Multijurisdictional M&A Litigation

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INTRODUCTION

This Article examines the seemingly intractable problem of multijurisdictional merger and acquisition (M&A) litigation. Virtually all M&A transactions result in litigation and more than 60% of deals generate suits in multiple courts. Currently there is no procedural mechanism to consolidate these duplicative suits, which increase litigation costs, waste judicial resources, raise the specter of inconsistent rulings and collusive settlements, and increase premiums for directors' and officers' insurance. This Article concludes that the optimal solution to the problem is amending 28 U.S.C. § 1407 to provide the Judicial Panel

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on Multidistrict Litigation (JPML) with authority to transfer civil litigation that is pending in different states to a single state for both pretrial management and trial by a single state court. That statute currently provides only for the transfer of civil actions that are pending in different federal districts. It does not permit transfers of state court suits from one state to another, and neither does any other statute.

The growing phenomenon of multijurisdictional M&A litigation has been well-documented. In 1999–2000, 11.9% of announced M&A offers with a value of at least $80 million generated litigation.[1] In 2005, approximately 39.3% of deals with a minimum value of $100 million attracted a lawsuit.[2] In 2013, shareholders challenged 97.5% of all M&A transactions with a value greater than $100 million involving U.S. public company targets.[3] This was the fourth consecutive year in which more than 90% of all deals this size generated litigation.[4] Shareholders challenge virtually all mergers announced, regardless of whether they are friendly or hostile, or whether the target company's board of directors accepted or rejected the proposed acquisition.[5] Likewise, most leveraged buyouts (LBOs) are subject to judicial challenge.[6]

Many transactions generate multiple lawsuits in multiple jurisdictions. In 2013, there were an average of 6.9 lawsuits per transaction for deals valued at more than $100 million.[7] Very often, when a transaction generates multiple lawsuits, the suits are filed in multiple jurisdictions. Of the 2013 deals, 62% were litigated in more than one court[8] and 40.6% were litigated in more than one state.[9] Multijurisdictional litigation is possible because shareholders who wish to challenge an M&A transaction's proposed terms can choose to do so in a state court in the target corporation's state of incorporation (typically Delaware),[10] in a state court where the target has its principal place of business (often

1. C.N.V. Krishnan et al., *Jurisdictional Effects in M&A Litigation*, 11 J. EMPIRICAL LEGAL STUD. 132, 139 (2014) [hereinafter *Jurisdictional Effects*]. *See also* C.N.V. Krishnan et al., *Shareholder Litigation in Mergers and Acquisitions*, 18 J. CORP. FIN. 1248, 1264 (2012) [hereinafter *Shareholder Litigation*] (finding that "about 10% of all announced deals attract[ed] target shareholder litigation").

2. Steven M. Davidoff, *Corporate Takeover? In 2013, a Lawsuit Almost Always Followed*, N.Y. TIMES DEALBOOK (Jan. 10, 2014, 12:20 PM), http://dealbook.nytimes.com/2014/01/10/corporate-takeover-in-2013-a-lawsuit-almost-always-followed/?_php=true&_type=blogs&_r=0.

3. Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013* 1, 2 (The Ohio State University Moritz College of Law, Public Law and Legal Theory Working Paper Series, Working Paper No. 236, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216727.

4. Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions: Review of 2013 M&A Litigation*, CORNERSTONE RESEARCH 1 (2014), http://www.cornerstone.com/getattachment/73882c85-ea7b-4b3c-a75f-40830eab34b6/Shareholder-Litigation-Involving-Mergers-and-Acqui.aspx.

5. Kevin M. LaCroix, *Why M&A-Related Litigation Is a Serious Problem*, THE D&O DIARY (Nov. 28, 2011), www.dandodiary.com/2011/11/articles/securities-litigation/why-ma-related-litigation-is-a-serious-problem/ ("[O]ne out of every two companies announcing an acquisition is sued and that is true whether or not the acquisition is friendly or hostile.").

6. Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 439–40 (2012) (showing that during the years 1994–2010 the proportion of LBOs involving a Delaware company that generated shareholder-initiated litigation never exceeded 60% until 2005, but beginning in 2005 the proportion was approximately 70% or higher in every year except 2009).

7. Cain & Davidoff, *supra* note 3, at 2.

8. Koumrian, *supra* note 4, at 3.

9. Cain & Davidoff, *supra* note 3, at 2.

10. *See* Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92, 92 (2012) ("No other state competes effectively with Delaware in attracting public corporation charters

California, Texas, or New York),[11] or in a federal court in one of those two jurisdictions.[12] The vast majority of M&A lawsuits involve corporations incorporated in Delaware but headquartered elsewhere.[13] This problem of multijurisdictional litigation is not unique to M&A deals[14] but is particularly acute in that domain.

M&A lawsuits can be filed as class actions, derivative suits, or individual actions by the bidder, the target company, or a shareholder. In typical deal litigation, the plaintiff shareholder on behalf of a class or derivatively on behalf of the corporation (or both)[15] alleges that the board of directors of the target company violated its fiduciary duties of loyalty, care, good faith, and fair dealing by conducting a flawed sales process that failed to maximize shareholder value.[16] Virtually all M&A suits also allege that the proxy disclosures which set forth information concerning the board's decision-making process, financial projections, and fairness opinions were inadequate, thereby depriving shareholders of the ability to make informed voting decisions.[17] In most cases the

. . . . The plain fact is that companies either charter in Delaware or, reflecting a locality bias, choose to incorporate in the jurisdiction of their executive headquarters."); *Why Businesses Choose Delaware*, DELAWARE CORPORATE LAW WEBSITE, http://corplaw.delaware.gov/eng/why_delaware.shtml (last visited Sept. 29, 2014) (stating that more than 60% of the Fortune 500 companies are incorporated in Delaware); Noam Noked, *2013 Delaware Decisions and What They Mean for 2014*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb. 20, 2014, 9:26 AM), http://blogs.law.harvard.edu/corpgov/2014/02/20/2013-delaware-decisions-and-what-they-mean-for-2014/#printable (noting that Delaware is the state of incorporation for 64% of the Fortune 500 and more than half of all companies whose securities trade on the New York Stock Exchange, NASDAQ, and other exchanges).

11. Matthew C. Baltay, *Merger Litigation: Coming to a Deal Near You*, 56 BOSTON BAR J. (2012), *available at* http://bostonbarjournal.com/2012/06/13/merger-litigation-coming-to-a-deal-near-you/ (stating that after Delaware, the five most active states for deal litigation are California, Texas, New York, Pennsylvania, and Massachusetts).

12. *See* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1351 n.32 (2012) (stating that the requisite personal jurisdiction over directors and officers is likely to exist in the state where the target is headquartered because most companies hold board meetings there).

13. Eric A. Chiappinelli, *The Myth of Director Consent: After* Shaffer*, Beyond* Nicastro, 37 DEL. J. CORP. L. 783, 787 n.28 (2013) ("[I]t is clear that only a tiny fraction of Delaware corporations, perhaps on the order of 3% to 5%, actually have their principal place of business there."); Boris Feldman, *Litigating Post-Close Merger Cases*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Nov. 9, 2012, 10:12 AM), https://blogs.law.harvard.edu/corpgov/2012/11/09/litigating-post-close-merger-cases/.

14. *See* FEDERAL JUDICIAL CENTER AND NATIONAL CENTER FOR STATE COURTS, COORDINATING MULTIJURISDICTION LITIGATION: A POCKET GUIDE FOR JUDGES 1 (2013), *available at* http://multijurisdictionlitigation.files.wordpress.com/2012/11/multijurisdiction-pocket-final.pdf ("Multijurisdiction litigation is a relatively common occurrence in the modern legal world.").

15. *See* Donald A. Corbett & Daniel K. Roque, *Shareholder Derivative Litigation: Keeping an Eye on the Parallel Class Action*, 45 SEC. REG. & LAW REP. 584, 584 (2013), *available at* http://www.lowenstein.com/files/Publication/842411a9-412b-4b12-93db-326bc18e1791/Presentation/PublicationAttachment/79ee5ada-a43b-4d1a-aa84-4013f7dc6888/ShareholderDerivative.pdf (noting that shareholder derivative actions rarely proceed in isolation).

16. Bradley W. Foster, *Recent Developments in Securities and M&A Litigation*, *in* NEW DEVELOPMENTS IN SECURITIES LITIGATION, 2013 EDITION: LEADING LAWYERS ON ADAPTING TO TRENDS IN SECURITIES LITIGATION AND REGULATORY ENFORCEMENT 11 (Aspatore 2013).

17. *Id.* Plaintiffs often file an M&A suit before the firm issues a preliminary proxy statement. Plaintiffs typically amend the complaint later to include allegations based on the proxy disclosures. Dwight W. Stone II et al., *Dealing with the Inevitable: Practical Considerations in Defending Merger Objection Lawsuits*, 55 FOR THE DEFENSE 57 (Oct. 2013), *available at* http://dritoday.org/ftd/2013-10F.pdf.

shareholders name the acquirer as a co-defendant for aiding and abetting the target's misconduct.[18]

Merger litigation can have genuine value—in part by financing litigation against larger flawed deals that should be challenged. Shareholder litigation also provides a policing effect, as the threat of litigation may encourage greater transparency and fairness in deal-making.[19] Merger offers potentially subject to shareholder litigation also provide a positive expected gain to target shareholders. Recent research indicates that whereas M&A offers subject to lawsuits are completed at a significantly lower rate than offers that are not subject to objection, litigation significantly increases the takeover premium in deals that are completed, and the expected rise in the deal premium more than offsets the fall in the probability of deal completion.[20]

Merger litigation may yield tangible benefits, but many scholars, jurists, and other observers agree that most of this litigation is meritless[21] and multijurisdictional M&A

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18. *See* Marcia Kramer Mayer et al., *Merger Objection Litigation*, NERA ECONOMIC CONSULTING 7 (Dec. 6, 2011), *available at* http://www.nera.com/nera-files/NERA_Merger_Objection_Litigation_CityBar.pdf (describing a study of 141 settled M&A cases showing that in 70% of them, both the target and acquirer were defendants).

19. *See* Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1948 (2013) ("[S]hareholder litigation has an important monitoring function to play in detecting and punishing parties that violate their fiduciary and contractual duties to target company shareholders."); Ann Woolner et al., *When Merger Suits Enrich Only Lawyers*, BLOOMBERG NEWS (Feb. 16, 2012), http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html (quoting Professor Bernard Black for proposition that policing effects of litigation have real value that "might well justify the money we throw at plaintiffs' lawyers"); Steven M. Davidoff, *Corporate Takeover? In 2013, a Lawsuit Almost Always Followed*, N.Y. TIMES DEALBOOK (Jan. 10, 2014, 12:20 PM), http://dealbook.nytimes.com/2014/01/10/corporate-takeover-in-2013-a-lawsuit-almost-always-followed/?_php=true&_type=blogs&_r=0 ("There is also the unquantifiable benefit that companies are on their best behavior because they know they will be sued if they are not.").

20. *See e.g.*, Krishnan, *Shareholder Litigation*, *supra* note 1, at 1250 (finding that the probability of deal completion decreased by 7.8% when an M&A offer was subject to litigation, but this reduction was more than offset by an increase of approximately 30% in the average takeover premium in completed deals); Krishnan, *Jurisdictional Effects*, *supra* note 1, at 144 (reporting that litigated offers have a significantly lower completion rate—72.9% versus 79.4%—and a significantly higher average takeover premium in completed deals—43% versus 37%—compared to non-litigated offers); *cf. Options for Directors in M&A Litigation*, CORPORATE DISPUTES 7 (Jan.–Mar. 2014) (quoting Peter L. Welsh, Partner, Ropes & Gray LLP, for the proposition that, with respect to actual or threatened litigation, "[v]ery few deals are prevented from closing on schedule"), *available at* http://www.ropesgray.com/biographies/w/~/media/Files/articles/2014/January/Ropes_Reprint_Jan14.ashx; PricewaterhouseCoopers, *At the Crossroads Waiting for a Sign: 2012 Securities Litigation Study* 8 (Apr. 2013), *available at* http://www.pwc.com/en_US/us/forensic-services/publications/assets/pwc-2012-securities-litigation-study.pdf (noting only one instance in 2012 where a federal lawsuit filed by shareholders of the target company appeared to be a contributing factor in a transaction's termination).

21. *See, e.g.*, Stephen Bainbridge, *Delaware Refuses to Feed the Sharks*, PROFESSORBAINBRIDGE.COM (Sept. 13, 2013), http://www.professorbainbridge.com/professorbainbridgecom/2013/09/delaware-refuses-to-feed-the-sharks.html ("As suggested by the very low average settlement figure, the vast majority of these suits are strike suits brought in hopes that the corporation will pay off a nuisance settlement to rid itself of the litigation so the deal can go through."); U.S. CHAMBER INST. FOR LEGAL REFORM, THE TRIAL LAWYERS' NEW MERGER TAX: CORPORATE MERGERS AND THE MEGA MILLION-DOLLAR LITIGATION TOLL ON OUR ECONOMY 3 (Oct. 2012), *available at* http://www.dandodiscourse.com/files/2012/10/U.S.-Chamber-Institute-Paper.pdf ("Certainly no one can reasonably claim that there is credible evidence of fraud or other violations with respect to more than 90% of the large M&A transactions in the United States. If the allegations were real, there would be intense law

litigation is highly undesirable. M&A litigation burdens companies and their shareholders by increasing expenses,[22] wasting scarce judicial resources,[23] and multiplying the danger of inconsistent rulings and collusive settlements.[24] In insurance terms, M&A litigation has become a high frequency risk,[25] with potential collateral consequences such as escalating pricing for directors' and officers' insurance, particularly at the primary level.[26]

Various solutions have been proposed. This Article critiques the most common suggestions, and then proposes the most logical remedy: amending 28 U.S.C. § 1407 to provide the JPML with authority to transfer civil litigation that is pending in different states to a single state for pretrial management and trial by a single state court.[27] To do so, this Article proceeds in four parts. Part I examines the recent sharp increase in multijurisdictional M&A litigation and the reasons for it. Part II examines the negative impact of such litigation. Part III analyzes the advantages and disadvantages of the most common proposals to solve the problem. These proposals include: (a) adoption by bylaw or charter amendment of exclusive forum provisions requiring shareholders to file stockholder class actions and derivative suits in the defendant company's state of incorporation, thereby designating the Delaware Court of Chancery as the exclusive venue for such litigation in most cases; (b) congressional amendment of the Securities Litigation Uniform Standards Act's (SLUSA)[28] Delaware carve-out[29] and the Class Action Fairness Act's (CAFA) parallel provision,[30] requiring shareholders to file class actions under the carve-outs (and shareholder derivative actions with similar effect) only in the courts of the defendant company's state of incorporation; (c) increased cooperation and comity between state court judges of different states; (d) greater use of one-forum motions; (e) stricter enforcement of the first-filed rule and increased use of the doctrine of forum non conveniens; (f) court adoption of a rule, or congressional enactment of a statute, requiring all merger-related securities litigation to be brought in the state of incorporation of the target company; and (g) enhanced scrutiny of attorneys' fees in M&A litigation. As discussed below, all of the foregoing proposals suffer from serious defects that render them unsatisfactory.

Part IV proposes granting the JPML authority to transfer multijurisdictional M&A litigation to a single state for pretrial management and trial by a single state court. This authority would be granted by amendment of 28 U.S.C. § 1407, providing the JPML with

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enforcement focus on such a hotbed of fraud—by the Securities and Exchange Commission, the Department of Justice, and State Attorneys General. That has not happened." (emphasis removed)).

22. *See infra* notes 81–100 and accompanying text.

23. *See infra* notes 101–03 and accompanying text.

24. *See infra* notes 104–19 and accompanying text.

25. *See infra* note 148 and accompanying text.

26. *See infra* notes 151–56 and accompanying text.

27. *See* John C. Coffee, Jr., *M&A Litigation: More and More Dysfunctional*, THE CLS BLUE SKY BLOG (Mar. 25, 2013), http://clsbluesky.law.columbia.edu/2013/03/25/ma-litigation-more-and-more-dysfunctional/ ("The most logical answer to the chaos of multi-forum litigation would be to empower the U.S. Judicial Panel on Multi-District Litigation to coordinate state, as well as federal, litigation—at least if certain tests in terms of the size and significance of the transaction were met.").

28. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

29. 15 U.S.C. § 77p(d)(1)(A), (B) (2012).

30. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). CAFA, like SLUSA, exempts claims that relate to the internal affairs or governance of corporations. 28 U.S.C. § 1332(d)(9)(B) (2012).

authority to transfer civil litigation that is pending in different states, and that involves one or more common questions of fact, to a single state court, subject to certain criteria. With respect to M&A litigation, this Article proposes to limit such transfer authority to deals valued at more than $100 million involving publicly traded companies with an offering price of at least $5 per share. This proposal does not contemplate granting the JPML authority to transfer state cases to federal court.

Currently, the JPML has no authority over state court litigation.[31] As a general rule no state court has the authority to transfer litigation to a court in another state or to federal court,[32] and no state court has the authority to accept litigation transferred by a court of another state or federal court.[33] Even though highly desirable, no mechanism exists to transfer a case from a state court in one state to a state court in another state. Amending 28 U.S.C. § 1407 to authorize the JPML to make such transfers is the optimal path. Authorizing the JPML to transfer M&A litigation will solve the multijurisdictional M&A problem without incurring disadvantages inherent in many of the alternative proposals.

In particular, authorizing the JPML to transfer M&A litigation without mandating transfers to Delaware's Court of Chancery will not undermine shareholder rights. In contrast, most of the alternative proposals cede to management control over some of the primary mechanisms available to shareholders to address managerial misconduct—the right to a jury trial in a state other than Delaware and the opportunity to recover punitive damages in the cases that proceed to trial. The Delaware Court of Chancery provides neither, as it is a court of equity.[34] This Article does not contemplate giving a preference to Delaware. Instead, it proposes identifying the jurisdiction of incorporation as merely one factor the JPML should consider when making its transfer decisions regarding M&A litigation commenced in multiple states.

Expanding the JPML's role has been a cornerstone of many attempts to reform the U.S. judiciary.[35] This Article's proposed expansion will solve the inability of federal and state courts to effectively manage multijurisdictional litigation in the M&A context and in many other contexts as well. The difficulties inherent in multi-forum litigation are not confined to internal corporate disputes. They also arise in numerous other types of

31. *See* DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 3:13 (updated May 2014) ("The Panel has no authority over actions pending in state courts."); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH § 20.31 (2004) ("Interdistrict, intradistrict, and multidistrict transfer statutes and rules apply only to cases filed in, or removable to, federal court . . . ."); Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 66 (2007) (noting that one limitation of the multidistrict litigation (MDL) statute is that "there is no formal mechanism to coordinate state proceedings pending in far-flung states and involving common questions of fact").

32. *Transfer of Litigation Act Summary*, UNIFORM LAW COMMISSION (2014), http://www.uniformlaws.org/ActSummary.aspx?title=Transfer%20of%20Litigation%20Act.

33. *Id.*

34. *See* Boris Feldman, *Litigating Post-Close Merger Cases*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Nov. 9, 2012, 10:12 AM), https://blogs.law.harvard.edu/corpgov/2012/11/09/litigating-post-close-merger-cases/ ("[T]he Court of Chancery has never allowed jury trial on breach of fiduciary duty claims."); Edward B. Micheletti & Cliff Gardner, *Multi-Forum Deal Litigation: A Growing Concern*, N.Y. L.J. (Sept. 1, 2011), http://www.newyorklawjournal.com/id=1202512974791/MultiForum-Deal-Litigation-A-Growing-Concern?slreturn=20140828222151 (access required) ("[L]itigation in the Court of Chancery does not pose the risk of a jury trial or punitive damages . . . .").

35. HERR, *supra* note 31, § 3:13.

disputes.[36] Authorizing the JPML to transfer these other actions will yield many of the same benefits that will accrue in the M&A domain.

I. THE RISE OF MULTIJURISDICTIONAL M&A LITIGATION

Multijurisdictional M&A litigation is the new normal. This Article first examines the phenomenon from an empirical perspective. It then considers a number of the most common explanations for the emerging trends.

A. Background

Death, taxes, and deal litigation are three inevitable events.[37] M&A litigation is not new, but the ubiquity of it is. As noted above, in 1999–2000, only 11.9% of announced M&A offers generated litigation. In contrast, in 2013 shareholders challenged 97.5% of all M&A transactions with a value greater than $100 million involving U.S. public company targets.[38] It is not uncommon for large deals to generate ten or more lawsuits,[39] and during the 2007–2011 period more than a dozen announced deals valued at more than $100 million apiece became the subject of 15 or more shareholder suits.[40] The net result has been a wave of litigation. In 2013, shareholders filed 612 lawsuits concerning M&A deals announced that year valued over $100 million.[41] During the four-year period from 2009–2012, shareholders filed 2485 lawsuits concerning M&A deals valued over $100 million and announced during that period.[42]

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36. *See, e.g.*, Edward M. McNally, *Chancery Closing the Door to Multidistrict Litigation*, DELAWARE BUSINESS COURT INSIDER (Oct. 9, 2013), http://www.morrisjames.com/newsroom-articles-194.html (noting that multistate employers may confront multijurisdictional litigation regarding the enforcement of non-compete provisions in their employment contracts).

37. Baltay, *supra* note 11 (quoting Professor Robert M. Daines).

38. Cain & Davidoff, *supra* note 3, at 1–2. A value of $100 million is a common floor in commentary about deals and deal litigation. *See, e.g.*, Paul, Weiss, Rifkind, Wharton & Garrison LLP, *M&A at a Glance: 2013 Year-End Round-Up* 1 (Jan. 15, 2014), *available at* http://www.paulweiss.com/media/2345416/15jan14maroundup.pdf (using $100 million as its floor). In 2012 there were approximately 7600 M&A deals involving a U.S. target or acquirer, but most of those deals were smaller than $100 million. PricewaterhouseCoopers, *supra* note 20, at 8.

39. Wilmer Cutler Pickering Hale & Dorr LLP, *2013 M&A Report* 17 (2013), *available at* http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/2013-wilmerhale-ma-report.pdf.

40. *See* Robert M. Daines & Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions*, CORNERSTONE RESEARCH 3 (Mar. 2012), *available at* http://www.cornerstone.com/getattachment/03dcde90-ce88-4452-a58a-b9efcc32ed71/Recent-Developments-in-Shareholder-Litigation-Invo.aspx (listing each deal and the number of resulting lawsuits). However, during the 2011–2013 period the percentage of deals litigated in three or more courts declined by half. Koumrian, *supra* note 4, at 2.

41. Koumrian, *supra* note 4, at 2.

42. Robert M. Daines & Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions*, CORNERSTONE RESEARCH 1 (Feb. 2013), *available at* http://www.cornerstone.com/files/upload/Cornerstone_Research_Shareholder_Litigation_Involving_M_and_A_Feb_2013.pdf. The statistics concerning deal litigation should be considered in context. The number of deals valued at a minimum of $100 million attracting litigation did not change much annually during the 2006–2011 period, but the number of deals dropped sharply. *See* Matthew D. Cain & Steven M. Davidoff, *A Great Game: The Dynamics of State Competition and Litigation* 35 tbl.1 (Jan. 31, 2013) (unpublished manuscript), *available at*

Most of the recent M&A litigation has been multijurisdictional. Sixty-two percent of deals announced in 2013 were litigated in multiple jurisdictions.[43] Multijurisdictional litigation takes place almost exclusively in state courts. For various reasons, M&A plaintiffs have become averse to federal courts. Pleading burdens are stricter in federal court, especially since the Supreme Court decisions in *Twombly*[44] and *Iqbal*,[45] and federal judges are much more likely than their state counterparts to dismiss an M&A suit on a motion to dismiss or at the summary judgment stage.[46] Fifteen federal securities class action suits concerning deals were filed in 2013 and only sixteen in 2012, compared with 44 and 41 in 2011 and 2010, respectively.[47] The dominant trend in securities litigation in recent years has been a decline in federal class action suits and a corresponding increase in state court M&A claims.[48]

M&A litigation commences very quickly. In 2013 the first suit was filed an average of 11.7 days after the deal announcement.[49] Quick filings are likely motivated in part by

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758 (showing a decrease from a total of 232 deals in 2006 to 127 deals in 2011; while the difference between deals subject to litigation remained relatively stable, with 99 deals subject to litigation in 2006, and 117 deals subject to litigation in 2011). One consequence is that the percentage of deals challenged by shareholders increased substantially. *Id.*

43. Koumrian, *supra* note 4, at 3.

44. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556–57 (2007) (establishing a new standard which requires that pleadings state a plausible claim for relief to satisfy Rule 8(a) of the Federal Rules of Civil Procedure).

45. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (extending *Twombly*'s pleading standard to all civil cases).

46. Feldman, *supra* note 34.

47. PricewaterhouseCoopers, *Are Changes on the Horizon? 2013 Securities Litigation Study* 27 (Apr. 2014), *available at* http://www.pwc.com/en_US/us/forensic-services/publications/assets/2013-securities-litigation-study.pdf. Higher levels of federal filings have been reported elsewhere. *See* Gibson, Dunn & Crutcher LLP, *2014 Mid-Year Securities Litigation Update* 5 (July 15, 2014), *available at* http://www.gibsondunn.com/publications/Documents/2014-Mid-Year-Securities-Litigation-Update.pdf (reporting 52 merger-related federal securities class action filings in 2013, 56 in 2012, 62 in 2011, and 70 in 2010, and projecting 42 for 2014). Prior to 2002, the vast majority of M&A suits involving Delaware-chartered targets were filed in Delaware's Court of Chancery. William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 573 (2012). The situation then changed and shareholders filed more and more cases in other states, even if the target company was chartered in Delaware. Some recent scholarship examined this so-called "Delaware flight," but the flight has reversed. In 2012, shareholders filed 39% of suits challenging M&A transactions in Delaware, up from 32% in 2011 and 25% in 2010, and drawing filings away from both federal courts and other state courts. *See* Daines & Koumrian, *supra* note 42, at 2; Foster, *supra* note 16, at *12 ("[P]laintiffs are moving back into Delaware.").

48. Foster, *supra* note 16; *see also* Jennifer Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 384 (2011) (noting that M&A litigation has "replaced traditional stock drop cases as the lawsuit of choice for plaintiffs' securities lawyers").

