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The Market for Preclusion in Merger Litigation

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INTRODUCTION

Delaware dominates the corporate law market.[1] More than half of all public companies and over sixty percent of the Fortune 500 are

1. Delaware took the incorporation business from New Jersey in the early 1900s and never looked back. *See* Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 969–70 (1995) (discussing Delaware's success in attracting corporations in the wake of New Jersey laws outlawing the trust and holding company).

incorporated in Delaware.[2] These companies are subject to Delaware's corporate law regardless of where their businesses are physically located. Although academics continue to debate whether it is good or bad,[3] they have long agreed that Delaware's dominance is a result of its law and its judiciary.[4] As a corollary, it was widely understood that Delaware courts decided most cases involving Delaware corporations.[5]

The discovery that litigation involving these corporations very often takes place outside of Delaware therefore came as something of a shock.[6] Recent research shows that more cases are filed against

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2. *See Division of Corporations*, DELAWARE.GOV, http://corp.delaware.gov/ (last updated Mar. 23, 2013); *see also* Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1572 (2002) (finding that ninety-five percent of all companies that seek legal rules from a state that is not the location of their headquarters incorporate in Delaware). Delaware hosts a substantial share of all corporations that incorporate outside of their home state. *See* Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1804 (2002) ("[B]y 2000[,] approximately half of all NYSE companies were incorporated in Delaware.").

3. *See, e.g.*, William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663, 684–86 (1974) (criticizing Delaware's lax corporation laws and proposing federal minimum-standards legislation); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 289–92 (1977) (arguing that competition among states to attract corporations to incorporate in their states, including Delaware's primacy in this market, actually results in laws to better protect shareholders).

4. *See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1074–81 (2000) (discussing the unique role of Delaware courts in making and developing corporate law). Other academic commentators have focused on Delaware's special incentive, deriving from incorporation revenues, to achieve balanced outcomes between the interests of managers, on the one hand, and shareholders, on the other. If Delaware jurisprudence drifts too far in favor of shareholders' interests, Delaware is faced with the risk that managers will seek to incorporate elsewhere. Meanwhile, if Delaware were to be seen as overly biased in favor of managers' interests, the state would risk increased federal incursion in corporate lawmaking. These twin constraints force chancery judges to adopt a balanced perspective in deciding disputes between shareholders and managers. *See generally* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1 (2005); Sean J. Griffith & Myron T. Steele, *On Corporate Law Federalism: Threatening the Thaumatrope*, 61 BUS. LAW. 1 (2006); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).

5. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 41 (1993); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1926 (1998) ("[T]he bulk of suits pursuant to Delaware corporate law are filed in the Delaware Court of Chancery."); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 165 (2004) ("[Delaware] is the center of shareholder litigation in this country.").

6. The disturbance to the academic community's settled understanding can be roughly gauged by the large number of papers recently written on the topic. Since two key articles by John Armour, Bernard Black, and Brian Cheffins were first circulated in 2010, a significant number of papers have appeared on the subject. The two key works are: John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345 (2012) [hereinafter ABC, *Balancing Act*], and John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its*

Delaware corporations in other states than in Delaware itself.[7] As practitioners have long lamented, not only are companies sued in connection with every major merger or acquisition transaction, it now appears that they are sued multiple times in multiple places; increasingly, these cases are resolved outside of Delaware.[8] As a forum for corporate litigation, Delaware no longer dominates.

The out-of-Delaware trend in corporate litigation could be significant for corporate law. Delaware corporate law is largely judge made.[9] The Delaware statute is famously enabling, providing for maximum flexibility in the design of governance arrangements.[10] Judges set the outward bounds of this flexibility by applying general principles of fiduciary duty to guard against opportunistic conduct in particular transactions.[11] The accretion of precedent from these cases forms the true substance of Delaware corporate law. Shaken from their settled understandings, academic commentators have sounded the alarm that fewer cases decided in Delaware could, over time, reduce the expertise of the Delaware judiciary in corporate law matters.[12] Worse, others have argued, the decisions reached by non-

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Cases?, 9 J. EMPIRICAL LEGAL STUD. 605 (2012) [hereinafter ABC, *Losing Cases*]. Other articles include Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 92–93 (2012) [hereinafter Cain & Davidoff, *Competitive Reach*] (noting that firms and shareholders have increasingly opted to adjudicate disputes in other competing jurisdictions); Matthew D. Cain & Steven M. Davidoff, A Great Game: The Dynamics of State Competition and Litigation (Jan. 2013) (unpublished manuscript) [hereinafter Cain & Davidoff, *Great Game*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758; Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1 (2012); Minor Myers, Fixing Multi-Forum Shareholder Litigation (2012) (unpublished manuscript) (on file with authors); 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); Verity Winship, *Bargaining for Exclusive State Jurisdiction* (Ill. Pub. Law Research Paper No. 11-21, 2012), *available at* http://ssrn.com/abstract=2046552.

7. ABC, *Losing Cases*, *supra* note 6, at 18–20.

8. *Id.* at 21–22.

9. Fisch, *supra* note 4, at 1074–75.

10. *See* Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 674 (2005) ("[O]ur statute is, by design, a broad enabling one that permits and facilitates company-specific procedures.").

11. *See* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1621 (1989):

> [W]hat is most mandatory in corporate law is not the specific substantive content of any rule, but rather the institution of judicial oversight . . . . In drafting the corporate contract, lawyers rely less on the model form provided by the legislature than on their expectation that courts will prevent either side from taking "opportunistic" advantage of the other.

12. *See, e.g.*, Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713, 750–51 (2009)

Delaware "dilatants" threaten to adulterate and degrade the basic Delaware product.[13] In sum, prior commentary on the out-of-Delaware trend has treated it as very bad for corporate defendants,[14] very bad for shareholder plaintiffs,[15] and very bad for Delaware.[16]

We don't see it that way. In our view, the out-of-Delaware trend has awakened an active "market for preclusion" in which parties seek to trade the preclusive effect of a judgment in exchange for compensation.[17] Multijurisdictional litigation is essential to making this market work since related claims filed in a single jurisdiction can be consolidated,[18] but related claims filed in different jurisdictions

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(noting that Delaware courts would lose their judicial expertise in corporate matters over time if they decided fewer cases involving issues of Delaware corporate law).

13. *See* Jed S. Rakoff, Lecture, *Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 FORDHAM J. CORP. & FIN. L. 4, 4–14 (2012); *see also* Kahan & Rock, *supra* note 12, at 751 (noting that over the long term loss of control over the corporate law caseload could cause Delaware law to "be less developed (due to the smaller number of cases), possibly become less coherent (due to the presence of decisions decided by other courts), and its judiciary could lose part of its expertise (due to the smaller number of cases heard)").

14. *See* ASS'N OF THE BAR OF THE CITY OF N.Y., COMM. ON SEC. LITIG., COORDINATING RELATED SECURITIES LITIGATION: A POSITION PAPER 2 (2008) [hereinafter NYC BAR REPORT], *available at* http://www.nycbar.org/pdf/report/Securities_Litigation_%20A.pdf (lamenting that "publicly listed companies are often forced to spend resources trying to coordinate and manage duplicative or overlapping securities litigations (with the brunt being borne by current shareholders), while judicial resources are unnecessarily consumed").

15. *See* MARK LEBOVITCH ET AL., MAKING ORDER OUT OF CHAOS: A PROPOSAL TO IMPROVE ORGANIZATION AND COORDINATION IN MULTIJURISDICTIONAL MERGER RELATED LITIGATION 1 (2011), *available at* http://www.blbglaw.com/misc_files/MakingOrderoutofChaos (stating that parallel litigation "wastes judicial resources, unduly burdens defendants, and most importantly, threatens shareholders").

16. *See, e.g.*, ABC, *Balancing Act*, *supra* note 6, at 1380–81 (stating that a decrease in Delaware's hearing of quality corporate cases would impair the court's expertise in corporate matters and affect the state's market share in incorporations); *see also* Kahan & Rock, *supra* note 12, at 750–51 (noting that Delaware courts would lose their judicial expertise in corporate matters over time if they decided fewer cases involving issues of Delaware corporate law).

17. For prior uses of the term, see generally Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 159–81 (2003); Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving* Amchem Products, Inc. v. Windsor, 59 OHIO ST. L.J. 1155, 1200 n.229 (1998) (explaining that "the defendant is the one that must make a uniform offer to a large group in order to maximize its utility in the market for preclusion"); *see also* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009) (emphasizing the market analogy in choice-of-law context).

18. For example, a case filed in Texas may be consolidated with other Texas cases, but not with a case proceeding in Delaware. There is no interstate mechanism for transferring cases, even when they contain identical subject matter, plaintiff classes, and defendants. Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 66 (2007). And there is no mechanism for transferring cases from a federal court to any state court; the federal courts only have the power to remand cases to the state court from whence they originally came. Within the federal system, however, cases may

cannot.[19] Multijurisdictional litigation thus creates a market of multiple sellers—that is, competing plaintiffs' counsel in each jurisdiction, each of whom has the power to settle.[20] Moreover, thanks to the operation of the Full Faith and Credit Clause of the U.S. Constitution,[21] the first settlement approved by a court precludes all other claims relating to the same underlying matter.[22]

The preclusive effect of settlement creates enormous value for the defendant. Without it, defendants' planned transactions will be burdened by potentially large contingent liabilities and may even be enjoined. Upon reaching a preclusive settlement and resolving all shareholder claims, the transaction can move forward to closing. The market for preclusion facilitates the transfer of this valuable commodity. When it is working well, this market provides a reliable price-discovery mechanism for shareholder claims, allowing low-value claims to settle quickly and cheaply while higher-value claims are litigated more aggressively.

Most prior commentary focuses on eliminating duplicative multijurisdictional merger litigation through consolidation or centralization.[23] Our contrarian account of the out-of-Delaware trend

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be consolidated in one venue for pretrial purposes. 28 U.S.C. §1407 (2006). States have similar provisions.

19. Other state law class actions can be easily removed to federal court so long as they exceed five million dollars and are not completely local in character. *See* 28 U.S.C. § 1332(d). As a result, they can be consolidated in the federal court system under the multidistrict litigation statute. 28 U.S.C. § 1404; 28 U.S.C. § 1447(c). But cases sounding in state corporate law are exempt from the Class Action Fairness Act's ("CAFA") mandate. 28 U.S.C. § 1453.

20. In economic theory, a market is the "sum of buyers and sellers of any good or service and their interaction." CHRISTINE AMMER & DEAN S. AMMER, DICTIONARY OF BUSINESS AND ECONOMICS 287 (1986). Consolidated claims result in a negotiation between one buyer (the defendant) and one seller (the consolidated lead plaintiff) but cannot be characterized as a market.

21. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

22. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 399 (1996) (holding that a Delaware settlement was entitled to full faith and credit and precluded federal court plaintiffs from continuing their lawsuit unless they could show a due process violation in the suit that settled first). If a putative class member demonstrates that the prior judgment violated due process, a subsequent court can append the settlement. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 251 (2d Cir. 2001), *aff'd in part, vacated in part* Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003). Because *Stephenson* was affirmed by an equally divided Court, the law is not settled with respect to the scope of a collateral attack on a class action settlement on due process grounds. The Delaware Supreme Court affirmed this principle as this Article went to press. Pyott v. La. Mun. Police Emps.' Ret. Sys., No. 380, 2013 WL 1364695 (Del. Apr. 4, 2013) (dismissing suit filed in Delaware based on California court's prior dismissal of derivative action with prejudice).

23. *See infra* Part III.A (discussing proposals to centralize merger litigation in the federal courts or in Delaware).

seeks both to identify overlooked benefits of the present system and also to gain a clearer understanding of its flaws. Reframing multijurisdictional litigation as a market process illuminates the core concern of agency costs; in doing so, we point the way to policy choices that are more consistent with the basic structure of federalism than an approach focusing on consolidation or centralization.[24] Our policy proposals thus seek to maintain the competitive structure of the current system while providing for more effective monitoring and communication among courts. Under our proposal, Delaware courts will have the opportunity to fast-track strong lawsuits and leave weaker lawsuits to be settled in alternative forums. The difficulty will be to determine which are which.

Our account also illustrates two broader points. First, it highlights yet another way in which procedure is often outcome determinative.[25] Second, our account highlights the flaws in prevailing notions of interstate comity.[26] Comity is generally understood as having two prongs—first, the idea that states are sovereign in their own territory, and second, the requirement that all states respect and enforce the laws and judgments of sister states.[27] Corporate law litigation presents a challenge to this traditional understanding of comity because Delaware exports its corporate law far beyond its territorial borders. Corporations in every state of the Union operate wholly outside of Delaware yet are creatures of its law. Since most commentators on federalism focus on the vertical relationship between

24. Forum shopping, of course, is widely criticized. Such criticisms, at their core, are critiques of "our federalism"—defined as the "recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).

25. In the words of Rep. John Dingell (D-Michigan): "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time." *Regulatory Reform Act of 1983: Hearings on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

26. The relationship between the federal government and the states is the subject of a great deal of scholarship. Often this scholarship addresses the ability of the federal government to regulate disputes between the states. We have found very little scholarly development of the concept of comity between the states and their responsibility of mutual respect toward one another where the federal government is not involved, and what literature there is focuses narrowly on particular issues such as child custody disputes. *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 569 (2008) (discussing the limited scholarship and doctrinal development of the concept of comity and calling for more study); Winship, *supra* note 6, at 56–62 (describing doctrinal limits of states' ability to export their law and judgments).

27. U.S. CONST. art. IV, § 1.

the federal government and the states or localities, they offer no coherent vision of what is to be done when states clash.[28]

The Article proceeds as follows: In Part I we describe merger litigation and introduce the out-of-Delaware phenomenon. In Part II we develop the idea of a market for preclusion in merger litigation; we first describe how a well-functioning market might provide benefits to all of the stakeholders in deal litigation—plaintiffs, defendants, and Delaware itself—then show how the opportunistic conduct of attorneys can distort the outcomes of this market. In Part III we consider solutions to these market defects, criticizing prior proposals in favor of consolidation and centralization. We offer, instead, a theory and practice of comity through dialogue that seeks to address the shortcomings of the market while preserving its benefits.

I. MERGER LITIGATION IN AND OUT OF DELAWARE

This Part describes the problems caused by the interaction of an active plaintiffs' bar that files numerous suits related to almost every merger and the availability of several alternative forums for filing these suits. We begin by describing the law governing mergers. We then document the phenomenon of parallel litigation and the migration of cases out of Delaware, relying on recent empirical studies and anecdotal evidence. We end by considering the rules for determining which of several competing jurisdictions will ultimately decide or otherwise dispose of the claim.

A. Merger Litigation

Shareholders can sue over almost anything their managers do. For example, they may believe that the corporation should not have opened a new plant or that it should not have closed an old one.[29] They may think that their managers are overpaid.[30] They may object to the

28. Recent work has begun to fill this lacuna. *See generally* ROBERT SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAS)*, 50 ARIZ. L. REV. 709, 717–21 (2008).

29. *See, e.g.*, Abrams v. Allen, 113 N.Y.S.2d 181, 184–85 (Sup. Ct. 1952) (shareholder suit against defendant corporation in connection to its dismantling and removal of corporate plants).

30. *See, e.g.*, Grimes v. Donald, 673 A.2d 1207, 1213–15 (Del. 1996).

way in which the board agreed to sell the company.[31] Most of these lawsuits are unlikely to get very far, however, as a result of both substantive and procedural rules. Procedurally, courts will treat most of these complaints as derivative rather than direct,[32] causing them to face considerably greater obstacles to recovery.[33] Additionally, without evidence of a clear conflict of interest, most of these complaints implicate only the duty of care owed by management to shareholders. The business judgment rule will operate as a strong substantive barrier to recovery.[34] In fact, if the defendant corporation adopted an exculpation provision in its charter, as many public companies have, the court will dismiss most of the above complaints for failure to state a claim on which relief can be granted.[35]

The exception is the complaint involving the sale of the company. Under Delaware law, a corporation can be sold either by its shareholders through a tender offer or by its board of directors in a merger, acquisition, or other business combination. For the sake of brevity, we refer to these transactions collectively as "mergers." Although the board negotiates and agrees to any merger, shareholders hold three important rights. First, a majority of shareholders must

31. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 863–64 (Del. 1985) (shareholder suit seeking rescission of a cash-out merger of a corporation into a new corporation).

32. The distinction depends on whether the shareholder's injury is separate and independent of an injury to the corporation. *See, e.g.*, *Grimes*, 673 A.2d at 1213–15 (explaining the derivative/direct distinction); Moran v. Household Int'l, Inc., 490 A.2d 1059, 1070 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985) (describing a direct claim as "an injury which is separate and distinct from that suffered by other shareholders, . . . or a wrong involving a contractual right of a shareholder . . . which exists independently of any right of the corporation") (internal quotations omitted). *See generally* R. CLARK, CORPORATE LAW 639–40 (1986) ("[A derivative suit is one in which] the shareholder sues on behalf of the corporation for harm done to it. Ordinarily, therefore, any damages recovered in the suit are paid to the corporation.").

33. For example, a derivative plaintiff must either make demand on the board—that is, formally ask the board to bring the suit themselves—or plead that demand should be excused, arguing, in effect, that the board is so conflicted in deciding whether to bring the claim, typically because the directors are being asked to sue themselves, that making formal demand would be futile and ought therefore to be excused. Thomas P. Kinney, *Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers*, 78 MARQ. L. REV. 172, 173 (1994). In some jurisdictions (but not Delaware), derivative plaintiffs must post a bond to reimburse the corporation for frivolous claims (judged by early dismissal). *E.g.*, N.Y. BUS. CORP. LAW § 627 (McKinney 2012). Moreover, derivative plaintiffs can have control of their claim wrested from them by special litigation committees who are subsequently free to dismiss the claim unless the shareholder plaintiff can successfully challenge the independence of the committee. Minor Myers, *The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation*, 84 IND. L.J. 1309, 1312–16 (2009).

34. *See* Griffith, *supra* note 4, at 11–13 (describing operation of the business judgment rule).

35. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2013); *see also* McPadden v. Sidhu, 964 A.2d 1262, 1277 (Del. Ch. 2008) (dismissing colorable claims of gross negligence and reckless indifference on basis of defendant's § 102(b)(7) provision).

vote to approve the transaction before it can be consummated.[36] Second, shareholders will often have the right, after consummation, to sue for appraisal, a process in which objecting shareholders may force the acquirer to pay them a higher judicially declared "appraised value" for their shares.[37] Third, shareholders have the right to sue their board for breach of fiduciary duty in agreeing to the transaction in the first place. We refer to this third type of suit as "merger litigation," and it will occupy our attention here.

Shareholders can bring merger claims directly or in the form of a class action, thereby avoiding the procedural complexities of the derivative suit.[38] Additionally, claims brought in merger litigation—even those involving no clear conflict of interest—typically do not receive the protection of the business judgment rule. Regardless of overt conflict, if a merger involves a "change of control"—essentially, a transaction that results in target shareholders losing voting control over the target corporation—then the process of negotiating and agreeing to the merger will be subject to a form of enhanced judicial scrutiny.[39] If a merger involves a conflict of interest, such as a "squeeze-out," management buyout, or other non–arm's length transaction, then judicial scrutiny is even more exacting; the law

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36. DEL. CODE ANN. tit. 8, § 251. This can be a supermajority requirement if specified in the charter. Lewis S. Black, Jr. & Craig B. Smith, *Antitakeover Charter Provisions: Defending Self-Help for Takeover Targets*, 36 WASH. & LEE L. REV. 699, 699–700 (1979).

37. DEL. CODE ANN. tit. 8, § 262.

38. *See* Thompson & Thomas, *supra* note 5, at 168 (reporting the results of a multiyear study of Delaware chancery court litigation finding that "[a]lmost all (94 percent: 772 of 824) class action suits arise in an acquisition setting whereas almost all (90 percent: 123 of 137) of the derivative suits arise in a non-acquisition setting").

39. *See* Paramount Commc'ns Inc. v. QVC Network, Inc., 637 A.2d 34, 42 (Del. 1993) (noting that directors' conduct is subjected to enhanced judicial scrutiny in a transaction involving change of control of the company); Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (stating that in the context of antitakeover measures, the board's responsive action has to be reasonable); *see also* Elliot J. Weiss & Lawrence J. White, *File Early Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1807–11 (2004) (summarizing the cases). Weiss and White elegantly summarize the rationale underlying merger law in the following:

> The Delaware courts' rationale for holding that sales of control are subject to enhanced scrutiny is that shareholders' voting rights are of overriding importance because they constitute the principal mechanism of shareholder participation in corporate governance. Consequently, shareholders should be compensated if and when the corporation enters into a transaction—a sale of control—that will result in the loss of these governance rights.

Weiss & White, *supra*, at 1809.

requires "entire fairness"—essentially, a fair process and a fair price.[40] These enhanced standards give plaintiffs strong grounds to contest mergers. Not surprisingly, one or more groups of shareholder plaintiffs very often challenge a merger.[41] Even when a merger does not clearly involve a change of control or an obvious conflict of interest, shareholder plaintiffs may file claims alleging the possibility of disloyal conduct in connection with the merger.[42]

Merger litigation asks existential questions on an expedited basis.[43] A paradigmatic shareholder claim involving a merger would allege some flaw in the sale process. The shareholder might allege an insufficiently competitive auction, deal-protection provisions designed to the advantage of a particular bidder, or anything that might compromise the neutral judgment of the board in agreeing to the deal—golden parachute payments for managers in connection with a change of control, for example.[44] The shareholder will further allege

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40. *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 711–15 (Del. 1983) (requiring fair dealing and fair price in non-arm's length transactions); *see also* Weiss & White, *supra* note 39, at 1813–21 (summarizing case law and litigation tactics).

41. Cain & Davidoff, *Great Game*, *supra* note 6, at 13 (finding that "87.3% and 92.1% of all transactions experience[d] litigation in 2010 and 2011, respectively, pointing to an increasing trend of litigation by percentage and number over time").

42. CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 1 (2012), *available at* http://www.cornerstone.com/files/News/d7e418ea-eb2c-4a17-8eae-de2510d9d1ba/Presentation/NewsAttachment/8b664075-ebfb-4cce-aa76-8a050befad03/Cornerstone_Research_Shareholder_ MandA_Litigation.pdf.

43. Such questions include: Will the corporation continue to exist, or will it be subsumed by another entity? Will the shareholders continue as such or will they be cashed out of their investment? And how much is all of it worth? Expanding on the fundamental importance of merger litigation, Thompson and Thomas argue:

> In hostile takeovers, management entrenchment and refusal to sell the company when a sale is in the shareholders' best interests are serious risks posed by the delegation of these decisions to the board of directors. In friendly sales to a third party, there is the constant fear that management may sell the firm too cheaply in order to obtain lucrative severance packages or employment contracts with the acquirer. Finally, if management itself, or a controlling shareholder, is the acquirer, managerial agency costs may be high because of the conflict of interest between the managers' duty to get the best deal for shareholders and their own self-interest (or that of the controlling shareholder) in implementing terms that minimize what the insiders will have to pay to gain control of the remaining interests in the corporation.

Thompson & Thomas, *supra* note 5, at 145.

44. *See* CORNERSTONE RESEARCH, *supra* note 42, at 1:

> Common allegations include the deal terms not resulting from a sufficiently competitive auction, the existence of restrictive deal protections that discouraged additional bids, or the impact of various conflicts of interests, such as executive retention or change-of-control payments to executives. Complaints also typically allege that a target's board failed to disclose sufficient information to shareholders to enable their informed vote. Insufficient disclosure allegations have focused on information related to the sale process, the reasons for the board's actions, financial projections, and the financial advisors' fairness opinions.

that these flaws in the process caused damage by leading to inadequate consideration in the merger price, inadequate disclosure in connection with the shareholder vote, or both. Shareholder plaintiffs may sue for an injunction barring consummation of the transaction or additional consideration or other monetary relief. At the very least, plaintiffs can request corrective disclosure prior to the shareholder vote. Along the way, they are likely to seek expedited discovery in order to support their allegations. All of these demands put significant pressure on the transaction. A deal that is enjoined, even temporarily, may fall apart. Extensive discovery will likely slow down the deal, adding cost and increasing the risk of nonconsummation. In order to minimize contingent liabilities and be assured of a legally valid transaction, both parties to the merger typically insist that such litigation be concluded before the transaction can close. Defendants, therefore, often seek to settle merger litigation as swiftly as possible.

Recent empirical studies of merger litigation involving significant U.S. public-company acquisitions summarize the settlement patterns of these cases.[45] These studies find that nearly seventy percent of these suits settle while the rest result in dismissal.[46] The vast majority of suits in one study settled before the merger closed, most often within forty-five days of filing and generally before a hearing on the plaintiffs' motion for a preliminary injunction.[47] Very few of these suits (approximately five percent) resulted in any payment to shareholders. The vast majority settled for nonpecuniary relief, most often for additional disclosures in the communications to shareholders.[48] A small number of settlements

45. *See, e.g., id.* (collecting and analyzing data on U.S. public-company acquisitions over one hundred million dollars announced in 2010 and 2011); Cain & Davidoff, *Great Game*, *supra* note 6 (collecting and analyzing data on U.S. public-company acquisitions over one hundred million dollars announced and completed between 2005 and 2010).

46. CORNERSTONE RESEARCH, *supra* note 44, at 8 (finding that sixty-nine percent of the 565 suits for which the authors could track the resolution resulted in settlement, while twenty-seven percent were voluntarily dismissed by plaintiffs, and four percent were dismissed with prejudice); Cain & Davidoff, *Great Game*, *supra* note 6 ("[L]itigation with respect to transactions is dismissed by the court 28.4% of the time. The other 71.6% of transaction litigations result in some type of settlement.").

47. CORNERSTONE RESEARCH, *supra* note 44, at 9:

> Of the 190 unique settlements we identified, 180 were reached before the merger closed. Most of these were reached shortly before a hearing on the plaintiffs' motion for preliminary injunction (restraining order) or shortly before the shareholder vote. The median time between lawsuit filing and settlement in this sample was forty-four days.

48. *Id.* at 10 (reporting that nine out of 190 settlements sampled resulted in payments to shareholders, while eighty-two percent resulted in disclosure-based settlements); Cain &

(approximately thirteen percent) resulted in changes to the merger agreement, most often to the deal-protection provisions; none of these changes resulted in a higher bid for the target.[49] The plaintiffs' attorneys were compensated in each settlement—even if they did not recover any additional payments for shareholders—because of the "substantial benefit" the additional disclosures or changes to the merger agreement brought the shareholder plaintiffs.[50] The average plaintiffs' attorneys' fee award for settlement found in the studies generally varies between one million dollars and $1.5 million.[51] Many of the fee awards were five hundred thousand dollars or less.[52]

Transaction planners frequently complain that settlements in merger litigation amount to little more than a "deal tax," where plaintiffs' attorneys are effectively paid off to allow the companies to go about their business.[53] Other commentators see it as a more serious cost.[54] However, there is also evidence that shareholder litigation is

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Davidoff, *Great Game*, *supra* note 6, at 16 ("Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement.").

