying transaction.[122] Thus, Defendants can use this information to determine whether settling all of these claims is in their interest. This would result in a kind of patchwork of preclusion by which defendants purchase liability releases from multiple plaintiff-shareholders and effectively achieve a broad release from liability when those individual releases are aggregated.[123]

Consequently, even when plaintiffs bring merger objection claims as individual actions, corporate defendants can settle and still achieve the same preclusive effect as if the plaintiff had brought a class action. However, because these individual suits lack the procedural requirements of class actions, shareholders are worse off.[124] These procedures give

---

118. *See* Duckett v. Fuller, No. 15-6568, 2016 WL 1622432 (4th Cir. 2016) (explaining that a nonparty is generally not subject to preclusion doctrines). This is not without exceptions, however. *See id.*

119. *See* Griffith, *supra* note 2, at 15 ("The defense side to the settlement bargain is the release of claims.").

120. *See* Griffith, *supra* note 8, at 466 (positing examples of ways in which parties reach a deal privately).

121. *See* Stipulation and [Proposed] Order of Dismissal, *In re* Dell Techs. Class V S'holders Litig., Consol. C.A. No. 2018-0816-JTL, 2019 Del. Ch. LEXIS 952 (Del. Ch. June 6, 2019) (requesting Plaintiff's attorney to provide additional information about ex-ante fee agreements used with other clients in the past five years). This suggests corporate defendants would be able to negotiate a settlement with the plaintiff's attorneys with a clear idea as to what the fee award will be.

122. Courts have also acknowledged that by the time parties settle, defendants have a clear idea that no other claimants are waiting in the shadows. *See In re* Revlon Inc. S'holders Litig., 990 A.2d 940, 947 (Del. Ch. 2010) (noting that parties easily struck a deal once the underlying transaction "ha[d] been exposed to the market for some time, by which point it is relatively clear to the parties that an interloper is unlikely to appear"). Thus, not only do defendants know how much each settlement will cost, but they also likely know the number of shareholders who will bring suit.

123. Once again, the proof here is limited as defendants have no incentive or reason to explain their reasons for settling these claims publicly. But the sheer volume of merger objection suits suggests defendants reap some kind of benefit from these bargains.

124. *See* Griffith, *supra* note 8, 464–65 (explaining that class action procedure protects shareholders).

shareholders rights—like the opportunity to object to a settlement and for a court to review that settlement—and these rights are designed to protect shareholder interests. Without these protections, shareholders who are not parties to the litigation lose their ability to "band together" to police management and they must individually bear the costs of the challenged transaction.[125]

Additionally, even though individual suits should only preclude the plaintiffs who brought the suit, these plaintiffs might still release defendants from liability for claims not contemplated in their suit. This provides further cause for concern about whether the merger objection suits result in collusive settlements.[126]

Importantly, however, the court must also approve the counsel's fee award when it reviews the proposed settlement.[127] In merger cases, this step usually requires the court to analyze the common benefit doctrine.[128] This concept is especially critical to understanding how plaintiff's attorneys are able to generate fees when their clients receive no monetary relief. As the discussion below will show, this doctrine also has an important role in determining fee awards outside of the class action context. This is because courts have applied the doctrine to individual merger suits.[129] and plaintiff's attorneys can rely on that to bargain for the equivalent of a class-based fee award during private negotiations.[130]

2. Common Benefit Doctrine

The common benefit doctrine allows a plaintiff who successfully litigates a claim to the benefit of a larger group of people—but not necessarily a certified class—to recover the costs and fees for the litigation.[131] Thus, under the doctrine, the court can order the defendant to

125. *See* Pincus, *supra* note 4.

126. *See* Griffith, *supra* note 2, at 16–17.

127. *See* FED. R. CIV. P. 23(e).

128. *See* Griffith, *supra* note 2, at 10.

129. *See* Tandycraft, Inc. v. Initio Partners, 562 A.2d 1162, 1163 (Del. 1989) ("We hold that, under certain circumstances, counsel fees may be awarded to an individual shareholder whose litigation effort confers a benefit upon the corporation, or its shareholders, notwithstanding the absence of a class or derivative component.").

130. *See* Griffith, *supra* note 8, at 466.

131. *See id.* at 22–23.

pay the fees and costs, rather than order the plaintiff to bear the full cost of litigation.[132]

The elements of the common benefit doctrine are well-settled under Delaware law and requires that: (1) the claim was meritorious when filed; (2) the litigation benefited the corporation or the class; and (3) the benefit was causally related to the lawsuit.[133] These requirements seek to distinguish claims that benefit a larger group of affected parties from those that only affect the individual plaintiff.[134] Importantly, the requirements also invite the court to scrutinize the plaintiff's claims before authorizing a fee award.[135]

Some critics argue that this doctrine allows plaintiffs to recover fees from the defendant even when the suit did not directly cause the benefit because "plaintiffs are presumed to have caused the benefit as long as it arose after the litigation began."[136] For example, in mootness fee litigation, plaintiffs can meet their burden by showing that the defendants made the required disclosures—which have value to the shareholders—after the litigation began even if they cannot show that the litigation caused the defendants to make those disclosures.[137]

Proponents of the doctrine, on the other hand, argue that the doctrine benefits merger litigation because it ensures that successful plaintiffs are appropriately compensated for the benefit they provide to a larger group.[138] This ensures that merger litigation does not suffer from collective action issues, where the cost of litigation for any individual plaintiff cannot be justified by the potential benefit to the shareholders as

---

132. *See id.*

133. *Id.*

134. *See* Tandycraft, Inc. v. Initio Partners, 562 A.2d 1162, 1166–67 (Del. 1989) (explaining that the court's plenary power when applying this framework will ensure only meritorious litigants receive fee award).

135. *See e.g.*, City Trading Fund v. Nye, 72 N.Y.S.3d 371 (N.Y. Sup. Ct. 2018), *aff'd,* 98 N.Y.S.3d 158 (N.Y. App. Div., 2019) (holding that the additional disclosures were not material and did not provide benefit to the shareholders); Griffith, *supra* note 2, at 25 ("Numerous recent Chancery Court decisions have [scrutinized the additional disclosures to determine their benefit to shareholders], dramatically reducing requested fee awards in disclosure-only settlements, even in the absence of opposition from defendants or objectors.").

136. *See* Griffith, *supra* note 2, at 24.

