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# What Should We Do About Multijurisdictional Litigation in M&A Deals?

Randall S. Thomas\*

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## I. INTRODUCTION

Companies and their investors have been battling over the value of representative shareholder litigation since at least the 1940s.<sup>1</sup> Investors argue that managerial agency costs are high and that class actions and derivative suits are key shareholder monitoring mechanisms that they can deploy to keep managers in line. Companies, on the other hand, believe that the plaintiffs' bar drives representative litigation claims, as agency costs in contingency fee suits make the lawyer the real party in interest.<sup>2</sup> Over the past several decades, there have been numerous skirmishes between these two sets of actors, manifesting themselves, for example, in congressional debates over the Private Securities Litigation Reform Act ("PSLRA") in 1995. Yet, even though one side or the other may temporarily gain the upper hand, the war continues today unabated.

The latest battleground of this extended fight is multijurisdictional deal litigation. Many merger-and-acquisition ("M&A") transactions attract shareholder litigation challenging the fairness of the economic terms of the deal for the target shareholders.<sup>3</sup> Since the end of the financial crisis, however, the number of jurisdictions in which shareholders attack each individual transaction has increased.<sup>4</sup> The potential for multijurisdictional litigation over a single deal arises because of the existing rules of civil procedure. Shareholders that wish to challenge the proposed terms of an M&A transaction can sue in either a state or federal court located in either the target company's state of incorporation or the location of the company's headquarters (assuming the defendants have the necessary presence in the jurisdiction). While the internal affairs doctrine dictates that the governing law for such a suit is that of the state of incorporation,<sup>5</sup> courts outside of that state have long entertained M&A

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1. Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 141, 149 (2004).

2. *Id.* at 148–49.

3. Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1764–65 (2012).

4. ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS: MARCH 2012 UPDATE 7–8 (2012), available at <http://www.cornerstone.com/getattachment/03dcde90-ce88-4452-a58a-b9efcc32ed71/Recent-Developments-in-Shareholder-Litigation-Invo.aspx>; Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2011*, at 3 (Feb. 2, 2012) (unpublished working paper), available at <http://ssrn.com/abstract=1998482>.

5. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (recognizing the long-standing doctrine).

suits where the filing shareholder has appropriately established jurisdiction by simply applying the incorporating state's law.<sup>6</sup> Thus, if two different investors choose to file complaints in two different state courts, perhaps one in Delaware (a frequent state of incorporation) and another in New York (a frequent headquarters state), then, while both the Delaware and the New York courts may have jurisdiction to hear the case, only Delaware law would apply to determine the validity of the investors' concerns.

Undoubtedly, there has been a marked increase in multijurisdictional litigation since 2007. For example, Cain and Davidoff found that the percentage of large deals that have been challenged in multiple jurisdictions rose from 38.7% to 94.2% from 2005 to 2011.<sup>7</sup> At the same time, there has also been a shift in shareholder litigation settlement terms, moving away from an increase in deal consideration towards more disclosure-based settlements. This trend is potentially disturbing because in these settlements, while the plaintiffs' attorneys are awarded attorneys' fees, the target investors only receive the uncertain benefit of increased deal disclosures. Some commentators have claimed these are inferior settlements, indicative of a low-value lawsuit.

Why has this upsurge in multijurisdictional litigation occurred? How significant are its real costs and benefits? And what should we do about it, if anything? This Article first summarizes what we know about these questions and then offers its own viewpoint on how best to respond to multijurisdictional litigation. It finds that different scholars have diagnosed the underlying causes for the change in filing patterns differently. One group of academics claims that multijurisdictional litigation initially arose because plaintiffs' law firms perceived that Delaware had become more hostile to shareholder litigation.<sup>8</sup> A second set of scholars claims that changes in plaintiffs' law firm structure, legal shifts affecting federal securities law class actions, and Delaware's new lead-plaintiff rules are the primary reasons for the change.<sup>9</sup> In fact, the phenomena described by both groups of commentators may have contributed to the observed change in filing patterns.

On the costs and benefits associated with multijurisdictional litigation, there are again very different views, depending on where

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6. Thomas & Thompson, *supra* note 3, at 1779, 1779 n.135.

7. Cain & Davidoff, *supra* note 4, at 2.

8. John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1366–70 (2012); John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 647 (2012) [hereinafter Armour et al., *Delaware Cases*].

9. Thomas & Thompson, *supra* note 3, at 1774–78, 1780.

one sits. The defense bar argues that these suits have vastly increased the transaction costs of completing deals without producing any offsetting benefits. Others are skeptical about these claims of enormous costs, while also finding benefits to investors from continuing to have a choice of forum. The lack of good empirical data identifying these costs and benefits makes it difficult to resolve the dispute, but I have argued elsewhere that, at present, it seems the costs are relatively low and not out of line with the benefits.<sup>10</sup>

Where you stand on the costs and benefits of these suits affects what you think needs to be done about them. As a result, the proposals for responding to the uptick in multijurisdictional litigation fall into two distinct groups. On one side, the defense bar and their academic supporters want to eliminate shareholders' choice of forum by either mandating that only the state of incorporation is a proper venue or, alternatively, vesting the choice of venue with the target company's board of directors. A corollary aspect of these proposals rests on whether the proponents believe that a bylaw passed solely by the board of directors is sufficient to implement such a change or that a shareholder-approved charter amendment is needed.

However, on the other side, there are judges, academics, and investors who believe the current system of judicial comity is appropriate, either as it is now or with some tweaks. These advocates see value in the current emphasis on federalism and comity, while at the same time differing over whether a thumb needs to be put on the scale in favor of the state of incorporation or greater coordination among judges in different courts. This Article argues that comity is the best solution, at least until scholars develop more complete data on multijurisdictional litigation's costs and benefits.

However, if the noticeable decline in the quality of the underlying suits challenging M&A transactions, evidenced by the resultant increase in disclosure-based settlements, is the real impetus for this debate, then courts in all jurisdictions should respond by denying expedited discovery in, or dismissing outright, weak shareholder class actions and derivative suits, particularly those that allege only disclosure violations in arm's length acquisitions.<sup>11</sup>

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10. *Id.* at 1800, 1800 n.253.

11. Not all disclosure claims are weak, however. For example, the Delaware courts have focused on insuring the disclosure of certain categories of information in deal litigation such as a fair summary of the substantive work performed by target company investment bankers in rendering their fairness opinions. *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 201-04 (Del. Ch. 2007); *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 448-49 (Del. Ch. 2002). If the courts would identify these necessary classes of documents more carefully, and then limit the

Moreover, judges should not hesitate to cut or deny fees in disclosure-based settlements where they find that the resultant change to the disclosures is of little value to investors. If all courts would apply these principles in approaching multijurisdictional litigation without concern for where these cases finally wind up being resolved, there should be little need to change the whole litigation system in ways that may adversely affect investors.

This Article proceeds as follows: Section II provides an overview of the recent history of M&A litigation as it has changed over the past thirty years. Section III then details the causes, costs, and benefits of multijurisdictional litigation. Next, Section IV compares the two most widely proposed policy responses to multijurisdictional litigation: forum-selection clauses and comity. It concludes that, on balance, a comity-based response is preferable, at least for now. Section V offers some brief concluding remarks.

## II. WHAT IS THE PROBLEM?

Representative shareholder deal litigation comes in two basic flavors: class actions and derivative suits. In the M&A context, class actions are by far the most common type of suit.<sup>12</sup> The typical acquisition-oriented class action alleges that, if the transaction is a friendly one, the target company's board of directors sold the company for too low a price, or if the offer is a hostile one, that target management refused to sell the company at a premium price. Derivative suits, on the other hand, typically claim that a company's board of directors took some action that adversely affected the firm's value and thereby lowered the company's stock price. However, derivative suits are less frequent in the deal area because plaintiffs face procedural barriers in those cases that are not present in class actions.<sup>13</sup>

This Section traces the evolution of M&A litigation and the role of the acquisition-oriented class action over the period of 1975 to the present. In particular, it describes the changing role of these suits since the Fourth Merger Wave.

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corporation's disclosure obligations to these types of information, they would be able to more clearly delineate what is necessary for companies to disclose in deal litigation.

12. Thompson & Thomas, *supra* note 1, at 135.

13. Thomas & Thompson, *supra* note 3, at 1784–85.

*A. Forum Shopping in the Fourth Merger Wave (1975–1989)*

During the “Golden Age” of shareholder litigation,<sup>14</sup> the Fourth Merger Wave that ran from 1975 to 1989, there were large numbers of hostile takeovers.<sup>15</sup> These deals frequently spurred both the target and the bidder to file suits that sought to further each of these participant’s tactical goals.<sup>16</sup> Bidders would ask the courts to strike down the target’s defenses under state law and would challenge the accuracy of the target company’s disclosures under federal law. If the target was a Delaware corporation, the bidder would routinely file in the Delaware Chancery Court as quickly as possible to fix the forum that would determine what defenses the target could use and how it could use them in responding to the unsolicited takeover proposal.

Targets would respond as quickly as possible by filing their own suit in their hometown state court. They would ask the court to permit the use of their defenses as they pleased or try to impede the bid in a variety of ways, such as alleging that the bidder had violated federal securities laws. The target’s hope was that the judge would be more sympathetic to its situation given the large number of local workers that it employed.

The ensuing race to the courthouse would inevitably lead to a flurry of jurisdictional motions as each side tried to stay the other side’s case in favor of their own suit. This blatant forum shopping was widespread and generally acknowledged as a necessary part of most hostile transactions because of the high stakes that attached to fixing the forum in the preferred venue. While there may have been occasional grumbling about these preliminary procedural jousts, no one seriously argued that either party should be denied its shot at getting into its preferred venue. Forum shopping, while not openly

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14. Transcript of Teleconference on Plaintiff’s Motion to Expedite and the Court’s Ruling at 10, *Stourbridge Invs., L.L.C. v. Bersoff*, C.A. No. 7300-VCL (Del. Ch. Mar. 13, 2012), available at <http://www.delawarelitigation.com/files/2012/04/stourbridge-teleconference-motion-to-expedite.pdf> (stating that the Delaware Chancery Court’s corporate litigation practice had “been through a somewhat apocryphal Golden Age in which the plaintiffs challenging public company M&A transactions were principally competing bidders seeking merits relief to help them overcome barriers to an alternative and higher-value transaction that was nevertheless opposed by target’s fiduciaries”).

