BEYOND APPROVAL:
THE ROLE OF THE DELAWARE COURT OF CHANCERY IN SETTLEMENTS OF FIDUCIARY LITIGATION

Gilda Sophie Prestipino[*]

Abstract

The Delaware Court of Chancery wields significant influence in resolving fiduciary disputes, yet its pivotal role in the settlement process remains underexplored. While existing scholarship predominantly views the Court as a passive arbiter merely endorsing party-crafted agreements, this article uncovers a more dynamic reality. By conducting a comprehensive analysis of every settlement in fiduciary duty lawsuits filed since 2013, along with over 100 bench ruling transcripts, this study reveals the Court's active engagement in shaping settlement outcomes and addressing systemic and case-specific issues.

The analysis highlights the Court's use of nuanced oversight to balance competing policy goals, including safeguarding shareholder interests, promoting fairness, and fostering judicial economy. Transcripts of settlement hearings, rarely cited in academic literature, offer unparalleled insights into the Court's reasoning and interventions. These include recalibrating attorneys' fees, refining release clauses, and ensuring settlements meaningfully benefit shareholders. This proactive role ensures that the settlement process remains equitable and aligned with "Delaware's credibility as an honest broker in the legal realm."

By reframing the narrative around fiduciary litigation, this article highlights the Court's critical function as an effective gatekeeper. Its interventions extend beyond mere settlement approval, reflecting a commitment to maintaining the integrity of representative litigation while adapting to evolving challenges in corporate governance. Through this comprehensive examination, the article contributes new insights into how Delaware's legal framework continues to shape corporate accountability and uphold equitable principles.

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Beyond Approval: The Role of the Delaware Court of Chancery in Settlements of Fiduciary Litigation

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[Preliminary Draft]

[T]he Court's role is not that of a rubber stamp.

-- Hon. Vice Chancellor John W. Noble
Settlement Hearing, December 29, 2015
In re InterMune, Inc. Stockholder Litigation

As a bench judge in a court of equity, much of what I do involves problems of, in a general sense, agency: insuring that those acting for the benefit of others perform with fidelity, rather than doing what comes naturally to men and women—pursuing their own interests, sometimes in ways that conflict with the interests of their principals.

-- Hon. Vice Chancellor Glasscock
In re Riverbed Tech., Inc. Stockholders Litigation

INTRODUCTION

Settlements are a cornerstone of fiduciary duty litigation, particularly in Delaware, where the concentration of incorporated businesses makes it the predominant venue for such lawsuits.[1] As expressions of private ordering,[2] settlements embody the parties' autonomy and reflect a preference for resolving disputes through private negotiations. As famously noted, individuals

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[1] Veasey, E. Norman. *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 BUS. LAW. 681 (1998); Lawrence A. Hamermesh & Leo E. Strine, *Delaware Corporate Fiduciary Law: Searching for the Optimal Balance*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 871 (Evan J. Criddle et al. eds. 2019); *see also* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995); John C. Coffee Jr., *Delaware Court of Chancery: Change, Continuity – and Competition*, 2012 COLUM. BUS. L. REV. 387 (2012).

[2] Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

bargain in the shadow of the law,[3] which highlights how the law "provid[es] a framework within which [litigants] can themselves determine their […] rights and responsibilities."[4] In this context, a primary role is served by the judiciary, which oversees the private dispute resolution. Under Delaware law, the Court of Chancery reviews and approves proposed settlements,[5] exercising its own business judgment to determine whether the settlement is, in all respects, fair, reasonable, and adequate,[6] and whether the amount of attorneys' fees requested by the plaintiff's attorney is appropriate.

Recent settlements in Delaware fiduciary litigation have garnered significant attention due to the broader policy implications they raise. The "mega" settlement reached in *In re Dell Technologies Inc. Class V Stockholders Litigation*[7] has become a focal point of discussion not only for the $266.7 million attorneys' fees awarded to plaintiffs' counsel but also for its potential impact on high-profile cases, such as the litigation involving Tesla's executive compensation package.[8] Following Chancellor McCormick's post-trial opinion revoking Elon Musk's $55.8 billion remuneration plan,[9] plaintiff's attorneys filed a motion seeking a $5.96 billion fee award in the form of Tesla's common stock.[10] This unprecedented request raises questions about the balance between shareholder interests and attorney compensation, as well as the broader consequences for corporate governance. As these cases unfold, they will continue shaping the evolving standards governing fiduciary settlements and attorneys' fees in an era where the stakes of litigation reach historic highs.

Against this backdrop, the Court of Chancery's oversight of settlements becomes even more crucial in addressing the agency problems that are inherent in representative litigation. Under classical agency theory,[11] shareholder litigation operates as a tool to realign managerial interests

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3 Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 997 (1979).

4 *Id*. at 950, 997 ("In each of these contexts, the preferences of the parties, the entitlements created by law, transaction costs, attitudes toward risk, and strategic behavior will substantially affect the negotiated outcomes.")

5 Del. R. Ch. Ct. 23(f)(1), 23.1(d)(1); *see infra* Section I.A; *see also* Jack B. Jacobs, *A Brief History of the Delaware Court of Chancery*, 2012 COLUM. BUS. L. REV. 406, 409 (2012).

6 Polk v. Good, 507 A.2d 531, 536 (Del. 1986) ("[The Court] looks to the facts and circumstances upon which the claim is based, the possible defenses thereto, and then exercised a form of business judgment to determine the overall reasonableness of the settlement."); Ryan v. Gifford, C.A. No. 2213- CC, 2009 WL 18143, at *1 (Del. Ch. Jan. 2, 2009).

7 *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679 (Del. Ch. 2023), as revised (Aug. 21, 2023), aff'd, No. 349, 2023, 2024 WL 3811075 (Del. Aug. 14, 2024).

8 Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024).

9 Tornetta, 310 A.3d 430.

10 Plaintiff's Opening Brief in Support of Application for an Award of Fees and Expenses, Tornetta v. Musk, C.A. No. 2018-0408-KSJM (Mar. 1, 2024).

11 Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983); Henry Hansmann, *Ownership of the Firm*, 4 J.L. ECON. & ORG. 267, 277–80 (1988); John Armour, Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW 1, 2 (Reinier Kraakman et al. eds., 2d ed. 2009); *see also* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020).

with those of shareholders.[12] By monitoring and enforcing fiduciary duty breaches, plaintiffs' attorneys are seen as a remedy to the rational apathy of shareholders.[13] Nonetheless, this very mechanism introduces new layers of complexity,[14] as plaintiff's attorneys may resemble "risk-taking entrepreneurs" pursuing early settlements, potentially jeopardizing the best interests of shareholders.[15] Hence, judicial scrutiny should not only ensure the "intrinsic fairness"[16] of the settlement's terms but also safeguard against abuses that could originate in the representative litigation model.[17] Furthermore, as a matter of public policy, Delaware law strongly favors the settlement of complex representative litigation.[18] This policy preference implicitly encourages the judiciary to guide litigants toward a privately negotiated resolution. Through early signals and interventions during the litigation, judges provide insights into the court's position vis-à-vis the lawsuit and promote the parties' autonomous negotiation.

Since the first modern empirical reviews of shareholder derivative and class action lawsuits, corporate law scholars have extensively analyzed shareholder litigation. These reviews have not only highlighted the central role of settlements but have also argued that judicial approval is an "imperfect safeguard," suggesting that the lack of substantive review fails to curb attorneys' incentives for early settlements that favor their own fees over shareholder value. Critics contend that courts "rarely scrutinize settlements"[19] and tend to approve settlements "even if the plaintiff's

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[12] Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. REV. 542, 569 (1980) ("In sum, shareholder litigation is an important means of oversight."); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 56 (1991) ("In this article, I seek to assess the effectiveness of shareholder litigation as an incentive-alignment device[.]"); Reinier Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133 (2004); Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753 (2012); *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d at 686 ("Delaware's response recognizes that our entity law depends on private litigation for enforcement.").

[13] Transcript of Plaintiff's Motion to Re-Certify the Class, Approve the Settlement, Attorneys' Fees, Expenses and Incentive Awards, and the Court's Rulings, Voigt v. Metcalf, C.A. No. 2018-0828-JTL, at 42:24-49:6 (Del. Ch. Jan. 19, 2022) ("The whole point of incentivizing stockholders to bring this type of litigation is because stockholders are rationally apathetic. And just as they're rationally apathetic about the underlying wrong, they're likely to be rationally apathetic about the settlement.").

[14] Robert B. Thompson & Randall S. Thomas, *Shareholder Litigation: Reexamining the Balance between Litigation Agency Costs and Management Agency Costs*, Vanderbilt University Law School manuscript (2002) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=336162.

[15] John C. Coffee Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 26-27 (1985); *see also* Lucian A. Bebchuk, *Litigation and Settlement under Imperfect Information*, 18 RAND J. ECON. 404 (1984); Lucian A. Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988).

[16] Rome v. Archer, 197 A.2d 49, 53 (Del. 1964).

[17] John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 670 (1986); 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 (1991); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 558, 723 (9th ed. 2014).

[18] Rome, 197 A.2d at 53.

[19] Romano, *supra* note 12, at 57 ("[Courts] rarely scrutinize settlements and, consequently, attorneys' incentives are the key factor in shareholder litigation"); *see also* Coffee, *supra* note 15, at 26-27 ("[A]s Judge Friendly concisely explained long ago, the trial court's approval is a weak reed on which to rely once the adversaries have linked arms and approached the court in a solid phalanx seeking its approval.") (*footnotes omitted*).

case is demonstrably weak."[20] This perceived leniency creates a tension between the theoretical role of judicial oversight and the implications of its practical application, leading some to question whether Delaware's judiciary fulfills its mandate as an effective gatekeeper. If these assertions are accurate, they "undercut[] Delaware's credibility as an honest broker in the legal realm."[21]

This article challenges these prevailing assumptions by providing a comprehensive analysis of Delaware's settlement review process, suggesting that the Court of Chancery's oversight is more robust than previously recognized. Conducting an extensive review of nearly 300 settlements of fiduciary litigation and 100 transcripts of settlement hearings, I argue that the Court of Chancery exercises a rigorous oversight of settlements going beyond mere approval.[22] When fairness is not readily apparent, the Court challenges the terms, probing the "give" and the "get" of the settlement.[23] This scrutiny often extends to the attorneys' fees and occasionally goes as far as intervening directly on release clauses to narrow their scope. In addition, although infrequently, the Court denies settlements entirely when the terms fail to meet the fairness standard. The low denial rate suggests that rejection of settlements is reserved for cases where less substantial interventions would not be sufficient to address the problems with the parties' negotiated agreement.

A key novelty of this article is its focus on the largely overlooked transcripts of settlement hearings. These transcripts, although publicly accessible, have been infrequently cited in academic literature, yet they are treated as indispensable references by corporate practitioners in Delaware.[24] While not formal precedents, these records are invaluable for corporate litigators, who analyze each transcript to inform strategy and decision-making. The transcripts reveal the Chancery Court's approach in granular detail, exposing the policies and priorities that influence judicial review beyond the published opinions. In particular, the transcripts provide insights into how the Court balances competing policy goals such as encouraging settlements and safeguarding shareholder interests.

The contribution of this article is threefold. First, it provides the most up-to-date and comprehensive overview of fiduciary duty litigation settlements in Delaware. Second, it offers a detailed account of evolving settlement practices in Delaware, highlighting key judicial interventions over the past decade. Lastly, it examines the broader policy implications of these practices, shedding light on the nuanced balancing act that the Delaware Court of Chancery performs in its oversight of settlements. These findings not only reshape our understanding of Delaware's approach to fiduciary settlements but also carry implications for broader discussions on judicial oversight in corporate litigation.

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[20] Mark J. Loewenstein, *Shareholder Derivative Litigation and Corporate Governance*, 24 DEL. J. CORP. L. 1, 5 (1999).

[21] Transcript, Acevedo v. Aeroflex Holding Corp., at 66:19-20.

[22] William Savitt, *The Genius of the Modern Chancery System*, 2 Columbia Business Law Review 570, 582 (2012) (referring to settlements of merger litigation) ("[S]ettlement review in Chancery is substantive, not merely a rubber stamp."); Donald F. Parsons Jr. & Jason S. Tyler, *Docket Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedures*, 70 WASH. & LEE L. REV. 473, 524-525 (2013) ("[T]he matters reviewed here demonstrate that the Court of Chancery's unique characteristics facilitate its ability to respond to challenging new issues of substantive and procedural law alike.")

[23] *In re* Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025, 1043 (Del. Ch. 2015) ("The tasks assigned to the court include . . . assessing the reasonableness of the 'give' and the 'get'").

[24] *See* Joel Edan Friedlander, *Performing Equity: Why Court of Chancery Transcript Rulings Are Law* (Univ. of Pa., Inst. for Law & Econ. Rsch. Paper No. 20-58) (Jan. 10, 2021), https://ssrn.com/abstract=3760722.

This article proceeds as follows. Section I provides a brief review of prior literature on shareholder litigation and scholars' assessment of the judiciary's involvement in settlements. Section II describes the Delaware Court of Chancery's role in reviewing settlements and surveys the policy considerations in their favor and against them. Section III presents the data and descriptive statistics on all settlements of fiduciary litigation in Delaware for cases filed between 2013 and 2023, focusing on different settlement types, release clauses, attorneys' fees and expenses, and incentive awards. Finally, Section IV offers a deeper reflection on the empirical findings, analyzing how the Court's interventions in settlement approvals align with broader corporate governance goals and policy concerns. It explores the Court's attempts to mitigate agency conflicts and examines the broader implications for the balance between encouraging settlements and safeguarding shareholder rights.

I. THE EVOLUTION OF SHAREHOLDER LITIGATION: FROM EARLY EMPIRICAL STUDIES TO MODERN JUDICIAL REFORMS

The first modern empirical review of shareholder litigation can be traced to Franklin S. Wood's 1944 analysis of court dockets in New York, which found that 22% of shareholder derivative cases settled, with attorneys' fees averaging 27% of the total recovery. [25] These findings laid the groundwork for subsequent theoretical and empirical investigations into the dynamics of shareholder litigation and the potential for opportunistic behaviors.[26] Analyzing a sample of 531 lawsuits, in 1980 Professor Thomas Jones found that 74.7% settled,[27] identifying the growing importance of settlements in corporate litigation.

Subsequently, Professor John Coffee's seminal work theorized that settlements' fee structures could create perverse incentives, fostering collusive settlements, which he described as "bribes by the defendant to make the plaintiff's attorney behave as would a normal attorney who is constrained by a client."[28] Similarly, Professor Roberta Romano's foundational work highlighted how attorneys frequently reaped disproportionate benefits from settlements, establishing themselves as "[t]he principal beneficiaries of litigation," and deepening concerns that shareholder litigation might encourage meritless lawsuits.[29]

Research focusing on shareholder litigation and Delaware, particularly the Court of

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[25] FRANKLIN S. WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS (for Special Committee on Corporate Litigation) (Chamber of Commerce of the State of New York 1944) (focusing on federal and state lawsuits from 1932 to 1942); at 11 (referring to attorneys' fees) ("[such fees were] among the largest possible for practitioners in any field of law" and could incentivize "unfounded and vexatious claims").

[26] *Id*. at 25 (Wood concluded his report with recommendations for increased transparency in attorney compensation, including the requirement that attorneys and plaintiffs file statements regarding their retainer agreements and surrounding circumstances.); *see also* Bryant G. Garth, Ilene H. Nagel & Sheldon J. Plager, *Empirical Research and the Shareholder Derivative Suit: Toward a Better-Informed Debate*, 48 LAW & CONTEMP. PROBS. 137 (1985).

[27] Jones, *supra* note 12, at 306 (analyzing any shareholder derivative or class action lawsuits filed between December 31, 1970, to December 31, 1978, involving 190 selected corporations); Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U. L. REV. 542, 544-545, 569 (1980) (supplementing the initial random sample of 190 corporations with 15 hand-picked); Coffee, *supra* note 15, at 9, n. 22 (characterizing Jones' review as "the fullest empirical study done to date.")

[28] Coffee, at 9, n. 24; at 33-34, 40-48 (explaining that the lodestar formula, adopted mainly by federal courts, is based on the hours expended by the attorney, the attorney's hourly billing rate, and a discretionary contingency bonus awarded by the court, and the "salvage value" approach, which is based on a percentage-to-the-recovery method.)

[29] Romano, *supra* note 12, at 84; *see also* Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3 (1990).

Chancery,[30] became more systematic in the early 2000s when Professors Robert Thompson and Randall Thomas pioneered the new methodological approach of reviewing courts' entire caseloads.[31] Their work helped inaugurate a new focus on merger and acquisition (M&A) litigation.[32] In their examination of merger-related class actions, Professors Elliott Weiss and Lawrence White emphasized that, while theoretically capable of policing M&A transactions, plaintiffs' attorneys often contributed minimal value and instead "free r[o]de on the efforts of others."[33]

The acceleration of M&A activity during the "Fifth Merger Wave"[34] (1993-2001) prompted scholars to explore the novel legal challenges posed by the unprecedented volume of M&A activity. In an influential study, C.N.V. Krishnan et al. reported that 32.9% of litigated cases settled, with many settlements providing increased consideration or "other substantive relief."[35] However, by the "Sixth Merger Wave" (2003-2007), the trend had shifted toward "disclosure-only" settlements, where attorneys' fees increased while shareholder benefits diminished. Professors Matthew Cain and Steven Davidoff Solomon's study revealed that 71.6% of challenged takeover transactions settled with minimal substantive benefits to shareholders,[36] a pattern corroborated by Cornerstone Research's 2012 report on 1,529 M&A shareholder lawsuits.[37]

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30 Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 350 (2001).

31 Thompson & Thomas, *supra* notes 12 and 14; Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747 (2004) (in a sample of 1,000 complaints for breach of fiduciary duties filed in the Delaware Court of Chancery (New Castle County) between 1999 and 2000, 24.2% settled).

32 *See* Thompson & Thomas, *supra* note 14.

33 Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1822 (2004) (analyzing lawsuits filed in Delaware between 1999 and 2001 and reviewing 564 mergers involving public companies with deal value above $100 million and found a settlement rate of 46%.)

34 Bernard S. Black, *The First International Merger Wave (and the Fifth and Last U.S. Wave)*, 54 U. MIAMI L. REV. 799 (2000); Richard G. Parker & David A. Balto, *The Merger Wave: Trends in Merger Enforcement and Litigation*, 55 BUS. LAW. 351 (1999) (providing an overview of the governmental enforcement actions adopted during the Fifth Merger Wave.); Jörn Kleinert & Henning Klodt, *Causes and Consequences of Merger Waves*, Working Paper nr.1092, Kiel Institute for World Economics (2002), https://www.econstor.eu/dspace/bitstream/10419/2692/1/kap1092.pdf, ("The most active industries in the current merger wave are those where globalized markets are of particular importance (for instance in the motor car or pharmaceutical industry), and in those industries where deregulation and liberalization significantly changed competition intensity (especially telecommunications and utilities).")

35 C. N. V. Krishnan, Ronald W. Masulis, Randall S. Thomas & Robert B. Thompson, *Jurisdictional Effects in M&A Litigation*, 11 J. EMPIRICAL LEGAL STUD. 132, 142 (2014) (reviewing 2,512 M&A offers and 299 lawsuits filed between 1999 and 2000)

36 *See* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 476, 480 (2015) (reviewing 1,117 takeover transactions valued at over $100 million announced between 2005 and 2011).

37 Robert M. Daines & Olga Koumrian, Cornerstone Research, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions - March 2012 Update* (2012), https://securities.stanford.edu/research-reports/1996-2012/Cornerstone-Research-Shareholder-MandA-Litigation-03-2012.pdf; Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEXAS L. REV. 557, 568 and 577 (2015) ("In disclosure-only settlements, the average requested fee award has declined over the past several years, from an average of $730,000 in 2009 to an average of $540,000 in 2012. Studies show that the average fee awarded in disclosure-only settlements is approximately $500,000." (*footnotes omitted*)).

This reliance on disclosure-only settlements drew widespread criticism, with scholars contending that these cases strained judicial resources and incentivized frivolous litigation.[38] Efforts to curb this trend, such as the adoption of fee-shifting bylaws,[39] were short-lived due to legislative intervention.[40] In response to these challenges, the Delaware Court of Chancery adopted a stricter stance in *In re Trulia Inc. Stockholder Litigation*, which limited approval of disclosure-only settlements to those providing "plainly material" information.[41] While *Trulia* led to a decline in such settlements within Delaware, scholars noted that the cases largely shifted to other venues, leaving unresolved concerns over meritless litigation. [42]

From early empirical studies to modern critiques, scholars have documented the increasing reliance on settlements in fiduciary litigation. Yet, a picture has emerged of Delaware's judicial oversight as a weak gatekeeper. Although judicial approval theoretically functions as a guard against unfair, unreasonable, and inadequate settlement terms as well as unreasonable attorneys' fees, most scholars suggest that, in practice, it is an "imperfect safeguard."[43] Much of the criticism has centered on the Court of Chancery's high approval rate, which some interpret as prioritizing expedient resolution over substantive review.

Critics argue that this high approval rate has fostered a system in which settlements are routinely approved even when they "impos[e] minimal sanctions on individual defendants[,] confer[] [only] nominal benefits on the corporation[, and award] large legal fees [to] the plaintiffs' lawyers[.]"[44] Hence, judicial review of settlements is described as "all bark and no bite."[45] Moreover, some critics find a causational link between the Court of Chancery's allegedly "hands-off approach" and the "race to the courthouse" phenomenon, which refers to cases filed hastily and settlements reached prematurely, often without adequate protection of shareholders' interests.[46]

These critiques highlight the need to reassess the Delaware Court of Chancery's settlement review process. While the high approval rate has often been cited as indicative of lenient oversight,

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[38] Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 2 (2015) ("In terms of filings, virtually every merger transaction is challenged, and derivative suits attend every corporate crisis, frequently following in the wake of prosecutorial or regulatory interventions." (*footnotes omitted*)); Parsons & Tyler, *supra* note 22, at 489-490, 491 (highlighting that "various problems emerge if the benefit is only therapeutic").

[39] ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 557 (Del. 2014) (upholding "fee-shifting" bylaw provisions, which would shift litigation expenses to plaintiffs who failed to obtain a favorable judgment.)

[40] Griffith, *supra* note 38, at 4 (a fee-shifting provision "shifts all litigation expenses to a plaintiff in intra-corporate litigation who 'does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought.'"); *see also* Howard F. Chang & Lucian A. Bebchuk, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371 (1996).

