IT IS WINTER IN DELAWARE FOR MERGER LITIGATION. AND IT MIGHT BE AUTUMN FOR DELAWARE'S DOMINANCE

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1. Although blatantly evocative or somehow suggestive, the metaphor of winter for merger litigation in Delaware is far from being just a poetical image or a mere wordplay – and so it is for the Autumn of Delaware's corporate dominance.

Evidence is clear and convincing that a lawsuit challenging a merger before Delaware courts is currently less likely to be successful than just five years ago – which does not mean that there is a decline *tout court* of the corporate litigation.

Indeed, in a rather short time, the legal framework has substantially changed, shifting to a less favourable position for the actual protagonist of such monitoring device: the plaintiff's attorney filing the case.

As a response to an unreasonable increase in deal litigation "beyond the realm of reason"[1], the principles stated in *Corwin*[2] and in *M&F Worldwide*[3] did extend the shield of the business judgment rule, under some conditions; and made the prosecution of merger litigation far more difficult before Delaware judges.

[1] *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 894 (Del. Ch. 2016); also quoting *In re Sauer-Danfoss Inc. Shareholders Litigation*, 65 A.3d 1116, 1135-43 (Del. Ch. 2011). *See* W.B. CHANDLER, A.A. RICKEY, A. *The Trouble with Trulia: Re-evaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims*, in *Can Delaware Be Dethroned?: Evaluating Delaware's Dominance of Corporate Law*, S.M. BAINBRIDGE, I. ANABTAWI, S.H. KIM, J. PARK (Eds.), Cambridge, 2018, p. 145.

[2] *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015).

[3] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014).

In addition, with *Trulia*[4], Delaware Chancery Court changed its standard on settlement countenance, proclaiming it would have no longer validated disclosure-only settlements, without a careful scrutiny on actual shareholders' benefits.

But whilst the result of a decrease, if not the complete eradication, of frivolous litigation is obviously desirable, some doubts have arisen about the actual outcome of this combination of new rules; and about the collateral effect of this shift not only in terms of the efficiency (if ever) of the classical mechanism of private enforcement but also in terms of corporate governance and, ultimately, of Delaware's role in American corporate law.

For some of these unwelcome effects, Delaware legislation has even been amended, enacting a provision unequivocally authorising forum selection bylaws – which companies have then massively adopted.

However, again, litigation dynamics have proved to be highly adaptive; and more than a strategy has been conceived to circumvent the rule and get around it. Given the entrepreneurial nature of corporate litigation, an adaptive response was somehow expected. But the extent and the consequence could be surprising; and some wounds appear to be somehow self-inflicted[5].

That is to say that the issue seems to be going well beyond the traditional Delaware's dilemma in maintaining a balance between efficient management and shareholders' protection.

2. The debate on Delaware's dominance has been going on for some years in a lively way; and so has been the alert on its decline.

For over a century, Delaware has dominated the corporate charter competition: half of all public companies are incorporated here; and 1209 North Orange Street in Wilmington, Delaware, has become an iconic address in

[4] *In re Trulia, Inc. Stockholder Litigation*, cit.

[5] S.M. BAINBRIDGE, *Fee-Shifting: Delaware's Self-Inflicted Wound*, in *Del. J. Corp.*, 2016, Vol. 40, p. 851 refers to the reversal of *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014) as a "self-inflicted wound" that "threatens to undermine Delaware's profitable position as the leading state of incorporation"; but the formula might be more broadly suitable to the whole described framework.

contemporary society, a site of American power rivalling even 1600 Pennsylvania Avenue NW, Washington D.C[6].

Some commentators have argued states' competition for incorporations is nothing more than an illusion, almost a myth, as no state is – or at least was until some years ago – engaged in substantial efforts to attract incorporations of public companies and to challenge Delaware's dominance on charters' market[7].

Such prominence depends primarily and relies largely upon Delaware's courts and their expertise on the matter: a specialisation developed over years, with no equals in other jurisdiction[8].

Yet, it now faces a menace that might erase this traditional competitive advantage.

Indeed, a famous study, published at the end of 2012, was already wondering whether Delaware were losing its cases – brilliantly remarking the reasons for such *trend*[9]. But, as said, in the last five years, the mentioned decisions on merger litigations and some controversial amendments to the Delaware General Corporation Law have brought the question back up again in a more urgent way.

It is not a casualty that the new warning signs are coming just from case law involving large M&A and leveraged buyout transactions. It is well known the pivotal role played by private enforcement in the American corporate governance pattern; and it is equally known that merger litigation is a significant, essential part of corporate litigation. Moreover, in the context of a public company, mergers' private litigation is the main mechanism for challenging the price, fairness or disclosure, as SEC enforcement actions have traditionally been limited to some particular kind of transactions, such as reverse mergers[10].

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[6] *See* L.M. LOPUCKI, *Delaware's Fall: The Arbitration Bylaws Scenario*, in *Can Delaware Be Dethroned?*, cit., pp. 35-56; and *ibid.*, C. ELSON, *Why Delaware Must Retain Its Corporate Dominance and Why It May Not.*, pp. 225-237.

[7] M. KAHAN, E. KAMAR, *The Myth of State Competition in Corporate Law*, in *Stan. Law Rev.*, 2002, Vol. 55, p. 684.

[8] *See* B.S. BLACK, *Is Corporate Law Trivial?: A Political and Economic Analysis*, in *NW. U. Law Rev.*, 1990, Vol. 84, partic. p. 589.

[9] J.A. ARMOUR, B. BLACK, B. CHEFFINS, *Is Delaware Losing its cases?*, in *Jour. Emp. Leg. St.*, 2012, Vol. 9, I. 4, pp. 605-656. Recently, *see* R.B. THOMPSON *Delaware's Dominance: A Peculiar Illustration of American Federalism*, in *Can Delaware Be Dethroned?*, cit., pp. 57-77.

[10] And even in such cases, the actions are typically addressed to disclosure issues. M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *The Shifting Tides of Merger Litigation*, (December 4, 2017), in *Vanderbilt Law Review*, 2018 forthcoming; *U. of Penn., Inst. for Law & Econ Research Paper* No. 17-6; UC *Berkeley Public Law Research Paper* No. 2922121; *Vanderbilt Law Research Paper* No. 17-19; *European*

Being the core of corporate litigation, it is not a surprise that case law on the matter is also particularly sensitive and perceptive to trends and issues.