15. RONALD J. GILSON & BERNARD S. BLACK, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 11 (Robert C. Clark et al. eds., 2d ed. Supp. 2003–2004).

16. Gregg A. Jarrell, *The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merge?*, 28 J.L. & ECON. 151, 152 (1985); Michael Rosenzweig, *Target Litigation*, 85 MICH. L. REV. 110, 120–22 (1986).



lauded, was embraced as part of the best lawyers' arsenal of appropriate litigation tactics.<sup>17</sup>

In these hostile deals, shareholders would routinely file class actions, but they were widely viewed as ancillary to the bidder-target suits. In some cases, such as *Time-Warner*,<sup>18</sup> the bidder gave the plaintiff shareholders a shot at arguing some of the harder claims, either because it thought the claims were unwinnable or because it believed that its overall case benefitted from having investors standing by its side. However, the Delaware Supreme Court's decision in *Time-Warner* to overrule the *Interco* case<sup>19</sup> changed things. *Time-Warner* permits a target almost unbridled discretion to use a poison pill, resulting in the near demise of the hostile tender offer and paving the way for shareholder litigation to assume greater prominence.

### *B. Shareholder Litigation in the Fifth Merger Wave (1993–2001)*

By the late 1990s, hostile takeovers gave way to friendly mergers.<sup>20</sup> Bidders used more stock to consummate these transactions as the booming stock market resulted in huge market-price run-ups. There was a massive surge in deal activity;<sup>21</sup> however, because these deals were almost all friendly, there was little bidder and target rivalry, so bidder-target litigation dwindled to a trickle.<sup>22</sup> This left a need for some alternative mechanism to police the fairness of these deals.

Recent empirical research shows that shareholder representative actions filled the void.<sup>23</sup> Class actions and derivative suits appeared in about 12% of all deals.<sup>24</sup> On average, these suits had some teeth: they made it harder for bidders to complete deals but had a positive effect on premiums in completed deals. About one-third of

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17. Herbert M. Wachtell, *Special Tender Offer Litigation Tactics*, 32 BUS. LAW. 1433, 1434–35 (1977).

18. See, e.g., *Paramount Commc'ns, Inc. v. Time, Inc. (Time-Warner)*, 571 A.2d 1140, 1142 (Del. 1989). Plaintiff shareholders argued that the target's actions violated the *Revlon* doctrine, whereas the bidder, Paramount Communications, claimed that the target's actions were inappropriate under the *Unocal* test. *Id.*

19. *City Capital Assocs. Ltd. P'ship v. Interco, Inc.*, 551 A.2d 787, 790 (Del. Ch. 1988) (forcing rare board redemption of poison pill).

20. GILSON & BLACK, *supra* note 15, at 17.

21. Bernard S. Black, *The First International Merger Wave (and the Fifth and Last U.S. Wave)*, 54 U. MIAMI L. REV. 799, 799 (2000).

22. C.N.V. Krishnan et al., *Shareholder Litigation in Mergers and Acquisitions*, 18 J. CORP. FIN. 1248, 1249, 1253 (2012).

23. *Id.* at 1264.

24. C.N.V. Krishnan et al., *Jurisdictional Effects in M&A Litigation*, J. EMPIRICAL LEGAL STUD. (forthcoming) (manuscript at 3), available at <http://ssrn.com/abstract=2277878>.

these cases settled, and in about 40% of those settlements, investors received an increase in the deal consideration.<sup>25</sup>

Representative litigation during this time period was largely filed in a single venue: either in a state or federal court located in the target's state of incorporation or headquarters state. Delaware state courts had the lion's share of all of these cases (over 52%), with other state courts garnering a little less than half (roughly 42%) and federal courts seeing only a small fraction (around 6%).<sup>26</sup> There was almost no multijurisdictional litigation (only 3.34% of all cases), with about half of this handful of cases filed in both Delaware and a second state, while the remaining half involved a federal suit and a state-court action.<sup>27</sup>

These results provide a baseline measure of the effectiveness of shareholder litigation in its so-called "Silver Age."<sup>28</sup> During that period, there was little multijurisdictional litigation occurring. A significant percentage of deals, but well less than a majority, involved litigation, and representative suits had an economically beneficial impact for shareholders.<sup>29</sup> Settlements occurred regularly, frequently increasing the deal price paid to target company shareholders.<sup>30</sup> Shareholder litigation, in other words, was a useful mechanism for policing the agency costs of management.

### *C. A Changing Role for Representative Litigation in the Post-Financial Crisis Period (2007–2012)*

The financial crisis of 2007 significantly changed the economics of dealmaking. Financing for deals dried up overnight, and the future prospects of many potential targets became much less certain in light of the serious recession that ensued. Strategic buyers grew skittish about making big bets on the future of their industry. Private-equity buyers could not find debt financing for new deals, held far too many shaky investments in firms they bought before the crisis, and were

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25. *Id.* (manuscript at 3–4).

26. *Id.* (manuscript at 31).

27. *Id.*

28. Transcript of Teleconference on Plaintiff's Motion to Expedite and the Court's Ruling at 14, *Stourbridge Invs. LLC v. Bersoff*, C.A. No. 7300-VCL (Del. Ch. Mar. 13, 2012), available at <http://www.delawarelitigation.com/files/2012/04/stourbridge-teleconference-motion-to-expedite.pdf> (stating that Chancellor Allen had set the standard for expedited injunction hearings "during the nineties, which were perhaps equally apocryphal but still something of a Silver Age in which when stockholders sought to litigate without a covering bid, they actually wanted to get merits relief and tried to obtain an injunction").

29. Krishnan et al., *supra* note 24 (manuscript at 9, 11).

30. *Id.* (manuscript at 24–25).

reluctant to close on new ones as their exit options from prior deals, such as the IPO market, tanked. Overall, there was a sharp decline in the number of deals completed after 2007.<sup>31</sup>

Fewer deals and a flurry of adverse court decisions closed down the hostile-transaction market. The Delaware Chancery Court's decision in *Air Products & Chemicals, Inc. v. Airgas, Inc.*<sup>32</sup> and the Delaware Supreme Court's ruling in *Versata Enterprises v. Selectica, Inc.*<sup>33</sup> made it exceedingly difficult for an unsolicited bidder to gain control of a Delaware target company that has both a poison pill and a classified board.<sup>34</sup> The decline in hostile deals means fewer accompanying bidder-target suits over their terms. However, representative shareholder M&A litigation could potentially still have an important role in policing the terms of friendly deals during the post-financial crisis period.

Yet, critics claim that there has been a significant and undesirable shift in representative shareholder litigation. They point to three changes in this area: first, an increase in the percentage of large deals being attacked by shareholder litigation; second, a big upswing in the amount of multijurisdictional deal litigation; and third, a high percentage of settled cases with increased disclosure policies as the only corporate concession. With respect to the first point, Cain and Davidoff have shown that in the post-financial crisis period the number of deals has dropped dramatically, while the number of suits attacking deals has been relatively unchanged.<sup>35</sup> As a result, the percentage of deals that are challenged in litigation has increased, but the amount of litigation is largely static. Professor Thompson and I have argued elsewhere that this is consistent with plaintiffs' law firms having a fixed amount of litigation capacity over this time period and therefore continuing to file roughly the same number of cases both before and after the financial crisis. The key point, though, is that the

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31. See Cain & Davidoff, *supra* note 4, at 2 (showing that 249 deals were completed in 2007, 71 in 2009, and 124 in 2010).

32. 16 A.3d 48, 54, 129 (Del. Ch. 2011) (upholding Delaware precedent regarding takeover defenses and holding that a board of directors, not shareholders, has the power to defeat an inadequate hostile tender offer).

33. 5 A.3d 586, 607 (Del. 2010) (upholding board's business judgment in adopting and implementing poison pill).

34. Paul H. Edelman & Randall S. Thomas, *Selectica Resets the Trigger on the Poison Pill: Where Should the Delaware Courts Go Next?*, 87 IND. L.J. 1087, 1102 n.115, 1126 (2012).

35. Cain & Davidoff, *supra* note 4, at 2. Cain and Davidoff find that there were 230 large deals in 2006, of which 97 were challenged by shareholder litigation for a 42.2% litigation rate, whereas in 2011, there were 103 large deals, with 97 being targeted by shareholder litigation, for a 94.2% litigation rate. *Id.* Note that the number of suits in 2006 is exactly the same as the number of suits in 2011. *Id.*

numbers do not represent a significant increase in the total amount of deal litigation.

The sharp uptick in multijurisdictional litigation and the rise in disclosure-based settlements is also well documented. For 1999 and 2000, Krishnan et al. found that only 3.3% of deal litigation occurred in multiple jurisdictions.<sup>36</sup> Cain and Davidoff have shown that, subsequently, in 2005, only 8.6% of deals were challenged by multijurisdictional litigation, and that, one year later, the percentage had increased to 25.8%. These numbers continued to climb until 2010, when the percentage of deals targeted by multijurisdictional cases had grown to 47.6%.<sup>37</sup> This is a clear shift in litigation-filing patterns.

Settlement patterns appear to have changed as well. Whereas Krishnan et al. found that about one-third of deal cases settled in 1999 and 2000, with 42% of those resulting in increased consideration for shareholders and 18.5% involving disclosure claims, Cain and Davidoff's more recent data show a starkly different situation.<sup>38</sup> In their 2005 data, disclosure-based settlements constituted about 63.9% of all settlements; by 2011, that number rose to 79.5%.<sup>39</sup>

Generally speaking, disclosure-based settlements are viewed as less valuable to target company shareholders than increased deal consideration. As Vice Chancellor Laster observed recently, "[T]he increase in disclosure-only settlements is troubling. Disclosure claims can be settled cheaply and easily, creating a cycle of supplementation that confers minimal, if any, benefits on the class."<sup>40</sup>

Cain and Davidoff's data also show a difference in attorneys' fee awards between the two types of cases: the median value for disclosure-only settlements varies between \$400,000 to \$575,000 over the 2005 to 2011 period, while the median for nondisclosure settlements ranges from \$725,000 to \$3.875 million.<sup>41</sup>

What should we make of these changes? As discussed below, the implications seem clear to the defense side of the table: this is forum shopping of the worst kind. Unlike during the Fourth Merger Wave, however, where forum shopping was viewed as part and parcel of an aggressive legal strategy employed by Wall Street firms

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36. Krishnan et al., *supra* note 24 (manuscript at 3, 25).