[41] *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884 (Del. Ch. 2016).

[42] Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *Mootness Fees*, 72 VAND. L. R. 1777, 1780 (2019) (explaining that the consequence of *Trulia* was a shift to federal courts). *See also* William B. Chandler III & Anthony A. Rickey, *The Trouble with Trulia: Re-Evaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims* (April 4, 2017), https://ssrn.com/abstract=2946477.

[43] Coffee, *supra* note 15, at 31.

[44] STEPHEN M. BAINBRIDGE, CORPORATE LAW 202 (2nd ed. 2009); *see also* Harald Baum & Dan W. Puchniak, *The Derivative Action: An Economic, Historical and Practice-Oriented Approach*, *in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 59 (Puchniak et al. eds. 2012).

[45] Bainbridge, *id.* at 202.

[46] Weiss & White, *supra* note 33, at 44.

a closer inquiry may reveal that an emphasis on approval statistics overlooks other critical facets of the Court's role. This inquiry is essential for a full understanding of Delaware's oversight function in fiduciary litigation and to ultimately determine whether the Court of Chancery merely serves as a procedural rubber stamp or engages in a substantive review of the settlement terms, weighing potential risks and policy objectives.

II. THE ROLE OF THE DELAWARE COURT OF CHANCERY IN SETTLEMENTS

A. The Settlement Review Process

Delaware law establishes procedural and substantive safeguards for the review of settlements. Under the Delaware Rules of the Court of Chancery ("Del. R. Ch. Ct."), neither a class action nor a derivative action can be dismissed or settled without the Court of Chancery's approval.[47] The Court reviews the settlement terms and determines whether to approve or deny the proposed stipulation of compromise, settlement, and release.[48] The approval of a settlement results in the dismissal of the action with prejudice, a resolution that forecloses future litigation of the same claims. Moreover, while Delaware generally follows the American Rule—under which each party bears its own legal fees[49]—two primary equitable exceptions often apply in representative litigation. Under the "common-fund" doctrine, when a party's efforts have led to the creation of a common fund, that party is entitled to have its attorneys' fees and expenses paid out of the fund.[50] Similarly, under the "corporate benefit" doctrine, if the party's efforts have conferred a substantial benefit upon the corporation or its shareholders, that party may receive an award of attorneys' fees and expenses.[51] Thus, if the plaintiff's counsel seeks an award of attorney's fees based on an exception, the Court also reviews the requested amount and awards attorneys' fees and expenses as it deems appropriate.[52]

A notice requirement is the critical procedural safeguard ensuring that all shareholders are adequately informed of the settlement's terms.[53] The notice of pendency details the litigation's procedural history, including any mediation efforts, explains why the settlement is preferred over

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[47] Del. R. Ch. Ct. 23(f)(1) and 23.1(d)(1); *In re* Activision Blizzard, Inc. S'holder Litig., at 1042 ("The settlement of representative litigation … 'is unique because the fiduciary nature of the [litigation] requires the Court of Chancery to participate in the consummation of the settlement.'" (quoting *Prezant v. De Angelis*, 636 A.2d 915, 921 (Del. 1994))).

[48] Alabama By-Prod. Corp. v. Cede & Co. on Behalf of Shearson Lehman Bros., 657 A.2d 254, 260 (Del. 1995) ("The unique fiduciary nature of the class action requires the Court of Chancery to participate in the consummation of any potential settlement to determine its intrinsic fairness").

[49] Goodrich v. E.F. Hutton Group, Inc., 681 A.2d 1039, 1043–44 (Del. 1996); Mahani v. Edix Media Grp., Inc., 935 A.2d 242, 245 (Del. 2007) ("Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs.").

[50] Goodrich, at 1044 ("[T]he most venerable equitable exception to the American Rule [is] the "common fund" doctrine (sometimes called the "equitable fund" doctrine or the "fund-in-court" doctrine)."); Maurer v. International Re-Insurance Corp., 95 A.2d at 830.

[51] Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1163 (Del. 1989); Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n, 902 A.2d 1084, 1089 (Del. 2006) ("Under the 'common benefit' exception [to the American Rule], a litigant may […] receive an award of attorneys fees if: (a) the action was meritorious at the time it was filed, (b) an ascertainable group received a substantial benefit, and (c) a causal connection existed between the litigation and the benefit.")

[52] Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEXAS L. REV. 557, 568 ff. (2015).

[53] Del. R. Ch. Ct. 23.1(c).

continued litigation, outlines the proposed allocation plan, and informs shareholders of their right to challenge the settlement. Shareholders may object to the settlement's terms and/or oppose the attorneys' fees and expenses requested by plaintiff's counsel.[54] Additionally, the notice delineates the scope of releases accorded to the defendants and any other released parties.

The settlement hearing is the fulcrum of the settlement process. Although defendants and other interested parties have the opportunity to be heard by the Court, the hearing typically centers on a dialogue between the plaintiffs' attorneys and the judge.[55] Plaintiffs' counsel present the settlement terms and clarify any ambiguities. Defendants' attorneys rarely contribute to the discussion unless directly prompted by the judge, or if they wish to oppose the amount of attorneys' fees.[56] During the hearing, the Court certifies the class (if applicable), confirms the adequacy of the notice, issues its ruling on the settlement, and awards attorneys' fees and expenses. In determining if the settlement terms are "fair, reasonable, and adequate," the Court exercises its own business judgment, evaluating the "give" (the plaintiff's release of defendants from liability) and the "get" (the settlement consideration, which can include monetary payments, corporate governance reforms, or amendments to deal terms).[57]

When reviewing the settlement, the Court weighs several factors, including the complexity of the litigation, the arm's length nature of negotiations, the involvement of mediation, counsel's experience, and the stage of discovery. Another crucial consideration is the risk that further litigation may pose for the settling parties. Plaintiffs' briefs in support of the settlement outline the strengths and weaknesses of the original claims based on information obtained during the litigation. Plaintiffs highlight why, without settlement, the ongoing lawsuit would drain corporate resources and expose the parties to unfavorable rulings. Thus, in order to justify the Court's approval of the settlement, plaintiffs' briefs present more nuanced and detailed versions of the claims, while underlining the difficulties of succeeding on the merits.

The Chancery Court has discretion to adjust the fee award[58] and to request clarification of information presented in affidavits, whether or not shareholders oppose the fees agreed upon by the settling parties.[59] In reviewing requests for attorneys' fees, the Court relies on the *Sugarland*[60] factors, awarding fees based on the benefit conferred upon shareholders through the settlement,[61]

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[54] Transcript of Plaintiff's Motion to Re-Certify the Class, Approve the Settlement, Attorneys' Fees, Expenses and Incentive Awards, and the Court's Rulings, Voigt v. Metcalf, C.A. No. 2018-0828-JTL, at 42:24-49:6 (Del. Ch. Jan. 19, 2022) ("I give virtually no weight to the absence of objections. The whole point of incentivizing stockholders to bring this type of litigation is because stockholders are rationally apathetic. And just as they're rationally apathetic about the underlying wrong, they're likely to be rationally apathetic about the settlement.").

[55] Transcript of Settlement Hearing and Rulings of the Court, Feuer v. Redstone, C.A. No. 12575-CB at 13:2-3 (Del. Ch. Jun. 25, 2019) ("It's a traditional old settlement. No words from the defense.").

[56] Anderson v. Magellan Health, Inc., 298 A.3d 734, 747 (Del. Ch. 2023) ("Settlement proceedings are largely non-adversarial because the parties have a shared goal of securing court approval."); Fisch et al., *supra* note 52, at 569 ("[T]he settlement hearing is likely to be nonadversarial in nature.")

[57] *In re* Activision Blizzard, Inc., C.A. No. 8885-VCL, 27 (Del. Ch. May. 20, 2015).

[58] *In re* Plains Res. Inc. S'holders Litig., 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005).

[59] Anderson v. Magellan Health, Inc., at 747 (noting that the non-adversarial nature of settlements proceedings "places the court at a disadvantage when valuing the benefit of the settlement consideration for the purpose of awarding attorneys' fees.")

[60] Sugarland Industries, Inc. v. Thomas, 420 A.2d 142 (Del. 1980)

[61] Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1254 (Del. 2012).

the time and effort expended by counsel in the lawsuit, the litigation's stage,[62] and the risk inherent in the fee arrangement. The Court also considers case complexity, the attorney's reputation and willingness to proceed to trial, the thoroughness of pre-filing investigation, the level of detail of the complaint, the success on motions, the volume of discovery documents, and the number of depositions. Additionally, the Court may take into account the efficiency of discovery review, including the use of technological tools to maximize productivity.[63]

As per attorneys' fees, Delaware courts primarily adopt the percentage-of-the-recovery method, particularly when the settlement consideration is quantifiable (e.g., monetary amounts, cancellation of a termination fee, etc.).[64] Plaintiffs' attorneys frequently reference precedents in which the Court approved comparable or higher percentages. To support their fee request, plaintiffs' attorneys also provide details on the "state of litigation," including the number of document pages reviewed, depositions conducted, and motions filed. Additionally, attorneys' affidavits include information on the lodestar calculation, which serves as an additional cross-check on reasonableness, particularly in cases where the fee request appears substantial relative to the benefit achieved.[65] The hourly rates used for lodestar calculation are typically the rates the firm applies in contingency cases and are consistent with those submitted to state and federal courts in other stockholder derivative and securities class action litigation. Firms regularly analyze rates charged by other firms performing similar work and include that information in the submitted affidavits.

Moreover, settlements may include an incentive award for the lead plaintiff. Delaware courts have defined principles governing the opportunities and risks surrounding such awards. Historically, due to the limited role typically served by plaintiffs[66] and the importance of maintaining a clear separation between class counsel and the class representative, Delaware courts

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[62] Americas Mining Corp. v. Theriault, at 1259-60 ("The Court of Chancery has a history of awarding lower percentages of the benefit where cases have settled before trial. When a case settles early, the Court of Chancery tends to award 10–15% of the monetary benefit conferred. When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards in the Court of Chancery range from 15–25% of the monetary benefits conferred. 'A study of recent Delaware fee awards finds that the average amount of fees awarded when derivative and class actions settle for both monetary and therapeutic consideration is approximately 23% of the monetary benefit conferred; the median is 25%.' Higher percentages are warranted when cases progress to a post-trial adjudication.") (*footnotes omitted*).

[63] *See e.g.*, Transcript of Settlement Hearing and Rulings of the Court, *In re* Calamos Asset Management, Inc. S'holder Litig., C.A. No. 2017-0058-JTL and 2017-0139-JTL, at 75:23-76:4 (Del. Ch. Apr. 25, 2019) ("In total, over 600,000 pages of documents were produced. I noted in the papers that plaintiffs used what I assume was predictive coding to review the documents, and I think that that's an efficient use of your time and an appropriate way to proceed in these sorts of cases.")

[64] *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679, 692 (Del. Ch. 2023), as revised (Aug. 21, 2023), aff'd, No. 349, 2023, 2024 WL 3811075 (Del. Aug. 14, 2024) (citing *Americas Mining Corp. v. Theriault*, at 1259 ("If the results are quantifiable, then 'Sugarland calls for an award of attorneys' fees based upon a percentage of the benefit.'")

[65] Lawyers submit affidavits in support of approval of the proposed settlement and award of attorneys' fees and expenses. These affidavits outline the hourly rate for each attorney who worked on the cases and the applicable individual hourly rate.

[66] Fuqua Indus. S'holder Litig. v. Abrams (In re Fuqua Indus.), 2006 Del. Ch. LEXIS 167, *5, *6 (referring to instances of plaintiffs being "mere 'puppet plaintiff[s].'")

held a "'presumption against awarding a separate payment or bonus' to a named plaintiff."[67] Such awards were justified only in rare circumstances, such as when "[the] significant amount of time, effort and expertise expended by the class representative [results in] a significant benefit to the class."[68] Recently, however, Delaware judges have adopted a more flexible approach, particularly as plaintiffs undertake increasingly demanding efforts, such as during the inspection rights exercise phase.[69]

Usually, the outcome of the settlement and requested fee awards' review is memorialized in an order and final judgment prepared in draft form by the parties and entered by the Court at the end of the settlement hearing. Alternatively, the Court may request supplemental briefings, take the matter under advisement, and/or opt for the issuance of an opinion. Opinions on settlements, most frequently addressing objections, may either relate to the entirety of the settlement terms or concern uniquely the requested fees and expenses. If appealed, a settlement ruling of the Court of Chancery is reviewed under an abuse-of-discretion standard.[70] Lastly, the Court of Chancery retains jurisdiction to enforce its orders which rarely results in modifications of allocation plans or rulings on collateral matters.[71]

B. Public Policy Considerations in Settlements' Judicial Review

In 1992, then-Vice Chancellor Carolyn Berger and her clerk Darla Pomeroy reported a 97% settlement approval rate in the Court of Chancery, noting that plaintiffs had a strong likelihood of settlement approval and generous fee awards.[72] This high approval rate raised concerns about the Court's effectiveness in monitoring and scrutinizing settlements.[73] Yet, the review of settlements of fiduciary litigation entails an array of public policy considerations, ranging from the role reserved to private ordering to the weight given to the promotion of judicial economy, as well as the monitoring of classic agency problems and those explicitly arising from the representative

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[67] Chen v. Howard-Anderson, No. 5878-VCL, 2017 Del. Ch. LEXIS 734 at *10 (Del. Ch. June 30, 2017) (quoting Raider v. Sunderland, 2006 Del. Ch. LEXIS 4, 2006 WL 75310, at *2 (Del. Ch. Jan. 4, 2006)). *See* Transcript of Record, *In re* Commercial Assets, Inc. S'holders Litig., C.A. No. 17402, at *33–34 (Del. Ch. Aug. 3, 2000) ("I don't think that we ought to start individually compensating named plaintiffs in every sort of litigation. . . . [W]e don't want them to become sort of a rival or a coordinated kind of fee application on behalf of named plaintiffs.").

[68] Raider v. Sunderland, 2006 WL 75310, at *1, (Del. Ch. Jan 4, 2006) ("Compensating the lead plaintiff for efforts expended is not only a rescissory measure returning certain lead plaintiffs to their position before the case was initiated, but incentive to proceed with costly litigation (especially costly for an actively participating plaintiff) with uncertain outcomes").

[69] *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679, 692 (Del. Ch. 2023), as revised (Aug. 21, 2023), aff'd, No. 349, 2023, 2024 WL 3811075 (Del. Aug. 14, 2024) (citing Charles R. Korsmo & Minor Myers, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 VAND. L. REV. 1923 (2019).

[70] Mentor Graphics Corp. v. Shapiro, 818 A.2d 959, 963 (Del. 2003).

[71] Mummert v. Wiggin, 616 A.2d 325, 326 (Del. 1992).

[72] Carolyn Berger & Darla Pomeroy, *Settlement Fever: How a Delaware Court Tackles Its Cases*, 2 BUS. L. TODAY 7 (1992) (analyzing corporate class or derivative actions in which the Court had held settlement hearings between July 1, 1989, and December 31, 1991, the outcome was that 96 out of 98 settlements had been approved) ("Plaintiffs stand an extremely good chance of having their settlements approved here, and their lawyers are likely to be awarded handsome fees.")

[73] Weiss & White, *supra* note 33, at 1845-1846 ("Nonetheless, the Chancery Court's 100 percent approval rate clearly provides no support for claims that the Court is acting as an effective monitor or is alert to the possibility of collusion. […] Thus, the Chancery Court's hands-off approach has had the unfortunate effect of promoting the "race to the courthouse" evidenced by our finding that the first complaints in the vast majority of merger-related cases were filed within one day after the challenged mergers were announced.")

litigation model.

Promoting the parties' voluntary resolution of contested issues aligns with several overarching policy goals. Delaware's enabling corporate law framework supports a system of private ordering, empowering corporate actors to shape intra-corporate agency conflicts through negotiated outcomes.[74] This underscores the importance of private enforcement mechanisms, as highlighted by Priest and Klein's selection hypothesis, which suggests that cases resolved through settlements generally reflect aligned party expectations, while those proceeding to trial involve greater uncertainty and divergence.[75] Moreover, the judiciary's favorable view of settlements is linked to three interrelated factors. First, courts face the challenge of overburdened dockets, and the Delaware Court of Chancery, in particular, has experienced increasing caseloads.[76] Settlements promote judicial economy by reducing the strain on the court system and conserving resources for the broader community.[77] Second, most settlements are approved as bench rulings, as opposed to full judicial opinions, reducing the demand for judicial resources and expediting case resolution.[78] Third, settlements provide certainty in their outcomes, with appeals of settlement orders being exceedingly rare.[79]

Private ordering relies on private enforcement mechanisms,[80] which can be activated through litigation,[81] with the judiciary as the restorer of imbalances between the parties.[82] Hence, representative litigation serves a crucial public function by monitoring agency problems and enforcing fiduciary duties. Because shareholders are conventionally defined by rational apathy,[83]

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[74] James D. Cox, *Corporate Law and The Limits of Private Ordering*, 93 WASH. U. L. REV. 257 ("In a world of private ordering, the state corporate statute is understood to have the limited role of providing default rules in those instances where the parties have not otherwise specified how their affairs or activities are to occur.")

[75] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

[76] *See* Figure IV in the Appendix.

[77] Transcript of Settlement Hearing and Ruling of the Court, Vero Beach Police Officers' Ret. Fund v. Bettino, C.A. No. 2017-0264-JRS, at 26:16-18 (Del. Ch. Dec. 3, 2018) ("And congratulations on a well-deserved settlement. I appreciate you clearing another one off the docket."); Transcript of Telephonic Oral Argument and Rulings of the Court on Plaintiffs' Application for an Award of Attorneys' Fees and Expenses, Asbestos Workers' Philadelphia Pension Fund et al. v. Avril, et al., C.A. No. 2019-0633-SG, at 24:19-25:2 (Del. Ch. Apr. 16, 2021) ("I'll note that the litigation here was largely outside the ken of the Court. I say that because while there were at least a couple of very heavily briefed issues that were about to be presented to the Court, those were resolved by settlement, which means this is exactly the kind of litigation that the Court should like because it was done with almost no effort on my part.")

[78] *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that settlements undermine the public function of courts by prioritizing efficiency and private resolution over justice and the development of legal norms); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (observing how private settlements can often diverge from socially optimal litigation outcomes, as parties prioritize efficiency over the development of legal precedent).

[79] The same is true for the approved attorneys' fees, *see* Cain & Davidoff Solomon, *supra* note 36, at 480 ("In Delaware it appears that attorney fees awards are rarely appealed, since there is a norm for the Delaware Supreme Court to defer to the Chancery Court on the issue of fees.")

[80] Weiss & White, *supra* note 33, at 1798, ("Delaware courts have largely privatized enforcement of fiduciary duties in public corporations.")

[81] John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems, Legal Strategies, and Enforcement* (Harvard John M. Olin Discussion Paper Series, No. 644, July 2009), at 12 ("[P]rivate enforcement embraces a wide range of institutions. At the formal end of the spectrum, these include class actions and derivative suits[.]")

[82] Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 OKLA. L. REV. 237, 2070 (2017) ("Judges are the first line of defense in shareholder lawsuits.")

[83] ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Macmillan 1933) (1932); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

plaintiff's attorneys play a pivotal role, possessing the expertise to detect violations and initiate enforcement actions.[84] However, as utility-maximizing entrepreneurs,[85] attorneys may prioritize their own financial interests over the collective benefit of the plaintiffs they represent.[86] Moreover, because indemnification of legal expenses and insurance coverage are generally contingent on not being "'adjudicated' to have breached a duty[,]"[87] defendants have a strong interest in avoiding trial.[88] As a result, settlements—often with broad releases[89]—are particularly attractive to defendants, who may pressure plaintiffs' counsel to settle. Such alignment of interests between plaintiffs' and defendants' attorneys adds another layer of agency risk for shareholders.[90]

Professional mediation has emerged as an increasingly common way to mitigate agency problems in settlement negotiations. Litigants can engage a private mediator (usually a former judge) or, as permitted under Del. R. Ch. Ct. 174(b), a sitting judicial officer from the Court of

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[84] *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679, 686 (Del. Ch. 2023), as revised (Aug. 21, 2023), aff'd, No. 349, 2023, 2024 WL 3811075 (Del. Aug. 14, 2024) ("Entrepreneurial plaintiff's counsel therefore perform a valuable service by pursuing litigation in a world where stockholders are rationally apathetic."); Weiss & White, *supra* note 33, at 1799, ("Chancellor Chandler also explained that Delaware courts have adopted this policy because they believe that the plaintiffs' bar is capable of performing a valuable 'service on behalf of shareholders.' Plaintiffs' attorneys understand 'abstruse issues of corporate governance and fiduciary duties' far better than do most shareholders. Consequently, they are uniquely qualified to identify situations in which principles of corporate governance have been violated or fiduciary duties have been breached and then to initiate lawsuits seeking corrective action." (citing *In re* Fuqua Indus., Inc., 752 A.2d at 133) (*footnotes omitted*)).
Plaintiffs' attorneys have the professional skills to review companies' filings, transactions and other indicators of the company's corporate governance quality, *see* Loewenstein, *supra* note 20, at 6, ("This reality has the apparent (although not intended) effect of encouraging the use of derivative actions to reform corporate governance. From the perspective of plaintiffs counsel, this may be a rather circuitous route to corporate governance reform, but it does support a fee, and that is often the motivating force behind the filing of the action.")

[85] *See* Coffee, *supra* notes 15 and 17. This agency problem between the plaintiff and the plaintiff's attorney is also referred to as the "meta-meta-agency" problem, *see In re* Riverbed Tech., Inc. Stockholders Litig., No. C.A. 10484-VCG, 2015 WL 5458041, at *1 (Del. Ch. Sept. 17, 2015).

[86] *See* Bebchuk, *supra* note 15; Weiss & White, *supra* note 33, at 1799 ("Delaware courts have recognized that encouraging private enforcement creates an obvious danger. Plaintiffs' attorneys may make litigation-related decisions primarily to advance their own economic interests rather than those of the corporations or shareholders that they purport to represent. Such decisions have the potential to impose substantial, litigation-related agency costs on corporations, shareholders, and the courts." (*footnotes omitted*))
See also Transcript of Settlement Hearing, Arbiter Partners QP, LP v. Hurwitz et al., C.A. No. 8394-CS, at 8:13-15 (Del. Ch. Feb. 12, 2014).