49. CORNERSTONE RESEARCH, *supra* note 44, at 10 ("Other merger agreement changes included the terms of top-up option and appraisal rights. Eleven settlements (6 percent) involved other terms, most often a delay of the shareholder vote.").

50. *See infra* notes 172–73 and accompanying text.

51. CORNERSTONE RESEARCH, *supra* note 42, at 11 (reporting an average settlement of $1.2 million, a number that was likely skewed high by a small number of very large awards—only twenty-three percent of reported attorneys' fees were one million dollars or higher); Cain & Davidoff, *Great Game*, *supra* note 6, at tbl.2, Panel C. Both studies find significant skew between mean and median settlement amounts, suggesting that mean numbers are driven higher by a small number of significantly higher awards. CORNERSTONE RESEARCH, *supra* note 42, at 11 ("Only nineteen (23 percent) of the reported attorney fees were $1 million or higher."); Cain & Davidoff, *Great Game*, *supra* note 6, at tbl.2, Panel C.

52. CORNERSTONE RESEARCH, *supra* note 42, at 11 ("43 percent of the reported attorney fees were at or under $500,000."); Cain & Davidoff, *Great Game*, *supra* note 6, at 18–19 (reporting median fees of approximately five hundred thousand dollars across several states). Interestingly, Cain and Davidoff connect attorneys' fees to settlement award, finding that "on average $1.7 million is awarded for a disclosure and amendment settlement, compared to $793,000 for a 'disclosure only' settlement." Cain & Davidoff, *Great Game*, *supra* note 6, at 17.

53. 31 NO. 6 OF COUNSEL (CCH)15 (2012).

54. *See* Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew Jennejohn, *Putting Stockholders First, Not the First Filed Complaint* 16 (Harvard John M. Olin Ctr. for Law, Econ., & Bus. Discussion Paper No. 74, Jan. 10, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200499 (arguing that merger litigation often amounts to deadweight loss because shareholders receive additional consideration in "5% of the time" yet plaintiffs' lawyers receive fees "100% of the time"); *see also* Kevin LaCroix, *Why M&A-Related Litigation Is a Serious Problem*, THE D&O DIARY (Nov. 28, 2011), http://www.dandodiary.com/2011/11/articles/securities-litigation/why-marelated-litigation-is-a-serious-problem/ (arguing that significant increases in the size of merger and acquisition ("M&A")–related settlements suggests that these suits can no longer be dismissed as high-frequency, low-severity claims). In his words:

> [I]t is increasingly common for the settlement of these cases to also involve significant cash payments. Indeed, the settlements in many of these cases suddenly are starting

associated with an increase in deal value.[55] This debate inevitably merges with questions concerning the value of nonpecuniary relief and the merits of merger litigation more generally, all of which we will treat as empirical questions beyond the scope of this Article. Instead, we will here assume that the underlying substantive law has been arranged in such a way that it *may* lead to meritorious claims in merger litigation. This simplifying assumption enables us to isolate what happens when these claims can be brought simultaneously in multiple jurisdictions.

B. A Litigation Migration: Out of Delaware

The merger litigation described above can be brought in multiple forums. Delaware will always have jurisdiction over Delaware-incorporated businesses,[56] but it will not, absent a provision in the corporate charter, have exclusive jurisdiction.[57] Other states and the federal courts have concurrent jurisdiction over Delaware corporations. Under the so-called "internal affairs doctrine," the law that applies to corporate law disputes is the law of the jurisdiction of incorporation of the defendant corporation regardless of the forum where the suit is brought.[58] As we shall see, this clear choice-of-law rule is only the beginning of the inquiry.

Plaintiffs can always sue a corporation in two locations: its state of incorporation and the state where its headquarters is

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> to resemble in order of magnitude the settlements of securities class action lawsuits. . . . Contrary to popular perception, the new M&A litigation model represents both a high frequency and a high severity risk. The severity risk is particularly acute given the exacerbating effects of escalating defense expenses and rising plaintiffs' attorneys' fees.

LaCroix, *supra*; *see also* ADVISEN, MERGER OBJECTION SUITS: A THREAT TO PRIMARY D&O INSURERS? (2011), *available at* https://www.advisen.com/downloads/Merger_Objection_Suits.pdf (reaching the same conclusion).

55. C.N.V. Krishnan et al., *Shareholder Litigation in Mergers and Acquistions*, 18 J. CORP. FIN. 1248, 1265 (2012) (finding that deals attracting litigation are slightly less likely to be completed, but that those deals that are completed enjoy a small premium over those transactions that are not challenged, and concluding that "the expected rise in the takeover premia more than offsets the fall in the probability of deal completion").

56. *See* Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846, 2853–54 (2011) (identifying a corporation's state of incorporation as one example of a paradigm forum for the exercise of general jurisdiction).

57. *See infra* notes 275–85 and accompanying text (discussing disputes concerning putting Delaware choice of forum provisions in charters and bylaws).

58. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 35–36 (2006) (explaining the internal affairs doctrine).

located.[59] Once the plaintiffs determine in which states they can sue the corporation, they must decide whether to sue in state or federal court.[60] A Delaware corporation may be sued in federal court so long as the federal court has both subject matter and personal jurisdiction. In a lawsuit arising out of a deal, the subject matter jurisdiction of the federal court may be based on diversity jurisdiction or, if additional federal claims are brought, on federal question and supplemental jurisdiction.[61] A federal court in Delaware, for example, could exercise jurisdiction over a lawsuit arising out of a merger of a Delaware corporation where the named class members are citizens of a different state than the corporation.[62] Since the plaintiffs can strategically choose their class representative, federal diversity jurisdiction is almost always available.[63]

Plaintiffs have recently been taking increasing advantage of the choices of forum available to them by filing merger litigation in courts other than Delaware state court—other than, in other words,

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59. Personal jurisdiction over a corporation will always be proper in the state where its headquarters is located. A corporation may be sued wherever the corporation is "essentially at home." *Goodyear*, 131 S. Ct. at 2851. Jurisdiction may also be available where the defendant has sufficient contacts so that it is fair to exercise jurisdiction over it and wherever the defendant consents to jurisdiction. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 326 (1945) (holding that personal jurisdiction over a corporation is proper in forums where the corporation has such minimum contacts that exercising jurisdiction comports with "traditional notions of fair play and substantial justice").

60. FED. R. CIV. P. 4(k)(1) (limiting reach of a federal court's personal jurisdiction to that of the state in which the court sits).

61. 28 U.S.C § 1331 (2006) (federal question jurisdiction); § 1332 (diversity jurisdiction); § 1367 (supplemental jurisdiction); *see also* Jessica Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 66 n.65 (2011) (describing reliance on both federal question and diversity jurisdiction in derivative class actions in federal court).

62. *See* Hertz Corp. v. Friend, 559 U.S. 77 (2010) (holding that the standard for determining the citizenship of a corporation for diversity jurisdiction purposes is the "nerve center" test). However, a Delaware corporation cannot remove such a lawsuit to federal court if it was filed in Delaware. *See* 28 U.S.C. § 1453(d)(2) (exempting cases relating to the internal affairs or governance of a corporation from the lenient removal provisions of CAFA).

63. At least one named plaintiff needs to have a claim that exceeds seventy-five thousand dollars, which means that lawyers seeking to file a merger suit in federal court need a plaintiff who is both diverse and a substantial shareholder. 28 U.S.C. § 1332(a). As a result, in some cases plaintiffs must wait until after the proxy is released so that they will have a federal proxy claim in order to be able to access the federal courts, making them late movers. Once a case is in the federal system, the corporation may move to transfer the case to a different venue—that is, a federal court elsewhere in the nation where it is subject to personal jurisdiction or where the acts or omissions that gave rise to the lawsuit took place. *See* 28 U.S.C. § 1391. For example, in one well-known case, the settling plaintiffs first filed in Pennsylvania federal court, but upon realizing that their case would be transferred to the forum of their competition in Illinois, they re-filed in Delaware chancery. De Angelis v. Salton/Maxim Housewares, Inc., 641 A.2d 834, 836–37 (Del. Ch. 1994).

the chancery. Practitioners were the first to announce this trend, with one prominent practitioner proclaiming that the new mantra among plaintiffs seemed to be "Anywhere but Chancery."[64] Academics have recently confirmed aspects of the trend, although their findings suggest that a more correct mantra may be "Chancery plus one or two other places besides."[65]

In a thorough empirical study, John Armour, Bernard Black, and Brian Cheffins documented the out-of-Delaware trend. They found that the expansion of merger litigation has principally taken place outside of Delaware: the proportion of such cases filed exclusively in Delaware shrank, while the proportion filed both in Delaware and in parallel jurisdictions or exclusively in other states grew substantially.[66] The incidence of Delaware companies being sued only in Delaware declined substantially over the sample period from over eighty percent in 1995 to an average of thirty-one percent in the years 2005–2009.[67] With regard to big M&A cases, a majority was filed in Delaware until 2001, after which, with the exception of a single year, a majority was filed in state courts other than Delaware.[68] In going-private transactions, too, a majority of cases is now brought

64. *Anywhere But Chancery: Ted Mirvis Sounds an Alarm and Suggests Some Solutions*, M&A J., May 17, 2007, at 17–18 (quoting Ted Mirvis of Wachtell, Lipton, Rosen & Katz observing the out-of-Delaware trend); LEBOVITCH ET AL., *supra* note 15, at 1–10 (prominent plaintiffs'-side lawyers noting the out-of-Delaware trend and proposing solutions); Micheletti & Parker, *supra* note 6, at 2–5, 35–47 (prominent litigators of Skadden, Arps, Slate, Meagher & Flom noting trend and proposing solutions).

65. *See* CORNERSTONE RESEARCH, *supra* note 42, at 6 fig.3 (showing that challenges to the same merger deals are moving forward in Delaware as well as other jurisdictions). *In re Diamond Foods, Inc. Derivative Litigation*, C.A. No. 7657-CS (Del. Ch. Feb. 28, 2013), presents a good example of this. Parallel suits were filed in both California state court and federal court. When federal jurisdiction appeared to be in jeopardy, the federal plaintiffs filed a parallel suit in Delaware, which chancery ultimately stayed in favor of the California action.

66. Armour, Black, and Cheffins tested the out-of-Delaware trend by analyzing four datasets, involving: (1) corporate law opinions involving Delaware-incorporated companies between 1995 and 2009; (2) filings relating to large M&A deals between 1994 and 2010; (3) claims filed in going-private transactions between 1995 and 2010; and (4) derivatives suits filed since 2005. Each of these analyses confirmed the out-of-Delaware trend. ABC, *Losing Cases*, *supra* note 6, at 10–11, 13–14, 17–18, 20–21.

67. *See* ABC, *Balancing Act*, *supra* note 6, at 1354 (based on an analysis of reported opinions). As Delaware-only opinions declined, the authors found the percentage of opinions written by federal judges increased steeply. *Id.* at 1355 fig.2.

68. *Id.* at 1356–57, 1358 fig.4.

outside of Delaware, typically in other state courts.[69] Derivative suits have also moved out of Delaware.[70]

Clearly plaintiffs are choosing to file claims in jurisdictions other than Delaware.[71] The question is: Why? Armour, Black, and Cheffins focus on three explanatory factors: (1) increasing antipathy expressed by the Delaware judiciary toward the plaintiffs' bar,[72] (2) Delaware's refusal to announce a clear standard for lead counsel selection, thereby creating incentives for plaintiffs' firms to race to file in a jurisdiction that will appoint them lead counsel on a simple first-to-file basis,[73] and (3) the strategic use of books and records requests to acquire access to evidence in support of parallel federal securities law class actions.[74] Matthew Cain and Steven Davidoff focus on the

69. *See id.* at 1360–61, fig.7 (finding that the percentage of cases filed in Delaware declined from seventy-three percent from 1997–2001 to forty-five percent in 2002–2009).

70. *Id.* at 1363 (stating that eleven percent of the derivative suits relating to options backdating were filed in Delaware and only four out of 234 were filed exclusively in Delaware). In a pair of studies focusing on derivative suits, Jessica Erickson finds that derivative suits have "moved into the federal courts," largely as a result of being filed alongside parallel securities law class actions. Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY. L. REV. 1749, 1761–62 (2010); Erickson, *supra* note 61, at 64 (finding a high percentage of parallel lawsuits filed in federal courts).

71. *See, e.g.*, NYC BAR REPORT, *supra* note 14, at 9 (explaining the trend by reference to the "gamesmanship" of plaintiffs' lawyers); *see also Anywhere But Chancery*, *supra* note 64, at 17 (explaining the phenomenon by reference to plaintiffs' lawyers who "perceive that there is greater settlement value outside of Delaware, that there's a greater vagary in the results, that you never know what you're going to get"). Even plaintiffs' lawyers blame other plaintiffs' lawyers. *See* LEBOVITCH ET. AL, *supra* note 15, at 4 (pointing to less established plaintiffs' firms that seek to file quickly in hopes of being appointed lead counsel without regard for the underlying merits of the claim). However, other commentators have attributed the out-of-Delaware trend in part to the rise in business or commercial courts, which presumably would be more expert in these matters. *See* Myers, *supra* note 6; *see also* Cain & Davidoff, *Great Game*, *supra* note 6, at 4–5 (finding states with business courts seek to attract litigation); John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1918–21 (2012) (describing the rise in business courts but arguing that the opportunities to divert litigation or other economic benefits to new jurisdictions is limited).

72. ABC, *Balancing Act*, *supra* note 6, at 1369 (emphasizing that this jaundiced view of the plaintiffs' bar appears to be a "recent phenomenon"). A handful of major opinions offering a sharply negative view of plaintiffs' lawyers, typically in dicta, but occasionally accompanied by a reduction in fee awards, coincides with the out-of-Delaware trend. In response to these opinions, the authors suggest, plaintiffs' lawyers have sought to take their cases elsewhere. *Id.* at 1369–70.

73. *Id.* at 1372–76.

74. ABC, *Losing Cases*, *supra* note 6, at 44–45. Discovery in securities law class actions is frozen by the Private Securities Litigation Reform Act of 1995 ("PSLRA") until after the motion to dismiss is heard, creating an incentive to use state law claims to generate access to evidence. Because Delaware books and records actions may be more costly or difficult to win than books and records actions under the laws of other states, the authors suggest that plaintiffs may have an incentive whenever possible to file these derivative suits in other states. *Id.* at 49. Erickson, meanwhile, focuses on the efficiencies of litigating derivative and related securities law claims in a single forum, which must be federal given the underlying federal securities law. Erickson,

twin variables of dismissal rates and attorneys' fees.[75] Thomas and Thompson, likewise, focus on the distribution of attorneys' fees.[76] Regardless of the ultimate diagnosis, much of this prior commentary decries the deleterious effects of the out-of-Delaware trend on corporate law. Armour, Black, and Cheffins, for example, write that the out-of-Delaware trend threatens "the viability of Delaware's Court of Chancery's current status as 'the Mother Court of corporate law' and Delaware's ability to retain its vice-like grip on incorporation business."[77]

C. Which Court Stays and Which Proceeds

Given that for any large merger there are likely to be a number of plaintiffs' attorneys filing several competing and fundamentally related claims in multiple jurisdictions, the rules for determining which of several competing forums will ultimately proceed with a claim are of paramount importance. The application of these procedural rules is within the discretion of each forum court.

In deciding whether to go forward, courts often claim to follow the first-filed principle.[78] Courts may also decline to follow the first-

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supra note 61, at 68 ("There is nothing surprising about a derivative plaintiff filing a lawsuit in the same court as multiple other related suits. Indeed, it would be more surprising if the derivative plaintiff filed suit in Delaware when nearly all of the other litigation was in the federal courts.").

75. Cain & Davidoff, *Great Game*, *supra* note 6, at 6 ("We ultimately conclude that the dynamics of state competition for corporate litigation are driven by attorneys and desired fees or expected settlements.").

76. *See generally* Thomas & Thompson, *supra* note 6, at 1757 (characterizing much multijurisdictional deal litigation as "fee distribution litigation").

77. ABC, *Losing Cases*, *supra* note 6, at 25; *see also* Kahan & Rock, *supra* note 12, at 751. In their words:

> In the short term, reducing Delaware's ability to rule on such cases would diminish its attractiveness as the state of incorporation and reduce the income of Delaware's corporate litigation bar, an important political constituency. In the long term, the consequences would be even more drastic. Delaware law would be less developed (due to the smaller number of cases), possibly become less coherent (due to the presence of decisions decided by other courts), and its judiciary could lose part of its expertise (due to the smaller number of cases heard).

Kahan & Rock, *supra* note 12, at 751; *see also* Cain & Davidoff, *Great Game*, *supra* note 6, at 10 (noting, more agnostically, that "the value of state law documented by [prior scholarly commentary] could be affected either positively or negatively if Delaware and other states compete by revising their law to attract corporate litigation").

78. *See, e.g.*, McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970) (holding that Delaware courts should "freely" use their discretion to stay actions filed in Delaware where parallel actions have been filed in other jurisdictions). The *McWane* doctrine is sometimes evoked to assert that Delaware should stay the suit in its jurisdiction so that the first-filed suit can proceed. *See* Ryan v. Gifford, 918 A.2d 341, 349 (Del. Ch. 2007)

filed principle in favor of an open-ended forum non conveniens analysis.[79] Although designed for contemporaneously filed actions, courts have been willing to find that filings separated by as much as seven days have been "simultaneously filed" in order to support the more discretionary forum non conveniens analysis.[80] The fiction of simultaneous filing permits courts to conclude that even though a claim was filed first in a competing jurisdiction, they may nevertheless proceed to hear the claim. A line of cases in the Delaware Court of Chancery directly rejects the first-filed rule for representative actions in particular, because a case too quickly filed may indicate irresponsible lawyering and, therefore, inadequate representation.[81]

(defendants moved to stay second-filed action in Delaware based on the *McWane* doctrine arguing that the court should "use its broad discretion under the first-filed rule to grant a stay"). As a corollary, some Delaware courts have stated that if the action is first filed in Delaware, the Delaware courts will allow it to proceed unless the choice "imposes overwhelming hardship on the defendant." Rapoport v. Litig. Trust of MDIP Inc., 2005 WL 3277911, at *2 (Del. Ch. Nov. 23, 2005) (quoting United Phosphorus, Ltd. v. Micro-Flo, LLC, 808 A.2d 761, 764 (Del. 2002)).

79. *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 136 (Del. 2006), sets forth the following factors for the forum non conveniens analysis:

> (1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of the view of the premises; (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction; (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.

Similar discretion exists in other jurisdictions. For example, New York courts may dismiss overlapping cases on the basis of three factors: (1) in which jurisdiction litigation was first commenced, (2) how far each litigation has progressed, and (3) which forum has a more significant and substantive nexus to the controversy. Certain Underwriters at Lloyd's, London v. Hartford Accident & Indem. Co., 791 N.Y.S.2d 90, 91 (N.Y. App. Div. 2005); *see also* White Light Prods., Inc. v. On The Scene Prods., Inc., 660 N.Y.S.2d 568, 572 (N.Y. App. Div. 1997) (stating court which has first jurisdiction over the case should decide it unless special circumstances warrant deviation).

80. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 116–17 (Del. Ch. 2009) (three days apart); *In re* Bear Stearns Cos., Inc. S'holder Litig., C.A. No. 3643-VCP, 2008 WL 959992, at *3 (Del. Ch. Apr. 9, 2008) (one suit three days and one suit seven days apart).

81. *See* Dias v. Purches, Civil Action No. 7199-VCG, 2012 WL 689160, at *1 (Del. Ch. Mar. 5, 2012) ("[W]hen there are multiple suits filed within a short time, this Court has tended to employ a test similar to that used in addressing motions on forum non conveniens grounds, and to consider whether the complaint in the competing jurisdiction is a better or fuller pleading than the Delaware complaint."); *In re* The Topps Co. S'holders Litig., 924 A.2d 951, 957 (Del. Ch. 2007) ("Just as it has no substantial weight in determining who should be lead counsel in a representative action, the fact that a particular plaintiff filed the first complaint in a wave of hastily-crafted class action complaints attacking a just-announced transaction has no rational force in determining where a motion to enjoin that transaction should be heard."); Biondi v. Scrushy, 820 A.2d 1148, 1159 (Del. Ch. 2003) ("The mere fact that a lawyer filed first for a representative client is scant evidence of his adequacy and may, in fact, support the contrary inference."); *see also* Strine, Hamermesh & Jennejohn, *supra* note 54 (arguing in favor of considerations other than first filing in determining where a merger suit should proceed).

The nightmare scenario arises when parties try to bring motions to stay or dismiss parallel actions but both jurisdictions elect to proceed. This situation arose in litigation stemming from the sale of Topps, a publicly traded Delaware corporation headquartered in New York that manufactures baseball cards. Within a day of each other, plaintiffs filed a number of competing class actions in New York and Delaware seeking to enjoin the merger.[82] The defendants first sought to stay the New York action in favor of Delaware, but the New York court denied their motion.[83] Having been rebuffed in New York, the defendants turned to Delaware and sought a stay from that court so that the litigation would proceed in only one forum.[84] The Delaware court also refused to stay proceedings.[85] As a result, the litigation proceeded simultaneously in New York and Delaware until the parties ultimately settled.[86] *Topps* may present a rare case, but it does illustrate the difficulty of achieving cross jurisdictional coordination under the current regime.[87]

Adding a third layer of complexity, there are doctrinal limits on the ability of federal courts to stay parallel proceedings in favor of state suits.[88] A federal court is supposed to grant a stay in favor of

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82. *Topps*, 924 A.2d at 953; *In re* The Topps Co., Inc. S'holders Litig., No. 600715/07, 2007 WL 5018882, at *2 (N.Y. Sup. June 8, 2007).

83. *Topps*, 924 A.2d at 953. The New York court denied the motion, among other reasons because (1) the action was first filed in New York, (2) the merger agreement chose New York as the forum and the governing law, (3) Topps was headquartered in New York, and (4) the bulk of the discovery was to take place in New York. *In re The Topps Co.*, 2007 WL 5018882, at *3–4.

84. *Topps*, 924 A.2d at 953.

85. *Id.*

86. Settlement, as a result of the Full Faith and Credit Clause, stops parallel proceedings, but it does not stop disputes over fees. In *Allion Healthcare*, for example, parallel lawsuits were proceeding in both Delaware and New York until the case was settled in Delaware, at which time the question arose as to how to split attorneys' fees between Delaware and New York counsel. *In re* Allion Healthcare Inc. S'holders Litig., No. 5022-CC, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011). Ultimately, the chancery court favored the settling plaintiff, awarding the New York lawyers a portion of the disclosure fee because they continued to litigate the case in parallel to the Delaware case until the final Delaware settlement. *Id.* at *6–7. The court refused to split a much larger portion of the fee arising out of the increase in share price because "New York plaintiffs had an opportunity to sign on to the settlement, which they declined to do." *Id.* at *8.

87. *See, e.g.*, *In re* Smurfit-Stone Container Corp. S'holder Litig., C.A. No. 6164-VCP, 2011 WL 2028076, at *9 (Del. Ch. May 24, 2011) (discussing procedural history of case); Micheletti & Parker, *supra* note 6, at 1 (examining problems of multijurisdictional litigation). *But see In re* Compellent Tech., Inc. S'holder Litig., C.A. No. 6084-VCL, 2011 WL 6382523, at *29 (Del. Ch. Dec. 9, 2011) (warning plaintiffs that if they insisted on proceeding in the other jurisdiction, "what you're likely to get from [Vice Chancellor Laster] is Topps II"); *infra* note 234 and accompanying text (discussing *Allion Healthcare*, 2011 WL 1135016, at *4 n.12, which presented the same dual-discovery situation as *Topps* but settled before the preliminary injunction motion).

88. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976) (noting that in determining whether to stay a federal action in favor of a parallel state action,

parallel state litigation only in exceptional circumstances.[89] The mere pendency of a parallel action is not enough; the federal court must find something more in order to stay the action.[90] In application, however, the standard has been unpredictable. Some district courts have been willing to stay federal deal litigation in favor of Delaware, and others have not.[91]

Finally, it is important to remember that courts are not passive players in forum competition. A significant factor in deciding whether to stay or proceed with the case is the development of the proceeding. A court can influence the outcome of the motion to stay in the parallel proceeding by allowing the case before it to move forward expeditiously.[92] Similarly, a court diminishes the chance that the competing court will grant a stay by not moving forward quickly. These tactics give some control to courts seeking to retain, or to cede, power over the litigation.

II. PERFECT AND IMPERFECT MARKETS

In the system of litigation outlined above, competing groups of plaintiffs shape the claim by choosing what to allege and where to file. Defendants control settlement by deciding what they are willing to

federal courts are to give substantial weight to the "heavy obligation" of the federal courts to exercise their jurisdiction).

89. *See id.* ("[W]e do not overlook the heavy obligation to exercise jurisdiction."); 17A CHARLES ALAN WRIGHT ET. AL, FEDERAL PRACTICE AND PROCEDURE § 4247 (3d ed. 2012) ("[I]n most cases neither stay nor dismissal will be proper and the federal court will be obliged to exercise its jurisdiction.").

90. McMurray v. De Vink, 27 F. App'x 88, 92 (3d Cir. 2002).

91. *Compare* Telesco v. Telesco Fuel & Masons' Materials, Inc., 765 F.2d 356, 359 (2d Cir. 1985) (granting dismissal of federal action in favor of state proceeding and noting particularly the investment and length of the parallel state suit), *and In re* Countrywide Fin. Corp. Derivative Litig., 542 F. Supp. 2d 1160, 1173 (C.D. Cal. 2008) (noting as factors favoring a stay under *Colorado River* the Delaware court's expertise, the fact that it obtained jurisdiction immediately after the merger was announced, and the fact that expedited discovery was proceeding and a preliminary injunction hearing was scheduled in Delaware), *with McMurray*, 27 F. App'x at 92 (overturning stay although litigation was proceeding apace in Delaware), *and* La. Mun. Police Emps.' Ret. Sys. v. Medco Health Solutions Inc., C.A. No. 2:11-cv-4211(DMC)(MF), 2011 WL 4386774, at *4 (D.N.J. Sept. 19, 2011) (refusing to grant stay based on Delaware's expertise in corporate law where progress in both cases was "negligible"), *and* Lasker v. UBS Sec. LLC, 614 F. Supp. 2d 345, 359 (E.D.N.Y. 2008) (declining to stay case in favor of Tennessee action).