137. *Id.*

138. *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).

a collective.[139] Additionally, this doctrine aligns with the court's interest in encouraging cases to settle.[140]

Although this doctrine may benefit merger litigation, the data suggests this doctrine has instead been captured by plaintiff's attorneys as a means for generating fee awards.[141] In cases that settle before a class is certified, plaintiffs sometimes move to apply the common benefit doctrine so (1) their attorneys can recover fees calculated on a class-wide basis without class certification and (2) the settlement can avoid the enhanced judicial oversight required by Rule 23.[142]

Additionally, it is worth explaining that this doctrine can impact settlements parties agree to privately outside of the court.[143] Because negotiations happens in the shadow of the law, the common benefit doctrine allows plaintiff's attorneys to bargain for large fees by relying on the doctrine to establish that the court would ultimately award a large, class-based fee.[144] Accordingly, plaintiffs can enjoy the benefit of the common benefit doctrine without submitting the settlement to the court for review.[145]

3. Attorneys' Fees in Merger Litigation

One study showed that, in 2012, the average attorneys' fees in merger objection suits was $540,000.[146] To put that in context, the average fee resulting from a settlement across all civil cases was $725,000 that year.[147] However, not every fee award falls on the average. In fact, a study of 2012 merger objection suits filed in federal courts found that 28% of cases resulted in fee awards of $1 million or more.[148] In sum, considering

---

139. *See* MARCUS ET AL., *supra* note 97, at 8.
140. *See id.* at 525.
141. *See* Bultman, *supra* note 1.
142. *See* Brief of Law Professors as Amici Curiae, *supra* note 9, at 11.
143. *See* Griffith, *supra* note 8, at 466.
144. *Id.*
145. *Id.*
146. *See* Daines & Kouminan, *supra* note 52, at 90–91.
147. *Id.*
148. *See* Jefferies, *supra* note 4, at 90–91. A million-dollar fee might not be a significant expense to some corporate defendants. For example, Microsoft is reportedly worth $2748.82 billion. *See Microsoft Net Worth 2010-2023*, MACROTRENDS (last visited Nov. 18, 2023), https://www.macrotrends.net/stocks/charts/MSFT/microsoft/net-worth#:~:text=Interactive%20chart%20of%20historical%20net,16%2C%202023%20is%20%242795.79B [https://web.archive.org/web/20230209231054/https://www.macrotrends.

this data in light of the speed at which merger objection suits settle suggests that merger objection suits are an effective tool for plaintiff's attorneys to generate revenue.[149]

There is also evidence that the size of fee awards has been declining.[150] The $540,000 average from 2012 represented a decline in average fee amounts for disclosure-only settlements for the third year in a row.[151] This decrease in fee awards may have resulted from the Delaware case *In re Trulia*, a seminal merger objection case which establishes an obligation for the courts to more closely monitor merger objection claims.[152] However, there is no reason to assume that this trend will continue. If the decrease in average fee award is a result of Delaware courts scrutinizing claims more closely under *Trulia,* then recent evidence illustrating that merger objection settlements are increasingly being filed outside of Delaware might suggest that the average fee award will increase in the future.[153] Simply put, plaintiffs can seek larger fees by avoiding jurisdictions that adopt the *Trulia* standard.

The shift toward the "non-class" class might also be driving the lower average fee award for merger objection suits. Since the "non-class" class is becoming an increasingly common strategy for plaintiffs, the practice of filing these claims may continue despite the smaller fee award.

4. Gatekeepers in Merger Litigation Introduced

Because non-party shareholders are unable to monitor plaintiff's attorney who do not represent them, a different monitor—such as a litigation gatekeeper—is needed to prevent abuse in these individual actions. Simply put, litigation gatekeepers are entities with the power to shape the litigation process by either allowing or preventing cases from moving forward.[154] They serve as an important check on and deterrent of

---

net/stocks/charts/MSFT/microsoft/net-worth]. In light of this valuation, a $1 million settlement is unlikely to impact the company's bottom line. However, it is also important to recognize that corporate defendants likely also have to pay for their counsel as well as any costs that might arise as a result of delaying the underlying transaction.

149. *See* Milstead & O'Brien, *supra* note 5.

150. *See* Jefferies, *supra* note 4, at 90–91.

151. *Id.* at 90.

152. *See* Brief of Law Professors as Amici Curiae, *supra* note 9, at 10–11.

153. *Id.* (writing in opposition to a fee for an individual suit that was significantly above the post-*Trulia* trend).

154. *See generally* Erickson, *supra* note 23.

abusive litigation tactics.[155] For example, the courts function as gatekeepers when they dismiss "fishing" expeditions for failure to state a claim.[156] In merger objection litigation, there are three common gatekeepers: legislators, the courts, and corporate boards.[157]

First, legislators have the power to shape the legal frameworks within which shareholder litigation takes place.[158] For example, Congress redefined the legal framework for merger litigation when it passed the PSLRA which raised the pleadings requirement for class action merger suits.[159] Alternatively, legislators can craft laws that affect the behavior of corporate boards, for example, by enabling alternative procedures like arbitration.[160] In this way, legislators can influence the types of shareholder actions brought and the likelihood that such suits will be successful.

Second, the courts can shape litigation by setting precedent which significantly affects the substantive and procedural nature of litigation and by actively managing pending cases to ensure fairness.[161] For example, the courts can dismiss cases that fail to meet the pleading requirements. In so doing, the courts set the standard for what kind of proof a litigant must show to bring a claim in the first place.[162] Courts can also shape litigation through their involvement in the discovery process and their role in setting the litigation's schedule.[163]

---

155. *Id.* at 237–39.

156. *See, e.g.*, Weirton Area Water Bd. v. 3M Co., No. 5:20-CV-102, 2020 U.S. Dist. LEXIS 247883, at *34 (N.D.W. Va. Nov. 20, 2020).

157. *Id.* at 239. Importantly, disciplinary rules and malpractice liability are probably unable to function as a gatekeeper in this context. *See* Erickson, *supra* note 16, at 1125–26. Though they might influence attorney decision-making, they cannot prevent a meritless claim from moving forward. *See id.* Instead, they only reprimand after the fact and therefore have a limited ability to prevent cases from moving forward. *See id.*

158. *See* Erickson, *supra* note 23, at 277–78 (discussing various ways in which legislatures can impact the legal system governing shareholder litigation).

159. *See* Erickson, *supra* note 23, at 255–57.

160. *See* 9 U.S.C. §§ 1–16.

161. *See* Erickson, *supra* note 23, at 246–48; *see* MARCUS ET AL., *supra* note 97, at 123.

162. *See, e.g.,* Mandala v. NTT Data, Inc., 988 F.3d 664, 665 (2d Cir. 2021) (holding general population statistics are inadequate proof to plausibly plead a disparate impact claim in employment discrimination).

163. *See* MARCUS ET AL., *supra* note 97, at 411–14.