[87] Coffee, *supra* note 17, at 715.

[88] Transcript, Acevedo v. Aeroflex Holding Corp., C.A. No. 9730-VCL, at 28:23-29:17 (Del. Ch. July 8, 2015) ("[Y]ou opened the door to it by saying, 'Why would these defendants settle a case they otherwise could win?' And the answer is that any lawsuit that can inflict costs on the defendant has value. That value can be in excess of the actual merit of the claim. Which, again, I think once you said there was no conflict, your case has no merit. And once you have that – the definition of a 'holdup,' it simply means – there's holdup lawsuits. […] There's all kinds of holdups. All 'holdup' means is that you have the ability to inflict more cost and pain on the other side and so they're willing to settle to go away. That is an alternative explanation that is other than your proffer and an answer to your proffered question, 'Why would the defendants settle with us if our claims weren't meritorious?' That's one answer. It was cheaper."

[89] Transcript of Settlement Hearing, *In re* InterMune, Inc., S'holder Litig., C.A. No. 10086–VCN (Del. Ch. Jul. 8, 2015) (referring to releases as "deal insurance"); Letter Opinion, *In re* Riverbed Tech., Inc. Stockholders Litigation, C.A. No. 10484-VCG, at 2, (Del. Ch. Dec. 2, 2015) ("In addressing the settlement and the award of counsel fees in this matter, I had before me the presentations of learned counsel for the individual Plaintiffs and the Defendants, parties that were by that point no longer adversarial.")

[90] *Id.* at 9, n. 24 ("[T]he pattern of collusive settlements […] might arguably be seen as bribes by the defendant to make the plaintiff's attorney behave as would a normal attorney who is constrained by a client.")

Chancery to facilitate negotiations.[91] Impartial and highly experienced mediators ensure that settlement terms are negotiated at arm's length, providing the Court with additional assurance of substantive equity in the settlement's terms.[92] Directors' and officers' ("D&O") insurers, who play a central role in funding and shaping these negotiations, also favor mediation. D&O insurance policies typically cover defense costs (i.e., defense counsels and, if any, defense experts) and settlement amounts, and many policies include "consent-to-settle" clauses that actively involve insurers in settlement discussions. These clauses often require a neutral mediator, as insurers are increasingly reluctant to allow defense counsel to negotiate directly with plaintiffs.

While plaintiffs' attorneys fill the gap left by shareholders' inability or disinterest in actively monitoring agents, their motives are sometimes questionable. They initiate lawsuits to address fiduciary breaches, but they may also steer the dispute toward the outcome most favorable to them, potentially extracting wealth from the corporation and its shareholders. This represents an additional agency problem that requires monitoring. Furthermore, the shared interest of plaintiffs' and defendants' attorneys in reaching a settlement can exacerbate the risks to shareholders, adding further to the layers of agency problems in representative litigation.

Judges, therefore, play a vital role in scrutinizing settlement terms to ensure that an equilibrium among the litigants is maintained. As the Delaware Supreme Court has stated, "the Court of Chancery must […] play the role of fiduciary in its review of […] settlements[.]"[93] Given that Delaware law favors settlements, a court would only reject the settlement if a superior public policy objective compels such action.[94] As this study of the Chancery Court's review of fiduciary duty litigation settlements over the past decade reveals, the Court balances multiple competing objectives.

III. EMPIRICAL ANALYSIS

A. Sample Set

The sample consists of settlements of (1) derivative suits and class action lawsuits, (2) alleging breaches of fiduciary duty, (3) filed between January 1, 2013, and December 31, 2023, and (4) overseen by the Delaware Chancery Court. For purposes of the present analysis, "breaches of fiduciary duty" include alleged fiduciary breaches by directors, officers, and other fiduciaries (e.g., controlling shareholders). The dataset is primarily derived from Lex Machina, supplemented by

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[91] Del. R. Ch. Ct. 174(b) ("*Voluntary Mediation*. In any type of matter, with the consent of the parties, the Court may enter an order referring the matter or any issue for mediation before a judicial mediator or a non-judicial mediator. A member of the Court of Chancery or a Magistrate in Chancery sitting permanently in Chancery who has had no prior involvement in the case may serve as a judicial mediator. Any impartial individual may serve as a non-judicial mediator. A non-judicial mediator need not be an attorney."); Elena C. Norman, Lakshmi A. Muthu & Michael A. Laukaitis II, *United States: Delaware*, *in* THE DISPUTE RESOLUTION REVIEW 381 (Damian Taylor ed., 15th ed. 2022). *See also* COURT OF CHANCERY OF THE STATE OF DELAWARE, *Mediation Guideline Pamphlet* (Rev. 7/2023), available at https://courts.delaware.gov/forms/download.aspx?id=15478 (last visited on Oct. 12, 2024).

[92] Transcript of Settlement Hearing and Rulings of the Court, *In re* Fitbit, Inc. S'holder Litig., C.A. No. 2017-0402-JRS, at 42:20-43:1 (Del. Ch. Oct. 27, 2020) ("[S]ettlements that are the product of mediation suggest a rigorous vetting of risk. Having an experienced mediator helping the parties bridge gaps and substantively discuss the issues often results in the parties having a strong handle on what makes sense as a negotiated resolution.")

[93] *In re* Resorts Int'l S'holders Litig. Appeals, 570 A.2d 259, 266 (Del. 1990).

[94] Barkan v. Amstead Indus., Inc., 567 A.2d 1279, 1283 (Del. 1989) ("The Court of Chancery plays a special role when asked to approve the settlement of a class or derivative action. It must balance the policy preference for settlement against the need to insure that the interests of the class have been fairly represented.")

data extracted from Bloomberg Law. In the Appendix, I provide additional detail on the data collection process.

B. Descriptive Statistics and Analysis

Following the data collection, each docket was manually reviewed to determine the procedural status and outcome of the case as of [November 17], 2024. Table 1 provides an overview of case outcomes that are pending or that involved judicial adjudication. Pending cases include ongoing trials or post-trial appeals. Cases that have proceeded beyond the motion to dismiss stage remain ongoing, with outcomes that may ultimately include either settlement or a different adjudication. Settlement prospects are generally higher when a motion to dismiss is denied, as such cases are likely to advance through additional stages of litigation. Conversely, parties may also opt to settle while a motion to dismiss is pending to avoid the costs and uncertainties associated with prolonged litigation. Even when a motion to dismiss is granted, parties may choose to settle to mitigate the potential risks of an appeal. The sample further indicated that 15.5% of cases were voluntarily dismissed on the grounds of mootness, which refers to instances where defendants' actions subsequent to the filing of the lawsuit mooted the plaintiff's claims. As per the negligible number of cases that proceeded to trial, these do not include the five instances where a post-trial settlement was reached. As per the dismissals by the Court, these are instances where no action by the parties was taken for a year or more. The total number of settlements comprises a relatively small number of confidential settlements (9, which account for 3% of the settlements), which suggests that publicity of settlement terms is generally maintained. For a comprehensive explanation of the selection criteria and a detailed breakdown of all case outcomes, please refer to the Appendix.

Table 1
Overview of Pending and Judicially-Adjudicated Case Outcomes

Outcome	Number of cases	Percentage	Mean Days	Median Days
Total number of cases	1,013	*100%*	-	-
Pending cases	[229]	*[22.6%]*	-	-
Cases that are past the motions to dismiss stage - Granted - Denied - Granted in part, denied in part	[216] [192] [10] [14]	*[21.3%]*	[556]	[485]
Voluntary dismissals with mootness fees	[176]	*[17.4%]*	[253]	[192]
Concluded trials	[29]	*[2.9%]*	[1,258]	[1,264]
Dismissed by the Court	[71]	*[7.0%]*	[518]	[266]
Cases that have reached settlement	[292]	*[28.8%]*	[816]	[678]

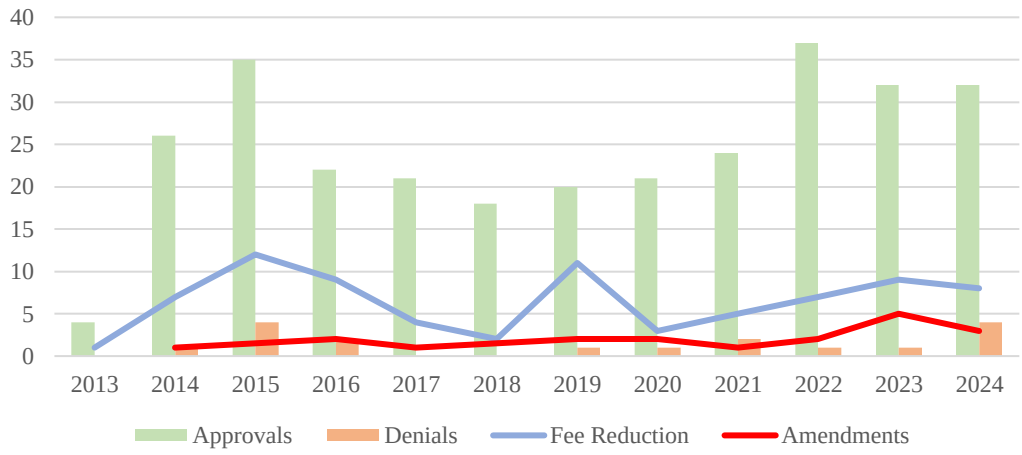
As shown in Table 2, 37% of settlements occur after the Court has issued a ruling on a motion to dismiss or presided over a trial. Notably, also the remaining 63% of settlements, reached before a ruling on a motion to dismiss, often involve significant judicial engagement, such as hearings on subsequently withdrawn motions to dismiss or rulings on other motions (e.g., motions for preliminary injunctions, motions to compel, motions for expedited proceedings and motions for judgment on the pleadings).

Table 2 Timing of Settlements Relative to Judicial Rulings		
Outcome	Number of cases	Percentage
Total number of settlements	[292]	*[100%]*
Reached before a ruling on a motion to dismiss	[184]	*[63.0%]*
Reached after a ruling on a motion to dismiss	[103]	*[35.3%]*
Reached following a trial	[5]	*[1.7%]*

C. Stipulations and Agreements of Settlement, Compromise and Release

A stipulation of settlement, typically titled "Stipulation and Agreement of Settlement, Compromise and Release," is largely based on a standardized template.[95] The three most heavily negotiated sections are: (i) the scope of the release, (ii) the settlement consideration, and (iii) the attorneys' fees and expenses, which may also include incentive awards for the lead plaintiff. Figure 1 illustrates the settlement proposals reviewed by the Delaware Court of Chancery from 2013 to 2024, breaking them down into approvals and denials, and highlighting instances where the Court reduced attorneys' fees and required amendments to the settlement language.

Figure 1
Settlement Proposals and Court Interventions (2013-2024)



1. ***Release Clauses***. – Release clauses are a pivotal element of settlement agreements, serving as a mechanism through which defendants secure protection from future litigation related to the same underlying issues.[96] Often referred to as the "give" in a settlement or a means of securing

[95] *See e.g.*, Transcript of Settlement Hearing and Rulings of the Court, Firefighters' Pension System of the City of Kansas City, Missouri Trust v. Presidio, Inc., et al., C.A. No. 2019-0839- JTL, at 24:24-25:2 (Del. Ch. Nov. 18, 2022) ("Your Honor, my suspicion is that we were pulling together releases from a variety of contexts and templates that relied on other templates.")

[96] Stipulations of settlement devote a section to the release language which defines the scope of the release through three separate defined terms. First, it defines the "Released Persons" to specify the group of individuals and entities that are going to benefit from the release. Among the individuals included in the Released Persons are the defendants and a broad number of additional related persons. Second, it defines the "Released Claims" to specify the full scope of the claims, suits and liabilities covered by the release. Lastly, it often includes a definition of "Unknown Claims" to comprise all the claims arising out of the same set of operative facts as the claims asserted and not known or suspected to exist at the moment of the settlement.

"global peace,"[97] these clauses can vary widely in scope. In certain instances, the release may extend beyond the specific allegations in the complaint or even include individuals or entities related to the defendants, which can raise concerns regarding overbreadth.[98] Accordingly, while release clauses are mostly standardized, the Delaware Court of Chancery polices against provisions that are "[neither] customary [n]or […] appropriate"[99] and ensures that their scope is commensurate with the settlement consideration provided by the defendants.

In reviewing release clauses, the Court carefully considers the implications of permitting claims to be released if the plaintiff's counsel has not thoroughly investigated them.[100] In rare instances, such concerns may be addressed by including multiple release clauses within the same settlement. A notable example is the settlement in *Carr v. New Enterprise Associates, Inc.*,[101] where the lead plaintiff negotiated separate release terms with the defendants, while the remaining class members agreed to a narrower release clause. This arrangement preserved the optionality of these class members to pursue claims that the lead plaintiff had chosen to forgo, thereby reflecting a nuanced consideration of the different risks and contributions of various parties involved.

The sample demonstrates that the Court's review of release clauses varies depending on the particularities of each case. Where the release language presents no substantial concerns, the Court approves the settlement without any intervention. When minor ambiguities or uncertainties arise, the Court can adopt a light approach, requesting supplemental briefings from the parties to justify the scope of the release by referencing similar, previously approved settlements.[102] Alternatively, the Court may instruct the parties to amend the language of the release or mutually agree on a specific interpretation to clarify its scope. In more interventionist cases, judges may provide direct drafting guidance, effectively reshaping the release clauses to ensure their appropriateness in the context of the settlement consideration.[103] Lastly, the Court may choose to deny the settlement

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[97] Transcript of Settlement Hearing and Rulings of the Court, Firefighters' Pension System of the City of Kansas City, Missouri Trust v. Presidio, Inc., et al., C.A. No. 2019-0839- JTL (Del. Ch. Nov. 18, 2022).

[98] *See e.g.,* Stipulation of Agreement of Settlement, Compromise, and Release, *In re* Dell Technologies Inc. Class V Stockholders Litigation, C.A. No. 2018-0816-JTL (Dec. 22, 2022) (including a broad release, which covered the immediate family, present and past professionals, and entities in which the defendants have any financial interests).

[99] During the 2014 settlement hearing in *In re Arthrocare Corp. Stockholder Litigation*, Vice Chancellor Laster noted that the drafters had added synonyms such as "embrace" to the standard "Released Claims" definition. He characterized the release as the "most extensive" he had seen, underlying the Court's discomfort with overly broad language that may inadvertently extend the scope of the release beyond what is equitable.

[100] *See*, Transcript of Telephonic Bench Ruling on Settlement Hearing, *In re* InterMune, Inc., S'holder Litig., C.A. No. 10086-VCN, (Del. Ch. Dec. 29, 2015); Transcript of Settlement Hearing and Rulings of the Court, Shumacher v. Dukes, et al., C.A. No. 2020-1049-PAF (Del. Ch. Nov. 17, 2022).

[101] Stipulation and Agreement of Compromise, Settlement and Release, Carr v. New Enterprise Associates, Inc., at 33, C.A. No. 2017-0381-AGB (Jan. 8, 2019).

[102] Transcript of Telephonic Bench Ruling on Settlement Hearing, *In re* Intermune, Inc. Stockholder Litigation, C.A. No. 10086-VCN (Del. Ch. Del. 29, 2015); Letter to Counsel, *Appel v. Berkman*, C.A. No. 12844-VCF (Del. Ch. Feb. 11, 2020) ("In reviewing the papers, I harbored some concerns that the settlement might have been bought too cheaply in light of what had been described in the settlement brief as plaintiff's expert's preliminary determination that the claims asserted in the action could have potentially resulted in an award close to $500 million. The settlement amount is only 5% of that amount.").

[103] *See* Transcript of Settlement Hearing and Rulings of the Court, Feinstein v. Outdoor Channel Holdings, Inc. et al., C.A. No. 8412-VCP (Del. Ch. Jan. 6, 2014); *see also* Order Granting the Motion for Entry of Settlement Distribution Order, Kleinman vs. Couchman, et al., C.A. No. 10552-CB (Del. Ch. Nov. 13, 2017) (approving the order but for one paragraph which aimed at releasing all persons involved in review and processing of claims because "It is not customary or, in the Court's view, appropriate to grant such a release in connection with the distribution of a settlement fund.")

when the release language appears disproportionately broad relative to the settlement consideration.

An illustration of the Court's intermediate approach, where parties were asked to revise release language, occurred during the settlement hearing in *Firefighters' Pension System of the City of Kansas, Missouri Tr. v. Presidio Inc.* when Vice Chancellor Laster required the parties to amend the release, citing concerns about its forward-looking scope.[104] Drawing upon former Chancellor Chandler's 2006 ruling in *UniSuper*,[105] Vice Chancellor Laster emphasized the Court's longstanding resistance to overly broad releases, particularly those including terms like "hidden or concealed," which could shield defendants from liability for undisclosed misconduct.[106] Similarly, in *Nantahala Capital Partners II Limited Partnership v. QAD Inc.*,[107] following Vice Chancellor Fioravanti's feedback, the parties submitted an amended stipulation of settlement, which specifically narrowed the definition of "Released Plaintiff's Claims."[108]

A more interventionist approach contemplates the rejection of settlements. These instances may lead to a revised stipulation of settlement or to the ultimate voluntary dismissal of the lawsuit. The former is exemplified by the procedural history of *Mindbody*, where Chancellor McCormick initially rejected the settlement due to concerns over the interpretation of the release clause and later approved it after the parties agreed to a more narrowly tailored interpretation. Chancellor McCormick emphasized that, while the Court encourages voluntary settlements, it avoids rewriting agreements, as doing so could create uncertainty and hinder the resolution process.[109]

By contrast, a voluntary dismissal occurred after Vice Chancellor Laster rejected the settlement proposed in *Rubin v. Obagi Medical Prods., Inc.*[110] Highlighting the inadequacy of the consideration in exchange for an expansive release, Vice Chancellor Laster's concern over "unknown unknowns" pointed to the danger of global releases in disclosure settlements, where plaintiffs may not have fully explored potential claims. He emphasized that even industry-standard release provisions must be supported by meaningful consideration to meet the Court's fairness standards. This heightened scrutiny became especially salient in cases involving disclosure-only settlements, leading up to the landmark ruling in *Trulia*.[111] Another example is *Schumacher v. Loscalzo*, et al. where Vice Chancellor Will denied the settlement due to the overly broad release,

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[104] Transcript, Firefighters' Pension System of the City of Kansas City, Missouri Trust v. Presidio, Inc., et al.

[105] Unisuper Ltd. v. News Corporation, 898 A.2d 344 (Del. Ch. 2006).

[106] Transcript, Firefighters' Pension System of the City of Kansas City, Missouri Trust v. Presidio, Inc., et al.

[107] Order and Final Judgment, Nantahala Capital Partners II Limited Partnership v. QAD Inc., C.A. No. 2021-0573-PAF (Del. Ch. Dec. 13, 2023).

[108] Order and Final Judgment, Nantahala Capital Partners II Limited Partnership v. QAD Inc.

[109] Transcript of Telephonic Rulings of the Court regarding Pending Settlement and Fee Petition, Ryan v. Mindbody, Inc., C.A. No. 2019-0061-KSJM, at 26:11-18 (Del. Ch. Oct. 31, 2020) ("I'm not going to blue-pencil this settlement agreement. The Court encourages the voluntary resolution of claims of this nature, and rewriting the settlement would, in most instances, inject risk and uncertainty into the settlement process and discourage the voluntary resolution of claims that we're trying to promote, so I'm not going to do that.")

[110] Stipulation and Agreement of Compromise, Settlement and Release, C.A. No. 8433-VCL (Jan. 31, 2014).

[111] Transcript of Telephonic Bench Ruling on Settlement Hearing, In re InterMune, Inc., S'holder Litig., C.A. No. 10086-VCN, at 10:9-17, (Del. Ch. Dec. 29, 2015) ("Counsel and their clients are on notice. Maybe the release should be limited to the matters actually litigated. Maybe the release should be in parallel with the benefits achieved for the class. Maybe closer scrutiny of fee awards will be necessary. In any event, these are issues that will evolve. It is the nature of the common law. Judicial decisions must be made in the context of specific cases.")

specifically criticizing the inclusion of unrelated disclosure claims.[112] Citing the Delaware Supreme Court's decision in *Griffith v. Stein*[113] and earlier cases such as *Celera*[114] and *UniSuper*,[115] Vice Chancellor Will reiterated that releases must be tied to the same set of operative facts as the underlying action, firmly rejecting any attempt to extend releases to tangential or unrelated matters.[116]

Similarly, in *In re AMC Entertainment Holdings, Inc.*, Vice Chancellor Zurn denied the settlement due to the release of claims tied to preferred units, which common stockholders-plaintiffs could not rightfully relinquish.[117] The Court's decision demonstrated its focus on the proper alignment between the claims being released and the plaintiff's authority to release them. Such scrutiny helps preserve the integrity of settlement negotiations, ensuring they are not overreaching or prejudicial to uninvolved parties.

2. ***The Settlement Consideration***. – The settlement consideration reflects the defendants' concessions in exchange for the termination of the lawsuit and the release of claims. It is customary to express the benefits provided by the settlement consideration in monetary terms. While this exercise is relatively straightforward for monetary settlements, it becomes significantly more complex for non-monetary settlements. Based on their consideration, settlements may be categorized as: (a) monetary settlements, (b) corporate governance settlements, (c) settlements combining a monetary component with governance reforms and/or supplemental disclosures, (d) disclosure-only settlements, and (e) deal amendment settlements. Table 3 provides an overview of the sample based on settlement types, indicating for each the number of approvals and denials, the mean and median lawsuit duration, and the portion of derivative suits and class actions.

[112] Transcript of Settlement Hearing and Rulings of the Court, Schumacher v. Loscalzo, C.A. No. 2022-0059-LWW (Del. Ch. Sept. 21, 2022).

[113] Griffith v. Stein, 283 A.3d 1124, 1134 (Del. 2022) (quoting In re Celera Corp. S'holders Litig., 59 A.3d 418, 434 (Del. 2012)).

[114] *In re* Celera Corp. S'holders Litig., *ibidem*.

[115] Unisuper Ltd. v. News Corporation, 898 A.2d 344 (Del. Ch. 2006).

[116] Transcript, Schumacher v. Loscalzo.

[117] *In re* AMC Entertainment Holdings, Inc. Stockholder Litig., 2023 WL 4677722 (Del. Ch. July 21, 2023).