92. *See, e.g., In re Smurfit-Stone*, 2011 WL 2028076, at *9 (awarding expedited discovery in a case involving a question of first impression under Delaware law so that the competing jurisdiction, Illinois, would be more likely to stay proceedings). *But see In re* Allion Healthcare Inc. S'holders Litig., No. 5022-CC, 2011 WL 1135016, at *1–2 (Del. Ch. Mar. 29, 2011) (granting expedited discovery but failing to induce other jurisdiction to stay); *In re* The Topps Co. S'holders Litig., 924 A.2d 951, 953 (Del. Ch. 2007) (same).

pay for preclusive effect. This basic dynamic suggests that a market mechanism is at play in the disposition of merger claims.

Exploring the market analogy may explain the patterns observed in merger litigation. In framing the question in this way, however, we do not mean to imply a laissez-faire approach. Rather, understanding the settlement process as a market illuminates defects alongside benefits. For example, the market analogy highlights the ways in which opportunistic conduct may distort the price-discovery function and thereby harm the shareholders whose interests are supposedly represented in the litigation. In the sections that follow, we examine the benefits and costs of the market for preclusion, looking at it in both idealized and real-world forms. We also describe some of the positive spillover effects of the market. This inquiry will ultimately inform the normative analysis of the next Part.

A. A Well-Working Market for Preclusion

In a well-working market for preclusion, attorneys serve their clients' objectives.[93] In other words, we assume for present purposes that lawyer interests are generally aligned with those of their clients. With this simplifying assumption, it is possible to see several features of the out-of-Delaware trend in merger litigation as mechanisms designed to create leverage for each side and to price and process shareholder claims efficiently. We relax this assumption in the subsequent discussion.

1. Sell-Side Leverage: Pressure Through Procedure

It has long been recognized that plaintiffs' attorneys sometimes use forum selection to increase the value of their clients' claims.[94] In the context of merger litigation, plaintiffs' lawyers may also look for the jurisdiction with the most favorable procedural rules in order to maximize their chances of success in the litigation and thereby increase the value of their clients' claims in settlement. In general, these are procedural rules that create greater leverage for plaintiffs

93. This does not mean they are motivated by altruism. They seek to maximize their own welfare, but they do so as professionals, maximizing their own return by serving their clients well. *Cf.* Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2092–93 (2004) (describing mixed motives of lawyers who seek both wealth and to advance the public good).

94. *See* BLACK'S LAW DICTIONARY 590 (5th ed. 1979) (defining forum shopping as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard"); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 340–42 (2006) (noting that critiques of forum-selection practices have particularly focused on plaintiffs).

vis-à-vis defendants. We refer to these rules as "pressuring rules." Later, we contrast them with "positioning rules," those rules that govern the distribution of control over the litigation and any fee awards among plaintiffs' attorneys.[95] Examples of pressuring rules include a forum's rules granting litigants access to information, rules about whether and when injunctive relief may be awarded, and rules about who the decisionmaker will be.

a. Access to Information

Access to information is governed by discovery practice. Rules about the timing of discovery, what information must be produced and what information must be protected all inform the choice of forum. We address each in turn.

The first advantage that plaintiffs seek in merger litigation is expedited discovery. This discovery is necessary in order for the plaintiff to file a motion for a preliminary injunction, which in turn will typically determine the outcome of the lawsuit in this context. If competing actions have been filed, the action that is proceeding apace is most likely to position the prosecuting plaintiffs' lawyers as leaders in the litigation. These lead lawyers control the case's future and assure their entitlement to the bulk of the fees.[96] Expedited discovery in state court gives the plaintiffs an additional benefit by providing the information necessary to file a suit in federal court under the restrictive pleading requirements imposed by the PSLRA.[97]

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95. These are not airtight categories. Overlap exists, for example, in the rules awarding control of the litigation, which can affect both attorneys' fees as well as leverage at settlement. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 908–09, 916–17 (1987) (discussing allocation of property rights over expected fee award); 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, 17–18 (1991) (discussing incentives to align interests of attorney and client). Nevertheless, the central distinction—between rules that are purely distributional in nature as opposed to those that can be used to increase the value of a claim—emphasizes the point that at least some of the procedural gamesmanship that goes on in merger litigation is not merely designed to get one group of lawyers a larger share of the pie at the expense of another group of lawyers, but rather enables well-meaning counsel to obtain better outcomes for their clients. *See generally* Thomas & Thompson, *supra* note 6, at 1757 (characterizing much multijurisdictional deal litigation as "fee distribution litigation").

96. Note that as part of the fee calculation, the court will consider the "vigor" with which the firm pursued the litigation, including discovery. TCW Tech. Ltd. P'ship v. Intermedia Commc'n, Inc., No. 18336, 18289, 18293, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000).

97. In cases brought under the PSLRA in federal court, the court will stay the litigation if the defendant intends to file a motion to dismiss until that motion is decided, so that for these cases (which must be filed in federal court) there is a significant procedural drawback for plaintiffs. *See* 15 U.S.C. § 78u-4(b)(3)(B) (2006). This means plaintiffs must meet the higher

In Delaware, the plaintiff must bring a request for expedited discovery by motion and must show "good cause."[98] To establish good cause, Delaware courts require a showing close to what is required in the preliminary injunction context—irreparable harm, weighing of the interests, and burdens on the parties and the public interest—only without having to demonstrate that there is a likelihood of success on the merits.[99] A defendant corporation that loses in its opposition to expedited discovery will not necessarily lose again on plaintiff's motion for a preliminary injunction. Nevertheless, a grant of expedited discovery is likely to encourage settlement for two reasons.[100] First, expedited discovery means a preliminary injunction motion is likely to be heard, and there is nothing like a deadline to trigger negotiations. Second, forced sharing of information encourages settlement by giving both sides a more accurate sense of the merits of the case. If the plaintiff is unable to obtain expedited discovery, the defendant will be in a much stronger bargaining position because it is unlikely that the plaintiff will be able to obtain a preliminary injunction.[101]

Not every jurisdiction has a rigorous standard for expedited discovery. For example, New York has no specific expedited-discovery standards. A request for expedited discovery in New York ordinarily accompanies a motion for a preliminary injunction. Defendants can resist expedition by arguing that monetary relief will be sufficient compensation for any injury suffered by the plaintiff.[102] The New York

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pleading standards without the benefit of discovery in the extant case, and renders discovery obtained from other litigation, particularly litigation in state courts, especially useful.

98. *In re* K-Sea Transp. Partners L.P. Unitholders Litig., C.A. No. 6301–VCP, 2011 WL 2410395, at *4 (Del. Ch. June 10, 2011); Raymond Revocable Trust v. MAT Five LLC, C.A. No. 3843-VCL, 2008 WL 2673341, at *2 (Del. Ch. June 26, 2008) (quoting *In re* SunGard Data Sys., Inc. S'holders Litig., No. Civ.A. 1221-N, 2005 WL 1653975, at *1 (Del. Ch. July 8, 2005)).

99. *See K-Sea*, 2011 WL 2410395, at *5 (noting that in deciding whether to expedite discovery, the court will determine " 'whether . . . the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding' " (quoting Giammargo v. Snapple Beverage Corp., Civ. A. No. 13845, 1994 WL 672698, at *2 (Del. Ch. Nov 15, 1994)); *see also TCW Tech.*, 2000 WL 1478537, at *2 (noting that the "colorable claim" standard for expedited discovery is lower than the likelihood of success standard that applies for preliminary injunctions).

100. *See* Olson v. EV3, Inc., C.A. No. 5583–VCL, 2011 WL 704409, at *7 (Del. Ch. Feb. 21, 2011) (case settled shortly after court granted motion for expedited discovery); *In re* Colt Indus. S'holder Litig., 553 N.Y.S.2d 138, 139–40 (N.Y. App. Div. 1990) (parties settled case while expedited discovery was underway).

101. *See, e.g.*, *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 434 (Del. Ch. 2012) (denying preliminary injunction in spite of express finding that El Paso's sale process may have been tainted by conflicts of interest affecting the company's CEO and financial advisors).

102. 4B N.Y. PRACTICE, COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 80:33 (3d ed. 2011).

courts impose no formal requirement of sufficiency of the complaint or a weighing of the burdens and benefits for the parties and the state.[103] Obtaining expedited discovery in New York may be somewhat easier for a plaintiff who can make a convincing argument that the merger is imminent and likely to cause harm that is not monetarily compensable. This in turn increases the plaintiffs' leverage in settlement negotiations.

The federal courts are inconsistent in their treatment of expedited discovery.[104] The Federal Rules of Civil Procedure do not provide a specific standard for expediting discovery or engaging in early discovery, so federal courts take a variety of approaches to expediting discovery. Some federal courts adhere to a loose "reasonableness" test.[105] Other courts subject such motions to a "good cause" standard.[106] Still other federal courts are even more wary of granting expedited discovery.[107] Accordingly, plaintiffs have an

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103. Factors such as those considered in Delaware may theoretically be taken into account by a New York court ruling on a motion for expedited discovery, but our research has revealed no cases that considered these factors in the merger context.

104. The Federal Rules of Civil Procedure impose a moratorium on formal discovery until the parties confer, submit a written discovery plan to the court, and attend a court conference about that plan. *See* FED. R. CIV. P. 26(d) (requiring a moratorium on discovery until parties have conferred pursuant to Rule 26(f)); FED. R. CIV. P. 26(f) (requiring parties to confer and submit written discovery plan); FED. R. CIV. P. 16 (requiring judge to set a scheduling order).

105. Considerations include: "(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made." *In re* Fannie Mae Derivative Litig., 227 F.R.D. 142, 143 (D.D.C. 2005).

106. Dimension Data North America, Inc. v. NetStar-1, Inc., 226 F.R.D. 528, 531 (E.D.N.C. 2005) (rejecting the more stringent standard of Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982)); Merrill Lynch, Pierce, Fenner & Smith v. O'Connor, 194 F.R.D. 618, 624 (N.D. Ill. 2000):

> [W]here, as here, a plaintiff seeks expedited discovery in order to prepare for a preliminary injunction hearing, it does not make sense to use preliminary injunction analysis factors to determine the propriety of an expedited discovery request. Rather, . . . it makes sense to examine the discovery request, as we have done, on the entirety of the record to date and the reasonableness of the request in light of all of the surrounding circumstances . . . .

(emphasis omitted).The lenient interpretation is supported by a Committee Note, which suggests that early discovery is appropriate in cases involving preliminary injunctions. *See* FED. R. CIV. P. 26 advisory committee's note (1993).

107. In *Notaro*, the Southern District of New York held that in order to impose expedited discovery:

> [C]ourts should require the plaintiff to demonstrate (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.

incentive to maintain their suit in some but not all federal jurisdictions if they hope to win expedited discovery.

Related to access to expedited discovery is the more general issue of access to information in discovery. Different jurisdictions provide different levels of access to information. Defendants may assert privileges in Delaware that may not be available elsewhere. For example, the Delaware chancery court recognizes a business-strategy immunity that is not recognized by all jurisdictions.[108] This immunity protects strategies being contemplated by the company on an ongoing basis, but not plans that have already been made.[109] The purpose of this immunity is to allow the company to "shield itself from discovery of time-sensitive information in the takeover context, including delicate financial information, defensive strategies, and potential responses to hostile bids."[110] Similar protective orders are available in federal court,[111] but because the federal courts have not recognized the immunity as part of state substantive law they will not automatically apply it. Other jurisdictions may not recognize the immunity or may limit its applicability, thus allowing plaintiffs to conduct broader discovery than would be available in Delaware.[112]

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95 F.R.D. at 405; *see also* Am. LegalNet, Inc. v. Davis, 673 F. Supp. 2d 1063, 1066–67 (C.D. Cal. 2009) (holding that merely seeking a preliminary injunction does not automatically expedite discovery).

108. BNS Inc. v. Koppers Co., 683 F. Supp. 454, 456–57 (D. Del. 1988) (discussing business strategy immunity). Some call this a "white knight privilege," but the federal courts have rejected this characterization and found it to be a procedural rule similar to the attorney-client privilege. *Id.*

109. Pfizer Inc. v. Warner-Lambert Co., No. Civ.A.17524, 1999 WL 33236240, at *2 (Del. Ch. Dec. 8, 1999).

110. *Id.*

111. FED. R. CIV. P. 26(c); *see also BNS*, 683 F. Supp. at 457 ("The scope of the protection to be afforded white knight documents is determined by Rule 26 of the Federal Rules of Civil Procedure.").

112. Another method for obtaining information about a corporate defendant that may be easier to achieve outside of Delaware is a books and records action. Under Delaware law, stockholders have the right to inspect the books and records of the corporation in which they hold stock and to sue for enforcement of this right. *See* DEL. CODE ANN. tit. 8, § 220 (West 2012). This type of suit may be useful for plaintiffs contemplating other actions, such as securities actions in federal court under the PSLRA. The chancery court attempted to limit this tactic by dismissing books and records actions where the plaintiffs had already filed a derivative suit. The Delaware Supreme Court overturned the chancery court's holdings, ruling that even if a plaintiff had filed a preexisting derivative suit he could still go forward with the books and records action. King v. VeriFone Holdings, Inc., 12 A.3d 1140, 1145 (Del. 2011). It is possible to conclude from this that the Delaware chancery court is wary of books and records actions and will use its discretion to limit them where possible.

b. Preliminary Injunctions: Timing and Availability

A preliminary injunction motion with a strong chance of success will exert pressure on the defendant, but so will the mere filing of a motion where the outcome is unpredictable. In merger litigation, uncertainty benefits plaintiffs.[113] Pressure on defendants to settle builds once hearings are scheduled on motions with unpredictable outcomes that put the transaction in jeopardy. This is especially so in jurisdictions where courts may schedule preliminary injunction hearings without an informal preview of the merits of the claim.

The standard for obtaining a preliminary injunction is essentially the same in most jurisdictions.[114] Because the interpretation of the standard depends on the individual judge and his or her familiarity with the underlying transaction and the relevant law, filing outside of Delaware may dramatically increase the unpredictability of outcomes. This uncertainty may increase the plaintiffs' leverage in settlement negotiations, especially if a preliminary injunction hearing can be scheduled early in the process.

Courts differ over when in the litigation process preliminary injunction motions should be heard. Delaware courts tend to refrain from scheduling a preliminary injunction hearing until after the proxy has issued to avoid multiple preliminary injunction motions.[115] Other jurisdictions, such as California, have recently adopted similar rules.[116] Plaintiffs may prefer to file in jurisdictions that have not

113. This is so because defendants, eager to go forward with their transaction, value the certainty of knowing that they will be able to do so. Decreasing certainty in litigation increases the amount that defendants may be willing to pay in settlement to achieve transactional certainty. *See* Bruce Hay & David Rosenberg, *"Sweetheart" And "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1404 (2000).

114. In Delaware, the standard requires the moving party to demonstrate "(1) a reasonable probability of ultimate success on the merits at trial; (2) that the failure to issue a preliminary injunction will result in immediate and irreparable injury before the final hearing; and (3) that the balance of hardships weighs in the movant's favor." La. Mun. Police Emps.' Ret. Sys. v. Crawford, 918 A.2d 1172, 1185 (Del. Ch. 2007). In the federal courts, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). It is possible that "likelihood of success" on the merits may be a more difficult standard to meet in some cases than the Delaware "reasonable probability" of success standard.

115. Telephone Interview with Stuart Grant, Senior Partner, Grant & Eisenhofer (Jan. 6, 2012).

116. Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc., 180 Cal. App. 4th 1542, 1545–47 (2010).

adopted this approach because doing so permits them to put greater pressure on the defendant earlier in the litigation.

c. Type of Decisionmaker

A third category of pressuring rule concerns the type of decisionmaker available in different forums. In Delaware, judges of the court of chancery decide cases concerning corporate law. This tight-knit group of judges, often former corporate lawyers, is deeply familiar with the relevant issues.[117] In other jurisdictions, adjudicators deciding cases concerning Delaware corporations may be generalist life-tenured judges, elected judges, or juries.[118]

It is an understatement to say that juries are less predictable with regard to corporate law matters than chancery court judges. Nevertheless, in some jurisdictions, including federal court, plaintiffs have a right to a jury trial for some claims that might be brought in merger litigation.[119] The additional volatility of outcome alone, apart from any suspicions regarding the jury's supposed sympathies in corporate cases, may provide plaintiffs with sufficient reason to file in jurisdictions where juries are available.[120] Even where a jury trial is

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117. *See, e.g.*, *Delaware – Law Firms A Senior Corporate Practitioner Looks at the Leadership Role of the Deleware Judiciary*, THE METROPOLITAN CORP. COUNSEL (Nov. 1, 2004), http://www.metrocorpcounsel.com/articles/4767/delaware-law-firms-senior-corporate-practitioner-looks-leadership-role-delaware-judici; Ronald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts: Their Rise to* Preeminence, A.B.A. BUS. L. SEC. (Mar./Apr. 2008), http://apps.americanbar.org/buslaw/blt/2008-03-04/slights.shtml.

118. For example, superior court judges in California are elected to six-year terms. CAL. CONST. art. VI, § 16(b).

119. *See* Ross v. Bernhard, 396 U.S. 531, 542–43 (1970) (holding that stockholders in a derivative suit alleging breach of contract and gross negligence were entitled to a jury trial in federal court). The availability of a jury under the Seventh Amendment in general is a complex question beyond the scope of this Article, as is the question of the extent to which the Seventh Amendment is even applicable to those internal corporate matters to which Delaware law applies. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 450–69 (1996) (holding that New York's standard for remittitur applies in federal diversity action); Byrd v. Blue Ridge Rural Elec. Coop., Inc. 356 U.S. 525, 537 (1958) (holding that plaintiff was entitled to a jury trial in federal court on diversity action because the jury trial is an "essential characteristic" of the federal system). It is important to remember that only a judge can decide a preliminary injunction motion, the main vehicle for decision in merger litigation. *See, e.g.*, FED. R. CIV. P. 65 ("The court may issue a preliminary injunction . . . .").

120. *See, e.g.*, Rapoport v. Litig. Trust of MDIP Inc., No. Civ.A. 1035-N, 2005 WL 3277911, at *4 (Del. Ch. Nov. 23, 2005) (in rejecting plaintiffs' motion to stay Delaware suit in favor of an Ohio suit set for trial, the court condemned the plaintiffs' "blatant forum shopping in search of a jury trial"); *see also* NRG Barriers, Inc. v. Jelin, No. 15013, 1996 WL 377014, at *6 (Del. Ch. July 31, 1996) (refusing to stay in favor of a California proceeding where "an outstanding request for a jury trial and a claim for punitive damages" made it unlikely that the case could be heard before the merger deadline).

not available, there are many levels of judicial experience and expertise—from elected judges to appointed judges to life-tenured federal judges—that may bear on the outcome of a particular suit. Experienced litigators will know where to file to maximize their advantage vis-à-vis defendants.[121]

2. Buy-Side Leverage: Monopsony

On the defense side, the principal interest is to settle merger litigation swiftly—and at the lowest possible cost—so that the transaction may proceed as planned. The plaintiff's ability to file merger litigation in more than one jurisdiction thus presents an obvious cost since it is more expensive to litigate a case in two (or three) places than in only one.[122] From the defendant's perspective, however, the greatest increase in costs likely arises from the potential of additional claims to create delay and uncertainty.[123] Delay creates transaction risk because deals that are delayed may fall apart.[124] More fundamentally, uncertainty over legal rulings creates uncertainty over whether the transaction will close.[125] Because defendants value transactional certainty, they will be willing to pay more in settlement to avoid these risks.[126]

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121. *See, e.g.*, O'HARA & RIBSTEIN, *supra* note 17, at 8 (describing how particular Illinois counties get more than their share of class action tort filings).

122. At the very least, multiple lawsuits in multiple jurisdictions will increase billable hours on the defense side, increasing an already significant source of cost. For example, one lawyer told us that defense fees for a preliminary injunction motion in 2011 could run to as much as $1.5 million. Interview with mergers and acquisitions lawyer at a prominent New York law firm who represents defendants (Oct. 2011) [hereinafter Interview with Mergers and Acquisitions Lawyer].

123. Typical defense work at this stage largely consists of filing answers and making motions, the substance of which will be essentially the same across jurisdictions. Moreover, lawyers tell us that many of the actions filed in competing forums are really "shadow" suits that are not actively litigated and do not therefore substantially increase defense costs but rather are filed as placeholders so that plaintiffs' lawyers can subsequently demand to be included in the settlement. *Id.*

124. This is an argument defendants raise in opposition to preliminary injunctions. *See, e.g.*, Gradient OC Master, Ltd. v. NBC Universal, Inc., 930 A.2d 104 (Del. Ch. 2007) (rejecting defendant's argument that delay will jeopardize the transaction and granting preliminary injunction).

125. Uncertainty is a core advantage to plaintiffs of each of the pressuring rules described above. *See supra* Part II.A.1 (discussing the advantages of uncertainty for plaintiffs).

126. *See* Hay & Rosenberg, *supra* note 113, at 1402 ("Risk averse parties will pay a premium to avoid taking a gamble."); *see also* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value Of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1295 (2006) (demonstrating that volatility of outcomes increases settlement size).

In spite of these increased costs, facing multiple claims in multiple jurisdictions also creates an important opportunity for defendants: the chance to be the sole buyer in a market with multiple sellers.[127] Because a judicially approved settlement with any of these plaintiffs would have preclusive effect over all others,[128] and because there is no formal means of coordinating or consolidating the plaintiffs' claims across jurisdictional boundaries,[129] defendants have a structural advantage. They can "shop" for the quickest and cheapest settlement from the various plaintiffs' teams.[130] This is monopsony power and it drives down the cost of settlement.[131] In an effort to provide further certainty to the transacting parties, defendants may also demand that the settling plaintiffs' counsel obtain agreement from all competing counsel as part of the overall settlement.[132] Thus, although multiforum litigation may marginally increase defense costs, it also creates monopsony power and clears a path to the principal defense-side benefit—transactional certainty.

Leading commentators criticize the monopsony power of defendants in the settlement of class actions[133] because it enables

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127. In the words of Vice Chancellor Laster: "[D]efense lawyers benefit from this game, too. . . . They . . . get a cheap settlement for their client. . . . [D]efendants can play multiple plaintiffs against each other to create the reverse-auction effect." Transcript of Courtroom Status Conference at 19, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890-VCL (Del. Ch. Dec. 17, 2010), *available at* http://www.delawarelitigation.com/uploads/file/int53%281%29.pdf.

128. *See supra* note 21 and accompanying text (explaining the role of the Full Faith and Credit Clause).

129. *See supra* note 19 and accompanying text.

130. Having identified the lowest-cost settlement, defendants may deploy a number of procedural tactics to move that complaint forward ahead of others. For example, defendants may stipulate to class certification, agree to an expedited schedule, or provide preferential access to documents. They can also move for a stay or dismissal in one jurisdiction and not another. LEBOVITCH ET AL., *supra* note 15, at 2 ("Defendants may seek to advance the procedural status of the litigation pursued by counsel less likely to litigate and thereby avoid more aggressive members of the shareholders' bar.").

131. In economic theory, monopsony power leads to a redistribution of welfare from the seller to the buyer as well as deadweight loss through underproduction of the good sold. *See generally* ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS (2003). In our view, however, the potential for deadweight loss is constrained by objectors and the judicial-approval mechanism discussed immediately below. *See infra* notes 136–47 and accompanying text.

132. *See infra* text accompanying note 197.

133. *See generally* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–72 (1995); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 765, 775 (1998) ("By indicating that they will deal with class counsel who is willing to settle for the least, [defendants] implicitly create a 'reverse auction' in which competing class lawyers 'underbid' each other in order to have their own action settled first and earn attorneys' fees."); Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc.,

them to conduct a "reverse auction."[134] As a result, claims may be undervalued and plaintiffs undercompensated.[135] This is not an inevitable consequence, however. Plaintiffs' lawyers, after all, would prefer to settle for a larger recovery rather than a small one and may wish to cultivate and maintain a reputation for good results.[136] A skeptic might counter that plaintiffs' firms operating on the basis of volume are unlikely to care about maximizing the value of any one claim and that at least some plaintiffs' firms seem to care not at all for their reputations. These types of plaintiffs' lawyers, even if they are in the minority overall, feed into the reverse auction mechanism, leading to the undervaluing of claims and the undercompensation of the plaintiff class. But there are two important structural mechanisms to keep everyone honest: judicial review of settlements and the potential for objectors.

Judicial approval is necessary for the settlement of merger litigation.[137] Before granting approval, judges review the fairness of the settlement for the class, during which time they may be able to assess whether plaintiffs' lawyers have in fact sold out the interests of the class they supposedly represent.[138] Commentators point to

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80 CORNELL L. REV. 1045, 1045 (1995) (describing allegations of breach of fiduciary duty to future class members in an asbestos settlement class action).

134. In the article in which he coined the term, Professor Coffee wrote:

> [I]t allows the defendants to pick and choose the plaintiff team with which they will deal. Indeed, it signals to the unscrupulous plaintiffs' attorney that by filing a parallel, shadow action in state court, it can underbid the original plaintiffs' attorney team that researched, prepared and filed the action. The net result is that defendants can seek the lowest bidder from among these rival groups and negotiate with each simultaneously.

Coffee, *supra* note 133, at 1371–72.

135. *See* John C. Coffee Jr. & Susan P. Koniak, *Rule of Law: The Latest Class Action Scam*, WALL ST. J., Dec. 27, 1995, at 11 (discussing how defendants facing overlapping class action suits in multiple forums can play plaintiffs' attorneys off each other in order to obtain the cheapest settlement possible).

136. They may prefer higher-value settlements to lower-value ones if only because it is therefore easier to justify significant attorneys' fees. *See infra* notes 173–79 and accompanying text. Likewise, a reputation for good results might help a plaintiffs' firm win lead plaintiff status in a leadership dispute. *See* FED. R. CIV. P. 23(g)(ii) (considering counsel's experience in handling class actions as a factor in favor of awarding class counsel status).

137. The federal class action rule requires judicial approval for any disposition of a class action. FED. R. CIV. P. 23(e). State courts ordinarily have similar rules. *See, e.g.*, DEL. CH. R. 23(e) (requiring judicial approval for dismissal or compromise of a class action); *In re* Triarc Cos. Class & Derivative Litig., 791 A.2d 872, 876 (Del. Ch. 2001) (asking whether the settlement is "fair and reasonable in light of all relevant factors").

138. At certification, the judge is charged with determining that the class meets the requirements of the class action rule, including adequacy of representation and of class counsel. Settlement approvals are often filed together with motions for class certification, but the requirements of the rule still need to be met even when a settlement has been reached, with the

factors—such as limited bargaining and nonpecuniary relief—that judges might consider in making this determination.[139] Information asymmetry, however, presents a significant obstacle to judges engaging in this inquiry.[140] The potential for collusion compounds the problem of information asymmetry; settling attorneys on each side mask what actually happened in the settlement process, making the negotiations seem harder fought than in fact they were.[141] Fortunately, there is a mechanism to revitalize the adversarial process and reveal information in this critical review process: the potential of class members to object.