49. Koumrian, *supra* note 4, at 2; *see also* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 21, at 4 (noting that shareholders file two-thirds of M&A suits within two weeks of the proposed deal's announcement). Critics of the current wave of M&A litigation sometimes suggest that quick filing is a new development, but this is incorrect. A study of 623 M&A-related class actions commenced in Delaware courts in 1999 and 2000 found that almost 70% were filed within three days of the announcement of the transaction. Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 182–83 (2004).

the fact that first filings yield larger fee awards.[50] More than 60% of M&A cases settle,[51] and they do so almost as quickly as they are filed. On average, settlements occur 42 days after the commencement of M&A litigation.[52] These cases settle early for several reasons. First, litigation is time-consuming and expensive. Second, defendants are eager to avoid delayed completion of their transactions,[53] and if settlement does not occur prior to closing then resolution becomes much more difficult, and perhaps impossible.[54] Third, settlement costs are quite modest when expressed as a fraction of the size of most deals, or when compared with bankers' and attorneys' fees incurred in completing the transactions.[55]

Historically it was uncommon for M&A suits to settle pre-close on the basis of additional disclosures about the transaction, with no increase in the deal price. Now, such settlements are the norm. In 2013, shareholder plaintiffs in deal cases achieved only two monetary settlements in excess of $5 million[56] and 84.8% of M&A settlements were made solely on the basis of additional disclosures.[57]

Disclosure-only settlements have become the norm in deal litigation even though they provide virtually no tangible value to corporations and their shareholders. In recent years companies have provided their shareholders with more complete disclosures. This improvement can be partially linked to Delaware cases in which the Court of Chancery approved disclosure-only settlements.[58] But recent research, based on a sample of 453 large public company mergers from 2005 to 2012, found that disclosure-only settlements had no effect on shareholder voting. The supplemental disclosures, compelled by the settlements and appearing in the merger proxies, did not reduce the percentage of shares voted in favor of the deals.[59] This finding is consistent with prior research covering the 2010–2011 period.

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50. *See* Woolner et al., *supra* note 19 (reporting that median legal fees are significantly greater in M&A cases filed within eight days of the deals' announcement than for later-filed cases).

51. *See* Daines & Koumrian, *supra* note 42, at 5 (reporting settlement rates of 64% in 2012, 58% in 2011, 62% in 2010, and 61% in 2010). In 2012, the court dismissed approximately 33% of the cases it resolved and the parties voluntarily dismissed the remaining three percent. *Id.*

52. *Id.*

53. PricewaterhouseCoopers, *supra* note 47, at 27 ("The desire to avoid delays to complete the transaction and move ahead with the acquisition appears to be the primary explanation for agreeing to a settlement.").

54. Douglas J. Clark, *Why Merger Cases Settle*, BOARDMEMBER.COM (June 6, 2013), http://www.wsgr.com/PDFSearch/clark-0613.pdf.

55. John C. Coffee, Jr., *Foreword: The Delaware Court of Chancery: Change, Continuity—and Competition*, 2012 COLUM. BUS. L. REV. 387, 392 (2012). This statement is less valid with regard to small-cap deals, which have been increasingly the target of litigation. *See* Steven M. Haas, *The Small-Cap M&A Litigation Problem*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (July 31, 2013), https://blogs.law.harvard.edu/corpgov/2013/07/31/the-small-cap-ma-litigation-problem/ (explaining that stockholders in small-cap deals are disproportionally harmed by excessive or frivolous M&A litigation).

56. Olga Koumrian, *Settlements of Shareholder Litigation Involving Mergers and Acquisitions*, CORNERSTONE RESEARCH 2 (Apr. 2014), *available at* https://www.cornerstone.com/getattachment/7bd80347-124b-4b69-add5-575e33c3f61b/Settlements-of-Shareholder-Litigation-Involving-Me.aspx. This represented just two percent of all M&A settlements reached in 2013, compared with more than five percent in prior years. *Id.*

57. Cain & Davidoff, *supra* note 3, at 4. A different study yielded a lower figure. According to Cornerstone Research, 75% of the settlements in M&A cases in 2013 were disclosure-only. Koumrian, *supra* note 56, at 2.

58. *See* Phillip R. Sumpter, *Adjusting Attorneys' Fees Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements*, 15 U. PA. J. BUS. L. 669, 686–87 (2013) ("[M]uch of the improved disclosure can be attributed, at least in part, to the disclosure-only line of cases.").

59. *See* Steven M. Davidoff et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform* 4 (Univ. of Penn. Law School Inst. for Law and Econ. Research

After receiving additional disclosures, shareholders voted down only two of the 162 transactions in which the parties settled the litigation on a disclosure-only basis during that period.[60] The additional disclosures' negligible impact on shareholder voting strongly suggests that they provide minimal tangible benefit.

Disclosure-only settlements often encompass hefty fee awards. In 2013 the mean fee award in such settlements was $511,000,[61] even after declining 24% during the 2010–2012 period.[62] In general the Delaware Court of Chancery has done little to discourage disclosure-only settlements and it only rarely refused to approve them.[63] More recently, Chancery judges have expressed greater skepticism about this kind of resolution, and have assessed the true materiality of the additional disclosures more critically.[64] The results in select cases have been substantially reduced attorneys' fees or outright rejection of the settlement.[65]

Not all suits end with closure of the deal. Historically it was quite rare for post-close litigation to occur.[66] But such litigation has increased in recent years,[67] at least in some

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Paper No. 14-4, Feb. 1, 2014) TEXAS L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398023 (finding that "disclosure-only settlements do not appear to affect shareholder voting in any way").

60. Robert M. Daines & Olga Koumrian, *Merger Lawsuits Yield High Costs and Questionable Benefits*, N.Y. TIMES DEALBOOK (June 8, 2012, 10:38 AM), http://dealbook.nytimes.com/2012/06/08/merger-lawsuits-yield-high-costs-and-questionable-benefits/?_php=true&_type=blogs&_r=0.

61. Cain & Davidoff, *supra* note 3, at 4. By comparison, the mean fee award in non-disclosure settlements of deal litigation in 2013 was $2.7 million. *Id.* (However, these dollar figures are based on incomplete data for 2013.) *Id.* Attorneys' fees may appear to be substantial, but they represent a tiny fraction of the value of the average transaction. *See Shark Attack: Why American Firms Cannot Do Deals Without Being Sued*, ECONOMIST.COM (June 2, 2012), http://www.economist.com/node/21556248 (noting that attorneys' fees in 2011 settlements were less than 0.1% of the average deal's value).

62. Daines & Koumrian, *supra* note 42, at 9.

63. Peter B. Ladig, *The Viability of the Disclosure Only Settlement*, DEL. BUS. LITIG. REP. (May 11, 2011), http://www.delawarebusinesslitigation.com/2011/05/articles/case-summaries/ma/the-viability-of-the-disclosure-only-settlement/.

64. *See* Daniel E. Wolf, *The Evolving Face of Deal Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Mar. 27, 2014, 9:19 AM), http://blogs.law.harvard.edu/corpgov/2014/03/27/the-evolving-face-of-deal-litigation/ (stating that "Delaware courts recently have become more skeptical of the value of these additional disclosures and the benefits they offer to shareholders"); *see also* Ladig, *supra* note 63 (speculating that disclosure-only settlements "may become a thing of the past" if scrutiny intensifies).

65. Wolf, *supra* note 64. For example, in *In re Transatlantic Holdings Inc. S'holders Litig.*, C.A. No. 6574-CS, 2013 WL 1191738, at *3 (Del. Ch. Mar. 8, 2013), then-Chancellor Strine issued a bench ruling rejecting a disclosure-only, negotiated settlement of an M&A stockholder suit. And in *In re Gen-Probe, Inc. S'holders Litig.*, No. 7495-VCL, 2013 WL 3246605, at *16 (Del. Ch. Apr. 10, 2013), the court slashed attorneys' fees in a "terribly thin" disclosure-only settlement from $450,000 to $100,000. *See also* Press Release, Shareholders Recover No Money in Vast Majority of M&A Litigation, Cornerstone Research (Apr. 15, 2014), http://www.cornerstone.com/Publications/Press-Releases/Shareholders-Recover-No-Money-M-and-A-Settlements (noting "steady decline over the last seven years in average plaintiff attorney fees in disclosure only M&A litigation settlements").

66. *See* Boris Feldman, *Shareholder Litigation After the Fall of an Iron Curtain*, 45 REV. COMMOD. & SEC. REG. 7, 9 (2012), *available at* http://www.wsgr.com/PDFSearch/feldman0112.pdf (discussing the historical rarity of settling a suit post-close).

67. *See* Feldman, *supra* note 34 (noting that merger suits now often survive closing); *see also* Bradley R. Aronstam & S. Michael Sirkin, *Post-Closing Litigation Risk in Stockholder M&A Actions*, 26 INSIGHTS 9, 9 (2012), *available at* http://www.seitzross.com/media/article/21_Pages%20from%20INSIGHTS-2012-05-31.pdf%20-%20Adobe%20Acrobat%20Pro.pdf (arguing that the Delaware Court of Chancery has effectively

states. Other states, such as California, bar post-close claims for additional consideration because they are derivative.[68] In 2013, litigation continued post-close in 25% of cases.[69]

Post-close, no additional disclosures can be made. What can be done to accomplish a settlement in this situation, in those states where post-close litigation is permissible? The most obvious way to settle an M&A case post-close is to increase the deal price, but such additional consideration will not be covered by the target company's directors' and officers' (D&O) liability insurance and must be borne directly by the acquirer.[70] The acquirer's insurer may cover the increased price, but this is unlikely.[71] The situation is somewhat different with regard to coverage of post-close defense costs. The target's D&O insurance often fails to cover these costs,[72] whereas the acquirer's insurance does provide coverage.[73] Accordingly, the acquirer has an incentive to continue the litigation—which will be financed by its insurer—rather than settle and absorb the expense of a richer deal.[74] The overall effect is likely to be an increase in M&A litigation expense and burden on the judicial system.

B. Explanations for the Rise of Multijurisdictional M&A Litigation

A number of theories have been advanced to explain both the rise in M&A litigation generally and the rise in multijurisdictional M&A litigation specifically. A non-comprehensive list includes all of the following: first, federal legislation designed to curb strike suits has driven plaintiffs' lawyers to state court, where they have pursued M&A-related class actions;[75] second, plaintiffs' lawyers, particularly those with weak cases, file suit against Delaware companies outside Delaware in the hope that less experienced non-Delaware judges will misapply Delaware law in plaintiffs' favor;[76] third, whereas the

encouraged post-closing deal litigation by denying preliminary injunction motions while simultaneously finding that plaintiffs demonstrated a probability of success on the merits).

68. Douglas J. Clark, *Why Merger Cases Settle*, BOARDMEMBER.COM (June 6, 2013), http://www.wsgr.com/PDFSearch/clark-0613.pdf. In September 2013, the Delaware Supreme Court, responding to a question certified from the Ninth Circuit, held that shareholders cannot maintain post-merger derivative claims under Delaware law, except in the limited situation where the merger is being accomplished merely to deprive the shareholders of their standing to bring the derivative action. Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp., 75 A.3d 888, 897 (Del. 2013).

69. Koumrian, *supra* note 4, at 1.

70. Clark, *supra* note 68.

71. *See* Feldman, *supra* note 34 (arguing that post-close suits have nuisance value because they subject executives of the acquirer to discovery that is often not covered by the target's D&O insurance).

72. *Id.*

73. *See* Clark, *supra* note 68 (noting that acquirer's D&O insurance covers post-close defense costs).

74. *Id.*

75. *See, e.g.*, Donald F. Parsons, Jr. & Jason S. Tyler, *Docket Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedure*, 70 WASH. & LEE L. REV. 473, 489 (2013) (suggesting that rise in M&A litigation predicated on state claims for breach of fiduciary duty may be attributed to enactment of SLUSA and the Private Securities Litigation Reform Act).

76. Charles M. Nathan, *Designating Delaware as the Exclusive Jurisdiction for Intra-Corporate Disputes*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (May 11, 2010), http://blogs.law.harvard.edu/corpgov/2010/05/11/designating-delaware-as-the-exclusive-jurisdiction-for-intra-corporate-disputes/; *cf.* Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1795 (2012) (referring to the misapplication theory as an unproven empirical assertion).

application of Delaware law by Delaware judges is predictable,[77] the application of Delaware law by non-Delaware judges is unpredictable, and this uncertainty increases the settlement value of the litigation;[78] fourth, courts outside Delaware are less likely to limit or reduce plaintiffs' attorneys' fees awards;[79] and finally, because state courts generally award attorneys' fees only to lead plaintiffs' counsel in any given case, plaintiffs' firms multiply their fee opportunities by filing in multiple jurisdictions. Multiple filings provide multiple opportunities for lead counsel appointment.[80] The true explanation for the rise in multijurisdictional M&A litigation may reflect some combination of the foregoing theories.

II. NEGATIVE CONSEQUENCES OF MULTIJURISDICTIONAL M&A LITIGATION

M&A multijurisdictional litigation has a host of negative consequences. This Part describes the most important ones. For the reasons explained below, while critics of deal litigation have exaggerated the harm of deal litigation, that harm remains significant.

A. Increased Litigation Expense

It is frequently noted that increased litigation expense is one of the primary disadvantages associated with multijurisdictional litigation generally[81] and multijurisdictional M&A litigation specifically.[82] This expense results from the retention

77. *See, e.g.*, Thomas & Thompson, *supra* note 76, at 1799 (noting predictability and certainty of outcome in most Delaware cases). Delaware's frequently lauded predictability has been disputed, in part because the reversal rate for decisions from the Court of Chancery is approximately 25%. *See* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 15–16 (2008) (linking the high reversal rate to the indeterminacy of Delaware law).

78. Nathan, *supra* note 76; *accord* Coffee, *supra* note 55, at 393 ("[O]ne advantage to plaintiffs in litigating before a state court outside of Delaware is that defendants cannot easily predict the outcome. The bottom line is that uncertainty is desired by plaintiffs because it encourages settlement, particularly when defendants have much at risk.").

79. Nathan, *supra* note 76.

80. *See* Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused this Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1, 11 (2012) ("Opening litigation on multiple fronts provides plaintiffs' counsel multiple opportunities to be the lead plaintiff, and therefore claim a bigger piece of the pie."); Charles M. Nathan, *New Challenges and Strategies for Designating Delaware as Jurisdiction for Corporate Disputes*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (May 11, 2011, 9:31 AM), https://blogs.law.harvard.edu/corpgov/2011/05/11/new-challenges-and-strategies-for-designating-delaware-as-jurisdiction-for-corporate-disputes/ ("Plaintiffs' lawyers choose to file suits in multiple forums because by doing so they can create more opportunities to serve as lead counsel (particularly if they are late to the party and litigation is already pending elsewhere) and better position themselves for a fee award in any settlement."). This phenomenon has been driven in part by the U.S. Supreme Court's decision in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). In *Matsushita* the Court held that a broad release in one action controlled subsequent settlements in other jurisdictions, thereby creating incentives for plaintiffs and their counsel to file in a second jurisdiction if they were excluded from the initial suit. *See* Thomas & Thompson, *supra* note 76, at 1767 ("*Matsushita* has stimulated multijurisdictional litigation filings by plaintiffs' law firms by creating incentives for plaintiffs and their law firms left out of the litigation in the first court to seek a second court in which to file.").

81. *See, e.g.*, ROBERT L. HAIG, 5 BUS. & COM. LITIG. FED. CTS. § 60.22 (3d ed. 2012) ("Particularly in multidistrict cases involving hundreds or thousands of individual claims, duplication can easily cost $1 million and may even run more than $10 million.").

82. *See, e.g.*, Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 471 (2014) ("Multi-forum litigation promises shareholders no benefits and threatens them with considerable

of multiple law firms, the preparation of multiple sets of pleadings and motion papers, and increased travel expense for corporate employees and counsel. But there is little empirical evidence to quantify this elevated expense in M&A cases[83] and there is some cause to be skeptical about its significance. In general, deal litigation is sparse or phantom[84] even if conducted in multiple jurisdictions. Such litigation typically settles quickly, following a brief, initial flurry of activity that includes limited discovery (if it has been expedited) and a few motions.[85] M&A cases settle on average six weeks after the litigation commences.[86]

Motions to expedite can be a major cost driver. During the 2004–2011 period, the percentage of acquisition-related and derivative cases in Delaware involving requests for expedited proceedings increased from 27.4% to 51.9%.[87] Historically, it was almost automatic for Delaware judges to grant expedited discovery in merger cases.[88] Expedition has the effect of ratcheting up litigation expense.[89] In Delaware, a motion for expedited discovery can be granted on the basis of good cause, a fairly low threshold which requires demonstration of a sufficient possibility of threatened irreparable injury and the existence of a colorable claim.[90] The burden of demonstrating a colorable claim is minimal.[91]

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costs . . . ."); Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 20 (2013) (stating that in multi-forum corporate litigation "the extraction of economic rents and imposition of deadweight costs are a substantial problem"); U.S. CHAMBER INSTIT. FOR LEGAL REFORM, *supra* note 21, at 6 (asserting that multijurisdictional litigation "dramatically increases the cost of defense").

83. *See* Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Sept. 10, 2013, 9:23 AM), http://blogs.law.harvard.edu/corpgov/2013/09/10/what-should-we-do-about-multijurisdictional-litigation-in-ma-deals/ (noting absence of good empirical data identifying costs and benefits of multijurisdictional M&A litigation).

84. Douglas J. Clark & Marcia Kramer Mayer, *Anatomy of a Merger Litigation* 6, NERA ECON. CONSULTING (Apr. 4, 2012), http://www.nera.com/publications/archive/2012/anatomy-of-a-merger-litigation.html; *but cf.* Savitt, *supra* note 47, at 574 (asserting that plaintiffs are litigating M&A cases "more intensively and settling them later").

85. *See In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 945–46 (Del. Ch. 2010); Coffee, *supra* note 55, at 397 ("Close students of M&A litigation have recognized that such litigation often has a 'phantom' character. Plaintiffs rush to file, then fight intensely over the appointment of lead counsel, but thereafter take little discovery, conduct no depositions, and make few motions."); Thomas, *supra* note 19, at 1943 ("[T]he best empirical evidence shows that, in the majority of deal cases, little discovery is taken.").

86. Daines & Koumrian, *supra* note 42, at 5.

87. Adam B. Badawi, *Merger Class Actions in Delaware and the Symptoms of Multi-Jurisdictional Litigation*, 90 WASH. U. L. REV. 965, 1003 (2013). Requests for expedited discovery in the Court of Chancery became so common that the court issued its own guidelines. *See generally* DELAWARE COURT OF CHANCERY, COURT OF CHANCERY GUIDELINES FOR EXPEDITED DISCOVERY IN ADVANCE OF A PRELIMINARY INJUNCTION HEARING, *available at* http://courts.state.de.us/chancery/docs/PIDiscoveryGuidelines.pdf (underscoring that, pursuant to the *Guidelines*, written discovery typically is limited to document requests and narrowly-tailored interrogatories intended primarily to identify persons with relevant knowledge).

88. Feldman, *supra* note 34; Savitt, *supra* note 47, at 582 ("Deal litigation in the Court of Chancery is routinely expedited . . . .").

89. *See* Strine et al., *supra* note 82, at 16 (noting the significant discovery expense resulting from expedition).

90. Ehlen v. Conceptus, Inc., Civ. A. No. 8560-VCG, Letter Op. at 4 (Del. Ch. May 24, 2013), *available at* http://courts.delaware.gov/opinions/download.aspx?ID=189760; Giammargo v. Snapple Beverage Corp., Civ. A. No. 13845, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994); *see* Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1076–77 (2013) (observing that in other jurisdictions the standard for granting expedited discovery is less rigorous, or no specific standard has been delineated by the courts).

91. *Ehlen*, Civ. A. No. 8560-VCG, Letter Op. at 4.

Granting motions to expedite was once routine in Delaware, but now such motions are increasingly opposed by defendants[92] and increasingly denied.[93] The denial of expedition can minimize the opportunity for litigation expenses to multiply, as well as reduce the likelihood that plaintiffs will prevail or extract a settlement. Where expedition is denied, plaintiffs have no discovery with which to support a motion for preliminary injunction or settlement demand.[94]

In 2007, the median and mean defense costs of shareholder/investor D&O claims were $830,000 and $3,382,927 per claim.[95] No doubt such costs have since increased.[96] But costs remain relatively low[97] and the common argument that shareholders are footing this bill[98] is not quite accurate. D&O insurance typically pays all the costs associated with the defense and settlement of shareholder litigation, above a deductible.[99] The company itself

92. Parsons & Tyler, *supra* note 75, at 498 (stating that historically, defendants, who prefer a Delaware forum, have agreed to expedited discovery in Delaware in order to push cases into that forum); Marc Wolinsky & Ben Schireson, *Deal Litigation Run Amok: Diagnosis and Prescriptions*, 47 REV. SEC. & COMMOD. REG. 1, 3 (2014), *available at* http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23029.14.pdf.

93. Parsons & Tyler, *supra* note 75, at 499 n.113 (noting that, during the limited period between January 1, 2011 to June 30, 2012, the Delaware Court of Chancery denied 13 of 27 contested motions to expedite); Paul J. Collins, *The Chancery Court as 'Gatekeeper' in M&A Litigation*, DEL. BUS. CT. INSIDER (Aug. 21, 2013), *available at* http://www.gibsondunn.com/publications/Documents/Collins-ChanceryCourtasGatekeeper-DBCI.pdf (noting that motions to expedite proceedings were denied by the Chancery Court in numerous cases in 2012 and 2013); Armour, et al., *supra* note 12, at 1379 (stating that whereas many states routinely allow expedited discovery, Delaware courts are more selective in granting such requests); *but cf.* Kevin Miller, Alston & Bird, LLP, The Dynamics of Disclosure Claims: Projections and the Financial Analyses Performed by Financial Advisors 12 (2012), *available at* http://www.alston.com/files/Event/cd40770a-f394-4ab7-8732-dafc3dcf6409/Presentation/EventAttachment/1166583a-f7d6-4d3a-aefa-dc4760b8656f/materials-1.pdf ("[T]he Delaware Court of Chancery has, with a few recent exceptions, increasingly been willing to grant expedited discovery and injunctive relief with respect to disclosure claims.").

94. *See* Wolinsky & Schireson, *supra* note 92, at 3 ("By denying motions for expedited treatment, the courts deprive plaintiff's lawyers of the single most valuable tool in extracting a settlement: the threat of a ruling that will delay the deal close."); *accord* Richard H. Zelichov & Christina L. Costley, *Stamping Out Merger Objection Cases Expedited Proceedings: A Privilege Not a Right*, 15 BLOOMBERG BNA MERGERS & ACQUISITIONS L. REP. 1258, 1258 (2012), *available at* http://www.kattenlaw.com/files/21622_katten_muchin_zelichov_costley_articleFINAL.PDF ("Eliminating expedited discovery effectively erases plaintiffs' primary leverage to force pre-closing settlements.").

95. TOWERS PERRIN, DIRECTORS AND OFFICERS LIABILITY: 2007 SURVEY OF INSURANCE PURCHASING AND CLAIM TRENDS 58 (2008).

96. *See* Kevin LaCroix, *Top Ten D&O Stories of 2013*, D&O DIARY (Jan. 7, 2014, 2:20 AM), http://www.dandodiary.com/2014/01/articles/director-and-officer-liability-1/top-ten-do-stories-of-2013/ (noting that D&O insurers "incur millions and possibly tens of millions of defense cost expense" in shareholder derivative suits); *see* Claudia H. Allen, *Exclusive Forum Provisions: Putting on the Brakes*, 10 BLOOMBERG BNA CORP. ACCOUNTABILITY REP. 1286, n.36 (2012), *available at* http://www.ngelaw.com/files/Uploads/Images/exclusive-forum-provisions-putting-on-the-brakes.pdf (discussing one recent effort to quantify the cost of defending multijurisdictional litigation in which United Rentals, Inc. submitted 2012 proxy solicitation materials asserting that its cost of defending multiforum derivative actions exceeded $2 million "without taking into account over $20 million of other costs that were common to the derivative cases and related class action and SEC inquiries").

97. *See* David Bradford, *Merger Objection Lawsuits: A Threat to Primary D&O Insurers?* 3 (2011), *available at* https://www.advisen.com/downloads/Merger_Objection_Suits.pdf (observing that merger objection lawsuits "come to a quick resolution, keeping defense costs low, and therefore tend to be relatively inexpensive for D&O insurers").

98. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 21, at 5.

99. Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' & Officers' Liability Insurer*, 95 GEO. L.J. 1795, 1804 (2007).

incurs an expense only to the extent of the deductible and a spike in D&O premiums attributable to increased M&A litigation. As discussed below, this spike has been modest, but it appears to be escalating. The rise in defense costs is in large measure a function of D&O insurers' failure to exercise budget control,[100] as opposed to harm inherent to deal litigation.

B. Wasted Judicial Resources

Judges, practitioners, and scholars alike have decried the fact that duplicative litigation wastes scarce judicial resources.[101] Waste occurs in several respects. When the litigation is active, judges in multiple jurisdictions must review the same pleadings and motion papers and may decide identical motions. When the litigation settles, judges may be required to resolve fee disputes among non-cooperating plaintiffs' counsel in multiple states. Judges may use additional resources to assure that settlements involving litigation in multiple jurisdictions are not collusive. But the significance of these factors has been somewhat overblown. In general, the judiciary's workload in multijurisdictional deal cases is light to moderate because the litigation itself is sparse. For the most part, the judges' role in these cases is limited to monitoring the selection of lead counsel, managing expedited discovery motion practice, and reviewing settlements.[102] None of these routine tasks are especially burdensome.[103] Of course, some cases may involve both additional complexity and significantly more waste.

C. The Specter of Conflicting Rulings and Collusive Settlements

Critics of multijurisdictional M&A litigation frequently mention the potential dangers of conflicting rulings[104] and collusive settlements.[105] With respect to the former, the Court of Chancery observed that such litigation presents the risk that "two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all concerned."[106] This risk is genuine, but perhaps the most controversial manifestation in recent years occurred when

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100. *See id.* at 1820 ("D&O insurers give public corporations and their directors and officers essentially a blank checkbook to cover the costs of defense.").

101. *See, e.g.*, *In re* Allion Healthcare Inc. S'holders Litig., Civ. A. No. 5022-CC, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011) (noting that judicial resources are wasted as judges in multiple jurisdictions review the same documents and decide the same motions); COMM. ON SEC. LITIG. OF THE ASS'N OF THE BAR OF THE CITY NEW YORK, COORDINATING RELATED SECURITIES LITIGATION: A POSITION PAPER 2 (2008), *available at* http://www.nycbar.org/pdf/report/Securities_Litigation_%20A.pdf (noting the "unnecessary consumption" of judicial resources); George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 297 (2014) ("The duplicative litigation is a waste of judicial resources and legal fees.").

102. Thomas, *supra* note 19, at 1944.

103. *See* Thomas & Thompson, *supra* note 76, at 1801 ("Relatively few judicial resources are likely to be expended in this type of work . . . .").

104. *See, e.g.*, Parsons & Tyler, *supra* note 75, at 508 (noting the risk of inconsistent findings of fact or rulings of law).

105. *See, e.g.*, Griffith & Lahav, *supra* note 90, at 1096 ("Collusive settlement, in other words, may be a real and pervasive threat in merger litigation . . . ."); Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 345 (2013) ("[T]he collusive settlement problem . . . is broadly appreciated by the judiciary and academia . . . .").