Table 3 Overview of Settlements*									
Type of Settlement	**N**	**%**	**Approvals**	**Denials**	**Objections to Settlement Terms**	**Objections to Attorneys' Fees**	**Mean Days from Filing to Settlement**	**Median Days from Filing to Settlement**	**Class Actions v. Derivative Suits****
Exclusively Monetary	112	*39.6%*	111	2*** (1.7%)	15 (13%)	6 (5%)	1094	1024	84 Class Actions 38 Derivative
Corporate Governance	63	*22.2%*	56	7*** (11.1%)	10 (16%)	10 (16%)	650	500	17 Class Actions 55 Derivative
Combination of Monetary and Governance Reforms	48	*17.0%*	47	1 (2%)	9 (18%)	4 (8%)	909	780	16 Class Actions 42 Derivative
Deal Amendment	21	*7.4%*	20	2*** (9.5%)	6 (28.5%)	3 (14%)	488	394	19 Class Actions 3 Derivative
Disclosure-Only	39	*13.8%*	35	4 (10%)	4 (10%)	7 (17%)	349	338	37 Class Actions 3 Derivative

** Settlement list excludes confidential settlements*

*** Lawsuits can contain both class action claims and derivative claims*

**** Denied at least once, but revised settlement may have been approved subsequently in some instances*

a. *Monetary Settlements.* – As shown in Table 3, monetary settlements represent the most prevalent form of negotiated resolution presented to the Delaware Court of Chancery, totaling [112] stipulations of settlement (i.e., approximately 39.6% of all settlements).[118] A substantial portion of these settlements arise from M&A-related litigation, such as going-private transactions and buyouts, recapitalizations, and corporate reorganizations. Depending on the underlying allegations, the settlement amount may be presented either as restitution to the corporation and its shareholders (e.g., for claims involving related-party transactions or compensation packages) or as compensation for losses suffered as a consequence of the breach (e.g., for claims related to merger transactions). Table 3 further indicates that the duration of lawsuits ultimately resulting in monetary settlements is considerable (i.e., mean and median duration of approximately three years). Moreover, this protracted timeline suggests that (i) lawsuits that result in monetary settlements may be more complex from the outset, and (ii) the intricate nature of financial negotiations may impact the duration of the lawsuits. For example, the sample includes instances where multiple rounds of mediation preceded the presentation of a settlement proposal to the Court.

[118] *Contra* Griffith, *supra* note 38, at 2 (describing the rise in shareholder M&A litigation) ("The vast majority of shareholder litigation settles for no monetary recovery to the shareholder class").

The complexity of these lawsuits can be explained by reference to relevant doctrinal developments. During the early years of the sample period, merger litigation was significantly shaped by two landmark decisions of the Delaware Supreme Court: *Kahn v. M&F Worldwide Corp*.[119] ("*MFW*") and *Corwin v. KKR Financial Holdings LLC*.[120] In transactions involving a controlling shareholder, the *MFW* decision established a framework that allows for a shift in the standard of review from entire fairness to the business judgment rule, provided certain procedural safeguards are in place. These safeguards include approval by an independent, disinterested special committee and a fully informed, uncoerced vote of a majority-of-the-minority shareholders. Similarly, the *Corwin* decision established that a fully informed, uncoerced vote to approve a merger by a majority of disinterested shareholders invokes the business judgment rule in a suit for post-closing damages, further reducing the likelihood of judicial intervention under the entire fairness standard. These rulings, combined with *Trulia*, have profoundly impacted fiduciary litigation and ultimately influenced settlement practices. The heightened focus on procedural safeguards and disclosures, together with the shift from pre-closing injunctions to post-closing damages lawsuits, allow plaintiffs to recover monetary amounts when the fairness of the transaction process is called into question or when material conflicts of interest and inadequate disclosures are exposed.

As outlined in Table 3, 75% of the lawsuits that resulted in monetary settlements were class actions—as opposed to derivative suits—which illustrates collective shareholder preference for financial recovery over structural remedies to the corporation's governance. This preference is further evidenced by a relatively low objection rate [(13%)]. Moreover, the Court's generally favorable disposition toward monetary settlements can be inferred from the negligible denial rate [(1.7%)]. In only one instance, the Court initially denied a settlement before approving it after resubmission.[121]

Table 4
Monetary Settlement Amounts

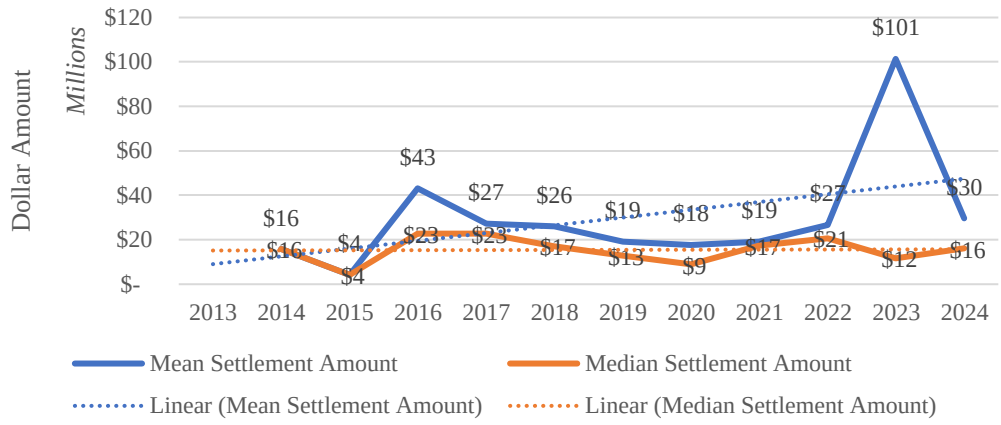
High	$1,000,000,000
Low	$52,029
Mean	$32,975,252
Median	$14,562,500

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

[120] Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).

[121] Stipulation of Settlement, Cutler v. Taylor, C.A. No. 11437-VCMR (July 3, 2018); Supplemental Stipulation of Settlement, Cutler v. Taylor, C.A. No. 11437-VCMR (Oct. 21, 2019); Order and Final Judgment, Cutler v. Taylor, C.A. No. 11437-VCMR (Del. Ch. Nov. 22, 2019); *see also* Transcript of Rulings of the Court on Settlement Stipulation, Cutler v. Taylor, C.A. No. 11437-VCMR (Del. Ch. Nov. 22, 2019) (The $309,000 settlement in *Cutler v. Taylor* was twice rejected, not for inadequacy of the amount, but due to technical issues surrounding the distribution of funds and outstanding creditor claims. The Court's concerns about the company's potential insolvency and unsettled debts led to the initial denials, with the settlement eventually being approved following restructuring to account for creditors' interests.)

Figure 2



Turning to the settlement amounts, Table 3 indicates that the mean monetary settlement amount is approximately [$32.9] million, with a median of [$14.5] million. Per Figure 3, monetary settlement amounts have followed an upward trend, suggesting several potential factors at play, such as the increasing value of merger transactions or corporations' willingness to pay larger sums to avoid the uncertainties and expenses associated with trials. In addition, Figure 3 illustrates a persistent disparity between the mean and median, particularly in 2016 and 2023. What emerges is that "mega" settlements are exceptional, as the sample includes only five settlements with a monetary consideration equal to or greater than $100 million. Among these, one settlement that stands out is the monetary settlement in *In re Dole Food Co., Inc. Stockholder Litigation*.[122] Unlike most settlements that are reached before trial, this agreement followed a nine-day trial, which found the defendants—Dole's Chairman and its General Counsel—jointly and severally liable for damages exceeding $148 million. The post-trial settlement, exceeding $100 million, had the dual benefit of addressing the Court's findings and mitigating the uncertainty of an appeal. Similarly, the case of *In re Dell Technologies Inc. Class V Stockholders Litigation* highlights the complexity of high-stakes monetary settlements. The litigation revolved around allegations that the controlling shareholder group orchestrated a scheme to expropriate the Class V stockholders.[123] After four years of litigation and extensive discovery, the parties reached a $1 billion settlement.[124]

b. *Corporate Governance Settlements*. – Corporate governance settlements, the second most common type, frequently arise in lawsuits involving allegations related to failures of oversight

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[122] Stipulation and Agreement of Settlement, *In re* Dole Food Co., Inc. Stockholder Litigation, C.A. No. 8703-VCL (Del. Ch. Dec. 7, 2015).

[123] *See* Stipulation of Agreement of Settlement, Compromise, and Release, C.A. No. 2018-0816-JTL (Dec. 22, 2022) (The complaint purported that (i) the board of directors of Dell Technologies Inc. breached its fiduciary duties by approving the transaction and coercing the stockholders to vote in its favor; (ii) the controlling shareholder group defendants caused the transaction to be concluded, the committees negotiating on behalf of the class to be conflicted, and ultimately cause the vote to be coerced; and (iii) Goldman Sachs aided and abetted the board and the controlling shareholder "by developing and promoting […] unrealistic valuations [presented] to the Special Committee."); *see also* Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Dell's Low-Voting Stock* (March 2019) https://ssrn.com/abstract=3285296.

[124] Stipulation of Agreement of Settlement, Compromise, and Release, *In re* Dell Techs. Inc. Class V S'holders Litig., C.A. No. 2018-0816-JTL (Dec. 22, 2022).

(i.e., *Caremark* lawsuits), compensation and stock award decisions, alleged conflicts of interests detrimental to shareholders, and misstatements. The peculiar nature of these settlements is that the resulting "relief […] would […] be[] difficult for the Court to judicially order"[125] because they achieve "therapeutic benefits" that address corporate governance shortcomings. These settlements may contemplate the adoption or reform of internal policies, the creation of dedicated committees, and even the appointment of new directors to the board. As shown in Table 3, the average time from the filing of the complaint to the Court's approval of these settlements is approximately [650] days, with a median duration of [500] days. Thus, governance settlements are achieved significantly faster as compared to monetary settlements. Moreover, governance settlements appear more common in derivative lawsuits [(87% of the 63 lawsuits that resulted in governance settlements)], where plaintiffs seek to implement long-term structural changes to correct or prevent corporate governance failures.

As further illustrated in Table 3, during the sample period, the Court denied [7] corporate governance settlements, which makes the [11.1%] denial rate the highest across settlement types. This relatively high figure may suggest that the benefits provided by these settlements are not always sufficient to justify the release of the claims and defendants. In fact, the sample includes instances where the Court denied governance settlements due to overly broad releases, because of questionably beneficial reforms that appeared premature,[126] or because of unjustified personal benefits granted to the plaintiff representative.[127] Hence, the difficulty of valuing the benefits provided by these settlements, which, if approved, would impose a cost on the corporation (i.e., the payment of the attorneys' fees by the corporation), leads to heightened judicial scrutiny.

In recent years, significant doctrinal developments in substantive law have affected governance settlements. In the area of the duty of oversight, the Delaware Supreme Court's decision in *Marchand v. Barnhill*[128] and the Court of Chancery's opinions in *In re Clovis Oncology, Inc. Derivative Litigation*[129] and *In re Boeing Company Derivative Litigation*[130] have been instrumental in shaping the landscape of compliance and risk management. These cases have led to settlements that include substantial governance reforms to address alleged *Caremark* violations.[131] For example, in *In re Clovis Oncology, Inc. Derivative Litigation*,[132] the company's alleged "serial non-compliance" with the Federal Drug Administration clinical trial protocol for a lung cancer

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[125] Transcript of Settlement Hearing and Rulings of the Court, *In re* TerraForm Power, Inc. Derivative Litigation, C.A. No. 11898-CB, at 20:20-21 (Del. Ch. Dec. 19, 2016).

[126] Final Order and Judgment, Buddenhagen et al., v. Clifford, et al., C.A. No. 2019-0258-JTL (Del. Ch. Sep. 15, 2021) ("For the reasons stated today, the court cannot approve the settlement as submitted. The court has concerns regarding the give and the get that are too significant, and the record at this stage is too preliminary, for the court to conclude that the plaintiffs have shown that the settlement falls within a range of reasonableness.")

[127] Letter Opinion, Smollar v. Potarazu, C.A. No. 10287-VCN (Del. Ch. Jan. 14, 2016).

[128] Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

[129] *In re* Clovis Oncology, Inc. Derivative Litigation, C.A. No. 2017-0222-JRS (Del. Ch. Oct. 1, 2019).

[130] *In re* The Boeing Co. Derivative Litig., C. A. 2019-0907-MTZ (Del. Ch. Sep. 7, 2021).

[131] Transcript of Plaintiff's Motion for Approval of Settlement and for Award of Attorneys' Fees and Expenses and the Court's Ruling, *In re* Clovis Oncology, Inc. Derivative Litigation, C.A. No. 2017-0222-JRS, at 42:22-43:2 (Del. Ch. May 4, 2022) ("The pled facts outlined a troubling narrative of a board that consciously ignored red flags of noncompliance with relevant clinical study protocols and associated [Food and Drug Administration] regulations, both arguably *mission-critical functions*." (*emphasis added*)).

[132] Order and Final Judgment, *In re* Clovis Oncology, Inc. Derivative Litigation, C.A. No. 2017-0222-JRS (Del. Ch. May 4, 2022); *see also In re* Clovis Oncology, Inc. Derivative Litig., No. CV 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

drug resulted in a governance settlement. The reforms included the adoption of a policy regarding disclosures on interim clinical trial results, the creation of a scientific review committee and a disclosure committee, the expansion of the general counsel's office, the hiring of a compliance officer, and the addition of independent and experienced directors to the board.[133] As Vice Chancellor Laster argued, these reforms were beyond what the Court might have ordered as a matter of equity.[134]

Given the high settlement-to-trial ratio, the review of settlements also serves as a critical venue for the Court to confront novel legal and business issues.[135] While the Court may not experience a full trial and discovery process in these instances, the settlement process allows it to engage with emerging trends in corporate governance and legal practices. This engagement can be particularly valuable in anticipating and facilitating doctrinal changes. For instance, the 2019 settlement in *In re Liberty Tax, Inc. Stockholder Litigation* addressed allegations of sexual misconduct by the former CEO and President of Liberty Tax, Inc., who had allegedly exerted his controlling position to benefit himself and engaged in "sexual relations with employees and/or franchisees of the Company[.]"[136] The settlement was critical for the defendant's departure from the company as a shareholder and prompted a thorough reform of internal governance practices.[137] With respect to the sexual harassment-related claims, the settlement led to substantive amendments to the company's code of conduct, including a new anti-harassment policy and a dedicated training program implementation.[138] Later, the Court solidified the legal framework for such claims in the 2023 *McDonald's* ruling.[139]

Additionally, the dataset reveals that several of the settlements stem from excessive

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[133] Plaintiffs' Motion for Approval of Settlement and for Award of Attorneys' Fees and Expenses and the Court's Ruling, *In re* Clovis Oncology, Inc. Derivative Litigation, C.A. No. 2017-0222-JRS, at 50:21-23 (Del. Ch. May 4, 2022) ("[The corporate governance reforms] were perhaps more than the company would have achieved had the litigation gone to trial and judgment[.]")

[134] Plaintiffs' Motion, at 50:23-51:3 ("It [i]s just not clear […] whether the Court would have the authority to cause the company in a mandatory way to do what the company has agreed to do voluntarily in this settlement, even as a matter of equity.")

[135] *See generally* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 455 (2001) ("We expect that the reform of corporate governance practices will generally precede the reform of corporate law, for the simple reason that governance practice is largely a matter of private ordering that does not require legislative action.").

[136] Verified Stockholder Derivative Complaint, *In re* Liberty Tax, Inc. Stockholder Litigation, C.A. No. 2017-0883-AGB, at 26 (Dec. 11, 2017).

[137] Stipulation and Agreement of Settlement and Release, *In re* Liberty Tax, Inc. Stockholder Litigation, C.A. No. 2017-0883-AGB (Mar. 15, 2019).

[138] Transcript of Settlement Hearing and Rulings of the Court, *In re Liberty Tax, Inc. Stockholder Litigation*, C.A. No. 2017-0883-AGB, at 65:16-19 (Del. Ch. Jun. 28, 2019) ("These benefits, although therapeutic, provide real value to the company by helping to remedy the workplace culture that allegedly was ripe with harassment.")

[139] *In re* McDonald's Corp. Stockholder Derivative Litigation, C.A. No. 2021-0324-JTL, 2023 Del. Ch. LEXIS 23 (Jan. 25, 2023) (citing Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1641 (2018)) ("[C]orporate fiduciaries who fail to monitor harassment at their firms may be liable in certain circumstances under a *Caremark* theory" and "corporate fiduciaries who are aware of harassment but fail to react—or who affirmatively enable harassment to continue—may be sued for breach of the duties of care and loyalty.")

compensation claims, particularly regarding non-employee directors.[140] The related settlements often provide for reforms to compensation practices, the selection of peer groups for purposes of determining compensation, and caps on total compensation between the 50th and 75th percentile of those groups.[141] This shift toward peer-based analyses began in 2016 following Vice Chancellor Laster's feedback during a hearing on a motion to dismiss, which indicated that generous peer comparisons would strengthen claims of excessive compensation.[142] Since then, plaintiffs have increasingly relied on expert reports to substantiate their claims of unwarranted compensation, making peer group selection a central issue in these cases.[143]

Governance settlements also arise from self-dealing or waste claims, often resulting in the appointment of independent directors.[144] In addition, allegations related to breaches of fiduciary duty for false or misleading statements, particularly under the authority of *Malone v. Brincat*,[145] have led to settlements that introduce or enhance corporate reporting and disclosure policies. For example, the settlement in *In re Geron Corp. Stockholder Derivative Litigation* required the creation of a management-level disclosure committee, the appointment of a chief compliance officer, and the addition of an independent director to the board.[146] These governance reforms are aimed at fostering greater transparency and compliance with both internal and external policies, and remediate the allegedly misleading statements about the results of a clinical study of the drug produced by the company.

As outlined above, these settlements are used to address a broad variety of alleged fiduciary breaches and governance shortcomings. By directly addressing corporate governance, these settlements achieve objectives that courts could not mandate. These governance reforms intend to have a long-term impact on the companies rather than offer financial gain to their shareholders. Nevertheless, the Court is careful in reviewing these settlements' terms as they still impose legal costs on the corporation when approved and release defendants from the alleged claims. In following this approach, the Court appears to employ heightened scrutiny of the representative

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[140] *See* Transcript of Oral Argument on Defendants' Motion to Dismiss and Rulings of the Court, Oldfather v. Ells, C.A. No. 12118-VCL, at 39:10-12 (Del. Ch. Dec. 7, 2016) (motion to dismiss ultimately granted because the complaint alleging excessive executive compensation and stock awards to outside directors did not perform any peer comparison); ("In a situation where the plaintiff did more to compare to peer compensation, or something like that, maybe you'd get past the pleadings stage.")

[141] *See e.g.*, Order and Final Judgment, *In re* Salesforce.com, Inc. Deriv. Litig., C.A. No. 2018-0922-AGB (Del. Ch. Dec. 17, 2019) (which reformed the compensation practices by requiring that the nominating and corporate governance committee retain a compensation consultant who will prepare a report on non-employee directors compensation practices, including at least 15 peer companies in the peer group, and a cap of the compensation to the non-employee directors to the 75th percentile of the peer group); *see also* Order and Final Judgment, Solak v. Sato, C.A. No. 2020-0775-JTL (Del. Ch. Apr. 16, 2021); Order and Final Judgment, Alvarado v. Lynch, C.A. No. 2020-0237-AGB (Del. Ch. Jun. 4, 2021).

[142] *See* Transcript, Oldfather.

[143] Transcript of Oral Argument and Rulings of the Court on Defendants' Motion to Dismiss, Alvarado v. Lynch, C.A. No. 2020-0237-AGB, at 22:1-2 (Del. Ch. Nov. 12, 2020) (Plaintiff Counsel: "[W]e don't agree with their peer group.")

[144] *See e.g.*, Transcript of Settlement Hearing and Rulings of the Court, *In re* Terraform Power Inc. Deriv. Litig., C.A. No. 11898-CB (Del. Ch. Dec. 19, 2016); Transcript of Settlement Hearing and Rulings of the Court, *In re* Tile Shop Holdings, Inc. S'holder Derivative Litigation, C.A. No. 10884-VCG (Del. Ch. Aug. 23, 2018).

[145] 722 A.2d 5 (Del. 1998) (imposing a duty of "complete candor" on directors).

[146] Exhibit A of Stipulation of Settlement, *In re* Geron Corp. S'holder Derivative Litigation, No. C.A. No. 2020-0684-SG (Filed on Dec. 21, 2022), *see also In re* Geron Corp. S'holder Derivative Litigation 2022 WL 1836238 (Del. Ch. June 3, 2022).

litigation model, ensuring that the financial reward to plaintiff's attorneys is commensurate with the benefits to the corporation and its shareholders.

c. *Combination Settlements*. – Combination settlements typically pair a monetary component with corporate governance reforms. As illustrated in Table 3, the dataset includes [48] combination settlements, with a growing trend in recent years. These settlements offer a flexible and tailored resolution mechanism, addressing both the financial harm to shareholders and underlying governance issues that contributed to the litigation. They originate from lawsuits alleging a wide variety of claims, such as breaches related to mergers, compensation, and the duty of oversight. The average time to resolution of [909] days (median of [780] days) places combination settlements closer to monetary settlements. Similar to monetary settlements, combination settlements most frequently arise from derivative lawsuits (87.5% of the 49 lawsuits).

The detailed data on the monetary component of combination settlements included in the Appendix (Table III) reveals a notable variability, particularly influenced by outliers. For example, 2015 stands out due to a single settlement involving a $275 million payment, marking the highest amount in the combination settlements sample. In contrast, other years display more typical settlement amounts, with both mean and median values hovering within a narrower range. The volatility of the data, especially in years like 2014, 2015 [and 2024], where the number of settlements is low, indicates that the monetary component of combination settlements is highly case-specific.

Table 5
Monetary Component of Combination Settlements

High	$275,000,000
Low	$46,000
Mean	$25,245,389
Median	$7,500,000

Despite the similarities, the data in Table 5 helps to draw an important distinction between combination settlements and exclusively monetary settlements. Notably, the monetary component in combination settlements tends to be significantly lower, with mean and median payments [23%] and [48%] lower, respectively, than those found in monetary-only settlements. The largest combination settlement in the sample—*In re Activision Blizzard, Inc. Stockholder Litigation* (2015)—featured a $275 million payment and governance reforms valued at $10 million.[147] This case arose from allegations that the directors of Vivendi S.A., the French conglomerate and Activision's majority stockholder, breached their fiduciary duties in a restructuring transaction aimed at divesting their controlling equity position.[148] The governance reforms were designed to address concerns about self-dealing by expanding the board to include two independent directors and reducing the voting power of the entity controlled by the defendants from 24.9% to 15.9%.[149]

The second-largest combination settlement involved The Boeing Corporation, stemming from

[147] Order and Final Judgment, *In re* Activision Blizzard, Inc. Stockholder Litigation, C.A. No. 8885-VCL (Del. Ch. May 20, 2015).

