



## The Future of Disclosure-Only Merger and Acquisition Class-Action Settlements in Michigan Post *Trulia*

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One of the most distinctive recent developments in class-action litigation has been the rise of merger and acquisition objection litigation. Over the past five years, nearly every corporate merger and acquisition deal valued at more than \$100 million has resulted in a flurry of shareholder litigation.<sup>1</sup> Typically, most of these cases were resolved as quickly as they began based on disclosure-only settlements.

Nationwide, approximately 80 percent of these suits have concluded with settlements in which the merging corporation agrees to provide the shareholders with additional information about the financial state of the organization or structure of the transaction (for example, deal protection mechanisms) to supplement the proxy materials, allowing the shareholders to cast more informed votes in deciding whether to accept the proposed merger and acquisition agreement.<sup>2</sup> In return, the shareholders as a class agree to release all future claims against the corporation and its fiduciaries relating to the sale or merger transaction.<sup>3</sup> The stockholders generally obtain no monetary compensation, although the attorneys representing the plaintiff class receive a fee award from the corporation. For a long time, the courts—both in Delaware and elsewhere—approved the vast majority of these class-action settlements as being fair and reasonable.

### The *Trulia* decision

In recent years, however, the Delaware Court of Chancery has displayed increasing skepticism and even antipathy toward disclosure-only settlements, questioning and at times intensely scrutinizing whether the shareholders have received sufficient benefit from the disclosed information to justify a broad release of claims.<sup>4</sup> This trend reached its apex in January 2016 with Chancellor Bouchard's opinion in *In re Trulia, Inc Stockholder Litigation*.<sup>5</sup>

The *Trulia* case arose as a result of a proposed merger between Trulia and Zillow, two online providers of listing information for residential real-estate sales and rentals.<sup>6</sup> Almost immediately after the two companies announced the merger, four independent shareholders filed class-action complaints against Trulia and several of its directors for breach of fiduciary duty, seeking to preliminarily enjoin the transaction.<sup>7</sup> Several months later, the plaintiffs and Trulia reached a settlement in which Trulia agreed to provide its shareholders with additional financial ratios and industry comparisons.<sup>8</sup> In return, the shareholders agreed to release “any claims arising under federal, state, statutory, regulatory, common law, or other law or rule” held by any member of the proposed class relating in

any conceivable way to the transaction, with the exception of antitrust claims.<sup>9</sup>

In evaluating the proposed settlement, Chancellor Bouchard emphasized the duty of the court to exercise its independent judgment in a case-by-case examination of “not only the claim, possible defenses, and obstacles to its successful prosecution, but also the reasonableness of the ‘give’ and the ‘get’”<sup>10</sup>—in other words, the court must weigh the assessed viability of the claims the shareholders give up against the value of the additional information they receive. The Chancery Court cautioned against what it perceived as the proliferation of “routinely fil[ed] hastily drafted complaints” in this type of deal litigation and the tendency of defendant corporations to “self-expedite” the settlement by volunteering to release what may turn out to be disclosures of little value.<sup>11</sup> Additionally, Chancellor Bouchard emphasized the breakdown of the adversarial system in the negotiation of these settlements: namely, the defendant corporation has significant incentives to obtain a release from potentially meritorious (and expensive) litigation by offering up desired information, and the plaintiffs’ attorneys generally receive substantial fees as part of the settlement.<sup>12</sup>

Consequently, to preserve the adversarial incentives of litigation, the court advocated additional judicial review of proposed disclosure settlements through two procedures: (1) in a preliminary injunction hearing in which the plaintiff would bear the burden of demonstrating that the omitted information is reasonably likely to be material<sup>13</sup> and (2) in a mootness fee hearing to determine attorneys’ fees after the corporation has voluntarily disclosed the sought-after information.<sup>14</sup> In both contexts, the adversary system is preserved because no release is at issue.

Significantly, Chancellor Bouchard announced that the Court of Chancery would disfavor disclosure-only settlements going forward unless the supplemental disclosures were plainly material and the release was narrowly circumscribed

to cover only those claims related to the sale process with sufficient exposition in the record for the court to evaluate the relative give and get.<sup>15</sup> The materiality of the disclosure “should not be a close call” under Delaware law.<sup>16</sup> Although the court encouraged other jurisdictions to adopt its approach, it also acknowledged that these other jurisdictions are not bound by its ruling and may evaluate disclosure settlements differently.<sup>17</sup> To date, *Trulia* represents the last word from the Court of Chancery on this topic.