Finally, corporate boards have the power to influence litigation by adopting policies and procedures that minimize the risk of litigation.[164] For example, boards can implement dispute resolution agreements and forum selection clauses.[165] These policies determine where and how plaintiffs can bring a claim. In turn, they can have a substantial impact on the resolution of a claim. For example, a forum selection clause requiring plaintiff-shareholders to bring suit in Delaware would face a court system that is deeply knowledgeable about corporate law and much more likely to be able to spot a meritless claim.[166]

Each of these gatekeepers has strengths and weaknesses.[167] Legislators can directly shape the legal framework, but they are subject to political pressures that make it difficult to act.[168] Courts have significant powers to oversee litigation and to craft precedent on point, but they may be subject to limited resources, overburdened dockets, and limited expertise in the area.[169] Corporate boards can craft bylaws and other policies that minimize the risk of litigation, but they may be subject to conflicts of interest or may prioritize other interests above litigation risks.[170]

II. FRAMING AND ANALYZING THE PROBLEM WITH THE "NON-CLASS" CLASS

In order to identify solutions to the problem of the "non-class" class, it is important to understand the dynamic between attorney and client in merger cases. Accordingly, this section begins by introducing the unique incentives driving plaintiff's attorneys. In addition, it reflects the power

---

164. *See* Erickson, *supra* note 23, at 257–58.

165. *See* James D. Cox & Randall S. Thomas, *Corporate Darwinism: Disciplining Managers in a World with Weak Shareholder Litigation*, 95 N.C. L. REV. 19, 33 (2016) ("The 800-pound gorilla in the room that has yet to be addressed is whether any states will permit corporate bylaws that mandate sending shareholder-manager disputes to arbitration.").

166. *See* J. Travis Laster, *A Milder Prescription for the Peppercorn Settlement Problem in Merger Litigation*, 93 TEX. L. REV. 129, 134 (2015).

167. *See* Erickson, *supra* note 23, at 279 ("No single gatekeeper is the answer[.]").

168. *See* Erickson, *supra* note 23, at 257–58.

169. *See id.*; *see* Laster, *supra* note 166, at 133 (remarking on federal courts' complex and highly variable dockets, showing the limited strained nature of contemporary docket schedules). Of course, some jurisdictions like Delaware have greater expertise in corporate governance. *See* Erickson, *supra* note 23, at 257–58. Nonetheless, this is not true of all jurisdictions in which merger objection suits are brought. *See id.*

170. *See id.* at 275–76.

dynamic between the attorney and client. Then, this Part returns to the concept of litigation gatekeepers to analyze three instances of litigation gatekeepers in merger objection suits. Finally, it reflects on how the "non-class" class emphasizes the difficulty for litigation gatekeepers preventing these suits.

A. THE PLAINTIFF'S ATTORNEY

Understanding the dynamic between attorneys and their clients is important to understanding the motivations driving merger litigation. In particular, the incentives driving the attorneys are salient to this discussion of the "non-class" class.

The interests of plaintiff's attorneys and clients are not always aligned.[171] In large part, this is a result of the economics of running a firm.[172] Plaintiff's attorneys in securities litigation tend to work on a contingency basis, where their fee is contingent on the success of the litigation.[173] Therefore, plaintiff's attorneys are incentivized to pursue the cases with the potential to yield the largest fees.[174] The larger the potential fee, the more likely it is to offset the risk of non-recovery.[175]

In addition, plaintiff's attorneys have significant control over the direction of the lawsuit when bringing claims in the merger litigation context.[176] The attorneys play a crucial role in selecting cases, targeting defendants, and investigating claims.[177] Moreover, rather than waiting for clients to come to them, plaintiff's attorneys in securities litigation frequently rely on "professional plaintiffs" to bring claims.[178] This reinforces the idea that it is the attorney, not the plaintiff, driving the

---

171. Miller, *supra* note 25, at 3–4.

172. *See* John C. Coffee, Jr., *Understanding Plaintiff's Attorney: Implications Economic Theory for Private Enforcement Law Through Class & Derivative Actions*, 86 COLUM. L. REV. 669, 686–90 (1986).

173. *See* Griffith, *supra* note 2, at 6; *see also* Erickson, *supra* note 16, at 1099–1100.

174. *See* Coffee, Jr., *supra* note 172, at 700–01.

175. *See* Griffith, *supra* note 2, at 48 (discussing how the incentive to suit bears on the expected value of recovery).

176. *See* Coffee, Jr., *supra* note 172, at 680; *see also* Erickson, *supra* note 23, at 242.

177. Coffee, Jr., *supra* note 172, at 679 (referring to plaintiff's attorneys as "bounty hunters").

178. *See generally* Erickson, *supra* note 16, at 1125–26; Jeffries, *supra* note 4, at 65 ("[P]laintiffs' attorneys in the securities class action setting would routinely use "professional plaintiffs" to bring claims, thus reinforcing the reality that it was the attorney, not the client, driving the litigation.").

litigation.[179] While there may be some value in plaintiff's attorneys using their expertise to bring suits, it also raises the possibility that their clients are vulnerable to collusive settlements that primarily benefit the attorneys at the cost of an absent third party, like corporate defendants.[180]

This is especially true where attorneys are able to persuade clients to bring claims they might not otherwise see the value in bringing.[181] While definitive evidence is hard to uncover, there is evidence suggesting that plaintiff's attorneys use professional plaintiffs that may either be totally uninterested or even uninformed of their involvement in the lawsuit.[182] For example, a derivative suit was once dismissed because the plaintiff had no idea that she was involved.[183] The explanation came to light when the plaintiff's attorneys sued the attorney who referred the plaintiff to them.[184] According to their complaint, the referral attorney provided them with information about the plaintiff because she was well-positioned to bring the derivative suit.[185] But the referral attorney never informed the plaintiff, and astonishingly, the plaintiff's attorneys never contacted her prior to filing the suit.[186]

Collusive settlements may also arise when plaintiff's attorneys systematically represent their family members as named plaintiffs in securities litigations.[187] For example, in a 2004 study of shareholder lawsuits in Delaware, Adele Brody was named one of the "Most

---

179. *See* Jeffries, *supra* note 4, at 64.

180. Erickson, *supra* note 16, at 1093; *see* John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 L. & CONTEMP. PROBS. 5, 25 (1985); *see also* Kenneth W. Kossoff, *Director Independence and Derivative Suit Settlements*, 1983 DUKE L.J. 645, 657 ("Although the derivative plaintiff is the party that initiates the suit, courts routinely approve derivative settlements over the plaintiff's vehement objection.").

181. *See* Coffee, Jr., *supra* note 172, at 680.

182. *See* Erickson, *supra* note 16, at 1123; *see also* Declaration of Richard Carrigan in Support of Plaintiff & Class Representative's Response to Court's Order to Show Cause ¶ 7, Carrigan v. Solectron Corp., No. 1:07-cv-087219 (Cal. Super. Ct. Aug. 5, 2011).

183. *See* First Amended Complaint ¶¶ 14–22, Jacobs v. Harris, No. 650637/2011 (N.Y. Sup. Ct. Apr. 22, 2011).

