Trulia 2.0? The Case for a 'Plainly Beneficial' Standard

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In 2016, the Delaware Court of Chancery held in *In re Trulia Inc. Stockholder Litigation* that what it called "disclosure settlements"—settlements in which a class of stockholders solely received supplemental proxy disclosures in exchange for a classwide release of claims—"would be met with continued disfavor unless the supplemental disclosures address a plainly material misrepresentation or omission." The *Trulia* court sought to address the inherent difficulty of quantifying the often theoretical benefits that disclosure-only settlements purported to provide by applying a "plainly material" standard that eliminated the need for future decisions to make close materiality calls.

Today, a new species of litigation—which we call "foot fault litigation"—is presenting the same core problem as the pre-*Trulia* disclosure settlements and warrants a similar judicial solution. Foot fault litigation involves challenges to corporate acts or provisions of organizational documents premised on alleged technical violations of the certificate of incorporation, bylaws, or Delaware General Corporation Law (DGCL). Recent examples of this type of litigation include: (1) challenges to disclosures regarding treatment of broker non-votes in routine annual meeting proxy statements; (2) challenges to stockholder meeting notices sent more than 60 days before the meeting date; and (3) facial challenges to bylaw or contractual provisions that have neither been used nor proposed to be used (for example, a provision in a rights plan stating that certain determinations of the board are "conclusive and binding") or that are invalid under Delaware law or binding judicial precedent (for example, a bylaw provision conflicting with a charter provision). In each instance, while there could be *some* benefit associated with addressing these types of issues, the *magnitude* of that benefit is often difficult to quantify with precision. The Court of Chancery addressed an analogous valuation difficulty in *Trulia*. There, the court identified three basic factors indicating that the non-monetary benefits conferred upon stockholders in that case and others (i.e., supplemental disclosures) were of dubious value.

First, the *Trulia* court observed that the litigation landscape created perverse incentives for class counsel. While the disclosures that stockholders received offered the "theor[etical]" benefit of being "better informed," "six-figure fees" were "routinely" granted to "certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints" and "settling quickly on terms that yield no monetary compensation to the stockholders they represent." This fueled an "explo[sion]" of deal litigation "beyond the realm of reason" because plaintiffs could plausibly claim that "more information is better" in virtually every deal.

Second, corporate defendants facing deal litigation had strong incentives not to litigate the merits of the claim. In the context of disclosure settlements, factors driving those incentives included the threat of a court order enjoining the transaction, the corporation's interest in securing a class-wide litigation release functioning as "deal insurance," and a general desire to mitigate expense and distraction. Compounding the problem was the fact that settlements had historically been approved even when the additional information "was not material, and indeed may [have been] of only minor value to the stockholders," making its disclosure an easy concession. Defendants' willingness to settle suggested that the disclosures lacked value.

Third, the Court of Chancery had inadequate means to assess the value of supplemental disclosures. Disclosure settlement cases involved "little or no motion practice," a "sparse" discovery record, and no adversarial briefing on the settlement itself. Although plaintiffs submitted briefs and affidavits in support of the settlement, defendants typically

offered no opposing viewpoints, requiring a "law-trained judge" to play "devil's advocate in probing the value of the 'get' for stockholders." This, again, suggested that the benefit might be miscalculated.

All three factors created an untenable risk that the "get" in the settlement (the disclosures) provided insufficient value for the "give" (the release). *Trulia* sought to directly combat that risk by holding that it would deny future settlements unless the new information was "plainly material" such that materiality is "not ... a close call."

The three factors that motivated the *Trulia* court to adopt the "plainly material" rule for disclosure settlements are present in foot fault litigation.

First, in foot fault litigation, stockholders often receive non-monetary benefits while plaintiffs' counsel receive significant cash awards for providing them. The litigation involves limited motion practice, complaints at times are duplicated from forms, and there is little or no evidentiary record. As was the case pre-*Trulia*, these dynamics have fueled a flood of demand letters and litigation in the Court of Chancery by repeat players who scan public filings for recurring issues.

Second, corporate defendants have incentives not to litigate these cases, often because providing therapeutic benefits and paying plaintiffs' counsel tends to be less costly than litigating. As a result, Delaware courts do not always have an opportunity to directly address whether the underlying foot fault claims are valid, which can allow meritless foot fault issues to persist as traps for unwary corporations and practitioners in the future.

Third, while foot fault claims, when actually litigated, are more likely to involve adversarial briefing than the disclosure-only settlements of the pre-*Trulia* era, the Court of Chancery is often faced with the difficult task of attempting to value hypothetical benefits without being presented with any real evidence of value. Although we are aware of instances in which an outsized fee award for a foot fault "fix" precipitated or contributed to a corporation's decision to file for bankruptcy, we are not aware of any studies that have shown with analytical rigor the value of curative measures taken in response to foot fault litigation. And, as other commentators have argued, the fact that Sections 204 and 205 of the DGCL now empower corporations to retroactively validate acts that otherwise suffered from technical defects casts further doubt on the benefits afforded by foot fault litigation. (See John Mark Zeberkiewicz & Robert B. Greco, "Reassessing a Defused 'Time Bomb': A Fresh Look at Corporate Foot Faults and the Benefits Conferred by Their Discovery," 49 Del. J. Corp. L. 1 (2024).)

Adopting a *Trulia*-like "plainly beneficial" standard in foot fault litigation could help to address these issues. Under such a standard, plaintiffs should not be entitled to a significant fee award unless they can clearly demonstrate that the benefit to the company's stockholders is "not a close call" and that their actions were the primary cause of that benefit. Plaintiffs seeking to address novel issues and prevent clear statutory violations should get credit for their efforts under such a standard, but repeat players should not be rewarded for creating ambiguities in the law for the sole purpose of wielding them against companies to collect a quick fee. Once a case or decision on a particular "foot fault" exists or it otherwise becomes well known to the corporate community, future plaintiffs' counsel should not receive windfall fees for simply pointing out those same issues to others. A "plainly beneficial" standard should be designed to create desirable incentives by rewarding efficient litigation while discouraging the rest. Until then, foot fault litigation will continue to impose costs analogous to the "deal tax" paid pre-*Trulia*: this time, in the form of a "governance tax" on public Delaware corporations.

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