In connection with the judicial approval process, the parties give all shareholders notice of the prospective settlement, and the court provides dissatisfied shareholders with an opportunity to object.[142] Yet in many class action contexts research has shown that would-be objectors tend to be indifferent or uninformed and therefore

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exception of the requirement that money damages class actions be manageable for litigation. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617–20 (1997).

139. Professors Macey and Miller suggest a list of "yellow flags" including:

> [S]ettlement bargaining limited to one of the competing groups of plaintiffs' attorneys; settlement with the group of attorneys who present a less substantial threat of carrying the case forward to trial . . . award of lucrative and potentially justified attorneys' fees; and sudden expansion of the scope of the settled case (for example, by converting the action from a statewide to a nationwide class).

Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 191–92 (2009), *quoted in* Brief of Spec. Counsel at 26, Scully v. Nighthawk Radiology Holdings, Inc., C.A. No. 5890-VCL (Del. Ch. Mar. 11, 2011). A similar list is offered in a guide for judges, focusing on three factors suggesting collusion: (1) "an imbalance between the cash value of the settlement to the class as a whole and the amount of attorney fees in the agreement," (2) "a difference between the apparent value of the class claims on the merits and the value of the settlement to the class members," and (3) settlement "with an attorney who has not been involved in litigating the class claims that other attorneys have been pursuing." BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 14 (1st ed. 2005).

140. *See* Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1272 (1995) (describing settlement process as a "black box" precluding serious judicial scrutiny); G. Donald Puckett, *Peering Into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1279–83 (1999) (describing serious judicial review of class settlements as "inherently futile").

141. The reverse auction is a kind of collusive-settlement practice. Macey & Miller, *supra* note 139, at 191–94. Collusion, of course, can produce process as well as result.

142. Typical objectors are class members who are unhappy with some aspect of the settlement and file papers with the court stating their grounds for dissatisfaction, thereby reinserting an adversarial element in the approval process. It is a question of serious dispute, however, whether typical objectors effectively guarantee fair settlements or merely represent yet another hold-out demanding a share of the settlement pie. *See generally* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 403; Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1640–66 (2010) (proposing solutions to address objector blackmail of settlements).

unlikely to mount a substantive challenge to the settlement.[143] Multijurisdictional merger litigation, however, presents an especially ripe environment for objectors. Many would-be objectors are already represented by counsel who may be both knowledgeable about the claim and frustrated at having effectively been undersold in the reverse auction. Moreover, because merger litigation often settles for attorneys' fees and nonpecuniary relief, would-be objectors may often have a strong basis for arguing that the class has been underserved by its supposed representatives.[144] Frustrated plaintiffs' teams wishing to upset the settlement in hopes ultimately of taking control of the action and reopening negotiations with defendants thus have a strong incentive to object, at least when the settlement award seriously undervalues the claim.[145]

This incentive to object serves to restore the adversarial process in an otherwise collusive environment by inserting a monitor and revealing important information about the value of the settlement to the judge charged with approving or rejecting it.[146] Judges should take this information seriously and reject settlements that appear inadequate.[147] The settling parties could be expected to internalize these incentives and avoid concluding settlements that could not withstand the scrutiny of motivated objectors. In this way, the price-discovery function of the market could be trusted to provide for the

143. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533–34, 1550 (2004) (showing that the objection rate is low across case types); *see also* Brunet, *supra* note 142, at 412–14 (noting that typical objectors are not active participants in the litigation or settlement and are therefore uninformed).

144. Prezant v. De Angelis, 636 A.2d 915, 926 (Del. 1994) (remanding settlement for more rigorous inquiry into inadequacy of representation based on objector appeal).

145. Objectors may mount a formal leadership challenge in order to pursue the claim themselves or merely to alter the terms of the settlement, thereby entitling the attorneys to fees. *See, e.g.*, Alaska Elec. Pension, Fund v. Brown, 988 A.2d 412, 417–20 (Del. 2009) (denying fees to objectors based on failure to increase shareholder value). Judges have wide latitude in dealing with objectors. *See, e.g.*, Forsythe v. ESC Fund Mgmt. Co., C.A. No. 1091-VCL, 2012 WL 1655538, at *3–8 (Del. Ch. May 9, 2012) (offering objectors the option to take over the case if they post a bond in the amount of the disputed settlement amount, but otherwise approving the settlement).

146. *See* Brunet, *supra* note 142, at 408–09 ("Informational input from objectors regarding a proposed settlement could, in theory, improve the monitoring problem. By definition, the objector is a monitor, who is evaluating a proposed settlement and then investing resources to either improve the settlement terms or reject the settlement.").

147. *See infra* Part III.B.1. (specifying how judges can stimulate objectors in order to police opportunism in the market for preclusion).

swift processing of low-value claims while also preventing high-value claims from being undervalued.[148]

B. Imperfections in the Market for Preclusion

Here we relax the (perhaps naïve) simplifying assumption that attorneys are generally motivated to serve their clients' best interests, thus allowing for the prospect of litigation agency costs.[149] Taking these agency costs into account, it is easy to see how the outcomes of the market for preclusion can be distorted through both the proliferation of low-value claims and potential transformation of high-value claims into low-value settlements.[150] We describe the potential for attorney opportunism and the distortions it introduces below.

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148. The reverse auction does not raise the same policy issues in the context of deal litigation as it does in the context of mass torts, in which the bulk of the critical scholarly commentary arose. Most notably, much of the scholarly focus on reverse auctions in the context of mass torts has been on the problem of future claimants—that is, those whose injuries are not presently known and who are therefore not present to object but whose rights are nevertheless decided by the settlement. *See, e.g.*, Coffee, *supra* note 133, at 1360–62 (describing defense-side incentive to settle early, before the extent of injuries is fully known, in order to be able to provide a low estimate of the cost of future claims). But there are no future claimants in merger litigation, where all class members are known (i.e., all target shareholders at the time of the merger) and participate ratably in the settlement. Likewise, the concern that plaintiffs' lawyers will fail to pursue socially valuable deterrence objectives by settling rather than seeking punitive damages is not as forceful in the deal litigation context, where punitive damages are not available. As regards compensatory objectives, the class settlement is not the merger plaintiffs' only hope for relief as it is in the context of mass torts: unsatisfied shareholders still have the right to vote no and thereby prevent consummation of the merger and, often, the right to sue for appraisal ex post to increase the consideration paid in the deal.

149. *See generally* Randall S. Thomas & Robert B. Thompson, *Empirical Studies of Representative Litigation*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 154 (Claire A. Hill & Brett H. McDonnell eds., 2012) (noting that "representative litigation introduces factors that can put daylight between the interests of lawyers and investors").

150. A persistent problem in this area is that commentators complain both about the proliferation of meritless litigation and the potential stifling of meritorious claims. We are agnostic on the question of the merits of merger litigation, adopting the view that some merger claims have merit, while others do not. Overall we assume that a legal regime permitting merger litigation is socially desirable. The problem, thus, is one of identifying and screening these claims. The market mechanisms we identify, adjusted by the policy interventions we identify in Part III below, strike us as a good screening mechanism. The market can limit the cost of meritless litigation by permitting cheap settlements while also rewarding enterprising plaintiffs' attorneys who litigate meritorious cases aggressively and who object to underpriced settlements. In other words, whether the concern is the proliferation of meritless litigation or the systematic underpricing of shareholder claims, a well-working market for preclusion provides a good solution. To the extent that merger litigation extracts rent from shareholders, this is a matter for the substantive law. In this sense, we disagree with Strine, Hamermesh & Jennejohn, *supra* note 54, at 26, who criticize our thesis and argue that venue and jurisdictional rules are the best way to eliminate needless costs for shareholders resulting from merger litigation.

1. Sell-Side Opportunism

The theoretical divergence between the interests of plaintiffs' lawyers and the class they represent is well documented in the literature.[151] In the context of multijurisdictional merger litigation, plaintiffs' lawyers may file strategically in order to take advantage of procedural "positioning" rules that benefit their own interests more than client interests.[152] Examples of positioning rules include rules for determining control of the litigation and awarding and allocating attorneys' fees. Such rules can motivate filings, leading to a proliferation of low-value claims.[153] We explore several such rules below. Although we focus primarily on a comparison of Delaware and New York law, cases could be brought in many other jurisdictions, giving rise to similar concerns.

a. Control over the Litigation

Perhaps the single most important goal for a plaintiffs' lawyer in merger litigation is to be appointed lead counsel with the ability to control the litigation. Most of the fees and reputational benefits associated with the litigation go to the lawyers who control the particular suit.[154] Each jurisdiction applies its own rules for determining which of several competing plaintiffs' teams will be appointed lead plaintiff for a particular claim. Because plaintiffs' attorneys value control, they prefer to file in jurisdictions where their client is more likely to be appointed lead plaintiff. Moreover, because plaintiffs may file merger suits in several jurisdictions, lawyers who have not been appointed lead counsel in one jurisdiction may choose to file in another jurisdiction in hopes of controlling the litigation there. This tactic is possible because there is no means of consolidating

151. *See, e.g.*, 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, 671–73 (1986).

152. *See supra* Part II.A.1 (defining "positioning rules" as those that affect the bargaining power of plaintiffs' attorneys vis-à-vis other plaintiffs and their attorneys); *see also* Thomas & Thompson, *supra* note 6, at 1757 (discussing this phenomenon as "fee distribution litigation").

153. On the ability of such positioning rules to motivate filing, see Cain & Davidoff, *Great Game*, *supra* note 6, at 4–7 (arguing that differences in fee awards motivate cross jurisdictional filings).

154. *See, e.g.*, *In re* Allion Healthcare Inc. S'holders Litig., Civil Action No. 5022-CC, 2011 WL 1135016, at *23–25 (Del. Ch. Jan. 19, 2011) (granting limited attorneys' fees to rival New York attorneys but giving bulk of fees to Delaware counsel in Delaware settlement); Alaska Elec. Pension, Fund v. Brown, 988 A.2d 412, 417 (Del. 2009) (denying attorneys' fees in Delaware settlement to rival plaintiffs' attorneys who had filed suit in California).

merger litigation across jurisdictions. Leadership disputes are thus likely to be an important factor driving the out-of-Delaware trend. How jurisdictions allocate control over the litigation becomes a critically important consideration.

Some jurisdictions may follow the traditional first-to-file rule for awarding leadership roles.[155] However, the law in most jurisdictions leaves the appointment of lead counsel to the court's discretion if counsel cannot agree.[156] In New York, the state's class action rule governs leadership disputes. The rule permits the consideration of filing order, but "the principal factor . . . is whether the appointment will serve the best interests of the shareholders."[157] New York courts focus on the proposed lead counsel's credentials.[158] All things being equal among competing counsel, however, New York courts have been willing to revert to the first-to-file rule.[159]

The tradition in Delaware was that plaintiffs' lawyers would agree amongst themselves.[160] Under Delaware custom, sometimes described as a "race to the book," the out-of-state counsel who first contacted prominent Delaware firms would control the litigation.[161] As the Delaware bar expanded, however, newcomers were not happy with this system and insisted on bringing leadership fights into court.[162] In 2000, chancery addressed the issue, articulating the standards for the

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155. *See* LEBOVITCH ET AL., *supra* note 15, at 4 (describing first-filed rule for selection of lead counsel in some jurisdictions but without citation).

156. *See, e.g.*, *In re* Zyprexia Prods. Liab. Litig., 594 F.3d 113, 128–30 (2d Cir. 2010) (approving appointment of lead counsel in mass tort litigation); Vincent v. Hughes Air West, Inc., 557 F.2d 759, 774–75 (9th Cir. 1977) (affirming district court's authority to direct appointment of committee of lead counsel).

157. Katz v. Clitter, 396 N.Y.S.2d 388, 389 (N.Y. App. Div. 1977); *see also* Rich v. Reisini, 266 N.Y.S.2d 492, 494 (N.Y. App. Div. 1966) ("The guiding principle in the selection of counsel is to find among those eligible the one who will best serve the interest of the plaintiffs.").

158. *Rich*, 266 N.Y.S.2d at 494.

159. *See, e.g.*, Sollins v. Alexander, No. 0060127/2006, 2006 WL 4682189 (N.Y. Gen. Term Apr. 11, 2006).

160. ABC, *Balancing Act*, *supra* note 6, at 1373.

161. In the 1980s and into the 1990s, plaintiffs' lawyers outside Delaware would all seek out the same Delaware firm, who would rank these lawyers in their "black book" based on priority. LEBOVITCH ET AL., *supra* note 15, at 5 (conveying their firsthand knowledge of this practice as partners in a prominent plaintiffs' side firm, Bernstein, Litowitz, Berger & Grossman LLP). This system was based on a gentlemen's agreement where Delaware counsel would fairly apportion control among outside counsel seeking out local representation. *See* Rales v. Blasband, 634 A.2d 927, 934 n.10 (Del. 1993) (recognizing first-filed custom for appointment of lead or colead counsel).

162. *See, e.g.*, *In re* Siliconix Inc. S'holders Litig., No. C.A. 18700-NC, 2001 WL 618210, at * 1 (Del. Ch. May 25, 2001) (lamenting the fact that "difficult and sometimes distasteful issues involved with the designation of who . . . will direct and control the course of the action have arisen with increased frequency").

appointment of lead counsel when the lawyers cannot agree amongst themselves.[163] The following standards now govern appointment of lead counsel: (1) the quality of the pleadings; (2) which shareholder-plaintiff has the biggest economic stake in the lawsuit; and (3) the "energy, enthusiasm or vigor" with which the litigants have pursued the litigation.[164] Taking pains to underscore that no one fact was determinative and that, in particular, Delaware was not endorsing a largest-shareholder rule akin to that of the PSLRA, the court preserved a great deal of judicial discretion in deciding leadership disputes.[165]

Subsequently, Delaware judges have gone to considerable lengths to avoid using that discretion. While some opinions apply the *TCW Technologies* factors (sometimes called the *Hirt* factors after a later case),[166] other judges expressly refuse to pick a lead plaintiff.[167]

Courts' reluctance either to pick lead counsel or to articulate a clear standard for plaintiffs to use in deciding leadership disputes on their own can have two important effects on litigation. First, fighting over who will serve as lead counsel delays proceedings. Lawyers cannot begin to litigate the case until they have established who will run the litigation. In the absence of a clear standard, such agreements

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163. *See* TCW Tech. Ltd. P'ship v. Intermedia Commc'ns, Inc., No. 18336, 18289, 18293, 2000 WL 1654504, at *4 (Del. Ch. Oct. 17, 2000) (listing factors "determining which lawsuit should assume a lead or coordinating role").

164. *Id.*; *see* LEBOVITCH ET AL., *supra* note 15, at 5 (referring to *TCW* as a "landmark decision"); ABC, *Balancing Act*, *supra* note 6, at 1373 ("Only in 2000, however, did the Delaware courts take concrete steps to displace the presumption that promptness would be rewarded as and when disputes arose among plaintiffs' lawyers over the lead counsel role."); *see also* Hirt v. U.S. Timberlands Serv. Co., Nos. 19575, 19577–78, 19584, 19592, 19608, 19613, 19632, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002) (holding that the following factors should be considered on a motion for lead counsel status: (1) the quality of the pleadings, (2) the relative economic states of the competing litigants in the outcome of the lawsuit, (3) the willingness and ability of counsel to litigate vigorously, (4) potential conflicts between larger and smaller stockholders, (5) vigor of prosecution of the lawsuit thus far, and (6) counsel's competence and access to resources).

165. *See TCW*, 2000 WL 1654504, at *4 (adopting a liberal and discretionary factors-based standard).

166. *See In re* Del Monte Foods Co. S'holders Litig., C.A. No. 6027–VCL, 2010 WL 5550677, at *4 (Del. Ch. Dec 31, 2010) (applying *TCW* factors in order to appoint lead counsel); Dutiel v. Tween Brands, Inc., C.A. Nos. 4743-CC, 4845-CC, 2009 WL 3494626, at *2 (Del. Ch. Oct 28, 2009) (same); Wiehl v. Eon Labs, No. Civ.A. 1116-N, Civ.A. 1117-N, Civ.A. 1119-N, Civ.A. 1125-N, Civ.A. 1134-N, Civ.A. 1136-N, Civ.A. 1139-N., 2005 WL 696764, at *1 (Del. Ch. Mar 22, 2005) (same); *Hirt*, 2002 WL 1558342, at *2 (same).

167. *See, e.g.*, *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 945 (Del. Ch. 2010) (describing letter order to counsel from Chancellor Chandler dated, May 29, 2009, which read in part: "Because I am unpersuaded by either motion, I will not grant any motion to . . . appoint lead counsel. I strongly urge you to make further attempts to resolve this dispute in a manner that will enable the cases to be prosecuted efficiently.").

will be difficult to reach. Second, enterprising lawyers might prefer to litigate in jurisdictions where judges are more willing to appoint lead counsel, especially if they believe they have a good chance of being so appointed. Some commentators argue that Delaware's historic failure either to decide or to articulate a clear standard for deciding leadership disputes is likely one factor behind the out-of-Delaware trend.[168]

Contrast the Delaware approach with that of the federal courts, where many of the out-of-Delaware cases are ultimately decided.[169] Under the federal class action rule, courts must appoint class counsel on the basis of factors similar to those suggested by the Delaware courts.[170] In other words, the standards for appointment of lead counsel are similar, but the enforcement approaches differ. The federal courts do not hesitate to make appointments, occasionally holding auctions for the role of lead counsel where appropriate.[171] Lawyers who feel confident that they meet the criteria for appointment, or that they can win an auction, may prefer the quick and decisive determination of lead counsel that the federal courts offer. This decisiveness could be a factor in explaining the growth of multiforum deal litigation in federal court.[172]

b. Attorneys' Fees

Awarding attorneys' fees will also be controlled by the procedural rules of the jurisdiction of the ultimate settlement. This is

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168. *See* LEBOVITCH ET AL., *supra* note 15, at 5 ("A non-effective or dysfunctional process for selecting lead counsel in class actions leads to suboptimal results for shareholders, waste for defendants, and an inability for the court to move the case along, even as other jurisdictions move ahead."); *see also* ABC, *Balancing Act*, *supra* note 6, at 1372–76 (citing Delaware's approach to appointing lead counsel as a cause to the out-of-Delaware trend).

169. ABC, *Balancing Act*, *supra* note 6, at 1354–55 (finding a substantial growth of lawsuits against companies incorporated in Delaware being filed in federal courts).

170. FED. R. CIV. P. 23(g)(1)(A) lists the following factors:

> (i) [T]he work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

171. *See* Jill E. Fisch, *Aggregation, Auctions and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROBS. 53, 80 n.192 (2001) (listing cases in which courts ordered a lead counsel auction); *see also Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 689–90 (2001) (listing judicial class-counsel auctions as a recent development that has "altered the class action landscape"). In securities litigation, the lead plaintiff chooses lead counsel, an approach Delaware rejects. 15 U.S.C. § 78u–4(a)(3) (2006).

172. *See supra* note 167 and accompanying text.

another area over which judges exercise considerable discretion. In Delaware, whether they are claiming to recover under a "common fund" theory or a "corporate benefit" theory,[173] plaintiffs' attorneys are entitled to a fee award if: (1) the claim was meritorious when filed; (2) there was an ascertainable class receiving the benefit; and (3) there exists a causal relationship between the benefit and the lawsuit.[174] Each of these requirements can be interpreted loosely or stringently to award or deny fees. Accordingly, even if jurisdictions other than Delaware considered fee awards a matter of substantive law, they would still have significant discretion in the amounts to award. For example, Delaware courts interpret the requirement that the suit be meritorious when filed to mean that some of the claims would have "some reasonable hope" of surviving a motion to dismiss.[175] This requires considerable judicial speculation when litigation settles before a motion to dismiss or motion for expedited proceedings is decided.[176] The causation requirement requires similar speculation in deciding, for example, whether corrective action taken by the

173. Under the "common fund" rule, the plaintiffs' attorney is awarded fees if he produced a monetary benefit to the class, and his fees are paid from this collective pot. Under the "corporate benefit" rule, the corporation pays the attorney's fees where the litigation has conferred a nonmonetary benefit on the shareholders such as a change to the merger agreement or additional disclosures. *See In re* First Interstate Bancorp Consol. S'holder Litig., 756 A.2d 353, 357 (Del. Ch. 1999) ("[T]he corporate benefit doctrine comes into play when a tangible monetary benefit has not been conferred, but some other valuable benefit is realized by the corporate enterprise or the stockholders as a group." (quoting *In re* Dunkin' Donuts S'holders Litig., No. 10825, 1990 WL 189120, at *1451 (Del. Ch. Nov. 27, 1990) (internal quotation marks omitted)); *see also* Goodrich v. E.F. Hutton Grp., Inc., 681 A.2d 1039, 1044–45 (Del. 1996) (describing common benefit rule); Norman M. Monhait & P. Bradford deLeeuw, *Negotiating and Litigating Fee Awards in Delaware*, 1740 PRACTISING L. INST. PROC. 561 (2009).

174. Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1167 (Del. 1989) (enumerating these factors in a significant benefit case); *Dunkin' Donuts*, 1990 WL 189120, at *1453 (enumerating these factors in a common fund case).

175. *See* Chrysler Corp. v. Dann, 223 A.2d 384, 387 (Del. 1966) ("It is not necessary that factually there be absolute assurance of ultimate success, but only that there be some reasonable hope."); *In re* First Interstate Bancorp Consol. S'holder Litig., 756 A.2d 353, 362 (Del. Ch. 1999) (holding that the complaint was meritorious because some claims survived a motion to dismiss).

176. In cases where the plaintiff actually survived a motion to dismiss or there were expedited proceedings, this prong is easy to meet. *See* San Antonio Fire & Police Pension Fund v. Bradbury, C.A. No. 4446-VCN, 2010 WL 4273171, at *10 n.75 (Del. Ch. Oct. 28, 2010) (holding that litigation was meritorious when filed because it proceeded to expedited proceedings); *Bancorp Consol.*, 756 A.2d at 362 (holding that litigation was meritorious when at least some claims in fact survived motion to dismiss). But the Delaware courts have held this prong is met even when plaintiffs have lost a summary judgment motion, because the relevant time frame for determining merit is when the case was *filed*. Allied Artists Pictures Corp. v. Baron, 413 A.2d 876, 879 (Del. 1980).

corporation prior to settlement was in fact caused by the litigation.[177] Finally, Delaware courts must approve the ultimate amount of plaintiffs' attorneys' fees on the basis of a series of open-ended factors that evaluate the amount of work and difficulty of the litigation.[178]

Fees in New York are rumored to be higher than in Delaware, yet the rules in the two states are functionally the same.[179] In New York, the class action rule governs attorneys' fees. It provides broad judicial discretion "based on the reasonable value of legal services rendered."[180] Similarly, New York plaintiffs must meet a causation requirement, showing that the suit was the "proximate cause" of the benefit obtained for the class.[181] If there is a consistent New York premium as some believe, it is the product of judicial discretion in fee awards. The New York awards may be consistently higher because of the higher cost of living and salaries in New York City, or because when New York judges discuss these matters amongst themselves they develop a collective sense of a higher "going rate" for certain types of settlements than Delaware.[182]

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177. Formally, the plaintiffs' counsel is entitled to a presumption that it may receive fees if the corporation took action subsequent to the complaint that renders the litigation moot. In that case, the burden shifts to the defendant to show that it took the action in question for some reason other than the lawsuit. In practice, it seems that this shift only requires the defendant to assert an alternative reason, and then the burden shifts back to the plaintiff to rebut that assertion. *See, e.g.*, Alaska Elec. Pension, Fund v. Brown, 988 A.2d 412, 418 (Del. 2010) ("[T]o overcome this presumption, the defendants must demonstrate that the lawsuit 'did not in any way cause their action.' " (quoting *Allied Artists*, 413 A.2d at 880)). In that case, plaintiffs filed lawsuits in California and Delaware, and the defendant settled with the Delaware plaintiffs. *Id.* at 415. The Alaska Electrical Pension Fund, the plaintiffs who had filed in California, initially objected to that settlement. *Id.* Thereafter, the acquirer increased its tender offer by nine dollars. *Id.* Based on this increase, the Alaska plaintiffs' lawyers sought fees in the Delaware case, but the court denied them. *Id.* at 416.

178. These are known as the "*Sugarland* Factors": (1) the benefit created/results achieved by the litigation; (2) the difficulty of the litigation and time and efforts of counsel; (3) the contingent nature of the undertaking; (4) the quality of the work performed; and (5) the standing and ability of counsel. *See* Sugarland Indus. v. Thomas, 420 A.2d 142, 149 (Del. 1980).

179. Like Delaware, New York courts permit attorneys' fees to be awarded where the litigation provides a "substantial benefit" to the class even if that benefit is not monetary. *In re* Cablevision Sys. Corp. S'holders Litig., 868 N.Y.S.2d 456, 467 (N.Y. Sup. Ct. 2008) ("The benefit need not have a 'readily ascertainable monetary value.' For example, where minority shareholders successfully establish that a proxy solicitation for an upcoming merger is materially misleading, they have conferred a substantial benefit on the corporation." (citations omitted)).

180. N.Y. C.P.L.R. 909 (MCKINNEY 2011).

181. *Cablevision Sys. Corp. S'holders Litig.*, 868 N.Y.S.2d at 468.

182. Deal litigation is litigated in the commercial part of the New York court system, where judges are somewhat more specialized, so there is a possibility that they discuss awards with one another. We do not have data on whether New York commercial part judges have the cohesiveness that the Delaware Court of Chancery seems to have.

The approval process that courts follow in determining fees awarded to class counsel is, in an important sense, nonadversarial. The defendant and shareholder class agree on the settlement prior to the judicial determination and all parties to the settlement have a strong interest in having the settlement and the concomitant fee award approved by the court.[183] This process may become adversarial, however, if the settlement or the fee award attracts objectors, as described above.[184]

The discretion in fee awards allows judges to reward the types of cases they seek to encourage and limit awards in the types of cases they prefer not to see.[185] Judicial attitudes towards fee awards are likely to be determinative.[186] Commentators note the increasing antiplaintiff rhetoric of the Delaware courts.[187] However, there are counterexamples. In a recent case, Chancellor Strine awarded the plaintiffs' firms a total of three hundred million dollars in attorneys' fees.[188] Strine took pains in the fee hearing to note that plaintiffs' firms that take risks will be rewarded in Delaware courts.[189] Some

183. As one prominent judge noted, class counsel and defendants' counsel cannot be relied on to point out unfair settlements; they are equally likely to "put one over on the court." Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc), *quoted with approval in* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2249 (1997); *see also* Alexandra D. Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 88–90 (2004) (noting the nonadversarial nature of fairness hearings and fee award determinations).

184. *See supra* notes 142–147 and accompanying text (describing the process for objecting to a settlement or fee award).