And an issue is, beyond a shadow of a doubt, the extraordinarily high litigation rate recorded. As the Court noted in *Trulia* case, "in just the past decade, the percentage of transactions of $100 million or more that have triggered stockholder litigation in [Delaware] has more than doubled, from 39.3% in 2005 to a peak of 94.9% in 2014"[11].

Over 96% of publicly-announced mergers have attracted at least a lawsuit – often more than one and in multiple jurisdictions[12]; so that some critics have referred to the phenomenon as an actual "merger tax" more than a monitoring device, because, as mentioned, these lawsuits are rarely able to derail the transaction and are mostly settled for supplemental disclosures and for the provision of highly-remunerative fees for the plaintiff's counsel[13].

Needless to say that the possible lack of material benefit to shareholders has not only fostered the criticism but has also frustrated any deterring function of the enforcement pattern, making such number of cases unbearable for the system.

In other terms, the perception that levels of merger litigation were unreasonable and the conclusion that a substantial proportion of these cases were not providing value reclaimed a response: it requested "corporate constituents" to raise the bar and to make it more difficult for plaintiffs to win a lawsuit challenging a merger and more difficult for their attorneys to collect a fee award.

And if not by the fee-shifting bylaws of *ATP Tour v. Deutscher Tennis Bund*[14] – prohibited shortly after the decision on their validity – the reaction has operated through the (imperfect) combination of *Corwin*, *M&F Worldwide*, *Trulia* standards and of the new provisions banning fee-shifting bylaws and permitting the forum selection clauses[15].

Corporate Governance Institute - Law Working Paper No. 375/2017, p. 2, nt. 1, available at: http://scholarship.law.upenn.edu/faculty_scholarship/1728 .

[11] *In re Trulia, Inc. Stockholder Litig.*, cit., at 892.

[12] M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *op. cit.*, p. 1.

[13] W.B. CHANDLER, A.A. RICKEY, A. *op. cit.*, p. 146 quoting *City Trading Fund v. Nye*, 2015 WL 93894, at 13 (N.Y. Super. Ct. Jan. 7, 2015) – where noted as "the ubiquity and multiplicity of merger lawsuits, colloquially known as a «merger tax», has caused many to view such lawsuits with a certain degree of skepticism"

[14] *ATP Tour, Inc. v. Deutscher Tennis Bund*, cit.

[15] DEL CODE ANN. tit. 8, §§ 102(b)(4), 109(b) (West 2017). Actually, the legislation seems to codify or at least to follow a principle affirmed by Delaware Chancery Court in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) – in which the judges upheld the validity of a board-adopted

Nevertheless, as anticipated, such reaction appears to be to some extent both excessive and unproductive – or even detrimental for Delaware jurisdiction. But before coming to a conclusion, it is convenient to proceed in an orderly fashion.

3. In 2015, confirming a 2014 decision of Chancery Court[16], the Delaware Supreme Court held, in *Corwin v. KKR Fin. Holdings*, that the business judgment rule is "the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully-informed, uncoerced majority of the disinterested stockholders"[17].

In other terms, in these type of transaction, previously operating under the Revlon standard of enhanced business judgment rule[18] (the so-called Revlon-land)[19], the approval of a fully-informed, uncoerced majority of the disinterested stockholders produces a "cleansing effect" and limits the judicial review to the scrutiny admitted under the business judgment rule. As a consequence, unless proved irrational, the merger will be shielded and the case is unlikely to survive a motion to dismiss.

The reasons behind these findings are somewhat simple. As the Court affirmed "when a transaction is not subject to the entire fairness standard, the long-standing policy of [Delaware] law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves". As a matter of fact, "when the real parties in interest — the disinterested equity owners — can easily protect themselves at the ballot box by simply voting no, the

forum selection bylaw. Recently, *see* J.E. FISCH, *Governance by Contract: The Implications for Corporate Bylaws*, (March 8, 2017), in *California Law Review*, 2018 forthcoming; in *Un. Penn., Inst. for Law & Econ. Research Paper* No. 17-13; in *European Corporate Governance Institute - Law Working Paper* No. 350/2017, available at SSRN: https://ssrn.com/abstract=2930529 .

[16] *In re KKR Financial Holdings LLC Shareholder Litigation*, Consol. C.A. No. 9210-CB (Del. Ch. Oct. 14, 2014).

[17] *Corwin v. KKR Financial Holdings LLC*, cit., at 304. *See*, for references, P. MATERA, F.M. SBARBARO, Cleansing effect *and* standard *di* judicial review *nella recente giurisprudenza statunitense*, in *Comp. dir. civ.*, 2017, Vol. I, pp. 1-49.

[18] Extending the judicial scrutiny from rationality to reasonableness.

[19] The expression is widely used by scholars – in last years, *see* S. M. BAINBRIDGE, *The Geography of* Revlon-*Land*, in *Ford. Law Rev.*, 2013, Vol. 81, p. 3277 or M. MANESH, *Defined by Dictum: the Geography of* Revlon-*Land in Cash and Mixed Consideration Transactions*, in *Vill. Law Rev.*, 2014, Vol. 59, n. 1 p. 2 –, although criticised by courts: *see*, *e.g.*, *In re Rural Metro Corp. Shareholders Litigation*, 88 A.3d 54, 84 (Del. Ch. 2014) – but see also *In Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003), where it is used by the court itself.

utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them. The reason for that is tied to the core rationale of the business judgment rule, which is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders)"; that is why in circumstances "where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form"[20].

Albeit plainly logical[21], the decision has to be considered a major change; in expanding the business judgment rule protection to these transactions, it achieved a significant, result shifting the balance of the relevant litigation.

Corwin's holding was promptly confirmed[22]; and shortly after extended, with Volcano, to cases involving a tender offer[23].

Indeed, in a line of cases started with Kahn v. M&F Worldwide[24], the courts of Delaware have resorted to the cleansing effect – presumably to thwart strike suits – even in transaction with controlling stockholders, where the standard of review would ordinarily be the entire fairness standard, if the merger had conditioned upfront by

[20] Corwin v. KKR Fin. Holdings. LLC, cit., at 314.