37. Cain & Davidoff, *supra* note 4, at 2. Cain and Davidoff find a small decline in 2011 with the percentage dropping to 47.4%. *Id.*

38. See Matthew D. Cain & Steven M. Davidoff, Takeover Litigation in 2012, at 3 (Feb. 1, 2013) (unpublished working paper), available at <http://ssrn.com/abstract=2216727>.

39. See *id.* (framing data in terms of nondisclosure settlements).

40. Transcript of Teleconference on Plaintiff's Motion to Expedite and the Court's Ruling, *supra* note 14, at 11–12.

41. Cain & Davidoff, *supra* note 4, at 3–4.

representing both bidders and targets, the defense bar now represents only defendant-corporations. As a result, it is now in the self-interest of these firms' corporate clients to claim that multijurisdictional litigation is an abusive forum-shopping technique. Wall Street defense firms have strongly argued in favor of their corporate clients adopting forum-selection provisions, either in the corporations' charters or bylaws, neglecting to mention that this would simply reverse the forum shopping in their clients' own favor.

Other commentators have been more cautious. Our federalist system has long fostered the horizontal interaction of sister state courts as well as the vertical back and forth between state and federal courts. Overturning hundreds of years of this existing practice simply as a response to what may well be a passing fad should only be done after careful consideration. The existing system of comity between courts has, in these commentators' eyes, much to commend. At the same time, some of them propose minor tinkering with the system. Before analyzing the potential solutions, though, it is important to look first at the reasons why multijurisdictional litigation has grown so dramatically in recent years and at what its real costs and benefits are.

### III. WHAT ARE THE CAUSES, COSTS, AND BENEFITS OF MULTIJURISDICTIONAL LITIGATION?

The importance of this new trend toward increasing amounts of multijurisdictional litigation depends on the underlying reasons why it is occurring and its costs and benefits to society. The first Section here, Part III.A, addresses the current theories that seek to explain the development of this phenomenon, while the second Section, Part III.B, critically examines its costs and benefits.

#### *A. Why Has Multijurisdictional Litigation Developed Now?*

The origins of the upsurge in multijurisdictional litigation have been the subject of several recent law review articles. As discussed below, they suggest that changes in the structure of plaintiffs' law firms, new procedural rules in some courts, and competition between courts are likely causes of this development. However, the groundwork for this explosion was first laid in an important U.S. Supreme Court decision.

### 1. *Matsushita* Encourages It

Multijurisdictional representative litigation became much more attractive to plaintiffs' lawyers after the U.S. Supreme Court's decision in *Matsushita Electric Industrial Co. v. Epstein*.<sup>42</sup> Briefly stated, the Supreme Court held that "a broadly written settlement release in an action in one jurisdiction controlled settlements made later in other jurisdictions."<sup>43</sup> Ultimately, this regime allowed large payouts for the plaintiffs' firms in the settling jurisdictions while also giving defendants incentives to settle with one class representative over another.

*Matsushita* allows plaintiffs that have been left out of deal litigation in a first court (often Delaware) to file suit in a second court (federal or another state) in order to try and gain control over the entire litigation, or at least regain a seat at the settlement table in the first jurisdiction.<sup>44</sup> After establishing control over the dispute in the second court, plaintiffs' counsel in the second suit may be able to convince the defendants to settle the second action by leveraging the release of claims in both cases. Inevitably, defendant firms will pressure all plaintiffs' firms into participating in a global settlement, thereby providing a fee recovery to all firms while eroding the return of those initial plaintiffs' firms with the largest amounts of time and money invested in bringing the litigation.<sup>45</sup>

The possibility of multiple suits and the incentives of plaintiffs' lawyers give defendants both a powerful role in determining which suits are settled and an opportunity to play one plaintiff representative against another. Defendants may run a reverse auction, in which competing plaintiffs' counsel offer to settle their suits at the lowest price.<sup>46</sup> This type of behavior will adversely affect those plaintiffs' law firms that invest substantial resources in pursuing strong cases against defendants, as their competitors that have made little litigation investment in other jurisdictions will be willing to settle for a lower price.

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42. 516 U.S. 367, 369 (1996).

43. Thomas & Thompson, *supra* note 3, at 1766.

44. *Id.* at 1780.

45. *Id.* at 1769.

46. Transcript of Courtroom Status Conference at 10-12, *Scully v. Nighthawk Radiology Holdings, Inc.*, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010), available at [http://www.delawarelitigation.com/uploads/file/int53\(1\).pdf](http://www.delawarelitigation.com/uploads/file/int53(1).pdf); see Peter E. Kazanoff, *Multi-Jurisdictional Shareholder Challenges to M&A Transactions*, in *M&A LITIGATION 2011*, at 5 (Practising Law Inst. ed., 2011) ("With plaintiffs in multiple jurisdictions, defense counsel charged with ensuring deal certainty may be motivated to negotiate and reach a settlement with plaintiffs' counsel who are the most willing to settle their claim and forgo a preliminary injunction hearing.").

## 2. Newer and Smaller Plaintiffs' Law Firms Have Incentives to Bring This Type of Case

Smaller and newer plaintiffs' law firms have limited financial resources, so they want to get profitable cases without investing large amounts of resources in each one. This makes multijurisdictional deal litigation a good candidate for these firms because it does not require the multimillion-dollar financial investment necessary to bring a federal securities law class action to trial. These firms may also lack the reputation and resources to attract the larger shareholders they need to qualify as lead plaintiffs in these class actions. By comparison, they can file M&A actions cheaply in either state or federal courts located in the target's state of incorporation or those in the state where the company's headquarters is located. After *Matsushita*, if plaintiffs' firms have a case in one of those competing jurisdictions, they can offer settlement of their case to eliminate any rival actions in competing jurisdictions. If these firms can establish themselves as lead counsel in an action in any one of these jurisdictions, they will have substantial leverage to get at least part of any attorneys' fee award paid in a global settlement of all the competing cases.

In addition, some features of Delaware's jurisprudence may disfavor smaller, newer firms in Delaware-based actions. For example, Delaware courts' approach to lead-plaintiff selection now largely tracks that of the PSLRA.<sup>47</sup> Thus, attorneys whose shareholder-clients do not have the largest financial stake, or who otherwise do not have some expertise that merits their selection by the Chancery Court, will be unlikely to be appointed lead counsel in that state. Courts outside Delaware will be attractive to plaintiffs' law firms excluded from the Delaware litigation or shunted to a less influential position with a smaller share of attorneys' fees.<sup>48</sup> Multijurisdictional filings may enable enterprising plaintiffs' attorneys' participation in settlements that otherwise would have been forestalled in Delaware courts.

Changes at the prominent plaintiffs' firm Milberg Weiss may have also contributed to the incentives of younger firms to file multijurisdictional litigation. The firm's split into east and west coast divisions became even more complicated when several partners were convicted of criminal charges related to their representation of clients

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47. Thomas & Thompson, *supra* note 3, at 1780.

48. Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1089–90 (2013). Griffith and Lahav note that the Delaware lead-plaintiff provision may also have the effect of pushing plaintiffs to file elsewhere if the Delaware courts are slow to select a lead plaintiff.

in class actions.<sup>49</sup> These changes undercut Milberg Weiss's impact on the plaintiffs' services market. Subsequently, Lerach Coughlin, a spinoff of Millberg Weiss, was thought by some to have begun filing more suits outside of Delaware.<sup>50</sup> The development of a more diverse plaintiffs' bar may signal that these attorneys are more comfortable outside of Delaware courts than their predecessors.

### 3. Courts Compete to Attract These Cases

Some commentators have argued that Delaware courts are in a losing competition for deal-litigation cases with other courts.<sup>51</sup> Delaware, they say, has manifested an antiplaintiff bias, leading many plaintiffs to file elsewhere. In response, Delaware judges, supposedly trying to reverse this trend, are raising attorneys' fee awards to encourage plaintiffs to come back. There is some empirical support for this claim: recently, Delaware courts have awarded fees that are on average \$400,000 to \$500,000 higher than other courts.<sup>52</sup> But this may change over time, as Delaware judges have fluctuated over the years in their attitudes toward attorneys' fee awards in deal litigation.<sup>53</sup>

One factor that pushes plaintiffs' attorneys to other jurisdictions is that Chancery Court judges often refuse to defer to

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49. Heidi Moore, *Double Trouble*, DAILY DEAL, May 10, 2004, available at LexisNexis (announcing the breakup of the Milberg Weiss firm).

50. Vice-Chancellor Laster stated in a hearing that "when Lerach Coughlin, the predecessor of Robbins Geller, split off from Milberg, they said, as their business plan, we are going to sue elsewhere. We're not going to sue in Delaware." Transcript of Motion to Consolidate and Organize Counsel and the Court's Ruling at 19, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL (Del. Ch. Jan. 13, 2011), available at [http://www.delawarelitigation.com/uploads/file/int76\(2\).pdf](http://www.delawarelitigation.com/uploads/file/int76(2).pdf). However, in an email to the author, one of the partners of that firm stated that this was an incorrect statement, that the firm files suits in Delaware as well as other jurisdictions, and that the firm is unaware of any statement otherwise by any employee of the firm.

51. Armour et al., *Delaware Cases*, *supra* note 8, at 607; see also Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 143 (2011) (discussing the role of the natural pressures of the plaintiffs' bar in reducing shareholder litigation filed in Delaware); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 61 (2009) (arguing that the Delaware courts' hold on corporate cases is under pressure "horizontally" due to claims being litigated in other states' courts).