106. *In re* Allion Healthcare Inc. S'holders Litig., Civ. A. No. 5022-CC, 2011 WL 1135016, at *4 (Del. Ch. Mar. 29, 2011).

the Court of Chancery itself overstepped its bounds. In the much-criticized 2012 decision in *Louisiana Munic. Police Employees Ret. Sys. v. Pyott*,[107] the Court of Chancery refused to give preclusive effect to the final judgment of a California federal court dismissing a derivative suit parallel to a case pending in Delaware. This decision conflicted with a series of federal and state cases holding that dismissal of one stockholder derivative suit for failure to make pre-suit demand precludes other stockholders from bringing similar demand-excused suits.[108] The Court of Chancery's conflicting decision reflected the court's efforts to establish itself "as the preferred and presumptive court for corporate litigation."[109] This effort was checked, at least temporarily, when the Delaware Supreme Court unanimously reversed it in 2013.[110] The Delaware Supreme Court held that where the law of the predecessor court recognizes privity between derivative stockholders, it collaterally estops a subsequent derivative plaintiff from re-litigating demand futility in Delaware under the Full Faith and Credit Clause.[111]

Commentary on the possibility of collusive settlements in M&A litigation often refers to the Court of Chancery's appointment in *Scully v. Nighthawk Radiology Holdings, Inc.*[112] of special counsel to report on whether there was collusive behavior in connection with a class action settlement. The special counsel's 2011 report observed that, when settling multijurisdictional litigation, defense counsel's unquestionably proper forum shopping can devolve into a "reverse auction" in which defendant seeks the lowest bidder among plaintiffs' counsel challenging the same conduct in different jurisdictions.[113] In the most egregious cases, the reverse auction can result in a collusive settlement in which a plaintiff's law firm accepts a low-ball settlement offer in order to secure attorneys' fees.[114] Such a collusive settlement may undervalue claims, under-compensate plaintiffs, and undermine the legitimacy of the litigation process. What is not always underscored in

107. La. Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313, 313 (Del. Ch. 2012).

108. *See, e.g.*, *In re* Sonus Networks, Inc. S'holder Deriv. Litig., 499 F.3d 47, 53 (1st Cir. 2007) (affirming dismissal of derivative suit on basis of issue preclusion); Henik *ex rel.* LaBranche & Co. v. LaBranche, 433 F. Supp. 2d 372, 382 (S.D.N.Y. 2006) (dismissing derivative suit on basis of issue preclusion).

109. Kevin LaCroix, *Delaware Supreme Court Blasts Chancery Court's Controversial Refusal to Recognize California Court Judgment*, D&O DIARY (Apr. 8, 2013, 3:05 AM), http://www.dandodiary.com/2013/04/articles/shareholders-derivative-litiga/delaware-supreme-court-blasts-chancery-courts-controversial-refusal-to-recognize-california-court-judgment/; *see also* Alison Frankel, *Delaware Supreme Court Rebukes Chancery for Litigation Territorialism*, REUTERS (Apr. 5, 2013), http://blogs.reuters.com/alison-frankel/2013/04/05/delaware-supreme-court-rebukes-chancery-for-litigation-territorialism/ ("Chancery's grabby ways reached their apex last year with Vice Chancellor Travis Laster's controversial ruling in [*Pyott*] . . . .").

110. Pyott v. La. Mun. Police Emps.' Ret. Sys., 74 A.3d 612, 612 (Del. 2013).

111. *Id.* at 617–18.

112. Transcript of Courtroom Status Conference at 28–29, Scully v. Nighthawk Radiology Holdings, Inc., Civ. A. No. 5890-VCL (Del. Ch. Dec. 17, 2010), *available at* http://www.law.du.edu/documents/corporate-governance/governance-cases/Scully-v-Nighthawk-transcript.pdf.

113. Brief of Special Counsel at 17–18, 26–27, Scully v. Nighthawk Radiology Holdings, Inc., Civ. A. No. 5890-VCL (Del. Ch. Mar. 11, 2011), *available at* http://www.rlf.com/files/DelawareSpecialCounsel.pdf (noting that forum shopping should not be equated with collusive settlements).

114. *See id.* at 26–27 (identifying factors which suggest the possibility of collusion); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, FEDERAL JUDICIAL CENTER 14 (2005), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/classgde.pdf/$file/classgde.pdf ("[A] reverse auction is the 'sale' of a settlement to the lowest bidder among counsel for competing or overlapping classes.").

commentary is that the special counsel's report concluded, and the Court of Chancery subsequently agreed, that there had been no collusion in *Nighthawk Radiology*.[115]

Multijurisdictional M&A litigation no doubt makes reverse auctions a possibility, and the reduction of such litigation could minimize that risk.[116] But the absence of a collusive settlement in *Nighthawk Radiology*—apparently the sole M&A case in which a Delaware court appointed special counsel to investigate the possibility of collusion—casts some doubt on the suggestion[117] that reverse auction collusion is common. To date, there is no published empirical evidence on the frequency issue.[118] Moreover, as Professors Griffith and Lahav observed, it is very difficult to distinguish impermissible reverse auctions from defendants' valid exercise of their monopsony powers.[119]

D. The Impact on D&O Insurance

Perhaps the most significant negative aspect of multijurisdictional M&A litigation has been its role as a cost driver for D&O insurance pricing. Deal litigation represents a significant liability exposure for both the companies involved in proposed transactions and their directors and officers. Directors have the responsibility to investigate, evaluate, and respond to a proposed takeover transaction, and they frequently find themselves named as defendants in connection with the performance of the foregoing duties.[120] The exculpatory charter provisions corporations adopted under section 102(b)(7) of the Delaware General Corporation Law (DGCL)[121] and equivalent statutes in many other states[122] generally insulate directors from liability for monetary damages for breach of the duty of care, but

115. *See* Scully v. Nighthawk Radiology Holdings, Inc., Civ. A. No. 5890-VCL, at *2 (Del. Ch. Apr. 12, 2011) ("I agree with special counsel's analysis of the law and assessment of what took place. As a result, I have no concerns about the conduct of any attorney involved in this matter."); *but cf.* Griffith & Lahav, *supra* note 90, at 1097 ("[S]everal traditional factors indicating collusion were indeed present.").

116. *See* Alan L. Beller, *Selected Issues for Boards of Directors in 2014*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb. 1, 2014, 9:00 AM), https://blogs.law.harvard.edu/corpgov/2014/02/01/selected-issues-for-boards-of-directors-in-2014/ (noting that reducing the likelihood of multiple courts hearing the same case reduces the likelihood of reverse auctions).

117. *See, e.g.*, Myers, *supra* note 82, at 509 ("Anecdotal evidence suggests that the reverse auction is common in multi-forum shareholder litigation . . . ."); *see also id.* (arguing that reverse auction was involved in recent litigation concerning Bank of America's acquisition of Merrill Lynch).

118. *See* Thomas, *supra* note 19, at 1946 (noting absence of data on frequency of reverse auctions); Coffee, *supra* note 55, at 394 ("The frequency of such 'reverse auctions' in this context is an uncertain empirical question . . . .").

119. Griffith & Lahav, *supra* note 90, at 1098.

120. Dan A. Bailey, *Director Liability Loss Prevention in Mergers and Acquisitions*, CHUBB GROUP OF INSURANCE COMPANIES 4 (2013), *available at* http://www.chubb.com/businesses/csi/chubb16452.pdf.

121. DEL. CODE ANN. tit. 8, § 102(b)(7) (2014). This section authorizes shareholders to include a clause in a corporation's charter eliminating personal liability of a director to shareholders for monetary damages for breach of fiduciary duty, provided that such clause does not eliminate liability for: (1) any breach of the director's duty of loyalty, (2) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, and (3) any transaction from which the director derived an improper personal benefit. *Id.*

122. *See* Richard B. Kapnick & Courtney A. Rosen, *The Exculpatory Clause Defense to Shareholder Derivative Claims*, 17 BUS. TORTS J. 1, 1 (2010), *available at* http://www.sidley.com/files/Publication/abc89116-669d-4de4-b4ec-18808940b54a/Presentation/PublicationAttachment/6552d128-8ac6-4713-aa7e-193e3817a3c7/Kapnick-Rosen_REPRINT.pdf (noting that many states have enacted statutes similar to section 102(b)(7)).

not for breach of the duty of loyalty or bad faith conduct.[123] Statutes in some states (not including Delaware) also extend protection to officers.[124]

When directors and officers do face liability or legal expenses, they may be indemnified by the corporations they serve. The DGCL requires a corporation to indemnify a present or former director or officer included as a party to a proceeding by virtue of his or her service to the corporation, if he or she achieves success on the merits.[125] The indemnification is for expenses, including attorneys' fees, that such a person actually and reasonably incurred in connection with the successful defense.[126] The DGCL also prohibits a corporation from indemnifying a corporate official who was unsuccessful in the underlying proceeding and has acted in bad faith.[127] Between those two extremes, the DGCL vests corporations with the discretion to provide indemnification to its officers and directors. Corporations routinely set forth their indemnification obligations by charter, bylaw or contract.[128]

Directors and officers may also be entitled to payment of their attorneys' fees in advance of any determination that they are entitled to indemnification. Most states have some form of advancement or indemnification statute, which is usually permissive,[129] as in Delaware. The DGCL authorizes but does not require corporations to advance expenses their directors and officers incur in defending any action, suit, or proceeding that permits indemnification.[130] Delaware law permits, but does not require, a company to advance legal fees incurred in defending a civil, criminal, administrative, or investigative suit or proceeding.[131]

Corporate charters, bylaws, or contracts routinely make permissive advancement obligations and indemnification obligations mandatory.[132] For example, bylaws often

123. Gibson, Dunn & Crutcher LLP, *Director and Officer Indemnification and Insurance—Issues for Public Companies to Consider* 3 (July 15, 2013), http://www.gibsondunn.com/publications/pages/Director-Officer-Indemnification-Insurance-Issues-for-Public-Companies-to-Consider.aspx. Exculpatory clauses are designed to encourage directors to undertake risky but potentially value-maximizing business strategies, so long as they do so in good faith. *See* Prod. Res. Grp., LLC v. NCT Grp., Inc., 863 A.2d 772, 777 (Del. Ch. 2004) (explaining purpose of good faith provision).

124. Kapnick & Rosen, *supra* note 122, at 1.

125. DEL. CODE ANN. tit. 8, § 145(a), (c) (2014); Hermelin v. K-V Pharm. Co., 54 A.3d 1093, 1094 (Del. Ch. 2012). "Success" does not mean moral exoneration. Escape from an adverse judgment or other detriment is determinative. Stockman v. Heartland Indus. Partners, L.P., Civ. A. Nos. 4227-VCS, 4427-VCS, 2009 WL 2096213, at *10 n.44 (Del. Ch. July 14, 2009). The contours of the good faith requirement are murkier.

126. DEL. CODE ANN. tit. 8, § 145(c); Robert F. Carangelo & Paul A. Ferrillo, *Guest Post: Dispelling the Myths of Side A Directors and Officers Insurance*, D&O DIARY (Jan. 22, 2014, 4:33 AM), http://www.dandodiary.com/2014/01/articles/d-o-insurance/guest-post-dispelling-the-myths-of-side-a-directors-and-officers-insurance-2/.

127. DEL. CODE ANN. tit. 8, § 145(a), (b); *Hermelin*, 54 A.3d at 1094.

128. *Id.*

129. Jennifer A. Waters & Peter V. Baugher, *Advancing D&O Litigation Expenses: The Power of the Perk*, 99 ILL. B.J. 36, 37 (2011), *available at* http://www.sw.com/site/rte_uploads/files/Advancing%20D%26O.pdf.

130. DEL. CODE ANN. tit. 8, § 145(e); Kevin LaCroix, *Director Protection: Advancement and Indemnification*, D&O DIARY (July 16, 2012, 3:48 AM), http://www.dandodiary.com/2012/07/articles/corporate-governance/director-protection-advancement-and-indemnification/.

131. DEL. CODE ANN. tit. 8, § 145(e).

132. *See* Homestores, Inc. v. Tafeen, 888 A.2d 204, 212 (Del. 2005) (noting frequency of this practice).

require companies to indemnify to the maximum extent Delaware law permits.[133] Delaware courts generally enforce advancement and indemnification provisions as written.[134] Those provisions thus serve as a potential first line of defense. But indemnification may be unavailable if the defendant corporation is financially troubled, insolvent, or if the law otherwise prevents it from indemnifying a director, officer, or employee. For example, applicable state law may prevent indemnification for settlements and judgments in derivative suits if the director or officer acted in bad faith.[135]

Where indemnification is unavailable, D&O insurance may provide a second line of defense. Virtually all U.S. public corporations purchase D&O insurance.[136] A typical public company D&O insurance program consists of a primary policy and one or more excess layer policies issued by different insurers. Each excess insurer agrees to pay for claims once the corporation exhausts the underlying layer. Ten or more layers are not unusual for large cap companies.[137] A program typically provides three types of coverage: (a) Side A coverage for directors' and officers' non-indemnifiable losses, (b) Side B coverage that reimburses the company for indemnification paid to directors and officers, and (c) Side C coverage for the company's securities-related claims.[138] In 2012, approximately 75% of public companies maintained a primary D&O insurance program structure that included Sides A, B, and C.[139]

In M&A cases, the target's D&O insurance almost always covers the cost of defending both the target and the target's board.[140] Similarly, the bidder's D&O insurance typically covers the bidder's defense cost where the bidder is sued on a theory of aiding

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133. Jon Eisenberg, *Surviving in an Age of Individual Accountability: How Much Protection Do Indemnification and D&O Insurance Provide?* 6 (May 21, 2014), *available at* http://www.klgates.com/files/Publication/104b43d0-1a9b-4098-bdd2-4d73ccede86f/Presentation/PublicationAttachment/f7a70418-0c56-47b5-834b-50bd7ffb30fc/GE_Alert_05212014.pdf.

134. Gibson, Dunn & Crutcher LLP, *supra* note 123, at 4; *cf.* Zachary N. Lupu, Note, *Fear of Commitment: Why* CA, Inc. v. AFSCME *Leaves Mandatory Advancement Bylaws Undisturbed*, 80 FORDHAM L. REV. 1759, 1797 (2012) ("Delaware courts have interpreted and enforced mandatory advancement bylaws to craft expansive advancement rights."). The courts enforce mandatory advancement provisions even where a company sues its directors, officers, or covered employees for serious corporate malfeasance. Waters & Baugher, *supra* note 129, at 37. This is because the issue of advancement is distinct from the issue of the ultimate merits, and advancement is required until the court determines the merits, which may require exhaustion of the appeals process. *See, e.g.*, Ridder v. CityFed Fin. Corp., 47 F.3d 85, 87 (3d Cir. 1995) ("Under Delaware law, appellants' right to receive the costs of defense in advance does not depend upon the merits of the claims asserted against them, and is separate and distinct from any right of indemnification they may later be able to establish.").

135. Gibson, Dunn & Crutcher LLP, *supra* note 123, at 3–4; R.J. Cinquegrana & John R. Baraniak, Jr., *A Securities Litigator's Guide to D&O Insurance, Part II*, LAW360 (Oct. 19, 2010), http://www.law360.com/articles/201541/a-securities-litigator-s-guide-to-d-o-insurance-part-ii (access required) ("Delaware law, and most bylaws, preclude indemnification where the individual office or director is ultimately determined to have acted wrongfully.").

136. Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 760 (2009); James J. Park, *Securities Class Actions and Bankrupt Companies*, 111 MICH. L. REV. 547, 557 (2013).

137. Baker & Griffith, *supra* note 136, at 810.

138. Gibson, Dunn & Crutcher LLP, *supra* note 123, at 4.

139. Towers Watson, *Directors and Officers Liability Survey: 2012 Summary of Results* 11 (2013), *available at* http://www.towerswatson.com/en/Insights/IC-Types/Survey-Research-Results/2013/03/Directors-and-Officers-Liability-2012-Survey-of-Insurance-Purchasing-Trends.

140. *Options for Directors in M&A Litigation*, CORPORATE DISPUTES 15 (Jan.–Mar. 2014) *available at* http://www.ropesgray.com/biographies/w/~/media/Files/articles/2014/January/Ropes_Reprint_Jan14.ashx (quoting Peter L. Welsh, Partner, Ropes & Gray).

and abetting the target board's alleged breach of fiduciary duty.[141] Coverage of other costs is less clear-cut. For example, there is continuing uncertainty as to whether D&O insurance covers plaintiffs' attorneys' fees payable in connection with a settlement.[142]

D&O insurance may also cover cash pay-outs from settlements. Such payments typically represent Side A losses because in many states D&O insurance may not indemnify derivative suit settlements.[143] Almost all M&A litigation claims settle within or just above the D&O policy limit.[144] In 2012, the average D&O policy limit for public companies was $132.6 million,[145] and virtually all M&A suits settle for less than that sum.[146] Defense costs count against the policy limit.[147]

The overall impact of M&A litigation on D&O insurance is difficult to assess but appears to have been mostly negative. D&O insurance underwriters and advisors disagree about how to characterize the current situation. M&A litigation has been alternately

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141. *Id.*

142. *Compare* Anthony P. Tatum & Shelby S. Guilbert, Jr., *Securing D&O for Attorneys' Fees in Securities Cases*, LAW360 (May 28, 2013), http://www.law360.com/articles/444555/securing-d-o-for-attorneys-fees-in-securities-cases (access required) ("[C]onsistent with the plain language of most D&O policies, courts generally view plaintiffs' attorneys' fees as just another type of damages. [Such] fees fall squarely within the scope of most D&O policies' definitions of key terms like 'loss,' 'damages' and 'claim,' and unless a D&O policy specifically excludes coverage for plaintiffs' attorneys' fees, such fees should be covered."), *with* Kevin LaCroix, *D&O Insurance: Providing Coverage for Plaintiffs' Fee Awards?*, D&O DIARY (May 29, 2013, 3:46 AM), http://www.dandodiary.com/2013/05/articles/d-o-insurance/do-insurance-providing-coverage-for-plaintiffs-fee-awards/ (arguing that "judicial views on this issue are hardly uniform"). The leading case is *XL Specialty Ins. Co. v. Loral Space & Commun's, Inc.*, 82 A.D.3d 108, 116 (1st Dep't 2011), in which the First Department of New York's Appellate Division held over a vigorous dissent that an insured's payment of attorneys' fees to plaintiffs' counsel in a derivative lawsuit was a covered loss; *see also Options for Directors in M&A Litigation*, *supra* note 140 (quoting Alan Goudiss, Partner, Shearman & Sterling, for proposition that increasingly D&O insurers have been resistant to covering attorneys' fees paid to plaintiffs' counsel "and have been demanding some form of contribution from the buyer").

143. Kevin LaCroix, *What to Watch Now in the World of D&O*, D&O DIARY (Sept. 3, 2013), http://www.dandodiary.com/2013/09/articles/director-and-officer-liability-1/what-to-watch-now-in-the-world-of-do/.

144. *See* Baker & Griffith, *supra* note 99, at 1806 ("Almost all shareholder litigation settles within the limits of the available D&O insurance.").

145. *See* Towers Watson, *supra* note 139, at 9 (reporting results of a survey of 325 organizations, most of which had total assets/revenues in excess of $1 billion). Large cap companies (defined here as companies with market capitalizations of ten billion dollars or more) had an average D&O policy limit of $199.1 million in 2012. *Id.* Smaller cap public companies had lower limits. *Id.*

146. *See* Robert M. Daines & Olga Koumrian, *Merger Lawsuits Yield High Costs and Questionable Benefits*, N.Y. TIMES DEALBOOK (June 8, 2012, 10:38 AM), http://dealbook.nytimes.com/2012/06/08/merger-lawsuits-yield-high-costs-and-questionable-benefits/?_r=0 ("Most boards decide to settle for an amount covered by directors insurance."); Baker & Griffith, *supra* note 136, at 760; Baker & Griffith, *supra* note 99, at 1806. In 2013, D&O insurance funded the entire $139 million cash portion of the settlement of the News Corp. shareholder derivative litigation. This was the largest cash derivative settlement to that date. *See* Kevin LaCroix, *D&O Insurance to Fund Entire 'Largest Ever' $139 Million News Corp. Derivative Suit Settlement*, D&O DIARY (Apr. 23, 2013), http://www.dandodiary.com/2013/04/articles/shareholders-derivative-litiga/do-insurance-to-fund-entire-largest-ever-139-million-news-corp-derivative-suit-settlement/ (discussing the litigation involving the settlement).

147. Baker & Griffith, *supra* note 136, at 810; R.J. Cinquegrana & John R. Baraniak, Jr., *A Securities Litigator's Guide to D&O Insurance, Part I*, LAW360 (Oct. 19, 2010), http://www.choate.com/uploads/113/doc/part-i-ii-a-securities-litigators-guide-to-do-insurance.pdf ("Most [D&O] policies are of the 'wasting' variety: every dollar paid in defense costs reduces the coverage available for a settlement or judgment.").

described as a high-frequency, low-severity risk[148] and high-frequency, high-severity risk.[149] Possible insurance ramifications of the M&A litigation phenomenon include the following: (1) the inclusion of separate retentions for D&O renewals which specifically address M&A activity and are typically considerably higher than the securities fraud claim retention on the policies; (2) overall premium increases on D&O renewals, particularly at the primary layer of insurance; and (3) exclusion of coverage for M&A activity. In practice the third ramification is of no consequence because historically exclusions have had no significant impact on D&O insurers' overall responsibility to pay for shareholder litigation.[150] The situation is, however, different with regard to the first and second ramifications.

D&O insurance companies annually re-price their policies.[151] During 2012 and 2013, many D&O insurers were successful in securing separate and often substantially higher retentions for M&A claims.[152] During the same period, premiums increased at least three to five percent for public companies and at least ten percent for private firms.[153] Some evidence suggests even more significant increases.[154] But the market has been bifurcated, with the most significant premium increases occurring in the primary layer of insurance and high excess rates remaining flat.[155]

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148. Willis Alert, *Increase in M&A Suits: Game Changer for D&O Underwriters*? 2 (Feb. 2013), *available at* http://www.willis.com/documents/publications/Services/Executive_Risks/2013/FINEX_Alert_0213_v3.pdf ("The high frequency, low severity nature of the exposure is also one that is not easily underwritten.").

149. Kevin M. LaCroix, *Why Mergers & Acquisitions-Related Litigation Is a Serious Problem*, 7 RISK INSIGHTS 1, 3–4 (2012), *available at* http://www.connerstrong.com/resources/site1/news/Insights%20Winter%20Vol%20VII%20Issue%201.pdf ("In insurance terms, M&A litigation has become a high frequency and high severity risk . . . . The severity risk is particularly acute given the exacerbating effects of escalating defense expenses and rising plaintiffs' attorneys' fees.").

150. Baker & Griffith, *supra* note 99, at 1804.

151. *Id.* at 1820.

152. Kevin LaCroix, *Takeover Litigation in 2013*, D&O DIARY (Jan. 14, 2014), http://www.dandodiary.com/2014/01/articles/securities-litigation/takeover-litigation-in-2013/ (noting that such retentions are being set at a level that would avoid loss costs associated with disclosure-only settlements); Judy Greenwald, *D&O Premiums Continue to Increase Due to Mergers and Acquisitions Claims*, BUSINESS INSURANCE (June 30, 2013), http://www.businessinsurance.com/article/20130630/NEWS07/306309980 (noting that insurers were seeking retentions in the range of $1 million to $2 million for companies with $200 million to $1 billion in capitalization); Kara Altenbaumer-Price, *How D&O Insurance Factors into M&A Transactions*, DALLAS BAR ASSOCIATION (July 2013), http://www.dallasbar.org/content/how-do-insurance-factors-ma-transactions (reporting that separate M&A deductibles in 2012 and 2013 D&O renewals are often "substantially higher than the standard deductible under the policy").

153. Greenwald, *supra* note 152; *see The Private Eye: Spotlight on the US Private D&O Market*, ADVISEN 26 (Aug. 2013), *available at* https://www.advisen.com/pdf_files/us-private-d-o-market-spotlight-aig-2013-08.pdf (reporting that in 2013 private D&O accounts were experiencing rate increases of approximately 10%, with some accounts experiencing 30% rate increases at renewal).

154. *See, e.g.*, *D&O Insurance Pricing Trends Catching Up*, FITCH RATINGS (Apr. 30, 2013, 12:17 PM), http://www.fitchratings.com/gws/en/fitchwire/fitchwirearticle/D%26O-Insurance-Pricing?pr_id=790070 (noting that direct written D&O premiums increased approximately six percent in 2012); David M. Katz, *D&O Rates Rise on Flood of Merger Lawsuits*, CFO (July 25, 2013), http://www3.cfo.com/article/2013/7/risk-management_ma-objection-claims-do-insurance-aon-ipos-cornerstone-research (noting that M&A litigation claims drove rate hikes for D&O insurance of five to ten percent in both the second and third quarters of 2013).

155. Greenwald, *supra* note 152; *but cf.* LaCroix, *supra* note 149 ("[T]here is an apparent misconception in the industry that M&A litigation represents a significant risk only to the D&O insurance carrier providing primary limits.").

Many underwriters and other observers assign significant weight to M&A litigation as a factor in recent D&O rate hikes.[156] Increased insurance expense reduces net income, which in turn reduces earnings per share. In sum, one of the most negative aspects of multijurisdictional M&A litigation has been its adverse impact on D&O insurance pricing.

III. FLAWED SOLUTIONS TO THE PROBLEM OF MULTIJURISDICTIONAL M&A LITIGATION

A number of solutions to the problem of multijurisdictional deal litigation have been proposed. This Article next analyzes the most common proposals. As will be seen, each of these proposals suffers from serious defects[157] that collectively render them inferior to the solution proposed herein.