[21] Some commentators had already remarked that Revlon was extinguishing its "force"; *see* L P.Q. JOHNSON, R. RICCA, *The Dwindling of* Revlon, in *Wash. & Lee Law Rev.*, 2014, Vol. 71, p. 167-227; but *see*, also, the divergent opinion of M. MANESH, *Nearing 30, is* Revlon *showing its Age?*, in *Wash. & Lee Law Rev. Online*, 2014, n. 71, p. 107-149.

[22] *Singh v. Attenborough (Zale III)*, 137 A.3d 151 (Del. 2016); *In Re Solera Holdings, Inc. Shareholders Litigation*, 2017 WL 57839 (Del. Ch. Jan. 5, 2017).

[23] *In Re Volcano Corp. Shareholders Litigation*, 143 A.3d 727 (Del. Ch. June 30, 2016). For the post-Corwin, *see* R.S. REDER, *Delaware Chancery Court Extends "Cleansing Effect" of Stockholder Approval Under KKR to Two-Step Acquisition Structure*, in *Vand. Law Rev. En Banc*, 2016, Vol. 69, p. 227 ss.; R.S. REDER, T. M. BULBA, *Delaware Courts Diverge on Whether "Cleansing Effect" of Corwin Applies to Duty of Loyalty Claims*, in *Vand. Law Rev. En Banc*, 2017, Vol. 70, p. 1 ss.; and *ibid.* ID., *Delaware Courts Confront on Whether "Cleansing Effect" of Corwin Applies to Duty of Loyalty Claims*, p. 35 ss.

[24] Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014). For extensive comments *see* D. WILSON, *Desirable Resistance:* Kahn v. M&F Worldwide *and the Fight for the Business Judgment Rule in Going-Private Mergers*, in *U. Penn. J. Bus. Law*, 2015, vol. 17, n. 2, p. 643-672; F. RESTREPO, G. SUBRAMANIAN, *The Effect of Delaware Doctrine on Freezeout Structure & Outcomes: Evidence on the Unified Approach*, in *Harv. Bus. Law Rev.*, 2015, vol. 5, partic. pp. 205-17; I. FIEGENBAUM, *The Geography of MFW-Land*, in *Del. J. Corp. Law*, 2017, Vol. 41, pp. 763-802.

the controlling stockholder on approval by both a properly empowered, independent committee and an informed, uncoerced majority-of-the-minority vote[25].

Although in *In re M&F Worldwide*[26], the Chancery Court referred to it as a "novel question of law" – namely what standard of review should apply to a going private merger conditioned – the decision was long awaited; and predictable to some extent.

Two hints were suggesting such conclusion, a line originated by *Siliconix*[27] and some indications contained in *Cox Communications*[28]: in the former, the Delaware Court of Chancery had already opted for this solution, applying the business judgment rule instead of the entire fairness standard in a freezeout merger carried out through a tender offer[29]; in the latter, Chancellor Strine had anticipated, even if just in the *dicta*, the M&F Worldwide opinion[30]. That is almost to say that, as a "part of a broader, desirable trend of pushback against Lynch"[31], M&F Worldwide case has merely been the first occasion – in that being the question "novel" – for the court to state a principle already devised and commonly perceived.

After all, if a special independent committee, fully-empowered can fulfil its duty of care in negotiating a fair price and if the merger is upfront conditioned to

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[25] In more detail: the Court adopted a six-part test (now known as *MFW* test), under which the business judgment rule will apply to a court's review of controller buyouts if (1) the controller conditions the transaction on approval of a special committee and a majority-of-the-minority shareholders; (2) the special committee is independent; (3) is empowered to select its own advisors and to say no definitively to the deal; and (4) meets its duty of care in negotiating a fair price; and the minority shareholders are (5) informed; and (6) uncoerced. *See amplius* P. MATERA, F.M. SBARBARO, *op. cit.*, 2017, pp. 23-32.

[26] In re M&F Worldwide Corp. Shareholders Litigation, 67 A.3d 496, 508 (Del. Ch. 2013).

[27] *In re Siliconix Inc. Shareholders Litigation*, No. CIV. A. 18700, 2001 WL 716787, (Del. Ch. June 19, 2001); confirmed by *In re Pure Resources, Inc., Shareholders Litigation*, 808 A.2d 421 (Del. Ch. 2002).

[28] *In re CNX Gas Corp. Shareholders Litigation*, 4 A.3d 397 (Del. Ch. 2010). *See*, also, *In re John Q. Hammons Hotels Inc. Shareholder Litigation*, No. 758-CC, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009).

[29] In a case where the controlling stockholder, at the completion of a successful tender offer, owned more than 90% of stock and as such was able to execute a short-form merger – so ending up in the same position as if he had tendered or if the transaction had been structured as a merger –, it would have been unreasonable to apply a different standard, even if the situation was formally dissimilar. In the words of the court: "it may seem strange that the scrutiny given to tender offer transactions is less than the scrutiny that may be given to [...] a merger transaction": *In re Siliconix Inc. Shareholders Litigation*, cit., at 18-9. See, also, G. SUBRAMANIAN, *Post-Siliconix Freeze-Outs: Theory and Evidence*, J. Leg.. Stud., 2007, Vol. 36, pp. 1-19.

[30] *In re Cox Communications, Inc. Shareholders Litigation*, cit., 606. Also predicted in M. SIEGEL, *The Illusion of Enhanced Review of Board Actions*, in *U. Penn. J. Bus. Law*, 2013, vol. 15, n. 3, p. 600.

[31] D. WILSON, *op. cit.,* p. 643, referring to Kahn v. Lynch Communications Systems, Inc., 638 A.2d 1110 (Del. 1994).

such approval, the transaction will be executed in the same situation as if there were no controlling stockholder; so that the potentially dangerous influence (i.e. the conflict of interest) requiring a stricter standard of judicial scrutiny is neutralised and the reasons for the application of the entire fairness standard disappears.

But again, the change is clearly of some importance and confirms the trend to adopt specific strategies to reduce merger litigation – and especially lawsuits whose goals are ostensibly far from creating value for shareholders by redressing a wrongdoing.

The net effect of these cases should have been to limit substantially the availability of a post-closing suit for damages, preserving the chance to proceed with the suit just for those claims that address a transaction where the involved company failed to disclose the alleged improprieties prior to shareholder approval[32].