185. *See* Alison Frankel, *Record $285 Million Fee Award Is Strine's Message to the Plaintiffs' Bar*, THOMSON REUTERS NEWS & INSIGHT (Dec. 20, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/12_-_December/Record_$285_ml_fee_award_is_Strine_s_message_to_plaintiffs__bar/ ("Monday's hearing on the Southern Peru fee request made it clear that the chancellor wants a certain kind of (legal) business to remain in Delaware. At the 90-minute hearing Strine talked about why this case isn't like the M&A injunction suits that settle quickly for minimum benefit to shareholders."); *accord* Cain & Davidoff, *Great Game*, *supra* note 6, at 4 (finding that state courts modify fee awards to attract litigants).

186. Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1167 (Del. 1989) ("In applying these tests the Court of Chancery has broad discretion to deny fees to an individual plaintiff whose suit would not have been meritorious had demand on the corporation been practical or effective.").

187. *See* ABC, *Balancing Act*, *supra* note 6, at 1367–68 (discussing *In re* Cox Communications Shareholders Litigation, 879 A.2d 604 (Del. Ch. 2005), and *In re* Revlon, Inc. Shareholders Litigation, 990 A.2d 940 (Del. Ch. 2010)).

188. *See* Frankel, *supra* note 185 (noting that the award in the title was increased to three hundred million dollars).

189. *Id.* ("If lawyers are willing to litigate big cases through discovery and trial, he suggested, Delaware will make sure they're well compensated for their efforts.").

speculated that this massive award was a reaction to suggestions of an antiplaintiff bias among chancery judges.[190]

2. Buy-Side Opportunism

Defense lawyers, of course, are not perfect agents either. They may fight unnecessarily in order to increase billable hours, filing motions, and responses in all jurisdictions in which plaintiffs choose to file.[191] The defense-side tactic that draws the most criticism in this context is the reverse auction.[192] At the core, reverse auctions are controversial because they are considered to be a form of collusion in which defense attorneys and plaintiffs' attorneys work together to undercompensate shareholder claimants.[193] This can be understood as a defense-side agency cost on a theory that treats shareholders as the essential corporate constituency. Under this theory, defense attorneys serve as a kind of shareholder representative as opposed merely to representing the interests of management.[194]

Important structural mechanisms exist to tame the worst consequences of the reverse auction. These are judicial review and approval of settlement backstopped by the presence of objectors who can prevent class interests from being sold out.[195] In the context of merger litigation, at least, the reverse auction is most problematic when these structural mechanisms fail.[196] Unfortunately, there is reason to believe that these mechanisms often do fail because would-be objectors, to state the matter plainly, can be paid off. Defendants have an incentive to see that competing counsel are paid off to increase the certainty that the transaction will go forward.

As noted earlier, the benefit of settling merger litigation from the defendants' perspective is the repose that permits the deal to go forward. There is, however, a gap between the time that the parties

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190. *See, e.g.*, Cain & Davidoff, *Great Game*, *supra* note 6, at 2 ("The award was notable not only because of the amount, but because it came only a few weeks after Chancellor Strine had deliberately and publicly promoted the Delaware court as a friendly haven for plaintiffs' attorneys to bring meritorious class action litigation.").

191. *See* Transcript of Courtroom Status Conference, *supra* note 127, at 19 ("[D]efense lawyers benefit from this game, too. They get to bill hours without any meaningful reputational risk from a loss.").

192. *See supra* notes 133–135 and accompanying text.

193. *See supra* note 141 and accompanying text.

194. *See generally* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 306–22 (1998) (describing the evolution of the norm of shareholder primacy in corporate law).

195. *See supra* notes 142–46 and accompanying text.

196. In other contexts, such as mass torts, the mechanism may be more broadly objectionable. *See supra* note 148.

are able to agree on settlement terms and judicial approval of settlements. During this gap period, competing plaintiffs (objectors) may seek to dismantle the settlement as defendants attempt to push forward to close the transaction. As a result, defendants may make "global peace"—the inclusion of competing plaintiffs in the ultimate settlement—a condition to their settlement agreement. Whether competing plaintiffs' counsel accepts or rejects offers to join in low settlements thus becomes a crucial factor in determining whether a reverse auction can in fact occur.[197]

In spite of objectors' critical role in maintaining the integrity of the settlement dynamics described above, courts and commentators often view them with skepticism or downright contempt.[198] This view is driven by the practice of some attorneys who file objections in hopes merely of being paid to withdraw them—a practice labeled objector "extortion" or "blackmail."[199] This practice is also said to be a part of merger litigation. Some even suggest that many out-of-Delaware filings are the work of passive "professional objectors" who have no plans to actively litigate the case, but will insist on a share of the attorneys' fees in exchange for withdrawing (or never filing) their objections.[200] For our purposes, the fact that objectors can be and often are effectively paid off means objectors cannot be counted upon to monitor and constrain the worst excesses of the reverse auction.[201]

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197. For example, in *Nighthawk*, described *infra* notes 203–05, the Delaware plaintiffs appeared to be cooperating with the Arizona plaintiffs in settlement negotiations, to the dismay of the chancery court.

198. *See* Brunet, *supra* note 142, at 411 (describing objectors as "the least popular litigation participants in the history of civil procedure" and noting references to objectors as "warts on the class action process," "pond scum," and "bottom feeders"). Courts have adopted a similarly jaundiced view, occasionally sanctioning frivolous objections. *See, e.g.*, Vollmer v. Publishers Clearing House, 248 F.3d 698, 711 (7th Cir. 2001) (approving court-imposed fifty thousand dollars in sanctions—to be donated to a charity—against objecting attorneys on the basis of evidence that the objecting attorneys had no opportunity to dispute); *In re:* Wal-Mart Wage & Hour Emp't Practices Litig., MDL No. 1735, No. 2:06-CV-00225-PMP-PAL, 2010 WL 786513, at *2 (D. Nev. Mar. 8, 2010) (requiring objectors to post five hundred thousand dollar bond to appeal the court's decision to reject their objections to the settlement); *see also In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175, 193 (3d Cir. 2002) (upholding one hundred thousand dollars in sanctions against objecting counsel and reversing on due process grounds a "scarlet letter" sanction requiring that objecting counsel attach documentation of the sanctions proceeding to all future pro hac vice applications).

199. Brunet, *supra* note 142, at 426; Fitzpatrick, *supra* note 142, at 1624–25.

200. *See, e.g.*, LEBOVITCH ET AL., *supra* note 15, at 3.

201. The other side of the "blackmail" concern may be that objectors making meritorious objections are not recognized by the court and receive little or no compensation for their work. This discourages attorneys from objecting and encourages them to collude or to focus on positioning themselves to lead the litigation against challengers rather than pressuring the

Collusive settlement, in other words, may be a real and pervasive threat in merger litigation, leading the market for preclusion to systematically underprice shareholder claims.[202]

The Delaware chancery court recently addressed the issue of collusive settlement in *Scully v. Nighthawk Radiology Holdings, Inc.*[203] *Nighthawk* involved competing lawsuits in Arizona and Delaware. In the chancery court's preliminary review of the merits, the merger raised potentially serious process issues but no colorable disclosure claim.[204] The Delaware court refused to grant a motion to expedite and criticized the plaintiffs for bringing a weak complaint, apparently aimed at winning an easy disclosure-only settlement (and associated attorneys' fees).[205] Later, the court of chancery learned that the case had settled on disclosure grounds in an Arizona court.[206] Because the litigants settled the suit on what the Vice Chancellor had already found to be the weakest possible grounds,[207] the Delaware court decried the settlement as a "classic reverse auction."[208] The Vice Chancellor then appointed a special counsel to determine whether a collusive settlement had in fact occurred and, if so, what the

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defendant to offer a good settlement. *See supra* note 154 (citing cases involving potential undercompensation of would-be objectors).

202. While we suspect, on the basis of these arguments, that the shareholder claims are indeed systematically underpriced, there is currently no empirical data that we can point to in order to prove this. Settlement values in merger litigation are certainly small. *See supra* notes 48–52 and accompanying text. However, this fact is as consistent with low-quality claims as it is with systematic underpricing. Empirical data to support the claim of underpricing would be extremely difficult to gather because it would require a *qualitative* evaluation of a set of claims—that is, a subjective assessment based on a comprehensive review of case files—compared to their *quantitative* settlement values. For an example of this kind of analysis in another context (medical malpractice), see TOM BAKER, THE MEDICAL MALPRACTICE MYTH 68–87 (2007) (collecting and analyzing the closed-claim file literature on medical malpractice claims and settlements).

203. Transcript of Courtroom Status Conference, *supra* note 127, at 19–21 (expressing skepticism toward defendants' use of reverse auctions).

204. The preliminary review of merits came in the context of a motion to expedite, which in Delaware requires a "colorable claim" and the "threat of irreparable harm." *Id.* at 3.

205. *See id.* at 4 ("[M]y concern at that point was that the plaintiffs seemed only to be litigating soft disclosure claims for the purpose of setting up a disclosure-based settlement.").

206. *See id.* ("[I]magine my surprise when . . . I got a letter informing me that the parties had agreed to a disclosure-based settlement [in Arizona].").

207. *See id.* ("[T]he settlement consideration was the claims that I already said weren't colorable. There was no apparent effort to address the claims that I thought were colorable. And rather than coming back to me on this, the parties had decided to go to the Arizona state courts.").

208. *Id.* at 11; *see also id.* at 17 ("What happened here is the plaintiffs filed a case that really had legs. And I told you guys you had legs—it had legs. And what do you know. All of a sudden [defense attorneys] are both working over the plaintiffs to get them to Arizona. That's a problem.").

consequences should be, including potential revocation of the litigants' *pro hac vice* status.[209]

Defining the issue as whether the parties reached a low-value settlement as a result of an implicit or explicit agreement to buy off a particular plaintiffs' attorney,[210] the special counsel concluded that a reverse auction had not taken place. However, several traditional factors indicating collusion were indeed present.[211] The special counsel's reasoning ultimately emphasized the absence of hard evidence of collusion,[212] along with the fact that the *Nighthawk* settlement was comparable to other settlements in terms of speed, attorneys' fees, and discovery.[213]

Although the special counsel's report and the court's subsequent approval of the Arizona settlement were ultimately nonevents, *Nighthawk* represents a clear warning to counsel seeking to engage in collusive-settlement practices.[214] While we agree that

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209. *Id.* at 27–28.

210. Brief of Special Counsel at 26, Scully v. Nighthawk Radiology Holdings, Inc., C.A. No. 5890-VCL (Del. Ch. Mar. 11, 2011). The special counsel summarized the issue as follows:

> [A] collusive settlement in the context of stockholder deal litigation appears to involve, at its core, an explicit or implicit agreement between counsel for plaintiffs and counsel for defendants to require less consideration for the settling class in exchange for (1) exclusive dealings with particular plaintiffs' counsel and/or (2) more consideration for plaintiffs' counsel. Factors that should give rise to heightened scrutiny for collusiveness include the following: settlement consideration disproportionately weak in comparison to the strength of the claims asserted; settlement with a plaintiff's firm that typically does not litigate aggressively when other, more formidable, firms are involved in the litigation; and an agreement to pay attorneys' fees significantly higher than are typical given the settlement consideration.

Id. at 26–27.

211. *Id.* Factors present included: document discovery provided only for purposes of settlement, preferential negotiations with one set of plaintiffs' attorneys, exclusion of the Delaware plaintiffs from the negotiation, and the avowed willingness of the Arizona plaintiffs to settle for disclosures on a claim that had already been discredited in Delaware court, giving the Delaware plaintiffs the "ultimatum to get on board or lose out." *Id.* at 27.

212. *Id.* at 28 (citing the fact that there were more claims filed in Arizona than Delaware and that it is typically easier to induce minority plaintiffs to join a settlement with the majority than vice versa).

213. *See id.* at 28–29 ("With the exception of the parties' move to settle away from a jurisdiction that had made merits rulings, review of the parties' negotiations revealed a fairly typical arm's-length negotiation. . . . Nothing in the negotiations themselves were outside the bounds of similar negotiations in similar cases.").

214. *See* Transcript of Courtroom Status Conference, *supra* note 127, at 22:

> [M]any defense counsel historically seem to have regarded this reverse-auction dynamic as something wonderful . . . for the benefit of their clients. But as I tried to remind people in the Revlon case, you're dealing with fiduciaries for a class. And when you knowingly induce a fiduciary breach, you're an aider and abettor.

Moreover, Nighthawk is not the only Delaware decision critical of collusive-settlement practices. *See, e.g.*, Stepak v. Tracinda Corp., C.A. No. 8457, 1989 WL 100884, at *6 (Del. Ch. Aug. 21, 1989) ("Where there are two or more attorneys purporting to act on behalf of the same or

collusive settlement is a significant problem where it occurs, we disagree with the chancery court's approach in *Nighthawk*. Threatening to sanction defense counsel for engaging in collusive-settlement practices seems likely to overdeter since it is so difficult to distinguish an impermissible reverse auction from a valid exercise of the defendant's monopsony power. Moreover, a simple prohibition threatens to destroy the benefits associated with the reverse auction mechanism made possible by the filing of multiple suits, throwing the proverbial baby out with the bathwater. We therefore offer, in Part III below, a more nuanced response to the imperfections of the market for preclusion.

C. Positive Externalities of the Market for Preclusion: The Strategic Outsourcing of Corporate Law

Before proceeding to our policy discussion of how best to correct imperfections in the market for preclusion, it is worth pausing to consider the interests of a party that we have so far left out of our account: the state of Delaware. Even if the market for preclusion creates benefits for litigants in many cases, the flight of corporate law cases to other jurisdictions would nevertheless seem to present a dangerous situation to Delaware. The flight may result in a loss of expertise in its judiciary, a loss of revenues from incorporations, and the adulteration of the core Delaware product.[215]

Notwithstanding this parade of horribles, the market for preclusion offers substantial benefits to Delaware. Not only does the out-of-Delaware trend pose no serious threat to Delaware's dominant position in the corporate-chartering business, it also creates an opportunity to engage in a process we call *strategic outsourcing*—that is, an opportunity to keep good cases while letting bad ones go. Strategic outsourcing allows Delaware to reduce administrative costs and conserve judicial resources for deployment in those cases most likely to chart the future path of corporate law. It also permits Delaware to avoid cases that entail potential political risk to Delaware's position as the leading state of incorporation.

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overlapping classes, there is a special risk that a defendant will seek advantage in choosing the adversary with whom it will negotiate . . . ."); *In re* MCA, Inc. S'holders Litig., C.A. No. 11740, 1993 WL 43024, at *5 (Del. Ch. Feb. 16, 1993) ("The potential for this type of abuse clearly exists in representative litigation.").

215. *See supra* note 77 and accompanying text.

1. The Market for Preclusion and the Market for Corporate Charters

Delaware's position as the dominant jurisdiction of incorporation for American businesses, especially large businesses, creates enormous value for the state.[216] Thus, whatever its other advantages, if the market for preclusion threatened Delaware's dominance in the market for corporate charters, Delaware would have a good reason to take strong actions against it. But the market for preclusion does not threaten Delaware's near monopoly over the incorporation business. We consider first the effect of the market for preclusion on Delaware's competition with other states, and then with respect to the federal government.

In order for another state to challenge Delaware's dominance as a state of incorporation, it would need to offer a corporate law product that appealed to at least one of Delaware's two principal interest groups: managers or shareholders. No state has successfully mounted a serious challenge to Delaware, though some have tried.[217] In any event, the way forward for any state seeking to challenge Delaware law lies in the creation of that state's own law. By merely reinterpreting Delaware law (the most a state would be able to do with the occasional Delaware suit that landed in its courts) rival states cannot capture its advantages. The corporations they benefit are, after all, incorporated elsewhere. Should a rival state's court issue an opinion in such a case—itself a rarity[218]—it can only *improve* Delaware law since the desirable innovation immediately becomes part of Delaware law, while misapplications or misinterpretations can be swiftly disavowed.[219] Improving a rival's product is not an effective

216. *See* Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1210–11 (2001) (noting the enormous tax revenues Delaware receives as a result of its dominance in the market for incorporations).

217. Nevada has emerged as the most clear corporate law alternative to Delaware. *See generally* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012). Nevada clearly designed it this way. *See id.* at 953–55 (citing legislative history to show that a primary reason behind a 2001 amendment to free corporate officers and directors from liability was to make Nevada more competitive with Delaware with respect to the market for incorporations). In the legislature, for example, one state representative argued that "Nevada ought to offer some liability protection to directors of corporations" to accommodate incorporation fee increases and to generate more incorporation revenues. *See id.* at 953.

218. Non-Delaware courts deciding cases under Delaware law rarely issue opinions. *See* ABC, *Losing Cases*, *supra* note 6, at 617–18.

219. Legal improvement here has the character of a public good: the non-Delaware court has no real incentive to attempt it since all (or most) of the benefit of the improvement will be captured by Delaware. Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357, 358 (1974).

means of competition. The market for preclusion thus creates no real competitive opportunities for rival states.

Even if it is not the substance of Delaware corporate law but rather the expertise of its judiciary that explains that state's dominance in the corporate-chartering business, the market for preclusion still poses no threat to Delaware. No other state court is likely to develop a reputation of corporate law expertise equal to Delaware's merely as a result of hearing the occasional Delaware case. Nor will other states derive significant advantage by "scooping" Delaware and becoming the first to decide a novel issue of corporate law. The business community understands that the issue is not really decided until Delaware speaks.[220]

Individual judges in rival states may occasionally try to impose an idiosyncratic view of corporate law on the Delaware cases that come before them. However, such decisions are not likely to have any lasting effect in Delaware since they can be easily disavowed. Moreover, any systematic promanagement or proshareholder biases of a rival state's courts are likely to be self-correcting through the political clout of instate managers pushing back when courts tilt too far in favor of shareholders[221] or by the plaintiffs' bar ceasing to bring cases before courts that tilt too far in favor of management.[222] Thus, the principal incentive of a rival state's judiciary will likely be to decide whatever Delaware cases appear in his or her courtroom efficiently and correctly. The rival state's judiciary should waste as little time and effort as possible, considering his or her own crowded

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220. *See, e.g.*, Ryan v. Gifford, 918 A.2d 341, 349 (Del. Ch. 2007):

> [T]his Court noted, as it has in the past, that "novel and substantial issues of Delaware corporate law are best resolved in Delaware courts." Thus, while the application of Delaware law in most cases is not determinative, more weight must be accorded to this factor where the law is novel. Such is the case here.

As we explore below, Delaware judges do have an informal system by which they can win control over significant cases. *See infra* Part II.C.2.

221. Any non-Delaware court hearing a Delaware case is likely to be located in the state of the principal place of business of the defendant corporation. *See supra* note 60 and accompanying text (describing where cases may be filed). Thus, a judge that sought to reach a radical proshareholder outcome would harm a strong instate interest group (i.e., the defendant corporation) with no concomitant instate benefit as public shareholders are likely to be diffused throughout the country and the world. State judges, whether elected or appointed, are unlikely to cultivate reputations for hostility to prominent instate businesses.

222. *See supra* Part I.B (describing that it is plaintiffs who decide where to file initially). For an empirical study of the same phenomenon in a different context, see Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007).

docket.[223] The only real threat to Delaware, therefore, is the risk of innocent error in applying its law. Even this is likely to be rare since merger cases routinely settle. The role of the rival state courts in the market for preclusion is often to approve settlements.[224]

Likewise, Delaware has little to fear when its cases are brought in federal court, as many recently have been.[225] Although it may be true that the principal threat to Delaware is the federal government, not rival states,[226] the federal government exercises its power by preempting Delaware law through legislation and rulemaking.[227] There is little threat in a federal judge hearing the occasional Delaware case. Moreover, in the absence of federal incorporation,[228] federal judges have even less incentive than rival state judges to encourage merger litigation in their jurisdiction.[229] The market for preclusion, in sum, presents little threat to Delaware's dominance in the corporate-chartering business. Rather, as we describe in the next Section, it provides several opportunities for the state.

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223. This same dynamic suggests that in cases where Delaware seeks to retain control over a case pending in a parallel jurisdiction, the other judge's incentive is to cede control to Delaware in order to get the case off of his or her docket. However, we have also heard that sometimes judges in competing jurisdictions seek to control cases because of pride, the size of the case, or the import of the corporation in question to the local economy. Building an interjurisdictional dialogue, described below, may go some way toward rationalizing this decision. *See infra* Part III.

224. *See, e.g.*, Transcript of Courtroom Status Conference, *supra* note 127, at 5 (disapproving of the decision of the parties to seek approval of a settlement in an Arizona court that was unfamiliar with the issues of Delaware law and the case at hand). It is possible, however, that a rival court will schedule or even hear a preliminary injunction motion where the lawyers litigate the case vigorously. *See, e.g.*, *In re* The Topps Co. S'holders Litig., 926 A.2d 58, 63 (Del. Ch. 2007) (noting that a New York court scheduled a preliminary injunction motion). In meritorious cases, this is a benefit to shareholders because it will either prevent a poor merger or result in greater compensation.

225. *See supra* note 70 (describing increase in opinions from Federal courts).

226. *See, e.g.*, Roe, *supra* note 4, at 601 ("Delaware . . . gets to make, or keep, only the rules that the federal authorities do not make themselves. What is left for Delaware is only what is left after the federal authorities act."); *see also* Renee Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625 (2004) (describing how federal regulatory intervention has threatened Delaware's primacy in corporate governance).

227. Roe, *supra* note 4, at 600.

228. This is so because there is currently no system of federal incorporation available as an alternative to Delaware and, at present, no serious prospect for one. *See id.* at 602. This was not always so. *See, e.g.*, William Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 700–03 (1974) (proposing federal corporate uniformity standards to mitigate the "race to the bottom" among states).

229. The federal caseload alone seems to compel this conclusion. In 2011, for example, there were 55,763 and 294,336 cases filed in the U.S. courts of appeals and U.S. district courts, respectively. U.S. COURTS, JUDICIAL CASELOAD INDICATORS: 12-MONTH PERIODS ENDING MARCH 31 (2011), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/front/IndicatorsMar11.pdf.

2. Strategic Outsourcing

The basic outcome of the current regime is that Delaware courts do not hear every dispute involving Delaware corporations. This outcome offers a clear upside to the state—namely, the conservation of judicial resources and administrative costs. Yet, if the state really has no control over which cases it hears, then the value of such savings is suspect. Delaware could lose as many good cases as bad ones—worse, it could lose more good cases than bad ones. However, there is a system based on formal procedural rules and informal judicial communications by which Delaware can often retain control over many of the cases it prefers to decide. Even if the system is not perfect—which it is not—the fact that it functions much of the time suggests that a significant selection effect is present. Delaware can hear cases of first impression or cases that are otherwise likely to make a contribution to the body of accreted precedent. It can avoid bad cases such as those that are weak, dull, low value, or otherwise unworthy of the investment of judicial resources. Importantly, Delaware can use this ability to cherry-pick cases to avoid cases that may prove politically damaging.

Delaware can deploy several of the procedural rules described in Part II to keep desirable cases in its own courts. For example, Delaware can apply forum non conveniens analysis to retain control over a case in spite of its having been filed in another jurisdiction first.[230] Moreover, Delaware can expedite cases it would like to keep to increase the likelihood that another jurisdiction deciding whether to stay or proceed with a related claim will defer to the more advanced process in Delaware.[231] On the other side, Delaware courts can refuse to exercise this discretion for cases they are not especially eager to keep.

As important as the strategic use of formal procedural rules, but less remarked upon, is the informal system of communications

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230. *See supra* note 80 and accompanying text (explaining that Delaware has treated cases filed up to seven days apart as "simultaneously filed" and rejected the first-filed rule altogether in representative litigation in order to permit it to apply its forum non conveniens analysis to determine control over the lawsuit).

231. *See, e.g.*, *In re* Cnty. of York Emp. Ret. Plan v. Merrill Lynch & Co., Inc., C.A. No. 4066-VCN, 2008 WL 4824053, at *8 (Del. Ch. Oct. 28, 2008) (granting plaintiffs' request for expedited discovery). There the Delaware chancery court refused to stay a lawsuit challenging the merger of Merrill Lynch and Bank of America, even though a related federal action had been pending for eleven months. *Id.* at *1–5. The Delaware court further granted the plaintiffs' request for expedited discovery. *Id.* at *8 (after discussing the weaknesses of the various claims, the court stated that it "finds a sufficiently pled possibility of irreparable harm here to justify expediting the claims").

between judges across state lines regarding the control of a particular case.[232] Delaware judges frequently contact out-of-state judges in cases of known simultaneous litigation in order to avoid duplicative and inconsistent rulings.[233] For example, in *Nighthawk*, Vice Chancellor Laster sent a copy of the transcript of the hearing where he excoriated counsel for engaging in a reverse auction to the Arizona judge before whom the offending settlement was pending.[234] Likewise, in *Allion*, Chancellor Chandler encouraged parties to file motions requesting that judges in parallel jurisdictions confer with one another.[235] Similar informal communications between state and federal judges occur in mass tort cases.[236] There is, as yet, no formal mechanism to trigger this type of communication across jurisdictional boundaries; we propose one in Part III, below. Such consultations may not always be effective.[237] Nevertheless, informal communications constitute another tool in the hand of a judiciary seeking to retain control over a case.

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232. Further research remains to be done on these networks of informal communications.

233. Evan O. Williford, *Chancery Rules on Revlon Standard for Mixed Case/Stock Deals*, DEL. CORP. L. UPDATE (May 31, 2011, 10:50 AM), http://evanwilliford.wordpress.com/category/preliminary-injunction.

234. *See In re* Allion Healthcare Inc. S'holders Litig., C.A. No. 5022–CC, 2011 WL 1135016, at *4 n.12 (Del. Ch. Mar. 29, 2011):

> [M]y preference would be for defendants to "go into all the Courts in which the matters are pending . . . asking those judges to please confer and agree upon . . . what jurisdiction is going to proceed and go forward and which jurisdictions are going to stand down and allow one jurisdiction to handle the matter."

Transcript of Courtroom Status Conference, *supra* note 127, at 25 ("Now—but to ensure that the Arizona Court is informed, I will enter an order directing the Register in Chancery to provide a copy of this transcript and other materials from this case to the Court."); *see also* Micheletti & Parker, *supra* note 6, at 38 n.177 (citing these cases for the same proposition).

235. *See In re Allion Healthcare*, at 4 n.12:

> [J]udges in different jurisdictions might not always find common ground on how to move the litigation forward. Nevertheless, this would be, I think, one (if not the most) efficient and pragmatic method to deal with this increasing problem. It is a method that has worked for me in every instance when it was tried.

236. The Federal Judicial Center recommends such communications. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 20.14 (4th ed. 2004) (discussing communication between courts where related cases are filed in different jurisdictions and the importance of effective communication); *id.* § 20.31 (describing informal communication methods); *id.* § 21.15 (discussing coordination in the context of parallel class actions).