184. *Id.*

185. *See id.* ¶¶ 8,16 (a referral attorney represented that client wanted to bring a derivative claim and plaintiff's attorneys accepted based on good faith legal judgment).

186. *Id.*

187. *See generally* Erickson, *supra* note 16, at 1112 (presenting empirical data and examples of occurrences when plaintiff's attorneys represent their family members).

Frequently Named Plaintiffs."[188] Mrs. Brody is married to Jules Brody, a partner at Stull, Stull & Brody, a plaintiff's firm in New York and California.[189] But Mrs. Brody is far from the only Brody who has been named Plaintiff in shareholder lawsuits. In fact, Mr. Brody's mother-in-law, daughter-in-law, son, son-in-law, and two grandchildren have all been named in shareholder or other class action lawsuits.[190] According to another study, at least a hundred suits were brought by a different attorney's family member between 2002 and 2012.[191]

In other instances, it appears plaintiff's attorneys may pay plaintiffs to bring merger objection suits.[192] Once again, there is limited evidence about this practice, but an exchange in *Carrigan v. Solectron Corporation* provides some evidence substantiating the allegation.[193] Early in the litigation, the defense claimed plaintiff Richard Carrigan had been paid to serve as a plaintiff in the class action suit against Solectron.[194] This allegation was seemingly confirmed later on when Mr. Carrigan alleged that his attorneys sought to protect co-plaintiff Steven Staehr at the expense of the rest of the class in the *Solectron* suit.[195] In particular, Mr. Carrigan alleged that he knew that "the firm had paid [Mr. Staehr] hundreds of thousands of dollars to act as plaintiff in over 30 cases."[196]

Some plaintiff's attorneys have turned to a practice often called "frequent filing."[197] Under this strategy, plaintiffs file multiple cases against different targets in hopes of achieving a settlement or fee award.[198]

188. *See* Thompson & Thomas, *supra* note 1, at 188.

189. Erickson, *supra* note 16, at 1114–15; *see also Brief Biography of Stull, Stull & Brody*, STULL, STULL & BRODY 20, https://ssbny.com/our-firm/ [https://perma.cc/C6W9-HSQU].

190. Erickson, *supra* note 16, at 1115.

191. *Id.* at 1113.

192. *See id.* at 1109–10.

193. *See* Defendants' Third Amended Answer to Plaintiff's Revised Third Amended Complaint, Carrigan v. Solectron Corp., No. 1:07-cv-087219 (Cal. Super. Ct. July 28, 2010).

194. *See id.* ¶ 53.

195. *See* Declaration of Richard Carrigan, *supra* note 182, ¶ 7 (implying decision to represent Mr. Staehr would hurt other shareholders).

196. *See id.* ¶¶ 1, 7.

197. *See generally*, Griffith, *supra* note 8, at 44 n.10.

198. *See, e.g.*, *id.* It is important to note, however, that even "frequent filers" target the same transaction, the suits are not necessarily consolidated or transferred. This is because these suits tend to be multi-jurisdictional, and negotiations tend to happen quickly. *Id.* Accordingly, plaintiffs can avoid requirements in the PSLRA that would

One study found that, between 2014 and 2018, seven "frequent filer" plaintiffs filed 282 shareholder suits.[199] These "frequent filers" routinely prioritize securing the benefit of a settlement or a mootness fee over the merits of the case.[200] Interestingly, it is not uncommon for institutional entities, like a state's retirement system to act as a "frequent filer."[201]

In sum, plaintiff's attorneys have significant control over merger litigation and their incentives differ from their clients' incentives in significant ways. Additionally, the wide array of mechanisms by which plaintiff's attorneys can bring a claim with an uninterested plaintiff means the rest of the shareholder class is vulnerable to a collusive settlement that does not benefit them.

B. Factors that Could Have Incentivized the Shift Away from Class Actions

Many strategic factors incentivize plaintiffs to bring individual suits over class actions.[202] By pursuing individual suits, plaintiffs avoid some of the procedural hurdles and other challenges associated with class actions.[203] Additionally, in cases where there are divergent interests among a putative class, individual suits may be a more efficient way to pursue those claims.[204] By filing an individual suit, the plaintiff does not need to address the divergent interests and can proceed in the manner that best fulfills their goals.[205] This could be especially true in the merger context, where the wider class may be more frustrated by the prospect of litigation delaying a transaction that will benefit them substantially once completed.[206]

Recent developments from the gatekeepers of shareholder litigation—legislators, courts, and corporate boards—have also incentivized the shift to the "non-class" class.[207] Individual suits allow

---

consolidate the suits. *See* Gideon Mark, *Multijurisdictional M&A Litigation*, 40 IOWA J. CORP. L. 291, 291 (2015); *see also* Erickson, *supra* note 23, at 246.

199. Griffith, *supra* note 8, at 444.

200. *Id.* at 452–53.

201. *See* Erickson, *supra* note 23, at 249.

202. *See* Bultman, *supra* note 1 ("If the purpose of the lawsuit is to generate a fee for the lawyer to make the case go away, it's a lot easier to do that in an individual action.").

203. *See supra* Part I.

204. *See, e.g.*, Declaration of Richard Carrigan, *supra* note 182, ¶ 7.

205. *Cf. id.*

206. *See* Jeffries, *supra* note 4, at 58.

207. *See, e.g.*, *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 888 (Del. Ch. 2016).

plaintiffs to bypass litigation gatekeepers.[208] The following section explores how the PSLRA, the Delaware court's opinion in *In re Trulia*, and recent experiments with forum selection clauses in corporate bylaws have a role in encouraging plaintiffs to leave the class action behind. This section will also discuss how the "non-class" class prevails despite litigation gatekeepers' efforts to prevent this abusive litigation tactic.

1. The PSLRA

The PSLRA had a significant impact on securities litigation broadly, but also on merger litigation.[209] Legislators enacted the PSLRA to address perceived abuses in securities class actions.[210] The PSLRA introduced several provisions that made it more difficult for plaintiffs to bring and maintain securities class actions such as a heightened pleading standard and limitations on damages.[211] These requirements made it more difficult for a plaintiff to survive a motion to dismiss because they require a more detailed factual pleading.[212] The PSLRA also prevented plaintiffs from acting as lead plaintiff in more than five securities litigations in three years.[213]

The PSLRA may have also unintentionally incentivized plaintiffs to forgo bringing their claims as class actions.[214] By making it more difficult to pursue an action as a class, the PSLRA effectively increased the costs and risks associated with such claims.[215] Thus, the PSLRA shifted the incentives associated with securities litigation, so that individual claims would be less costly to pursue than class claims.[216] Additionally, the first

---

208. *See* Bultman, *supra* note 1 (noting individual plaintiffs evade the PSLRA).