So the question becomes if such a solution has been effective and the end achieved; or if the described revisions have only made challenging a merger less desirable in Delaware – but not elsewhere. Particularly, as said, the switch to the more deferential business judgment rule in these cases could contribute to revitalise – perhaps resuscitate – a jurisdictional competition, by way of bringing the same lawsuit in another jurisdiction, federal or state.

4. In the depicted scenario, another response has to be examined briefly; a mechanism that, albeit lived for a rather short time, it is significant for the dynamics illustrated: the fee-shifting bylaws.

It is evident that any provision shifting the liability for the corporation's attorneys' fees on unsuccessful plaintiffs, by altering the basic scheme of American litigation and of the so-called American rule, is maybe one of the strongest, ever conceivable, disincentive to bring a corporate lawsuit. Moreover, it does not rely on a judicial intervention[33].

Thus, quite surprisingly to some extent, in *ATP Tour* the Delaware Supreme Court upheld the validity of fee-shifting bylaws and article, upholding that stockholder plaintiffs could be required to reimburse other stockholders or the

[32] M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *op. cit.*, p. 1. *In Re Volcano Corp. Shareholders Litigation*, cit., 730.
[33] Cf. W.B. CHANDLER, A.A. RICKEY, *op. cit.*, p. 157.

company for the costs of an unsuccessful lawsuit[34]. Actually, the case involved a board-adopted bylaw of a non-stock corporation; but, the grounds of the decision being provisions of Delaware General Corporation Law also applicable to public companies, it has been immediately clear its wider authority[35].

The principle the reasoning relied upon, in addition to the existing provisions, seems to be "all contractual", and not only based on a contract analogy. It is tied to the contractual model of the company and to theory of implied consent, already recalled by Chief Justice Strine in a case, *Boilermakers*[36], which can also be deemed as the foundation for forum selection bylaws: shareholders who buy stock in a corporation implicitly consent to be bound by the adopted bylaws; furthermore, shareholders who buy stock in a corporation in which the charter confers the power to amend the bylaws on the board of directors implicitly consent to be bound by board-adopted bylaws[37].

The judges specifically dealt with the bylaw in question just as dealing with a contract term, considering the provision equivalent to a "contractual exception to the American Rule"[38].

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[34] In 2007, members of ATP – a Delaware non-stock membership corporation that, as it is well known, operates the professional men's tennis tour – sued the corporation and six of its directors in federal court, alleging several federal antitrust and Delaware corporate law claims. After the plaintiffs lost at trial, ATP invoked the fee-shifting bylaw enacted by ATP's board of directors in 2006. The district court certified four questions of law to the Delaware Supreme Court, collectively addressing the validity of fee-shifting bylaws both on their face and as applied. Indeed, the Supreme Court did not reach the question of whether the specific bylaw was enforceable, but declared fee-shifting bylaws were not *per se* unenforceable under Delaware law – namely: "Under Delaware law, a fee-shifting by-law is not invalid *per se*"; *ATP Tour, Inc. v. Deutscher Tennis Bund*, cit., at 560. See, also, W.B. CHANDLER, A.A. RICKEY, *op. cit.*, p. 149.

[35] *ATP Tour, Inc. v. Deutscher Tennis Bund*, cit., at 557 n.10, recalling that the provisions of 8 *Del. C.* § 109(b), is applicable to stock a non-stock corporations.

[36] *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, at 955-56.

[37] J.E. FISCH, *Governance by Contract: The Implications for Corporate Bylaws*, (March 8, 2017), cit., pp. 3-4. Cf. V. WINSHIP, *Contracting Around Securities Litigation: Some oughts on the Scope of Litigation Bylaws*, in *SMU Law Rev.*, 2015, Vol. 68, p. 913; Id., *Shareholder Litigation by Contract*, in *Bos. Univ. Law Rev.*, 2016, vol. 96, p. 485 ss.; S. GRIFFITH, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, in *B.C.L. Rev.*, 2015, Vol. 56, p. 1; L.A. HAMERMESH, *How Long Do We Have to Play the "Great Game"?*, in *Iowa Law Rev. Bull.*, 2015, Vol. 100, p. 31.; J. R. BROWN, JR., *The Future Direction of Delaware Law (Including a Brief Exegesis on Fee Shifting Bylaws)*, in *Den. Univ. Law Rev. Online*, 2015, Vol. 92, p. 51. See, also, L.A. HAMERMESH, *Consent in Corporate Law*, in *Bus. Law.*, 2014, Vol. 70, p. 166, where the A. points out that *ATP*'s fee-shifting bylaw did not create a "loser pays" rule, as it "prescribed a one-sided rule – only the plaintiff has to pay the other side's costs – and it has to pay those costs not just if it loses, but even if it wins many of its claims but fails to get substantially all the relief it sought"; also quoted in S.M. BAINBRIDGE, *Fee-shifting: Delaware Self-inflicted Wound*, cit., p. 856. nt. 56.

[38] *ATP Tour, Inc. v. Deutscher Tennis Bund*, cit., at 558.

Given the reach of the decision and the circumstance that, following it, several publicly-traded firms enacted fee-shifting mechanisms in their bylaws or articles, it is of no wonder the prompt backlash: severe criticism raised by large part of Delaware's legal community, pointing out fee-shifting bylaws sometimes as a draconian use of corporate power; sometimes, quite imaginatively, as solution throwing the baby out with the bathwater[39]; almost always as a real threat to the whole system of private enforcement.

Under such heavy fire, fee-shifting provisions had little hope to survive.

Quite rapidly came the countermeasure: Delaware General Corporation Law was amended and a prohibition to fee-shifting bylaws or articles passed (S.B. 75)[40].

Indeed, some scholars argued that around this tool "legal community struck a grand bargain with its corporate citizens": first, the enactment of the ban on fee-shifting bylaws; second the Delaware State Bar Association's explicit encouragement to the adoption of forum selection bylaws by corporations, as a way "to reduce the incidence of socially wasteful litigation"; and within seven months of the ban on fee-shifting provisions, the Delaware Court of Chancery issued the *Trulia* decision, "widely seen as a promising corrective to the problem of excessive corporate litigation, and in particular disclosure-only settlements"[41].

Of course, the influence between amendments to the Delaware law and the *Trulia* decision cannot be demonstrated. But it is hard to resist the conclusion the change in the court's approach is not just a coincidence or an event occurred in a similar timeline.