[148] Verified Fifth Amended Class and Derivative Complaint, *In re* Activision Blizzard, Inc. Stockholder Litigation, C.A. No. 8885-VCL (Del. Ch. Oct. 31, 2014).

[149] Stipulation of Compromise and Settlement, *In re* Activision Blizzard, Inc. Stockholder Litigation, C.A. No. 8885-VCL (Dec. 19, 2014).

Caremark claims related to the crashes of two Boeing 737 MAX airplanes.[150] Following a landmark opinion partially denying the defendant's motion to dismiss,[151] the Court approved a $237.5 million settlement and significant corporate governance reforms.[152] These reforms included the appointment of an independent director with expertise in aviation/aerospace safety, the enhancement of oversight by the company's Aerospace Safety Committee, and the establishment of an Ombudsperson program to assist personnel interacting with the Federal Aviation Administration.[153] Another high-profile *Caremark* case is *City of Monroe Employees' Retirement System v. Rupert Murdoch, et al.*,[154] which involved allegations of board oversight failures concerning the "systemic culture of sexual [and racial] harassment, discrimination, and retaliation at Fox News."[155] The settlement included a $90 million payment by insurance companies to the company and the creation of a council composed of independent members and human resources executives to oversee a new compliance program. By not only compensating shareholders but also seeking to improve corporate culture and strengthen risk monitoring, both the Boeing and Fox News settlements illustrate two examples of how combining monetary recovery with structural governance changes can address *Caremark* claims, where oversight failures have led to increased reputational and legal risks and public scrutiny.

d. *Disclosure-Only Settlements*. – The sample contains [39] disclosure-only settlements submitted to the Court of Chancery for approval between 2013 and early 2016, culminating with the last settlement approved under the Court's new stance adopted in *Trulia*.[156] This period captures a critical phase in merger litigation, characterized by the Court's increasing scrutiny, including the denial of four settlements and multiple hearings that assessed the adequacy of settlement terms. These developments offer valuable insights into the Court's evolving perspective on disclosure-only settlements.

A company's issuance of a Form 14A Preliminary Proxy Statement, containing a merger prospectus, would undergo plaintiffs' counsel review and often trigger lawsuits alleging breaches of fiduciary duty both in deal negotiations and potential inaccuracies in the proxy documentation. Upon filing a lawsuit, plaintiffs' counsel continues investigating the alleged wrongdoing, and unless a deal amendment is feasible, the most immediate resolution often involves agreeing to supplemental or corrective disclosures in the proxy statement, intended to provide shareholders with sufficient information to make informed voting decisions. Historically, in reviewing disclosure-only settlements, the Court of Chancery used to "exercise its own independent business judgment by balancing the benefits afforded by the settlement and the *immediacy* and certainty of

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[150] *See* Verified Amended Consolidated Complaint, *In re* The Boeing Co. Derivative Litig., C. A. 2019-0907-MTZ (Nov. 18, 2019).

[151] *In re* The Boeing Co. Derivative Litig., C. A. 2019-0907-MTZ (Del. Ch. Sep. 7, 2021).

[152] Stipulation and Agreement of Compromise, Settlement, and Release, *In re* The Boeing Co. Derivative Litig., C. A. No. 2019-0907-MTZ (Nov. 5, 2021).

[153] Exhibit A to Stipulation and Agreement of Compromise, Settlement, and Release, *In re* The Boeing Co. Derivative Litig., C. A. No. 2019-0907-MTZ (Nov. 5, 2021).

[154] Verified Draft Derivative Complaint, City of Monroe Employees' Retirement System v. Rupert Murdoch, et al., C.A. No. 2017-0833-AGB (Mar. 21, 2017).

[155] Plaintiff's Opening Brief in Support of Motion for Final Approval of Proposed Settlement and an Award of Attorneys' Fees and Reimbursement of Expenses, City of Monroe Employees' Retirement System v. Rupert Murdoch, et al., C.A. No. 2017-0833-AGB, at 21 (Jan. 19, 2018).

[156] Transcript of Settlement Hearing, *In re* NPS Pharmaceuticals S'holders Litig., C.A. No. 10553-VCN, at 12:7-9 (Del. Ch. Feb. 18, 2016) (commenting on *Trulia*) ("I just think the world has finally changed. It's not as if there were no signals being given.")

the benefit for the member of the class against the continued risks attendant to going forward with the litigation."[157] The Court would "award [] attorneys' fees even if there is no financial component to the settlement [if] th[e] disclosures are material."[158]

The expedited nature of disclosure-only settlements highlights their distinct role in corporate litigation. Because they address deficiencies in proxy materials, they often require swift resolution before shareholders vote on the transaction. The sample analysis confirms that disclosure-only settlements were typically achieved more quickly than other types of settlements.[159] However, as the Court continued reviewing these settlements, it became increasingly concerned about whether the supplemental disclosures provided adequate benefits to justify the broad releases granted to defendants.[160] The Court began to occasionally mention the low probability of victory had cases continued to trial[161] and to analyze the settlement consideration in light of the standard of review applicable to the alleged claims.[162]

As part of its evolving stance, the Court began to deny disclosure-only settlements when it believed the disclosures failed to deliver meaningful value to shareholders. Before its landmark decision in *Trulia*, the Court had already signaled a shift toward increased scrutiny by denying several disclosure-only settlements. In *Rubin v. Obagi Medical Products, Inc., et al.*,[163] Vice Chancellor Laster rejected the proposed settlement because the supplemental disclosures were insufficient to justify the broad release granted to the defendants. A similar ruling followed in *In re Theragenics Corp. Stockholders Litigation*, where Vice Chancellor Laster cited inadequate investigation into questionable aspects of the record as the basis for denying the settlement.[164] In

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[157] Transcript of Settlement Hearing, *In re* Zipcar, Inc. S'holders Litig., C.A. No. 8185-VCP, at 27:3-8 (Del. Ch. Feb 6, 2014) (*emphasis added*).

[158] Transcript, *In re* Zipcar, Inc. S'holders Litig., at 31:6-8.
The materiality standard employed by the Court of Chancery is the same standard under federal securities laws articulated by the Supreme Court of the United States in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 2132, 48 L. Ed. 2d 757 (1976) "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" and further clarified in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (quoting *TSC Industries*, 426 U. S., at 449) "materiality "is satisfied when there is a 'substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'"

[159] The mean and the median number of days to achieve disclosure-only settlements were 349 and 338, respectively.

[160] Transcript of Settlement Hearing and Rulings of the Court, Ocieczanek v. Thomas Properties Group, et al., C.A. No. 9029-VCG, at 35:23-36:3 (Del. Ch. Apr. 29, 2014) (discussing its considerations) ("[The Court] has to balance the outcome of the settlement and the results achieved against the likelihood that more could be achieved if the settlement is denied.")

[161] *See e.g.*, Transcript of Settlement Hearing and Attorneys' Fee and Expense Petition and the Court's Rulings, *In re* Viropharma, Inc. S'holders Litig., C.A. No. 9104-VCG, at 18:7-8 (Del. Ch. Jul. 28, 2014) ("I think that it would be difficult to envision damages claim being successful here.")

[162] *See e.g.*, Transcript of Settlement Hearing, Hall v. Berry Petroleum Co., C.A. No. 8476-VCG, at 17:7-13 (Del. Ch. Dec. 4, 2014) ("I'm not suggesting that the suit was frivolous. I'm just suggesting that the settlement, to my mind, is supported by the fact that you would have had the difficult task of demonstrating, without enhanced scrutiny most likely, that there was a breach of duty and that that was a stiff hill to climb."); Transcript of Settlement Hearing, *In re* True Religion Apparel, Inc. S'holder Litig., C.A. No. 8598-VCG, at 17:17-21 (Del. Ch. May 1, 2014) ("I just don't see that there was a viable price or procedure claim under Revlon, and so it's clear to me that it's in the best interests of the stockholders to approve the settlement.")

[163] Transcript of Settlement Hearing and Rulings of the Court, Rubin v. Obagi Medical Products, Inc., et al., C.A. No. 8433-VCL (Del. Ch. Apr. 30, 2014).

[164] Transcript of Settlement Hearing and Rulings of the Court, *In re* Theragenics Corp. Stockholders Litigation, C.A. No. 8790-VCL (Del. Ch. May 23, 2014).

In re Aruba Networks, Vice Chancellor Laster noted,

> "We have reached a point where we have to acknowledge that settling for disclosure only and giving the type of expansive release that has been given has created a real systemic problem. We've all talked about it now for a couple years. It's not new to anybody. But when you get the sue-on-every-deal phenomenon and the cases-as-inventory phenomenon, it is a problem. It is a systemic problem."[165]

The Court's ruling in *Trulia* marked a turning point, cementing a heightened standard of scrutiny for disclosure-only settlements. In its aftermath, one final settlement was approved in *In re NPS Pharmaceuticals Stockholders Litigation*.[166] Former Vice Chancellor Noble, while expressing support for the *Trulia* ruling,[167] approved the settlement, recognizing the difficulties litigants faced post-*Trulia*.[168] Since then, no disclosure-only settlement has been presented to the Court for approval, signaling the end of an era in which these settlements played a prominent role in resolving shareholder disputes in merger litigation. The Court's shift reflects a broader trend toward ensuring that settlements meaningfully benefit shareholders, moving away from purely procedural resolutions to a more substantive approach.

e. *Deal Terms Amendments*. – The sample contains [21] settlements that provided for amendments to deal terms. They typically address deal terms that are unfavorable to the company or minority shareholders and disproportionately benefit controlling shareholders or management-affiliated third parties. The core achievement of these settlements is altering the structure of a contested transaction or revising specific deal protections.[169] The sample includes instances of waivers to "don't ask/don't waive" (DADW) standstill provisions,[170] reduction or elimination of the termination fee, increase of the deal price, and some non-conventional arrangements designed to address shortcomings of the merger process. The average duration of lawsuits resolved through deal amendment settlements mirrors that of disclosure-only settlements, with a mean duration of [488] days and a median of [394] days. As shown by Figure 6, these settlements largely align with the trend of disclosure-only settlements and have become increasingly rare since 2016. The chronological distribution of deal amendment settlements reveals that they were most common during the height of the merger wave when disclosure-only settlements also dominated the

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[165] Transcript of Settlement Hearing and Rulings of the Court, *In re* Aruba Networks, Inc. Stockholder Litig., C.A. 10765-VCL, at 65:15-23 (Del. Ch. Oct. 9, 2015)

[166] Transcript of Settlement Hearing, *In re* NPS Pharmaceuticals Stockholders Litigation, C.A. No. 10553-VCN (Del. Ch. Feb. 18, 2016).

[167] Transcript, *In re* NPS Pharmaceuticals Stockholders Litigation, at 12:7-8 ("I just think the world had finally changed.")

[168] Transcript, *In re* NPS Pharmaceuticals Stockholders Litigation, at 31:23-32:1 ("I recognize the difficulty when the rules of the game change while you're playing the game.")

[169] *In re* Compellent Techs., Inc. S'holder Litig., No. C.A. 6084-VCL, 2011 WL 6382523, at *1 (Del. Ch. Dec. 9, 2011) ("Deal protections provide a degree of transaction certainty for merging parties by setting up impediments to the making and accepting of a topping bid. Relaxing deal protections facilitates a topping bid.")

[170] *In re* Complete Genomics Shareholder Litigation, C.A. No. 7888-VCL (Del. Ch. Nov. 9, 2012); *In re* Ancestry.com Inc. Shareholder Litigation, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012).
These provisions prevent a party bound by a standstill agreement from requesting a waiver, effectively silencing potential bidders and locking in a preferred bidder, which reduces the likelihood of a higher competing bid. Settlements that involve the waiver of DADW clauses play a critical role in reopening the bidding process and allowing potential bidders to participate, safeguarding directors' fiduciary duties under *Revlon* to seek the highest price reasonably attainable for shareholders. The use of DADW clauses has persisted despite the Court's skepticism expressed in 2012.

landscape. The four settlements since 2020 raise compelling questions about the evolution of deal litigation post-*Trulia*. These settlements frequently include a monetary component aimed at addressing price unfairness claims and providing additional protection for minority shareholders, adding substantive value compared to the more limited relief offered by disclosure-only settlements.

A notable example is the settlement in *In re Schuff International Inc. Stockholders Litigation*, which involved a challenge to the 2014 tender offer by Schuff's controlling stockholder, HC2 Holdings, Inc.[171] The lawsuit alleged that both the offer price and the negotiation process failed to meet the entire fairness standard. Following five years of litigation, the settlement provided a 114% premium over the original tender offer, representing one of the largest premiums achieved in Delaware litigation.[172] Another significant settlement in the sample is the stipulation in *Ryan v. Mindbody, Inc.*, which the Court initially rejected and later approved.[173] This case challenged the merger between Mindbody, Inc. and Vista Equity Partners Management, LLC, alleging that the shareholder vote on the merger was invalid due to the board's failure to provide full and accurate disclosure. The settlement's unique consideration was an "appl[ication] to the Court pursuant to [DGCL] Section 205 to have the Court validate and declare effective the Merger."[174] As Chancellor McCormick observed, "[t]he primary benefit for the plaintiff is that the settlement eliminates any claim of uncertainty concerning the validity of the merger itself and any attendant uncertainty concerning the former Mindbody stockholders' entitlement to the merger consideration."[175] This case exemplifies the heterogeneity of settlement outcomes in merger litigation, where settlement considerations can extend beyond financial or governance reforms.

Deal amendment settlements continue to provide meaningful remedies in situations where deal terms disproportionately favor controlling shareholders or management. Together, *MFW* and *Corwin* have played a crucial role in defining shareholder merger litigation over the past decade. The emphasis on providing complete and accurate information to shareholders has led to a proliferation of disclosure-only settlements. Although the number of Delaware lawsuits challenging mergers has declined since *Trulia*, the effective policing of deal processes continues. While violations related to disclosure quality are now often litigated in federal courts, Delaware plaintiffs' attorneys have successfully achieved substantive monetary settlements in cases where significant financial harm to shareholders is evident.[176]

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[171] Revised Stipulated Order and Final Judgment, *In re* Schuff International Inc. Stockholders Litigation, C.A. No. 10323-VCZ (Del. Ch. Aug. 14, 2020).

[172] *See* Plaintiff's Brief in Support of Final Approval of the Proposed Settlement and Application for an Award of Attorneys' Fees and Reimbursement of Expenses, *In re* Schuff International Inc. Stockholders Litigation, C.A. No. 10323-VCZ, at 13 (Jan. 15, 2020) (increasing the price from $31.50 to $67.45 per share).

[173] Stipulation of Settlement, Ryan v. Mindbody, Inc., C.A. No. 2019-0061-KSJM (May 7, 2020).

[174] Stipulation of Settlement, Ryan v. Mindbody, Inc.

[175] Transcript of Telephonic Rulings of the Court regarding Modified Settlement and Fee Petition, Ryan v. Mindbody, Inc., C.A. No. 2019-0061-KSJM, at 17:23-18:4 (Del. Ch. Dec. 4, 2020).

[176] *In re* PLX Technology Inc. Stockholders Litigation, 2018 WL 5018535 (Del. Ch. Oct. 18, 2018) (where plaintiffs proved liability, but failed to prove damages); Transcript of Settlement Hearing and Rulings of the Court, *In re* Tangoe Inc., S'holder Litig., C.A. No. 2017-0650-JRS (Del. Ch. Jan. 29, 2020) (where former Vice Chancellor Slights referred to the 2018 *PLX* decision to underline the challenges of proving damages).
See also Holger Spamann, PLX, *Burden of Proof for Damages, and the Internal Logic of Delaware Law*, Harvard Law School Forum on Corporate Governance (Nov. 30, 2018) https://corpgov.law.harvard.edu/2018/11/30/plx-burden-of-proof-for-damages-and-the-internal-logic-of-delaware-law/.

3. ***Attorneys' Fees and Expenses***. – The sample analysis offers critical insights into the evolving practices surrounding attorneys' fees and expenses ("AF&E") in Delaware fiduciary duty litigation and the Court's role in monitoring agency problems embedded in the representative litigation model.

Figure 3

Inflation-Adjusted Attorneys' Fees and Expenses for All Settlements by Year

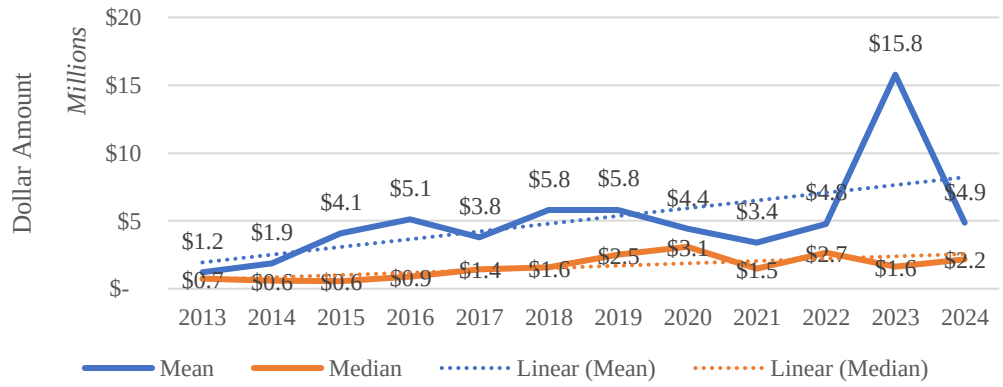


Figure 3 presents inflation-adjusted AF&E across all settlement types, revealing considerable volatility in the mean values, largely driven by a handful of high-value settlements in specific years. In contrast, the median demonstrates a more stable, albeit gradual, upward trend. Given that AF&E are calculated as a percentage of the benefits conferred to the corporation or its shareholders, the trend suggests that settlements have increasingly delivered greater value. However, this conclusion warrants closer scrutiny. A more systematic analysis of the data, segmented by settlement type, offers a clearer understanding of how these fees reflect the underlying value of settlements to shareholders and corporations.

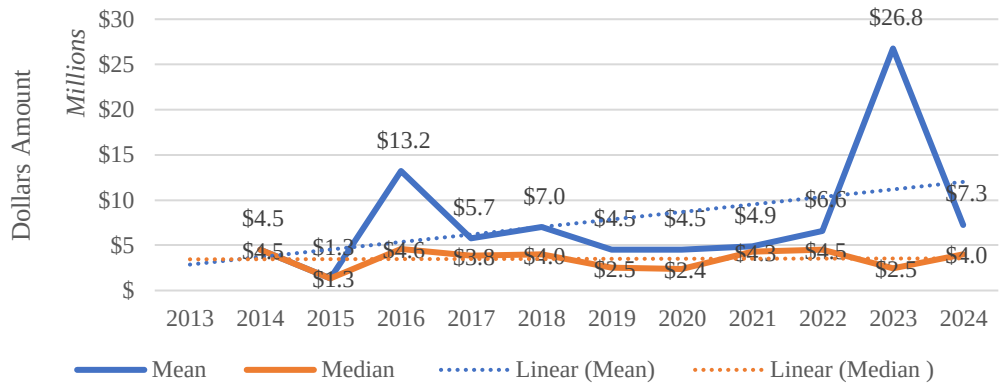
a. *Monetary Settlements.* AF&E in monetary settlements typically represent a percentage of the settlement payment. On average, AF&E constitute 27% of the settlement amount, with a median of 24%. Per Table 6, the smallest AF&E awarded during the sample period was below $100,000, while the largest was $266,700,000. The disparity between the mean ($8.49 million) and the median ($3 million) reflects the skewing influence of a small number of "mega" settlements, where exceptionally high fees are awarded. The median, in contrast, offers a more accurate picture of the typical AF&E earned in most cases.

Table 6
Attorneys' Fees and Expenses in Monetary Settlements

High	$266,700,000
Low	$96,525
Mean	$8,491,993
Median	$3,029,730

Figure 4

Inflation-Adjusted Attorneys' Fees and Expenses by Year in Monetary Settlements



As depicted in Figure 4, AF&E in monetary settlements have generally followed an upward trajectory, broadly reflecting the growth in monetary settlement amounts. However, a closer analysis of Figures 2 and 4 reveals a discernible gap between the rate of increase in settlement amounts and the corresponding growth in AF&E. While both metrics exhibit upward trends, the more conservative rise in AF&E relative to settlement amounts is noteworthy. This tempered growth suggests that attorneys' fees, while inherently tied to the value of settlements, are not accelerating at an exploitative pace. The Court's active role in reviewing AF&E is shown in the [23] instances of AF&E reduction—amounting to 20.5% of monetary settlements—with an average reduction of [14%].

Most reductions occurred in lawsuits challenging transactions perceived to be detrimental to minority shareholders. In some cases, the Court's adjustments were minor, occasionally reducing fees by as little as 1%.[177] In other instances, the Court took a more assertive approach, reducing fees by as much as 40%-44%. For example, in *In re Mavenir Systems, Inc. Stockholders Litigation*,[178] which stemmed from a squeeze-out merger, the Court awarded $450,000 in AF&E (15% of the settlement consideration)[179] compared to the $750,000 (25%) requested by plaintiffs' counsel.[180] Similarly, in the lawsuit challenging related-party transactions between Southern Copper Corporation and its controllers Grupo México, S.A.B. de C.V. and Americas Mining

[177] In *In re Handy & Harman, Ltd. Stockholder Litigation*, Vice Chancellor Montgomery-Reeves lowered the fees from $8.1 million (27% of the monetary settlement) to $7.75 million (25% of the monetary settlement), *see* Transcript of Plaintiffs' Motion Approval of Settlement and for Awards of Attorneys' Fees and Expenses and the Court's Rulings, *In re* Handy & Harman, Ltd. Stockholder Litigation, C.A. No. 2017-0882-TMR (Del. Ch. Nov. 14, 2019).

[178] *See* Plaintiff's Brief in Support of Motion for Final Approval of Proposed Settlement, Certification of the Class, and an Award of Attorneys' Fees and Expenses, *In re* Mavenir Systems, Inc. Stockholders Litigation, C.A. No. 10757-VCMR, (Sept. 21, 2016).