52. Cain & Davidoff, *supra* note 4, at 5; see also Transcript of Oral Argument on Plaintiffs' Petition for an Award of Attorneys' Fees and Expenses and Rulings of the Court, *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 30 A.3d 60 (Del. Ch. 2011) (C.A. No 961-CS) (awarding \$150 million in attorneys' fees to plaintiffs' counsel).

53. See, e.g., Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 31 (Jan. 31, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=1984758>.



parties' settlement agreements and may reduce fee awards in some actions.<sup>54</sup> As a consequence, other state courts may compete for filings by actually deferring more often to the parties' settlement numbers.<sup>55</sup>

But why would Delaware want to get more M&A litigation? Delaware judges already have substantial prestige and influence stemming from sitting on the business court of the nation. Their dockets are very busy, and none of the judges seem to be lacking for things to do. Perhaps they are concerned that the state will lose companies, a significant concern in a state where corporate fees account for 15% to 20% of the state's budget.<sup>56</sup> Furthermore, it seems hard to believe that Delaware judges care all that much about most M&A deal litigation these days, as they have publicly disparaged the quality of many of the cases being filed.<sup>57</sup>

If competition for these cases actually exists, a rational plaintiffs' counsel would use a number of factors to determine the most advantageous forum in which to file. Those with strong cases would like to have an experienced and knowledgeable judge who issues predictable and speedy decisions without any perceived biases for or against plaintiffs.<sup>58</sup> In other words, good cases are likely to migrate to the Delaware courts.<sup>59</sup> Weaker cases, however, are more likely to go elsewhere, in an effort to find a more hospitable home. For example, a sympathetic hometown judge where the company is headquartered may rule in the plaintiffs' favor if the deal at issue is likely to result in large-scale layoffs of employees or the closing of their executive offices within the state. Or, a judge that rarely sees corporate cases may inadvertently misapply Delaware law to reach a plaintiff-friendly result.

Analytically, we get more traction by looking at multijurisdictional litigation as arising because different courts have different advantages for plaintiffs. Consider speed of resolution as one

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54. Pamela S. Tikellis, *Under the Microscope – Disclosure Based Settlements and Multi-Jurisdictional Litigation*, in *M&A LITIGATION 2011*, *supra* note 46, at 95, 97 (noting that the Delaware Chancery Court is reducing fee awards in disclosure-only settlements in recent years, even when the amount of the award is unopposed).

55. Thomas & Thompson, *supra* note 3, at 1773.

56. ROBERTA ROMANO, *FOUNDATIONS OF CORPORATE LAW* 117 (2d ed. 2010).

57. Transcript of Teleconference on Plaintiff's Motion to Expedite and the Court's Ruling, *supra* note 14, at 11–12 (expressing strong reservations about the quality of recent M&A deal litigation). Some commentators have even suggested that multijurisdictional litigation presents Delaware with an opportunity to engage in "strategic outsourcing," whereby Delaware is able to "reduce administrative costs and conserve judicial resources for deployment in those cases most likely to chart the future path of corporate law." Griffith & Lahav, *supra* note 48, at 1098.

58. Thomas & Thompson, *supra* note 3, at 1771.

59. *See id.* (identifying the numerous respects in which Delaware courts are preferable over other jurisdictions).

such possible difference. The Chancery Court often grants plaintiffs' motions for expedited proceedings. In deal cases, this is critical if the plaintiff seeks to obtain an injunction to stop the deal, or at least to use as leverage to force the defendants to settle in order to eliminate the threat of such an injunction.<sup>60</sup> But not all other courts have such policies, especially federal courts.

Other important procedural practices vary between courts. One peculiarity of Delaware practice in merger cases is the Chancery Court's unwillingness to schedule preliminary injunction hearings before the defendants send their proxy statements to the target's shareholders.<sup>61</sup> Although there are good reasons for this reluctance, other state and federal courts may prefer to move forward without waiting on the delivery of the proxy statements. Along similar lines, Delaware courts are normally unwilling to enjoin a transaction in which no other bidder has come forward.<sup>62</sup> Other jurisdictions may be willing to offer plaintiffs this possibility. Furthermore, the Delaware Chancery Court does not permit juries, whereas other jurisdictions do, and if plaintiffs seek to try the case, that may influence their choice of jurisdiction.<sup>63</sup>

In addition, even before the PSLRA was enacted, Delaware traditionally did not permit discovery before a motion to dismiss in derivative suits. This lack of available discovery makes it difficult for the plaintiffs' case to get off the ground.<sup>64</sup> On the other hand, other states' rules are not always as hostile to plaintiffs, and, under current law, competing states can apply their own procedural rules regardless of the substantive law that the internal affairs doctrine mandates.<sup>65</sup>

Finally, of course, there is always the age-old problem that some plaintiffs' law firms may believe that particular judges will be more sympathetic to their cause than others. It is easy to think of examples: attorneys may believe that judges will favor former law clerks or major campaign contributors.<sup>66</sup> All courts employ law clerks,

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60. *Id.* at 1772.

61. *Id.*

62. *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 452 (Del. Ch. 2012).

63. However, very few cases actually go to trial, especially in deal litigation.

64. Generally, the Chancery Court has also looked askance at plaintiffs seeking documents they may need to pursue securities fraud class actions. *See Beiser v. PMC-Sierra, Inc.*, C.A. No. 3893-VCL, 2009 WL 483321, at \*3-4 (Del. Ch. Feb. 26, 2009) (denying plaintiff's request for such documents where the plaintiff had already filed a securities fraud class action using the same counsel as in the Delaware action).

65. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. d (1971) ("[A] court under traditional and prevailing practice will apply its own state's rules involving process, pleadings, joinder of parties, and the administration of the trial . . .").

66. Thomas & Thompson, *supra* note 3, at 1773.

but many judges, including those that sit on the Delaware Chancery Court, are not elected.

In the end, all of these factors may have contributed to the rise of multijurisdictional litigation. While the origins of these suits are important, perhaps more important is determining what their costs and benefits are. We turn to that question next.

*B. What Are the Costs and Benefits of Multijurisdictional M&A Litigation?*

The costs and benefits of multijurisdictional litigation are difficult to quantify with any precision. Beginning with the benefits side of the equation, there are several rationales for keeping the existing system in place. First, the current regime conforms to the traditional jurisdiction and venue rules for forum selection.<sup>67</sup> Our civil procedure system has endured for many years and works well in most instances. There is value in keeping the current method in place unless it is drastically broken. Second, our federalist system preserves a state's ability to influence the business and affairs of corporations maintaining headquarters within its borders. It "requires that states respect other states' laws," and multijurisdictional litigation preserves that ability.<sup>68</sup> Third, Delaware courts have a quasi-monopoly over the growth of corporate law, which affects public companies everywhere. The current schema has the advantages of predictability and certainty because competent judges with business experience preside over corporate law cases. Yet, Delaware could stop balancing the interests of shareholders and managers if it obtained a complete monopoly.<sup>69</sup> Multijurisdictional litigation gives other states' courts a channel to articulate their state's interest in these cases and thereby influence corporate law.<sup>70</sup>

On the cost side of the equation, a very limited amount of empirical work of any type has been done on this topic, and none of it has attempted to measure such important things as the direct impact

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67. *Id.* at 1799.

68. Griffith & Lahav, *supra* note 48, at 1106.

69. See Thomas & Thompson, *supra* note 3, at 1799–800 (describing the advantages posed by the Delaware courts' quasi-monopoly over the future growth of corporate law).

70. *Id.* at 1800. Griffith and Lahav suggest two additional benefits: (1) multijurisdictional litigation allows plaintiffs' lawyers to 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 client's claim in settlement; and (2) multijurisdictional litigation provides defendants with a structural advantage that allows them, effectively, to "shop" for the quickest and cheapest settlement from the various plaintiffs' teams. Griffith & Lahav, *supra* note 48, at 1082.

of multijurisdictional litigation on total attorneys' fees or settlements. These direct costs are important but may be relatively small. First, consider the defendants' costs for settling these cases. Many shareholder deal cases are dismissed with very little litigation activity and no settlement,<sup>71</sup> whether or not filed in one or multiple jurisdictions. For example, Cain and Davidoff report that in 2010 there were 124 deals over \$100 million in value, and that 105 of these deals involved litigation, resulting in a total of 75 settlements.<sup>72</sup> In other words, 30 cases, or about 28.5% of the total cases filed, were dismissed without a settlement. For the cases that do settle, we do not know if the individual settlements for deals involving multijurisdictional litigation were higher than, lower than, or the same as those for comparable deals where litigation was filed in one court.<sup>73</sup>

Is there an increase in the total cost of settlements for all target firms? While Delaware's dismissal rate is higher than other jurisdictions, its courts dismiss fewer cases filed in multiple jurisdictions.<sup>74</sup> Defendants' litigation costs could be higher if other states are not dismissing these cases, because that would, in turn, drive defendants to settle more multijurisdictional litigation.<sup>75</sup> However, higher direct costs to defendants from individual multijurisdictional settlements (such as greater deal-consideration payments) are unlikely, because most of these settlements involve increased disclosure to the class of affected shareholders, and not increased deal consideration. Settling more cases, therefore, does not lead to greater cash payments. Moreover, by settling more cases, the defendants are obtaining more global releases from all potential claims arising out of the transaction, and these additional releases have value.<sup>76</sup>

Consider next the implications of multijurisdictional litigation on total attorneys' fees paid. Multijurisdictional litigation could create more mouths to feed in the plaintiffs' bar and therefore generate a greater total amount of fee payments to plaintiffs' attorneys. While

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71. Thompson & Thomas, *supra* note 1, at 176, 176 n.174.

72. Cain & Davidoff, *supra* note 4, at 1-3.

73. A much harder question would be whether, given the merits of the particular multijurisdictional case, the settlements were higher or lower than would have been expected if the litigation was filed in only one jurisdiction.

74. See Cain & Davidoff, *supra* note 4, at 5-6 (noting that Delaware appears to be dismissing fewer cases and that such behavior is consistent with conduct designed to recapture litigation).