Yet, it took less than a year to doubt about the effectiveness of *Trulia* and of forum selection provisions – soon adopted.

A step back, before the conclusion.

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[39] M. LEBOVITCH, J. VAN KWAWEGEN, *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*, in *Del. J. Corp. Law*, 2016, Vol. 40, p. 491. But *see* S.M. BAINBRIDGE, *Fee-shifting: Delaware Self-inflicted Wound*, cit., pp. 852-876. *See*, generally, J.C. COFFEE, JR., *Fee-Shifting and the SEC: Does It Still Believe in Private Enforcement?*, in *CLS Blue Sky Blog* (Oct. 14. 2014), archived at https://perma.cc/QD6P-N9TX.

[40] Senate Bill 75 – 2015 Leg., 148th Gen. Assemb., Reg. Sess. (Del. 2015) – passed by the Delaware Senate on May 12, 2015; approved by the Delaware House on June 11, 2015; and signed by Governor Markell on June 24, 2015. The bill became effective on August 1, 2015.

[41] W.B. CHANDLER, A.A. RICKEY, *op. cit.*, p. 149-50.

5. The idea behind the *Trulia* decision is fairly simple; and to some extent it can unquestionably be agreed with.

If a large portion of corporate litigation serves no useful purpose for the company and creates no value for the shareholders, but it is only intended to "generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent"[42], then, safeguarded the fee mechanisms, the other way to halt the frivolous suits is striking such "peppercorn settlements".

Although the court's criticism of this kind of settlements has been intensifying for some time and although some hints of *Trulia*'s coming can be tracked in *Acevedo v. Aeroflex*[43] and *in Riverbed Technology*[44], so far this decision represents both the brightest illustration of the perverse mechanism generated by the previous system and the most definitive statement of court's firm intention to carefully scrutinize and refuse the validation each time the settlement consideration of class actions does not include any monetary recovery for the class.

Regarding the former (the depiction of the pattern), the Court recalled that "in such lawsuits, plaintiffs' leverage is the threat of an injunction to prevent a transaction from closing". Such threat cannot be underestimated as it is a strong incentive for defendants to settle quickly "in order to mitigate the considerable expense of litigation and the distraction it entails, to achieve closing certainty, and to obtain broad releases as a form of «deal insurance»". Indeed, as the Court noted, these motivations are so potent that "many defendants self-expedite the litigation by volunteering to produce «core documents» to plaintiffs' counsel, obviating the need for plaintiffs to seek the Court's permission to expedite the proceedings in aid of a preliminary injunction application and thereby avoiding the only gating mechanism (albeit one friendly to plaintiffs) the Court has to screen out frivolous cases and to ensure that its limited resources are used wisely". And so, "once the litigation is on an expedited track and the prospect of an injunction hearing looms, the most common currency used to procure a settlement is the issuance of supplemental disclosures to the target's stockholders before they are asked to vote on the proposed transaction"[45].

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[42] *In re Trulia, Inc. Stockholder Litigation*, cit., at 904.
[43] *See* Transcript, *Acevedo v. Aeroflex Hldg. Corp.*, C.A. No. 7930-VCL (Del. Ch. July 8, 2015).
[44] *In re Riverbed Technology, Inc. Stockholders Litigation,* 015 WL 5458041 (Del. Ch. Sept. 17, 2015).
[45] *In re Trulia, Inc. Stockholder Litigation*, cit., at 895-6.

The additional disclosure provided should in theory allow shareholders to exercise their rights in a better-informed manner. Yet, the practice of courts to approve disclosure-only settlements, even when the supplemental information is not material and of minor value to stockholders, provides "a particularly easy «give» for defendants to make in exchange for a release"[46].

Once the parties have agreed on the terms of settlement to submit to the court, the context of the suit changes radically and its character becomes non-adversarial, as both parties have a common interest in extracting the validation by the court and have no interest in filing a motion to provide judges with information. Bearing in mind that typically, in an expedited deal litigation, the discovery record is sparse, it is easy to understand why courts, although used to evaluate the proposed settlement of stockholder class and derivative actions without the benefit of hearing opposing viewpoints, have a hard time in the scrutiny of disclosure-only settlements[47].

The result is just the peppercorn and fee settlements and, as a consequence, the potential for abuse of corporate litigation basic mechanism.

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[46] *Ibid*., also quoting *In re Riverbed Technology, Inc. Stockholders Litigation,* cit., at 4-5. To the reported representation, the Court added: "The next step, after notice has been provided to the stockholders, is a hearing in which the Court must evaluate the fairness of the proposed settlement. Significantly, in advance of such hearings, the Court receives briefs and affidavits from plaintiffs extolling the value of the supplemental disclosures and advocating for approval of the proposed settlement, but rarely receives any submissions expressing an opposing viewpoint. Although the Court commonly evaluates the proposed settlement of stockholder class and derivative actions without the benefit of hearing opposing viewpoints, disclosure settlements present some unique challenges. It is one thing for the Court to judge the fairness of a settlement, even in a non-adversarial context, when there has been significant discovery or meaningful motion practice to inform the Court's evaluation. It is quite another to do so when little or no motion practice has occurred and the discovery record is sparse, as is typically the case in an expedited deal litigation leading to an equally expedited resolution based on supplemental disclosures before the transaction closes". *See*, generally, J.E. FISCH, S.J. GRIFFITH, S.D. SOLOMON, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, in *Tex. Law Rev.*, 2015, Vol. 93, p. 557; and *ibid.* J.T. LASTER, *A Milder Prescription for the Peppercorn Settlement Problem in Merger Litigation*, p. 129. S.J. GRIFFITH, *Private Ordering Post-Trulia: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*, in *The Corporate Contract in Changing Times: Is the Law Keeping Up?*, S.D. SOLOMON, R.S. THOMAS (Eds.), Chicago, 2017, p. 81; H. JIANG, *Enforcing the Bargain v. Materiality Requirement. The Future of Disclosure-only Settlements Post-Trulia*, in *Pace Law Rev.*, 2017, pp. 1-30.

[47] *In re Trulia, Inc. Stockholder Litigation*, cit., at 896-7. In this case, no motions were decided – not even a motion to expedite. And as the Court remarked "discovery was limited to the production of less than 3,000 pages of documents and the taking of three depositions, two of which were taken before the parties agreed in principle to settle and one of which was a «confirmatory» deposition taken thereafter".