[179] Order and Final Judgment, *In re* Mavenir Systems, Inc. Stockholders Litigation, C.A. No. 10757-VCMR (Del. Ch. Oct. 12, 2016).

[180] *See* Plaintiff's Brief in Support of Motion for Final Approval of Proposed Settlement, Certification of the Class, and an Award of Attorneys' Fees and Expenses, *In re* Mavenir Systems, Inc. Stockholders Litigation, C.A. No. 10757-VCMR (Sept. 21, 2016).

Corporation,[181] the Court awarded $4.2 million in AF&E (17% of the settlement amount), a substantial reduction from the $7.5 million[182] requested by plaintiffs' counsel.[183]

Turning to "mega" settlements, the attorneys' fees awarded in such cases have come under frequent public scrutiny and are examples of how rulings on settlements may have broader implications. For example, in 2023, Vice Chancellor Laster approved the *Dell* settlement during a bench ruling, awarding $266.7 million in attorneys' fees to plaintiffs' counsel. This fee award was subsequently appealed to the Delaware Supreme Court, which affirmed it in 2024.[184] In approving the $1 billion settlement, the court applied the same established precedents it has long followed, particularly in awarding attorneys' fees. The 26.7% fee awarded in *Dell* falls squarely within the typical range of fees awarded in such cases, demonstrating the Court's commitment to consistency, even when these decisions might provoke public criticism. This judicial consistency reinforces the reliability and predictability of Delaware's corporate jurisprudence, and incentivizes attorneys to bring forth fiduciary claims and pursue significant recoveries, knowing they can expect commensurate fees, irrespective of any contrary public discourse.[185] Moreover, concerns about the lack of judicial rulings in settlement cases are alleviated when the Court issues opinions in response to objections, ensuring transparency and providing further clarity on its decision-making process. The decision in *Dell* highlights that Delaware courts steadfastly uphold the principles of Delaware corporate law, even in cases with extraordinary financial outcomes, reinforcing the reliability and predictability of the state's corporate jurisprudence.

b. *Governance Settlements.* AF&E across the [63] governance settlements in the sample illustrate the varying complexity of governance settlements, with a wide range in both the perceived benefit to the company and the resulting fees. While the Court once indicated that AF&E

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[181] Public Version of Plaintiff's Verified Amended Derivative Complaint, Lacey v. Larrea Mota-Velasco, et al., C.A. No. 2019-0312-SG (Nov. 4, 2019).

[182] Plaintiff's Brief in Support of Proposed Settlement, Award of Attorneys' Fees and Expenses, and Incentive Fee Award, Lacey v. Larrea Mota-Velasco, et al., C.A. No. 2019-0312-SG (Jan. 7, 2022).

[183] Order and Final Judgment, Lacey v. Larrea Mota-Velasco, et al., C.A. No. 2019-0312-LWW (Del. Ch. Feb. 2, 2022).

[184] *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679, 685 (Del. Ch. 2023), as revised (Aug. 21, 2023), aff'd, No. 349, 2023, 2024 WL 3811075 (Del. Aug. 14, 2024) ("The plaintiff settled this class action on the eve of trial in exchange for the defendants' agreement to pay $1 billion in cash. The "b" is not a typo. It is the largest cash recovery ever obtained by a representative plaintiff in this court.")

[185] Alison Frankel, *Dell case's $267 million legal fee appeal sparks law profs' fierce debate*, REUTERS (Jan. 3, 2024), https://www.reuters.com/legal/transactional/column-dell-cases-267-million-legal-fee-appeal-sparks-law-profs-fierce-debate-2024-01-03/; *see also* Transcript of Settlement Hearings and Rulings of the Court, *In re* Tile Shop Holdings, Inc. Litigation, C.A. No. 2019-0892-SG, at 35:13-24 (Del. Ch. Oct. 11, 2020) ("If [plaintiff's firms] are not adequately compensated on those cases where they achieve something, then the system doesn't function. The question that arises is, well, what is an amount that is fair to the stockholders and adequately encourages appropriate, but not overweening, investigation and activity on the part of plaintiff firms and plaintiff stockholders? That's a difficult enough question where there is a monetary fee. It's a much more difficult question where a therapeutic result only is obviously beneficial to the corporation.")

for non-monetary relief may range between $5 million and $10 million,[186] Table 7 reveals that AF&E in governance settlements typically fall below this threshold and are considerably lower than those in monetary settlements.

Table 7 Attorneys' Fees and Expenses in Governance Settlements	
High	$19,651,896
Low	$0
Mean	$1,888,658
Median	$716,000

Figure 5

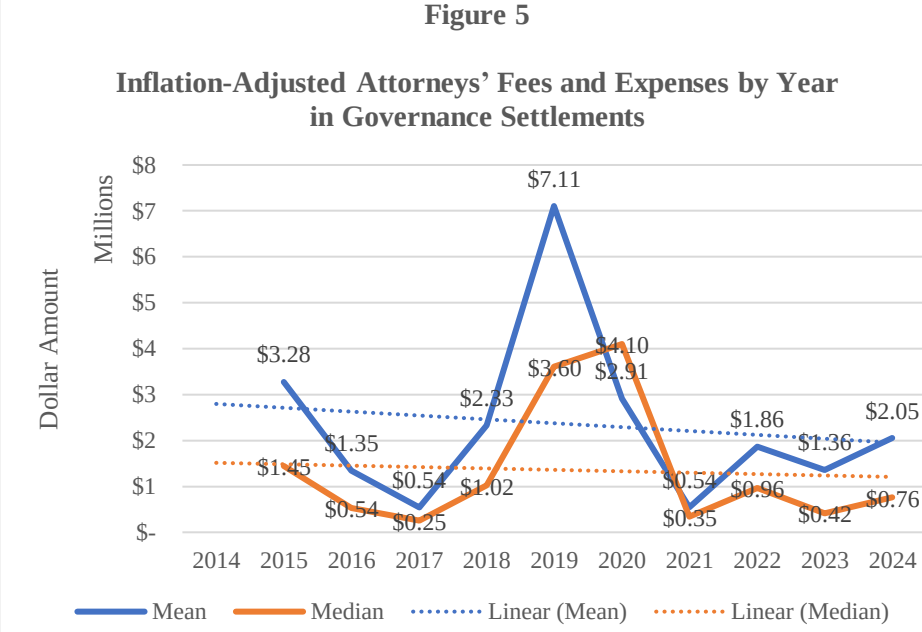

Figure 5 provides further context on the volatility of AF&E in governance settlements, where only one post-trial settlement—*In re Ebix, Inc. Stockholder Litigation*—saw AF&E exceed $8 million, with the Court awarding $19.6 million due to the substantial benefits conferred by the

[186] *In re* Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025, 1071 (Del. Ch. 2015), as revised (May 21, 2015), judgment entered sub nom. *In re* Activision Blizzard, Inc. S'holder Litig., No. CV 8885-VCL, 2015 WL 2415559 (Del. Ch. May 20, 2015) ("Precedent suggests that an award of $5–10 million could be justified."); n. 30, ("See In re Google Inc. Class C S'holder Litig., Cons. C.A. No. 7469-CS, tr. at 19-20 (Del. Ch. Oct. 28, 2013) (awarding $8.5 million plus expenses for a "largely corporate governance settlement" in which "the benefits are substantial" and "somewhere between a solid single and a double"); *In re* Yahoo! S'holders Litig., C.A. No. 3561-CC, let. op. at 1 (Del. Ch. Mar. 6, 2009) (awarding $8.4 million for "substantial benefit" of amending employee severance plan in a manner that "made it less expensive to sell Yahoo, making the company a more attractive target to potential suitors"); Minneapolis Firefighters' Relief Assoc. v. Ceridian Corp., C.A. No. 2996-CC (Del. Ch. Feb. 25, 2008) (awarding $5.4 million for empowering a potential buyer to present a leveraged recapitalization proposal and eliminating a termination right for the merger partner in the event a new slate of directors was elected before the merger closed).")

amended Stock Appreciation Rights Agreement.[187] The notable fluctuations in Figure 5 can be partly attributed to three instances where plaintiffs chose not to seek attorneys' fees.[188] In contrast to the upward trajectory observed in monetary settlements, AF&E in governance settlements follow a distinct downward trend, with both the mean and median awards declining over the sample period. This suggests that either recent governance reforms are being conservatively valued, or the corporate changes proposed in recent years are perceived as delivering less tangible benefits than those achieved in earlier reforms.

In addition to the relatively high denial rate for governance settlements,[189] the Court has shown heightened scrutiny in reviewing AF&E. Over the sample period, the Court intervened in [seventeen] cases (26.9% of governance settlements) to reduce AF&E, with an average reduction of 32%, and reductions exceeding 50% in some cases.[190] This heightened scrutiny likely reflects the inherent difficulty in ascribing value to corporate governance reforms, as well as the Court's cautious approach in ensuring that fee awards are commensurate with the substantive benefits delivered to shareholders.

c. *Combination Settlements.* The mean and median AF&E in combination settlements stand at $5.4 million and $1.7 million, respectively. These figures are influenced by the absence of attorneys' fees in five instances and by the 2015 outlier, *In re Activision Blizzard, Inc. Stockholder Litigation*, where the awarded fees reached an extraordinary $72.5 million, including a $50,000 incentive fee.[191] Despite these anomalies, AF&E in combination settlements remain substantially lower than in purely monetary settlements. Specifically, the mean and median AF&E are 37% and 45% lower than their counterparts in monetary-only settlements. However, as the case of *In re NantHealth, Inc. Stockholder Litigation* illustrates, there are instances where attorneys' fees in combination settlements can significantly exceed the monetary component. In *NantHealth*, a $400,000 monetary recovery was accompanied by $1.25 million in attorneys' fees, justified by several substantial governance reforms. These reforms included enhanced conflict-of-interest training, improved audit and disclosure committee oversight, and the creation of a clearinghouse file for related-party transactions, which collectively provided long-term governance benefits.

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[187] Order and Final Judgment, *In re* Ebix, Inc. Stockholder Litigation, C.A. No. 8526-VCS (Del. Ch. Apr. 5, 2019) (awarding $19,651,896 to plaintiff counsel for the Amended Stock Appreciation Right Award ("SARA") reached after over five years of litigation. The litigation challenged the original SARA for its exorbitant size and cost. The value of the benefit provided by the Amended SARA was estimated to be between $159.2 and $245.1 million. Moreover, the settlement included six separate governance benefits to address specific issues uncovered by the litigation, such as establishing an annual meeting of the Nominating and Corporate Governance Committee.

[188] *See* Plaintiff's Brief in Support of the Proposed Settlement, Grimstad v. Melchiorre, C.A. No. 12782-VCL (July 3, 2017); Stipulation of Settlement, Compromise, and Release, Petrodome Welder, LLC v. Welder Oil & Gas GP, LLC, et al., C.A. No. 2017-0170-JTL (Dec. 4, 2017); Brief of Plaintiffs Alpha Real Estate Partners, Inc. and Daniel Eli Glanz in Support of Dismissal, Alpha Real Estate Partners, Inc. v. Kaplan, C.A. No. 2021-0261-JRS (Sep. 30, 2021).

[189] *See supra* Section C.2.b.

[190] *See e.g.*, Transcript of Telephonic Settlement Hearing and Rulings of the Court, Brown v. Barse, C.A. No. 2019-0735-SG (Del. Ch. Apr. 6, 2021) (awarding $153,422 against the requested $750,000); Final Order and Judgment, Solak v. Huff, C.A. No. 2022-0400-LWW (Del. Ch. Jan. 11, 2023) (awarding $160,000 against the requested $350,000); Amended Final Order and Judgment, Estreen v. Lefkowsky, C.A. No. 2022-2157-PAF (Del. Ch. Jun. 14, 2023) (awarding $950,000 against the proposed amount of $2,500,000).

[191] *In re* Activision Blizzard, Inc. Stockholder Litigation, C.A. No. 8885-VCL (Del. Ch. May 20, 2015) (This fee represented 26.4% of the monetary consideration, and 23% when the governance reforms were factored in).

Table 9 Attorneys' Fees and Expenses in Combination Settlements	
High	$72,500,000
Low	$0
Mean	$5,443,127
Median	$1,771,977

As illustrated in detail in the Appendix (Table IV), the AF&E figures for combination settlements reflect the distinctive interplay between the quantitative (monetary) and qualitative (governance reforms) components, resulting in relatively clear patterns compared to purely monetary or governance settlements. A general downward trend is observed in AF&E. The Court's intervention in AF&E requests in combination settlements (20% of cases) mirrors its approach in monetary settlements, though with an average fee reduction of 40%, which is more aligned with the Court's scrutiny in governance settlements. This suggests the Court is particularly cautious in valuing governance reforms within hybrid settlements. The willingness to reward comprehensive reforms in combination settlements should mitigate concerns about attorneys exploiting the settlement process, as the Court demonstrates a rigorous approach to the multifaceted implications of these settlements.

d. *Disclosure-Only Settlements.* The brief but intense era of disclosure-only settlements reveals significant insights into the Court's evolving approach toward AF&E. In 2011, Vice Chancellor Laster issued a pivotal opinion in *In re Sauer-Danfoss Inc. Shareholders Litigation*, guiding the valuation of supplemental disclosures by suggesting that "$400,000 to $500,000 for one or two meaningful disclosures" constituted an appropriate fee range. This guidance shaped the Court's approach toward AF&E in subsequent disclosure-only settlements.[192]

Table 9 Attorneys' Fees and Expenses in Disclosure-Only Settlements	
High	$1,100,000
Low	$125,000
Mean	$390,538
Median	$400,000

As shown in Table 9, most AF&E awards for disclosure-only settlements in the sample period remained within the $400,000-500,000 range. Thus, the median AF&E indicates that most disclosure-only settlements in the sample added one or two supplemental disclosures to the proxy materials. Only in exceptional cases did the Court award higher fees. One noteworthy example is *In re EnergySolutions, Inc. Stockholder Litigation*,[193] in which a disclosure-only settlement was accompanied by a parallel amendment of the merger agreement, resulting in a $.40/share price

[192] *In re* Sauer-Danfoss Inc. S'holders Litig., C.A. No. 5162-VCL, at 35 (Del. Ch. Apr. 29, 2011) ("This Court has often awarded fees of approximately $400,000 to $500,000 for one or two meaningful disclosures, such as previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors. […] Disclosures of questionable quality have yielded much lower awards. […] Higher awards have been reserved for plaintiffs who obtained particularly significant or exceptional disclosures."); *see also* Transcript Settlement Hearing and Rulings of the Court, *In re* AsiaInfo-Linkage, Inc. S'holders Litig., C.A. No. 8583-VCP, at 29:5-9 (Del. Ch. Jun. 6, 2014) ("Even where a supplemental disclosure is material, however, all supplemental disclosures are not equal. To quantify an appropriate fee award, this Court evaluates the qualitative importance of the disclosures obtained.")

[193] Transcript of the Settlement Hearing and Rulings of the Court, *In re* EnergySolutions, Inc. Shareholder Litigation, C.A. No. 8203-VCG (Del. Ch. Feb. 11, 2014).

increase. The supplemental disclosures included critical details about the sale process, the roles of transaction committees, conflicts of interest among directors and financial advisors, and previously undisclosed DADW provisions. Due to the significant benefits conferred on shareholders, the Court approved an award of $1.1 million in AF&E—the highest for a disclosure-only settlement in the sample period.

Table 10
Attorneys' Fees and Expenses in Disclosure-Only Settlements

Year	Number of Proposed Settlements	Mean AF&E	Median AF&E	Number of Court's Interventions of AF&E
2013	2	$400,000	$400,000	-
2014	16*	$477,083	$420,000	2
2015	19*	$314,269	$325,000	9
2016	2*	$370,000**	$370,000**	-

** Including denials.*
*** AF&E for one settlement.*

As illustrated in Table 10, the Court's intervention in 28% of disclosure-only settlements—particularly in the lead-up to *Trulia*—is indicative of the heightened judicial skepticism toward these settlements. The high frequency of fee reductions, particularly in 2015, reflected a growing concern over the limited value of supplemental disclosures relative to the releases granted to defendants. As the data demonstrate, the Court was more inclined to reduce fees in these settlements than in any other settlement type, with the AF&E intervention rate among the highest across all categories of settlements. This vigilance suggests that the Court's gatekeeping function is reflected in a more assertive approach to AF&E, particularly when the misalignment of interests between attorneys and their clients in representative litigation heightens the risk of opportunistic behavior.

e. *Deal Amendment Settlements.* The mean AF&E for deal amendment settlements in the sample stands at [$1,918,726], with a median of [$887,500], closely resembling the fee structures typically observed in governance settlements.

Table 11
Attorneys' Fees and Expenses in Deal Amendment Settlements

High	$12,812,452
Low	$310,000
Mean	$1,918,726
Median	$887,500

As detailed in the Appendix (Table V), the AF&E awarded in deal amendment settlements offer critical insight into their place within the broader framework of Delaware fiduciary litigation. Unlike disclosure-only settlements, deal amendments inherently deliver more tangible benefits to the corporation and minority shareholders. In some instances, these settlements include direct monetary relief to address deficiencies in the deal process. The significant variation in awarded fees, ranging from a low of $310,000 to a high of $12.8 million, underlines the intricacies of merger litigation. This variability is particularly striking given the inherent challenge of quantifying non-monetary gains, such as governance improvements or enhanced deal structures. Moreover, this

heightened judicial scrutiny—with 29% of deal amendment settlements seeing fee reductions averaging 60%—should be interpreted cautiously due to the small sample size and the fact that most interventions occurred pre-*Trulia*.

4. *Incentive Awards*. – Settlements may provide for monetary awards to plaintiffs.[194] Typically involving trivial amounts, the rationale for these awards is to symbolically compensate lead plaintiffs for their contribution to the litigation.[195] Although a handful of exceptions exist, incentive awards generally fall within the $1,000 to $20,000 range.[196] Moreover, to minimize intra-class conflicts, incentive fees are commonly paid out of the attorneys' fee awards not to burden the settlement consideration.[197] The review of the sample period reveals that incentive awards serve different functions and can be separated into three categories: (i) compensatory awards, awarded to plaintiffs who have contributed to the litigation through their professional skills; (ii) rewarding awards for plaintiffs who detected the potential misconduct, reached out to plaintiff's firms and cooperated with counsel throughout the litigation, and (iii) symbolic amounts for plaintiffs who played little role in the litigation, as means to reward plaintiffs for their willingness to serve as lead plaintiffs.

Table 12 **Incentive Awards**	
High	$350,000
Low	$0
Mean	$17,700
Median	$5,500

The data in the sample shows that in lawsuits settled between 2013 and 2015, incentive awards were provided for in rare instances (less than 5% of settlements), but always approved and subjected to minimal scrutiny (only once lowered from the requested $15,000 to $10,000). Since 2016, requests for incentive fees have become more common, which may result from the increased participation of sophisticated plaintiffs with the competencies to contribute professionally to the lawsuit. During the sample period, the Court lowered incentive awards [ten] times (10.5%) and denied the requests in the entirety in [eleven] instances (11.5%). These rates further support the

[194] Instances of incentive awards were already present in the early 1980s and have become increasingly more common over time, *see* Raider v. Sunderland, 2006 WL 75310, at *1, n. 1 (Del. Ch. Jan 4, 2006) (referencing Shanghai Power Co. v. Delaware Trust Co., Del. Ch., C.A. No. 3888 (Feb. 15, 1980) ($95,000 award to one class representative)); Transcript of Plaintiffs' Motion Approval of Settlement and for Award of Attorneys' Fees and Expenses and the Court's Ruling, *In re* Handy & Harman, Ltd. S'holder Litig., C.A. No. 2017-0882-TMR, at 55:12-20 (Del. Ch. Nov. 14, 2019) ("[W]hile this Court is reluctant to award fees to representative plaintiffs outside their out-of-pocket expenses and costs, there are situations that merit such an award. The Court must balance the desire to incentivize the pursuit of meritorious litigation against the possibility that awarding fees will encourage representative plaintiffs to hold up settlement in hopes of a larger personal payout.")

[195] Fuqua Indus. S'holder Litig. v. Abrams (*In re* Fuqua Indus.), 2006 Del. Ch. LEXIS 167, at *7 (The rationale is to "reward and incentivize extraordinary service to the class performed by the class representative.")

[196] *In re* Orchard Enters. Inc. S'holders Litig., 2014 WL 4181912, at * 13 (Del. Ch. Aug. 22, 2014) ("[Not] so large as to raise specters of conflicts of interest or improper lawyer-client entanglements.")

[197] Orchard, at *13 ("[The incentive fees] will be paid out of [counsel's] fee, so they do not harm the [C]lass."); *see also* Chen v. Howard-Anderson, 2017 Del. Ch. LEXIS 734, *6 (Del. Ch. June 30, 2017) (explaining the reasoning in a prior case) ("I adopted that approach because (i) the company was small, which capped the size of any potential recovery, (ii) class counsel undertook a significant amount of work to litigate the case through trial and achieve a post-trial settlement of $4.7 million, and (iii) class counsel already was undercompensated relative to their opportunity cost. In the specific case, as between the lawyers who generated the benefit and the class that passively received it, I concluded that the incentive award should be borne by the class.")

idea that the Court carefully evaluates such requests due to their nature and the potential conflict between the class representative and the rest of the shareholders.

Table 13
Incentive Awards per Settlement Type

Settlement Type	N (%)	Range	Mean	Median
Monetary Settlements	57 (50%)	$1,000-$350,000	$22,558	$10,000
Governance Settlements	20 (31%)	$1,000-$50,000	$9,353	$5,000
Combination Settlements	20 (41%)	$2,500-$50,000	$13,475	$6,000
Disclosure-Only Settlements	-	-	-	-
Deal Amendment Settlements	3 (14%)	$5,000-$15,000	$6,667	$5,000

Table 13 outlines the distribution of incentive awards across different types of settlements. In more than half of the sampled monetary settlements, the Court approved incentive awards ranging from $1,000 to $350,000, with mean and median amounts of $22,558 and $10,000, respectively. Thus, plaintiffs in monetary settlements tend to receive larger awards, likely due to the direct financial benefits such settlements provide to shareholders. Similarly, although with lower mean and median, incentive awards appeared in 41% of combination settlements. Incentive awards are instead less prevalent in governance settlements (20%) and deal amendment settlements (14%). Lastly, none of the proposed disclosure-only settlements contemplated a request for incentive awards, which might also indicate the little role played by individual lead plaintiffs and the centrality of plaintiff firms in initiating lawsuits to challenge M&A transactions.