A. Exclusive Forum Provisions

The proposal that may have garnered the most support to date is adoption by bylaw or charter amendment of exclusive forum provisions that require derivative actions, stockholder class actions, and other intra-corporate disputes to be litigated exclusively in a designated forum—typically the Delaware Court of Chancery. Purported advantages to public companies and their shareholders of such provisions include: (1) resolution by Chancery, the preeminent forum in the United States for the litigation of disputes involving a company's internal affairs, and (2) preclusion of costly and duplicative litigation and the attendant risk of inconsistent outcomes. Regarding the first advantage, it is commonly asserted that Chancery is superior to alternative forums in terms of quality, experience, precedent, predictability of outcomes, and quickness of resolution.[158] The merits of this assertion are discussed below. Regarding the second advantage, it is undeniable that if a bylaw or charter forced M&A litigation into Delaware, then duplicative litigation and the risk of inconsistent outcomes could be reduced. The United States Supreme Court has observed that forum selection clauses establishing ex ante the forum for dispute resolution

156. *See, e.g.*, Greenwald, *supra* note 152 (identifying merger litigation as a cause of higher insurance rates); *but cf.* LaCroix, *supra* note 149 (arguing that D&O pricing has been constrained by increased supply of insurers and decreased demand for insurance). The decline of 36% in the number of U.S. companies listed on the New York Stock Exchange and NASDAQ during the 1999–2010 period reflects the decreased demand. *Id.* The decline in the number of NYSE-listed companies continued until 2014. *Securities Class Action Filings: 2014 Midyear Assessment*, CORNERSTONE RESEARCH 8 (2014), *available at* http://www.cornerstone.com/getattachment/8b34f0cd-79a2-497a-9821-a2893928506f/Securities-Class-Action-Filings%e2%80%942014-Midyear-Asses.aspx; *see also The Private Eye: Spotlight on the US Private D&O Market*, *supra* note 153 ("[T]he perceived underwriting profitability of the private D&O sector had attracted new entrants to the space in the past five years."); Kevin LaCroix, *Guest Post: Dispelling the Myths of Side A Directors and Officers Insurance*, D&O DIARY (Jan. 22, 2014), http://www.dandodiary.com/2014/01/articles/d-o-insurance/guest-post-dispelling-the-myths-of-side-a-directors-and-officers-insurance-2/ ("In the current environment, the Side A D&O market is very competitive . . . .").

157. *See, e.g.*, Pamela S. Palmer & Andrew Gray, *Another Day, Another Forum: Strategies for Litigating Stockholder Class Actions and Derivative Suits in Multiple Forums*, LATHAM & WATKINS LLP 1, 7 (June 28, 2013), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.lw.com%2FthoughtLeadership%2Fanother-day-another-forum&ei=5UQuU7z-HIXH0QHE74CgCw&usg=AFQjCNE7NtsH48h3qNOa0AqWaJLNr5KiMw ("Multi-forum litigation in the context of class actions and derivative suits involving internal corporate affairs presents an intractable problem with no fully predictable and reliable solution.").

158. *See, e.g.*, Nathan, *supra* note 76 ("[Delaware] is virtually universally viewed as the preeminent jurisdiction for [M&A] litigation.").

have "the salutary effect of dispelling any confusion about where suits . . . must be brought."[159] Nevertheless, such provisions have major drawbacks, as discussed below.

1. Enforceability of Exclusive Forum Provisions

American courts traditionally were hostile to contractual forum selection clauses and often refused to enforce them on public policy grounds.[160] This hostility ultimately abated, and state and federal courts now generally view such clauses as presumptively valid and assign the burden to the "party opposing enforcement to demonstrate that enforcement would be unfair or inequitable."[161] Judicial acceptance helps explain why forum selection clauses have become common in consumer and commercial contracts.[162] Forum selection clauses in other contexts have been more controversial. In 2010, Delaware Vice Chancellor Laster suggested in dicta in *In re Revlon, Inc. Shareholder Litigation* that corporations are free to adopt "charter provisions selecting an exclusive forum for intra-entity disputes."[163] Such charter or bylaw provisions had been in use since at least 1991,[164] but they were rare. Only 16 publicly traded entities had adopted such provisions by 2010.[165]

Adoption accelerated in the wake of *Revlon*, as corporations took their cue from Laster's dicta. By mid-2013, more than 250 publicly traded U.S. corporations had designated an exclusive venue for intra-corporate disputes, and most of these were Delaware-chartered corporations that had designated the Delaware Court of Chancery.[166] A majority of these provisions had "been adopted in connection with [initial public offerings (IPOs)], restructurings or reincorporations in Delaware."[167] By 2013, the inclusion of forum selection clauses in corporate charters had become standard with IPOs,[168] but most of the established companies adopting such a provision had done so

159. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–94 (1991).

160. Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. U. L. REV. 265, 266 (2009).

161. *See id.* at 267 (describing how courts have come to accept forum selection clauses, using the Colorado state courts as an example); Grundfest & Savelle, *supra* note 105, at 381.

162. *See* James Stewart & Bea Swedlow, *Enforce This: Forum Selection Clauses in Federal Courts*, 60 FED. LAW. 66, 66 (2013) (noting ubiquity of contractual forum selection clauses in both consumer and business contracts).

163. *In re* Revlon, Inc. S'holder Litig., 990 A.2d 940, 960 n.8 (Del. Ch. 2010).

164. *See* Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 379 (2012) ("The earliest identified instance of an intra-corporate forum selection provision . . . appears to arise in Section 8.5 of Standard Pacific Corporation's bylaws adopted in October of 1991.").

165. Steven M. Davidoff, *A Litigation Plan that Would Favor Delaware*, N.Y. TIMES DEALBOOK (Oct. 26, 2010, 9:30 AM), http://dealbook.nytimes.com/2010/10/26/a-litigation-plan-that-would-favor-delaware/?_r=0.

166. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 944 (Del. Ch. 2013); *see* Allen, *supra* note 96, at 1 n.1 (noting that a small number of corporations have adopted exclusive forum bylaws in eight states other than Delaware).

167. Cleary Gottlieb Steen & Hamilton LLP, *Should Your Company Adopt a Forum Selection Bylaw?* (June 27, 2013), http://www.cgsh.com/files/News/390c58b1-5d43-48f1-a664-64d70c84133c/Presentation/NewsAttachment/a04b6755-69bc-4c04-a230-1d6e685c89a5/Should%20Your%20Company%20Adopt%20A%20Forum%20Selection%20Bylaw%202.pdf.

168. Tom Hals, *Navistar, Others Retreat from Delaware Lawsuit Rule*, REUTERS (Mar. 23, 2012), http://www.reuters.com/article/2012/03/23/delaware-law-forum-idUSL1E8EN46120120323.

through board-adopted bylaw amendments, rather than shareholder-approved charter amendments.[169]

Exclusive forum provisions generally regulate the four types of corporate litigation most often brought in a representative capacity: (1) derivative actions; (2) suits asserting breaches of fiduciary duty; (3) actions arising pursuant to any provision of the DGCL; and (4) actions asserting claims governed by the internal affairs doctrine, which mandates that the law of the state of incorporation governs internal disputes between a company's managers and shareholders.[170] In general, first-generation forum selection provisions were mandatory. They required all litigation encompassed by the provision to be litigated in the specified forum—almost always the Delaware Court of Chancery.[171] In contrast, second-generation provisions (those adopted beginning around 2011) are typically elective.[172] They permit a corporation to consent to an alternative forum. In the event of a challenge, the board's decision to elect a particular forum under an elective provision is potentially subject to review for reasonableness, rather than pursuant to the business judgment rule.[173]

Prior to 2013 there was considerable uncertainty about the enforceability of board-adopted forum selection bylaws. In 2011, the federal district court for the Northern District of California declined to enforce a forum selection clause in *Galaviz v. Berg*.[174] In *Galaviz*, a case of first impression, the defendant directors of Oracle Corporation unilaterally adopted the forum selection clause as a bylaw after the majority of the purported wrongdoing had allegedly occurred and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect.[175] Oracle is a Delaware corporation with principle executive offices located in California. The federal court denied defendants' motion to dismiss on the ground of improper venue, reasoning that it would be inequitable to apply the forum selection clause to plaintiffs, who had purchased their shares before the directors adopted the bylaw and therefore had no notice of it.[176] The court cited federal common law as the basis for its refusal to dismiss, glossed over *Revlon*'s dicta, and thereby avoided the underlying issue of the validity of the bylaw under Delaware corporate

169. Elizabeth C. Brandon & Laurel S. Fensterstock, *From* Revlon *to* Galaviz*: Judicial Treatment of Forum-Selection Clauses in Corporate Charters or Bylaws*, 10 SECURITIES LITIG. INSIGHTS 1, 7 (2013), *available at* http://www.velaw.com/uploadedFiles/VEsite/Resources/SecuritiesLitigationInsightsApril2013.pdf.

170. *See* Edgar v. MITE Corp., 457 U.S. 624, 645–46 (1982) (concluding that the internal affairs doctrine has federal constitutional underpinnings); McDermott Inc. v. Lewis, 531 A.2d 206, 209 (Del. 1987) ("[W]e reaffirm the principle that the internal affairs doctrine is a major tenet of Delaware corporation law having important federal Constitutional underpinnings.").

171. Claudia H. Allen, *Trends in Exclusive Forum Bylaws: They're Valid, Now What?*, KATTEN MUCHIN ROSENMAN LLP, 1 (Nov. 18, 2013), *available at* http://www.kattenlaw.com/files/49783_Trends%20in%20Exclusive%20Forum%20Bylaws.pdf (describing the requirements and advantages of exclusive forum bylaws).

172. *See* Frederick H. Alexander & Daniel D. Mathews, *The Multi-Jurisdictional Stockholder Litigation Problem and the Forum Selection Solution*, 26 BNA CORP. COUNSEL WEEKLY 1, 3 (May 11, 2011), *available at* http://www.mnat.com/assets/htmldocuments/Alexander_Matthews_BNA_Insights_Forum_Selection_May2011.pdf ("[S]econd generation forum selection provisions are normally elective provisions that permit a corporation to consent to the selection of an alternative forum."). By January 2012, "64% of exclusive forum bylaws included elective language." Allen, *supra* note 171, at 3.

173. *See* Alexander & Mathews, *supra* note 172 (arguing for an application of reasonableness review).

174. Galaviz v. Berg, 763 F. Supp. 2d 1170, 1175 (N.D. Cal. 2011).

175. *Id.* at 1174.

176. *Id.*

law.[177] The court, however, suggested that the outcome might have been different if the clause had been adopted in the company's certificate of incorporation, following a shareholder vote.[178]

In February 2012, institutional plaintiffs filed substantially similar complaints[179] in the Delaware Court of Chancery against 11 corporations—seven of which are members of the Standard & Poor's 500 (S&P 500)—which had adopted exclusive forum bylaw provisions without shareholder approval.[180] The majority of the 11 defendant corporations promptly repealed their bylaw provisions, and plaintiffs dismissed their suits on mootness grounds.[181] Only Chevron Corporation (a Delaware corporation headquartered in California) and FedEx Corporation (a Delaware corporation headquartered in Tennessee) opted to litigate.[182] The court consolidated their cases into a single action for purposes of deciding the common legal issues. Chevron and FedEx then moved for judgment on the pleadings.

In June 2013, the Court of Chancery held in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*[183] that the forum selection bylaws adopted by the Chevron and FedEx boards were both (1) statutorily valid under section 109(b) of the DGCL[184] and (2) contractually valid and enforceable.[185] Chancery also noted the following: (1) shareholders who object to board-adopted bylaws with forum selection clauses have other means of recourse, including the right to amend or repeal the bylaws and the opportunity to discipline directors during annual elections for their failure to accede to a stockholder vote repealing such a clause;[186] (2) as with other forum selection clauses, a plaintiff may argue that forum selection bylaws are unenforceable under the reasonableness

177. *Id.* at 1175.

178. *Id.* at 1175 n.6. *Galaviz* is discussed in Bonnie White, Note, *Reevaluating* Galaviz v. Berg*: An Analysis of Forum-Selection Provisions in Unilaterally Adopted Corporate Bylaws as Requirement Contracts*, 160 U. PA. L. REV. ONLINE 390 (2012). In *In re Facebook, Inc. IPO Sec. & Deriv. Litig.*, 922 F. Supp. 2d 445, 463 n.16 (S.D.N.Y. 2013), the district court recognized "the considerable debate on the efficacy, enforceability and desirability of the use of forum provisions," but declined to take a position while holding that such a clause voted into Facebook's pre-IPO charter by shareholders was inapplicable to claims and parties in the case.

179. David Hernand & Thomas Baxter, *Under Fire: Continued Attacks on Exclusive Forum Provisions May Slow Adoption*, 16 WALL ST. LAWYER 12 (Apr. 2012), *available at* http://www.gibsondunn.com/publications/Documents/HernandBaxter-UnderFire.pdf.

180. *Id.*

181. *See* Bradley W. Voss, *An Update on the Forum Selection Bylaw Cases*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (May 4, 2012, 9:13 AM), http://blogs.law.harvard.edu/corpgov/2012/05/04/an-update-on-the-forum-selection-bylaw-cases/. The court awarded attorneys' fees in nine of the ten dismissed cases. Allen, *supra* note 96, at 3.

182. *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 942 (Del. Ch. 2013) (explaining that the bylaw provisions of both Chevron and FedEx permitted actions to be commenced in a non-Delaware forum with the corporation's consent, and Chevron's amended bylaw also permitted suit to be commenced in any state or federal court in Delaware with jurisdiction over the subject matter and the parties).

183. *Id.* at 934.

184. DEL. CODE ANN. tit. 8, § 109(b) (2014).

185. *Boilermakers*, 73 A.3d at 939.

186. *Id.* at 956–57; *see also* David F. Larcker, *Stanford Graduate School of Business Corporate Governance Research Program, Board of Directors: Selection, Compensation, and Removal* 2 (2011), http://www.gsb.stanford.edu/sites/default/files/documents/04.Board%20Recruitment_1.pdf (explaining that in practice, disciplining directors by voting them out has proved very difficult in the absence of major governance lapses; among public corporations in the United States, only two percent of directors who step down are dismissed or not reelected).

standard adopted by the U.S. Supreme Court in the seminal 1972 decision in *M/S Bremen v. Zapata Off-Shore Co*.;[187] (3) as with bylaw provisions generally, a board's exercise of its powers under a forum selection bylaw is subject to challenge as a violation of the directors' fiduciary duties;[188] and (4) a board's conduct in adopting such bylaws could be subject to challenge as a breach of fiduciary duty.[189]

Adoption of forum selection provisions in bylaws ground to a halt in early 2012 with the onset of the *Boilermakers* litigation. Adoptions resumed in the wake of the Court of Chancery's *Boilermakers* decision. In the following seven months, by February 2014, more than 150 companies had amended their bylaws to adopt forum selection provisions,[190] and by May 2014 the list of post-*Boilermakers* adoptees included 32 S&P 500 corporations.[191] Virtually all of these provisions: (a) require litigation against the companies to commence in their jurisdiction of incorporation (which for most of them is Delaware),[192] and (b) permit the boards of directors to consent to an alternate forum.[193]

Boilermakers clarified, but did not resolve the enforceability issue, and this lack of resolution may operate to discourage more widespread adoption. First, as of this writing, the Delaware Supreme Court has not addressed the facial validity of forum selection provisions in either bylaws or charters. In October 2013, the stockholder plaintiffs

187. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (holding that forum selection clauses are generally valid, unless the resisting party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching"). The Supreme Court reaffirmed in December 2013 that forum selection clauses are presumptively valid and enforceable. *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Texas, 134 S. Ct. 568, 583 (2013) (holding that parties' contractual choice of forum should be enforced in "all but the most unusual cases").

188. *Boilermakers*, 73 A.3d at 963.

189. *See* Allen M. Terrell, Jr., *Court of Chancery Upholds Forum-Selection Bylaws Under the DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (June 26, 2013, 11:40 AM), http://blogs.law.harvard.edu/corpgov/2013/06/26/court-of-chancery-upholds-forum-selection-bylaws-under-the-dgcl/ ("[T]he Court reiterated that a stockholder-plaintiff is free to sue in a forum other than the one in the bylaw and to argue . . . the forum-selection provision is being used for an inequitable purpose in breach of the directors' fiduciary duties.").

190. *See* Alan L. Beller, *Selected Issues for Boards of Directors in 2014*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb. 1, 2014, 9:00 AM), https://blogs.law.harvard.edu/corpgov/2014/02/01/selected-issues-for-boards-of-directors-in-2014/ (summarizing recent trends in governance). Corporations headquartered in at least 28 different states adopted exclusive forum bylaws during the period July–December 2013. Claudia H. Allen, *Trends in Exclusive Forum Bylaws* 6 (Jan. 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411715; *see also* Michael O'Bryan, *Exclusive Forum Provisions: A New Item for Corporate Governance and M&A Checklists*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (July 14, 2014, 9:19 AM), http://blogs.law.harvard.edu/corpgov/2014/07/14/exclusive-forum-provisions-a-new-item-for-corporate-governance-and-ma-checklists/ (noting that in the first quarter of 2014, approximately 40 public companies incorporated in Delaware, and about 75% of Delaware corporations going public, adopted exclusive forum bylaws).

191. Sullivan & Cromwell LLP, *Exclusive Forum Bylaws Gain Momentum* 7 (May 28, 2014), *available at* http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Exclusive_Forum_Bylaws_Gain_Momentum.pdf.

192. O'Bryan, *supra* note 190. Before the *Boilermakers* litigation commenced, 96% of forum selection bylaws adopted by Delaware corporations mandated the Delaware Court of Chancery as the exclusive forum. Allen, *supra* note 190, at 4. Of the post-*Boilermakers* bylaws, only 43% do so. *Id.* The remaining provisions establish that: (a) if the specified court (typically the Delaware Court of Chancery or a state court in Delaware) lacks personal jurisdiction, then jurisdiction vests in another Delaware state or federal court, or (b) jurisdiction will vest in the state and federal courts in Delaware. *Id.*

193. Allen, *supra* note 190, at 4.

abandoned an appeal in *Boilermakers*.[194] In November 2013, the Court of Chancery, citing *Boilermakers*, upheld the validity of a forum selection clause in a corporate charter.[195] The plaintiff shareholders did not appeal the ruling.

Second, while forum selection provisions in both bylaws and charters are now presumptively valid and enforceable in Delaware,[196] it remains unclear whether non-Delaware courts will enforce such provisions if a shareholder files suit in a non-Delaware forum. *Boilermakers* will not bind courts outside Delaware. As previously discussed, in *Galaviz* the federal district court declined to enforce a forum selection bylaw. There has

194. Claudia H. Allen, *Voluntary Withdrawal of Appeal in Delaware Exclusive Forum Bylaw Case*, CORPORATE & FINANCIAL WEEKLY DIGEST, http://www.corporatefinancialweeklydigest.com/2013/10/articles/seccorporate-1/voluntary-withdrawal-of-appeal-in-delaware-exclusive-forum-bylaw-case/ (last visited Oct. 21, 2014); Theodore Mirvais, *Surrender in the Forum Selection Bylaw Battle*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Oct. 28, 2013, 9:21 AM), http://blogs.law.harvard.edu/corpgov/2013/10/28/surrender-in-the-forum-selection-bylaw-battle/ (explaining that the decision of the Chancery Court was widely expected to be affirmed). The abandonment of the appeal most likely was a strategic move designed to avoid the precedential weight of a Delaware Supreme Court decision squarely in favor of forum selection clauses. *See* Allen, *supra* note 171, at 2 ("Compared to the decision from the Court of Chancery, such a precedent would make it more difficult to successfully mount an 'as applied' challenge to the enforcement of a forum selection bylaw in a non-Delaware court."). Abandonment of the appeal was not the end of the road. In January 2014, Chevron moved in federal court in California, where an action parallel to *Boilermakers* was pending, for certification to the Delaware Supreme Court of the question as to whether Chevron's forum selection bylaw is valid. Brian JM Quinn, *Chevron Seeks to Certify Question*, M&A LAW PROF BLOG (Feb. 4, 2014), http://lawprofessors.typepad.com/mergers/2014/02/chevron-seeks-to-certify-question.html. That motion was denied in June 2014. Dan Ivers, *Correction: Judge Won't Let Del. Court Rule on Chevron Bylaw*, LAW360 (June 26, 2014, 12:23 PM), http://www.law360.com/articles/551974/correction-judge-won-t-let-del-court-rule-on-chevron-bylaw (access required).

195. Telephonic Hearing on Plaintiff's Motions for Expedited Proceedings and for Temporary Restraining Order and Rulings of the Court, Edgen Group Inc. v. Genoud, Civ. A. No. 9055-VCL (Del. Ch. Nov. 5, 2013), *available at* http://uk.p02del.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1247708053296&ssbinary=true. In this case, Vice Chancellor Laster denied Edgen's request for a temporary restraining order to block a shareholder suit from proceeding in Louisiana. *Id.* at 34. He did so even though the suit violated the forum selection provision in Edgen's charter, which was valid as a matter of Delaware corporate law. *Id.* at 39. According to Laster, Edgen had to enforce the provision by first seeking dismissal in Louisiana. *Id.* at 40. Laster noted that *Boilermakers* appeared to contemplate that enforcement of foreign selection clauses would take place in the "foreign" court. *Id.* at 41. *Edgen* strongly suggests that, as a matter of comity, Delaware courts will permit the initial decision concerning the enforceability of an exclusive forum provision to occur in the non-Delaware court. *Id.* The case is discussed in Alison Frankel, *Delaware Judge: Don't Sue in Delaware to Enforce Forum Clauses*, REUTERS (Dec. 2, 2013), http://blogs.reuters.com/alison-frankel/2013/11/12/delaware-judge-dont-sue-in-delaware-to-enforce-forum-clauses/ (hypothesizing that "until the corporations have asked judges outside of Delaware to enforce the provisions and dismiss shareholder suits," Delaware judges will not enforce forum-selection clauses that specify Delaware). Following Laster's ruling, the parallel action was dismissed by the Louisiana state court in a summary order that does not specify whether the court relied on the forum selection bylaw or instead on traditional forum non conveniens principles. *See* Joel C. Haims & James J. Beha II, *Commercial Division Enforces Forum Selection Bylaw*, N.Y. L.J. (Feb. 19, 2014), *available at* http://media.mofo.com/files/Uploads/Images/140219-Commercial-Division-Enforces-Forum-Selection-Bylaw.pdf (discussing state courts' decisions on the enforceability of forum selection bylaws).

196. *See* Jones Day, *Exclusive Forum Provisions Become Mainstream* (May 2014), http://www.jonesday.com/exclusive-forum-provisions-become-mainstream-05-30-2014/ ("[T]he overwhelming view of corporate law experts is that exclusive forum provisions are valid and enforceable under Delaware law.").

been considerable criticism of *Galaviz*,[197] but other courts that have grown accustomed to presiding over shareholder litigation may refuse to relinquish control over these cases to Delaware courts.[198] They may rely on public policy grounds[199] or reason that their states, unlike Delaware, provide for jury trials in M&A disputes.[200] In short, because forum selection provisions are not self-enforcing, their efficacy will heavily depend upon the uncertain willingness of non-Delaware judges to enforce the provisions and dismiss stockholder suits filed in their courts.[201]

Third, the Court of Chancery's decision relates only to the facial validity of forum selection clauses on a statutory and contractual basis. Under *Boilermakers*, forum selection

197. *See, e.g.*, Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 956 (Del. Ch. 2013) (asserting that the holding in *Galaviz* "rests on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders"); Sullivan & Cromwell LLP, *supra* note 191, at 9 ("*Galaviz* appears unlikely to carry much, if any, weight in the future—it was limited to its facts and was rejected in the *Boilermakers* and *Safeway* decisions."); Grundfest & Savelle, *supra* note 105, at 405–08 (arguing that *Galaviz* was wrongly decided).

198. *See* Dominick T. Gattuso & Meghan A. Adams, *Delaware Insider: Forum Selection Provisions in Corporate Charters and Bylaws: Validity vs. Enforceability*, BUS. LAW TODAY 1, 4 (Dec. 2013), http://www.americanbar.org/content/dam/aba/publications/blt/2013/12/delaware-insider-201312.authcheckdam.pdf ("[I]n order to gauge how successful forum selection clauses in Delaware corporate charters and bylaws are in stemming the tide of multi-forum stockholder litigation, it will ironically be necessary to wait to see whether and how the courts of states other than Delaware enforce such clauses."); Pillsbury Winthrop Shaw Pittman LLP, *Client Alert: Delaware Court Upholds Exclusive Forum-Selection Bylaws* (July 25, 2013), *available at* http://www.pillsburylaw.com/publications/delaware-court-upholds-exclusive-forum-selection-bylaws (describing the impact of *Boilermakers*).

199. *See* Michael C. Holmes et al., *Forum Selection Provisions: Why Strine Got it Right*, LAW360 (Sept. 27, 2013, 9:19 AM), http://www.law360.com/articles/476101/forum-selection-provisions-why-strine-got-it-right (access required) (contrasting *Galaviz*'s public policy driven reasoning with *Boilermakers*', and arguing that *Boilermakers* is the better decision).

200. For example, Article I, Section 16 of the California Constitution guarantees the right to a jury trial. In *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479 (Cal. 2005), the California Supreme Court interpreted section 16 to render unenforceable pre-dispute contractual jury trial waivers. Plaintiffs in M&A litigation commenced in California may to try to set aside forum selection clauses on this basis.

201. Kevin LaCroix, *Top Ten D&O Stories of 2013*, D&O DIARY (Jan. 7, 2014, 2:20 AM), http://www.dandodiary.com/2014/01/articles/director-and-officer-liability-1/top-ten-do-stories-of-2013/ ("The one thing that is clear is that the adoption of a forum selection clause alone will not be sufficient to eliminate the possibility that a company might still face shareholder litigation in other jurisdictions."); Ron Mueller et al., *Forum Selection Provisions Gather Momentum*, 17 No. 8 WALLSTREETLAWYER.COM: SEC. ELEC. AGE 15 (Aug. 2013). Some early decisions have minimized this concern. By November 2014 state and federal courts in several jurisdictions, including California, Illinois, New York, and Ohio, had relied on *Boilermakers* to enforce forum selection clauses. *See* North v. McNamara, No. 1:13-cv-833, 2014 WL 4684377, at *3–10 (S.D. Ohio Sept. 19, 2014) (enforcing forum selection clause and granting motion to transfer venue); Groen v. Safeway, Inc., No. RG14716641 (Cal. Super. Ct. May 14, 2014), *available at* http://blogs.reuters.com/alison-frankel/files/2014/06/safeway-MTDopinion.pdf (granting defendant's motion to dismiss and determining that plaintiffs were obligated to bring their suits in Delaware); Miller v. Beam Inc., No. 2014 CH 00932 (Ill. Cir. Ct. 2014), *available at* http://www.sidley.com/files/News/83d08302-7548-492b-96c4-1a3679fd4b00/Presentation/NewsAttachment/9e48eae1-5a40-44f9-94a6-36fd850e4abe/Link_4_06-03-14.pdf (relying on *Boilermakers*); Hemg v. Aspen Univ., No. 650457/13, 2013 WL 5958388 (N.Y. Sup. Ct. Nov. 14, 2013) (relying on *Boilermakers*). The foregoing cases are discussed in Michael O'Bryan, *Exclusive Forum Provisions: A New Item for Corporate Governance and M&A Checklists*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (July 14, 2014, 9:19 AM), http://blogs.law.harvard.edu/corpgov/2014/07/14/exclusive-forum-provisions-a-new-item-for-corporate-governance-and-ma-checklists/; Victor I. Lewkow, *Forum Selection Clauses in the 'Foreign' Court*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Mar. 29, 2014, 9:00 AM), http://blogs.law.harvard.edu/corpgov/2014/03/29/forum-selection-clauses-in-the-foreign-court/.

bylaws are presumptively, but not necessarily situationally, enforceable. The Court of Chancery acknowledged that application of a forum selection provision in a particular situation remains subject to challenge based on equitable principles or breach of fiduciary duty,[202] but it failed to provide clear guidance regarding what factors might be relevant in assessing when and in what context courts should deem invalid the adoption or application of such a provision.[203]

Fourth, the decision in *Boilermakers* has no binding effect on companies not incorporated in Delaware and not governed by Delaware law. Corporate statutes in states other than Delaware often do not provide the same explicit authority to include in a corporation's bylaws any provision relating to the rights or powers of its stockholders such as DGCL section 109(b)[204] provides. For example, neither the Minnesota Business Corporations Act nor the Washington Business Corporations Act provides such authority.[205]

2. Exclusive Forum Provisions Provide a Sub-Optimal Solution

A company adopting a forum selection provision that designates Delaware is more likely to avoid multijurisdictional M&A litigation and ensure that such litigation proceeds only in Delaware. Nevertheless, these provisions are an undesirable solution for multiple reasons. First, an obvious effect of such provisions is to restrict the ability of plaintiffs to choose a less management-friendly forum that permits jury trials in M&A litigation and an award of punitive damages. Delaware, widely regarded as management-friendly,[206]

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202. *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 954–63 (Del. Ch. 2013) (stating that under *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971), a plaintiff may challenge a particular forum selection bylaw if the bylaw was being used for improper purposes inconsistent with the directors' fiduciary duties). In *Roberts v. TriQuint SemiConductor, Inc.*, No. 1402-02441 (Or. Cir. Ct. Aug. 14, 2014), *available at* http://www.wlrk.com/docs/Triquint_oregon.pdf, an Oregon trial court relied upon *Schnell* to refuse to enforce a forum selection bylaw. The court concluded that the board of directors acted inequitably because it "enacted the bylaw in anticipation of this exact lawsuit" and without ample time for the shareholders to accept or reject the change. *Id.* at 9–10. The decision in *TriQuint* has been criticized on the basis that it "stray[s] far from settled and binding Delaware authority." Theodore Mirvis, *The Battle Against Multiforum Stockholder Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Aug. 25, 2014, 12:17 PM), http://blogs.law.harvard.edu/corpgov/2014/08/25/the-battle-against-multiforum-stockholder-litigation/.