### The effect of *Trulia* on Michigan law

The effect of the *Trulia* decision on Michigan law governing disclosure settlements has yet to be determined. Michigan’s corporate law generally follows that of Delaware when Delaware law has been explicitly incorporated into Michigan law or when no independent body of Michigan law exists.<sup>18</sup> However, Michigan’s class-action statute<sup>19</sup> differs from that of Delaware<sup>20</sup> in one significant respect: Michigan expressly requires that class members be given the opportunity to opt out and be excluded from the settlement,<sup>21</sup> thereby preserving any additional claims they might have against the corporation to be pursued individually later. Thus, there is less risk of prejudice to the interests of individual shareholders who disagree with the disclosure settlement or, more specifically, with the court’s evaluation of the strength of their potential claims.

Additionally, with regard to class-action litigation generally, Michigan courts have tended to look to caselaw interpreting Federal Rule of Civil Procedure 23 for guidance in applying MCR 3.501 since “Michigan’s requirements for class certification are nearly identical to the federal requirements, [and] similar purposes, goals, and cautions are applicable to both.”<sup>22</sup> Relying on this body of law, Michigan courts tend to apply a three-part test from *Williams v Vukovich*,<sup>23</sup> which requires that (1) a court must first preliminarily approve the

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## fast facts

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- In the last five years, almost every corporate merger and acquisition deal valued over \$100 million has resulted in a class-action shareholder lawsuit. In the last several years, 80 percent of these suits have concluded with settlements in which the merging corporation agrees to provide the shareholders additional disclosures in return for a release and an attorney fee award.
- It is unclear whether Michigan courts will follow Delaware’s lead in evaluating proposed class-action shareholder settlements, but the only Michigan business court to address the issue thus far—*In re Compuware Corp Shareholder Litigation*—declined to do so.

## The *Trulia* test may simply be a necessary tool for separating the meritorious wheat from the frivolous chaff in Delaware's abundant field of shareholder litigation.

proposed settlement; (2) an opportunity to opt out must then be offered to class members; and (3) the court must determine whether the proposed settlement is fair, reasonable, and adequate.<sup>24</sup> In assessing the third prong of the test in *Vukovich* as set forth in *Poplar Creek Dev Co v Chesapeake Appalachia*,<sup>25</sup> courts must balance seven factors:

- (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.<sup>26</sup>

Michigan courts have also recognized an overriding public interest in the settlement of lawsuits.<sup>27</sup>

Thus, Michigan courts faced with class-action shareholder lawsuits must decide between these two considerations: defer to Delaware's expert corporate law or defer to the body of law that has developed around FR Civ P 23. Since the vast majority of shareholder litigation—at least to date<sup>28</sup>—occurs in Delaware, Michigan courts have had scant opportunity to develop a similarly robust body of caselaw addressing disclosure settlements. As a result, whether and how the *Trulia* decision will affect the choice between Delaware law and civil

procedure caselaw remains to be seen. Interestingly, the court in *In re Consumers Power Co Derivative Litigation*<sup>29</sup> found it appropriate to look to Delaware's rule on derivative suits for guidance in interpreting the similarly worded federal rule.<sup>30</sup>

All of this suggests that a Michigan court could decide to apply the three-part *Vukovich*/seven-factor *Poplar Creek* test and then incorporate *Trulia*'s "plainly material" requirement into the fourth factor of the test: likelihood of success on the merits. This appears to be precisely the approach adopted by the only Michigan court to consider a proposed disclosure-only settlement since *Trulia* was decided. Hon. Lita Popke, a Wayne County business court judge ruling from the bench in *In re Compuware Corp Shareholder Litigation*,<sup>31</sup> expressly held that "public policy favor[s] settlements of class action lawsuits" and went on to find that "Michigan's class action rules are similar to federal rules" and thus the court should look to federal law for guidance.<sup>32</sup> In considering the objectors' likelihood of success on the merits, Popke specifically addressed the *Trulia* decision's materiality requirement and found that the plaintiffs had met their burden of showing that the information was material and the settlement reasonable.