IV. GUARDIAN OF EQUITY: THE COURT'S ROLE IN PROMOTING FAIRNESS IN FIDUCIARY DUTY SETTLEMENTS

A. The Distinctive Ecosystem of Delaware Fiduciary Litigation

The Delaware Court of Chancery operates within a uniquely specialized ecosystem of corporate litigation. As the nation's leading forum for business disputes, the Court has cultivated an environment characterized by a sophisticated judiciary, a close-knit cadre of repeat-player attorneys,[198] and a legal framework meticulously aligned with the complexities of corporate governance. This ecosystem embodies the principles of private ordering while functioning as a high-performing system in which the Court serves as a vigilant and effective gatekeeper.

Delaware's legal system is structured to encourage settlements, offering litigants a stable and predictable framework that mitigates the uncertainties inherent in litigation. Negotiations occur within the "shadow" of the Court's extensive jurisprudence.[199] This carefully calibrated system incentivizes settlements by delivering clarity and reliability to litigants while ensuring that negotiated outcomes uphold principles of equity. Moreover, the negotiated outcomes in settlements often extend beyond the Court's ability to order equitable relief, offering tailored solutions that address the unique contours of each dispute. This flexibility enhances the value of

[198] Thompson & Thomas, *The New Look of Shareholder Litigation*, *supra* note 12, at 186.

[199] William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351 (1992)-

settlements as a mechanism for resolving fiduciary breaches. Thus, the system's success hinges on the Court's dual role: as both the architect of clear procedural and substantive guidelines and the overseer that enforces their application, fostering a dynamic yet orderly process. Settlements further contribute to judicial economy by reducing the need for protracted litigation, conserving public resources, and alleviating the Court's increasingly demanding caseload.

The Court's engagement with fiduciary breaches also addresses the multi-layered agency problems inherent in representative litigation.[200] By employing its business judgment, the Court ensures that settlement terms are fair, reasonable, and adequate, taking into account the challenges of proving liability and damages. The analysis of settlement hearing transcripts reveals how the Court considers potential trial outcomes when approving settlements, ensuring that the negotiated terms genuinely benefit the corporation and its shareholders.[201] This is evident in its rigorous review of factors such as discovery adequacy, claim value, and proportionality of relief. For example, in *Shumacher v. Duke*, the Court expressed concerns over inadequate discovery and overly broad releases, demonstrating its insistence on substantive and well-supported settlements.[202]

This article's data analysis provides a previously unavailable level of insight into this dynamic process. By examining not only settlement outcomes but also the Court's interventions, this work reveals the intricate balancing act that underpins Delaware's model. This analysis further demonstrates that criticisms of high settlement approval rates as indicative of judicial leniency fail to account for the Court's multifaceted oversight mechanisms. The data indicates that the Court exercises its authority not merely through denials but also through subtler forms of intervention, such as signaling the merits of claims during rulings on motions to dismiss, reducing attorneys' fees, or requiring amendments to settlement terms. These actions illustrate how the Court ensures substantive fairness while maintaining a legal environment conducive to private ordering without the need for more frequent denials.

B. Reduction of Plaintiffs' Attorneys Fees

The complexity of fiduciary duty breaches and the widespread rational apathy of shareholders in dispersed ownership structures position plaintiffs' attorneys as critical enforcers within Delaware's corporate litigation system.[203] The Court of Chancery has repeatedly acknowledged

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[200] *In re* Riverbed Tech., Inc. Stockholders Litig., No. C.A. 10484-VCG, 2015 WL 5458041, at *2 (Del. Ch. Sept. 17, 2015) ("At each remove, there may be interests of the agent that diverge from that of the principals. This matter, involving the deceptively straightforward review of a proposed settlement, bears a full load of such freight.")

[201] *See e.g.*, Transcript of Settlement Hearing and Ruling of the Court, Appel v. Berkman, C.A. No. 12844-VCF, at 46:2-11 (Del. Ch. Feb. 20, 2020) ("I recognize that the plaintiff would have faced obstacles in proving liability. There were also defenses of exculpation under the corporation's certificate of incorporation and Section 102(b)(7) of the DGCL, as well as Section 141(e), reliance on expert's defenses. There were also hurdles in proving damages.").

[202] Transcript of Settlement Hearing and Rulings of the Court, Shumacher v. Dukes, C.A. No. 2020-1049- PAF (Del. Ch. Nov. 17, 2022).

[203] Transcript of Settlement Hearing, *In re* True Religion Apparel, Inc. S'holders Litig., C.A. No. 8598-VCG, at 20:10-11 (Del. Ch. May 1, 2014). ("How do you, in a wholesome way, incentivize oversight without causing an unwholesome windfall[?]").
Transcript, *In re* Tile Shop Holdings, Inc. Litigation, at 39:10-13 ("Our entrepreneurial system of policing corporate wrongdoing obviously involves plaintiff's firms undertaking a lot of cases where they receive nothing. That's just a function of the system.")

the value of these attorneys in ensuring accountability where shareholder monitoring is weak.[204] At the same time, the Court remains acutely aware of the agency problems that permeate representative litigation, including the potential for misaligned incentives between plaintiffs' attorneys and their clients.[205]

Despite these risks, the data analysis challenges the conventional notion that plaintiffs' attorneys exploit settlements for disproportionate personal gain. First, nearly all plaintiffs' attorneys operate on a contingency basis, assuming significant financial risks in pursuing fiduciary litigation. Second, Delaware's adherence to the *Sugarland* precedent,[206] which ties attorneys' fees directly to the benefits achieved through settlement, fosters an ecosystem that closely aligns the interests of shareholders and plaintiffs' attorneys.[207] Because fees are calculated based on a percentage-of-the-benefit approach, attorneys are motivated to maximize recovery for shareholders. The proportionality embedded in this system ensures that attorneys' financial interests are closely linked to their clients' outcomes, as evidenced by the data's clear correlation between settlement amounts and fees awarded.

Furthermore, the Court of Chancery's rigorous scrutiny of fee requests provides an additional safeguard against potential abuses. While the Court reduces fees in approximately 25–27% of cases, this relatively low adjustment rate reflects the legal community's adherence to well-established norms shaped by Delaware precedent and reinforced through settlement hearings. Fee reductions are largely confined to outlier requests, demonstrating that most attorneys operate within the bounds of the Court's clearly defined expectations.

Importantly, settlements are not achieved without significant effort and judicial involvement. Before a settlement is even presented, the Court often shapes the litigation through rulings on motions, such as motions to dismiss or for preliminary injunctions. These rulings provide critical guidance on the strength of claims, influencing settlement negotiations and reducing uncertainty. Even in cases where a motion to dismiss is granted, settlement may still be pursued to avoid the costs and risks of an appeal. The data confirms the protracted nature of this process: the average duration of lawsuits culminating in settlement exceeds two years, reflecting both the depth of judicial engagement and the substantial effort required of plaintiffs' attorneys.

Beyond financial incentives, reputational considerations play a pivotal role in shaping the behavior of Delaware's plaintiffs' bar. Practicing within a small, interconnected legal community,[208] attorneys place high importance on maintaining credibility with both the Court and their clients. This reputational interest serves as an additional check on conduct, deterring

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[204] Transcript of Settlement Hearing and Rulings of the Court, *In re* Am. Int'l Group, Inc. Cons. Deriv. Litig., C.A. No. 769-VCS, at 10:9-11 (Del. Ch. Jan. 25, 2011) ("I've said this before and I will continue to say it—that, you know, you don't reduce people's fees because they gain much. You should, in fact, want to create an incentive for real litigation.")

[205] Transcript of Settlement Hearing and Ruling of the Court, Heng Ren Silk Road Investments v. Hamlin Chen and China Automotive Systems, C.A. No. 2019-0010-JTL, at 27:5-11 (Del. Ch. Feb. 5, 2021) ("So I worry when a derivative action looks like a pass-through for counsel. In other words, when the monetary payment is effectively routed through the entity and back out again in the form of a fee award. That's generally regarded in the scholarly literature as one among many flags of various red hues to look out for in terms of a settlement.)

[206] Sugarland Industries, Inc. v. Thomas, 420 A.2d 142 (Del. 1980)

[207] *See also* Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1254 (Del. 2012).

[208] *See e.g.*, AMERICAN BAR ASSOCIATION, *Profile of the Legal Profession 2023 - Demographics*, https://www.abalegalprofile.com/demographics.html.

unreasonable fee requests and other practices that might attract judicial scrutiny.[209] The Court's consistent oversight, combined with these reputational dynamics, ensures that the system functions effectively as a guardian of shareholder interests.

C. Release Clauses and the Court's Surgical Interventions

Defendants' attorneys operate under a distinct set of incentives shaped by their fee arrangements, which typically involve hourly billing and are mainly funded through directors' and officers' (D&O) insurance policies. This structure contrasts with the contingency-based model of plaintiffs' counsel, where fees are tied to litigation or settlement outcomes. The dual role of D&O insurance—covering both defense costs and settlement consideration—significantly influences the litigation landscape. As defense costs mount, the available pool of insurance resources diminishes, creating a strong incentive for corporate defendants to resolve disputes efficiently through settlement rather than prolonging litigation.

Settlements offer a dual benefit for defendants: they halt the accumulation of defense costs and provide a release of liability, shielding them from future claims related to the allegations. Consequently, defendant attorneys are often driven to pursue resolution strategies that mitigate both financial exposure and reputational risks for their clients. This pragmatic approach reflects the reality that the considerable costs and uncertainties inherent in trials render settlements a more predictable and advantageous resolution.

As revealed by the data analysis, release clauses are a pivotal element of settlements, extinguishing liability for claims arising from the same set of operative facts as the claims asserted. Because of the critical implications of these provisions, the Court of Chancery subjects them to exacting scrutiny to ensure they do not disproportionately favor defendants at the expense of shareholders. In a system where shareholder apathy limits direct oversight, the Court's careful review ensures that valuable claims are not relinquished without sufficient justification. This scrutiny often takes the form of surgical interventions, where the Court identifies and addresses specific issues within the release language without dismantling the broader settlement. Overly broad or non-customary release clauses, which risk insulating defendants from unrelated liabilities, encounter rigorous judicial resistance. In several cases, the Court required amendments to the release language as a condition of approval, while in rare circumstances, it rejected settlements entirely due to inadequately crafted releases.

The Court's rigorous scrutiny of release clauses accomplishes more than addressing potential agency problems; it reinforces the structural equilibrium of Delaware's corporate litigation system. By clearly delineating the permissible boundaries of release provisions, the Court ensures that settlements operate as equitable resolutions, rather than as unmerited shields against liability. This careful calibration reflects Delaware's commitment to balancing the policy goal of favoring settlements with broader principles of fairness, thereby maintaining the legitimacy of its legal framework.

D. Systemic Distortions and the Court's Course Corrections

One of the defining features of the Court of Chancery is its ability to intervene in systemic distortions through "course correction" rulings. These rulings address structural imbalances that

[209] Transcript of Settlement Hearings and Rulings of the Court, *In re* Tile Shop Holdings, Inc. Litigation, C.A. No. 2019-0892-SG, at 35:16-17 (Del. Ch. Oct. 11, 2020) ("It is an honor to be a judge, given the bar that appears in front of me[.]")

might otherwise undermine the integrity of fiduciary litigation, ensuring that the settlement process operates equitably and efficiently. The *Trulia* decision illustrates the Court's capacity for systemic reform. By establishing a heightened evidentiary standard for approving disclosure-only settlements, the Court effectively curtailed a practice that prioritized attorneys' fees over substantive shareholder benefits. This decision marked a fundamental trajectory change for representative litigation, prioritizing genuine shareholder protection and deterring frivolous lawsuits driven primarily by attorneys seeking fees.

As this analysis has shown, the judiciary frequently signals upcoming corrective actions during settlement hearings, later formalizing these changes through opinions. Although rare, such rulings carry a profound didactic value, serving to define standards for fiduciary duty settlements and recalibrate practices that threaten to distort the system's equilibrium. The Court also signaled that attorneys' fees in such cases would be subjected to heightened scrutiny, granting awards only when meaningful shareholder benefits were achieved.[210] More broadly, *Trulia* exemplifies the Court's didactic role in addressing systemic distortions and setting guardrails for fiduciary litigation. The decision was not an isolated ruling but part of an ongoing effort by the judiciary to adapt Delaware's corporate governance framework to new challenges, balancing innovation with the preservation of foundational principles. By signaling its stance during settlement hearings and formalizing these shifts in rulings, the Court reinforces its role as a sophisticated gatekeeper, ready to act when systemic issues demand a course correction.

E. Reputational Risks and Incentive Awards

The Delaware Court of Chancery's evolving approach to incentive awards reflects its responsiveness to the dynamics of fiduciary litigation. By moving beyond its historical presumption against separate compensation for named plaintiffs, the Court acknowledges the substantive contributions lead plaintiffs make in advancing shareholder claims. This shift demonstrates an understanding that, in modern litigation, the role of the lead plaintiff is not merely symbolic but essential, particularly in cases that involve significant burdens, such as reputational harm, privacy intrusions, and aggressive discovery tactics.

Lead plaintiffs today encounter substantial challenges, including the threat of reputational harm and privacy intrusions. In *Dell*, the Court acknowledged the lead plaintiff's exposure to aggressive discovery tactics, including multiple rounds of document production, interrogatories, and depositions, which demanded significant time and effort. The Court also recognized that serving as a named plaintiff in high-profile litigation invites heightened public scrutiny, with potential consequences for the plaintiff's professional and personal life. Drawing on prior cases, the opinion highlighted examples such as *Chen v. Howard-Anderson*, where reputational damage from litigation participation extended beyond the courtroom, affecting career prospects despite eventual exoneration.

Incentive awards now serve as more than restitution for time and effort; they function as critical mechanisms to align shareholder interests, promote accountability, and encourage active participation in enforcing fiduciary obligations. The Court's approach is not indiscriminate, however. By calibrating awards to the level of contribution and benefit provided—granting larger

[210] Trulia, 129 A.3d 884, 898 ("[P]ractitioners should expect that the Court will continue to be increasingly vigilant in applying its independent judgment to its case-by-case assessment of the reasonableness of the 'give' and 'get' of such settlements in light of the concerns discussed above.")

awards in monetary settlements while exercising restraint in other contexts—the Court ensures these payments are both fair and purposeful.

F. The Critical Role of Settlement Hearings Transcripts

Transcripts of settlement hearings provide an invaluable lens into the Delaware Court of Chancery's approach to fiduciary litigation, offering insights beyond published opinions. These transcripts reveal the Court's priorities, reasoning, and the policies shaping its review of settlements, attorneys' fees, and release clauses. For practitioners, transcripts serve as indispensable references, informing litigation strategies and setting realistic expectations for settlement negotiations.[211]

Despite their significance, transcripts remain underutilized in academic analyses. This underrepresentation is partly due to the costs associated with obtaining transcripts and the Court's explicit position that they should not serve as binding precedents. However, the data analysis in this article demonstrates the essential role these transcripts play in understanding the Court's work. The nuanced discussions captured in these hearings illuminate the Court's engagement with evolving fiduciary standards, its emphasis on shareholder protection, and its balancing of competing policy goals. For example, the transcripts reviewed reveal how the Court actively engages in a dialogue with the settling parties, providing a clearer picture of the Court's oversight than published opinions alone can convey.

Advances in AI transcription technology could help lower the costs of producing transcripts, making these resources more accessible to scholars and practitioners alike. Incorporating transcripts into legal research would provide a more comprehensive understanding of Delaware corporate law, ensuring that the Court's rationale and evolving policies are fully captured. By bridging this gap, the legal community could further deepen its understanding of the Court's role in reviewing settlement terms and reinforce the Court's reputation as an "honest broker in the legal realm."[212]

CONCLUSION

The Delaware Court of Chancery exemplifies a judicial approach to fiduciary duty settlements that combines strategic oversight with a steadfast commitment to equity. Although settlement denials are rare, this analysis reveals that focusing solely on the denial rate obscures the Court's significant influence on the settlement process. Rather than frequently rejecting proposals, the Court relies on a suite of sophisticated tools to shape outcomes, balancing its policy preference for encouraging settlements with its obligation to safeguard shareholder interests and maintain fairness. The Court's oversight often begins well before settlements reach the approval stage. Through rulings on motions to dismiss and other key procedural decisions, the Court provides critical guidance that helps define the parameters within which parties negotiate. Settlements frequently emerge after this extensive judicial engagement, benefiting from the Court's expertise and the procedural safeguards it imposes. Data confirms that settlements are not hastily reached but instead follow years of litigation, reflecting the substantial efforts of both the judiciary and the litigants to achieve meaningful resolutions.

Once a settlement is proposed, the Court employs a broad array of tools to ensure its fairness.

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[211] *See* Joel Edan Friedlander, *Performing Equity: Why Court of Chancery Transcript Rulings Are Law* (Univ. of Pa., Inst. for Law & Econ. Rsch. Paper No. 20-58) (Jan. 10, 2021), https://ssrn.com/abstract=3760722.

[212] Transcript, Acevedo v. Aeroflex Holding Corp., at 66:19-20.

It may require revisions to release clauses that are overly broad, recalibrate attorneys' fees to reflect the benefits achieved, or, in rare instances, deny approval outright. These interventions illustrate the Court's capacity to address potential imbalances without resorting to blanket rejections. Notably, the *Trulia* decision demonstrates the Court's ability to recalibrate systemic distortions by raising evidentiary standards for disclosure-only settlements, thereby aligning outcomes more closely with shareholder interests. The Court's evolving stance on incentive awards further demonstrates its responsiveness to the changing dynamics of fiduciary litigation. Recognizing the importance of pre-litigation efforts, such as Section 220 demands, the Court has adopted a more flexible approach to awarding compensation to named plaintiffs whose contributions materially advance litigation. This shift reflects the Court's commitment to fostering an equitable enforcement framework while incentivizing meaningful shareholder participation.

This analysis further reveals the Court's recognition of the indispensable role played by plaintiffs' attorneys in overcoming shareholder disengagement. By tying attorneys' fees to the benefits achieved, the Court ensures that attorneys' financial incentives remain closely aligned with shareholder outcomes. This balance preserves the integrity of representative litigation while promoting equitable resolutions that prioritize shareholder benefits over excessive attorney gains. The negotiated outcomes of settlements often provide remedies that exceed the scope of equitable relief the Court itself could order. This flexibility highlights the unique value of settlements as tailored solutions to fiduciary breaches, offering both tangible and intangible benefits to corporations and their shareholders. Settlements also yield significant public benefits, including the promotion of judicial economy and the conservation of judicial resources—considerations of increasing importance given Delaware's crowded dockets.

Finally, this analysis underscores the vital role of settlement hearing transcripts in providing a deeper understanding of the Court's priorities and reasoning. These transcripts, though not binding precedents, offer unparalleled insights into the Court's engagement with fiduciary standards and its balancing of competing policy objectives. Enhancing access to these materials through advances in transcription technology could expand their utility for both practitioners and scholars, enriching the broader discourse on Delaware corporate law. In sum, the Delaware Court of Chancery's approach to fiduciary duty settlements embodies a finely tuned balance between encouraging settlements and imposing rigorous oversight. By addressing systemic risks, tailoring interventions to evolving challenges, and fostering a dynamic legal environment, the Court reaffirms its role as the guardian of equity in corporate governance.

APPENDIX

A. Data Collection and Supplement Procedure

To identify lawsuits alleging a breach of fiduciary duty during the sample period, I began on Lex Machina by filtering under the case type category of "Corporation Law" and the case tag "Breach of Fiduciary Duty," yielding an initial pool of 2,583 cases, which represents approximately 20% of the total number of lawsuits (12,499) filed in the Delaware Court of Chancery during the sample period. I then performed a cross-verification exercise using the Bloomberg Law database, filtering under the case type category of "Breach of Fiduciary Duties" which led to the inclusion of 164 additional cases, bringing the total sample to 2,747 lawsuits (21.9% of the total). The breakdown of data sources is summarized in Table I.

Table I

Data Source	**Number of cases**	**Percentage**
Total number of complaints alleging a breach of fiduciary duty (January 1, 2013 – December 31, 2023)	2,747	*100%*
- *Lex Machina*	2,583	*94%*
- *Bloomberg Law*	164	*6%*

For purposes of the present analysis, I excluded cases that were transferred, removed, compelled into arbitration, defaulted, or settled in another jurisdiction, reducing the final sample to 2,670 lawsuits. Subsection B provides an overview of fiduciary litigation data, and Subsection C provides more granular data on settlements.

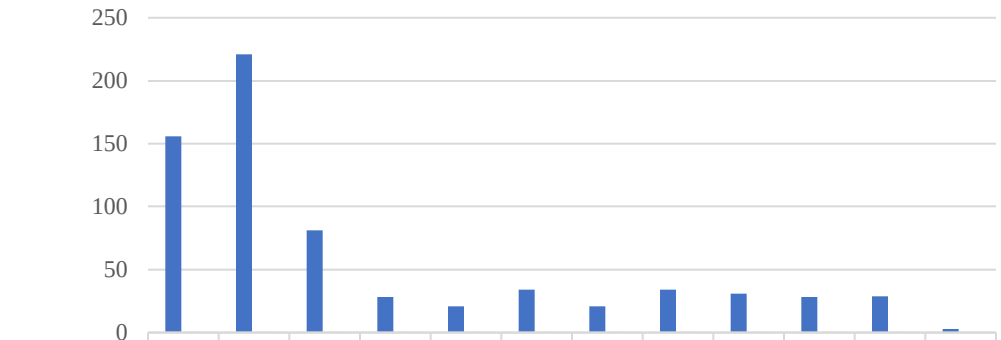
B. Fiduciary Litigation Data

The dataset reveals several key trends, including the number of ongoing cases, dismissals, voluntary dismissals, concluded trials, and settlements. The relatively low number of trials versus settlements highlights the Court's pivotal role in promoting private ordering and facilitating settlement negotiations. Notably, half (50.7%) of the sample resulted in voluntary dismissals, which reflects the common practice of plaintiffs withdrawing complaints, often following corrective action or mooting events initiated by the defendants.