203. *See* Andrew J. Norueil, *Will Recent Delaware Court Decisions Curb Excessive M&A Litigation?*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Sept. 18, 2013, 9:13 AM), http://blogs.law.harvard.edu/corpgov/2013/09/18/will-recent-delaware-court-decisions-curb-excessive-ma-litigation/ (noting that it is unclear how non-Delaware judges might apply on a case-by-case basis *Bremen*'s reasonableness requirement for enforcement of forum selection bylaws). In September 2014, in *City of Providence v. First Citizens Bancshares, Inc.*, C.A. No. 9795-CB (Del. Ch. Sept. 8, 2014), the Delaware Court of Chancery reaffirmed *Boilermakers* and upheld a form selection bylaw adopted by a Delaware corporation selecting North Carolina (where the company is headquartered) as the forum for intra-corporate disputes. The decision upheld the bylaw as a matter of facial validity and on an as-applied basis at the motion to dismiss stage. *See* David J. Berger, *Delaware Court of Chancery Upholds Forum Selection Bylaw*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Sept. 15, 2014, 9:04 AM), http://blogs.law.harvard.edu/corpgov/2014/09/15/delaware-court-of-chancery-upholds-forum-selection-bylaw/ (summarizing *First Citizens Bancshares*, and offering further analysis).

204. DEL. CODE ANN. tit. 8, § 109(b) (2014).

205. MINN. BUS. CORP. ACT § 302A.181 (2013); WASH. BUS. CORP. Act § 23B.10.200 (2013).

206. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974) (observing that Delaware courts had "watered the rights of shareholders vis-à-vis management

permits neither, because its Court of Chancery is a court of equity.[207] Moreover, the common counter-argument that parties should litigate M&A cases in Delaware because its judiciary is far better-equipped than other courts to handle such cases[208] is weak. In the last two decades specialized trial courts with dockets comprised primarily or exclusively of business cases have been established in at least 19 states where hundreds of Fortune 1000 corporations are headquartered—New York, Illinois, New Jersey, Pennsylvania, Massachusetts, Florida, and Ohio, among others.[209] These business courts are modeled after Delaware's Court of Chancery,[210] and they are empowered to hear claims involving breach of fiduciary duty.[211] Many of them are able to act expeditiously,[212] and there is little or no evidence establishing that the courts are unable to apply the DGCL properly to disputes involving Delaware-chartered companies.[213] Surveys of attorneys who appeared

down to a thin gruel"); Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 782 (2013) ("Delaware law can be criticized for proving insufficiently vigilant in monitoring managerial power."); Timothy R. McCormick et al., *The Aggressive Pursuit of Merger Litigation Outside of Delaware*, IN-HOUSE DEFENSE Q. 65, 66 (2013), *available at* http://www.tklaw.com/files/Publication/dab6e344-3c66-4b19-983c-964af1a313ef/Presentation/PublicationAttachment/46e0d0d7-c5e1-415c-b886-a4f47d9258c1/AgressivePursuitofMergerLit.pdf ("[J]udges in other venues may appear more friendly to shareholders."); Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 65 (2009) (noting that access to forums beyond Delaware's equity courts "exerts a salutary, countervailing force against corporate managers' preferences in Delaware corporate law"). Not surprisingly, the pro-business U.S. Chamber of Commerce's Institute for Legal Reform ranked Delaware number one in the country in its State Liability Systems Survey every year that the organization conducted the survey during the 2002–2012 period. *See* U.S. CHAMBER INSTIT. FOR LEGAL REFORM, 2012 STATE LIABILITY SYSTEMS SURVEY 7 (2012), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit_Climate_Report_2012.pdf. The survey considers such factors as the handling of class action lawsuits and judges' competence and impartiality. *Id.*

207. *See* Hernand & Baxter, *supra* note 179 ("[C]ompanies favor shareholder litigation in the Court of Chancery because it is a court of equity, which is one of the principal reasons plaintiffs' attorneys express for avoiding the court. As a court of equity, plaintiffs in Chancery Court cannot recover punitive damages (unless expressly authorized by statute) or demand a jury trial."). However, other states may be moving in Delaware's direction. At least two California Superior Courts have held that plaintiffs in merger cases are not entitled to jury trials, on the ground that breach of fiduciary claims are equitable in nature. Feldman, *supra* note 34.

208. *See, e.g.*, Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y.L. SCH. L. REV. 481, 482 (2011) ("The assertion of Delaware judicial superiority is so much a majority view that it in effect constitutes conventional wisdom within the corporate law academy."). Professor Greenfield provides a dissenting view. *Id.* at 491–96. For another strong dissenting view, *see* Carney & Shepherd, *supra* note 77, at 4–17, 49–55.

209. *See* John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1918 (2012) (identifying states where business courts have been established).

210. DEL. STATE BAR ASS'N COMM. ON JUDICIAL COMP., REPORT TO THE DEL. COMP. COMM'N 2012 1, 15 (Dec. 11, 2012), *available at* http://www.delawarepersonnel.com/class/docs/comp/2013_de_bar_assoc_report.pdf ("Competing states are modeling their business courts after the Court of Chancery.").

211. *See, e.g.*, N.Y. SUP. CT. R. § 202.70(b) (outlining court rules for New York's commercial division, including permissible grounds for relief).

212. *See Delaware's Future: Ted Mirvis and His Charter Proposal*, 12 M&A J. 1, 2 (2012) (quoting Wachtell, Lipton, Rosen & Katz partner Theodore N. Mirvis), *available at* http://www.mayerbrown.com/files/News/30179335-acdd-40e0-9772-bd1449ea546d/Presentation/NewsAttachment/11d09538-1f38-45d0-8144-485290e9164d/TheMAJournalVol_12No_5.pdf (noting that state business courts can "move very quickly").

213. *See id.* (quoting Theodore Mirvis for the proposition that rulings by non-Delaware business courts have not "created any issue about the development of the law"). After a long debate, California rejected the idea of a specialized business court in favor of specialized complex litigation courts. Lee Applebaum, *Future Trends in State Courts: The Steady Growth of Business Courts*, NATIONAL CENTER FOR STATE COURTS 70, 70 (2011),

in various business courts reveal high levels of satisfaction with such courts.[214] Key states that lack business courts, but serve as headquarters for numerous large companies, are also quite capable of applying Delaware law.[215]

A second reason why forum selection clauses provide a sub-optimal solution is that, as indicated above, the enforceability of such clauses remains uncertain. Forum selection clauses fall short to the extent that predictability is one of the key attributes of an optimal solution.[216] Indeed, prior to *Boilermakers* the total number of Delaware corporations with exclusive forum bylaws was declining, probably in part as a reaction to the legal uncertainty.[217] Eight companies adopted exclusive forum bylaws during the January–October 2012 period, but 14 companies repealed such bylaws during that same period.[218]

This uncertainty is magnified because shareholder sentiment regarding exclusive forum provisions is far from uniform.[219] Such proposals were new for the 2011 proxy season, following the 2010 *Revlon* decision. From the beginning of that proxy season to December 2013, fewer than 15 management proposals to amend corporate charters to add exclusive forum provisions went to a vote.[220] In most instances the amendments passed, generally by a narrow margin, except where there was sizable insider ownership.[221] However, recent successful votes have been characterized as unrepresentative of broader shareholder sentiment, in light of company-specific factors.[222] During the 2012 proxy season, activist–investor Amalgamated Bank offered non-binding repeal proposals to an additional four corporations. Two of these companies repealed their bylaws prior to a stockholder vote.[223] The remaining two companies (Chevron Corporation and United

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available at http://www.ncleg.net/documentsites/committees/BCCI-6628/2014-1-23%20Meeting/05-2%20The_Steady_Growth_of_Business_Courts.pdf. But even the complex litigation courts have become very familiar with corporate litigation involving Delaware law. *See* Armour et al., *supra* note 12, at 1397 (discussing the considerable expertise of such courts).

214. *See* Coyle, *supra* note 209, at 1976 (citing surveys taken in Pennsylvania and Massachusetts).

215. *See, e.g.*, Yolanda C. Garcia & Robert Velevis, *Texas Courts Must Enforce Corp. Forum Selection Clauses*, LAW360 (Feb. 11, 2014, 2:29 PM), http://www.law360.com/articles/506171/texas-courts-must-enforce-corp-forum-selection-clauses (access required) ("[I]n the case of Texas, the state courts generally do a very good job of applying Delaware law.").

216. *See* Mitchell Lowenthal, *Enhancing the Promise of Exclusive Forum Clauses*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Aug. 21, 2013, 8:52 AM), http://blogs.law.harvard.edu/corpgov/2013/08/21/enhancing-the-promise-of-exclusive-forum-clauses/ ("[U]ntil the decisional law outside of Delaware (or other state of incorporation) accepts the validity of exclusive forum selection clauses, and the circumstances become well-defined where fiduciary duties require suits outside of the selected forum to continue there, the very uncertainty and inefficiencies that forum selection clauses are designed to address will to a meaningful degree remain.").

217. *See* Allen, *supra* note 171, at 1–2 (noting that forum selection bylaw adoptions "ground to a halt" in 2012 after the *Boilermakers* litigation commenced); Coffee, *supra* note 55, at 401 (positing that legal uncertainty was one factor explaining why corporations were refraining from adopting forum selection clauses).

218. Allen, *supra* note 96, at 6.

219. *Id.*

220. Akin Gump Strauss Hauer & Feld LLP, *Corporate Alert: Top Ten Topics for Directors in 2014* 16 (Dec. 4, 2013), *available at* http://cdn.akingump.com/images/content/2/6/v4/26118/Top-10-Topics-for-Directors-in-2014.pdf.

221. *Id.*

222. *See* Allen, *supra* note 96, at 4 (highlighting that "shareholder sentiment on exclusive forum provisions is far from uniform").

223. *Id.* at 5.

Rentals, Inc.) opted to take the repeal proposals to their shareholders, who defeated them.[224]

The uncertainty surrounding exclusive forum provisions is further magnified because the major proxy advisory firms and many institutional investors oppose such provisions. Proxy advisors' views are especially important because they are often relied upon by institutional investors—who hold approximately 60% of publicly traded stock[225]—in casting their stockholder votes.[226] Institutional Shareholder Services, Inc. (ISS) and Glass Lewis & Co. (Glass Lewis) control about 97% of the market for proxy voting advice.[227] ISS is the more influential of the two firms, by virtue of its significantly greater market share. ISS has a market share of 61%, compared with approximately 37% for Glass Lewis.[228] An ISS recommendation in favor of a given shareholder proposal increases the vote for approval by an average of 15%, and in other cases its influence is even greater.[229]

ISS's updated proxy voting guidelines for 2015 provide that it will review on a case-by-case basis those bylaws which impact shareholders' litigation rights, including exclusive venue provisions. The updated guidelines identify multiple relevant factors, including: (1) the company's stated rationale for adopting such a provision, and (2) the disclosure of past harm from shareholder lawsuits in which plaintiffs were unsuccessful or from shareholder lawsuits outside the jurisdiction of incorporation.[230] Glass Lewis

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224. *Id.* at 5–6; *see also* Tom Hals, *Companies Adopt Tweaked Forum Selection Bylaws, Study Finds*, REUTERS LEGAL (Dec. 3, 2013), https://a.next.westlaw.com/Document/Ic0d47fe05c1411e38e8080ec30f8ad0a/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default (access required) (noting that many companies, fearing shareholder backlash, have declined to adopt forum selection bylaws).

225. Holly J. Gregory, *SEC Guidance May Lessen Investment Adviser Demand for Proxy Advisory Services*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (July 29, 2014, 9:10 AM), http://blogs.law.harvard.edu/corpgov/2014/07/29/sec-guidance-may-lessen-investment-adviser-demand-for-proxy-advisory-services/. *Cf.* Daniel M. Gallagher, *Outsized Power and Influence: The Role of Proxy Advisers* (Wash. Legal Found. Critical Legal Issues Working Paper Series, No. 187, at 1 n.1, Aug. 2014), *available at* http://www.wlf.org/upload/legalstudies/workingpaper/GallagherWP8-14.pdf ("Between 1950 and 2000, institutional ownership of total U.S. equity outstanding increased from approximately 6% to approximately 50%, where it has since remained . . . . Within the top 1000 U.S. corporations, institutional investors are even more entrenched, holding nearly 75% of the equity.").

226. The pervasive influence of proxy advisory firms has attracted growing attention. *See generally* James K. Glassman & Hester Peirce, *How Proxy Advisory Services Became So Powerful*, MERCATUS CENTER AT GEORGE MASON UNIVERSITY (June 2014), *available at* http://mercatus.org/sites/default/files/Peirce-Proxy-Advisory-Services-MOP.pdf (outlining the rise in proxy advisory firms' power and related policy considerations); *see generally* Paul Rose, *On the Role and Regulation of Proxy Advisors*, 109 MICH. L. REV. FIRST IMPRESSIONS 62 (2011) (discussing the rise and role of proxy advisors).

227. Gregory, *supra* note 225.

228. Charles M. Nathan, *Proxy Advisory Business: Apotheosis or Apogee?*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. at n.1 (Mar. 23, 2011, 9:10 AM), http://blogs.law.harvard.edu/corpgov/2011/03/23/proxy-advisory-business-apotheosis-or-apogee/.

229. David A. Katz, *Important Proxy Advisor Developments*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Sept. 29, 2014, 9:08 AM), http://blogs.law.harvard.edu/corpgov/2014/09/29/important-proxy-advisor-developments/.

230. Institutional Investor Services, *U.S. Proxy Voting Guideline Updates: 2015 Benchmark Policy Recommendations* 7 (Nov. 6, 2014), *available at* http://www.issgovernance.com/file/policy/2015USPolicyUpdates.pdf; *see also* King & Spalding, *What You Need to Know About Exclusive Forum Provisions* 3 (May 10, 2012), http://www.kslaw.com/imageserver/KSPublic/library/publication/PublicCompanyAdvisor-May2012.pdf ("ISS and Glass Lewis are both vocally opposed to exclusive forum provisions and will likely recommend 'against' any stand-alone proposal."); *cf.* Richard J. Sandler, *Exclusive Forum Provisions: Is*

generally opposes forum selection bylaws unless the corporation: (1) provides a compelling argument as to why the provision would directly benefit shareholders, (2) provides evidence of abuse of legal process in other, non-favored jurisdictions, (3) narrowly tailors such provision to the risks involved, and (4) maintains a strong record of good corporate governance practices.[231] Glass Lewis has noted that exclusive venue provisions are not in the shareholders' best interests because they effectively discourage derivative claims by increasing their associated costs and rendering them more difficult to pursue.[232] An examination of ISS's and Glass Lewis's case-by-case recommendations suggests that, despite their official discretionary policies, as a practical matter both firms oppose exclusive forum provisions.[233] Both firms supported the Chevron and United Rentals repeal proposals noted above.[234]

Other key constituencies agree with the major proxy advisory firms that exclusive forum provisions are not corporate governance best practices. For example, both the Council of Institutional Investors (CII)[235]—whose members have combined assets in excess of $3 trillion[236]—and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)[237] have recommended that U.S. companies not restrict the venue

Now the Time to Act?, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Nov. 7, 2013, 9:09 AM), http://blogs.law.harvard.edu/corpgov/2013/11/07/exclusive-forum-provisions-is-now-the-time-to-act/ (stating that ISS is mildly opposed to exclusive forum provisions and Glass Lewis is firmly opposed).

231. Glass Lewis & Co., *Proxy Paper Guidelines: 2015 Proxy Season* 39 (2015), *available at* http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf. In addition, Glass Lewis will recommend a vote against the chair of an IPO company's governance committee if the company adopts an exclusive forum provision without obtaining shareholder approval after the IPO takes place. Edmond T. Fitzgerald, *ISS and Glass Lewis Voting Guidelines for 2015 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Nov. 20, 2014, 9:39 AM), http://blogs.law.harvard.edu/corpgov/2014/11/20/iss-and-glass-lewis-voting-guidelines-for-2015-proxy-season/.

232. *See* Bob McCormick, Glass Lewis & Co., *Glass Lewis on Exclusive Forum Provisions* (Sept. 25, 2013), http://www.glasslewis.com/tag/exclusive-forum/ (noting that exclusive forum provisions "unnecessarily limit full legal recourse").

233. *See* Fitzgerald, *supra* note 231 ("For many companies, it will be difficult to obtain ISS support if they decide to ask shareholders to approve exclusive forum provisions, since the companies may be unable or unwilling to meet the factor related to disclosure of past harm suffered as a result of these types of suits."); Theodore N. Mirvis et al., *Implementation of a Forum Selection Bylaw*, 50 BANK AND CORP. GOV. L. REP. (2013), *available at* http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22693.13.pdf (click on "Attached are materials" to access).

234. Allen, *supra* note 96.

235. *See Policies on Corporate Governance Section 1.9*, COUNCIL OF INSTITUTIONAL INVESTORS (May 9, 2014), http://www.cii.org/corp_gov_policies ("Companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum. Nor should companies attempt to bar shareowners from the courts through the introduction of forced arbitration clauses."); Stephanna F. Szotkowski, Note, *Oh the Places Stockholders Will Go! A Guide for Navigating Forum Selection Bylaws Outside of Delaware*, 98 MINN. L. REV. 1980, 1996 (2014) (noting that CII "unequivocally opposes adoption of all forum-selection provisions").

236. *About Us*, COUNCIL OF INSTITUTIONAL INVESTORS, http://www.cii.org/about_us (last visited Oct. 18, 2014).

237. *See generally Proxy Voting Guidelines*, AFL-CIO 20 (2012), *available at* http://www.aflcio.org/content/download/12631/154821/proxy_voting_2012.pdf (providing proxy voting guidelines for AFL-CIO members); Holly J. Gregory, *The Elusive Promise of Reducing Shareholder Litigation Through Corporate Bylaws*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (June 9, 2014, 9:25 AM), http://blogs.law.harvard.edu/corpgov/2014/06/09/the-elusive-promise-of-reducing-shareholder-litigation-through-corporate-bylaws/ (noting opposition by AFL-CIO to such provisions).

for shareholder claims by adopting exclusive forum provisions. Opposition by the proxy firms and CII may have deterred more widespread adoption of forum selection provisions.[238]

Third, while the Court of Chancery did not address this issue, *Boilermakers* makes it increasingly likely that corporations will adopt forum selection clauses that specify mandatory arbitration of shareholder claims, and arbitration entails a host of negative consequences. In *Corvex Management LP v. CommonWealth REIT*, a Maryland trial court applied contract law principles to determine that an arbitration bylaw adopted by a real estate investment trust was enforceable.[239] The court concluded that plaintiffs had knowledge of the bylaw, they assented to it by purchasing stock, and there was sufficient consideration for it to be binding.[240] The *Corvex* decision, issued in 2013, has no precedential value,[241] but such decisions may become increasingly common, insofar as the basic rationale of *Corvex* is the same as the rationale in *Boilermakers*. Indeed, two post-*Corvex* decisions issued in 2014—one of which approvingly cited *Boilermakers*—reinforced *Corvex*.[242] These cases have pushed the door open to widespread adoption of

238. Alan L. Beller, *Selected Issues for Boards of Directors in 2014*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb. 1, 2014, 9:00 AM), https://blogs.law.harvard.edu/corpgov/2014/02/01/selected-issues-for-boards-of-directors-in-2014/; *but cf.* Michael O'Bryan, *Exclusive Forum Provisions: A New Item for Corporate Governance and M&A Checklists*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (July 14, 2014, 9:19 AM), http://blogs.law.harvard.edu/corpgov/2014/07/14/exclusive-forum-provisions-a-new-item-for-corporate-governance-and-ma-checklists/ (noting that ISS recommended against approval by stockholders of 11 exclusive forum provisions that were put to votes during the period January-early June 2014, but each one passed).

239. Corvex Management LP v. CommonWealth REIT, No. 24-C-13-001111 (Md. Cir. Ct. May 8, 2013), *available at* http://www.courts.state.md.us/businesstech/pdfs/mdbt4-13.pdf.

240. *Id.*

241. *See* Kevin LaCroix, *More About Arbitration Clauses in Corporate By-Laws*, D&O DIARY (July 11, 2013, 12:43 AM), http://www.dandodiary.com/2013/07/articles/director-and-officer-liability-1/more-about-arbitration-clauses-in-corporate-bylaws/ (noting that plaintiff Corvex filed a notice of appeal of the trial court's decision but later dismissed the appeal to pursue arbitration).

242. *See* Delaware Cnty. Emps' Ret. Fund v. CommonWealth REIT, No. 13-10405-DJC (D. Mass. Mar. 26, 2014), *available at* http://www.sidley.com/files/News/83d08302-7548-492b-96c4-1a3679fd4b00/Presentation/NewsAttachment/266b3896-0448-4de1-8d39-45477c254d31/Link_9_06-03-14.pdf (denying plaintiff shareholders' request for a declaratory judgment on the basis that the arbitration clause contained in the company's bylaws was invalid and unenforceable); Katz v. CommonWealth REIT, Case No. 24-C-13-001299 (Md. Cir. Ct. Feb. 19, 2014), *available at* http://www.sidley.com/files/News/83d08302-7548-492b-96c4-1a3679fd4b00/Presentation/NewsAttachment/b271d8d2-2bd9-45b6-96d4-3bd99105b696/Link_7_06-03-14.pdf (citing *Boilermakers*, and concluding that "stockholders assent to a contractual framework that explicitly recognizes that they will be bound by bylaws adopted unilaterally pursuant to Maryland REIT law"). *Corvex*, *Delaware County Employees Ret. Fund*, and *Katz* are discussed in Andrew Stern et al., *Two More Bullets to Fight Corporate Activism*, LAW360 (May 15, 2014, 7:10 PM), http://www.law360.com/articles/536771/2-more-bullets-to-fight-corporate-activism (access required) (concluding that these decisions "suggest that other jurisdictions may view such provisions favorably").

arbitration provisions in bylaws.[243] After all, an arbitration clause is nothing more than a specialized kind of forum selection clause.[244]

Mandatory arbitration of intra-corporate disputes is unwise for numerous reasons. First, mandatory arbitration may be contrary to the anti-waiver provisions in section 14 of the Securities Act of 1933[245] and section 29(a) of the Securities Exchange Act of 1934.[246] The provisions establish in substance that any condition, stipulation or provision binding any person to waive compliance with those statutes and their rules shall be void. Both provisions are designed to prevent negotiated deals that would undermine the protection offered by the securities laws.[247]

The Securities and Exchange Commission (SEC) is hostile toward mandatory arbitration and generally will not allow a company to go public with such a provision,[248] although it has said little about arbitration bylaws adopted by companies that are already public.[249] In 2012, the SEC rejected an effort by The Carlyle Group L.P. to go public with a provision in its partnership agreement requiring individual arbitration instead of securities class actions.[250] That same year it granted no-action relief to two corporations seeking to exclude stockholder proposals to amend bylaws to provide for mandatory individual

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243. *See* Brian JM Quinn, *Adoption of Exclusive Forum Bylaw Provisions*, M&A LAW PROF BLOG (July 3, 2013), http://lawprofessors.typepad.com/mergers/2013/07/adoption-of-exclusive-forum-bylaw-provisions-.html (predicting that *Boilermakers* may further open the door to widespread adoption of arbitration provisions in bylaws); Andrew W. Stern et al., *A Template for Tamping Down Corporate Activism*, LAW360 (July 8, 2013), http://www.sidley.com/files/Publication/bb0070b4-afc1-4930-a7f9-209cb0f9a0b2/Presentation/PublicationAttachment/b89eb01d-5273-43b8-b4a9-2c4c929588a0/A%20Template%20For%20Tamping%20Down%20Corporate%20Activism.pdf (noting that *Corvex* "can be viewed as a green light for the boards (of Maryland companies at least) to include broad arbitration clauses in their bylaws without seeking shareholder approval").

244. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 482–83 (1989) (holding predispute agreement to arbitrate claims under the Securities Act enforceable); Paul Weitzel, *The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement through Arbitration Provisions in Charters and Bylaws*, BYU L. REV. 65, 99 (2013) ("[A]rbitration agreements are typically analyzed as forum selection clauses."). One countervailing factor which may discourage widespread adoption of arbitration bylaws is that pursuant to the Federal Arbitration Act there is virtually no judicial review of arbitration awards. *See* 9 U.S.C. § 10(a) (2012) (identifying four limited grounds for vacating an award); Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 109, 120 (2012) (noting this very narrow review "may make the risk of an aberrational award unacceptably high" and that securities class actions and derivative suits are the paradigmatic high-stakes cases where such a risk is particularly unacceptable to issuers and leading proxy advisory firms will probably oppose such bylaws for the same reasons they generally oppose forum selection bylaws).