237. Informal communications, for example, may not be as effective in leading to a stay of one action when the competing jurisdiction is a federal court as opposed to another state court. Federal courts will proceed with parallel litigation unless there are "exceptional circumstances." *See supra* notes 88–91 and accompanying text. Delaware courts seeking to retain jurisdiction are generally unlikely to benefit from the "exceptional circumstances" contemplated by federal law, and will therefore have to use formal procedures, such as expediting discovery, to retain control of a case filed concurrently in federal court.

The combination of formal and informal systems to allocate control provides Delaware with considerable discretion over which cases it will decide and which cases it will allow to go to another jurisdiction. This sorting mechanism is not perfect—*Topps*, after all, did happen.[238] The availability of various tools at Delaware's disposal, however, suggests that the cases that are staying in Delaware are not selected solely by plaintiffs' counsel, but also by chancery itself. This means Delaware likely already hears more good cases than bad ones.

A good case, in this context, may be one that allows Delaware to clarify aspects of corporate law or one that allows Delaware to develop corporate law doctrine to respond to contemporary events. Between 2003 and 2006, for example, Delaware announced several important decisions that honed the doctrinal meaning of "good faith" as a tool to increase corporate accountability. These decisions responded to a political climate (in the aftermath of the Enron and WorldCom debacles) that threatened Delaware's primacy as a corporate lawmaker.[239] Developing this jurisprudence consumed significant judicial resources, including a televised multiday trial in Delaware chancery court. It is obviously easier for Delaware to muster judicial resources for such "statement" cases if it has a pressure-relief valve, releasing it from the necessity of hearing every case filed under Delaware law. This is especially true if a lawsuit accompanies every merger. The market for preclusion provides Delaware with just such an opportunity.

Strategic outsourcing is useful in another political sense. Delaware may take advantage of parallel litigation to avoid hearing cases that risk stirring a backlash against Delaware and thus jeopardize its dominant position as a corporate lawmaker. The case in point is the merger between Bear Stearns and J.P. Morgan Chase, brokered by the Federal Reserve and the Treasury Department in the midst of the 2008 financial crisis.[240] The ultimate merger agreement

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238. *See supra* notes 82–87 and accompanying text.

239. *See, e.g.*, Comm. of Unsecured Creditors of Integrated Health Serv., Inc. v. Elkins, C.A. No. 20228-NC, 2004 WL 1949290, at *9 nn.36–37 (Del. Ch. Aug. 24, 2004) (conceptualizing good faith analyses as belonging under both the duties of loyalty and care); *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 278 (Del. Ch. 2003) (establishing good faith as a claim that is independent of the duties of care or loyalty, but which is tied to those two traditional fiduciary duties). *See generally* Griffith, *supra* note 4, at 16, 44–52 (arguing that the Delaware judiciary developed the good faith doctrine in response to the corporate scandals that started in the early 2000s).

240. *In re* Bear Stearns, C.A. No. 3643-VCP, 2008 WL 959992, at *1–3 (Del. Ch. Apr. 9, 2008). For a detailed discussion of this deal and Delaware's political dilemma in taking the case,

included harsh deal-protection provisions that likely would have given the shareholder plaintiffs grounds for injunctive relief.[241] Rather than enjoining a transaction that the federal government deemed necessary to prevent the collapse of the U.S. financial system, the Delaware chancery court took notice of a parallel proceeding in New York state court and stayed proceedings in Delaware.[242] The unstated but unmistakable rationale of the court was that New York could be responsible for bringing down the financial system if it liked,[243] but Delaware would not presume to do so. Thanks to the pendency of the New York action, Delaware did not need to distort its precedent in order to bring about the necessary result.[244] Clearly such threats to Delaware's primacy as a corporate lawmaker are rare, but as the *Bear Stearns* example shows, they do come up. The market for preclusion provides Delaware with an important pressure-relief valve for avoiding such situations.

What all of this suggests to us is that the market for preclusion may provide important benefits to its participants. It allows Delaware courts to avoid both low-value and politically costly cases while still making law in statement cases. Shareholders meanwhile benefit from the improved outcomes they receive through their attorneys' use of pressuring rules and, equally, through the ability of defendants to bring low value claims to a quick conclusion via the market mechanism. While these mechanisms may be subject to abuse, a problem we have acknowledged and will address in the next Part, the benefits inherent in the market for preclusion suggest that multijurisdictional litigation is not the source of deadweight loss that

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see Kahan & Rock, *supra* note 12, at 716–21, 744–59; Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 127–30 (2009).

241. *See* Kahan & Rock, *supra* note 12, at 719–20, 743–44 (describing the Share Exchange Agreement and analyzing its preclusive effect).

242. *Id.* at 720–21.

243. Fortunately for New York and perhaps all Americans, the shareholders withdrew their objection to the merger before the New York court needed to decide the issue. *Id.* at 721.

244. In the words of Professors Kahan and Rock:

> By taking advantage of the pendency of actions in New York and the defendants' motion to stay, and by invoking the doctrine of comity to allow a New York trial court judge to decide a pure question of Delaware corporate law, Delaware managed to dodge both bullets. On the one hand, it could predict that the New York judge would not enjoin the transaction for a similar set of reasons that would lead Delaware to refrain from enjoining such a deal. On the other hand, any decision approving the merger would have no precedential value in Delaware and thus would not disturb its case law. And if the New York court were to distort the facts to reach such a decision, it would matter even less for Delaware.

Id. at 756 (citation omitted).

others have suggested.[245] The next Part discusses how to regulate the market for preclusion to correct its anticipated defects.

III. RECONCEPTUALIZING COMITY

Ultimately, multijurisdictional merger litigation is a product of federalism. Comity requires that states respect other states' laws. This principle, combined with corporate law's internal affairs doctrine, allows Delaware to export its corporate law throughout the United States.[246] States are understandably reluctant to cede all authority over what they consider to be instate businesses merely because the organizational documents are filed elsewhere. For example, Wal-Mart is a Delaware corporation with its principal place of business in Bentonville, Arkansas.[247] Wal-Mart is famously centralized, negotiating all contracts in Bentonville and controlling even the number of items on the shelves in every store across the United States from Bentonville.[248] It is not hard to see why Arkansas might believe that it has as much right to adjudicate the fate of Wal-Mart as Delaware—even if it is not the state of incorporation and even if it has to apply Delaware law to reach its decision.

Federalism means not only that the national government is asked to respect Delaware's sovereignty but also that Delaware and every other state is asked to respect the sovereignty of sister states operating within legitimate spheres of control. The situation described in this Article presents an overlap of these spheres of control, creating a tension between sister states. Any solution to this problem must account for these important horizontal federalism concerns.

Since the ratification of the Constitution, no robust theory has developed to explain how the states ought to get along in spheres in which the federal government does not intervene. The Full Faith and Credit Clause gives little insight into the horizontal relationship

245. *See* Strine, Hamermesh & Jennejohn, *supra* note 54, at 25–26 (asserting that multiforum litigation leads to deadweight loss). The difference in our positions may be due, in part, to our starting point on the value of merger litigation generally. *See supra* notes 54–55 and accompanying text.

246. Under the internal affairs doctrine, states apply the substantive law of the state of incorporation notwithstanding the location of headquarters or other contacts that the corporation may have with the state. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983).

247. *Frequently Asked Questions: Operations*, WALMART.COM, http://investors.walmartstores.com/phoenix.zhtml?c=112761&p=irol-faq (last visited Aug. 1, 2012).

248. CHARLES FISHMAN, THE WAL-MART EFFECT: HOW THE WORLD'S MOST POWERFUL COMPANY REALLY WORKS AND HOW IT'S TRANSFORMING THE AMERICAN ECONOMY (2006).

between states.[249] The scholarly literature is not helpful because for the most part it focuses on the relationship between the states and the federal government.[250] Hence, the prevailing theory of comity can be concisely summarized as follows: in those areas where there is no federal intervention, states exercise power within their territories and lack power outside their territories.[251] To date, the formal relationship between state courts has been limited to the decision to stay a case or to decline jurisdiction.[252] The limits of both the theory and the practice of comity are most evident when this process fails and lawsuits over the same subject matter proceed simultaneously in two jurisdictions.

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249. *See* Robert H. Jackson, *Full Faith and Credit: The Lawyers' Clause of the Constitution*, 45 COLUM. L. REV. 1, 19–20 (1945) (describing the limitations of the courts' interpretation of the Full Faith and Credit Clause and arguing in favor of greater integration of our legal systems). The federal courts can rarely decline jurisdiction. *See* discussion of the *Colorado River* doctrine, *supra* notes 88–91 and accompanying text.

250. This is not to say that there has not been a great deal of thoughtful recent scholarship focusing on various aspects of federalism. *See, e.g.*, SCHAPIRO, *supra* note 28 (focusing on the interaction between federal, state, and local actors, coining the term "polyphonic federalism" to describe the variety of interactions); Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 584–92 (2010) (explaining the importance of coordination between government and private actors); David Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1586–94 (2009) (arguing that Full Faith and Credit Clause was intended as an evidentiary rule, not as a self-executing provision, and that the focus should be on the effects clause); Heather K. Gerken & Jessica Bulman-Pozen, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009) (illustrating how states can both be harnessed by the federal government to realize national policy goals and how states can resist the attempts by the federal government to realize these goals); Abbe Gluck, *Intersystematic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1960–68 (2011) (emphasizing the role of states as interpreters of federal law by focusing on the different methodologies state courts employ when interpreting federal statutes); Gillian E. Metzger, *Congress, Article IV and Interstate Relations*, 120 HARV. L. REV. 1468, 1493–98 (2007) (focusing on the relationship between the federal government and state courts as regulated by both the Full Faith and Credit and Effects Clauses); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 626–28, 630–34, 642–44 (2001) (criticizing the Supreme Court's inaccurate description of the relationship between federal, state, and local governments); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009) (describing history of attempts to legislate the effects of sister-state judgments in the early Congress and ultimate failure to do so).

251. This theory is at least as old as the Supreme Court's opinion in *Pennoyer v. Neff*, that famous personal jurisdiction case most students are assigned in their first year of law school. 95 U.S. 714, 722 (1877) (explaining that two principles of public law apply to the relationship between the states: "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.").

252. *See* Jackson, *supra* note 249, at 31 (discussing state power to dismiss actions under the doctrine); *supra* note 80 and accompanying text (discussing standards for stay or dismissal under forum non conveniens doctrine).

Principles of comity are not sufficiently well developed to address this type of problem.[253]

But of course the territorial theory of comity is not an accurate description of the relationship between the states. The fact that Delaware succeeded in exporting its corporate law to every state in the country demonstrates that the relationship between the states is one of overlapping spheres rather than separate territories. Accordingly, a more substantial conception of comity than the traditional framework of territoriality and vertical control is needed. Since a state court cannot usurp the power to enjoin parallel actions outside its jurisdiction, and centralization is undesirable, the most efficient solution is likely to be found through negotiation.

Our approach contrasts with the recommendations of other commentators who advocate solving these problems with greater centralization and control. These commentators typically give short shrift to the competing interests of sister states and the potential benefits of overlapping jurisdiction. In the sections that follow, we first critique centralization. Then we sketch a more robust conception of horizontal comity that we think responds appropriately to the defects in the market for preclusion.

A. Against Centralization

All class actions founded on state law once raised the multijurisdictional litigation issues now facing merger litigation.[254] With the passage of the Class Action Fairness Act ("CAFA"), however, class actions were effectively federalized, allowing all suits to be consolidated in a single federal court.[255] Multijurisdictional litigation persists in the merger context only because corporate law class actions

253. *See generally* Smith v. Bayer Corp., 131 S. Ct. 2368, 2381 (2011) (noting, in a case concerning overlapping class actions, that "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs").

254. *See, e.g.*, Geoffrey Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 540–42 (1996) (discussing the challenges of duplication and overlaps); Nagareda, *supra* note 17, at 159 (discussing the "market for preclusive effect"); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 512–19 (2000) (discussing various areas of the law in which parallel class actions were brought predating CAFA).

255. Class Action Fairness Act of 2005, Pub. L. 109–2, 119 Stat. 4. CAFA was widely seen as a boon to corporate defendants because it effectively killed the national consumer class action, making it significantly more difficult for consumers to vindicate their rights collectively. *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013), *available at* http://ssrn.com/abstract=2038985 (describing the difficulties plaintiffs faced in organizing a class action under CAFA).

were explicitly carved out of CAFA in order to preserve Delaware as a forum for corporate disputes.[256] Now many of the core policy arguments that were originally sounded in favor of CAFA—arguments focusing on the costs of forum shopping and the proliferation of duplicative nonmeritorious suits[257]—are being made in the context of merger litigation.[258] It is therefore unsurprising to find that a similar approach—consolidation and centralization—dominates contemporary policy discussions of multijurisdictional merger litigation.

There are at least three approaches to centralization in the context of merger litigation. The first is to mandate exclusive federal jurisdiction over merger litigation.[259] A second approach imposes exclusive jurisdiction for merger litigation in the state of incorporation.[260] A third, similar to the second, would establish centralization as an opt-in strategy rather than a legal mandate by encouraging the adoption of forum-selection provisions in corporate charters or bylaws.[261] In our view, each of these approaches upsets the balance of federalism unnecessarily, destroying the potential benefits of the market for preclusion.

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256. *See* 28 U.S.C. § 1453(d)(2) (2006) (excepting removal from class actions that solely involve "internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized"). There were also exceptions for securities class actions, 28 U.S.C. § 1453(d)(1), presumably because the PSLRA & Securities Litigation Uniform Standards Act of 1998 ("SLUSA") already address jurisdictional issues in that area. *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) (addressing private securities class actions); Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. 105–353, 112 Stat. 3227 (discussing removal of covered class actions).

257. *See, e.g.*, J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1164–65 (2012) (discussing CAFA's legislative history); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2039 & n.9 (2008) (describing CAFA's stated purpose and analyzing the "jurisdictional paradox" it embodies). For arguments raising similar concerns and predating CAFA, see Miller, *supra* note 254, at 516 (arguing that overlapping class actions burden the efficient enforcement of the law).

258. *See supra* notes 14–16 and accompanying text.

259. The multidistrict litigation statute allows related federal suits to be transferred to one forum. 28 U.S.C. § 1407.

260. *See, e.g.*, ABC, *Balancing Act*, *supra* note 6, at 1395–96 (citing a federal proposal to limit multidistrict litigation to the state of incorporation).

261. Proponents of this approach include Stanford law professor and former SEC Commissioner Joseph Grundfest and prominent defense-side litigator Ted Mirvis. Joseph Grundfest, *Choice of Forum Provisions in Intra-Corporate Litigation: Mandatory and Elective Approaches* 15–16, 24 (Rock Ctr. for Corporate Governance at Stanford Univ. Working Paper No. 91, Oct. 6, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690561; *Anywhere But Chancery*, *supra* note 64, at 17.

1. Forced Federalization

In general, the federalization of class actions has been part of a strategy to tame (or kill) the beast of litigation.[262] It is not clear, however, that the federalization of merger class actions would have the effect of taming or killing them. CAFA dealt a serious blow to national consumer class actions. The reason for this is the difficulty of the choice-of-law inquiry in national suits. Consumer protection laws differ from state to state, although the product or service may be uniform. As a result, federal courts have held that individual choice-of-law issues predominate over collective issues, so that national classes cannot be certified.[263] Merger litigation does not present this hurdle to certification since all claims, wherever the shareholders or the corporation may in fact reside, arise under Delaware law.

Plaintiffs might benefit from the federalization of merger litigation since many of the pressuring rules discussed above are available in federal court.[264] The federal system does not approach these procedural issues in a uniform manner. This creates the potential that plaintiffs will file strategically in the federal district they think most beneficial to them. Competing lawsuits will

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262. *See* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 595 (1997):

> Defendants have historically used federal class actions to resolve their litigation problems in the context of securities, financial, commercial, employment, and other types of cases. They have long been successful in obtaining finality, predictability, and a cessation of financial and public relations bleeding by agreeing to class action settlements to disputes.

See also Klonoff, *supra* note 255, at 1–7 (discussing genesis of CAFA as an attempt to limit use of the class action device); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1852–55 (2008) (discussing how Congress passed CAFA in an effort to address abuses in class action lawsuits).

263. At least under current interpretations of FED. R. CIV. P. 23(b)(3). *See* Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1857 (2006) (describing barriers to certifying class actions invoking laws of multiple states). *But see* Sullivan v. DB Inv., Inc., 667 F.3d 273, 301–05 (3d Cir. 2011) (approving settlement despite some variations in state laws and noting that the class action could not be certified for litigation).

264. For example, federal courts may make expedited discovery available more readily than Delaware courts. Federal courts may make more information available to plaintiffs by limiting the business strategy immunity. Some federal judges may schedule preliminary injunction hearings more readily than their Delaware counterparts. A jury trial may be available in federal court where it would not be an option in Delaware chancery court. *Cf.* Byrd v. Blue Ridge Elec. Coop., 356 U.S. 525, 537–39 (1958) (holding that the *Erie* doctrine does not mandate that state law limiting access to jury be applied in federal court because the jury right is an "essential factor in the process for which the Federal Constitution provides"); *see also supra* note 119 (addressing applicability of Seventh Amendment to merger litigation).

eventually be consolidated into a single federal court.[265] However, it will not always be the same federal district, nor can the defendant be guaranteed that the federal court that ultimately hears the case will be the one that best suits its interests.[266]

It is important to recall, as well, that the technical barrier to federalizing merger litigation is the express exception to CAFA excluding suits relating to the internal affairs or governance of a corporation.[267] This exception exists to protect the interests of Delaware more than it does the interests of plaintiffs or defendants.[268] Federalization hurts Delaware by realizing the state's persistent fears that it will lose control over the corporate law product and no longer be able to extract value from its leading position in the market for corporate charters.[269] Moreover, insofar as the coherence of Delaware corporate law administered by an expert judiciary provides value to corporations and their shareholders, federalization threatens to harm them, as well, without providing a clear countervailing benefit.[270]

2. Delaware Repatriation

A second proposal for resolving the problem of multiforum merger litigation is to require that all litigation concerning the internal affairs of a Delaware corporation be brought in Delaware.[271] Setting aside the practical difficulties of passing such legislation,[272] does centralizing merger litigation in Delaware produce a better outcome for either the various stakeholders or society?

A Delaware-only solution offers several benefits. It would save resources across jurisdictions by avoiding duplicative judicial effort. It

265. It is possible to transfer venue anywhere in the federal system. 28 U.S.C §§ 1391, 1404, 1407 (2006).

266. All this could change, of course—the federal courts could develop a uniform jurisprudence in this area. But even if they did, it is unlikely that uniformity across federal circuits would be swiftly achieved. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1571–72 (2008) (describing lack of uniformity in the federal courts).

267. 28 U.S.C. § 1453(d)(2).

268. *See supra* note 256 and accompanying text.

269. *See* Griffith, *supra* note 4, at 54.

270. Even if these benefits are, in general, overstated, it does seem clear that federal courts, inundated as they are by a variety of cases, would not be willing or able to develop the same expertise in corporate cases as the judges of the Delaware Court of Chancery.

271. *See* Myers, *supra* note 6 (proposing a system where all merger cases not brought in the state of incorporation would be removed to federal court and stayed pending resolution in the courts of the state of incorporation).

272. For a discussion of the doctrinal limitations on states' abilities to create exclusive jurisdiction, see Winship, *supra* note 6, at 18–19, 21–22 (describing states' limited ability to claim exclusive jurisdiction as to federal courts or courts of other states).

would eliminate the additional expenses incurred by defendants when defending in multiple forums. To the extent that Delaware courts are predictable in their application of the discretionary substantive and procedural legal standards, it would decrease volatility of outcomes.

Concentration of litigation in Delaware also has its costs. First, Delaware would be unable to avoid deciding certain classes of cases that, as mentioned earlier, it might like to avoid. Its dockets would be clogged with "junk" cases, and it would have no alternative but to decide those politically sensitive issues that it might prefer to outsource. By contrast, a system that allows Delaware to outsource both junk and politically sensitive cases will permit Delaware judges to focus on developing the best corporate law in cases presenting novel issues.

Second, shareholders with meritorious claims may be stymied in Delaware because of (real or perceived) promanagement bias. Centralization would eliminate the safety valve aspect of multijurisdictional litigation. Indeed, the out-of-Delaware trend encourages Delaware courts to remain receptive to plaintiffs' interests.[273] A Delaware monopoly over merger litigation thus threatens to increase the state's promanagement bias, leading to worse outcomes for plaintiffs and a greater risk of federal intervention in state corporate law.[274]

Finally, defendants may also suffer because centralization will likely make it more difficult to settle low-value cases expeditiously. Centralization means litigants cannot use the reverse auction to make quick work of low-value claims. Less controversially, the hesitance of Delaware courts to appoint lead counsel may make them a slower forum in which to resolve cases than jurisdictions that can create a clear negotiating partner with whom the defendant can settle.[275] Centralization in Delaware is also unlikely to kill off low-value merger litigation, should that be the reformers' aim, considering the chancery's willingness to approve nonpecuniary relief and attorneys'

273. *See* sources cited *supra* note 4 (describing how competition causes Delaware to balance its approach to shareholders and management); *see also* ABC, *Balancing Act*, *supra* note 6, at 1395 (arguing that the out-of-Delaware trend ought to cause chancery to be more friendly to plaintiffs' lawyers, thereby balancing its prodefendant approach).

274. *See supra* notes 226–27 and accompanying text (discussing the risk of federal preemption).

275. Consider the *Nighthawk* case in this light. Whereas the case might have continued in Delaware chancery court, defendants were able to leverage the Arizona forum to settle the litigation and move on with the merger. Transcript of Courtroom Status Conference, *supra* note 127, at 4. A true Delaware-only solution would eliminate this possibility.

fees.[276] Accordingly, even if Delaware were the sole forum for merger litigation, plaintiffs could still file nonmeritorious suits and potentially hold up transactions for high-value settlements.

3. Forum Selection in the Charter or Bylaws

Moving away from top-down mandates, the solution that attracts perhaps the most attention is the ability of Delaware corporations to engage in self-help by adopting forum-selection bylaw provisions in their formation documents. Delaware recently indicated its approval of this method when Vice Chancellor Laster suggested in dicta that "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes."[277] Numerous commentators picked up on this thread, arguing that forum-selection provisions are clearly enforceable if placed in the corporate charter[278] and arguably enforceable if placed in the bylaws.[279] Although still relatively rare, corporations have begun to adopt forum-selection provisions.[280] Interestingly, corporations adopted these positions in the aftermath of Vice Chancellor Laster's remarks, demonstrating how quickly the corporate bar heeds the advice of the Delaware bench.[281] As of this writing, several suits are pending in the chancery court concerning whether forum-selection provisions are enforceable when adopted in a corporation's bylaws rather than its charter.[282]

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276. *See, e.g.*, *In re* Sauer-Danfoss S'holders Litig., No. 5162-VCL, 2011 WL 2519210, at *17–18 (Del. Ch. Apr. 29, 2011) (discussing disclosure-only settlements and fee regimes).

277. *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 (Del. Ch. 2010); *see also, e.g.*, *In re* Facebook, Inc., IPO Sec. & Derivative Litig., MDL No. 12-2389, 2013 WL 525158 (S.D.N.Y. Feb. 13, 2013) (upholding Delaware forum-selection clause in firm charter as basis for dismissing plaintiffs' actions in California). Leading practitioners have concluded from this that "absent fraud, a mandatory forum-selection clause . . . is absolutely enforceable under Delaware law." DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY §5.04[a] at 5-62 (2009).

278. Micheletti & Parker, *supra* note 6, at 35–36.

279. LATHAM & WATKINS, DESIGNATING DELAWARE'S COURT OF CHANCERY AS THE EXCLUSIVE JURISDICTION FOR INTRA-CORPORATE DISPUTES: A NEW "MUST" FOR DELAWARE COMPANY CHARTER OR BYLAWS 2–3 (2010).

280. Grundfest, *supra* note 261, at 3.

281. *Id.* at 7 (showing that fifty-nine percent of the firms in his sample adopted their forum-selection provision after *Revlon*).

282. *See* Alison Frankel, *Shareholder Lawyers Sue over Delaware Forum-Selection Bylaws*, THOMAS REUTERS NEWS & INSIGHT (Feb. 8, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/02_-_February/Shareholder_lawyers_sue_over_Delaware_forum-

Several aspects of the larger forum-selection issue bear directly on the discussion here.[283] For example, the fact that corporations seem to be adopting forum-selection provisions might undermine our contention that the market for preclusion promises to benefit defendants as well as plaintiffs. If defendants benefit from the market for preclusion, why would they seek to adopt a forum-selection provision that forces them to litigate in a single jurisdiction? We have a twofold response to this objection.

First, not all forum-selection provisions mandate a particular forum. Instead, the innovative *elective* forum-selection provision provides the adopting corporation "with the option either to compel that litigation proceed in the state of incorporation or to allow the litigation to proceed in another state, but only if a complaint has been filed in that state and only if the corporation consents."[284] The election is entirely in the hands of the defendant corporation, leaving defendants with the tacit option of running a reverse auction or enforcing the provision and returning to Delaware. The elective forum-selection provision preserves the defense-side benefits of the market for preclusion. By allocating all discretion to defendants, it may destroy the plaintiff-side benefits, rendering it potentially problematic.[285]

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selection_bylaws/ (discussing cases pending in chancery court about enforcement of forum-selection clauses). The cases include Boilermakers Local 154, Ret. Fund v. Danaher Corp., No. 7218, 2012 WL 381847 (Del. Ch. Feb. 6, 2012), and Boilermakers Local 154, Ret. Fund v. Priceline.com, No. 7216, 2012 WL 420778 (Del. Ch. Feb. 6, 2012).

283. The technical question of whether a corporation must adopt its forum-selection provision in the bylaws or in the charter is beyond the scope of this Article.

284. Grundfest, *supra* note 261, at 6. Professor Grundfest provides sample language for an elective forum-selection provision as follows:

> Unless the corporation consents in writing to the selection of an alternative forum, The Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the DGCL, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this Article VII, Paragraph D.

Id. at 8.

285. We are concerned that such clauses would permit the most pernicious effects of the reverse auction while severely limiting the possibility for aggressive plaintiffs' lawyers with meritorious cases to pursue their claims. Aggressive plaintiffs would still be able to pursue their cases in Delaware, but may not get lead counsel status there or may have to watch as the case is sold out from under them in a reverse auction. Our view on this point is that if Delaware were to adopt the position we advocate—that the market for preclusion ought, for now at least, to be encouraged—then it should consider not enforcing elective forum-selection provisions since they

Second, with respect to mandatory forum-selection provisions, corporations may be reacting to the Delaware judiciary's rejection of reverse auctions. Most corporations are adopting mandatory forum-selection provisions.[286] This might imply that the market for preclusion is of little advantage to them. This may well be; if so, it is likely because the Delaware judiciary effectively precludes them from using the market to their full advantage. After all, defendants' counsel will hesitate to take advantage of the reverse auction mechanism, even in its mildest forms, when doing so may result in the loss of their *pro hac vice* status or other judicial sanction.[287] When the basic value to them is taken away through threats and harsh criticism—criticism that, as we have argued, is sometimes misguided—defendants can be forgiven for finding little remaining value in participating in the market for preclusion. This impulse—and the irregular rate of legal change—may explain the adoption of mandatory, as opposed to elective, forum-selection provisions. In a world where parties are free to participate in a well-working market for preclusion, we expect few firms to adopt mandatory forum-selection provisions.