Consistently, "the judicial pushback"[48] culminating in January 2016 with *Trulia* is essentially logical. And the *Trulia*'s reasoning cannot be criticised in itself; so cannot its statement according to which courts, in validating merger litigation settlements, should reject those failing to achieve substantial benefits for shareholders – i.e. because providing only additional non-material disclosures, a broad release and a fee award to plaintiffs' attorney[49]: that is no meaningful benefits for shareholders then no settlement approval by the court.

Still, the actual effect in terms of reducing corporate litigation is questionable, as the data recorded proves a decline of litigation only before Delaware courts and, correspondingly, an increase of lawsuits brought outside of Delaware, either in other state jurisdiction, either in federal court – and in 2017 the trend accelerated[50].

To be honest, in *Trulia* the Chancery Court anticipated that the new "enhanced judicial scrutiny of disclosure settlements could [have led] plaintiffs to sue fiduciaries of Delaware corporations in other jurisdictions in the hope of finding a forum more hospitable to signing off on settlements of no genuine value"; but also indicated a resort, by adding that it was "within the power of a Delaware corporation to enact a forum selection bylaw to address this concern"[51]. A resort punctually adopted by Delaware's legislature, as said[52].

The point is that, as a matter of fact, the forum selection bylaws – widely implemented by Delaware's corporations after the mentioned codification of a rule explicitly permitting them – fell short of the expectation, as perhaps equally predictable.

6. Given the specialisation of corporate plaintiffs' attorneys and the entrepreneurial essence embedded in the role of bounty hunter they play, an adaptive response was highly foreseeable – and took only a few months to be developed.

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[48] As defined by M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *op. cit.*, p. 3.

[49] In the case, the Court refused to approve a settlement whose proposed terms provided insignificant additional information to stockholders, a significant amount (of $375,000) in fees and a release for the corporate defendant that might have prevented class members from later filing commendable and grounded lawsuits.

[50] *See* M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *op. cit.*, p. 6, where figures and references.

[51] *In re Trulia, Inc. Stockholder Litigation*, cit., at 899.

[52] DEL CODE ANN. tit. 8, §§ 102(b)(4), 109(b) cit.; see *sub* nt. 15.

In other words, the disincentive originated by disclosure-only settlement-averse courts' policy following *Trulia* has revealed to be a motivation stronger than the obstacle created by forum selection bylaws. Indeed, legal tools to get around it were already available and, somehow, the tactics devised can appear even banal. But just like in a puzzle, changed a few pieces, the whole image can be surprisingly different.

Needless to say that, on the companies' side, managers have immediately adapted by structuring the transaction in a guise to get the guarantee of a more deferential standard of judicial review; but the plan can succeed to the extent the lawsuit is filed before a court applying *Corwin*, *Volcano* or *M&F Worldwide*.

Records report as, after a temporary decrease in the volume of litigation – probably just the time for the backlash –, the numbers of mergers challenged in a lawsuit have increased again, this time before federal and other state courts. That is to say that, in less than a year, forum selection bylaws proved to have basically failed their mission to prevent plaintiff's counsel from filing a suit away from Delaware – presumably in the effort to escape the application of the new Delaware standards[53].

Regarding federal jurisdiction, forum selection bylaws cannot refrain corporate plaintiffs to pursue a lawsuit in a federal court, e.g. for disclosure violations under Rule 14a-9 (Securities Exchange Act of 1934)[54]. And that is exactly what occurred.

Ironically, the combination cleansing effect/*Trulia*/forum selection bylaws might be able to revitalise the languishing federal jurisdiction on the matter[55].

Therefore, there are other viable "options" for claimants in other states' courts; one relies upon the potential for a collusion between plaintiffs' attorneys and the defendant corporation: even whereas the company has adopted a forum selection bylaw, the board of directors may opt to waive the application of that provision[56] and

[53] Of the deals completed in 2016, only 32% were challenged in a Delaware's court, while 65% were challenged in other states and 37% in federal court – the percentages do not sum to 100% because of multiple cases in multiple forums. M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *op. cit.*, p. 6. See, also, data reported in S.M. BAINBRIDGE, *Fee-shifting: Delaware Self-inflicted Wound*, cit., p. 860-867.

[54] As it is well known, this rule applies to omission or misleading statements "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation".

[55] Undoubtedly, the figures *sub* nt. 52 represent a significant increase in federal court filings. Cf. W.B. CHANDLER, A.A. RICKEY, A. *op. cit.*, pp. 146-7. M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *op. cit.*, pp. 5-6.

[56] The arbitration clauses require a motion of the defendant to operate.

to accept a lawsuit before a non-Delaware forum in order to negotiate a settlement on terms that currently would not have any hope of approval in Delaware under *Trulia*.

Or, again, another strategy could be the allegation that just the filing of the case induced defendants to provide an increased disclosure; that would enable the parties to settle disclosure-only cases on the grounds of "mootness" and the defendants to compensate, on a voluntary basis, plaintiffs' counsel through a "mootness fee."

Of course, like in a game of chess, against these strategies the litigation system plays its countermeasure[57].

For instance, federal law provides a variety of safeguards against strike suits that might frustrate or at least discourage the use of federal jurisdiction as a substitute[58]; and subsequently, the shift of cases into federal court might work itself out, gradually as federal courts address these cases[59].

As to Delaware's courts, with *Receptos* decision, they have already started to show their will to reduce in some cases mootness fee[60].

But the dynamics of corporate litigation and American federalism are articulated. Actions and reactions follow each other, sometimes in a hectic way. So that even the capability to intervene of Delaware's legislature and courts appears to be limited; and the risk is to keep on chasing plaintiffs' new tactics while the ship continues to sink.

Another example is the upsurge of appraisal litigation in Delaware. Notwithstanding the reforms on such specific type of lawsuits, some recent statistics relates the newly-gained popularity of appraisal litigation with the new authority of *Corwin*, *Volcano* and *Trulia*; in the sense that plaintiffs' attorneys could now be filing, as appraisal cases, those deal challenges they are no longer allowed to bring in the form

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[57] In the context, *see* generally J.E. FISH, *The New Governance and the Challenge of Litigation Bylaws*, in *Brook. Law Rev.*, 2016, Vol. 81, n. 4, p. 1637-52.