245. 15 U.S.C. § 77n (2013).

246. 15 U.S.C. § 778cc (2013).

247. Jason M. Halper et al., *Mandatory Arbitration as Substitute for Private Securities Class Actions*, N.Y. L.J. (June 14, 2012); *see also* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 230 (1987) (observing that section 29(a) is concerned with whether the agreement weakens customers' ability to recover under the Securities Exchange Act).

248. *See* Alison Frankel, *Wake Up Shareholders! Your Right to Sue Corporations May be in Danger*, REUTERS (June 25, 2013), http://blogs.reuters.com/alison-frankel/2013/06/25/wake-up-shareholders-your-right-to-sue-corporations-may-be-in-danger/ ("[T]he SEC has never permitted the IPO of a company with a mandatory arbitration clause.").

249. Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. (2014) (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2444771.

250. Hal Scott & Leslie Silverman, *SEC's Silent Opposition to Arbitration Bylaws Is Speaking Volumes*, NAT'L L.J. (Aug. 12, 2013), http://www.nationallawjournal.com/id=1202614630845/SECs-Silent-Opposition-to-Arbitration-Bylaws-is-Speaking-Volumes (access required).

arbitration under certain circumstances, stating that there was some basis for the view that such amendments would violate the federal securities laws.[251] The SEC did not elaborate, consistent with its custom, but it is likely that it accepted the argument that the arbitration proposals, if adopted, would violate the anti-waiver provisions.[252]

Second, if mandatory arbitration bylaws barring class actions are enforceable, "the logical outcome would be a marked decline in class actions,"[253] including meritorious actions. This would significantly reduce securities class action litigation's policing effect. Third, to the extent that mandatory arbitration of shareholder disputes becomes the norm, this development risks degrading Delaware's continued maintenance and development of its corporate common law.[254] A similar degradation of contract law development related to broker-dealer disputes followed the imposition of mandatory arbitration in that context.[255] To the extent that the development of Delaware corporate law is viewed positively,[256] arbitration provisions are undesirable. Overall, the most commonly proposed solution to the problem of multijurisdictional deal litigation—the adoption and enforcement of exclusive forum provisions designating Delaware—has numerous disadvantages that collectively render it a poor idea.

B. Amendment of SLUSA and CAFA

A second common proposal is amendment of SLUSA's Delaware carve-out and the parallel provision in CAFA to provide that class actions brought under the carve-outs (and shareholder derivative actions with similar effect) may be filed only in the courts of the defendant company's state of incorporation. Congress enacted SLUSA in 1998, three years after it enacted the Private Securities Litigation Reform Act (PSLRA).[257] The PSLRA was

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251. *See* Pfizer, Inc., SEC No-Action Letter (Feb. 22, 2012), *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/donaldvuchetich022212-14a8.pdf (noting that the SEC will recommend non-enforcement if Pfizer omits the proposal from its proxy materials); Gannett Co., Inc., SEC No-Action Letter (Feb. 22, 2012), *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/2donaldvuchetich022212-14a8.pdf (noting that the SEC will recommend non-enforcement if Gannett omits the proposal from its proxy materials).

252. *Cf.* Allen, *supra* note 249, at 18 ("The Staff's position is at odds with Supreme Court precedent that does not construe agreements to arbitrate as waivers of substantive rights."); Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1221 (2013) (disagreeing with the argument that arbitration proposals violate anti-waiver provisions); Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time has Come?*, 75 LAW & CONTEMP. PROBS. 107, 108 (2012) (noting that the SEC "has never repudiated its staff position that an arbitration provision in a publicly traded issuer's governance documents would violate the anti-waiver provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934").

253. Claudia Allen, *Guest Post: Bylaws and Arbitration*, D&O DIARY (July 22, 2014), http://www.dandodiary.com/2014/07/articles/director-and-officer-liability/guest-post-bylaws-and-arbitration/.

254. Brian JM Quinn, *Arbitration and the Future of Delaware's Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829, 869 (2013).

255255. *Id.*; Emily Farinacci, Note, *In a Bind: Mandatory Arbitration Clauses in the Corporate Derivative Context*, 28 OHIO ST. J. DISP. RESOL. 737, 751 (2013).

256. *See, e.g.*, Fisch, *supra* note 206, at 740 ("Delaware law offers distinctive substantive and structural attributes that other commentators and I have argued make it particularly well-suited for regulating the public corporation.").

257. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).

enacted to address perceived abuses of class action litigation in securities litigation.[258] Its multiple provisions limit recoverable damages and attorneys' fees, provide a safe harbor for forward-looking statements, impose restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, authorize a stay of discovery pending resolution of motions to dismiss, and impose heightened pleading requirements in actions brought pursuant to Securities Exchange Act section 10(b)[259] and companion Rule 10b-5.[260]

Congress convened hearings several years after the PSLRA was enacted to assess its impact. It found that to avoid the obstacles PSLRA created, plaintiffs began to file class actions under state law, often in state court.[261] In response, Congress enacted SLUSA in 1998 to stem the shift from federal to state court and prevent private state class action securities fraud litigation from frustrating the objectives of the PSLRA.[262]

SLUSA precludes covered class actions based on state law claims alleging misrepresentations in connection with the purchase or sale of nationally traded or registered securities.[263] To prevent SLUSA-precluded actions from being litigated in state court, SLUSA authorizes defendants to remove such actions to federal court.[264] This ensures that federal courts have the opportunity to determine whether SLUSA preclusion has occurred. Any suit removable under SLUSA is precluded, and any suit not precluded is not removable.[265] SLUSA thus prevents plaintiffs from evading the requirements of the PSLRA by artfully pleading what are essentially federal securities claims under the rubric of state common law.

SLUSA also includes a savings clause, known as the Delaware carve-out, which preserves certain state law actions based on the statutory or common law of the state in

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258. *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81–82 (2006) (citing the House Conference report accompanying the PSLRA for proposition that "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years").

259. *See* 15 U.S.C. § 78j (2013) (scattered in sections 1 through 4).

260. 17 C.F.R. § 240.10b-5 (2013). Section 10(b) and Rule 10b-5 broadly prohibit deception, misrepresentation, and fraud in connection with the purchase or sale of any security. *Dabit*, 547 U.S. at 78. The major provisions of the PSLRA are identified in *Dabit*, 547 U.S. at 81.

261. *See, e.g.*, H.R. Rep. No. 105-803, at 14–15 (1998) (stating that "[t]he managers also determined that, since passage of the Reform Act, plaintiffs' lawyers have sought to circumvent the Act's provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or substantive protections against abusive suits are available").

262. *See* Atkinson v. Morgan Asset Mgt., Inc., 658 F.3d 549, 554 (6th Cir. 2011) ("Congress enacted SLUSA to ensure that PSLRA's standards govern fraud-based class actions involving securities."); Erin O'Hara O'Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 687 (2013) ("SLUSA was enacted to cut off an attempted end run around . . . [the PSLRA].").

263. 15 U.S.C. § 77p(b) (2013). SLUSA amended section 16 of the Securities Act of 1933, codified at 15 U.S.C. § 77p, and made a substantially identical amendment to section 28(f) of the Securities Exchange Act, codified at § 78bb(f). Madden v. Cowen & Co., 576 F.3d 957, 962 n.2 (9th Cir. 2009). The Supreme Court has explained that SLUSA precludes, rather than preempts, state law claims: "The preclusion provision is often called a preemption provision; the Act, however, does not itself displace state law with federal law but makes some state-law claims nonactionable through the class-action device in federal as well as state court." Kircher v. Putnam Funds Trust, 547 U.S. 633, 637 n.1 (2006).

264. 15 U.S.C. § 77p(c).

265. Kircher v. Putnam Funds Trust, 547 U.S. 633, 644 (2006); *see* Proctor v. Intertech., Inc., 584 F.3d 1208, 1228 (9th Cir. 2009) ("We now hold that SLUSA requires remand once a federal court dismisses precluded claims.").

which the issuer is incorporated or organized.[266] The savings clause is widely referred to as the Delaware carve-out because it has a disproportionate impact on Delaware, as more than 60% of Fortune 500 companies and more than 50% of all companies whose shares trade on major U.S. exchanges are incorporated there.[267] If a federal court determines that an action may be maintained in state court pursuant to the carve-out, the proper course is for the federal court to remand.[268] SLUSA's legislative history suggests that the Delaware carve-out has two overlapping objectives: (1) preservation of state law actions brought by shareholders against their own corporations in connection with corporate transactions requiring shareholder approval, such as mergers and tender offers, whether or not the corporations issued nationally traded securities;[269] and (2) deference to Delaware courts.[270]

CAFA, enacted in 2005, effectively federalized class actions.[271] CAFA permits the removal from state court to federal court of class actions involving at least 100 claimants where the amount in controversy exceeds five million dollars and there is minimal, rather than complete diversity—at least one member of the plaintiff class is of diverse citizenship from at least one defendant.[272] CAFA, like SLUSA, has a Delaware carve-out. CAFA carves out an exception for class actions that solely involve "internal affairs or governance of a corporation or other form of business enterprise and arise under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized."[273]

Various commentators have argued that the Delaware carve-outs in SLUSA and CAFA facilitate multijurisdictional M&A litigation and elimination or amendment of the carve-outs will constitute an effective solution to the problem.[274] This argument does not withstand scrutiny. Perhaps the most serious critique of the proposal to amend SLUSA and CAFA is that amendment is very unlikely to occur. Congress has demonstrated no inclination to either: (1) eliminate the Delaware carve-outs and thereby federalize all corporate litigation, or (2) revise the carve-outs to restrict state jurisdiction to the state of an entity's incorporation and thereby favor Delaware as the presumptive forum for corporate litigation. The first option would encounter strong opposition, in part because it would destroy the litigation benefits currently stemming from the expert state judiciary's

266. 15 U.S.C. § 77p(d); 15 U.S.C. § 78bb(f)(1)(A); *see* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 87 (2006) (describing the Delaware carve-out as applying to class actions based on the law of the state in which the issuer of the covered security is incorporated). SLUSA also includes other exceptions. It does not apply to class actions with fewer than 51 persons or prospective class members and it does not apply to actions brought on behalf of a state. Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058, 1064 (2014).

267. *See supra* note 10 and accompanying text.

268. 15 U.S.C. § 77p(d)(4).

269. Madden v. Cowan & Co., 576 F.3d 957, 971 (2009).

270. *See* O'Connor & Ribstein, *supra* note 262, at 689 (noting SLUSA's legislative history "indicating that Congress's respect for Delaware courts was a justification for the carve-out").

271. Griffith & Lahav, *supra* note 90, at 1108.

272. Class Action Fairness Act, 28 U.S.C. § 1332(d)(2); *see also* Jay Tidmarsh, *Living in CAFA's World*, 32 REV. LITIG. 691, 699 (2013) (observing that CAFA's minimal-diversity and aggregate amount-in-controversy approach to original jurisdiction "built a wider door for plaintiffs who want to enter federal court").

273. 28 U.S.C. § 1453(d)(2) (2013).

274. *See, e.g.*, U.S. CHAMBER INSTIT. FOR LEGAL REFORM, *supra* note 21, at 8 (asserting that the explosion of state court class actions is possible only because of the Delaware carve-out).

application of DGCL.[275] It is reasonable to assume that state court judges have more expertise than federal judges in applying state corporate law, and federalization of such law would eliminate that advantage.[276] The second option is equally remote, because Congress is unlikely to legislate in a way that so clearly favors the courts of any single jurisdiction.[277]

C. Judicial Comity

Another proposed solution is the expansion of comity and cooperation between courts. Judicial comity is the respect that courts of one jurisdiction exhibit to courts of another jurisdiction by giving effect to the other's laws and judicial decisions.[278] Comity is a cornerstone of the courts' discretionary power to stay proceedings in deference to proceedings in another jurisdiction. Where comity is employed, judges weigh a variety of factors to determine which court is the most appropriate sole venue for parallel litigation. These factors might include the courts' respective docket backlogs and subject matter expertise, the relative quality of the cases filed, the attorneys' qualifications to pursue the litigation, and the competing jurisdictions' interests in the defendant corporation's affairs.[279]

Comity's probable primary attraction is that it is a low-cost solution that requires no major modification of the current judicial system. There is currently no official conduit for judicial communication across jurisdictional lines[280] and there is no central registry to track parallel litigation in different states.[281] However, these deficiencies are not insuperable obstacles to greater judicial comity and cooperation. Instead, other issues prevent comity from being an effective solution to the problem of multijurisdictional litigation. An obvious problem, noted by some of comity's advocates, is that there is no policing mechanism to

275. *See* Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 162 (2011) ("[N]either Delaware policymakers nor Delaware's chief advocates in Congress can be expected to support elimination of the Delaware carve-out."); Stevelman, *supra* note 206, at 77 ("The fact that Congress has declined to enact a comprehensive federal corporate law reflects a concrete political reality . . . .").

276. *See* Myers, *supra* note 82, at 523 ("Federalizing shareholder litigation would constitute an abandonment of our unique arrangement of producing corporate law, a price far too high."); Thomas & Thompson, *supra* note 76, at 1810 ("It seems logical that, as a general matter, state courts should be better than federal courts in interpreting state law").

277. *See* Kevin LaCroix, *M&A-Related Litigation Has Replaced Stock Drop Suits as Plaintiffs' Securities Lawyers' Lawsuit of Choice*, D&O DIARY (Dec. 27, 2011, 3:27 AM), http://www.dandodiary.com/2011/12/articles/securities-litigation/ma-related-litigation-has-replaced-stock-drop-suits-as-plaintiffs-securities-lawyers-lawsuit-of-choice/ (observing that Congress is unlikely to eliminate the Delaware carve-out from SLUSA because doing so would clearly favor courts of a single jurisdiction); *but cf.* Johnson, *supra* note 48, at 388 ("[W]e should not be surprised to see congressional action eliminating or restricting the Delaware Carve-Out.").

278. *See* Griffith & Lahav, *supra* note 90, at 1107 ("[T]he prevailing theory of comity can be concisely summarized as follows: in those areas where there is no federal intervention, states exercise power within their territories and lack power outside their territories.").

279. Thomas, *supra* note 19, at 1956.

280. *See* Griffith & Lahav, *supra* note 90, at 1129 (observing that there is "no established mechanism for informing Delaware . . . courts of pending merger litigation in other jurisdictions" and no "central registry").

281. *Id.* at 1129.

deal with non-cooperating judges or counsel.[282] Even where cooperation does occur, there is little assurance that judges will reach an agreement on the appropriate forum. This is especially likely to be true in cases involving Delaware-chartered corporations, where Delaware judges generally perceive that they are much better-equipped to apply Delaware law.[283] As indicated below, where a case is first-filed in Delaware, Delaware courts almost never agree to stay the litigation in favor of a parallel action filed elsewhere. They rarely agree to stay a Delaware action in favor of a parallel action involving the application of Delaware law. There is no reason to expect this situation to change.

D. One-Forum Motions

A fourth proposed solution is a specific application of comity—the increased use of one-forum motions. These motions are sometimes referred to as Savitt motions[284] and often have the formal title of "Motion to Proceed in One Jurisdiction, Dismiss or Stay Litigation in the Other Jurisdiction, and Organize Counsel for the Putative Class." Such a motion has all of the foregoing objectives and typically asks the judges in each jurisdiction where plaintiffs have filed suit regarding merger activity to confer with one another, select a single forum in which the case will proceed, and stay or dismiss the parallel suits. On its face, the motion—which typically is filed in all forums where litigation regarding a deal is pending—does not favor proceeding in one jurisdiction over another.

By the fall of 2011, at least 16 such motions had been filed in the Delaware Court of Chancery.[285] Some members of the Court of Chancery have endorsed one-forum motions,[286] but there has been no consensus about relevant factors when resolving them. A non-exclusive list of factors considered by the Court includes whether: (1) the case involves important issues of Delaware law, (2) one jurisdiction is more familiar with the case than the other, (3) forum non conveniens factors weigh in favor of staying the Delaware litigation, and (4) the procedural posture of the parallel actions places them in conflict.[287] The first factor, which is based in part on the internal affairs doctrine, is typically regarded as the most important.[288]

Of the 16 one-forum motions that had been filed by the fall of 2011, all but one proceeded in a single forum after the motion was filed.[289] Nevertheless, it is difficult to

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282. *See, e.g.*, Thomas, *supra* note 19, at 1957 (noting that judicial comity lacks policing mechanisms); Thomas & Thompson, *supra* note 76, at 1804 ("Because [comity] is an informal, judge-driven solution, the potential for defections is significant, and there is no policing mechanism.").

283. *See, e.g.*, Thomas, *supra* note 19, at 1957 ("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.").

284. William D. Savitt of Wachtell, Lipton, Rosen & Katz and his co-defense counsel filed the first one-forum motion in Delaware in March 2009. C. Barr Flinn & Kathaleen St. J. McCormick, *The Delaware Court of Chancery Endorses One Forum Motions as a Solution to Multi-Jurisdictional Litigation*, YOUNG CONWAY STARGATT & TAYLOR, LLP at n.2 (Fall 2011), *available at* http://www.youngconaway.com/files/Uploads/Documents/CorporateFall2011%5b1%5d.pdf. Former Chancellor William B. Chandler III referred to it in a subsequent action as the "Savitt Motion." *Id.*

285. *Id.*

286. *See, e.g.*, *In re* Allion Healthcare Inc. S'holders Litig., No. 5022-CC, 2011 WL 1135016, at *9 n.12 (Del. Ch. Mar. 29, 2011) (endorsing one-forum motions); Parsons & Tyler, *supra* note 75, at 511 (noting receptivity of Delaware judges to one-forum motions).

287. Flinn & McCormick, *supra* note 284.

288. *Id.*

289. *Id.*

evaluate the success of such motions on the basis of this statistic because the filing of the motion is frequently accompanied by contemporaneous informal negotiations between the parties and it is problematic to disentangle the effect of the filing of the motions from the impact of negotiations.[290] In many cases the parties reach an agreement that moots the motion, either by settling the case, or by plaintiffs' counsel devising a leadership structure and the parties voluntarily agreeing to proceed in a single jurisdiction.[291]

There are good reasons to doubt the efficacy of one-forum motions. First, the most important factor in resolving these motions is whether the case involves an important issue of Delaware law.[292] Delaware courts perceive, correctly or not, that they have no serious rivals in their ability to decide such issues.[293]As a result, of the 16 one-forum motions that had been filed by the fall of 2011, only one resulted in a stay of the Delaware litigation.[294] A second reason to be skeptical is that the success of one-forum motions depends heavily on cooperation between judges in multiple jurisdictions,[295] thereby rendering the motions' outcome inherently uncertain.[296] Third, defendants do not necessarily support the filing of such motions because it requires them to cede control over where the litigation will ultimately land.[297] Fourth, while former Chancellor Chandler supported the use of one-forum motions, current members of the Court of Chancery have been much more skeptical.[298]

E. First-Filed Rule and Forum Non Conveniens

Another proposed solution is strict enforcement of a "first-filed" rule. A number of states, including Texas and New York, follow or are perceived to follow such a rule, which

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290. *Id.*

291. 1 ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATION LITIGATION § 7.9 (Denise Seastone Kraft & K. Tyler O'Connell eds. 2013).

292. *Id.*

293. *See* Alison Frankel, *Delaware Supreme Court Rebukes Chancery for Litigation Territorialism*, On the Case, 27 No. 20 WESTLAW J. DEL. CORP. 3 (Apr. 5, 2013) ("There is little doubt that the judges on Delaware's Chancery Court believe they are unrivalled in the business of overseeing corporate litigation.").

294. Flinn & McCormick, *supra* note 284. The one motion resulting in a stay of the Delaware action was *In re* OptionsExpress Holdings, Inc. S'holder Litig., No. 6314-VCL (Apr. 28, 2011) (staying Delaware litigation in favor of Illinois litigation because Illinois judge was more familiar with the issues); *see also* Baltay, *supra* note 11 ("Delaware courts will rarely, if ever, stay Delaware merger litigation in favor of merger litigation pending elsewhere.").

295. *See, e.g.*, Alison Frankel, *Delaware Is Not the Only State with Multi-Forum Problems*, 27 WESTLAW J. DEL. CORP. *1, *2 (2012) (noting that Delaware Vice Chancellor J. Travis Laster regularly calls judges in other courts to seek coordination, after the filing of one-forum motions).

296. *See* Parsons & Tyler, *supra* note 75, at 512 ("Hence, like comity, this solution may be more aspirational than actual."); *accord* Myers, *supra* note 82, at 520 (concluding that one-forum motions "are likely to fail in the most important cases"); Mirvis et al., *supra* note 233 (noting that one-forum motions "are widely disfavored and increasingly ineffective"); King & Spalding, *supra* note 230 ("Whether or not a one forum motion is granted depends on the case, the jurisdictions and the judges.").

297. *See* Micheletti & Parker, *supra* note 80, at 18 ("[T]he criticism of this approach is that defendants (and their counsel) are, in essence, divesting themselves of tactical decision-making regarding the forum.").

298. *See* Palmer & Gray, *supra* note 157 (stating that "current members of the Court of Chancery have commented that [the motions] lack 'utility,' provide a 'pretext for courts who want to cling to cases for the wrong reasons,' and encourage defendants to 'really punt[] on the question' about which forum should decide the merits of the case").

gives control of M&A litigation to the first stockholder plaintiff and associated law firm to file a representative action,[299] and has been described as follows:

> The contemporary version of the rule provides that when parallel litigation has commenced in separate courts, the first-filed suit has priority, and subsequent actions are to be stayed or dismissed in deference to it . . . . The foundation for the rule is respect for plaintiff's choice of forum, comity, and the orderly administration of justice.[300]

Faster filing typically yields higher attorneys' fees,[301] but does not necessarily benefit plaintiffs,[302] with the result that judges have been increasingly skeptical of applying a first-filed rule in shareholder representative actions.[303]

In Delaware, the decision of whether to stay or to dismiss a Delaware action in favor of a first-filed foreign action is a matter of discretion for the court. Under Delaware's *McWane* doctrine, introduced in 1970, the court must stay second-filed equitable claims in favor of equivalent first-filed claims in front of competent tribunals.[304] Specifically, a stay is justified when: (1) there is a prior action pending in another jurisdiction, (2) involving the same parties, (3) litigating the same issues, and (4) the court in the foreign forum is capable of rendering prompt and complete justice.[305]

The Chancery Court has negated the first factor's importance by finding, on multiple occasions, that second-filed Delaware actions were effectively contemporaneously filed,[306] even where the second filing did not occur until three weeks after the original suit commenced.[307] With respect to the second and third factors, complete identity of parties or issues is not required. Instead, the parties must be "substantially the same," and the actions in question must be closely related and arise out of a common nucleus of operative facts.[308] The fourth factor entails the accurate application of controlling law,[309] and Delaware courts frequently find that it militates against a stay. Delaware judges are especially reluctant to dismiss or stay an action that involves an emerging or novel aspect

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299. Quinn, *supra* note 275, at 155 ("Many states still follow the first-filed doctrine, thus ensuring that an early filer in a foreign jurisdiction gets control of the litigation.").

300. Strine et al., *supra* note 82, at 47.

301. *See* Wolinsky & Schireson, *supra* note 92 ("The perverse result of [the first-filed presumption] is that the lawyer who has spent the least amount of time investigating the merits of a claim is rewarded for shooting first and aiming later.").

302. *See* Micheletti & Parker, *supra* note 80, at 41 (noting that the first-filed rule "rewards plaintiffs who race to the courthouse, usually with the least-developed complaints").

303. Strine et al., *supra* note 82, at 52.

304. McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970).

305. *See id.* (stating that a court's "discretion should be exercised freely in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties, and the same issues"); Brookstone Partners Acquisition XVI, LLC v. Tanus, No. 7533-VCN, 2012 WL 5868902, at *3 (Del. Ch. Nov. 20, 2012) (staying later-filed Chancery Court action in favor of first-filed Texas proceeding). *McWane* is designed to avoid a situation in which "the interests of justice are eroded by the excessive cost and burden of unnecessary litigation over the same issues in multiple forums." *In re* Diamond Foods, Inc. Deriv. Litig., No. 7657-CS, 2013 WL 755673, at *4 (Del. Ch. Feb. 28, 2013).

306. Stevelman, *supra* note 206, at 109.

307. *See* Ryan v. Gifford, 918 A.2d 341, 347 (Del. Ch. 2007) (finding pending actions "differ in some respects" and letting them proceed).

308. *Brookstone Partners*, 2012 WL 5868902, at *3–4.

309. *Id.* at *6.

of Delaware corporate law.[310] But even where the case does not involve any novel aspect of law, Delaware courts have expressed their strong interest in adjudicating matters involving the internal affairs of Delaware corporations as opposed to deferring to earlier-filed actions in other jurisdictions.[311]

One notorious example involved the sale of Topps Co., which led to actions first-filed in New York and subsequent litigation in Delaware. The courts in both Delaware[312] and New York[313] refused to issue stays, leading to actively litigated parallel cases until the parties reached a settlement.[314] A more recent example in 2012–2013 involved shareholder objections to the sale of NYSE EuroNext to Intercontinental Exchange, which again resulted in parallel litigation in Delaware and New York.[315] Overall, over the years the Chancery Court has found a number of reasons to both reject the first-filed rule and justify denying a stay of Delaware litigation under *McWane*.[316] A 2013 review found no cases where a Delaware court relied exclusively on the first-filed rule in granting a stay, when the Delaware plaintiffs wished to continue the Delaware action and had not previously filed a similar representative action elsewhere.[317] This finding reflects Delaware's aggressive approach to resolving and retaining forum in parallel proceedings.

When there is no earlier-filed action in another jurisdiction, Delaware courts may invoke the doctrine of forum non conveniens (FNC). Whereas the *McWane* burden is relatively light, under FNC a defendant seeking dismissal must show that litigating in Delaware would impose an overwhelming hardship based on one or more of the multiple factors originally set forth in *Gen. Food Corp v. Cryo-Maid, Inc*.[318] "These factors include (1) the applicability of Delaware law to the controversy; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; and (4) all other practical considerations that would make the trial easy, expeditious, and inexpensive."[319] To prevail under the FNC doctrine in Delaware, a defendant must meet the high burden of showing that the *Cryo-Maid* factors weigh so heavily that the defendant will face overwhelming

310. 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 13.5 (2014). *See also* Stevelman, *supra* note 206, at 117 (arguing that the "novel issues" rationale is so malleable as to fail as a legitimate decisional criteria).

311. *See, e.g.*, Landesbank Baden-Wurttemberg v. Walton Seattle Mezz Holdings VI-B, L.L.C., No. 7933-VCG, 2013 WL 1286192, at *7 (Del. Ch. Apr. 1, 2013) (expressing "Delaware's strong interest in adjudicating matters brought before the Court involving the internal affairs of its corporate citizens").