B. Remaking the Market

Having rejected centralization, what alternative solution is there to the distortions introduced into the market for preclusion by the potential for opportunistic conduct? We believe that a better balance between efficiency and federalism can be achieved by regulating the market for preclusion through enhanced judicial oversight. Effective judicial oversight requires that judges have the tools and information necessary to police opportunism and the ability to communicate and coordinate across jurisdictional lines. The next two Sections will address first the policing function of judges and then how communication and coordination can make judicial oversight more effective across jurisdictional lines. We begin with what judges can do in their own courtrooms. We also recognize that without

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threaten to destroy the market by eliminating the value to plaintiffs. Even if such clauses were upheld, our proposals of monitoring and encouraging objectors would still be necessary. There is interesting game theoretic work to be done on the interaction between counsel selection rules, procedural benefits, and forum selection clauses on litigation, but that is beyond the scope of this Article.

286. Of the twenty-five forum-selection provisions in Professor Grundfest's sample, a total of eight were elective—that is, thirty-two percent. Grundfest, *supra* note 261, at 10.

287. *See supra* note 209 and accompanying text (discussing the threat, in *Nighthawk*, to remove defense counsel's *pro hac vice* status in connection with an apparent reverse auction and the ripple effects this threat was likely to have in the defense bar).

communication and coordination, the availability of alternative forums will put pressure on judicial policing because strategic filers can avoid jurisdictions where regulations do not favor them. Accordingly, we consider what rules can be adopted to develop such communication and coordination.

Underlying these proposals is an appeal to the basic principle of horizontal comity: mutual respect between jurisdictions. Such mutual respect requires an opportunity for dialogue. Given the shared interests and culture of judges even across jurisdictions, we hope this will ultimately lead to trust and cooperation. The development of an ongoing dialogue between judges will ease competition between courts and ultimately result in the type of cooperation needed to address the problems of multidistrict litigation.[288] Currently, only limited mechanisms exist for ongoing dialogue. Our proposals fill this gap.

1. Policing Opportunism

As we have shown, the prospect of litigation agency costs inhibits the efficient functioning of the market for preclusion. Such opportunism on the plaintiffs' side can result in the proliferation of low-value suits and settlements. Plaintiffs may seek to exploit positioning rather than pressuring rules. Alternatively, plaintiffs may abandon valid objections to inadequate settlements in exchange for a share of attorneys' fees. On the defense side, defendants may pursue opportunistic ends through collusive-settlement practices intended to settle potentially high-value claims for low-value, nonpecuniary relief. What, then, can judges do to correct the defects of the market for preclusion while preserving its benefits?[289]

Judges in merger litigation should understand their policing role as having two functions: screening claims at the initial stage of

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288. For other scholarship connecting the concept of dialogue with the concerns of federalism, see SCHAPIRO, *supra* note 28, at 121–51 (describing the benefits of a "polyphonic" conception of federalism); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 868 (2006) (arguing for the value of intersystemic regulation); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550–52 (2012) (describing plural conceptions of federalism and their uses in different contexts); Gluck, *supra* note 248, at 1906–07 (arguing that federal courts should look to state court interpretation of state statutes and vice versa in the adjudication of cases).

289. For discussion of the judge's role in constraining litigation agency costs, see Lahav, *supra* note 183, at 69 (discussing the important role of judges to guarantee fairness in class actions); *id.* at 138 (discussing the fiduciary duty courts hold to class members); *see also* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280 (7th Cir. 2002) (Posner, J.) (describing the district court judge as "a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries").

the litigation and protecting shareholders in settlement at the close of litigation. Screening suits is important because a sophisticated screening mechanism can help the court decide which cases are stronger and need robust judicial protection and which involve weak claims and can be relegated to a reverse auction mechanism.[290] Settlement oversight is necessary because of the concern that lawyers will settle strong claims cheaply due to the combination of jurisdictional opportunism and agency costs discussed earlier.[291]

Screening involves taking a hard look at the complaint and, in many cases, applying heuristics commonly used by the Delaware courts to separate strong claims from weak ones. Screening at the outset of the litigation is controversial because judges may sometimes make mistakes. We are particularly concerned about false negatives, that is, when judges screen out strong claims.[292] Since judges screen cases in any event, we advocate that they do so explicitly and communicate their evaluations to judges in other jurisdictions. Courts should use their first look at claims to determine the level of judicial oversight appropriate to the claims by evaluating their strengths. This review could happen on a motion to dismiss or a number of other motions filed at the start of the litigation.

What type of review should screening include? If, based upon a preliminary analysis, the claims fit a pattern that suggests a strong substantive basis for relief, judges should clearly indicate this.[293] Likewise, weak claims should also be noted by judges at this stage.[294] There is reason to believe that the Delaware Court of Chancery already engages in this early-stage review of claims based upon

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290. *See generally* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010) (discussing the uses and potential abuses of screening mechanisms for complaints).

291. *See supra* Part II.B.1 (discussing imperfections in the market for preclusion resulting from sell-side and buy-side opportunism).

292. Allowing the court that is most inclined to move the case expeditiously toward litigation to do so will err on the side of false positives. This system may allow some less meritorious cases to go forward but is less likely to allow strong cases to be settled quickly and cheaply. In its pleadings doctrine, the Supreme Court has adopted a "thick" screening process that does result in the dismissal of cases that do not meet the new "plausibility" pleading standard. We do not advocate that state courts adopt this type of standard in the preliminary stages of merger litigation because of the policy implications of thick screening, particularly that for many classes of cases the pleading stage is too early to tell whether a suit truly has merit. For a policy argument against thick screening on motions to dismiss, see Bone, *supra* note 290, at 878–84.

293. *See, e.g.*, Transcript of Courtroom Status Conference, *supra* note 127, at 3–4 (discussing indicia of a strong underlying process claim).

294. *See id.* at 17 ("[W]hen I see a case that is a suit against an independent majority board after a meaningful shopping process and plaintiffs roll in saying nothing but naked price inadequacy because it's below its 52-week high, that's a silly case.").

generally accepted notions of what constitutes a strong versus a weak claim.[295] This early-stage review ought to be made explicit and the result communicated to any other courts in which a suit concerning the same merger has been filed.[296] The underlying logic here is that stronger claims deserve greater judicial attention as they move through the system; weaker claims might rightly be consigned to the reverse auction dynamic. By evaluating claims early and communicating their findings, even if they are nonbinding, judges encourage vigorous litigation where they see indicia of quality.[297]

There are three points early in the litigation when judges will have the opportunity to screen claims (in addition to any substantive motions such as a motion to dismiss). They are (1) motion for lead counsel status, (2) motion to stay, and (3) motion for expedited discovery. Each of these motions should be understood as an opportunity for courts to screen the complaint and determine which claims, if any, appear strong. These motions may come before the courts in varying order, or may be brought simultaneously, depending on how the case is litigated.

First, motions for lead counsel status may, or ought to, precede motions that move the lawsuit forward because lawyers want to know that they control the suit in order to invest resources in litigating it. The motion for lead counsel provides a good opportunity for judges to screen the suit and propel forward those suits that demonstrate merit. As discussed above, Delaware courts apply the *TCW* factors in motions for lead counsel, but none of these involves explicit screening of the suit, only of counsel.[298] Instead of only evaluating whether the pleadings demonstrate the quality of counsel, courts should also

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295. *See id.* (noting the strength of the claim); *accord* Donald F. Parsons & Jason S. Tyler, *Docket Dividends: Shareholder Litigation Leads to Refinements in Chancery Procedures*, 70 WASH. & LEE L. REV. 473, 500 (2013) (noting that the motion to expedite mechanism sorts shareholder claims into three general categories: the "wholly meritless," the "colorable," and the "clearly meritorious").

296. *See infra* Part III.B.2.c. (offering further detail on how such communications might occur).

297. *But see* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 444–45 (1982) (critiquing the managerial model of judging we are alluding to here). Our response to this critique is that merger litigation in particular may be so rife with agency costs that a more active role for judges may be necessary.

298. The *TCW* (or *Hirt*) factors include evaluation of (1) the quality of the pleadings, (2) the relative economic stakes of the competing litigants in the outcome of the lawsuit, (3) the willingness and ability of counsel to litigate vigorously, (4) potential conflicts between larger and smaller stockholders, (5) vigor of prosecution of the lawsuit thus far, and (6) counsel's competence and access to resources. *See* Hirt v. U.S. Timberlands Serv. Co., Nos. 19575, 19577–78, 19584, 19592, 19608, 19613, 19632, 2002 WL 1558342, at *2 (Del. Ch. July 3, 2002) (outlining these factors).

evaluate whether the pleadings demonstrate the strength of the underlying suit and communicate findings to the litigants. Courts should take the opportunity presented by a motion for lead counsel status to review the pleadings in *alternative jurisdictions*, as well, to determine whether any lawyers have made allegations that give rise to a more robust claim. Delaware judges sometimes do this already.[299] Our proposal differs from the existing practice of informal consultation between courts in response to litigant requests, sometimes called a "Savitt motion," in that it formalizes the practice and gives courts the power to initiate such review.[300] Delaware judges would have access to these pleadings under our proposed Merger Litigation Notification Statute, which would require defense lawyers to file complaints relating to the merger brought outside of Delaware with the court of chancery.[301]

Motions to stay provide a second screening opportunity. On motions to stay, Delaware courts currently consider a number of factors akin to forum non conveniens analysis, which is not explicitly aimed at determining the strength of the underlying suit itself.[302] Instead, courts in all jurisdictions entertaining motions to stay in a merger suit should look at five factors. First, courts should review the complaint in the context of those filed in other jurisdictions to evaluate the strength of the case. Complaints with strong claims should be given priority, as should the jurisdiction where the strongest claims are brought.

Second, courts should consider the extent to which the case presents novel questions of Delaware corporate law, as these cases have the strongest claim to being decided by the Delaware Court of Chancery.[303] This factor might be balanced against the economic

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299. *See id.* (considering the strength of the case).

300. *See* Thomas & Thompson, *supra* note 6, at 1796.

301. *See infra* note 327 (text of proposed Merger Litigation Notification Statute).

302. These factors include: (1) the applicability of Delaware law, (2) the relative ease of access of proof, (3) the availability of compulsory process for witnesses, (4) the pendency or nonpendency of a similar action or actions in another jurisdiction, (5) the possibility of a need to view the premises, and (6) all other practical considerations that would make trial easy, expeditious, and inexpensive. Berger v. Intelident Solutions, Inc., 906 A.2d 134, 136–38 (Del. 2006); *see also* Dias v. Purches, No. 7199-VCG, 2012 WL 689160, at *1 (Del. Ch. Mar. 5, 2012):

> [W]hen there are multiple suits filed within a short time, this Court has tended to employ a test similar to that used in addressing motions on forum non conveniens grounds, and to consider whether the complaint in the competing jurisdiction is a better or fuller pleading than the Delaware complaint.

303. This proposal shares some commonality with a recent proposal by Leo Strine, Chancellor of the Delaware Court of Chancery, and academic coauthors. Their proposal puts its emphasis on the importance of the internal affairs doctrine and parties' choice-of-law decisions in

interest of other forums in the outcome of the litigation, recognizing that the merger may involve an existential question regarding an important local company.

Third, courts should consider the extent to which the filing in its jurisdiction is motivated by pressuring rules (such as the availability of a jury, ease of obtaining expedited discovery as compared to other jurisdictions, and the opportunity to schedule preliminary injunction motions expeditiously) or by positioning rules (such as lead counsel status having already been granted in competing jurisdictions to other lawyers, availability of higher attorneys' fees, and progress of the competing litigation).[304] Chancery judges have not always viewed litigation filed to take advantage of pressuring rules as a positive factor—particularly when the pressuring rule in question is the jury trial.[305] But perhaps judges should rethink this view since a lawyer who files in order to take advantage of a pressuring rule is more likely to be motivated to increase value for his client.

Fourth, courts should consider the extent to which the action in the alternative jurisdiction has been prosecuted vigorously to take advantage of these pressuring rules.[306] The theory here is that actions that are not being actively prosecuted are more likely to lead to a low-value settlement than actions that are being actively litigated, because the defendant can turn to the lawyer who has adopted a wait-and-see attitude with a low offer. Since that lawyer has not invested much in the suit, it is easier to settle cheaply. These cases should be stayed in favor of actively litigated cases.

A third opportunity to screen cases is the motion for expedited discovery. In some cases, the motion for expedited discovery will be

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determining where simultaneously filed litigation ought to proceed, whereas ours includes an assessment of the strength of the suit. *See* Strine, Hammermesh & Jennejohn, *supra* note 54, at 3–9 (arguing that parties' choice of law and the internal affairs doctrine should govern forum decisions).

304. Which type of rule motivates lawyers will be difficult to determine, and there are likely to be many cases where mixed motives are in play. However, the court ought to take notice if there are strong indicia that positioning rules dominate, such as when a litigant seeks lead counsel status, but not expedited discovery, or otherwise fails actively to litigate the claim. Delaware currently does not consider the progress of the litigation as a formal factor; New York does. *See supra* Part II.B.a. *But see Dias*, 2012 WL 689160, at *2 (considering progress of the litigation on motion to stay).

305. *See, e.g.*, Rapoport v. Litig. Trust of MDIP, Inc., No. 1035-N, 2005 WL 3277911, at *4 (Del. Ch. Nov. 23, 2005) (condemning the plaintiffs' "blatant forum shopping in search of a jury trial").

306. *See In re* Countrywide Fin. Corp. Derivative Litig., 542 F. Supp. 2d 1160, 1173 (C.D. Cal. 2008) (noting the fact that expedited discovery was proceeding and a preliminary injunction hearing scheduled in Delaware were among factors favoring a stay under *Colorado River*).

the first motion that comes before the court. If the court believes a case is important or potentially meritorious, it will be more likely to keep that case if it grants expedited discovery. By contrast, if the court believes the case is a "junk" case, denying a motion for expedited discovery limits plaintiffs' ability to pressure the defendant corporation. As a result, denial will likely lead to either a disclosure-only settlement so that the transaction can go forward unencumbered or settlement in a competing jurisdiction where the defendant feels greater pressure. In the competition between jurisdictions, the availability of expedited discovery will likely continue to play a significant role, especially so long as the standards differ among courts.[307] Where multiple courts have granted expedited discovery, the case is likely a strong one. In such cases, courts most need to coordinate adjudication to avoid duplicative litigation and promote efficiency to the extent possible and to be especially wary of a settlement bearing indicia that it is the product of a reverse auction.

After screening claims through motions for lead counsel status, for a stay, for expedited discovery, or to dismiss the suit, the next opportunity for judicial intervention is likely to be the evaluation of proffered settlements.[308] All class action settlements must be approved by the court to be binding and furthermore must meet the due process requirement of adequate representation of absent class members. These requirements give courts considerable power to police settlement in class actions. The settlement phase is the best and final opportunity for courts to shepherd the litigation to a fair result for shareholders.

In ordinary litigation, judges can rely on the parties to present both sides of a controversy. By contrast, in the settlement phase of a class action, the defense counsel and class counsel have already agreed to the settlement and have a shared interest that may prevent them from presenting the court with a full picture of whatever arguments against the settlement could be made. For this reason, the courts cannot rely solely on the presentations by defendant and class counsel to evaluate whether a settlement should be approved.

307. We take no position here on what standard ought to apply for discovery to be expedited, but we note that the choice of a more rigorous standard will predictably diminish the court's ability to hold on to certain classes of cases. It is possible that this category of cases is not one that is important for the court to adjudicate in any event.

308. In some cases there may also be a litigated motion for a preliminary injunction.

Fortunately, the possibility of rival counsel objecting to a settlement can provide an antidote.[309]

Objectors represent critical monitors of the class action settlement process and serve an essential role in revealing information to judges seeking to evaluate the fairness and adequacy of settlement.[310] Unfortunately, objectors can be induced to abandon their objections in exchange for attorneys' fees or side payments.[311] Such side payments may be a part of obtaining "global peace."[312] Judges must therefore empower and monitor objectors if the market for preclusion is to function optimally.[313] This can largely be done by paying objectors a share of attorneys' fees in connection with settlement,[314] but courts may also consider awarding successful objectors a leadership role in subsequently pursuing the claim.[315]

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309. Where there are no natural objectors, the court may also decide to appoint an objector as a kind of guardian ad litem for the class. *See* Alon Klement, *Who Should Guard the Guardians: A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 28–30 (2002) (proposing private monitors who would be paid out of settlement fund); Lahav, *supra* note 183, at 128 (proposing judicial appointment of a "devil's advocate" to scrutinize settlements); Macey & Miller, *supra* note 95, at 4 (suggesting judicial review of settlements could be improved by appointing guardians ad litem to represent the interests of the class).

310. *See supra* Part II.A.2.

311. *See supra* Part II.B.2.

312. As noted above, because there is a time lag between successful settlement negotiations and judicial approval, in some cases defendants will demand that all plaintiffs in all jurisdictions sign on to a settlement in order to provide the certainty necessary to move the transaction forward to closing. *See supra* note 197 and accompanying text. In such cases, however, the lead plaintiffs' counsel may need to provide some incentive for competing plaintiffs' counsel to sign on, most likely by offering a share of attorneys' fees.

313. *See* Lahav, *supra* note 182, at 124 (discussing role of objectors as information intermediaries who assist in judicial monitoring). The problem of controlling objectors may be described as a "superagency" problem. *See* Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1630–31 (1999) (discussing second-order agency, or "superagency," problems). The question of who will monitor the monitors is also a central concern of corporate governance. *See* Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 866–67 (1993) (analyzing the question of who should monitor corporate managers).

314. Judges already do this, of course, but the fees they award may be suboptimal to provide an incentive for would-be objectors to actively monitor claims. For example, in *In re Allion Healthcare Shareholders Litigation*, the Delaware court that ultimately approved the settlement of the case awarded a portion of attorneys' fees to lawyers who continued to litigate the case aggressively in New York in parallel to the Delaware proceeding. *See In re* Allion Healthcare Inc. S'holders Litig., No. 5022-CC, 2011 WL 1135016, at *9 (Del. Ch. Mar. 29, 2011) (splitting fees between New York and Delaware plaintiffs). That fee award was limited, however, and perhaps was not a sufficient incentive. *See id.* (refusing to split a larger portion of the fee because "New York plaintiffs had the opportunity to sign the settlement, which they declined to do").

315. *See, e.g.*, Forsythe v. ESC Fund Mgmt. Co., CA. No. 1091-VCL, 2013 WL 458373 (Del. Ch. May 9, 2012) (offering an objector the opportunity to take over prosecution of the case on condition of posting a bond in the proposed settlement amount).

Courts, in other words, may, in appropriate circumstances, treat objections as implicit leadership challenges and, if successful, award lead plaintiff status to successful objectors, thereby empowering the successful objector to litigate or negotiate further with the defendant and to enjoy the lion's share of any subsequent fees. This could create an incentive for objectors to challenge those settlements where there is a significant difference between the quality of the claim and the value of the settlement. By effectively jumping over the settling attorney to assume control of the claim, the former objecting attorney would have the opportunity to extract that value, thereby pushing the value of the settlement closer to its real value. Importantly, however, this would not create a strong incentive for attorneys to object to low-value settlements or appropriately valued settlements because the margin necessary to make the attorney's intervention worthwhile would not exist.

Determining the value of the objector's contribution to the ultimate settlement is a difficult task. Courts must distinguish between objectors who are merely holding up the settlement to receive fees and those with serious and valid objections that increase the benefit of the litigation to shareholders. Relevant factors may include (1) the strength of the objection and any information revealed by the objector concerning the strengths or weaknesses of the claims or of the settlement under review, (2) objectors' behavior throughout the litigation—that is, whether the objector has sought actively to litigate the claim or has instead waited passively to lodge his objection, (3) the quality of any relief offered by objectors as a potential alternative, and (4) the likelihood that the objector would be able realistically to obtain this relief. The attorneys' (or the firms') reputations for quality results may also be a factor, allowing judges to consider the firms' prior achievements in similar litigation.

The most significant risk courts face when encouraging objectors is that the objectors will seek payment from the parties to withdraw their objections. Recent scholarship focusing on this problem has sought to solve it through the adoption of an inalienability rule that would bar objectors from selling or otherwise being paid not to pursue their objections.[316] Objectors would be forced to file and

316. Advocating such an inalienability rule for class action objectors, Professor Fitzpatrick writes:

> If objectors were prohibited from selling their right to appeal to class counsel, then objectors who wished to appeal solely to extract rents from class counsel eager to avoid delay, risk, and litigation costs would not bother filing appeals at all. Indeed, even objectors who had legitimate appeals but who were happy to settle their appeals

advocate their causes in court because only success in court would entitle them to a share of fees.[317]

Anticipating that, would-be objectors might attempt to evade an inalienability rule by *threatening* to file objections and, on the basis of those threats, cutting side deals with the settling attorneys to be included in settlement for a share of fees.[318] We would pair the inalienability rule with a disclosure rule requiring settling plaintiffs to disclose, prior to judicial approval of settlement, all side deals reached with all counsel in connection with a settlement.[319] Courts would have an opportunity to inquire into the reasons underlying all side payments and would presumably be less inclined to approve settlements where would-be objectors had been bribed.[320] In addressing the problem of objector bribery, however, there is the risk of going too far and chilling objectors. Courts must be careful not to subvert the monitoring and information-forcing function of objectors.

Taken as a whole, these approaches refocus the judicial inquiry onto the problem of litigation agency costs, both at the initial motion stage and at the settlement stage, and empower objectors as monitors and information agents to assist courts in settlement evaluation. Moreover, these corrections to the current screening and settlement process are realistically implementable. They can be acted upon at the discretion of judges, without the need for legislative action. In order to implement them effectively, however, judges will need to communicate and coordinate across jurisdictional boundaries. Otherwise the incentives created by a good set of rules in one jurisdiction will be undone by failure to monitor in another. Unfortunately no mechanism currently exists for such communication and coordination across

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> for a premium would be unable to collect those premiums. In short, inalienability rules completely eliminate any sort of holdout tax. . . . At the same time, no legitimate objector would be discouraged from having their appeals heard in the face of an inalienability rule; the rule would not affect access to appellate review at all. That is, an inalienability rule can thwart blackmail-minded objectors at the same time it leaves access to appellate review open to sincere objectors.

Fitzpatrick, *supra* note 142, at 1662.

317. *Id.* at 1662–63.

318. Thomas & Thompson, *supra* note 6, at 1768–69 (characterizing multijurisdictional litigation as being driven by a process in which plaintiffs' firms file lawsuits with the intent of getting themselves a seat at the table with a defendant who seeks global peace).

319. *Accord* Brunet, *supra* note 142, at 446 (advocating disclosure of side deals); Lahav, *supra* note 182, at 124 ("[O]bjectors who make side deals to drop objections must be required to publicly disclose the terms of all such settlements and to have them approved by the court."); Judith Resnik, *Compared to What? ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 673 (2011) (discussing proposals).

320. *See* Resnik, *supra* note 319, at 673 (discussing requirements that side deals be disclosed to the court).

jurisdictions. We offer solutions to this problem in the sections that follow.

2. Comity Communications

The trouble with judicial oversight as a solution to the problems posed by the market for preclusion is that when alternative jurisdictions are available, litigants may file in those courts with the weakest oversight, thereby taking advantage of the failure of courts to communicate and coordinate across jurisdictional lines. The best way to handle this sort of problem might also be the simplest: for the judges to talk to each other. Unfortunately there is currently no official means of judicial communication across jurisdictional lines. Because we view the dialogue between judges in sister jurisdictions as essential to solving the problems of the market for preclusion, we offer several suggestions for creating an infrastructure for such a dialogue, which we call "comity communications."

Our proposed infrastructure has four aspects: (a) packaging important precedents to reach the widest possible audience; (b) designing a system of notice so that judges in different jurisdictions hearing the same dispute can be made aware of that fact; (c) instituting guidelines for informal comity communications; and (d) creating Delaware Court of Chancery certification procedures. We discuss each of these in turn.

a. Packaging Precedent for a Broader Audience

Much of the court of chancery's decisionmaking is unreported in traditional case reporters. Rather, these decisions are recorded in transcript opinions—that is, transcribed colloquies between the judge and one or more lawyers from either or both sides. Releasing information in this way is discretionary, as far as we can tell, and obviates the need for chancery judges to write opinions, a time-consuming task. Like much of the spoken word, these opinions are relatively unstructured. They move from one topic to another in no clear order and often include extended discussions that are not ultimately relevant to the decision rendered. Indeed, reading transcript opinions awakens one to the highly structured nature of the traditional judicial opinion—the thorough recitation of facts, followed by a discussion of relevant law, followed by the application of the law to the facts accompanied by often elaborate justifications for applying the law in a way that favors one side or another. Virtually all of this is absent in a transcript opinion or, if present, typically appears in a

disorganized, seemingly haphazard way. Not surprisingly, transcript opinions rarely appear in case reporters or on Lexis or Westlaw.

Nevertheless, transcript opinions are often extremely informative about how chancery judges are inclined to view current issues in corporate practice. We have already noted several influential transcript opinions, such as *Nighthawk* on the issue of reverse auctions or *Revlon* on the advisability of forum-selection provisions. For an example of a transcript opinion addressing Delaware practices in expedited merger litigation, consider Vice Chancellor Laster's discussion in *Compellent*:

> Those of us who see a lot of these things know that the litigation really can't kick off until after the preliminary proxy. That's because the principal claims that are litigated by stockholder plaintiffs in most of these cases are disclosure claims. It's also because to plead a meaningful process claim . . . you need to see the background of the merger. You don't get to see the background section that describes the events leading up to the merger until the preliminary proxy. So when somebody rolls in prior to the preliminary proxy and tries to create some flurry of activity and seek a scheduling hearing . . . what it signals is, is that they're trying to get control of the case, not that they're acting for the benefit of the stockholders.[321]

This opinion signaled to litigants that the court of chancery will not expedite merger litigation until the preliminary proxy has been issued. Every experienced merger litigator we have spoken with mentioned this rule as one that influences their choice of litigating in Delaware Court of Chancery as opposed to rival jurisdictions.