209. *See* Erickson, *supra* note 23, at 250.

210. *See* S. REP. NO. 104-98, at 10 (1995); *see also* H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.) ("Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets.").

211. *See* 15 U.S.C. § 78u-4(b) (2000); *see also id.* § 78u-4(e).

212. *See* Jeffries, *supra* note 4, at 65; *see also* Erickson, *supra* note 23, at 250.

213. *See* 15 U.S.C. § 78u-4(a)(3)(B)(vi)(2000).

214. *See* Bultman, *supra* note 1 (explaining that individual plaintiffs evade the PSLRA).

215. *See* Coffee, Jr., *supra* note 172, at 700–01.

216. *Id.*

time a frequent filer brought an individual suit was in 2015.[217] Thus, it is likely that plaintiffs started bringing these suits individually to avoid the PSLRA which only applies to class actions.

Accordingly, although the PSLRA has succeeded as a deterrent to merger objection suits in part, it also shows that legislators are probably limited in their ability to effectively act as gatekeepers in merger objection litigation. The PSLRA places limitations on broad categories of suits like class actions generally, but it does not adequately address the underlying incentives driving frivolous merger objection suits. For example, it fails in placing limits on the average fee award for plaintiff's attorneys.[218] Moreover, plaintiff's attorneys can strategize around the PSLRA to continue bringing these suits by bringing individual suits. Lastly, legislators depend on the courts for enforcement.[219] Consequently, the courts' failure or refusal to enforce legislative provisions, like the PSLRA's disclosure requirement, limits legislators in their ability to function as litigation gatekeepers.

2. *In re Trulia*

The Delaware Court of Chancery's holding in *In re Trulia* may have also encouraged the shift to individual suits.[220] In particular, the *Trulia* court aimed to combat the practice of "disclosure-only" settlements.[221] The dispute in *Trulia* arose after a proposal for Zillow to acquire Trulia for $3.5 billion dollars.[222] After the merger was announced, four shareholders challenged it in court, bringing essentially identical claims of violations of fiduciary duties against Trulia.[223] The parties agreed to a disclosure-only settlement where plaintiffs would provide a broad litigation release.[224] The proposed settlement was rejected after the court found that it would not be fair or reasonable to the shareholders because the disclosures were not helpful.[225]

---

217. *See* Griffith, *supra* note 8, at 459 (documenting emergence of individual suit in frequent filer data); *see also* Erickson, *supra* note 23, at 247 (noting that the PSLRA reduced the average fee award).
218. *Cf. In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 888 (Del. Ch. 2016).
219. *See* Griffith, *supra* note 8, at 462.
220. *In re Trulia, Inc. S'holder Litig.*, 129 A.3d.
221. *Id.* at 887.
222. *Id.* at 888.
223. *Id.* at 888–89.
224. *Id.* at 889.
225. *Id.* at 899.

The *Trulia* decision made it clear that the Delaware Court of Chancery will no longer approve disclosure-only settlements unless they include "plainly material" disclosures.[226] The court clarified that a disclosure is "plainly material" only when it is "not a close call that the supplemental information is material as that term is defined under Delaware law."[227] The court's holding also requires plaintiffs to conduct an investigation into the claims in order to show the settlement was in the best interest of the shareholder class.[228]

Plaintiffs can flee the jurisdiction of the Delaware Chancery Court to avoid *Trulia*.[229] By bringing a suit in a state that does not apply the Trulia standard, plaintiffs avoid *Trulia* even if the court scrutinizes the claim. Importantly, the evidence shows that plaintiffs are fleeing Delaware for other jurisdictions.[230] This data shows plaintiffs are taking lengths to avoid *Trulia*, and they appear to even go so far as to avoid disclosing *Trulia* when filing in alternative forums.[231]

Moreover, because plaintiffs can voluntarily dismiss individual suits, plaintiffs could probably avoid *Trulia* without fleeing Delaware by filing individual suits.[232] In short, since the plaintiff can dismiss the action before the court has the chance to review the complaint,[233] they can effectively dismiss the claim before the court can apply *Trulia*. Thus, because the attorneys can still receive a large fee award without involving the courts,[234] attorneys can avoid Trulia without even leaving Delaware.

Accordingly, the Chancery Court's gatekeeping role in *Trulia* has been the subject of much debate.[235] *Trulia*'s gatekeeping succeeded in at least two ways. First, it enabled the courts to put pressure on attorneys to demonstrate why their case will provide meaningful benefits to

226. *Id.* at 898.
227. *Id.* at 898–99.
228. *Id.*
229. *See* Erickson, *supra* note 23, at 257.
230. *See* Emma Weiss, *In Re Trulia: Revisited and Revitalized*, 52 U. RICH. L. REV. 529, 532 (2018).
231. *See* Brief of Law Professors as Amici Curiae, *supra* note 9.
232. *See* Bultman, *supra* note 1.
233. *Id.*
234. *See* Griffith, *supra* note 8, at 465–66 (noting an example by which plaintiff's avoid involving the court but still extract fee awards).
235. *See* Erickson, *supra* note 23, at 255–58 (discussing the pros and cons of Trulia).

shareholders.[236] Second, *Trulia* does not categorically deny merger objection claims but rather signals to courts when they should be more involved in the matter.[237]

However, *Trulia* has not succeeded in the way Chancellor Bouchard hoped.[238] Although it raised the standard for disclosure-only settlement, it did not address other types of problematic resolutions, like when plaintiffs withdraw their claims after reaching a private agreement with the defendant.[239] Likewise, it does not apply to mootness resolutions, which have become increasingly commonplace.[240] As a result, *Trulia* might only encourage plaintiff attorneys to carefully avoid disclosure-only settlements when bringing these suits in Delaware.

Additionally, courts might not always have the necessary information or expertise to fully evaluate the merits of a case.[241] Despite its expertise in shareholder suits, even the court in *Trulia* acknowledged the challenge of valuing the benefit of the settlement.[242] This presents an important obstacle to the court's ability to function as a litigation gatekeeper in merger objection suits.

Finally, relying on the courts might not effectively address the underlying incentives driving merger objection litigation. As discussed earlier, plaintiff's attorneys have incentives to prioritize their interests over their clients.[243] However, increasing judicial oversight does not change the underlying incentive structure for the attorneys.[244] Accordingly, as demonstrated by the increase in merger objection suits

---

236. *See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 898 (Del. Ch. 2016) (discussing the "plainly material" standard when reviewing a fee).

237. *See id.* at 891–92, 896 (criticizing disclosure settlements and announcing a departure from the court's "its historical predisposition toward approving disclosure settlements").

238. *See In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 888 (decision evidences an intent to curb the abuses in merger objection suits).

239. *See* Bultman, *supra* note 1 (acknowledging many complaints are voluntarily dismissed before courts get involved).