75. See Thomas & Thompson, *supra* note 3, at 1800 n.249.

76. Griffith & Lahav, *supra* note 48, at 1094-95.

this could be true in particular cases, even when all of the cases are filed in one court, there are generally several different plaintiffs' law firms that assist in the litigation, each of which has a claim to a share of any fee award. It is not clear why allowing a firm with a suit in another jurisdiction to participate in the overall settlement fee allocation is any different from what occurs when all of the cases are in one court.

Defense counsel might also complain that if they are forced to defend actions in two jurisdictions, then they will have to charge their clients more. There are several problems with this argument. First, there is no publicly available information about the attorneys' fees that defendants pay, so we cannot make any empirical determination about changes to them. If defendants would disclose such fees systematically, then the issue could be studied empirically. Second, deal litigation is not as lawyer intensive as most forms of litigation: there are few significant motions filed, except for motions to expedite discovery, and most cases are resolved quickly. Third, defendants can run a reverse auction, whereby they have competing plaintiffs' counsel filing cases in different jurisdictions, which should permit them to drive settlement costs to the lowest level possible.<sup>77</sup>

Furthermore, the best empirical evidence shows that, in the majority of deal cases, little discovery is taken.<sup>78</sup> Interrogatories are likely to be the same in each related case, or at least quite similar, while depositions are frequently taken once for use in all of the pending matters related to the transaction. Moreover, it is common practice to conduct all discovery on a consolidated basis across jurisdictions. Furthermore, most multijurisdictional cases are only litigated in one forum because the judges and attorneys from each court involved agree on which court should hear the case.<sup>79</sup> Finally, only one preliminary injunction hearing needs to be scheduled per transaction. So while there are likely to be some increased defense costs from having multiple courts involved in these cases, it is hard to quantify them, and they may be relatively small.<sup>80</sup>

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77. If objectors are paid off, then reverse auctions may have this effect. Griffith & Lahav, *supra* note 48, at 1096 ("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.").

78. Thompson & Thomas, *supra* note 1, at 189.

79. Comity between courts generally results in this type of agreement amongst judges, and counsel is often able to work out such a schedule without judicial involvement.

80. Thomas & Thompson, *supra* note 3, at 1800-01; *see also* Griffith & Lahav, *supra* note 48, at 1081 ("[W]hatever increase in the dollar cost of defense does come about as a result of parallel merger litigation will be an increase on the margin and likely immaterial in terms of the transaction as a whole.").

An additional cost is each court's time and effort. Multijurisdictional litigation by definition involves more than one court, increasing the judiciary's cost. However, the courts' workload in these cases is relatively light, as it is limited to managing the minimal discovery motion practice, monitoring the selection of lead counsel, and reviewing settlements. Most courts avoid the finer issues of corporate law and civil procedure, so they will probably expend relatively few resources on this litigation. And regardless, any resources that are expended mostly belong to state courts that are voluntarily assuming jurisdiction over a case that likely would otherwise be litigated in the Delaware Chancery Court.

Defendants could point to the potentially increased uncertainty of the outcome of deal litigation that results from giving plaintiffs a choice of forum. This is not unique to deal litigation: any time that a plaintiff can select the judge of their choice by taking advantage of forum-selection options that are within the boundaries of existing procedural and jurisdictional rules, there is a chance that they will get a better outcome in their case. It is always possible that a judge from Idaho, for example, might be more inclined to issue an injunction stopping a multibillion-dollar deal than one from Delaware. Although there is a small possibility of this happening, which may be worth something in settlement value to plaintiffs, it would be a very rare case indeed where it would occur. For one thing, deal-related injunctions are infrequently issued by any court unless there are competing bidders fighting over a single target (a rare occurrence these days). Moreover, if defendants are right that M&A deal cases have become much weaker over time, so that there are more frivolous cases filed today than in decades past, then the likelihood of the plaintiffs obtaining an injunction or otherwise delaying the completion of a deal should have also declined commensurately over this time period. In other words, defendants should have fewer worries about uncertainty in case outcome.

More generally, though, a common refrain from the defense bar is that *all* M&A deal litigation is frivolous. Whatever the merits of such claims in the "golden" and "silver" eras of shareholder litigation, the data from the current era are enough to give even strong supporters of shareholder rights pause for reflection. One disturbing trend can be seen in settlements in these cases. In the Fifth Merger Wave, M&A shareholder-litigation settlements occurred in about one-third of all cases filed.<sup>81</sup> The underlying cases were largely based on claims of substantive unfairness in the deal terms, such as

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81. Krishnan et al., *supra* note 24 (manuscript at 32).

underpayment in sweetheart deals or favoritism in sale processes, and resulted in increased deal-consideration payments to shareholders in about 42% of the cases settled.<sup>82</sup> For Delaware cases, only 10% of all settlements were solely based on disclosure claims.<sup>83</sup>

In more recent years, settlement percentages in Delaware have gone from 48.7% of all M&A class actions filed in 2005 to 76.9% of all such cases in 2012.<sup>84</sup> These settlements are quite different from those in the earlier time period, as they are generally based solely on allegations of disclosure violations. For example, Cain and Davidoff show that in 2005, disclosure-based settlements constituted 67% of all settlements in deal litigation, but that by 2011, this figure had increased to 84% of all settlements.<sup>85</sup> In a related paper, the same authors find that 52% of all cases filed settled in disclosure-based settlements, while less than 5% of all cases filed settled with consideration increases.

Does multijurisdictional litigation lead to more bad cases and more strike-suit settlements? Yes, say some commentators. As examples in support of this proposition, they have identified a number of different situations in which multijurisdictional litigation may be hurting the quality of M&A litigation as a whole.<sup>86</sup> For example, defendants would normally oppose granting expedited discovery in a case that is very weak on the merits if the litigation was in only one forum. However, because a second, nearly identical complaint is filed in a different forum, the defendants agree to actively support discovery expedition in the first forum “in the absence of reasonable certainty that the court in that other forum would abstain from exercising jurisdiction.”<sup>87</sup> The defendants’ decision to agree to discovery could significantly increase discovery costs, thereby increasing litigation expenses. While this situation is a problem, a possible solution is for the first court to deny expedited discovery if the judge believes the case is very weak. Other courts might well follow suit if presented with the same request. However, if that does not happen, then multijurisdictional litigation could create additional discovery costs, although there is currently no way to quantify the size of these costs or the number of cases in which they arise.

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82. *Id.*

83. Thompson & Thomas, *supra* note 1, at 181.

84. Cain & Davidoff, *supra* note 4, at 5; Krishnan et al., *supra* note 24 (manuscript at 32).

85. Cain & Davidoff, *supra* note 4, at 3–4.

86. These examples are taken from Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint* 17–25 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 740, 2013), available at <http://ssrn.com/abstract=2200499>.

87. *Id.* at 17–18.

A second problem could occur with a reverse auction in a meritorious case. The defendants can pressure a plaintiff's law firm in the first jurisdiction into releasing all of its claims arising out of the transaction by threatening to settle with a different plaintiff's law firm in a second jurisdiction. This allows the defendants to cheaply escape liability. If all the plaintiffs had been constrained to one forum, the defendants would not have had the power to obtain such a result.<sup>88</sup> Here, the real driver is the *Matsushita* decision, because it ensures that defendants can obtain a global release from any plaintiff's law firm that files a case. One answer would be to overrule *Matsushita* legislatively, although Griffith and Lahav argue that it creates a beneficial market for preclusion.<sup>89</sup> In any event, with *Matsushita* in place, there is an unquantified cost to this type of reverse-auction behavior, as it adversely affects meritorious cases challenging M&A transactions. Again, though, without more data, it is hard to know how frequently this scenario occurs or the impact that it has on any particular case.

A third problematic situation is when the threat of a second firm filing first in another jurisdiction leads plaintiffs' counsel to forgo doing a careful investigation and instead hastily file a poorly researched action. The logic here is that if the second firm files first, it may thereby gain the lead counsel position in its chosen jurisdiction by virtue of the first-to-file preference. If the second firm's court of choice ultimately gains control of the litigation, then the first plaintiffs' firm may receive less compensation for its efforts. Again, there are unquantifiable costs associated with this behavior, but the best response is for all courts to give preference to well-researched cases over poorly drafted ones, a response already in place in Delaware that could be adopted easily elsewhere. Yet, it is worth noting that some commentators claim that "many judges (both in Delaware and California) have denied expedited discovery in merger cases on the ground that the plaintiff waited too long after the deal was announced to get to work,"<sup>90</sup> suggesting that lengthy prefiling

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88. One point to observe here is that the defendants' costs of litigating this case will be significantly reduced because of the reverse auction. This could more than offset any increase in discovery costs that are generated in the first example.

89. Griffith and Lahav might see this scenario as an example of how reverse auctions drive down the value of cases, leading to more low value settlements that give defendants the preclusion they are seeking. See generally Griffith & Lahav, *supra* note 48 (noting that reverse auctions amount to a form of collusion in which defense and plaintiff attorneys work together to undercompensate shareholder-claimants).

90. Boris Feldman, *Litigating Post-Close Merger Cases*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 9, 2012, 10:12 AM), <http://blogs.law.harvard.edu/corpgov/2012/11/09/litigating-post-close-merger-cases/>.



fact-finding may hurt a plaintiffs' firm's chances in deal litigation, even if there is only one forum available.

Another issue comes up if courts compete to hear these cases: Plaintiffs' counsel has incentives to push for class certification and lead counsel designation as quickly as possible in order to establish control over deal litigation. Facing this pressure, a court that is competing to keep these cases may, in order to keep the case, be tempted to move too quickly to resolve these important procedural questions without considering their subtleties. It is very hard to know if judges engage in this behavior, explicitly or subconsciously. Even though judges may benefit from the potential publicity of handling a big case, this incentive to compete for cases is likely offset by most judges' heavy workloads and huge backlogs. Of course, it is possible that judges do engage in such behavior, and if so, then it costs society in some unquantifiable amount.

One final problem involves a knowledgeable court that recognizes the parties are proposing a weak settlement but is unwilling to reject it for fear that the plaintiffs will pursue the case in a second, less knowledgeable court in another jurisdiction that will accept it. If this scenario plays out, then the corporation will suffer harm from settling an unmeritorious case. However, if the first court rejects the settlement in a well-reasoned and thoughtful opinion explaining the weaknesses of the case, the second court should be able to recognize the case's true weakness and respect the first court's decision.