312. *See In re* Topps Co. S'holders Litig., 924 A.2d 951, 953 (Del. Ch. 2007) (denying motion to stay or dismiss Delaware action in light of pending identical action filed in New York).

313. *See In re* Topps Co., Inc. S'holders Litig., 859 N.Y.S.2d 907, at *7 (N.Y. Sup. Ct. 2007) (denying motion to stay or dismiss consolidated shareholder class action in favor of similar class action litigation pending in Delaware Chancery Court).

314. *See* Tom Hals, *Delaware, New York Judges Clash over Control of Merger Cases*, REUTERS (Feb. 6, 2013), http://www.reuters.com/article/2013/02/06/mergers-lawsuits-idUSL1N0B49VK20130206 (discussing the parallel New York and Delaware litigation); Stevelman, *supra* note 206, at 119 (concluding that in *Topps*, the Court of Chancery "makes something akin to a universal claim of right to keep forum over Delaware corporate lawsuits in parallel proceedings").

315. Hals, *supra* note 314.

316. Badawi, *supra* note 87, at 1006.

317. Strine et al., *supra* note 82, at 52; *see also* Myers, *supra* note 82, at 521 ("Delaware courts have declined to stay Delaware actions in favor of earlier filed complaints in other states."); Palmer & Gray, *supra* note 157 ("[T]he Court of Chancery does not follow a first-filed rule.").

318. Gen. Food Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 684 (Del. 1964).

319. Brookstone Partners Acquisition XVI, LLC v. Tanus, No. 7533-VCN, 2012 WL 5868902, at *7 n.64 (Del. Ch. Nov. 20, 2012).

hardship if the lawsuit proceeds in that state.[320] The FNC law of most other jurisdictions also requires courts to weigh a number of public and private interests, and it provides courts with a great deal of discretion.[321]

The expanded use of FNC motions has been touted as one possible solution to the problem of multijurisdictional M&A litigation.[322] A fundamental problem with this solution, however, is that such motions lack predictability. Currently, FNC motions are rarely used in M&A litigation,[323] and when they are used the outcome is unpredictable,[324] just as it would be with such motions in other kinds of litigation.[325] To the extent that an outcome is predictable, it is likely that Delaware will use the FNC doctrine to retain cases filed in its courts,[326] even though in almost all cases the convenience of the parties cuts in favor of the foreign forum taking the case.[327] A somewhat contrary objection is that the FNC factors merely parrot the contemporary minimum contacts analysis by focusing upon a defendant's geographic connections to a state,[328] and therefore, may be of limited utility in determining the appropriate forum in multijurisdictional M&A litigation. Delaware Supreme Court Chief Justice Leo E. Strine, Jr. and his co-authors concluded that: "[N]either the first filed rule nor the doctrine of forum non conveniens responds to the multi-forum litigation problem in a principled manner that promotes stable and cohesive development of the law or protects parties' legitimate expectations."[329]

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320. Martinez v. E.I. DuPont De Nemours & Co., 86 A.3d 1102, 1104 (Del. 2014); *see* BALOTTI & FINKELSTEIN, *supra* note 310, at § 13.5 (2014) ("A defendant cannot prevail by showing that another forum would be more convenient or even that all six *Cryo-Maid* factors favor a dismissal, but must establish with particularity that it would suffer overwhelming hardship if forced to litigate in Delaware.").

321. Strine et al., *supra* note 82, at 72.

322. *See, e.g.*, *Justice Jack B. Jacobs: Helping to Shape Delaware Law*, METROPOLITAN CORP. COUNSEL (Apr. 28, 2014), http://www.metrocorpcounsel.com/articles/28695/justice-jack-b-jacobs-helping-shape-delaware-law (quoting former Delaware Supreme Court Justice Jack B. Jacobs for the proposition that FNC "is one doctrinal tool that the state courts can use to try to solve the multiforum problem").

323. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 21, at 9.

324. *See* Latham & Watkins LLP, *Designating Delaware's Court of Chancery as the Exclusive Jurisdiction for Intra-Corporate Disputes: A New 'Must' for Delaware Company Charter or Bylaws*, CORPORATE GOVERNANCE COMMENTARY 3 (Apr. 2010), *available at* http://www.lw.com/upload/pubContent/_pdf/pub3510_1.pdf (observing that the outcomes of FNC motions to transfer or stay shareholder actions "are not predictable").

325. In its most recent decision on FNC, the Delaware Supreme Court affirmed the dismissal of a toxic tort claim against DuPont, a Delaware corporation whose headquarters is located in Wilmington, Delaware. Martinez v. E.I. DuPont De Nemours & Co., 86 A.3d 1102, 1113 (Del. 2014). As the dissent noted, the majority opinion's real point was that "Delaware corporate law should be decided in Delaware and that other jurisdictions should 'stay in their lane.'" *Id.* at 1116 (Berger, J., dissenting).

326. *See* Stevelman, *supra* note 206, at 135 (stating that "until the Delaware Supreme Court rules otherwise, the Court of Chancery can continue to exert its authority expansively to keep forum over these cases"); Armour et al., *supra* note 12, at 1386 (observing that Delaware courts rarely grant FNC motions in favor of litigating in another state court).

327. Thomas & Thompson, *supra* note 76, at 1796.

328. Strine et al., *supra* note 82, at 76.

329. *Id.* at 54. *Accord* Palmer & Gray, *supra* note 157, at 5 ("The [FNC] doctrine is grounded in geographical convenience which has little relevance in identifying the forum most appropriate for deciding a stockholder class action or derivative suit based on intra-corporate fiduciary duty claims.").

F. State of Incorporation Rule or Legislation

A sixth proposal is for courts to adopt a rule or Congress to enact legislation requiring that M&A litigation be filed in the target company's state of incorporation. Some commentators have argued in favor of the former,[330] and a committee of the New York City Bar Association, among other groups, has suggested the latter.[331] Purported benefits of such a rule include an increase in efficiency, a decrease in undesirable tactical maneuvering, and greater comity.[332] The stated basis for such a rule is the internal affairs doctrine, which some commentators contend has a constitutional underpinning.[333] Some Delaware courts have concurred that the doctrine is rooted in the U.S. Constitution,[334] and believe this justifies the resolution of M&A litigation in the forum where the target company is incorporated.[335]

There are multiple problems with judicial adoption of a rule requiring M&A litigation to be brought where the target is incorporated. One major problem, as some proponents readily acknowledge, is that the rule would have to be "universally adopted in order to be universally effective."[336] Universal adoption is extremely unlikely, partly due to statutory developments. California, for example, enacted a statutory exception to the internal affairs doctrine.[337] California is not alone. A New York statute provides that domestic rules, *inter alia*, on shareholder rights and mergers apply to unlisted foreign companies that conduct more than one-half of their business income activities in New York.[338]

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330. *See, e.g.*, Micheletti & Parker, *supra* note 80, at 41–46 (proposing and arguing in favor of adoption of a state of incorporation rule).

331. *See* Comm. on Sec. Litig., Ass'n of the Bar of the City of New York, *supra* note 101, at 9 (stating that a "potential way to eliminate the costs of duplicative litigation would be to enact federal legislation requiring all deal litigation to be brought in the state of incorporation").

332. Micheletti & Parker, *supra* note 80, at 41.

333. *See, e.g.*, Irwin H. Warren & Seth Goodchild, *The Delaware Supreme Court Reaffirms the Primacy of the Internal Affairs Doctrine*, 17 BUSINESS & SEC. LITIGATOR 1, 10–11 (2005), *available at* http://www.weil.com/wgm/cwgmhomep.nsf/Files/BSLOct05/$file/BSLOct05.pdf (asserting that internal affairs doctrine has a constitutional basis).

334. *See, e.g.*, McDermott, Inc. v. Lewis, 531 A.2d 206, 216 (Del. 1987) ("[A]pplication of the internal affairs doctrine is not merely a principle of conflicts law. It is also one of serious constitutional proportions . . . .").

335. *See* Micheletti & Parker, *supra* note 80, at 42 ("[M]embers of the Delaware Court of Chancery that have analyzed this issue have strongly indicated their belief that the constitutional underpinnings of the internal affairs doctrine warrants deal litigation being resolved in the forum where the subject company is incorporated.").

336. *Id.* at 46.

337. *See* CAL. CORP. CODE § 2115 (West 2010). Under section 2115, enumerated provisions of California's corporate law govern a company incorporated in another state if: (1) California residents hold more than half of the company's voting stock, (2) the company conducts a majority of its business in California (as measured by its assets, payroll, and sales), and (3) the company's shares are not listed or traded on a national exchange. The provisions of California corporate law imposed by section 2115 are often contrary to the corporate law of a foreign company's home state. For example, California law mandates cumulative voting for the election of directors, whereas Delaware law permits, but does not mandate, such voting. Jeffrey Selman & J.R. Eppler, *Cutting Down California's Long-Arm Statute*, LAW360 (July 11, 2012, 2:05 PM), *available at* http://www.crowell.com/files/Cutting-Down-Californias-Long-Arm-Statute.pdf. The Delaware Supreme Court held that section 2115 violates "Delaware's well-established choice of law rules and the federal constitution . . . ." VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1116 (Del. 2005); *but see* Matt Stevens, Note, *Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. REV. 1047, 1047 (2007) (critiquing *VantagePoint*).

338. N.Y. BUS. CORP. LAW §§ 1319, 1320 (McKinney 2012).

Moreover, the notion that the internal affairs doctrine has a constitutional basis is far from settled. Many scholars believe it has no such basis.[339] Given the unsettled nature of the doctrine's underpinning, it would be easy for non-Delaware courts seeking to retain M&A litigation to justify rejecting a state of incorporation rule. This is especially true for those non-Delaware judges who chafe under the constant refrain that only Delaware judges are truly capable of applying Delaware corporate law or are opposed to such a rule for public policy reasons. Finally, it is difficult to see exactly how the internal affairs doctrine provides support for legislation requiring plaintiffs to commence M&A litigation where the target is chartered, insofar as the doctrine governs only choice of law.[340] It is not jurisdictional.

A second major problem with a state of incorporation rule or statute is that such a rule or law, like many of the alternate proposals reviewed herein, would clearly favor Delaware as the presumptive M&A litigation forum. As such, it would enhance Delaware judiciary's widely perceived pro-management bias[341] and deprive plaintiffs of the opportunity to seek a jury trial and punitive damages in other jurisdictions. The likely net result is that legislation would be politically unsustainable.[342] The counterargument that jury trials are a poor idea because jurors are biased against corporations merits scant attention. There is very little empirical evidence of jurors' bias against corporate defendants.[343] The additional counterargument—that juries are irrelevant because M&A litigation almost never goes to trial[344]—also deserves to be dismissed. What matters is the opportunity for a jury to resolve these cases and the possibility of an award of exemplary damages.

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339. *See, e.g.*, Christoph Allmendinger, *Company Law in the European Union and the United States: A Comparative Analysis of the Impact of the EU Freedoms of Establishment and Capital and the U.S. Interstate Commerce Clause*, 4 WM. & MARY BUS. L. REV. 67, 84 (2013) ("In sum, the question of whether the internal affairs doctrine is a constitutional principle mandated, inter alia, by the dormant Interstate Commerce Clause remains unresolved in the U.S."); Reza Dibadi, *(Mis)Conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731, 758 n.115 (2013) ("The internal affairs doctrine, however, does not rise to the level of constitutional imperative."); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 597 (2003) ("[T]he internal affairs doctrine is just an understanding, not a crisp constitutional rule . . . ."); Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for its Continued Primacy*, 115 HARV. L. REV. 1480, 1482 (2002) [hereinafter Note, *The Internal Affairs Doctrine*] ("[A]lthough there have been some suggestions over the years—primarily by the Delaware Supreme Court—that the [internal affairs] doctrine has a constitutional basis, the bulk of these arguments appear spurious."); Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CAL. L. REV. 29, 35 (1987) ("[T]he constitutional 'Delawarization' of state corporation law . . . is not what *CTS* intends or effects."). In *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88–89 (1987), the Supreme Court hinted at a dormant Commerce Clause basis for the internal affairs doctrine. It did so as well in a prior case. Edgar v. MITE Corp., 457 U.S. 624, 645–46 (1982). But both of these hints were mere dicta. *See, e.g.*, Note, *The Internal Affairs Doctrine*, *supra*, at 1495 ("[T]he Supreme Court's broad references to the constitutional status of the internal affairs doctrine in MITE were merely dicta . . . .").

340. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971); Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 56 (2012).

341. *See* Griffith & Lahav, *supra* note 90, at 1112 ("A Delaware monopoly over merger litigation[] threatens to increase the state's promanagement bias, leading to worse outcomes for plaintiffs . . . .").

342. *See* Grundfest & Savelle, *supra* note 105, at 351 ("It is, however, far from clear that such a measure would be politically sustainable . . . .").

343. Stevelman, *supra* note 206, at 101.

344. *See* Thomas & Thompson, *supra* note 76, at 1797 n.239 ("Almost no cases go to trial . . . .").

G. Scrutiny of Attorneys' Fees

Another perspective is that the only viable solution is for judges to shift attorneys' fees in M&A litigation to discourage overuse or abuse of the class action device while encouraging meritorious litigation.[345] Under the American rule, parties generally bear their own attorneys' fees and costs,[346] on the basis that a potential plaintiff should not be discouraged by the possibility of losing the case and having to cover the defendant's expenses. An equitable exception to the American rule provides for fee-shifting under the "common fund" doctrine, which was developed to prevent a plaintiff from being likewise discouraged when the benefits of winning the case will inure to others.[347] A widely recognized corollary to the common fund doctrine is the "common benefit" or "corporate benefit" doctrine,[348] pursuant to which a plaintiff stockholder may receive an award of attorneys' fees when the litigation provides a substantial benefit to the corporation regardless of whether the benefit is pecuniary in nature.[349] Supplemental disclosures can constitute a common benefit[350] and plaintiffs' attorneys in M&A litigation rely on the doctrine to shift fees in exchange for the disclosures they achieve for the shareholder class.[351] Many critics believe the doctrine provides a perverse incentive for counsel to file suit early and often.[352]

State and federal courts in the United States have widely adopted the corporate benefit doctrine.[353] Delaware is among the states that adopted the doctrine. In Delaware, the court may award attorneys' fees in M&A cases in connection with claims brought individually,

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345. *See* Dias v. Purches, No. 7199VCG, 2012 WL 4503174, at *5 (Del. Ch. Oct. 1, 2012) (stating that "[i]t is the ability of bench judges over many diverse jurisdictions to shift fees in a way that discourages overuse or abuse of the class action mechanism while encouraging meritorious suits").

346. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717–18 (1967) ("The [American rule] has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore.").

347. *Id.* at 719.

348. *See, e.g.*, *Dias*, 2012 WL 4503174, at *5 ("Under the corporate benefit doctrine, plaintiffs may be reimbursed for attorneys' fees and expenses in corporate litigation.").

349. Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 395 (1970). *See also* Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 25 (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496395 (noting that common fund and corporate benefit doctrines are not interchangeable, and when the only relief is non-pecuniary, fees can only be awarded on the basis of the latter).

350. *See In re* PAETEC Holding Corp. S'holders Litig., No. 6761-VCG, 2013 WL 1110811, at *7 (Del. Ch. Mar. 19, 2013) ("In this case, I find that the supplemental disclosures qualify as a common benefit . . . ."); Jason W. Adkins, Note, *A Guide to Predicting the Calculation of Attorneys' Fees Under Delaware Law for Shareholder Suits*, 37 DEL. J. CORP. L. 501, 520 (2012) (noting that supplemental disclosures are the most common non-monetary result of successful shareholder litigation).

351. Koji F. Fukumura & Peter M. Adams, *Update on Corporate Governance Litigation: M&A and Proxy Strike Suits*, COOLEY LLP 2 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013_corporate_counselcleseminar/7_2_update_on_corporate_governance.authcheckdam.pdf.

352. *See, e.g.*, Peter Wald & Michele Johnson, *Taking a Second Look at the Corporate Benefit Doctrine*, DELAWARE BUSINESS COURT INSIDER (Jan. 8, 2014), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.lw.com%2FthoughtLeadership%2Ftaking-a-second-look-at-the-corporate-benefit-doctrine&ei=YQ0vU9aNA4X20gHXroDwDw&usg=AFQjCNHiqB3cY70pACPVOlAyjjiFeWyjSQ&bvm=bv.63556303,d.dmQ (discussing perverse incentives of the corporate benefit doctrine).

353. Griffith, *supra* note 349, at 45.

derivatively, or as a class action.[354] Once the court has identified a corporate benefit, the plaintiff may be entitled to an award of fees if: "(1) the [lawsuit] was meritorious when filed; (2) the action producing [the corporate benefit] was taken by the defendant[] before a judicial resolution [occurred]; and (3) the resulting corporate benefit was causally related to the [suit]."[355] If the claim satisfies those factors and the court decides to make a fee award, the court must then determine the amount of the award.

In general, courts have broad discretion to make an award of attorneys' fees in M&A litigation. In many states, including California, the discretion to award fees is guided by a lodestar analysis,[356] which begins by multiplying the number of hours counsel devotes to the litigation by counsel's hourly rate.[357] The court may increase or decrease the lodestar figure depending on various factors.[358]

Delaware does not use a lodestar approach to determine the amount of the fee award. Instead, Delaware courts use a seven-factor analysis, set forth by the Delaware Supreme Court in *Sugarland Indus., Inc. v. Thomas*,[359] which typically assigns the most weight to the seventh factor—the size of the benefit conferred on the shareholders.[360] Delaware also considered awards in prior cases where similar disclosures were obtained.[361] Delaware's approach had been widely perceived to be more generous than the lodestar approach other jurisdictions use.[362] Some recent statistics confirm this perception. In 2012, the mean attorneys' fee award in an M&A case filed in Delaware was $1.26 million, compared to a

354. *In re* First Interstate Bancorp Consol. S'holder Litig., 756 A.2d 353, 357 (Del. Ch. 1999).

355. United Vanguard Fund, Inc. v. TakeCare, Inc., 693 A.2d 1076, 1079 (Del. 1979).

356. *See* Armour et al., *supra* note 12, at 1370 (stating that courts in most states use a lodestar analysis).

357. *See* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."); PersonalWeb Tech., LLC v. Google, Inc., No. C13-01317 EJD (HRL), 2014 WL 4090588, at *1 (N.D. Cal. Aug. 20, 2014).

358. These factors include: (1) the novelty and difficulty of the litigation's legal issues; (2) counsel's skill in addressing the issues; (3) the extent to which the nature of the litigation precluded other employment by counsel; and (4) the contingent nature of the fee award. Ketchum v. Moses, 17 P.3d 735, 741 (Cal. 2001).

359. Sugarland Indus., Inc. v. Thomas, 420 A.2d 142, 143 (Del. 1980). Many of the *Sugarland* factors are derived from Model Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct. *See* Aveta, Inc. v. Bengoa, No. 3598-VCL, 2010 WL 3221823, at *5 (Del. Ch. Aug. 13, 2010) ("The Sugarland factors are 'virtually identical' to [the] factors in Rule 1.5(a)."); DEL. LAWYERS' R. OF PROF'L CONDUCT § 1.5(a) (2010).

360. *In re* PAETEC Holding Corp. S'holders Litig., No. 6761-VCG, 2013 WL 1110811, at *7 (Del. Ch. Mar. 19, 2013). The remaining factors include: the amount of time and effort applied to the case by plaintiffs' counsel, the standing and ability of plaintiffs' counsel, the contingent nature of the litigation, the stage at which the litigation terminated, and whether plaintiff can properly receive all of the credit for the benefit conferred. *Id.*

361. Edward B. Micheletti et al., *Valuing Therapeutic Benefits for an Award of Attorneys' Fees Post-In re* Compellant Technologies Shareholder Litigation, 17 M&A LAWYER 1, 4 (2013), *available at* http://www.skadden.com/sites/default/files/publications/MandA_Lawyer_Valuing_Therapeutic_Benefits_For_an_Award_of_Attorneys_Fees.pdf ("Fees for therapeutic benefits are generally based on precedent fee awards."); *see generally* Richard B. Kapnick et al., *Evaluating Attorney Fee Requests in Mergers & Acquisitions Litigation*, 14 BNA MERGERS & ACQUISITIONS LAW REP. (2011), *available at* http://www.sidley.com/files/Publication/4f236b95-7d0a-4ccd-8bd3-57e1b77a603b/Presentation/PublicationAttachment/9c6f766d-3d2f-4c40-8353-5851636d0ebb/Evaluating%20Attorney%20Fee%20Requests%20in%20MA%20Lit.pdf (discussing attorneys' fee requests in M&A litigation).

362. John Armour et al., *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 643 (2012); *but cf.* Micheletti & Parker, *supra* note 80, at 39 (asserting that "Delaware courts have historically been conservative when approving fee awards for disclosure-based or other therapeutic settlements").

general sample average of $716,000.[363] Defendants often agree not to oppose the fee application in connection with settlements of M&A litigation,[364] and historically the Court of Chancery approved the full amount of the attorneys' fees the parties agreed to in settling both class actions and derivative suits.[365]

Beginning in 2000, however, Delaware courts began to examine fee awards in M&A cases more carefully. Some observers point to *In re Digex Inc. Shareholders Litigation*[366] as a turning point. In that case, Chancellor Chandler reduced a $24.75 million fee to $12.3 million after the plaintiffs obtained a $180 million settlement. Other cases followed with fee cuts, skeptical rhetoric on the part of Delaware judges, or both.[367] *Digex* may have been a turning point, but the practice of Delaware courts to reduce fee awards did not begin in earnest until 2011, when the Court of Chancery slashed a fee award from the requested $750,000 to $75,000 in *In re Sauer-Danfoss Inc. Shareholders Litigation*.[368]

Delaware courts' greater scrutiny of fee awards in M&A litigation could reduce the incentive for plaintiffs' lawyers to file suit in Delaware courts in cases involving Delaware targets.[369] But such a reduced incentive is unlikely to have a significant impact on the problem of multijurisdictional M&A litigation. While specific examples of Delaware fee reductions can be found during the period commencing in 2000, there is no evidence to indicate that, as a general proposition, Delaware courts are examining fee awards with such care that reductions have become commonplace.[370] Delaware judges do not routinely demand to examine detailed time sheets when reviewing fee applications[371] and they continue to regard a fee of $400,000–$500,000 as the standard rate[372] for a settlement that

363. Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2012* 5 (Feb. 1, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216727. The situation is different with respect to disclosure-only settlements. *See* Koumrian, *supra* note 56, at 3 ("Over the last four years (2010–2013), fees requested and approved in disclosure-only settlements were, on average, slightly lower in the Delaware Court of Chancery compared with other courts.").

364. Ronald Barusch, *Dealpolitik: Junk Settlements and Improving Incentives in Class Action Litigation*, WALL ST. J. (Aug. 20, 2012, 12:35 PM), http://blogs.wsj.com/deals/2012/08/20/dealpolitik-junk-settlements-and-improving-incentives-in-class-action-litigation/.

365. Armour et al., *supra* note 362, at 643.

366. *In re* Digex Inc. S'holders Litig., 789 A.2d 1176 (Del. Ch. 2000).

367. *See* Armour et al., *supra* note 362, at 644 n.76 (listing Delaware cases in which fees were reduced); RICHARD A. ROSEN ET AL., SETTLEMENT AGREEMENTS IN COMMERCIAL DISPUTES § 27.10 (2013) ("Recently the court has given much closer scrutiny to therapeutic benefits before approving a settlement and application for attorneys' fees.").

368. *In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1119 (Del. Ch. 2011). In appendices to this case the court set forth ranges of attorneys' fees awarded for disclosures of questionable quality ($75,000–$225,000), one or two meaningful disclosures ($300,000–$550,000), and exceptional or significant additional disclosures ($800,000–$1,200,000). *Id.* at 1141.

369. Armour et al., *supra* note 362, at 645.

370. *See* Griffith, *supra* note 349, at 28 ("Fee reductions, however, are not likely to solve the crisis in shareholder litigation because they are *ad hoc* and scattered, more the luck of the judicial draw than a comprehensive program of [] reform.").

371. *See* Fukumura & Adams, *supra* note 351, at 5.

372. *See* Nate Raymond, *Alison Frankel's On The Case: Don't Mess with Texas (if You're a Lawyer for Plaintiffs in an M&A Case*), ON THE CASE (Oct. 9, 2012), http://newsandinsight.thomsonreuters.com/Legal/News ("[T]he Delaware bench regards a fee of $400,000 to $500,000 as the going rate for a settlement that provides one or two 'meaningful' disclosures in a proxy statement."); *but cf.* Karlee Weinmann, *Chancery's Appetite for Fee Awards Wanes as Deal Suits Rise*, LAW360 (Apr. 23, 2014, 5:51 PM), http://www.law360.com/articles/530863/chancery-s-appetite-for-fee-awards-wanes-as-deal-suits-rise (access

provides one or two meaningful disclosures in a proxy statement.[373] That rate, which is especially significant to defendants in the context of a small-cap M&A transaction,[374] provides little incentive for plaintiffs' counsel to reduce their Delaware filings.[375]

To the extent that Delaware courts begin to scrutinize fee awards ever more carefully, that will simply increase the incentive for plaintiffs' counsel to file in other states, where review may be less intense.[376] Delaware courts are aware of this incentive. They have made some massive fee awards in recent M&A cases,[377] and these awards may have been a strategic response to the observed phenomenon of plaintiffs opting to file in other jurisdictions where fees have been less carefully examined.[378] Delaware courts are highly motivated to retain jurisdiction over major M&A cases for multiple reasons. One reason is that such litigation supports the Delaware Bar—a leading local industry.[379] A second is

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required) (noting that more recently Vice Chancellor J. Travis Laster has "walked back on that range after it became something of an implied benchmark for litigants looking for disclosure-based settlements").

373. *See* Dias v. Purches, Civil Action No. 7199-VCG, 2012 WL 4503174, at *6 (Del. Ch. Oct. 1, 2012) (stating that '"[t]his Court has often awarded fees of approximately $400,000 to $500,000 for one or two meaningful disclosures, such as previously withheld projections'" (citing *In re* Sauer-Danfoss Inc. S'holders Litig., 2011 WL 2519210, at *18 (Del. Ch. Apr. 29, 2011)). Meaningful disclosures ordinarily include previously withheld financial projections, bankers' analyses, and conflict-oriented information about fiduciaries or their advisors. *See* Phillip R. Sumpter, *Adjusting Attorneys' Fees Awards: The Delaware Court of Chancery's Answer to Incentivizing Meritorious Disclosure-Only Settlements*, 15 U. PA. J. BUS. L. 669, 709–10 (2013). Where the consideration for a settlement in deal litigation is monetary, rather than therapeutic benefits, the fee award is typically expressed as a percentage of the benefit obtained. During the period of 2005–2011, the average fee award in Delaware M&A settlements involving only monetary consideration was 24% of the benefit conferred. RICHARD A. ROSEN ET AL., *supra* note 367, at § 27.10.