240. *See* Griffith, *supra* note 8, at 457.

241. *See* Erickson, *supra* note 23, at 257.

242. *See In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 893–94 (reflecting on the difficulty in evaluating a proposed settlement in light of the lack of an adversarial process between plaintiffs and defendants).

243. *See supra* Part I.B.3

244. *See* Erickson, *supra* note 23, at 242 (noting the incentives for plaintiff's attorneys are to file suits that have positive monetary value for them).

outside of Delaware,[245] increasing judicial oversight has the effect of driving plaintiff's attorneys to pursue their economic interests in other forums.[246]

3. Corporate Boards

While the evidence does not suggest plaintiffs are turning to individual suits to avoid efforts from corporate boards to deter merger objection suits, corporate boards could take an increased role in preventing these claims.[247] Boards can act as litigation gatekeepers in merger objection litigation by adopting no-pay provisions and forum selection clauses.[248] No-pay provisions are clauses that require shareholders to agree not to seek any payment or benefit from defendants in litigation, such as a settlement or a fee award.[249] Forum selection clauses specify a particular forum, usually a state in which the company is incorporated, as the exclusive venue for all disputes related to a merger.[250] Thus, they deter efforts to "forum shop" for a jurisdiction that might be less likely to dismiss a merger objection suit.[251] These provisions were endorsed by the Chancery Court in *Trulia*[252] and have since become increasingly popular.[253]

One advantage to no-pay provisions is that they align the incentives of the attorneys with those of the shareholders.[254] Without the prospect of a settlement or a fee award, attorneys are less likely to pursue a meritless

245. *See* Mark, *supra* note 198, at 298 ("Most of the recent M&A litigation has been multijurisdictional.").

246. *See id.* at 301–02 (discussing the reasons plaintiff's attorneys file outside of Delaware).

247. *See supra* Part II.B (discussing the role of PSLRA and Trulia in causing the shift to individual suits); *see In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 899 (acknowledging that plaintiffs might flee bring suit outside of Delaware and suggesting that corporate boards should address this through forum selection clauses).

248. *See* Weiss, *supra* note 230, at 532, 544 (discussing forum selection clauses and no-pay provisions).

249. *See* Griffith, *supra* note 54, at 948–49.

250. *See* Weiss, *supra* note 230, at 538–39.

251. *See* Mark, *supra* note 198, at 301–02 (noting some plaintiffs might bring file suits in other jurisdictions to receive a more favorable standard of scrutiny).

252. *See In re Trulia, Inc. S'holder Litig.*, 129 A.3d at 899.

253. *See* Jeffries, *supra* note 4, at 95–96.

254. *See* Griffith, *supra* note 2, at 30.

claim or settle for nominal relief.[255] Forum selection clauses can similarly promote efficiency and reduce costs by centralizing merger objection litigation in one forum.[256] Similarly, forum selection clauses can prevent the high costs of duplicative litigation in multiple jurisdictions .[257]

However, these might not be as effective as they seem. For example, no-pay provisions might be difficult to enforce.[258] Courts might be reluctant to enforce no-pay provisions if they view them as unfairly limiting plaintiff's access to courts.[259] Importantly, the Delaware legislature has taken steps against implementing fee-shifting provisions.[260] While no-pay provisions are different from fee-shifting provisions,[261] both could make it harder for plaintiffs to afford the expenses of bringing a lawsuit.[262] Similarly, forum selection clauses can also be challenged on the grounds of public policy.[263] Some jurisdictions, like California, have declined to enforce forum selection clauses when the clauses were challenged by plaintiffs.[264] This means others plaintiffs could potentially strike down these clauses, rendering them utterly ineffective in the process.

Both forum selection clauses and no-pay provisions also risk acting as an overbroad response to meritless merger objection suits.[265] These provisions are not narrowly tailored to deter frivolous litigation and do not allow courts to apply them selectively to the merits of a claim.[266] Thus, these provisions are just as likely to deter meritorious claims as frivolous claims, suggesting they could be inadequate as a means of litigation gatekeeping.

---

255. *Id.*
256. *See* Erickson, *supra* note 23, at 275 (explaining that forcing litigation to take place in Delaware could eliminate inefficiencies); *see also* Griffith, *supra* note 2, at n.194 (acknowledging Delaware's political economy interests centralizing its role in merger litigation).
257. *See* Jeffries, *supra* note 4, at 98.
258. *See* Griffith, *supra* note 54, at 950.
259. *See id.* at 948–49.
260. *See* Weiss, *supra* note 230, at 542.
261. *See* Griffith, *supra* note 78, at 949 n.107.
262. *See* Weiss, *supra* note 230, at 542.
263. *See* Sciabacucchi v. Salzberg, C.A. No. 2017-0931-JTL, 2018 WL 6719718, at *23 (Del. Ch. Dec. 19, 2018) (plaintiff raised public policy argument).
264. *See* Galaviz v. Berg, 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011).
265. *See* Griffith, *supra* note 2, at 30.
266. *Id.*

Finally, neither option precludes a corporate defendant from merely waiving the enforcement of either clause.[267] Thus, if a defendant determines it is still more cost-effective to settle, regardless of the likelihood that either provision would lead to the claim being dismissed, then settlement is probably still the most likely outcome.[268]

In sum, corporate boards could use no-pay provisions and forum selection clauses to deter meritless merger objection claims. In some ways, both options appear promising as effective tools for preventing merger objection claims. However, they also demonstrate the limitations of corporate boards as litigation gatekeepers in this context. The remedies available to corporate boards are overbroad, and they are vulnerable to the courts nullifying them. Furthermore, corporate boards might also be unreliable as litigation gatekeepers in this context because they have the incentive to settle when settling is less costly than enforcing a forum selection clause or a no-pay provision.

Importantly, it is worth reiterating that even when corporate defendants settle because it is in their best interest to settle a merger objection suit, that does not mean the underlying practice of plaintiffs filing frivolous merger objection suits is benign. Ultimately, corporate defendants are using shareholder dollars to pay a group of attorneys for work that has provided no real value to the shareholders of the corporation. Even if the corporation can afford these costs, it does not make it harmless for them to do so. Additionally, even though an individual suit is less costly than a class action, corporate defendants may settle multiple individual suits over the same transaction simultaneously.[269] Thus, the total cost might rival the costs of a class action.[270]

267. *See* Erickson, *supra* note 23, at 261.

268. *Id.*

269. *See* Griffith, *supra* note 2, at 11 ("Currently, in the United States, over ninety-seven percent of deals attract at least one shareholder claim, and many attract several such claims filed in multiple jurisdictions."); *see also* Order Requesting Additional Information, *In re* Dell Techs. Class v. S'holders Litig., 2019 Del. Ch. LEXIS 952 (Del. Ch. June 6, 2019) (on file with author) (discussion of ex-ante agreements suggests defendants bargain with multiple plaintiffs in "mega-cases").