All five of these situations (and others) point out potential costs of multijurisdictional litigation, some of which could be reduced by taking other action, and all of which need to be quantified to give us a better idea of their importance. But perhaps the most disturbing fact about M&A litigation in the post-financial crisis period is that there are so many disclosure-based settlements. Are these cases all weak? Perhaps transactional lawyers have learned the lessons of *Revlon* so well, given the numerous decisions on that subject, that there just are not good claims to be made anymore in most deal litigation, so that the cases filed today are just bad. Undoubtedly, there are some bad deal cases out there. For those cases, the courts ought to increase their scrutiny, especially where the plaintiffs' main claims are based solely on disclosure.

The courts have several tools with which to do so. First, they can deny plaintiffs' expedited-discovery requests when the case appears frivolous. As pointed out in a recent article, "[e]liminating expedited discovery effectively erases plaintiffs' primary leverage to force pre-closing settlements" and thus reduces the risk of an

injunction being issued.<sup>91</sup> Alternatively, if defendants file a motion to dismiss the case, a court could grant it. Even for cases that do settle, the court could critically examine the amount of attorneys' fees awarded and cut or reduce them, especially in disclosure-based settlements.<sup>92</sup> Finally, some defense counsel argue in favor of filing summary judgment motions and even trying cases, at least postmerger, as a way of combating potential abuses.<sup>93</sup> But if defendants are unwilling to take such actions or the courts will not dismiss these cases when asked to do so, then perhaps the cases are not frivolous after all.

As recent Delaware Chancery Court decisions illustrate, we must take care to avoid throwing the baby out with the bath water. *In re Southern Peru Copper Corporation Shareholder Derivative Litigation*,<sup>94</sup> *In re Del Monte Foods Company Shareholders Litigation*,<sup>95</sup> and *In re El Paso Corporation Shareholder Litigation*<sup>96</sup> are three enormously important victories for plaintiff shareholders that the Chancery Court has decided within the last year. While their facts are all different, the underlying lesson from all of these cases is that shareholder litigation has an important monitoring function to play in detecting and punishing parties that violate their fiduciary and contractual duties to target company shareholders.

The *Del Monte* case is particularly illustrative of this point. As Vice Chancellor Laster's opinion states, the case appeared to have little merit when first filed, and the claims made were largely based on alleged disclosure violations. Once the defendants issued supplementary disclosures, thereby mooted the disclosure claims, the case's prospects looked dim until discovery revealed that the board's investment banker had "secretly and selfishly manipulated the sale process to engineer a transaction that would permit [it] to obtain lucrative buy-side financing fees."<sup>97</sup> The judge went on to issue an important opinion that set critical precedent relating to how investment bankers should act in advising target boards of directors in friendly transactions. But most importantly for our purposes, the

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91. Richard H. Zelichov & Christina L. Costley, *Stamping out Merger Objection Cases Expedited Proceedings: A Privilege Not a Right*, 27 BNA CORP. COUNS. WKLY. 288 (2012).

92. Some commentators have argued that the Delaware standard for awarding fees "can be interpreted loosely or stringently to award or deny fees." Griffith & Lahav, *supra* note 48, at 1091.

93. Feldman, *supra* note 90.

94. 30 A.3d 60 (Del. Ch. 2011).

95. 25 A.3d 813 (Del. Ch. 2011).

96. 41 A.3d 432 (Del. Ch. 2012).

97. *In re Del Monte*, 25 A.3d at 817.

case shows that routine denial of expedited discovery requests in M&A litigation would have adverse consequences both for target company shareholders and Delaware law. Moreover, these cases show that despite the costs associated with M&A litigation, it serves an important function both as a deterrent to bad behavior and as a source of guidance to practitioners about the appropriate rules of conduct in transactional practice.

In short, while multijurisdictional litigation does create some additional costs that need to be addressed, it also creates some benefits. Unfortunately, we have relatively little information about either. But based on the present data, it seems that the net costs associated with this new form of multijurisdictional litigation could be relatively small. Solutions that aim at fixing the multijurisdictional problem should therefore be relatively inexpensive. The next section surveys two possible policy solutions.

#### IV. FORUM-SELECTION CLAUSES VS. COMITY

Forum-selection clauses and improved comity are the two main policy responses that have been proposed to solve the increase in multijurisdictional litigation.<sup>98</sup> Forum-selection-clause proponents focus on implementing corporate charter or bylaw provisions that either require all shareholder suits to be heard in the Delaware Chancery Court or give the defendant-company's board of directors the option to litigate the case in Delaware or in its preferred jurisdiction. Advocates of comity argue that the judges whose courts receive these cases are best positioned to resolve amongst themselves which single court ought to decide all of the cases arising out of the transaction. I explore both sets of proposals below.

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98. Thomas and Thompson, *supra* note 3, provide an extensive discussion of potential policy choices, including coordinated state action to promulgate a uniform law on the subject. Professor Edward Cooper recently pointed out to me that such a uniform law was released by the Uniform Law Commission in 1991. Titled the "Uniform Transfer of Litigation Act," it was approved by the American Bar Association on February 4, 1992. See UNIF. TRANSFER OF LITIG. ACT (1992), available at <http://uniformlaws.org/Act.aspx?title=Transfer%20of%20Litigation%20Act>. Unfortunately, not a single state has adopted it to date. The Act empowers a state court to transfer a case to a court in another state if the court receiving the case consents to the transfer. *Id.* at 7. The accepting court must have personal and subject matter jurisdiction.

*A. Forum-Selection Clauses*

Several practitioners<sup>99</sup> and academics have written in support of using forum-selection clauses to resolve which court ought to decide multijurisdictional deal litigation. One well-known judge has urged companies to adopt such clauses, saying 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.”<sup>100</sup>

At present, though, only a small number of companies have followed this advice.<sup>101</sup> One threshold issue is whether such clauses can be placed in the corporate bylaws, or whether they must be in the charter. Some firms have put these provisions in their charters in anticipation of an IPO,<sup>102</sup> while a few others have submitted charter amendments to a shareholder vote. Most firms that have adopted forum-selection clauses, however, have done so in director-approved bylaws.<sup>103</sup> Undoubtedly, firms prefer to use board-initiated bylaws to avoid the potential embarrassment of having their shareholders vote down proposed charter amendments.<sup>104</sup>

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99. For an important volume containing numerous articles by practicing lawyers on this topic, see M&A LITIGATION 2011, *supra* note 46.

100. *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960–61 (Del. Ch. 2010).

101. However, following Vice Chancellor Laster's pronouncement in *Revlon* that “corporations could avoid forum dispute battles by adopting forum-selection clauses in their corporate charters,” Grundfest found that the number of corporations adopting forum-selection clauses increased at a statistically significant rate. Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 339, 354, 404 (2012). Grundfest further found a “statistically significant acceleration” in the adoption of intracorporate forum-selection clauses following the Chevron Corporation's announcement on September 30, 2010, that its board of directors had amended its bylaws to include such a provision. *Id.* at 354, 358. Based on the results of his study, Grundfest argues that the data indicates a much larger number of publicly traded corporations could join this trend. *Id.* at 360.

102. Some corporations have adopted these provisions before their IPO to eliminate the need for shareholder approval. CLAUDIA H. ALLEN, STUDY OF DELAWARE FORUM SELECTION IN CHARTERS AND BYLAWS 2, 4 (2012), available at <http://www.ngelaw.com/files/Uploads/Images/StudyofDelawareForum012512.pdf> (finding that charter amendments are being adopted by corporations “as they go public, are spun-off, emerge from bankruptcy protection or reincorporate in Delaware,” thereby eliminating the necessity of shareholder approval); Grundfest, *supra* note 101, at 338–39.

103. ALLEN, *supra* note 102, at 3 (finding that 195 “exclusive” Delaware charter and bylaw provisions had been adopted as of December 31, 2011, where an “exclusive” provision “generally provide[s] for the Court of Chancery to be the sole and exclusive forum for enumerated categories of actions”). Quinn argues that status quo bias is the reason for the infrequency of the adoption of these provisions. Quinn, *supra* note 51, at 142.

104. ALLEN, *supra* note 102, at 2. While shareholders generally have the power to amend corporate bylaws, there have only been four publicly disclosed attempts by shareholders to do so

Forum-selection clauses limit the jurisdictions in which shareholders can pursue representative litigation. Initially, these clauses were generally mandatory in nature, requiring litigation to proceed in the state of incorporation. More recently, however, corporate boards have largely adopted clauses that give the corporation's directors the option to select a court in the state of incorporation or in the location of the company's headquarters. Defendants can use such clauses to forum shop and could potentially decide to force merger litigation out of the Delaware courts, or at least pressure Delaware to become more management friendly by threatening to do so.

There are several advantages to permitting charter or bylaw forum-selection provisions. The most important one, and most obvious, is that, by limiting shareholder litigation to (mostly) Delaware, Delaware law will be consistently interpreted by the Delaware courts and not by judges from other states. Delaware judges and lawyers often complain that other jurisdictions do a poor job of applying Delaware corporate law's highly nuanced fiduciary principles because they are unfamiliar with those principles and have few opportunities to learn about them.<sup>105</sup> By comparison, the Delaware Chancery Court's caseload is primarily corporate law cases, and many of its judges are experienced corporate law practitioners. A clause that specifies the Delaware Chancery Court or gives directors the option to choose that court (which they are likely to take advantage of) will also reduce duplicative lawsuit filings in other jurisdictions while maintaining a convenient forum for both parties.

Second, advocates claim that forum-selection clauses will lead to greater certainty in the outcomes of these cases. The Delaware courts' experience and expertise makes it easier for practitioners to predict the result in shareholder deal litigation: strong suits will lead to bigger settlements, while weak ones will be dismissed. When other judges are faced with these cases, it may lead to a wider variation of results, so that some bad cases may suddenly take on great value. A slight variation on this theme is that some judges in other jurisdictions are elected judges who may, at least subconsciously, be

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to date. Institutional Shareholder Service's voting policies for the 2012 proxy season advises companies they will evaluate these "exclusive venue" provisions on a case-by-case basis, asking whether the company in question has good corporate governance structures currently in place and whether it has disclosed any material harm done to it by shareholder litigation in other jurisdictions. INST. S'HOLDER SERVS. INC., U.S. CORPORATE GOVERNANCE POLICY: 2012 UPDATES 13 (2011), available at [http://www.issgovernance.com/files/ISS\\_2012US\\_Updates20111117.pdf](http://www.issgovernance.com/files/ISS_2012US_Updates20111117.pdf).