374. *See* Steven M. Haas, *The Small-Cap M&A Litigation Problem*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (July 31, 2013, 9:11 AM), https://blogs.law.harvard.edu/corpgov/2013/07/31/the-small-cap-ma-litigation-problem/ (noting that while larger companies view expenses associated with deal litigation as an acceptable transaction cost, such expenses can be material relative to small-cap deals); Craig Barner, *Big Acquisitions a Hotbed of Lawsuits*, FORBES (May 1, 2013, 12:37 PM), http://www.forbes.com/sites/mergermarket/2013/05/01/big-acquisitions-a-hotbed-of-lawsuits/ (noting that litigation could deter mid-cap and small-cap deals).

375. *See* Raymond, *supra* note 372 ("At those rates [of $400,000–$500,000 for one or two meaningful disclosures] it's well worth lawyers' time to bring M&A disclosure suits."); *but cf.* Bradley W. Voss, *Delaware Chancery Emphasizes Materiality as Key in Disclosure-Based M&A Settlements*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb. 21, 2014, 9:02 AM), https://blogs.law.harvard.edu/corpgov/2014/02/21/delaware-chancery-emphasizes-materiality-as-key-in-disclosure-based-ma-settlements/ ("Several recent statements by the court emphasize, however, that fee awards in the $400,000 to $500,000 range should not be perceived as automatic, or the 'default.'").

376. *See* Coffee, *supra* note 55, at 390 ("[R]educing fee awards increases the incentive for relatively mobile plaintiffs' attorneys to sue outside of Delaware.").

377. In *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), the Delaware Supreme Court approved a fee award of $305 million in a derivative action with claims for breach of fiduciary duty. The fee award was 15% of the $2 billion damage award and was the largest fee award ever made in a shareholder derivative action. Joe Palazzolo, *How Much Is $300 Million in Attorneys' Fees?*, WALL ST. J. LAW BLOG (Dec. 28, 2011, 12:21 PM), http://blogs.wsj.com/law/2011/12/28/how-much-is-300-million-in-attorneys-fees/. In approving this fee award the Delaware Supreme Court declined to apply a suggested "megafund rule" that would cap fees at a low percentage when the damage award is substantial. The court stated that it would not "impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in megafund cases." *Americas Mining*, 51 A.3d at 1261.

378. *See* McCormick et al., *supra* note 206, at 70 ("[I]t seems possible that the Delaware courts have recently supported substantial fee awards strategically in response to evidence that they have lost cases that they previously would have heard . . . .").

379. Coffee, *supra* note 55, at 388.

that Delaware judges want to maintain their elite status, and the best way to accomplish that is by handling a steady flow of cases that involve large deals and/or are likely to generate important precedents.[380]

One other recent development in Delaware is germane to this analysis. In 2014, the Delaware Supreme Court held in *ATP Tour, Inc. v. Deutscher Tennis Bund* that a non-stock corporation's bylaw that eschewed the American rule and shifted litigation expenses, including attorneys' fees, to the losing plaintiff in intra-corporate litigation was permissible under the DGCL.[381] The court held: "A fee-shifting bylaw . . . is facially valid. Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws."[382] The court stated that whether a fee-shifting bylaw is enforceable depends on the manner in which it was adopted and the circumstances under which it was invoked. Specifically, a fee-shifting bylaw may be enforceable if adopted by the appropriate corporate procedures and for a proper corporate purpose.[383] Among other authorities, the court cited *Boilermakers*[384] to support its decision. The court issued its decision in the context of a non-stock corporation, but the opinion may be equally applicable to traditional stock corporations.[385]

Two weeks after the court issued the *ATP Tour* decision, the Corporation Law Section of the Delaware State Bar Association proposed an amendment to the DGCL—Senate Bill 236[386]—that was intended to limit the applicability of the decision to non-stock corporations.[387] One obvious concern was that the widespread adoption of fee-shifting bylaw provisions "could drastically reduce the ability of stockholders to bring even meritorious claims"[388] and thereby diminish Delaware's preeminence in the field of

380. *See* Armour et al., *supra* note 12, at 1381.

381. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014).

382. *Id.* at 558.

383. *Id.* at 559.

384. *Id.* at 560 n.38.

385. Some commentators have assumed equal applicability. *See, e.g.*, Gibson, Dunn & Crutcher LLP, *supra* note 47, at 16 ("[I]t is unclear whether *ATP*'s rule applies to stock corporations as well as non-stock corporations, though the court's reasoning strongly suggests that it does."); Paul, Weiss, Rifkind, Wharton & Garrison LLP, Client Memorandum, *Delaware Supreme Court Finds Fee-Shifting Bylaws Permissible* (May 9, 2014), http://www.paulweiss.com/media/2495878/9may14alert.pdf ("[T]he holding [in *ATP Tour*] may be read to apply to all Delaware corporations."). However, no court had made such a determination by November 2014.

386. S.B. 236, 147th Gen. Assemb., Reg. Sess. (Del. 2014).

387. Kevin M. LaCroix, *Delaware Legislative Revision Proposed to Restrict Fee-Shifting Bylaws*, D&O DIARY (May 28, 2014), http://www.dandodiary.com/2014/05/articles/corporate-governance/delaware-legislative-revision-to-restrict-fee-shifting-bylaws-introduced/.

388. George S. Geis, *Shareholder Derivative Litigation and the Preclusion Problem*, 100 VA. L. REV. 261, 292 (2014) (noting that fee-shifting "may put an enormous damper" on shareholder derivative litigation); Karen Weinmann, *Del. Attys. Push to Shield Stock Cos. from Fee-Shifting Ruling*, LAW360 (May 22, 2014, 6:02 PM), http://www.law360.com/articles/540901/del-attys-push-to-shield-stock-cos-from-fee-shifting-ruling (access required); Brian JM Quinn, *ATP, Fee Shifting, and Transactional Litigation*, M&A LAW PROF BLOG (May 28, 2014), http://lawprofessors.typepad.com/mergers/2014/05/atp-fee-shifting-and-transactional-litigation.html ("Clearly, such a bylaw, if adopted and upheld, would bring the transaction-related litigation train to a screeching halt or at the very least dramatically alter the settlement dynamics."). Both ISS and Glass Lewis oppose fee-shifting bylaws. Pursuant to its 2015 *Proxy Voting Guidelines Updates*, ISS will recommend that shareholders vote against bylaws that mandate fee-shifting whenever plaintiffs are not completely successful on the merits. Institutional Investor Services, *supra* note 230, at 7. Glass Lewis & Co. "strongly opposes" the adoption of fee-shifting bylaws and if they are adopted without shareholder approval will recommend voting against the company's governance committee. Glass Lewis, *supra* note 231, at 40.

corporate law. A second concern was that fee-shifting would undermine the limited liability protections the DGCL affords to shareholders. However, the Senate withdrew Senate Bill 236 following substantial lobbying by the pro-business U.S. Chamber Institute for Legal Reform.[389] The Senate withdrew the proposed amendment in favor of Senate Joint Resolution No. 12,[390] which postponed consideration of fee-shifting until at least 2015.[391] In the interim, mostly smaller stock corporations—emboldened by *ATP Tour*—began to adopt fee-shifting bylaws.[392] During the period from May to September 2014, 24 public companies adopted bylaws or charter provisions mandating that an unsuccessful plaintiff in shareholder litigation must pay the attorneys' fees (and expenses) of all defendants, and the adoption trend was accelerating during that period.[393]

Texas, second to California as the home of the most Fortune 500 companies,[394] has taken a different path from the one Delaware pursued. In 2003, the Texas Supreme Court amended Rule 42 of the Texas Rules of Civil Procedure to adopt a lodestar approach to fee determinations. Section (i)(2) of the amended Rule, regarding class actions, also provides that "[i]f any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class."[395] In 2013, the Fourteenth District Texas Court of Appeals held in *Kazman v. Frontier Oil Corp*.[396] that Rule 42(i)(2) applied to preclude the award of attorneys' fees in cash to class counsel when the class received injunctive relief in the form of additional disclosures but no cash and unanimously struck a $612,500 fee.[397] *Kazman* followed the lead the Fifth District Texas Court of Appeals established in 2012 when it struck a $1.1 million fee award in a

389. *See* Paul, Weiss, Rifkind, Wharton & Garrison LLP, *Delaware Supreme Court Finds Fee-Shifting Bylaws Permissible*, DELAWARE M&A Q. (2014), http://www.paulweiss.com/media/2552912/10jul14del.pdf (noting that the Delaware legislation "originally fast-tracked for passage in June [2014], was delayed due in part to heavy lobbying by various interests").

390. S.J. Res. 12, 147th Gen. Assemb., Reg. Sess. (Del. 2014).

391. Stephen F. Arcano et al., *Fee-Shifting Bylaws: The Current State of Play*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (June 20, 2014), https://www.skadden.com/insights/fee-shifting-bylaws-current-state-play. In September 2014, Oklahoma became the first state to legislatively intervene in the debate when it enacted a bill requiring fee-shifting in derivative suits. The Oklahoma statute is both narrower than the *ATP Tour* decision, insofar as the legislation only applies to derivative suits, and more balanced, insofar as it provides for an award of expenses (including attorneys' fees) to successful shareholder plaintiffs. J. Robert Brown, Jr., *Fee-Shifting in Derivative Suits and the Oklahoma Legislature*, THERACETOTHEBOTTOM.ORG (Sept. 24, 2014, 6:00 AM), http://www.theracetothebottom.org/home/fee-shifting-in-derivative-suits-and-the-oklahoma-legislatur.html.

392. *See* Tom Hals, *US Companies Adopt Bylaws that Could Quash Some Investor Lawsuits*, REUTERS.COM (July 7, 2014, 4:01 PM), http://www.reuters.com/article/2014/07/07/usa-litigation-companies-idUSL2N0PE1YZ20140707 (reporting that at least six smaller companies had adopted such bylaws by July 2014).

393. John C. Coffee, Jr., *Fee-Shifting and the SEC: Does It Still Believe in Private Enforcement?*, 53 BANK & CORP. GOV. LAW. REP. 7, 7–8 (Nov. 2014), *available at* http://www.lawreporters.com/feeshifting.pdf (noting that by the end of September 2014, "adoption of fee-shifting provisions was occurring on a virtually daily basis").

394. *See* Joel C. Haims & James J. Beha II, *Recent Decisions Show Courts Closely Scrutinizing Fee Awards in M&A Litigation Settlements*, MORRISON & FOERSTER LLP 4 (2013), http://www.mofo.com/files/Uploads/Images/130418-In-the-courts.pdf (noting that Texas is home to the second-most Fortune 500 companies).

395. TEX. R. CIV. P. § 42(I)(2).

396. Kazman v. Frontier Oil Corp., 398 S.W.3d 377 (Tex. App. 2013).

397. *Id.*

disclosure-only settlement concerning the merger of Centex Corporation and Pulte Homes.[398]

Kazman and *Centex* may operate as major disincentives to the commencement of M&A litigation in Texas. If, as speculated, fee awards in disclosure-only Texas settlements "become as much of a bygone Texas as cattle drives through Fort Worth,"[399] then plaintiffs may shift their M&A filings elsewhere.[400] But this is not inevitable. In an effort to circumvent *Kazman* and *Centex*, some plaintiffs have commenced direct action suits seeking to enjoin shareholder votes on mergers, in lieu of filing class actions.[401] On its face, Rule 42(i)(2) only applies to class actions. Accordingly, settlements of direct action suits could encompass significant fee awards, thereby restoring plaintiffs' incentive for making Texas state filings. An alternative effect of *Kazman* and *Centex* may be to encourage class litigants to pursue their merger objection lawsuits in federal court in Texas, where Rule 42 has no application.[402] Under any of these scenarios M&A litigation is unlikely to decrease, just as it is unlikely to ebb in Delaware.

IV. A BETTER SOLUTION—AMENDMENT OF 28 U.S.C. § 1407

The amendment of 28 U.S.C. § 1407 is a better solution. That statute provides for the temporary transfer of civil actions pending in different federal districts and involving one or more common questions of fact to a single district for pretrial management by a single judge. The statute provides in section 1407(a) that:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.[403]

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398. Rocker v. Centex Corp., 377 S.W.3d 907 (Tex. App. 2012), *review granted, judgment vacated, and remanded by agreement* (Nov. 30, 2012).

399. Raymond, *supra* note 372; *accord* Haims & Beha, *supra* note 394 ("*Kazman* effectively precludes merger litigation in Texas.").

400. Raymond, *supra* note 372 (quoting Texas attorney Harry Susman for the proposition that either plaintiffs will decline to file in Texas, or if they do file, plaintiffs' lawyers will refuse to settle in the absence of a monetary award).

401. Nate Raymond, *Another Texas Appeals Court Says No to Fees in Disclosure-Only M&A Cases*, ON THE CASE (Mar. 28, 2013), http://www.acq5.com/another-texas-appeals-court-says-no-fees-in-disclosure-only-ma-cases/.

402. David Sterling & Danny David, *Securities Litigation Update: Recent Texas Appellate Opinion Removes Incentive for Shareholders' Counsel to Settle Merger Lawsuits on the Basis of Additional Disclosures*, BAKER BOTTS (Aug. 22, 2012), http://www.bakerbotts.com/file_upload/Update201208Lit-RecentTexasAppellateOpinion.htm ("We expect *Centex* to have the perverse result of encouraging class litigants to pursue their claims in the federal courts of Texas . . . .").

403. 28 U.S.C. § 1407(a) (2014). Many states have enacted mini-MDL statutes which in certain respects mimic section 1407. *See* Ostolaza & Hartmann, *supra* note 31, at 69–74 (identifying 15 states with mini-MDL statutes). In other respects the mini-MDLs differ significantly from their federal counterpart. For example, some of the state versions permit coordination for both pre-trial and trial purposes, whereas the federal MDL permits only the former. Mark Herrmann et al., *Creating Mini-MDL Statutes*, 32 LITIG. 39, 39 (Fall 2005), *available at*

The JPML is a group of seven United States circuit and district court judges whom the Chief Justice of the United States Supreme Court chooses for service, with no limitation on their terms,[404] while they remain on their respective courts. Congress created the JPML in 1968 for the primary purpose of providing centralized management under court supervision of pretrial proceedings in multidistrict litigation (MDL) in order to assure the just and efficient conduct of such actions.[405] The text of 28 U.S.C. § 1407 refers only to transfers for pretrial proceedings, and once a transfer occurs the transferee judge handles all discovery matters, pretrial motions, and pretrial alternative dispute resolution. While the text is limited, in practice, once the JPML orders a transfer, a case rarely comes back to its original district for trial.[406]

Transfers under 28 U.S.C. § 1407 are made without consideration for either personal jurisdiction over the parties or the venue requirements of 28 U.S.C. § 1407. Instead, the JPML, functioning as the federal judiciary's traffic controller,[407] considers only two issues in resolving transfer motions in new dockets. First, the panel considers whether common questions of fact among pending civil actions exist such that centralization of those actions in a single district will further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions.[408] Second, the panel considers which federal

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http://www.jonesday.com/files/Publication/43684faa-fd6c-4990-a5b6-4ccb608b7391/Presentation/PublicationAttachment/58687413-88b1-4620-897b-73e2108eaa8e/Herrmann_012006pdf.pdf

404. In June 2000, then-Chief Justice William H. Rehnquist established staggered seven-year terms for each panel member. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2227 (2008). Chief Justice John Roberts has continued that practice. *Id.*

405. CHARLES ALAN WRIGHT ET AL., 15 FED. PRAC. & PROC. JURIS. § 3862 (4th ed.) (database updated Apr. 2014).

406. Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIG. 497, 498 (2013); *see* Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 317 (2009) (noting that less than 20% of cases are remanded to the transferor district). In *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 956 (1998), the Supreme Court held that the statute must be applied according to its literal language, thereby rejecting the general practice of transferee courts to retain coordinated cases after all pretrial procedures had been completed. Following *Lexecon*, the JPML Rules of Procedure were revised to match its holding. Courtney E. Silver, Note, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the* Lexecon *Result*, 70 OHIO ST. L.J. 455, 466 (2009). Proposals to overturn *Lexecon* have been endorsed by the JPML and the Judicial Conference of the United States but have failed as bills in Congress. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2217 (2008).

407. Todd G. Cosenza & Christopher J. Miritello, *The Case for the Automatic Multidistrict Litigation Stay*, NEW YORK LAW JOURNAL (June 11, 2009), *available at* http://www.willkie.com/~/media/Files/Publications/2009/06/The%20Case%20for%20the%20Automatic%20Multidistrict%20Litigat__/Files/The%20Case%20for%20the%20Automatic%20Multidistrict%20Litigat__/FileAttachment/The%20Case%20for%20the%20Automatic%20Multidistrict%20Litigat__.pdf.

408. *See* 28 U.S.C. § 1407(a) (providing that transfers may be made if the JPML determines that transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions). The JPML broadly interprets the requirement of common questions of fact. Ostolaza & Hartmann, *supra* note 31, at 52. The pending civil actions need not share common questions of law in order for consolidation to occur. *See, e.g.*, *In re* M3 Power Razor Sys. Mktg. & Sales Practices Litig., 398 F. Supp. 2d 1363, 1364 (J.P.M.L. 2005) (stating that "the presence of differing legal theories is outweighed when the underlying actions . . . arise from a common factual core").

district judges are best situated to handle the transferred matters.[409] As to the latter issue, neither section 1407 nor the JPML's own rules provide any guidance. The concurrence of four of the seven panelists is required for any action to occur.[410]

The JPML exercises broad discretion in deciding transfer motions[411] and that discretion is usually exercised in favor of transfer. During the 2000–2007 period, the grant rate ranged between 67% and 87%,[412] although more recently it declined to about 55%.[413] Appeal is available only by petition for a writ of mandamus or prohibition.[414] To date, there have been no successful appeals.[415] The overall result is that approximately one-third of all pending federal civil cases are part of MDL[416] and in the JPML's nearly 50 years of existence, it has consolidated almost 400,000 lawsuits for pretrial proceedings.[417] Such litigation has been called the "primary vehicle for the resolution of complex civil cases."[418]

Congress should amend 28 U.S.C. § 1407 to provide the JPML with authority to transfer civil litigation that is pending in different states to a single state for pretrial management and trial by a single state court, subject to certain criteria. The same statutory criteria that currently condition transfers of federal cases should apply to state transfers. Specifically, for a transfer to occur under this proposal, there must be common questions of fact among pending civil actions such that centralization of those actions in a single district will further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions. With respect to M&A litigation, this Article contemplates that such transfer authority would be limited to deals valued at more than $100 million that involve publicly traded target companies with an offering price of at least five dollars per share. This proposal does not contemplate that the JPML would receive authority to transfer state cases to federal court. However, it does contemplate that such cases would be transferred for both pretrial proceedings and trial.

Authorizing the JPML to transfer M&A litigation will solve the multijurisdictional M&A problem while avoiding the negative aspects of many of the alternative proposals. Coordinating every M&A action arising from a single deal in one court, before one judge, would virtually eliminate the risk of inconsistent rulings.[419] Judicial efficiency will increase and litigation expense will decline as costly duplicative discovery and motion

409. Heyburn, *supra* note 404, at 2227. The statute itself is silent as to where consolidation, if granted, should occur.

410. 28 U.S.C. § 1407(d).

411. Richards, *supra* note 406, at 315.

412. Heyburn, *supra* note 404, at 2229.

413. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIG. 26, 30 (Summer/Fall 2012), *available at* http://www.americanbar.org/publications/litigation_journal/2011_12/summerfall/improving_mdl_process.html.

414. 28 U.S.C. § 1407(e).

415. Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 435 (2013) ("Higher courts have never overturned a panel decision on transfer.").

416. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 762 (2012).

417. Williams & George, *supra* note 415, at 427.

418. Bradt, *supra* note 416, at 785.

419. *See* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1667 (2011) ("Coordinating every action in one place, before one judge, all but eliminates the risk of inconsistent rulings.").

practice disappear.[420] In turn, D&O premiums may decrease as the cost of litigation declines.

The MDL statute has been instrumental in expeditiously disposing of hundreds of thousands of complex cases since the late 1960s. Amendment of the statute as this Article proposes could produce the same salutary effect in M&A litigation and other kinds of state court litigation. Moreover, authorizing the JPML to transfer M&A litigation without requiring it to transfer to Delaware's Court of Chancery will minimize the undermining of shareholder rights that many of the alternative proposals entail. Conversely, while this Article's proposal would not require the JPML to transfer M&A litigation to Delaware, it does contemplate that a defendant's state of incorporation would be one of multiple factors that the panel would consider when making the transfer decision.

This is not a radically new idea. Somewhat similar proposals have been advanced in the past. For example, the Uniform Transfer of Litigation Act (UTLA), promulgated in 1991, proposed to largely supplant forum non conveniens analysis "with an interstate transfer system akin to that at the federal level."[421] The primary difference between the UTLA and this Article's proposal is that the former did not contemplate the involvement of the JPML in making case transfers.

One issue that may arise is whether an amendment of 28 U.S.C. § 1407 would be constitutional. It would be. The Commerce Clause of the United States Constitution[422] provides constitutional authority for such an amendment, enabling Congress to deal with horizontal coordination issues that hinder the operation of an efficient national market. Investors buy, sell and hold stocks of publicly listed corporations on national securities markets across the United States, using interstate communications. Accordingly, the amendment would satisfy the requirement that the regulated activity substantially affect interstate commerce.[423] The Full Faith and Credit Clause may provide a second source of constitutional authority for such an amendment.[424]

A second potential issue is whether the JPML could handle the increased case load that would ensue. Some commentators have noted that the JPML is already inundated and has consequently slowed down the rate at which it issues transfer orders.[425] To the extent that this is true it may be time to increase the size of the panel. But it is not clear that the panel is overwhelmed. In 2007, for example, the panel received only 98 transfer motions; that number declined to 91 in 2013.[426] During the 2000–2013 period, the annual number of new docket requests surpassed 100 only twice—in 2009, when there were 121, and in

420. *See* Sherman, *supra* note 406, at 2206 (observing that coordinated discovery is the primary benefit of the MDL statute).

421. Winship, *supra* note 340, at 81; UNIF. TRANSFER OF LITIG. ACT § 302 (1992), *available at* http://www.uniformlaws.org/shared/docs/transfer%20of%20litigation/utla_final_91.pdf.

422. U.S. CONST. art. I, § 8, cl. 3.

423. *See* John C. Coffee, Jr., *M&A Litigation: More and More Dysfunctional*, N.Y. L.J. (Mar. 21, 2013), http://www.newyorklawjournal.com/id=1202592906739?slreturn=20140829194654 (access required) ("[T]his legislation seems clearly constitutional given the impact of such litigation on interstate commerce.").

424. *See* Winship, *supra* note 340, at 79 (suggesting that the Full Faith and Credit Clause is a potential basis of congressional power to enact federal statute allocating jurisdiction among states in purely state law cases).

425. Richard Marcus, *Still Confronting the Consolidation Conundrum*, 88 NOTRE DAME L. REV. 557, 584 (2012).

426. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, CALENDAR YEAR STATISTICS OF THE UNITED STATES PANEL ON MULTIDISTRICT LITIGATION: JANUARY THROUGH DECEMBER 2013 (2014), *available at* http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2013.pdf.

2011, when there were 109.[427] In addition, the JPML has no trouble acting quickly on transfer requests. According to one review, "[t]he panel now issues a final decision no later than four months and often closer to two months after the filing of a 1407 motion."[428]

CONCLUSION

Multijurisdictional M&A litigation has become an intractable problem. In 2013, shareholders challenged 97.5% of all M&A transactions with a value greater than $100 million involving U.S. public company targets. Many transactions generate multiple lawsuits in multiple jurisdictions. In 2013, there were approximately seven lawsuits per transaction for deals of this size. When a transaction generates multiple lawsuits, very often the suits are filed in multiple jurisdictions. Of the 2013 deals, 62% were litigated in more than one court and 40.6% of deals involved lawsuits in more than one state.

Multijurisdictional litigation has numerous negative consequences. It burdens companies and their shareholders by increasing the cost of litigation and the likelihood of inconsistent or unfavorable judgments. It wastes scarce judicial resources and raises the specter of collusive settlements. In insurance terms, M&A litigation has become a high-frequency risk, with potential collateral consequences that include escalating pricing for directors' and officers' insurance.

Various solutions have been proposed. For the reasons indicated herein, the most common proposals suffer from various defects that render them undesirable. A superior alternative is amending 28 U.S.C. § 1407 to provide the JPML authority to transfer civil litigation that is pending in different states to a single state for pretrial management by a single state court. Currently, the JPML has no authority over actions pending in state courts. As a general rule, no state court has the authority to transfer litigation to a court in another state, or to a federal court, and no state court has the authority to accept litigation transferred by a court of another state or a federal court. Accordingly, no mechanism exists to transfer a case from a state court in one state to a state court in another state. Such a mechanism is highly desirable, and amending 28 U.S.C. § 1407 to authorize the JPML to make such transfers is the optimal vehicle for this occur. Authorizing the JPML to transfer M&A litigation will solve the multijurisdictional M&A problem without incurring the negative aspects of many of the alternative proposals.

In particular, authorizing the JPML to transfer M&A litigation without requiring it to transfer to Delaware's Court of Chancery will minimize the undermining of shareholder rights that most of the alternatives entail. The proposal set forth herein does not

427. *Id.* Apart from resolving new docket requests, each year the panel also facilitates the transfer of approximately 6000 tag-along cases to existing MDL dockets. *See* UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *supra* note 426 (reporting that the annual number of cases transferred as tag-along actions ranged between 5224 and 6272 during the period 2009–2013). MDL Panel Rule 1.1 defines a "tag-along action" as "a civil action pending in a district court which involves common questions of fact with . . . actions previously transferred . . . under Section 1407." RULES OF PROCEDURE OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 1.1(h) (2011), *available at* http://www.jpml.uscourts.gov/sites/jpml/files/Panel_Rules-Amended-7-6-2011.pdf. During the years 2000–2013 the annual number of actions transferred as tag-alongs peaked at 11,620 in 2004 and declined to 5623 by 2013. *See* UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *supra* note 426. About 96% of tag-along transfers occur without objection, so the time commitment by the panel is modest. *See* Heyburn & McGovern, *supra* note 413, at 31. Annually, the panel must resolve objections to about 200 disputed tag-along transfers. *Id.*

428. Heyburn & McGovern, *supra* note 413, at 27.

contemplate giving a preference to Delaware. Instead, the proposal identifies the jurisdiction of incorporation as merely one factor for the JPML to consider when it makes its transfer decisions regarding M&A litigation commenced in multiple states. Congress should amend 28 U.S.C. § 1407. Amendment promises a fair and effective solution to the vexatious problem of multijurisdictional M&A litigation.