270. Evidence here is limited because defendants do not publicize this data. *See* Brief of Law Professors as Amici Curiae, *supra* note 9, at 8–9 (explaining that it is impossible to know how often plaintiffs and defendants settle "without filing suit" and that the "lack of transparency renders the cost of merger-related litigation statistically impossible to calculate."). However, evidence suggests defendants make multiple ex-ante fee

C. THE "NON-CLASS" CLASS HIGHLIGHTS THE LIMITS OF LITIGATION GATEKEEPERS

Importantly, the shift in strategy by plaintiffs to the non-class class highlights the weaknesses of each litigation gatekeeper. Individual non-class class suits in merger objection litigation are better at avoiding judicial scrutiny than class actions.[271] In class actions, plaintiffs must satisfy several legal requirements before they can proceed with a lawsuit.[272] These legal requirements are designed to ensure that the class action is the most appropriate mechanism for resolving the dispute.[273] The class certification requirement gives the court the opportunity to review the merits of the class's claims because the class must be certified by the court.[274] Moreover, once a court has certified a class, the court has increased obligations to supervise the litigation to ensure the class members' interests are protected.[275]

However, individual suits do not face these requirements. Thus, they are less likely to draw judicial scrutiny. When this reality is considered in light of the limited resources and expertise of courts outside of Delaware, it becomes clearer that it is harder for courts to gatekeep individual merger objection suits.[276] For example, it is unclear at what point courts with diverse dockets, like federal district courts, should closely scrutinize

agreements with different plaintiffs bringing merger objection suits. *See* Order Requesting Additional Information, *supra* note 269. Therefore, depending on the number of plaintiffs and the value of these agreements, the total figure defendants pay to plaintiff's attorneys could rival the $540,000 average fee award for a class action from 2012. *See* Daines & Kouminan, *supra* note 52, at 90-91. For example, if the ex-ante agreement is for $50,000 (which is a conservative estimate based on current data about mootness fees), defendants would pay a total of $550,000 to settle with 11 plaintiffs. *See* Order Requesting Additional Information, *supra* note 269; *see also* Griffith, *supra* note 54, at 941 (noting plaintiff's attorneys bargained for mootness fees ranging from $87,500 to $450,000 "without a release to shareholders not named in the complaint.").

271. *See supra* Part I.B.1 (discussing class action procedure protects shareholders).

272. *See id.*; *see also* FED. R. CIV. P. 23.

273. *See supra* Part I.B.1; *see also* Griffith, *supra* note 8, at 459 (discussing the ways class action procedure protects shareholders); Griffith, *supra* note 2, at 19–20.

274. *See* FED. R. CIV. P. 23.

275. *Supra* Part I.B.1; *see* Griffith, *supra* note 8, at 459 (discussing the ways class action procedure protects shareholders); *see also* Griffith, *supra* note 2, at 19–20.

276. *See* Erickson, *supra* note 23, at 257–58; *see also* Laster, *supra* note 166, at 133 (remarking on federal courts' complex and highly variable dockets, showing the limited strained nature of contemporary docket schedules).

every claim filed before it.[277] Additionally, courts have limited time and resources.[278] If the courts are going to be the primary litigation gatekeeper in merger litigation these limitations need to be addressed because, as discussed above, many other litigation gatekeepers ultimately rely on the courts.

Finally, individual suits might also be better at evading efforts from corporate boards to act as gatekeepers in merger objection litigation regardless of whether a court is involved. For example, a corporate defendant might be more willing to waive a no-pay provision against an individual plaintiff because the cost analysis favors a quick settlement.[279] Consequently, the "non-class" class can take advantage of the availability of the corporate defendant's waiver of these kinds of provisions. Accordingly, they can evade reasonable attempts at deterring meritless claims.

This highlights that the "non-class" class is concerning because such a class frequently incorporates defendants' broad liability releases in exchange for additional disclosures.[280] Corporate defendants are incentivized not just by a motive to avoid the expenses of litigating the claim, but by the possibility of purchasing broad liability releases.[281] Thus, the "non-class" class poses a greater risk to shareholders of collusive settlements because attorneys and corporate defendants have strong incentives to reach a deal, but non-party shareholders and litigation gatekeepers are unable to act as effective monitors of the terms of the deal once reached.

III. ACTION BY MULTIPLE GATEKEEPERS IS NECESSARY TO ADDRESS THE PROBLEM OF THE "NON-CLASS" CLASS

A mixed response involving multiple gatekeepers is best suited to respond to the problem of the "non-class" class. As highlighted by the preceding analysis, no singular gatekeeper is perfectly positioned to deter

---

277. *See* Laster, *supra* note 166, at 133 (remarking on federal courts' complex and highly variable dockets, showing the limited and strained nature of contemporary docket schedules).

278. *Id.*

279. *See* Erickson, *supra* note 23, at 261.

280. *See* Weiss, *supra* note 230, at 530–31.

281. *See* Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1084 n.142, 1122 (2013) (discussing the value of preclusion to defendants).

meritless merger cases.[282] Therefore, a solution to the “non-class” class must capitalize on the benefits of each gatekeeper.

This Note proposes that the following changes are necessary to effectively address the problem of the “non-class” class: (1) legislators should heighten the pleading requirement for merger litigation; (2) the courts should limit the application of the common benefit doctrine in merger litigation and lower expectations for attorneys’ fees; and (3) corporate boards should increase implementation of forum selection clauses and implement measures that would require the board to notify shareholders that a merger suit is pending and give nonparty shareholders the opportunity to intervene.

A. Heightened Pleading Requirement and Increased Implementation of Forum Selection Clauses

Taking lessons from what worked with PSLRA, heightened pleading requirements could enable more effective judicial enforcement.[283] Specifically, similar legislation could require plaintiffs to disclose their litigation history with their counsel and in merger litigation more generally at the pleading stage in an individual suit. By requiring plaintiffs to disclose their history with their counsel, instances like the Brody family and other frequent filers would be less likely to go unnoticed.[284] This would enable courts to scrutinize the underlying claims more adequately before a settlement is reached.

This heightened pleading standard is unlikely to prejudice meritorious claims. A heightened pleading standard does not necessarily require courts to conclude a claim is meritless. Rather, it compels plaintiffs to provide the kind of information that would help a court determine whether to scrutinize the merits further. In fact, even a frequent filer like Mrs. Brody could still overcome the negative inference that would flow from her extensive history of filing merger objection suits.[285] By pleading specific information about the benefit she expected her suit to yield to the shareholders, she could overcome the inference that her suit was designed primarily for the benefit of her attorneys instead of the shareholders.

---

282. *See supra* Part II.