The corporate bar well understands the value of transcript opinions. Leading practitioners (or their associates) review these transcripts as soon as they are available, bringing their partners and leading clients immediately up to speed on what they find. Moreover, top corporate law firms in New York and Delaware regularly release memoranda to clients and others on their mailing lists summarizing recent developments, often gleaned from transcript opinions. In this way, the immediately relevant professional community—top-level practitioners and their clients—remain well informed of Delaware law developments regardless of the form in which they appear. Delaware's practice of issuing transcript opinions suggests that the state relies on this network of professional intermediation to disseminate much of its informational output.

This network breaks down, however, when the relevant audience for Delaware decisionmaking is outside this professional community. In the context of the market for preclusion, the relevant

321. Plaintiff's Motion for a Preliminary Injunction and the Court's Ruling at 21–22, *In re* Compellent Tech., Inc. S'holder Litig., C.A. No. 6084–VCL (Del. Ch. Dec. 9, 2011).

audience will often be a trial court judge in another state. Not only will this judge likely not be an expert in corporate law matters, but he or she will also likely be a complete outsider to the way in which corporate law norms are conveyed. How, for example, can a Minnesota judge asked to render a decision on Delaware law be expected to remain apprised of legal developments when the decisions are issued in a highly disorganized form that is not compiled or reported in any of the traditional formats but rather conveyed through a largely exclusive network of professionals centered in Wilmington and Manhattan?

Ordinarily the answer to this question would be that the lawyers have an incentive to introduce this information to the sister-state court as part of the adversarial process. But the adversarial process, which informs judges of competing viewpoints on an issue, does not operate effectively in the context of settlement. In presenting a class action settlement to the court, both sides are keenly interested in obtaining judicial approval and are not in an adversarial position with respect to one another.[322] Thus, to apply Delaware law correctly, such a judge must not only learn what the law is, but he or she must learn how to learn what the law is. Since no digest of transcripts exists, a significant time investment would be required to research these questions. It is too much to expect a busy judge and his or her clerks to invest the time to wade through transcript opinions, even if the judge is aware of their import. And if he or she does not bother (or does not succeed), then this would seem to be a further factor in the volatility of outcomes outside of Delaware.

Delaware could address this problem without having to hear all merger cases, as the proponents of centralization advocate, by moving away from the transcript opinion and reporting more of its judicial output to traditional case reporters or digital databases such as Lexis and Westlaw. Additionally or in the alternative, Delaware could invest in a database system of its own that reliably sorted opinions by topic and issue. Delaware could also send a regular abstract of major decisions or established practices with respect to recurring issues to other court systems around the country, all with the goal of making other judges in other court systems more aware of its precedents and

322. *See* Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 807–09 (2009) (describing plaintiff- and defense-side cooperation in the settlement of securities class actions); Lahav, *supra* note 182, at 91 ("The extent to which judges police class actions is largely a matter of the individual judge's choice, influenced by traditional views of the attorney-client relationship and settlement as a form of private ordering.").

general procedures. All of these innovations come at (varying) costs, but it is in Delaware's interest to make some investment so that it can retain the advantages of the market for preclusion while minimizing the corruption of its law and the volatility of outcomes to Delaware-incorporated firms. In fact, the more Delaware is able to outsource unimportant cases, the more time the judiciary can devote to creating a well-catalogued and easily accessible body of law.

Some of what Delaware judges discuss in transcript opinions is not "substantive" but "procedural" according to the dichotomy we described above and would not necessarily bind a judge in another forum. Nevertheless, we suspect that such judges, especially those who are new to the intricacies of corporate law, are simply looking for guidance on how to analyze a particular issue and would be more than happy to receive guidance from Delaware, binding or not. Moreover, in other situations where Delaware may be concerned that the problem is not ignorance but a prideful refusal to follow Delaware where the judge does not have to, Delaware could incorporate more of the heuristics it uses to determine whether a case is a "good" one into its substantive law. For example, Delaware judges could incorporate the requirement that a proxy issue before a case alleging disclosure is "ripe" into the substantive law, either as a requirement for the plaintiff to state a claim or as a condition precedent to success on the merits. We do not take a position on whether this would be a beneficial change in the law. Our point instead is that the heuristics Delaware judges use are not easily accessible under the current regime. The more these heuristics are incorporated into the substantive cause of action, rather than as rules of thumb with respect to when certain procedures are available, the more likely it is that sister-state courts will take heed.[323]

In sum, the market for preclusion and the proliferation of merger litigation have created a new audience for Delaware corporate law jurisprudence: members of the judiciary of other state and federal courts. In order to reach this audience, Delaware should rethink the form of its judicial decisionmaking, recording its precedent in a more

323. An objection may be raised here that the value of Delaware law is not its set of substantive rules but rather its system of fact-specific judicial discretion. Thus our emphasis on prescriptive heuristics might threaten to make Delaware law rigid and thereby diminish its core value. We are not advocating a wholesale retreat from judicial discretion to a strictly rule-based approach. Our suggestion is merely that Delaware clarify the tools its judges use in exercising their discretion in order to prevent judges in other states from mishandling it. For a discussion of how law oscillates between hard and soft sets of rules, see generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

traditional and easily accessible form. Delaware should make clear the heuristics it uses to evaluate the merits of cases by incorporating these explicitly into its merits evaluation to create greater predictability. Delaware's current practices recall a now-bygone era when a highly expert group of corporate lawyers could be counted on to convey the latest developments to all of those in the loop. Now that critical consumers of Delaware law—state and federal judges in various faraway places—are not likely ever to be in this loop, Delaware needs to adapt.

b. Providing Notice of Multijurisdictional Litigation

Before two parties can discuss an issue, they must know that they have an issue to discuss. The absence of this knowledge often frustrates the ability of judges across jurisdictions to communicate meaningfully about merger litigation. Frequently, a judge will not know whether or where parallel litigation has been filed until a motion for a stay is filed or until settlement has been reached.[324] Often judges rely on the parties, especially defendants seeking stays, to inform them of competing lawsuits. If the judge does not know where else plaintiffs have filed, he or she has no opportunity to discuss the litigation process with the judge(s) in the other jurisdiction(s). There is no established mechanism for informing Delaware or other state courts of pending merger litigation in other jurisdictions nor is there presently any sort of central registry where related litigation in different states can be tracked.[325]

As a preliminary step, we suggest the adoption of a statute requiring defendants in merger litigation to inform judges everywhere such litigation has been filed that substantially similar litigation has also been filed in another jurisdiction and to provide the judges in each jurisdiction with a copy of the related complaint filed elsewhere.[326] Such notice would make it possible for the judges to

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324. Although no permission is needed to file a lawsuit, after a class action has been certified, the judge's approval is required before the case can be settled or voluntarily dismissed. *See, e.g.*, FED R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."). Delaware's version of Rule 23 parallels the federal rule. *See* DEL. CH. CT. R. 23.

325. By contrast, in the federal courts litigants are required to note if their litigation is related to other pending litigation at the time of filing. This designation is used to assign cases.

326. A similar provision is found in CAFA, requiring notice to states' attorneys general of class action settlements. *See* 28 U.S.C § 1715 (2006) (requiring notification of states' attorneys general). *See generally* Catherine Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971 (2008) (discussing CAFA).

discuss the litigation with one another and to coordinate future proceedings. Because the party with access to this information is the defendant—who can be counted upon to know all of the jurisdictions where it has been sued—the statute would require the defendant to serve notice of parallel litigation, attaching copies of complaints, in every jurisdiction where related litigation is pending.[327]

We understand that chancery judges will not eagerly await these notifications and pore over the attached complaints. They could, however, assign them to their clerks for review and, when a particular complaint raises concerns that seem especially relevant to Delaware—a claim raising a novel issue of law, for example, or a claim providing an opportunity to clarify or extend an existing legal doctrine—the Delaware judge could contact the judge in the other jurisdiction to discuss the question of where the issue should be decided. These discussions may not always be successful, but we suspect that they will be more often than not.[328] In any event, the discussion is not possible at all without some form of notice.

Notice is a first step to promoting comity. Because notice comes early in the litigation, dialogue is more likely since no judge has invested time and effort in the case. When a court is faced with a situation such as that in *Nighthawk*—a settlement that appears to be an end run around chancery—it is almost too late to have a dialogue about where a case should be litigated, the most efficient form of litigation, and how cooperation can be managed if the case proceeds in tandem in more than one jurisdiction. If judges are to communicate fruitfully with one another, that communication should begin upon filing, not when the case has already developed and judges have sunk time and effort into deciding motions and have developed a sense of ownership over the case. The next question is how, after notice has

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327. Suggested statutory language for a Merger Litigation Notification Statute is as follows:

> No later than 5 days after the filing of a lawsuit or amended complaint against an entity incorporated under the laws of this state relating to a merger, acquisition or other business combination, each defendant shall file with the Register of the Delaware Court of Chancery the following documents: a copy of the complaint or amended complaint and any materials filed with such complaints or amended complaints. If such documents are made electronically available through the Internet, a filing under this provision may consist of notice of how to electronically access such material.
>
> No later than 5 days in advance of any hearing regarding a settlement of any action defined under paragraph (A) of this statute, the defendants shall file with the Register of the Delaware Court of Chancery a copy of the order granting the hearing, a copy of the proposed settlement, and copies of any objections to the settlement that were filed with the court in that action.

328. *See supra* notes 81–86 and accompanying text (discussing *Topps* and expressing the view that the case represents an important exception to the general rule).

been served, communication between sister jurisdictions can best be encouraged and streamlined.

c. Creating a Means of Informal Comity Communications

Once informed of parallel litigation, the judges in the various jurisdictions will have an opportunity to communicate about the course of the litigation. Delaware judges, as we have suggested, may use this opportunity to persuade the judges in the other jurisdictions to allow the case to move forward in Delaware, a request that, we suspect, the overburdened judges in the other jurisdictions will often be happy to grant.[329] In situations where the court does not cede to Delaware or Delaware does not want the case, communication can lead to greater predictability and uniformity by allowing sister courts to utilize chancery's expertise. Finally, communication will allow courts to strengthen their relationships with one another and enhance mutual respect, in contrast to jurisdiction stripping, which would do neither of these. In this Section we consider what form these communications should take and what limitations should be placed on them.

Communication between judges across jurisdictions is not unheard of. For example, some chancery judges are already communicating with judges who have parallel litigation before them either through informal telephone conversations (which we assume take place *ex parte*) or by providing documentation. In *Nighthawk*, Vice Chancellor Laster ordered that the transcript of the hearing at which he excoriated the defense lawyers for engaging in a reverse auction be sent to the judge in Arizona overseeing the settlement.[330] We question whether communication by transcript is the clearest means of expressing the Vice Chancellor's concerns, but this nevertheless represents a form of comity communication. For another example, consider the following statement by former Chancellor Chandler in *Allion*:

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329. We recognize that sometimes judges will take a territorial approach to these cases or be interested in retaining them because they involve large transactions or prominent litigants. Increased communication and trust may go some way to resolving these disagreements. For a discussion of developing this type of rapport and the habits of thought that encourage it in the political sphere, see AMY GUTMANN AND DENNIS THOMPSON, THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT (2012). Other judges might retain a merger suit because it involves existential questions about a company based in the forum. In our view, this may be a legitimate reason for a state court to retain a case. *See supra* notes 246–47 and accompanying text.

330. Transcript of Courtroom Status Conference, *supra* note 127, at 25.

> My personal preferred approach, for what it's worth, is for defense counsel to file motions in both (or however many) jurisdictions where plaintiffs have filed suit, explicitly asking the judges in each jurisdiction to confer with one another and agree upon where the case should go forward. In other words—and I mentioned this during an earlier oral argument in this case—my preference would be for defendants to 'go into all the Courts in which the matters are pending and file a common motion that would be in front of all of the judges that are implicated, asking those judges to please confer and agree upon, in the interest of comity and judicial efficiency, if nothing else, what jurisdiction is going to proceed and go forward and which jurisdictions are going to stand down and allow one jurisdiction to handle the matter.' Of course, as I recognized at the time, judges in different jurisdictions might not always find common ground on how to move the litigation forward. Nevertheless, this would be, I think, one (if not the most) efficient and pragmatic method to deal with this increasing problem. It is a method that has worked for me in every instance when it was tried.[331]

Our approach is similar to Chancellor Chandler's suggestion, except that rather than waiting for defense counsel to expressly ask the various judges across jurisdictions to confer, the judges would be empowered to enter into these conversations of their own volition. We are proposing an infrastructure where judges can freely communicate regarding multijurisdictional litigation.

Ex parte judicial communications are not without controversy. The traditional judicial role involves the neutral judge making all decisions after hearing argument from counsel, giving each litigant a chance to participate prior to the decision in their case being rendered. By contrast, *ex parte* communications between judges would result in a determination of whether, where, and how the litigation will proceed—decisions that determine the outcome of the litigation—without the litigants being present.

The main objection to *ex parte* conferences is that they limit litigant autonomy. Such conferences could lead to substantive decisions or undue influence over substantive decisions without counsel having the opportunity to participate in the discussion. This would impose a limitation on each litigant's day in court and his ability to participate fully in the litigation. These are serious concerns. Judges ought to give litigants an opportunity to present their arguments regarding any major decision in the litigation, including choice of forum, dismissal, coordinated expedited discovery, or the refusal to expedite. But there is strong precedent for judicial conferral. The Justices of the Supreme Court confer with one another in conference prior to assigning opinions and as the opinions are drafted and revised. Appellate courts sit on three-judge panels and, in some controversial cases, review decisions en banc. Even trial-level judges

331. *In re* Allion Inc. S'holders Litig., C.A. No. 5022-CC, 2011 WL 1135016, at *4 n.12 (Del. Ch. Mar. 29, 2011) (citations omitted).

confer with their clerks outside the presence of counsel, perhaps also with each other. There is no reason why conversations that happen in chambers cannot also happen intrachambers. Anecdotal evidence indicates that in other contexts, such as in parallel litigation concerning mass torts, judges conduct *ex parte* conferences with sister courts in order to streamline motions and avoid duplicative litigation.[332] We see no reason why judges should be barred from conferring with one another so long as the parties have had the opportunity to weigh in on the issues to be decided either orally or in writing.

It is true that the traditional judicial role, at least at the trial level, is based on the idea that a single judge decides a case. There is no room in this traditional conception of the judicial role for judicial dialogue except over time through opinions. This is because the judge is presumed to have exclusive control over the subject matter of the particular lawsuit. In parallel litigation, as at the appellate and Supreme Court levels, multiple judges are in a position to make decisions about a case, and the theory of judging needs to evolve to take account of this. Accordingly, interstate judicial discussions should be permitted outside the presence of the litigants, although litigants should receive notice of the subject of such discussions and these conferrals should be preceded by opportunities for the parties to present their arguments.

A second objection is that even if such conferences are conducted with the opportunity for counsel to be heard prior to conferral, comity communications overstep the judicial role, which traditionally does not permit judges to consider issues *sua sponte*, but instead relies on the litigants to raise issues on their own. By necessity such a conferral would be judge, rather than litigant, driven some of the time.

The requirement that judges raise issues on their own in some situations is a corollary to the requirement that judges develop the law through judicial decisions.[333] It is also a corollary to the doctrines of judicial avoidance and the set of doctrines the Supreme Court has adopted to "avoid avoidance."[334] Henry Monaghan demonstrates that,

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332. *See supra* note 236 (discussing informal communications in circumstances of parallel cases).

333. *See* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L. J. 447, 453–54 (2009) (defending judges raising issues *sua sponte* when the parties have failed to adequately address all issues of a litigation).

334. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control and Related Matters*, 112 COLUM. L. REV. 665, 684–85 (2012).

at least where the Supreme Court is concerned, the dominant model of judicial decisionmaking is the law-declaration model and that the Court has adjusted its various mechanisms of avoidance to serve this goal.[335] There is an emerging recognition that the pure dispute-resolution model of judging, where the judge plays a passive role and adjudicates the dispute as it is presented to him or her, is not desirable and does not reflect the reality of litigation.[336] A similar recognition is necessary in multijurisdictional litigation. In the absence of litigant coordination, judges are a natural place to look to regulate the litigation market prior to the moment when a class settlement precludes all others by operation of the Full Faith and Credit Clause.

Finally, in the class action context, judicially driven regulation of the market for preclusion is supported by the structure of the class action rule.[337] That rule requires judges to review settlements or voluntary dismissals and approve or disapprove of them. It permits judges to appoint counsel, fire counsel, and determine counsel's compensation. All of these powers are reserved to the client in the ordinary case. Accordingly, structurally embedded into the class action rule is the mandate that judges act independently of the litigants in monitoring the litigation. The proposal here is merely an extension of that power.

How would the process of comity communications work? We propose a set of best practices analogous to that provided by the Manual on Complex Litigation, widely referred to by judges and practitioners to solve recurring problems in multidistrict litigation and class actions.[338] Upon notice of a competing litigation concerning the same merger, whether through the notification system described above or in the process of certifying a class and settlement, the judge in each jurisdiction would contact the judges overseeing the parallel cases. The judges would hold an initial conference call to discuss the status of the litigation in each jurisdiction. Then the judges would notify the parties of their intent to confer regarding specific issues

335. *Id.* at 683–85.

336. The classic articulation of this argument was in the public law sphere. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (arguing that the involvement of the judge in public law litigation is workable and inevitable to ensure justice in a regulatory society). For a broader historical view on the controversy, see generally Amalia Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

337. The Delaware class action rule tracks FED. R. CIV. P. 23, as do the class action rules in many states. *Compare* DEL. CH. CT. R. 23, *with* FED. R. CIV. P. 23.

338. *See* FED. JUDICIAL CTR., *supra* note 236.

such as the propriety of staying one action in favor of the other, appointment of lead counsel, expedited discovery, and discovery coordination. At that time, the parties would have the opportunity to brief the judges on their positions with respect to the issues up for discussion. Oral argument by conference call or video conferencing would also be possible upon motion. Thereafter, the judges would confer with one another and issue their separate rulings.

We anticipate that in most cases this process will result in the stay of all the suits but those proceeding in one jurisdiction. But this process would not mandate deferral to a single jurisdiction and leaves open the possibility that in the rare case the rival jurisdictions may not defer to a single forum. In such a case, there is still a benefit to judicial coordination of the various aspects of the litigation, such as scheduling discovery and preliminary injunction motions, to avoid repetitive litigation. The process would be respectful of the equal validity of rival jurisdictions and the structural reality of concurrent jurisdiction, which is a central (if sometimes frustrating) feature of our federalism.

Over time, as practices emerge and judges become more accustomed to these conferrals, we hope that a cooperative spirit will develop between judges of different jurisdictions. We also hope that this continuing dialogue will educate judges in different jurisdictions concerning the different procedural regimes in sister courts and thereby promote the adoption of the best among these procedures. This may lead to the organic development of a robust form of comity in which state and federal courts engage in a joint enterprise of law creation.

d. Chancery Certification and Other Formal Communications

In addition to the infrastructure for informal communications described above, we believe that there should be a means by which sister states can formally certify questions to the chancery court.[339] Currently, Delaware law contemplates certification to the Delaware

339. Suggested language for a court of chancery certification statute is as follows:

> The Court of Chancery shall have jurisdiction to hear and determine questions of law certified to it by United States District Courts and the trial courts of any other state, where it appears to the Court of Chancery that there are important and urgent reasons for an immediate determination of such questions by it. The Court of Chancery may, by rules, define the conditions under which questions may be certified to it and prescribe methods of certification.

Supreme Court,[340] a process that, although vanishingly rare, is not without precedent.[341] Nevertheless, certification to the supreme court is not an appropriate means of addressing the types of issues that are likely to arise in multijurisdictional merger litigation. The principal reason for this is speed of resolution. Merger litigation, as we described above, must be decided quickly—most cases are resolved forty-five to sixty days from filing.[342] The Delaware Supreme Court, like most appellate courts, cannot be expected to routinely move at that speed, even though it has been relatively expeditious in deciding cases certified to it by federal courts and agencies.[343]

The court of chancery is well placed to hear such certifications. A large part of its caseload consists of merger cases, which it customarily decides in the necessary one- to two-month window. Moreover, certified cases that come to the court of chancery in the context of multijurisdictional merger litigation are unlikely to present a significant additional burden to the court since the same case is likely also proceeding in the court of chancery itself.[344] A system could be created that allowed the certified question to be referred to the same judge hearing the Delaware case, guaranteeing that the vice chancellors would not have to spend a great deal of time educating themselves as to the relevant factual context. The only risk of such a procedure is that the chancellor in question may have already formed an opinion as to the merits of the litigation.

Similarly, the types of questions likely to be certified at this stage in the litigation are those with which the court of chancery would be most familiar and for which the court has developed

340. DEL. CONST., art. IV, § 11(8) (providing authority for the Delaware Supreme Court to hear and decide questions certified by Delaware courts, U.S. federal courts, the SEC, or the highest appellate court of any state); *see also* Henry duPont Ridgely, *Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporation Law*, 63 SMU L. REV. 1127 (2010) (discussing how to avoid the "thickets" by certifying questions of law process on corporate law to the Delaware Supreme Court).

341. Lambrecht v. O'Neal, 3 A.3d 277 (Del. 2010) (answering question certified by Judge Rakoff of the Southern District of New York).

342. CORNERSTONE RESEARCH, *supra* note 42, at 9 (finding that the median time between the lawsuit and the settlement is forty-four days).

343. We note that the Delaware Supreme Court can be expeditious in deciding these issues. Judge Rakoff of the Southern District of New York certified a question to the Delaware Supreme Court on July 7, 2010 and received an answer on August 27, 2010. Lambrecht v. O'Neal, 3 A.3d 277, 280 (Del. 2010); *see also* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227 (Del. 2008) (deciding on July 9, 2008 and modifying on August 15, 2008 an SEC certification of a question of Delaware law that was submitted on June 27, 2008).

344. *See* CORNERSTONE RESEARCH, *supra* note 42, at 6, fig.3 (finding that forty-six percent and forty-three percent of acquisition-related lawsuits against companies incorporated in Delaware were filed in Delaware and other forums for 2010 and 2011, respectively).

heuristics, such as the limitation on expediting discovery in cases where a preliminary proxy has not been issued. For example, courts might certify questions of the propriety of particular processes for entering into a merger or other aspects of the validity of particular claims that would assist the courts in determining the plaintiffs' likelihood of success on the merits. In other words, this would be a formal means for sister-state courts to determine "what would Delaware do?" in a given situation.

If certification becomes a routine practice, this may spur Delaware's confidence that sister states are not deciding cases in unpredictable ways. When the case is meritorious and shareholders ought to receive compensation, Delaware can play a bigger part in ensuring this happens. Certification can also serve as an antidote to territoriality, both literally and figuratively. Certification is an antidote to territoriality literally construed because it allows the rival jurisdiction to retain power over a case while leveraging the expertise of the Delaware courts. In this way Delaware law more effectively crosses state lines. It is an antidote to figurative territoriality because it encourages power sharing between courts, rather than understanding jurisdiction as total power over a case or its dismissal.

There is a burgeoning literature on certification of questions between state courts as well as states and other entities, including legislatures and administrative agencies.[345] In the past, certification has been largely understood to be a rare occurrence that invoked the powers of the highest court in the jurisdiction.[346] With the increased importance of lower courts in making final determinations, especially in the fast-moving area of merger class actions where settlement is the order of the day, certification to the court of chancery is a sensible option.

From the perspective of the sister state's court, certification to chancery would allow judges unfamiliar with corporate law complexities to seek guidance from an expert judiciary. In this way, chancery court certification would reduce the volatility of outcomes from multiforum merger litigation in a way that is acceptable to

345. *See, e.g.*, Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 3 (2007) (arguing that federal courts should have the option to certify certain statutory questions to Congress); Verity Winship, *Cooperative Interbranch Federalism: Certification of State Law Questions by Federal Agencies*, 63 VAND. L. REV. 179, 182–84 (2010) (proposing that federal agencies should be able to certify state-law related questions to state courts).

346. A full analysis of chancery certification and potential pitfalls is beyond the scope of this Article, but we think it a promising avenue for investigation. For a discussion of certification in this context, see Winship, *supra* note 6.

defendants and the state of Delaware alike, both of which are interested in greater uniformity and consistency in the application of Delaware law. Plaintiffs, meanwhile, lose some of their ability to pressure defendants into settlement due to uncertainty, but because the system leaves the authority of the sister jurisdiction largely intact—certification, after all, is at the discretion of the trial court—plaintiffs retain the ability to file in jurisdictions with advantageous procedural rules.

CONCLUSION

We have argued that the market for preclusion is a more promising approach than the centralization of merger litigation in a single forum. A well-working market for preclusion allows weak cases to settle quickly and cheaply while ensuring that strong cases settle for more significant consideration. An active market for preclusion has the additional benefit of limiting the strain on Delaware's courts from an influx of weak cases or the occasional politically charged case. Although the current market is imperfect, we believe it can be corrected through some of the policy measures we have outlined. A regulated multiforum regime would allow courts to fast-track "good" cases and leave "bad" cases on a slower course likely to end in cheap settlement and lead to outcomes superior to a regime of centralization.

The market for preclusion also respects the real interests of the states in deciding existential questions for locally headquartered corporations, even if those corporations are incorporated elsewhere. In that sense, the market for preclusion fits well with our federalist structure of government. Moreover, the encouragement of mutual respect and dialogue among state judiciaries that we have advocated as a solution to defects in the market for preclusion may pay dividends in the development of the law more generally. Accordingly, we think the market for preclusion can strike a workable balance between federalism and efficiency.

Against Proportional Punishment

Adam J. Kolber *66 Vand. L. Rev. 1141 (2013)*

The Supreme Court has held that pretrial detainees are presumed innocent and that their detention does not constitute punishment. If convicted, however, detainees usually receive credit at sentencing for the time they spent in detention. We reduce their punishment by time spent unpunished.

Crediting time served conflicts with the commonly held view that punishment should be proportional to blame. Offenders who deserve to be punished by a year in prison but spend a year in pretrial detention may be released immediately at sentencing and technically receive no punishment at all.

One way to solve the mystery of credit for time served is to recognize that people don't care about proportional "punishment" in the narrow way the Supreme Court and many theorists use the term. Rather, they seek to dispense proportional "harsh treatment." Even though pretrial detention is technically not punishment, it is harsh treatment inflicted by the state, and most believe offenders deserve credit for it.

Shifting focus to proportional harsh treatment, however, solves one problem at the expense of several others. For if state-inflicted harsh treatment before conviction counts for purposes of assessing proportionality, then surely state-inflicted harsh treatment afterward should count too. While we could try to salvage proportionality by better measuring harsh treatment, I explain the sometimes absurd consequences of doing so.

Even though retributivist notions of proportionality are central to sentencing systems around the world and are widely thought to undergird core notions of criminal justice, both proportional punishment and proportional harsh treatment have profoundly counterintuitive implications. When the weaknesses in retributivist proportionality are revealed, consequentialist punishment theories look correspondingly more appealing.

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