[58] *See* sub § 7.

[59] M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *op. cit.*, p. 7 and *amplius* J.E. FISCH, S.J. GRIFFITH, S.D. SOLOMON, *op. cit.*, p. 558-71.

[60] *In re Receptos, Inc. Stockholder Litigation*, No. 11316-CB (Del. Ch. Jul. 21, 2016), the Court reduced mootness fees from $350,000 to $100,000; and imparted a real "lesson" – according the wording used by the judges –, that there "is no right to cover one's supposed time and expenses just because you sue on a deal, and plaintiffs should not expect to receive a fee in the neighborhood of $300,000 for supplemental disclosures in a post-Trulia world unless some of the supplemental information is material under the standards of Delaware law".

they used to before *Corwin*, *Volcano* and *Trulia* – or, if brought, would be presumably unsuccessful[61].

As a consequence of that, Delaware courts started to consider the merger price, determined in a correctly set transaction, as a fair value for purposes of the appraisal proceeding[62].

The trend is consolidating. Yet, in August 2017, the Delaware Supreme Court – in a much-awaited decision, *DFC Global Corp. v. Muirfield Value Partners*[63] – did not push the reaction to the limit by establishing a broad presumption[64]. The Court, on one side, emphasised the significance of a merger price resulting from a competitive, arm's-length sale process in determining the fair value under Delaware's appraisal statute; on the other, refused to draw a sharp line and to impose a deference to the merger price in such cases (i.e. to cast the pre-determined, general condition to invoke the presumption) [65].

However, the decision is indicative of the evolution. And, in combination with a recent statutory amendment enabling acquirors to pre-pay some or all of the merger consideration to appraisal petitioners in order to limit the accrual of interest on an eventual fair value award in an appraisal proceeding, it should be able to reassure acquirors; that is to provide them with some comfort on Delaware's courts

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[61] M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. Randall, *op. cit.*, p. 36.

[62] *See Huff Fund Inc. Inv. Partnership v. Ckx, Inc.*, 2013 Del. Ch. LEXIS 262 (Del. Ch. 2013), aff*'d*, 2015 Del. LEXIS 77 (Del., Feb. 12, 2015); *Merion Capital L.P. v. Lender Processing Servs.*, C.A. No. 9320-VCL (Del. Ch. Dec. 16, 2016). *In re Appraisal of PetSmart, Inc.*, C.A. No. 10782-VCS (Del. Ch. May 26, 2017) the Court reaffirmed the trend of increasing reliance on the merger price to determine appraised "fair value", every time sales process involved "meaningful competition" and the target company projections available for a discounted cash flow analysis were unreliable. But *In re Appraisal of SWS Group Inc.* (May 30, 2017), the same Court of Chancery, this time relying on a discounted cash flow analysis, determined that the appraised "fair value" of SWS Group, Inc. (the "Company") was below the merger price paid by acquiror Hilltop Holdings, Inc.

[63] *DFC Global Corp. v. Muirfield Value Partners, L.P.*, No. 518, 2016 (Del. Aug. 1, 2017).

[64] As predicted by M.D. CAIN, J.E. FISCH, S.D. SOLOMON, S.T. RANDALL, *op. cit.*, p. 37. Indeed, such presumption (that the merger price represents the fair value of the target company's stock), coupled with the 2016 legislative reforms on the matter, would have struck dramatically the use of appraisal litigation for these purposes.

[65] The Court noted that it would have been too hard to specify, "on a general basis, the precise pre-condition" to establish a presumption of that kind; but added: "As our preceding discussion presages, our refusal to craft a statutory presumption in favor of the deal price when certain conditions pertain does not in any way signal our ignorance to the economic reality that the sale value resulting from a robust market check will often be the most reliable evidence of fair value, and that second-guessing the value arrived upon by the collective views of many sophisticated parties with a real stake in the matter is hazardous".

reluctance to second-guess in such context the price resulting from competitive, arm's-length bargain, absent unusual circumstances.

7. Outside of The First State – as it is nicknamed –, New York Court of Appeals has rather promptly followed M&F Worldwide authority[66].

But a bit slower and indeed uncertain appears the progression of *Trulia*'s take-up. It could be the result – maybe just in part – of the non-adversarial process – that *Trulia* set out to correct –, as parties presenting disclosure settlements outside of Delaware have little reason to cite newer Delaware authority[67].

Recently, the New York courts have examined the matter. To be honest the revision of the rule and the application of a greater scrutiny to this kind of settlements had commenced by these courts almost simultaneously than in Delaware[68].

The Empire State judges have expressly recalled *Trulia* and, in a comparative analysis with the standard of routinely validation previously applied in New York, have considered no longer sustainable, in this context, the countenance of settlement granting stockholders just a generic "benefit".

Nevertheless, they have not (yet) embraced *Trulia*'s strictness. In a public company M&A litigation, *City Trading Fund v. Nye*, the Court has – twice – declined to approve a disclosure-only settlement, openly described by the judges as a "peppercorn and a fee" one[69]. But in another case, pending the remanding of *City Trading Fund*, the Appellate Division adopted a more lenient approval standard for these settlements than the one followed by Delaware's courts[70].

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[66] *See In re Kenneth Cole Prod., Inc., Shareholder Litigation*, 2016 WL 2350133 (2016), superseding *Alpert* v. *28 Williams St. Corp.,* 63 N.Y.2d 557 (N.Y. 1984). The Court affirmed that "the *MFW* standard properly considers the rights of minority shareholders […] and balances them against the interests of directors and controlling shareholders in avoiding frivolous litigation and protecting independently-made business decisions from unwarranted judicial interference" (at 12-13).

[67] W.B. CHANDLER, A.A. RICKEY, A. *op. cit.*, p. 146.

[68] *Ibid.*, p. 151.

[69] *City Trading Fund v. Nye*, 2018 WL 792283 (N.Y. Sup. Ct., Feb. 8, 2018), finding the supplemental disclosures "utterly useless to the shareholders". Previously, Justice Kornreich had already denied the approval of the settlement, but that decision had been reversed by the New York Supreme Court, Appellate Division and remanded for a fairness hearing: *City Trading Fund v. Nye*, 144 A.D.3d 595, 21 (N.Y. App. Div. 2016). In the meantime, the Appellate Division had also decided *Gordon v. Verizon Communications, Inc.*, 148 A.D.3d 146 (N.Y. App. Div. 2017).