105. Thomas & Thompson, *supra* note 3, at 1795 n.231.

more likely to favor outcomes that benefit litigation counsel who have contributed to their election campaigns.

Finally, proponents claim that these clauses are enforceable as a matter of contract law. Charters are claimed to be contracts, and forum-selection provisions, in general, are permissible as a matter of contract law, so these particular types of clauses must also be enforceable. Interestingly, this argument has been widely accepted for LLCs, as courts have upheld strict contract constructions for LLC articles of organization and operating agreements.<sup>106</sup> However, as discussed below, things are much less clear in the corporate context, where fiduciary principles overlay the contractual underpinning of the corporation's charter.

Despite these potential advantages, it is important to examine the arguments against allowing these forum-selection provisions. First, a strong push by Delaware for such clauses may spark a backlash from other states, federal regulators, and plaintiffs' lawyers. Delaware's insistence on being the sole interpreter of its law runs counter to basic federalism principles.<sup>107</sup> Other states might retaliate by enacting foreign-corporation-law statutes or by expanding the scope of existing ones. They might also refuse to hear cases involving Delaware corporations whenever possible, or otherwise discriminate against them, which might discourage companies from initially incorporating in Delaware.

One related question is whether jurisdictional or constitutional issues prevent forum-selection clauses. In our existing federalist system, citizens invoke the general jurisdiction of state courts to sue defendants over whom that court has personal jurisdiction. No state can divest another state from asserting such jurisdiction. Moreover, federal law allows litigants to pursue a state-law claim in a federal tribunal by using diversity jurisdiction, perhaps to avoid a perceived hometown bias. Forum-selection clauses would prevent citizens from making these choices for corporate law claims.<sup>108</sup> Instead, these

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106. Grundfest notes that courts have permitted "partners to have the broadest possible discretion in drafting their partnership agreements." Grundfest, *supra* note 101, at 358. Therefore, courts have invalidated partnership agreements only when the contractual provisions are inconsistent with mandatory statutory provisions, which are more often intended to protect third parties and not the contracting partners. *Id.*

107. Griffith & Lahav, *supra* note 48, at 50 ("[S]tates are understandably reluctant to cede all authority over what they consider to be in-state businesses merely because the organizational documents are filed elsewhere.").

108. See U.S. CONST. art. III, § 2 (granting judiciary the authority to hear diversity cases); 28 U.S.C. § 1332 (2012) (providing for diversity jurisdiction); see also Stevelman, *supra* note 51, at 131 ("[A]ny measures to limit shareholder-plaintiffs' otherwise legitimate access to the federal courts would almost certainly prove unconstitutional.").

clauses generally permit defendants to funnel all cases to sympathetic state courts in the state of the corporation's headquarters. There is value in letting plaintiffs bring suit against defendants in jurisdictions with which they have significant contacts and permitting parties to have access to federal courts as a response to possible home-court discrimination.

Second, plaintiffs' lawyers would undoubtedly look for ways around these forum-selection clauses, perhaps by choosing to file alternative claims in other states' courts or purely federal claims in the federal courts. Other states' courts could also refuse to enforce forum-selection clauses on a variety of grounds, some of which are discussed below. This would lead to significant collateral litigation in these representative actions, as plaintiffs would make claims that the clauses impinge on shareholders' fundamental right to enforce directors' and officers' fiduciary duties. It seems likely that, despite Delaware corporate law's importance nationwide, judges in other jurisdictions may push back against the idea that Delaware courts occupy a privileged position in interpreting it. If a split in the courts developed, then the U.S. Supreme Court could get involved,<sup>109</sup> with unpredictable consequences for Delaware's continued quasi-monopoly in corporate law. Additionally, the federal government could well decide that it no longer needs to carve out Delaware class actions and derivative suits from the Class Action Fairness Act ("CAFA")<sup>110</sup> or the PSLRA<sup>111</sup> and that federal regulation would be the simplest solution to the multijurisdictional litigation problem.

Third, there are substantive reasons to think that these clauses are unenforceable. The first of these is the issue of shareholder consent, especially as to management-imposed bylaws. Director-adopted bylaws do not have express shareholder consent. This fact seemed important to Vice Chancellor Laster when he endorsed forum-selection clauses because he expressly referred to action by both "directors and shareholders" in adopting "charter" provisions,<sup>112</sup>

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109. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) (indicating that a state court's particularly egregious distortion of another state's law could violate the Full Faith and Credit Clause).

110. Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012) (explaining that a claim relating to the internal governance of a corporation may not be removed to federal court if the claim arises under the laws of a state in which the corporation is incorporated).

111. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, 3228 (1998) (codified as amended in scattered sections of 15 U.S.C.) (preserving certain state-law actions based upon the law of the state in which the corporation is organized).

112. ALLEN, *supra* note 102, at 6 (reporting that 96.9% of forum-selection clauses were proposed or adopted after Vice Chancellor Laster's statement in *Revlon*).

highlighting the importance of shareholder approval. A similar concern was raised in the first case deciding this issue, *Galaviz v. Berg*, where a federal district court rejected a forum-selection clause that required all shareholder derivative actions to be brought in the Delaware Chancery Court.<sup>113</sup> There, the defendants moved to dismiss the case for improper venue, defending their motion by claiming that the bylaw provision was enforceable under contract law. The defendants' argument was undermined by the fact that the board had unilaterally adopted the bylaw only after the plaintiff brought the derivative action claiming that the directors had breached their fiduciary duties. The federal court found the contract analogy unsupported because the directors' bylaw lacked the requisite mutual consent.<sup>114</sup>

Nor is the contract-law analogy conclusive. It is true that forum-selection clauses are widely found in corporate contracts<sup>115</sup> and that a court will generally enforce those agreements under the applicable contract law.<sup>116</sup> However, forum-selection clauses that implicate the relationship between shareholders and managers raise questions about their effect on the management's fiduciary duties to shareholders. In more theoretical terms, forum-selection clauses implicate corporate governance and disadvantage shareholder efforts to engage in rigorous monitoring of management agency costs.

Contracting to weaken corporate law fiduciary duties in public companies is permitted in some contexts but not in others. For example, Delaware corporate law permits corporations to ask shareholders to approve charter provisions that exculpate directors for breaches of the duty of care.<sup>117</sup> However, it is also quite clear that such exculpatory clauses do not extend to violations of the duty of good faith or the duty of loyalty.<sup>118</sup> On a national level, midstream dual class recapitalizations have been prohibited, even when approved by

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113. See *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011) ("[T]he venue provision was unilaterally adopted by the directors who are defendants in this action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect.").

114. *Id.* at 1174-75.

115. Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1982 (2006).

116. See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-15 (1972) (holding that a venue provision in a freely negotiated contract should not be set aside absent a strong showing that either enforcement would be unreasonable and unjust or that the clause was invalid for such reasons as fraud or overreaching).

117. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 1999).

118. *Id.*



shareholders, because they increase managerial agency costs.<sup>119</sup> Forum-selection provisions are likely to negatively impact shareholders' ability to bring suits to enforce managers' fiduciary duties as well, but how much and whether they will substantially increase managerial agency costs can be debated.

Overall, charter and bylaw provisions are not the best solution for multijurisdictional litigation for all of the above reasons, as well as several others. For instance, forum-selection clauses are nothing more than forum shopping by defendants. Why should we privilege defendants to choose the forum for shareholder litigation rather than plaintiffs? Our litigation system makes many trade-offs in allocating power to plaintiffs or defendants. Reallocating forum choice to defendants is a fundamental change that would require shifting more power to plaintiffs in other ways, none of which defendants are likely to be willing to consider.

Moreover, the most popular form of these provisions is a director-imposed bylaw. Advocates argue that shareholders generally have the power to amend any director-passed bylaws, so they have little need to fear self-interested director conduct.<sup>120</sup> This argument seems to ignore the substantial collective action problems that shareholders face in any ballot initiative, especially one that does not involve takeover defenses. Furthermore, even if shareholders succeeded in overcoming these problems, management could reverse any shareholder-passed bylaw under most states' law. In other words, unilateral director bylaw action is essentially irreversible.

Shareholder-approved charter amendments are better, but still fraught with difficulty. While a shareholder vote provides some protection to investors, they still face significant collective action problems in opposing such provisions. It is true that third-party voting advisors will issue voting recommendations to help overcome shareholder collective action problems.<sup>121</sup> However, if there are collective action problems and strategic-choice issues, shareholder approval of charter amendments does not necessarily mean the

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119. See, e.g., N.Y. STOCK EXCH., NEW YORK STOCK EXCHANGE MANUAL § 313(A) (2013) (stating that "[v]oting rights of existing shareholders of publicly traded common stock . . . cannot be disparately reduced or restricted through any corporate action or issuance"), available at <http://nysemanual.nyse.com/LCM/Sections/>.

120. This claim is particularly suspect when directors are adopting such amendments after they have been sued for alleged misconduct or when they adopt bylaws that give the board the discretion to select one forum among a group of potential forums once shareholder litigation has been filed.

121. ISS has issued voting guidelines to its clients concerning forum-selection clauses. See INST. S'HOLDER SERVS. INC., *supra* note 104, at 13 (directing clients to vote on forum-selection clauses on a case-by-case basis while taking listed factors into account).

amendments increase shareholder wealth, at least in the context of dual class recapitalizations.<sup>122</sup> Forum-selection clauses may pose similar problems, although it is too soon to tell if these problems will develop.

Finally, forum-selection provisions create a lock-in effect.<sup>123</sup> They are generally written to give boards the power to force plaintiffs to sue them in Delaware.<sup>124</sup> If that occurs, it is not beyond imagination that the Delaware courts could develop hostility to these cases.<sup>125</sup> In other words, while the Delaware judges currently do an excellent job balancing investor and management interests, this could change, leaving shareholders without effective recourse for management wrongdoing. This weighs against permitting corporate forum-selection provisions.