283. *See* Erickson, *supra* note 23, at 250–52 (discussing the success of the PSLRA in reducing the number of suits in connection with its heightened pleading standard).

284. *See supra* Part I.

285. *See supra* Part 1.B.3 (discussing Mrs. Brody’s litigation history).

B. LIMITED APPLICATION OF THE COMMON BENEFIT DOCTRINE

While a heightened pleading standard would help put litigation gatekeepers in the strongest position to address meritless merger cases, a heightened pleading standard would not necessarily strike at the heart of the issue. The core of the problem lies in the collusive nature of these settlements. The two parties at the bargaining table, the plaintiff's attorneys and the corporate defendants, both have an interest in reaching a deal. As explained earlier, plaintiff's attorneys want fees while defendant want preclusion and a broad release from liability.

The common benefit doctrine allows plaintiff's attorneys to generate fees without providing any real benefit to their clients.[286] Thus, the common benefit doctrine fuels the conflicts of interest between attorney and client in merger litigation. Accordingly, a robust solution to this problem should not only fully empower gatekeepers to take action but should also strive to realign the attorney's incentives with those of the client. The best way to do so is to adjust the application of the corporate benefit doctrine in merger cases.

Courts should limit the application of the common benefit doctrine so that even when a party can meet its requirements, the fee the attorneys receive for a disclosure-only settlement is proportional to their client's financial interest in the corporation.[287] This helps to align the attorney's interests with the client's interests by reducing their ability to reap fees based on a benefit conferred on non-clients. Thus, the cost-benefit analysis for determining whether to pursue a merger claim would change. In short, an individual suit might not be as attractive when recovery is limited.

Additionally, because bargaining takes place in the shadow of the law, lowering expectations about the size of a fee that the courts would award would further limit plaintiff's attorney leverage at the bargaining table. Thus, even in situations where the court does not review the fee award, plaintiff's attorneys would not be in a position to request large fees because the defendants would know that the courts would reduce this figure. In this way, the plaintiff's limited ability to recover fees should diminish the defendant's willingness to pay them in private

286. *See generally* Griffith, *supra* note 54.

287. Courts could remain consistent with the framework for the common benefit doctrine through a rigorous analysis of whether the benefit is conferred to the rest of the shareholder class.

negotiations.[288] Thus, not only would changing the application of the common benefit doctrine decrease the incentive for plaintiffs to file suits, but it would also change the defendant's incentives, too. By limiting the fee award, defendants have less of an incentive to pay for preclusion and broad liability releases because the costs associated with litigating these issues would be lowered.[289]

While changing how the common benefit doctrine is applied might deter some plaintiffs from bringing cases, this change does not harm plaintiffs. In fact, it does not limit what plaintiffs can recover at all. Instead, it places a boundary on the nature of the fee award for their counsel. This is appropriate since it limits the fee to the individual proportion of their client's interest in the underlying transaction. If attorneys want to recover on a class-wide basis, they should certify a class and comply with the rigorous procedures safeguarding class actions.[290]

C. Corporate Board Notification and Opportunity to Intervene

These legislative and judicial solutions should be coupled with increased implementation of forum selection clauses by corporate boards. This would put these cases in front of judges with adequate expertise to handle these cases. Delaware has a well-established expertise in corporate law, and as such, it is well-suited to hear merger cases.[291] The Chancery Court's expertise would put it in a stronger position to serve as a gatekeeper in other jurisdictions because it is familiar with the controlling precedents and can use this knowledge to prevent plaintiffs who avoid precedents, like *Trulia*, from proceeding further with litigation.[292]

Additionally, these clauses assist in reducing duplicative claims which help deter frivolous suits generally. By requiring plaintiffs to sue in the same forum, similar suits can be joined more easily through

---

288. *See* Griffith, *supra* note 8, at 466.

289. A distinct possibility here is the opposite result: defendants might be more willing to settle frivolous claims because the relative cost to acquire preclusion and a broad liability release is low. However, some scholars remain convinced that lowering fee awards would incentivize defendants not to pay them in the first place. *See id.*

290. *See id.* at 464 (noting that attorneys seeking class-wide fees should do so through the recognized procedural methods for representing a class of shareholders).

291. *See* Erickson, *supra* note 23, at 257.

292. *See* Griffith, *supra* note 54, at 937–38 & n.42 (discussing reluctance of settling parties to even cite *Trulia* in forums outside of Delaware).

procedural mechanisms like consolidation.[293] This would make the management and resolution of multiple merger objection cases easier for all the parties involved and some of the burden on the courts would be reduced.

As a final measure, corporate boards should implement measures that would require the board to notify shareholders of a merger suit and give non-party shareholders the opportunity to intervene. In so doing, corporate boards would introduce another potential gatekeeper to monitor merger suits. Thus, the plaintiff's attorneys could not easily evade the supervision of other shareholders by refusing to file a class action. Furthermore, intervening shareholders would be in a better position to inform the courts as to the value of a potential settlement because the process would be more adversarial.[294] Intervening shareholders would lack some of the incentives to settle motivating plaintiff's attorneys and corporate defendants. In sum, this would improve the court's ability to gatekeep meritless merger cases and cut against the collusive nature of settlement in merger objection suits.

CONCLUSION

In sum, the "non-class" class presents a multi-faceted issue. On the one hand, it enables the plaintiff's attorneys to generate fees without providing value to their clients and the group of shareholders who supposedly benefit from the lawsuit. This clogs court dockets with claims that provide no real value to anyone other than the attorneys involved.

On the other hand, the "non-class" class demonstrates how shareholder suits are vulnerable to collusive settlements because

293. Rule 42 of Civil Procedure for the Superior Court of the State of Delaware enables courts to bring join multiple actions into a single proceeding before a single court. *Id.*:

> When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

294. *See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 893–94 (Del. Ch. 2016) (discussing how the lack of an adversarial process made it difficult for courts to evaluate a potential settlement).

corporate defendants also have the incentive to settle as part of a market for claim preclusion and broad liability releases. This suggests that these suits are not only concerning because they are frivolous. Rather, these suits illustrate how agents of the shareholders can take advantage of their position to pursue their best interests at the expense of the shareholders. The attorneys reap fee awards that would otherwise flow to the shareholders as part of the benefit of the underlying merger or acquisition. Management secures protection from liability for wrongdoing in the underling transaction, insulating management from shareholder accountability.

Against this backdrop, the need for litigation gatekeepers to monitor these settlements is clear. The "non-class" class illustrates the difficulty—on part of shareholders and litigation gatekeepers—to monitor merger objection litigation. In light of the problem, the best way to address the issue is by tackling the conflicted incentives driving the "non-class" class. This can be achieved by increasing the pleading requirements for all merger objection suits, changing the common benefit doctrine, and increasing the shareholder's opportunity to intervene by centralizing merger objection litigation in Delaware and adopting notice requirements.