[70] *Gordon v. Verizon Communications, Inc.*, cit.

Rather interestingly, a patent distrust for disclosure-only settlements seems to be spreading in federal jurisdiction. In *In Re Walgreen Co. Stockholder Litigation*[71], the Court, following *Trulia* and with an eminent opinion, refused to validate a disclosure-only settlement. And so it occurred in another by now famous case, some months later: *In Re Subway Footlong Sandwich*[72].

Here, the Court affirmed that a class action seeking "only worthless benefits for the class" and yielding only "fees for class counsel" is "no better than a racket" and "should be dismissed out of hand"[73].

8. Although latest federal cases and even New York cases demonstrate that disclosure-only settlements will no longer be approved simply as a matter of course, the escape from Delaware is far from being warded off.

No doubt that, in the past, courts' predisposition to approve "disclosure settlements of marginal value and to routinely grant broad releases to defendants and six-figure fees to plaintiffs' counsel in the process have caused deal litigation to explode in the United States"[74]. But just halting such inclination it is no guarantee for a rebalancing.

The litigation system, with its opportunities and incentives, combined with the American federalism, makes perhaps the framework so intricate that even the expert Delaware's corporate constituents can have a hard time to manage.

Situation is fluid. The dynamic nature of the merger litigation shows that the pattern is highly adaptive; and the inter-jurisdictional competition reactivated by latest changes in Delaware law is largely still a game to be played.

But according to some, the ban on fee-shifting bylaws is a "self-inflicted wound" that seriously "threatens to undermine Delaware's profitable position as the leading state of incorporation"[75]. The critics remark that it could trigger a further competition among jurisdiction and induce "more conservative states (think, Texas)"

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[71] *In Re Walgreen Co. Stockholder Litigation*, 832 F.3d 718 (7th Cir. 2016).

[72] *In Re Subway Footlong Sandwich Marketing and Sales Practices Litigation*, 869 F.3d 551 (7th Cir. Wis. Aug. 25, 2017), reversing district court decision and remanding the case.

[73] *In Re Walgreen Co. Stockholder Litigation*, cit., at 724, also quoted by *In Re Subway Footlong Sandwich Marketing and Sales Practices Litigation*, cit., at 554.

[74] *In re Trulia, Inc. Stockholder Litigation*, cit., 894.

[75] S.M. BAINBRIDGE, *Fee-shifting: Delaware Self-inflicted Wound*, cit., p. 876.

to adopt statutes authorizing fee-shifting bylaws, so "lur[ing] companies to reincorporate there to exploit their tolerance for such provision"[76].

In this view, S.B. 75 could even cause to Delaware what the Seven Sisters Act did to New Jersey: by significantly altering the cost-benefit calculus of incorporation decisions it might tempt incorporators to establish companies elsewhere[77].

The reason for such mistake – according to these opinions – is that "the local bar has captured the State's legislative process"[78]. The historic and reasonable relationship between the corporate bar and the state government – that made the fortune of Delaware corporate law – could have been distorted in part, with the mentioned implication, potentially destructive for Delaware's dominance[79].

Besides, an additional element should also be taken into account: the intensification of federal incursion into corporate matter. Pursuant to Sarbanes-Oxley Act (of 2002) and Dodd-Frank Act (of 2010), state regulation has been definitely displaced in areas such as audit oversight and executive compensation. The increasing federal intervention and the reduction of differentiation between applicable state regulations diminish Delaware's competitive advantage[80]; and it could dramatically change the result of cost evaluation of incorporating in Delaware.

In other words, such factor, if it progresses, might have a non-negligible potential to accelerate the shift initiated by the illustrated disincentives; and all this, without an unquestionably beneficial effect on the level of corporate litigation.

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[76] J.C. COFFEE, JR., *op. cit.*, also quoted in S.M. BAINBRIDGE, *Fee-shifting: Delaware Self-inflicted Wound*, cit., p. 870.

[77] In 1913, New Jersey adopted the so-called "Seven Sisters Acts," a package of legislation that collectively made that state much less attractive to incorporators. Correspondingly, Delaware swooped in and attracted a flow of New Jersey corporations. *Ibid.*, p. 869.

[78] *Ibid.*

[79] C. ELSON, *op. cit.*, pp. 231-7. Of utmost interest, the facts there reported regarding a recent Chancery Court decision (*In the TransPerfect Derivative Litigation*, C.A. No. 9700-CB, 2016): "Chancellor Bouchard ordered the dissolution of a privately-held corporation on deadlock grounds. While he applied well-established closed-corporation law principles, one of the parties, in an effort to reverse the Chancellor's decision, engaged in a massive statewide public relations campaign to persuade the Legislature to amend the state's corporate statute in the area.24 Petitions, rallies, editorials, radio and newspaper advertisements under the moniker «Citizens For a Pro-Business Delaware» were initiated to short-circuit the traditional corporate law reform process. The effort did not have the support of the Delaware corporate bar and there was significant opposition to the disappointed party's efforts. Nevertheless, should this attempt have been successful and a precedent set for a private litigant expending funds to co-opt the bar's traditional rule in the development of the state's corporate law, Delaware' dethronement would be rapidly advanced".

[80] *Ibid.*, p. 226.

Thus, considering that all the arguments on the decline of Delaware's dominance, vividly highlighted in past years by some studies[81], are now rejuvenated by the new trends, the image of a cold winter approaching the First State can be not far from reality.

If this is just a seasonal cycle, although prolonged, it remains to be seen. Still, it is not easy to resist the conclusion that the summer of Delaware's corporate law could become just a distant memory.

[81] Delaware firms were already increasingly more likely to be sued, and more likely to face multiple lawsuits, than firms incorporated in their home state; there was an increasing likelihood that takeover litigation against Delaware companies would entirely bypass the Delaware courts; the number of cases and publicly available opinions on these matter were already increasing outside of Delaware – and not because Delaware courts were at that time receiving fewer suits, nor writing fewer opinions, rather because there was a lager number of lawsuits and opinions outside Delaware. J.A. ARMOUR, B. BLACK, B. CHEFFINS, *op. cit.*, pp. 605-656