Most significantly, Popke strongly suggested that Michigan courts should not necessarily follow the Court of Chancery's decision in *Trulia*. While acknowledging the trend in Delaware to look upon disclosure-only settlements with disfavor, Popke heavily emphasized the "absolutely crucial...distinction" between Delaware and Michigan law: the opt-out provision of MCR 3.501(A)(3), which preserves the interests of objecting shareholders by giving them the option to opt out and litigate their claims if they "don't like" the proposed settlement.<sup>33</sup> In addition, Popke's decision in *Compuware* went on to suggest that *Trulia* is a product of the peculiar circumstance of the Delaware Court of Chancery as a forum for much of the shareholder litigation that has proliferated in the last decade rather than a fundamental attack on disclosure settlements in general.<sup>34</sup> As such, the *Trulia* test may simply be a necessary tool for separating the meritorious wheat from the frivolous chaff in Delaware's abundant field of shareholder litigation.<sup>35</sup> These same concerns do not arise in Michigan's system, and thus, the rule need not apply.



## Strategic takeaway

To summarize, in response to the growing volume of disclosure-only settlements in shareholder merger litigation, the Delaware Court of Chancery has been increasingly skeptical of the value of these disclosures, and in Chancellor Bouchard's recent *In re Trulia* decision, effectively denounced these settlements and articulated a higher standard of materiality, instructing courts to carefully scrutinize the relative give and get between the corporation and its stockholders. Although it is unclear whether Michigan courts will follow Delaware's lead in evaluating proposed settlements, the only Michigan court to address the issue thus far has declined to do so. While *In re Trulia* appears to have led to a decline of class-action shareholder lawsuit filings in Delaware,<sup>36</sup> disclosure-based settlements and class-action merger and acquisition litigation may be alive and well in the future for Michigan. ■

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## ENDNOTES

1. Cain & Solomon, *Takeover Litigation in 2015* (January 14, 2016), p 2.
2. See Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions* (2014), p 4 <<https://www.cornerstone.com/GetAttachment/73882c85- ea7b-4b3c-a75f-40830eab34b6/Shareholder-Litigation-Involving-M-and-A-2013-Filings.pdf>> (accessed July 5, 2017).
3. See Reeder & Myers, *Delaware Chancery Court Resets the Rules of the Road for Disclosure-Only Settlements*, 69 Vand L Rev En Banc 41, 43 (2016).
4. See, e.g., *In re Riverbed Tech, Inc Stockholders Litigation*, unpublished opinion of the Delaware Court of Chancery, issued September 17, 2015 (Docket No. 10484-VCG); *In re Transatlantic Holdings Inc Stockholders Litigation*, unpublished opinion of the Delaware Court of Chancery, issued March 8, 2013 (Docket No. 6574-CS).
5. *In re Trulia, Inc Stockholder Litigation*, 129 A3d 884 (Del, 2016).
6. *Id.* at 888.
7. See *id.* at 889.
8. See *id.* at 900.
9. *Id.* at 890.
10. *Id.* at 891 (internal quotation marks omitted).
11. *Id.* at 892.
12. See *id.* at 892–896.
13. See *id.* at 896.
14. See *id.* at 896–897.
15. *Id.* at 898.
16. *Id.*
17. *Id.* at 899.
18. See *In re Consumers Power Co Derivative Litigation*, 132 FRD 455, 462 (ED Mich, 1990).
19. MCR 3.501.
20. Del Ch Ct R 23.
21. MCR 3.501(A)[3].
22. *Henry v Dow Chem Co*, 484 Mich 483, 499; 772 NW2d 301 (2009); see also *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997) (“[I]n the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule for guidance.”)
23. *Williams v Vukovich*, 720 F2d 909 (CA 6, 1983).
24. See *id.* at 921–922.
25. *Poplar Creek Dev Co v Chesapeake Appalachia LLC*, 636 F3d 235 (CA 6, 2011).
26. *Id.* at 244.
27. *Brenner*, 222 Mich App at 133.
28. It remains to be seen whether corporations will decide to include forum-selection provisions in their charters to avoid the adverse effects of the *Trulia* decision, as the Court of Chancery suggested they might.
29. *In re Consumers Power*, 132 FRD 455.
30. *Id.* at 462.
31. *In re Compuware Corp Shareholder Litigation*, No. 14-011437-CB, Tr 60:4–60:7; 68:5–68:10 (March 24, 2016).
32. *Id.* at Tr 60:4–60:7; 68:5–68:10.
33. *Id.* at Tr 31:18–32:3.
34. *Id.* at Tr 68:5–68:10.
35. *Id.*
36. Sinha, *Shareholder Litigation Involving Acquisition of Public Companies: Review of 2015 and 1H 2016 M&A Litigation* (August 2, 2016) <<https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016>> (accessed July 5, 2017).