### *B. Comity—Tweaking the Current System*

A promising alternative solution is comity between courts. The Delaware courts have already had some experience with this judicially based solution. Chancellor William Chandler of the Delaware Chancery Court developed a practice in multijurisdictional deal litigation of contacting the other judge(s) in courts with pending litigation from the same transaction to discuss which forum was the most appropriate for the litigation to proceed. If practiced effectively by judges and agreed to by counsel, multijurisdictional cases can be litigated in one forum.<sup>126</sup>

At this practice's best, judges will weigh important factors to decide which court is most appropriate to handle the case such as their courts' docket backlog, their subject matter expertise, the relative quality of the cases filed, the attorneys' ability to effectively pursue the litigation, and their jurisdiction's interest in the defendant-corporation's affairs. If appropriately used, judicial comity is an efficient mechanism for reallocating multijurisdictional litigation

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122. In that context, Gordon claims that management may tie the recapitalization to an unrelated dividend sweetener or threaten to take action adverse to shareholder interests if their proposal is defeated.

123. Thomas & Thompson, *supra* note 3, at 1817.

124. ALLEN, *supra* note 102, at 3.

125. See, e.g., *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 959 (Del. Ch. 2010) ("There are sound policy reasons for this Court to police against shirking by representative counsel.").

126. Federal courts may be able to do the same in a somewhat different manner: a federal court could abstain under the *Colorado River* doctrine from hearing federal proxy claims and breach of fiduciary duty claims in favor of a Delaware action raising similar claims under Delaware law. Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 16, 45 (2012).

between state courts.<sup>127</sup> Importantly, courts can implement judicial comity without changing the existing litigation system.

This practice, of course, is not without problems. First, not all judges, nor all attorneys, will participate effectively. There can be defections, and there is no surefire policing mechanism. Comity may at times result in diverting cases inefficiently, for example, if a particular judge wants to preside over a high-profile case. Even if conducted in good faith, though, judges may still simply disagree about the proper forum, leaving two cases proceeding on the same transaction at the same time.

Second, corporate litigation poses a special challenge to comity because Delaware corporate law is effectively exported to the rest of the country. Delaware can legitimately claim that it has a special interest in the consistency of its law, which may suffer injury if other states' courts take license with it. At the same time, other states have strong interests in the affairs of their own locally based corporations, especially when change-of-control transactions may adversely affect these companies.<sup>128</sup> Balancing these states' competing interests falls outside the traditional boundaries of federalism into an evolving area of jurisprudence.<sup>129</sup>

Comity's great virtue is its relatively low-cost, easily reversible policy approach that does not require any remarkable changes to the current system. It is flexible and permits judges to weigh whether the interests of their jurisdiction and local corporations require having shareholder litigation resolved in their courts as opposed to elsewhere. Until better evidence is developed about the costs and benefits of multijurisdictional litigation, comity is likely the best solution.

Griffith and Lahav have made some interesting suggestions about how to improve the current system.<sup>130</sup> First, they advocate for a change in the Delaware Chancery Court's practice of releasing

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127. *Id.* at 16–17 (“By and large, such motion practice has been successful . . .”).

128. In this bargain for jurisdiction between two states with equally compelling interests, Winship argues that the effectiveness of comity and reciprocity depends on whether a state has something to trade. Verity Winship, *Bargaining for Exclusive State Court Jurisdiction* (Ill. Pub. L. Research Paper No. 11-21, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2046552](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046552). For example, California has something to trade because many corporations choose to headquarter there. *Id.* Therefore, California can decline “to exercise jurisdiction in the expectation that other states would do the same for its corporations.” *Id.* This is in contrast to a state like Delaware, which has few corporations physically located within its borders and therefore little opportunity to hear cases about nondomestic entities. *Id.* Thus, while Delaware courts acknowledge the importance of comity in allocating cases among states, Delaware is not positioned to effectively bargain for exclusive jurisdiction with other states. *Id.*

129. Griffith & Lahav, *supra* note 48, at 50–52 (developing a more robust theory of federalism in the M&A litigation context).

130. *Id.* at 65–77.

important precedent in forms that are not widely disseminated.<sup>131</sup> They claim that the Delaware Chancery Court's precedent is widely used by other courts, so the Court should start using traditional case reporters or modern digital databases for its important precedent to ensure accessibility.<sup>132</sup> Next, Griffith and Lahav focus on providing notice to judges in different jurisdictions hearing the same dispute.<sup>133</sup> They suggest that defendants should provide notice to all courts involved since defendants are in the best position "to provide the judges in each jurisdiction with a copy of the related complaint filed elsewhere."<sup>134</sup> Third, Griffith and Lahav call for "instituting guidelines for informal comity communications."<sup>135</sup> This would facilitate communication amongst the various judges that have multijurisdictional cases pending in front of them.<sup>136</sup> Lastly, Griffith and Lahav propose creating a means for sister states to formally certify questions to the Delaware Chancery Court.<sup>137</sup> They argue that, by establishing official lines of communication, the judiciary can better take advantage of the benefits provided by the market for preclusion.

Chancellor Strine of the Delaware Chancery Court and his coauthors have also endorsed comity as the most feasible solution to the multijurisdictional litigation problem, although they would add a rebuttable presumption in favor of the court whose law is being applied.<sup>138</sup> In corporate law cases, this would mean that the courts in the state of incorporation, frequently Delaware, should decide the case unless either another jurisdiction had a "supervening public interest" or other "compelling circumstances" existed. The authors' justification is straightforward: "Giving the parties' choice of law greater significance in evaluating choice of forum promotes the consistent application of relevant doctrine, by allowing the courts that are authoritative in that law to adjudicate the case."<sup>139</sup> They further argue

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131. *Id.* at 65–68.

132. *Id.* at 67.

133. *Id.* at 68–70.

134. *Id.* at 69.

135. *Id.* at 65, 70–74.

136. *Id.* at 71.

137. *Id.* at 74–77. Likewise, Winship suggests that certification allows a lawsuit to be broken down into legal issues in an effort to accommodate competing state interests. Winship, *supra* note 128, at 94. Using the procedural posture of *Scully v. Nighthawk* as an example, Winship argues that "Delaware might have an interest in determining the content of its law, but Arizona might have an interest in adjudicating cases against corporations headquartered there." *Id.* Therefore, splitting adjudication could serve both states' interests: Delaware could certify all questions of Delaware law, while Arizona could adjudicate the matter. *Id.*

138. Strine et al., *supra* note 86, at 4.

139. *Id.* at 4

that this presumption would enhance judicial efficiency, as it would reduce the time that overburdened judges spend learning foreign law.<sup>140</sup> If courts effectively implemented this approach, it would result in the Delaware Chancery Court deciding most M&A deal litigation.

In short, the existing system of comity, with perhaps a few tweaks, is effective in dealing with the vast majority of multijurisdictional cases. For sure, there are occasional cases, like *In re Topps Co. Shareholders Litigation*,<sup>141</sup> where more than one court assumes jurisdiction over a case arising out of the same transaction. But those appear to be the exception, not the rule.

## V. CONCLUSIONS

A lot remains to be determined about the future of multijurisdictional litigation. The Delaware courts may well end the fight between forum-selection clauses and comity in the coming months. The Chancery Court issued an important decision in two combined cases, *Boilermakers Local 154 Retirement Fund v. Chevron* and *Iclub Investment Partnership v. Fedex Corp.*, that addresses many of the issues discussed in this article.<sup>142</sup> In that decision, Chancellor Strine ruled that forum-selection clauses in corporate bylaws are enforceable.<sup>143</sup> As a result, the battleground over these clauses is likely to shift to courts in other jurisdictions. While it is difficult to predict what the Delaware Supreme Court will do, other states' courts are less likely to be hospitable to the defense bar's efforts to deprive them of jurisdiction over cases that affect prominent local industries. In the event of a judicial split on the matter, it seems likely that the U.S. Supreme Court or Congress could step in to decide the issue. Such action could threaten Delaware's preeminence in corporate law far more than the current system's smattering of other state courts' interpretations of Delaware law.

The corporate ballot box is likely to become an important location for efforts for and against the implementation of these clauses. Some Chevron shareholders have already filed a Rule 14a-8

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140. In the traditional comity analysis, the authors also would deemphasize the importance of being the first-filed case. *Id.* at 8.

141. *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 961 (Del. Ch. 2007).

142. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

143. *Id.* Interestingly, a carbon copy of the *Chevron* case was filed in federal court in Northern California shortly after it was filed in Delaware. *Bushansky v. Armacost*, No. C 12-1597, 2012 WL 3276937 (N.D. Cal. Aug. 9, 2012). That action was stayed in response to a motion by the defendants based on the Delaware courts' ability and interest in resolving the issues at stake in the litigation.

proposal asking that its board of directors remove the bylaw that it installed without a shareholder vote. Institutional Shareholder Services, the leading proxy voting advisor, has also issued voting recommendations on any proposed charter amendments or shareholder-approved bylaw amendments that may surface in the coming months.<sup>144</sup> There will undoubtedly be some spirited skirmishes at annual meetings this coming spring.

In the meanwhile, more empirical research is needed to inform the continuing debate. Unsubstantiated assertions of high costs for defendants need to be tested with real data.<sup>145</sup> Claims of reverse auctions, elevated attorneys' fees for defendants, declining quality of cases, and increased settlement leverage are, to this point, undocumented. Until some of these questions are resolved, it seems prudent to respond to multijurisdictional filings through our existing system of comity, perhaps with a few slight modifications as discussed above. But absent more complete data, policymakers should be slow to take further action.

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144. INST. S'HOLDER SERV. INC., 2013 U.S. PROXY VOTING SUMMARY GUIDELINES 7 (2013), available at <http://www.issgovernance.com/files/2013ISSUSSummaryGuidelines1312013.pdf>.

145. The need for further disclosure of attorneys' fees for defense counsel is a topic that the SEC might well want to consider given the important corporate governance implications of forum-selection clauses.