Table II
Overview of Case Outcomes

Outcome	Number of cases	Percentage	Mean Days	Median Days
Total cases	2,670	*100%*	-	-
Consolidated cases	[873]	*[32.69]*	[56]	[25]
Pending cases	[229]	*[8.58%]*	-	-
Dismissed cases	[71]	*[2.66%]*	[518]	[266]
Cases voluntarily dismissed	[954]	*[35.74%]*	[258]	[225]
- of which, moot	[176]		[253]	[192]
- of which, settled in a different jurisdiction and voluntarily dismissed in Delaware	[15]			
- of which, following withdrawal of settlements	[3]			
Cases past trials (and not settled post-trial)	[29]	*[1.09%]*	[]	[]
Cases past a ruling on a motion to dismiss	[216]	*[8.09%]*	[555]	[485]
- of which, granted	[192]			
- of which, with an ongoing appeal to Supreme Court	[9]			
- of which, affirmed by Supreme Court	[45]			
- of which, reversed by Supreme Court	[1]			
- of which, denied	[10]			
- of which, granted in part and denied in part	[14]			
Summary judgments	[6]	*[0.22]*		
Cases settled	[292]	*[10.94%]*	[797]	[663]
- of which, confidential	[9]			

Figure I
Number of cases consolidated



	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Consolidated	156	221	81	28	21	34	21	34	31	28	29	3
Percentage of filed cases	48%	49%	17%	12%	16%	23%	12%	21%	15%	13%	13%	

Consolidation. The sample set includes a significant proportion of consolidated cases, totaling 859 (32.69%) of the total (*see* Figure I). Under Delaware Court of Chancery Rule 42, "When [separate] actions involv[e] a common question of law or fact" and the administration of justice would be best served by consolidating separate actions, the Court may order their consolidation.[1] Typically, the Court solicits a proposed order from plaintiffs, which may include recommendations for a "leadership structure" to provide effective representation,[2] including lead or derivative counsel. "[This] type of private ordering […] to propose the most efficient means of consolidation"[3] is encouraged by the Court since it aims to streamline case management. Where plaintiffs cannot agree on leadership, the Court intervenes to appoint counsel.[4] The data reveals a

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1 Del. Ch. Ct. R. 42. *See also* Wood, supra note 16, at 66-78 (Wood referred to "duplicates," and discussed the existence of a phenomenon by which, once one complaint was filed, other plaintiff lawyers would file similar complaints with the hope of being named lead counsel.)

2 In re Investors Bancorp, Inc. S'holder Litig., 2016 WL 4257503, at *2 (Del. Ch. Aug. 12, 2016).

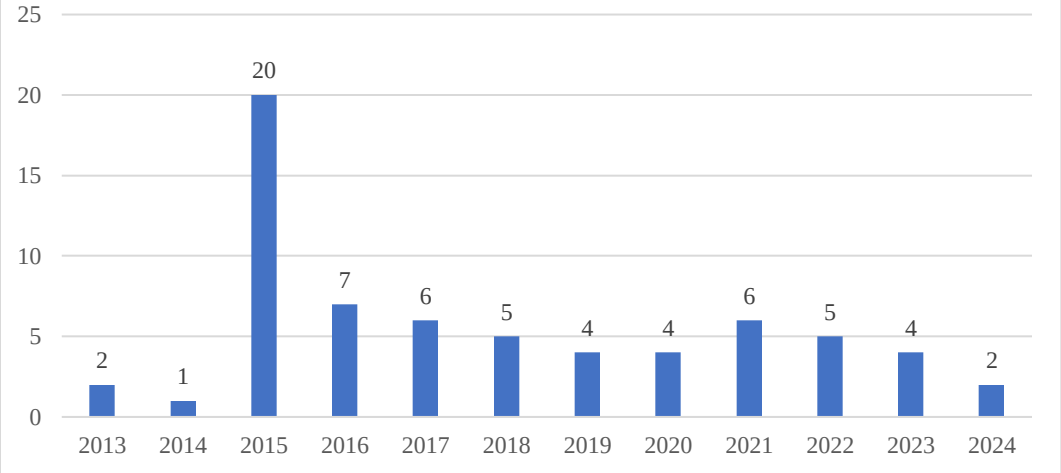
3 TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc., No. 18289, 2000 WL 1654504, at *3 (Del. Ch. Oct. 17, 2000).

4 *Id.* at *3 ("Over the past ten years, members of the Court of Chancery have been asked, with increasing frequency, to become involved in the sometimes unseemly internecine struggles within the plaintiffs' bar over the power to control, direct and (one suspects) ultimately settle shareholder lawsuits filed in this jurisdiction. In every single instance that I am able to recall, this Court has resisted being drawn into such disputes.").
Under Del. Ch. Ct. R. 23(d)(1) and 23.1(c)(2), "[C]ounsel must fairly and adequately represent the interests of the class [or] of the entity[.]"In appointing counsel, the Court may consider the following criteria: "(i) counsel's competence and experience; (ii) counsel's access to the resources necessary to represent the class [or counsel's

decline in consolidation rates over time, which may suggest a stabilization in the filing of similar complaints by different plaintiffs' attorneys.

Pending Cases. Ongoing cases, comprising 8.58% of the sample, represent a broad spectrum of procedural stages. These include cases where only a complaint has been filed, cases stayed by the Court, and instances where motions to dismiss were denied. To maintain docket efficiency, the Court regularly mandates status updates from the plaintiffs.

Figure II
Number of cases dismissed



Dismissals. Under Del. R. Ch. Ct. 41(e),[5] a complaint may be dismissed due to inactivity when no action has been taken for a year, unless the plaintiff provides good cause for the delay. As

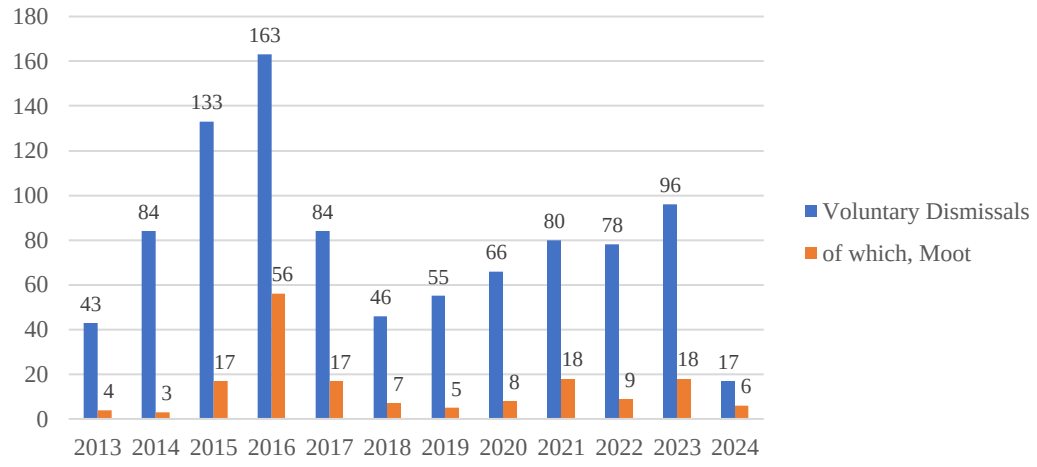
access to the resources necessary to prosecute the litigation]; (iii) the quality of the pleading; (iv) counsel's performance in the litigation to date; (v) the proposed leadership structure; (vi) the relative economic stakes of the representative parties [or the derivative plaintiff's relationship to and interest in the entity]; (vii) any conflicts between counsel or the representative parties and members of the class [any conflicts between counsel or the derivative plaintiff and the entity]; and (viii) any other matter pertinent to the ability of counsel or the representative party to fairly and adequately represent the interests of the class [or any other matter pertinent to ability of counsel or the derivative plaintiff to fairly and adequately represent the interests of the entity in the derivative action]." Del. Ch. Ct. R. 23(d)(4)(A) and 23.1(c)(3)(B) as revised on September 25, 2023, and reflecting long-settled practice. *See* Hirt v. U.S. Timberlands Serv. Co., LLC, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002) citing TWC Technology Limited Partnership v. Intermedia Communications, Inc., 2000 WL 1654504 (Del. Ch. 2000) at *3-4, and In re SFX Entertainment, Inc. Shareholders Litig., Consol. C.A. No. 17818, Steele, V.C. (Apr. 25, 2000) (ORDER), ("[The] quality of the pleading that appears best able to represent the interests of the shareholder class and derivative plaintiffs; the relative economic stakes of the competing litigants in the outcome of the lawsuit […]; the willingness and ability of all the contestants to litigate vigorously on behalf of an entire class of shareholders; the absence of any conflict between larger, often institutional, stockholders and smaller stockholders; the enthusiasm or vigor with which the various contestants have prosecuted the lawsuit; [and the] competence of counsel and their access to the resources necessary to prosecute the claims at issue. The court has also recognized that no special weight or status will be accorded to a lawsuit 'simply by virtue of having been filed earlier than any other pending action.'"); In re Delphi Financial Group Shareholder Litigation, 2012 WL 424886, at *1 (Del. Ch. Feb. 7, 2012) The court further clarified that "each factor is given weight only to the extent that it bears on the ultimate question of what is in the best interests of the plaintiff class.

[5] Del. R. Ch. Ct. 41(e) ("no action has been taken for a period of 1 year, the Court may upon application of any party, or on its own motion, and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given, or the parties have stipulated with the approval of the Court as to such matter.")

shown in Figure II, such dismissals are relatively infrequent. This reflects the Court's preference for resolving cases either through settlements or adjudication rather than allowing them to languish.

Motions to dismiss. In contrast to dismissals based on a plaintiff's inactivity, a defendant may seek dismissal by filing a motion to dismiss the complaint. Such motions are often predicated on procedural deficiencies, failure to state a claim or lack of jurisdiction.

Figure III
Number of cases voluntarily dismissed



Voluntary dismissals. Under Del. R. Ch. Ct. 41(a)(1), most actions can be voluntarily dismissed without a court order. However, exceptions apply to shareholder derivative actions and class actions, where dismissals are subject to the same judicial scrutiny applicable to settlements.[6] In these instances, the Court must ensure that voluntary dismissals are in the best interest of the shareholders or the class. Voluntary dismissals require a court order following either (i) the plaintiff's notice of dismissal or (ii) a stipulation of dismissal agreed upon by the parties.[7] A significant category of voluntary dismissals involves cases where the plaintiff's claims have been mooted due to remedial actions by the defendant or other mooting events outside the parties' control (*see* Figure III).[8] Under Delaware's corporate benefit doctrine, plaintiffs' attorneys may be entitled to fees if the mooted claims were meritorious and causally related to corrective actions that resulted in a corporate benefit.[9] In such cases, the Chancery Court retains jurisdiction to review and award attorneys' fees and expenses post-dismissal. Voluntary dismissals may also occur in

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6 Unlike dismissals based on settlement, voluntary dismissals often result from events outside the courtroom, such as corrective actions taken by the defendant.
Hack v. Learning Co., No. CIV.A. 14657, 1996 WL 633306, at *1 (Del. Ch. Oct. 29, 1996) ("In a dismissal based on mootness, the Court determines nothing, and approves nothing except that the claims are being dismissed as moot. In that context, no claims are "released", no class is "certified", and no attorneys fees are awarded by any order of the Court. The only procedural requirement (in addition to satisfying the Court that the case is moot) is that the shareholders be informed that the action will be dismissed on that basis.")

7 *See* Del. R. Ch. Ct. 23(f)(1) and 23.1(d)(1).

8 EMAK Worldwide, Inc. v. Kurz, 50 A.3d 429, 432 (Del. 2012).

9 Anderson v. Magellan Health, Inc., *supra* note 56, at 734, 740, citing Goodrich v. E.F. Hutton Gp., Inc., 681 A.2d 1039, 1046 (Del. 1996) ("[T]he court 'must make an independent determination of reasonableness' of the amount requested.")

cases where a settlement was either announced or presented to the Chancery Court but subsequently withdrawn by the parties. Additionally, voluntary dismissals frequently occur when a parallel settlement has been reached in another jurisdiction, with the Delaware action terminated as part of the broader settlement terms.

C. Settlements Data

Figure IV
Proportion of Filed Cases
Reaching Settlement by Filing Year

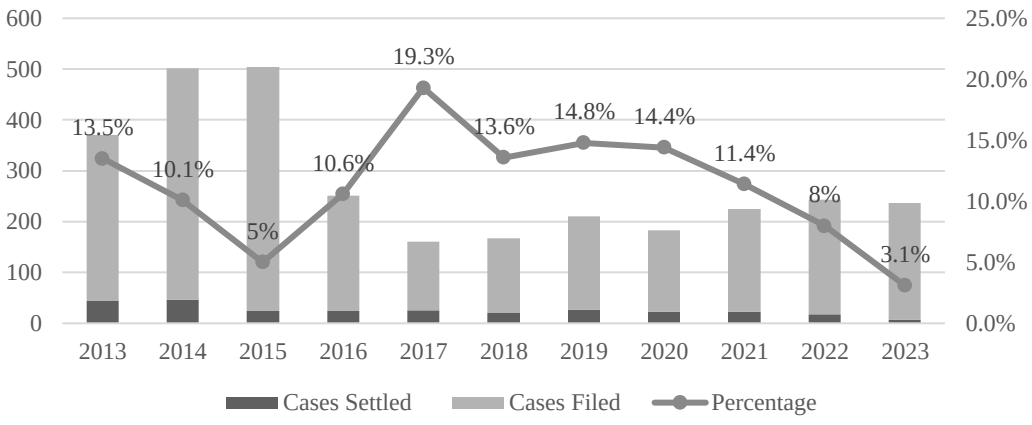

Figure V
Number of Monetary Settlements per Year

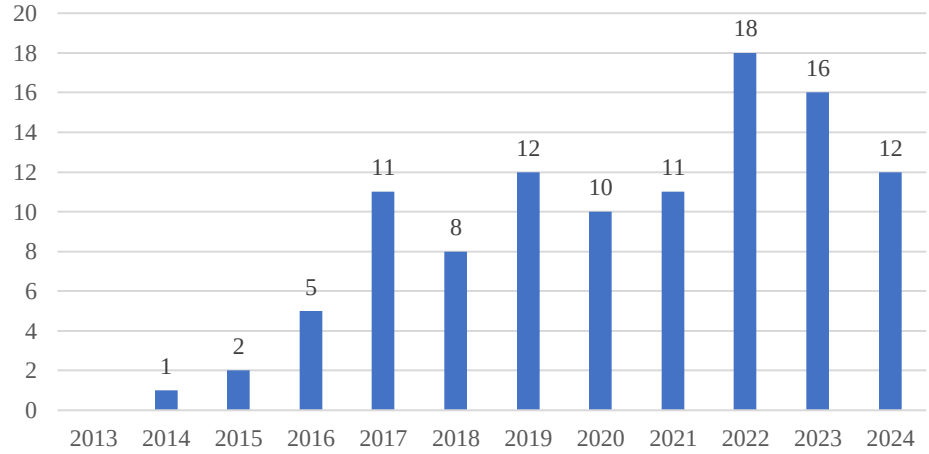

Figure VI
Number of Governance Settlements per Year

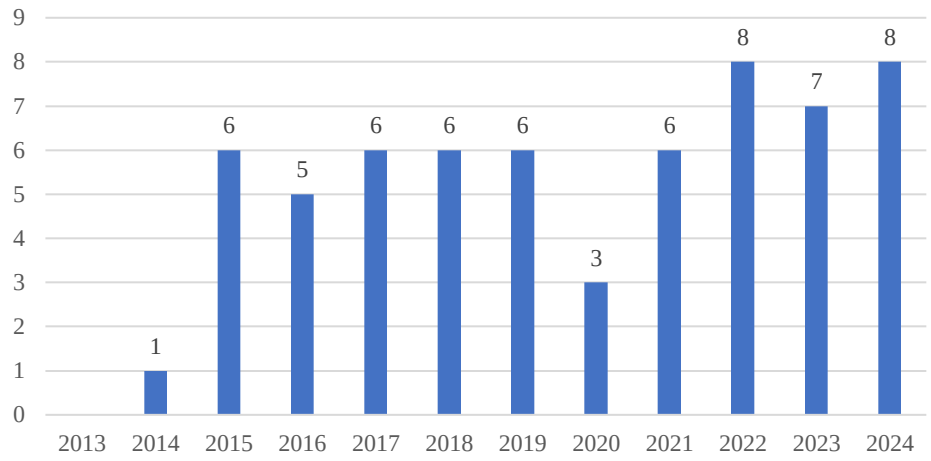

Figure VII
Number of Combination Settlements per Year

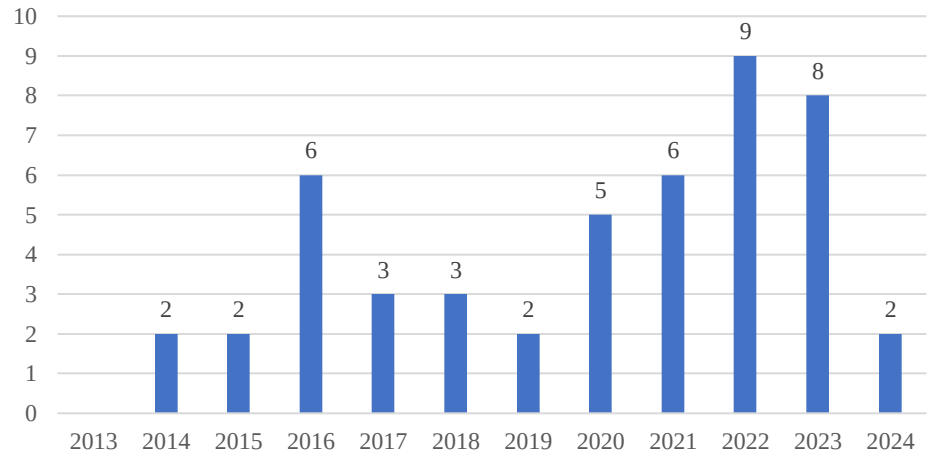

Figure VIII
Deal Amendment and Disclosure-Only Settlements

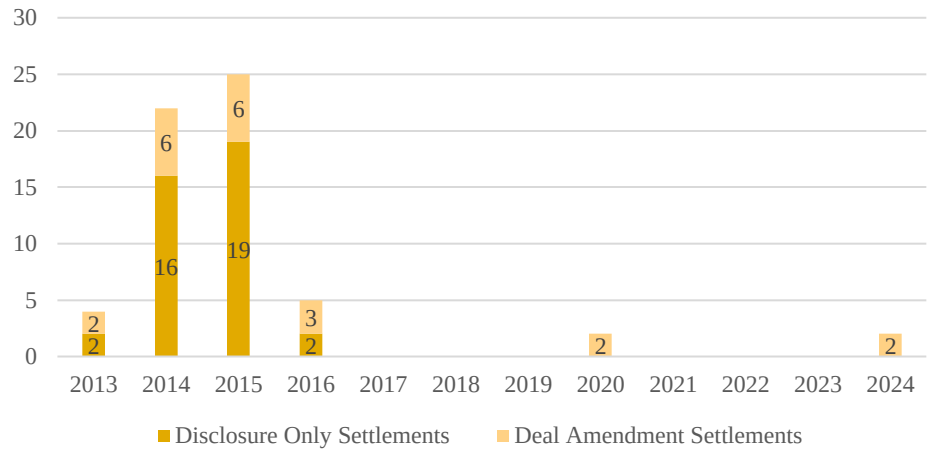

Table III
Monetary Component of Combination Settlements

Year	N of Settlements	Mean	Median	Inflation-Adjusted Mean	Inflation-Adjusted Median
2013	-	-	-	-	-
2014	2	$25,250,000	$25,250,000	$33,292,934	$33,292,934
2015	2*	$275,000,000	$275,000,000	$362,166,427	$362,166,427
2016	6	$11,021,167	$6,625,000	$14,333,711	$8,616,224
2017	3	$5,416,667	$3,000,000	$6,897,764	$3,820,300
2018	3	$30,449,967	$1,250,000	$37,851,491	$1,553,849
2019	2	$30,250,000	$30,250,000	$36,933,688	$36,933,688
2020	5	$14,720,000	$12,000,000	$17,753,340	$14,472,832
2021	6	$7,152,500	$604,500	$8,239,325	$696,354
2022	9	$37,371,778	$14,250,000	$39,860,505	$15,198,961
2023	8	$18,150,000	$9,250,000	$18,593,293	$9,475,921
2024	2	$3,500,000	$3,500,000	$3,500,000	$3,500,000

** Settlement amount available only for one settlement.*

Table IV Attorneys' Fees and Expenses for Combination Settlements per Year					
Year	**N of Settlements**	**Mean**	**Median**	**Inflation-Adjusted Mean**	**Inflation-Adjusted Median**
2013	-	-	-	-	-
2014	2	$4,372,500	$4,372,500	$5,765,281	$5,765,281
2015	2*	$72,500,000	$72,500,000	$95,480,240	$95,480,240
2016	6	$2,987,711	$1,625,000	$3,943,722	$2,113,413
2017	3	$2,346,605	$500,000	$2,988,245	$636,717
2018	3	$7,665,000	$275,000	$9,528,144	$341,845
2019	2	$7,875,000	$7,875,000	$9,614,968	$9,614,968
2020	5	$4,046,591	$3,180,000	$4,880,469	$3,835,300
2021	6	$1,646,667	$15,000	$1,896,878	$17,279
2022	9	$3,786,062	$1,587,500	$4,038,190	$1,693,218
2023	8	$5,048,926	$3,065,000	$5,172,240	$3,139,859
2024	2	$2,317,453	$2,317,453	$2,317,453	$2,317,453

Table V Attorneys' Fees and Expenses in Deal Amendment Settlements						
Year	**Number of Proposed Settlements**	**Mean AF&E**	**Median AF&E**	**Inflation-Adjusted Mean AF&E**	**Inflation-Adjusted Median AF&E**	**Number of Court's Interventions of AF&E**
2013	2	$555,000	$555,000	$743,656	$743,656	1
2014	6	$2,745,907	$1,607,721	$3,620,566	$2,119,832	3
2015	6	$1,090,625	$862,500	$1,436,319	$1,135,886	-
2016	3	$649,746	$674,239	$845,036	$876,890	1
2017	-	-	-	-	-	-
2018	-	-	-	-	-	-
2019	-	-	-	-	-	-
2020	2	$3,135,443	$3,135,443	$3,781,562	$3,781,562	-
2021	-	-	-	-	-	-
2022	-	-	-	-	-	-
2023	-	-	-	-	-	-
2024	2	$2,248,230	$2,248,230	$2,248,230	$2,248,230	1